

Merritt, Allen

From: Luke, Tim
Sent: Tuesday, August 07, 2007 1:13 PM
To: Merritt, Allen
Cc: Miller, Nick
Subject: RE: Futile Call

Good point on curtailing the smaller sr priority rights. Nick made the same observation. I overlooked that part of Jack's e-mail but agree that we need to ask him for further info or the logic of making futile call on smaller uses with the same sr. priority. I will also attach Norm's memo - I had forgotten about that and I agree that it is worth sending for further guidance.

Thanks to both of you for your comments

Tim

-----Original Message-----

From: Merritt, Allen
Sent: Tuesday, August 07, 2007 1:07 PM
To: Luke, Tim
Subject: RE: Futile Call

Tim,

You may recall the letter of direction that Norm Young wrote to Lee Peterson about futile call dated 7/11/02. We recently sent a copy of this letter to the watermaster on Muldoon Creek who was asking about futile call. Copy attached. It essentially follows what you advise below.

You may be interested that Betty Lusher called here yesterday complaining about Jack Challis. She indicated that she had her water turned off and questioned his authority to turn her off since this was the first time ever. (Note she has 1879 water rights 72-24 for 0.08 cfs). She was upset in that she said she only runs her pump a couple of times a week to conserve water and she was shut off without warning and was upset that her pump could have burned up. I told her that it was the watermaster's job to curtail junior water right holders to deliver senior rights. I told her I was not going to second guess the watermaster as to what priorities to shut off without more information. I asked if she had talked to Mr. Challis but she said at that time she had not since he was such a bully and difficult to work with. I told her that if she did not like the watermaster that she could consider not electing him at the annual meetings. She requested information about changing her point of diversion to a pump on her property and move it away from a long ditch. I sent her the forms and information about filing a transfer application to her address in California since she has recently moved down to her property there for the next few weeks. It appears Mrs. Lusher decided to call Mr. Challis after our phone conversation. I'm not sure of the logic of turning off small diversions while delivering others with the same priority.

Allen

-----Original Message-----

From: Luke, Tim
Sent: Tuesday, August 07, 2007 10:35 AM
To: Merritt, Allen; Miller, Nick

8/7/2007

Subject: RE: Futile Call

Allen, Nick

Below is a response to a question from Jack Challis regarding futile call. I view some of my responses to Jack anymore as being potentially sensitive so I thought both of you should look at this before I forward it. Let me know if you have any comments or suggestions.

Jack,

Other than an explanation of futile call in the Water District 34 Water Distribution Rules (see rule below), I am not aware of any other written rule, statute or other guidance regarding this subject. Futile call has been recognized by the courts (including Idaho courts) for many years. Believe it or not the question of futile call does not come up all that often other than severe drought years which now seem to be more the norm. The question has been addressed to me several times in the past few weeks. IDWR may need to provide some written guidance to watermasters. Until then I'll give you my guidance on the issue.

The following definition or description of futile call from the WD34 distribution rules is as good as any in terms of a definition:

Futile Call for the Delivery of Surface Water. When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile. (IDAPA 37.03.12.020.04)

You will note in the case of the WD34 rule that there is an expectation that the Director make a final determination of futile call. Indeed, the Director has in the past issued orders determining a futile call regarding delivery of senior rights on the Big Lost River. I believe that futile call determinations in other districts, while generally not that common, have been handled less formally and often on the watermaster's own initiative and determination without ever consulting anyone at IDWR. I have recently advised several watermasters and IDWR staff that if a watermaster feels a futile call is imminent, then he/she should proceed with the following steps:

- Watermasters must make every attempt to deliver the senior rights before seeking or making any futile call determination. A good effort needs to be made to cut junior rights first in an attempt to deliver the senior rights before any futile call can be considered.
- Carefully record deliveries and document stream flows or stream flow losses, as well as record observations about the beneficial use of water occurring under the remaining senior water rights.
- Watermasters should communicate with the Department regarding the potential need for futile call determinations and be prepared to submit water right diversion/delivery and stream flow/stream loss data to the Department to justify or back-up any determination.
- Watermasters should seek guidance from IDWR before making any determination and seek at least a verbal approval from IDWR through the appropriate regional manager, water management division administrator, the manager of water distribution section (Boise, state office), or a staff member designated by the Director, division administrator, or regional manager. A formal written order or notice from IDWR approving a futile call is probably not necessary in most cases but there probably should be some follow-up memo, e-mail or letter documenting that the watermaster sought guidance on a futile call and that IDWR and the watermaster concluded or determined a futile call was appropriate given the evidence and circumstances.

Please reply if you have any comments or further questions.

8/7/2007

Tim

-----Original Message-----

From: J. R. "Jack" Challis [mailto:jack@randrforhorses.com]

Sent: Monday, August 06, 2007 9:09 PM

To: Luke, Tim

Subject: Futile Call

Tim:

It is becoming more and more apparent that further reductions (we are presently at 60%; 50% is likely within days and things are NOT getting any better) will be inevitable in order to provide water to the major May 1, 1879, water users. It has also become necessary with some smaller users to invoke the "Futile Call" to try and save every drop possible. This action has already generate some negative results. Just this evening I was trying to explain to Ms. Betty Lusher (72-00024A - .08cfs) why this action was necessary when she informed me I was an "ASS" for cutting off her water despite my repeated attempts to explain our situation. Realizing the situation is only going to get worse can you please tell me the Statute or precedent for the Futile Call. I can't seem to find it. I have seen reference to this in the Watermaster Handbook and have discussed the issue numerous times with IDWR personnel but don't know the source. Since we may need it what is it?

Jack