



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

September 19, 2013

MIKE TELFORD
1450 WEST HWY 24
PAUL ID 83347

RE: Mitigation Questions

Dear Mr. Telford:

This letter responds to your letter and email of September 3, 2013. You list seven questions related to formulating and implementing mitigation plans in Water District No. 34. I will address each question below, but wanted to first discuss the common issues of power and authority in water districts that run through many of your questions.

A water district is created and governed by Chapter 6, Title 42 Idaho Code. A water district is an organization of users of a common water supply created for the sole purpose of distributing water according to priority. Water is distributed by a watermaster acting under the supervision of the Director of the Idaho Department of Water Resources ("Director" or "IDWR"). The water users are collectively vested with authority to annually elect a watermaster, adopt resolutions to guide the operations of the district between annual meetings, and adopt a budget sufficient for the watermaster to carry out his duties.

The "powers" and "authorities" of a water district are limited to those that directly advance the purpose of water distribution. However, in Water District No. 34 the narrow purpose of water distribution has been broadened, either out of necessity or convenience, to satisfy needs that are beyond a water district's core responsibilities. Many water districts in Idaho engage in activities ancillary to their core responsibilities. Sometimes the broadening of a water district's activities is supported by administrative rules or prior IDWR guidance. For instance, the Water Distribution Rules¹- Water District 34 provide some justification for water district involvement.

The main questions you ask in your letter are whether a water district should be responsible for development and implementation of a mitigation plan, and, if so, how the water district (through either the watermaster or the advisory committee) is supposed to develop and implement a mitigation plan. This is a difficult question to answer because mitigation plan development is outside the purpose of a water district. Other alternative organizations may be better suited to developing and implementing a mitigation plan.

¹ Idaho Department of Water Resources Water Distribution Rules – Water District 34 (IDAPA 37.03.12)

As discussed more fully below, questions of responsibilities and authorities would be much clearer if some or all of the mitigation activities are conducted by an entity other than the water district.

With this in mind, the questions you ask and our responses are included below.

- 1. There is confusion as to the Advisory Board's authority and powers. Part of the confusion is in the name "Advisory". The question is advisory to whom. Is it the Department, or the Director, or the Water Master?**

Section 42-605(6), Idaho Code provides for the creation of an advisory committee and affirms the ability of the users to grant the committee some authority via resolutions:

42-605(6) At such meeting the water users may choose an advisory committee to be composed of members selected as may be determined at the meeting, which committee shall serve as advisors to the director and the watermaster in matters pertaining to the distribution of water within the district. The advisory committee may be authorized to carry out policies as set forth in resolutions duly adopted by the water users at the annual meeting or at a special meeting...

The advisory committee advises the watermaster and director in matters related to water delivery. The water users may assign additional authorities to the advisory committee via resolutions at the annual meeting. In other words, an advisory committee has no authority to act on the water user's behalf unless that authority is expressly granted by the users. In practice, an advisory committee is a group of users selected for their knowledge and experience to represent the interests of the users. While the committee may have little power to act, it can be very influential and can serve an important role in developing resolutions for the water users to implement. Further, users can grant authority to the advisory committee to act on matters related to water district operation (as opposed to water delivery). Note that the authority the users give to the advisory committee should not usurp the watermaster's duties and responsibilities defined by statute or as required by the Director of IDWR.

- 2. What is the power and authority of the water master in general and specifically in regards to the formulation and execution of any mitigation plan. I understand he has the check book, but who is responsible for what checks he writes. Is it himself with the Advisory Board only putting forth the budget or does the buck stop with the board? The clear answer to Question #2 could smooth relations and make for a smoother road forward.**

The watermaster's powers and authorities are limited to those tasks related to delivery of water by priority. The watermaster may also hold other powers or authorities necessary to carry out responsibilities related to day to day water district operations. While these other responsibilities may not be directly related to water delivery, they often fall on the watermaster by default when the water district did not elect a district Treasurer or where duties were not delegated to an advisory committee.

With regards to a watermaster's power and authority in formulating and executing a mitigation plan, this is typically outside of the scope of a water district and beyond the duties of a watermaster. However, Water District No. 34 is unique in that it is the only district governed by

distribution rules promulgated specifically for that district (The Water Distribution Rules). These rules provide an atypical role for the water district in executing mitigation within those rules.

Rule 50.04(d) of the Water Distribution Rules gives the watermaster the ability to acquire water supplies to augment the flow of the river and recover the cost from the ground water users. While the rule authorizes the water district, through the watermaster, to do this, it is silent on how the source and costs for the mitigation water are determined. The rule only says the water district can be used as a vehicle for purchasing the water and for collecting the costs from the ground water users. The question of who develops the plan and negotiates the costs is not addressed. In practice, it has been assumed that the authorization to acquire water implies a duty to also formulate the plan for that acquisition and that the water district, either the watermaster or the advisory committee, or both would develop the mitigation plan with the input of the ground water users. However, nothing in the rule explicitly requires the district to be involved in the creation of the plan, nor does the rule prevent it. As discussed at the opening of this letter, the absence of a better option (supported by the provision for a water district role in Rule 50.04(d)) drove the use of the water district for plan development and resulted in the watermaster bearing the burden of responsibility.

As an alternative, the ground water users should consider forming a groundwater district to acquire flow augmentation water or develop another, more permanent mitigation plan and limit the involvement of the water district to delivering the water under the plan.

3. Is the Advisory Board the right entity to formulate and execute a mitigation plan? They represent all water users not just ground water appropriators.

The legislature enacted the Ground Water District Act in 1995 authorizing ground water users to organize and create ground water districts, largely to respond to conjunctive management issues. A ground water district is expressly authorized to formulate and manage a consolidated mitigation plan on behalf of constituent ground water users. The statutes authorizing creation of ground water districts was enacted after promulgation of the Water Distribution Rules – Water District 34 in 1994. The water users may now form a ground water district, removing the burden of developing mitigation or augmentation plans from the water district, and the advisory committee.

4. You had mentioned to me that there was a statute that says mitigation plans will only be accepted by organized districts of some kind. Nick's answer leaves that question still unclear. The question is, Is there such a statute, and if so does it apply to Basin 34 as well?

The statute I had in mind was Idaho Code § 42-5259. Section 5259 allows the legislature to provide by law² that certain ground water users must participate in a mitigation plan submitted by a ground water district. The legislature has provided by law that users on the ESPA that are not otherwise covered by an approved mitigation plan must join a local ground water district as a nonmember participant solely for mitigation purposes. The intent of that law and its effects are to limit the number of mitigation plans and encourage participation in ground water district plans on the ESPA.

² House Bill 848 (*Act Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain, ch. 352, 2004 Idaho Sess. Laws 1052*)

With respect to mitigation plans under the Water Distribution Rules – Water District 34, junior users may submit an alternative³ mitigation plan to the Director for consideration pursuant to the State Conjunctive Management Rules⁴. The Director's evaluation of a mitigation plan under those rules is similar to an evaluation of a water right transfer. Given the detail of consideration, it is impractical for the Director to evaluate small, individual mitigation plans. Additionally, more plans create a larger administrative load for the watermaster to administer. For these reasons, past directors of IDWR have included a requirement that ground water users submit an integrated plan of mitigation for all ground water users as a conditions in delivery call orders.

5. How many appropriators does it take to for a ground water district? Perhaps you could send me a link or guide to the formation of the how to form a ground water district.

Groundwater districts are provided for and governed by Chapter 52, Idaho Code. These statutes are available online at the following link:

<http://legislature.idaho.gov/idstat/Title42/T42CH52.htm>

IDWR produced a Ground Water District Handbook in the late 1990s after the groundwater districts on the Eastern Snake Plain were created. The document is rather large (over 100 pages) so I will see that the handbook is made available on our website for your use. It will be placed on the following page:

<http://www.idwr.idaho.gov/WaterManagement/WaterRelatedDistricts/gw-district.htm>

These materials will provide additional details, but in general a groundwater district can be proposed by submitting a petition to the county commission signed by 50 groundwater users, or the majority of users within the proposed area, whichever is less.

Can a ground water district be one user with lots of unconnected places of use?

A single user cannot form a groundwater district, and I do not see a benefit to that user for doing so. However, note that a groundwater district need not encompass the entire basin, and lands within a groundwater district need not be contiguous. In addition to the fact that some of the benefits of a groundwater district accrue as a result of including many users, the statutes put some limits on the minimum size of a groundwater district.

6. Can the new district or an individual, depending on answer to questions above, propose a plan for their proportionate share of the mitigation burden under Rule 50?

Yes.

7. Is it possible for the new district or possibly individual have presented and approved plan in advance in the event that there is a mitigation call? I agree that an arbitrated solution with the callers Basin wide is the best solution, and I support that approach. Can we not work with the Department on contingency plans? I assume that the new district or individual could have a seat at the table and would still be part of the Basin #34 group.

³ Alternative to the consolidated flow augmentation mitigation plan provided in the rule.

⁴ Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11)

September 19, 2013

Page 5 of 5

Yes. It is possible to develop a mitigation plan prior to a call for mitigation, but it could be difficult to develop a plan in advance that is flexible enough to accommodate the specifics of each call because those details are not known until the call is made. A large water user might be able to pre-formulate a mitigation plan if the water user can dedicate a certain number of acres to set aside on years there is a call, for example.

The solution that provides ground water users with the most flexibility is to organize as a ground water district. As members of a ground water district, ground water users would be able to enter into contracts, incur debt, fund legal representation, hold water rights, and purchase other real property.

I hope this response helps you plan and move forward, and I also hope this letter can be useful in working with other users to formulate a creative, long-term solution to the conjunctive management issues in Water District No. 34. IDWR intends to continue working with users to find and implement such solutions.

Sincerely,

A handwritten signature in black ink that reads "Gary Spackman". The signature is fluid and cursive, with a long horizontal flourish at the end.

Gary Spackman
Director

Cc: Nick Miller