

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF PETITION FOR)
REMOVAL OF WATER DISTRICT NO. 34)
WATERMASTER ROGER TOTTEN) **FINAL ORDER**
FILED BY JAY AND DEANN JENSEN)

)

PROCEDURAL HISTORY

On June 12, 2013, the Director (“Director”) of the Idaho Department of Water Resources (“Department” or “IDWR”) received a petition seeking the removal of watermaster Roger Totten as the watermaster of Water District No. 34 (“the petition”). The petition was filed by Jay and DeAnn Jensen (“Jensens”). The petition was filed pursuant to Idaho Code §42-605(9).

In the petition, Jensens allege the following seven deficiencies in Roger Totten’s performance as watermaster:

1. The watermaster has failed to properly measure and account for both surface and groundwater.
2. The watermaster is not recording the amount of water being diverted into each of the canal headings which divert off of the Big Lost River.
3. The watermaster is failing to distinguish between different water types, including available natural flow surface water supplies, storage water releases, and ground water diversions into various canals from ground water right holders, the result of which has deprived the Jensens of water.
4. The watermaster has failed to maintain a list of water users who are calling for water delivery.
5. The watermaster has failed to enforce the Department’s regulations on the adequacy of water diversions and their associated measuring devices.
6. The watermaster has failed to limit water use to the authorized places of use of certain water users, even after having actual knowledge of these violations.
7. The watermaster has failed to continually adjust water deliveries to water users by priority as the different water type supplies change. For example, on Monday June 3rd, Mr. Jensen turned on one of his ground water wells that diverts into one of the local canals. Mr. Jensen ordered the delivery of other water the next day (June 4th). When nothing was delivered under either request, he once again ordered his water supplies on Thursday, June 6th.

Despite these requests for water, the Jensens finally began receiving usable quantities of water on Sunday, June 9th nearly a full week after his well was turned on.

A formal hearing was held on July 9, 2013, at the high school auditorium of Butte County Schools, 250 S. Water St. Arco, Idaho. At the hearing, Jay Jensen testified that:

1. The Arco and Moore diversions need measuring devices to measure the flow of the Big Lost River at those locations.
2. On June 3, 2013, he (Jay Jensen) began pumping ground water from his well and his well was pumping through June 9, 2013.
3. Although he called for the delivery of his water to his land via the Munsey Canal, there was not sufficient water for beneficial use at the end of the Munsey Canal until June 9, 2013.
4. Roger Totten does not keep daily records of individuals who call for water.
5. Roger Totten does not accurately account for the different types of water (storage, natural flow, and rotation credit) delivered to the heads of the canals.
6. Not all of the water users in Water District No. 34 are complying with the operating guidelines of Water District No. 34.
7. Irrigators within Water District No. 34 should be personally responsible for measuring their own flows.
8. There is a need for an independent, transparent accounting system that can display to everyone the flow delivery numbers for all diversions and canal heads.

Water District No. 34 Advisory Committee Chairman Seth Beal, testified that:

1. The duties of a watermaster are to: 1) determine available natural flow; and 2) allocate natural flow to the various water users according to the priority of their rights. (In reference to Exhibit No. 7)
2. He (Seth Beal) has not personally been to the Arco and Moore diversions, but he has been told that there is some hardware in place at the Moore diversion.
3. The advisory committee asked Roger Totten to supply: 1) daily report logs showing available natural flow; and 2) daily lists of water users calling for water delivery. Roger Totten did not submit to the advisory committee all of the information requested by the advisory committee. (In reference to Exhibit No. 14)
4. The watermaster is responsible for improving water measurement and is specifically responsible for installing the water measuring devices at the Moore and the Arco diversions.
5. Roger Totten has the information requested by the advisory committee, but it is not compiled and is not in a format that is easily understood by most people.

Water District No. 34 Advisory Committee member Mitchell Sorenson, testified that:

1. Roger Totten did not keep records in compliance with Water District No. 34 operating guidelines provision 3.2.3. (In reference to Exhibit No. 2).
2. Roger Totten has overseen the installation of a measurement device on the Moore diversion, but he (Mitchell Sorenson) was without information regarding the Arco diversion measurement device.

IDWR employee, Nick Miller, testified that:

1. Roger Totten has conducted water accounting for Water District No. 34 according to IDWR's instructions and Roger Totten has been delivering water and accounting for the delivery of water in a manner that is consistent with practices of past watermasters for Water District No. 34.
2. Item No. 2 in the petition is false. (Referencing Exhibit No. 1) The watermaster is recording the amount of water being diverted into each of the canal headings which divert water from the Big Lost River.
3. Roger Totten has kept the records that item no. 4 of the petition alleges Roger Totten has not kept. (Referencing Exhibit No. 1).
4. Roger Totten does not yet have the tools to accurately compute water accounting for Water District No. 34. IDWR is working on supplying those tools to Roger Totten.
5. Roger Totten distributed water this year as if the Big Lost River was not administratively connected per the Howell gage, when the Big Lost River was administratively connected per the Howell gage and Water District No. 34 General Provision No. 6. (Referencing Exhibit No. 2)
6. He (Nick Miller) instructed Roger Totten to comply with General Provision No. 6 and administer the Big Lost River as administratively connected. Roger Totten failed to initially comply with the instructions from Nick Miller. Roger Totten complied only after he (Nick Miller) confronted Roger Totten about the violation of general provision no. 6. (Referencing Exhibit No.17)
7. He (Nick Miller) had previously prepared an order requiring measuring devices on ground water wells in Water District No. 34 and received enough objections from Water District No. 34 water users that the order was not completed.
8. Water users are responsible for holding a watermaster accountable for the installation of measuring devices if the water district has asked the watermaster to install measuring devices.
9. He (Nick Miller) does not believe that any water has flown past the Arco and Moore diversions while water was being delivered this year, so the fact that the measuring devices at the Moore and Arco diversion are not in place has not had much of an impact on water distribution practices.

Current watermaster for Water District No. 34, Roger Totten, testified that:

1. There is no measuring device above the Mackay reservoir that measures in-flow to the reservoir.
2. This year, he delivered water to the up-river users while the river was physically and administratively disconnected (less than 750 cfs). After the river became administratively connected (more than 750 cfs for three consecutive days) he continued to deliver to the up-river users as if the river was not administratively connected because he believed it would not physically connect at that time. He (Roger Totten) ceased delivering water as if the river was not administratively connected when instructed to do so by Nick Miller.
3. The accounting method that he (Roger Totten) must use is “day after” accounting which makes it impossible for him to know what type of water (storage, natural flow, rotation credit) is being delivered until the day after the water has been delivered.
4. Jensens’ well was not operating on June 3, 4, or 5 of 2013. Jensens’ well was operating on June 6, 7, 8, and 9 of 2013.
5. Jay Jensen called him and told him that water was not delivered to Jensens’ point of delivery from the Munsey Canal. According to his (Roger Totten) records, there were 45.56 cubic feet per second of water in the Munsey Canal on June 3, 2013.
6. He (Roger Totten) keeps a written record of: water users that call for water, the date a water user calls, and the amount delivered. The data is not yet neatly compiled for easy access. These records are kept in his office and are accessible to the public.
7. The measuring devices on the Moore and Arco diversions are paid for, but not yet delivered. An engineer, Dave Shaw, was retained to design, construct, and install the measuring devices.
8. He (Roger Totten) had a local welder construct measuring devices for the Moore and Arco diversion. The Moore diversion measuring device is installed. The Arco diversion measuring device has a problem that has not been resolved.

A public witness, the Big Lost River Irrigation District Manager, James Rindfleisch, testified that:

1. It is his (James Rindfleisch’s) responsibility to oversee the distribution of water once it reaches the canal head.
2. Every day, the ditch rider records on ditch rider logs the type of water and amount diverted at the head of every canal.
3. The daily ditch rider logs are supplied to Roger Totten every morning.
4. The daily ditch rider logs provide the information that Roger Totten needs to calculate the running total of storage water from the reservoir that has been used to date.
5. Jensen’s well was not pumping on June 3, 4, and 5 of 2013. A deputy watermaster confirmed that the well was not pumping on June 3, 4, and 5 of 2013. (Referencing Public Witness Exhibit No. 1)
6. Jay Jensen called for the delivery of surface water when he did not receive water at his point of diversion. The priority date of the water right that Jay Jensen called for was not “on” when Jay Jensen called for his surface water.

7. On June 7, 2013, irrigation district crew member Bill Hanks measured 323 inches of water at the end of the Munsey Canal.
8. On June 8, 2013, irrigation district crew member Bill Hanks measured 341 inches of water at the end of the Munsey Canal at 2:00 p.m.
9. Jay Jensen called him (James Rindfleisch) and told him there was no water at Jensens' point of delivery on June 8, 2013 at 2:48 p.m. On June 9, 2013, at 4:58 p.m. he (James Rindfleisch) personally went to Jensens' point of delivery from the Munsey Canal. When he arrived, there were 189 inches of water at the end of the Munsey Canal.
10. It will be difficult to install measuring devices on the Moore and Arco diversions, but it can be done.

A public witness, Pat Brown, as a representative of the Barton and Chilly water users and as a public witness, testified that:

1. He (Pat Brown) was present during the drafting of the general provisions of Water District No. 34.
2. He participated in the drafting of the general provisions for Water District No. 34.
3. General Provision No. 6(a), the Howell Gage general provision, determines if the river is connected. General Provision No. 6(c) discusses how measurements might be employed to determine if there is a futile call. (In reference to Exhibit No. 2)
4. The intent of General Provision No.6 (c) is that when rising river conditions allow the river to administratively connect, and the river cannot physically connect, the river would be treated as administratively disconnected.
5. General Provision No. 6(c) has been misrepresented to IDWR in the past and also was misrepresented during the hearing. Roger Totten was complying with General Provision No. 6 when he continued to distribute water above the reservoir as if the river was not administratively connected.

In addition, although not pertinent to the immediate issues about removal of watermaster, there were several witnesses who testified that IDWR was not requiring the watermaster, the water users, and IDWR to timely comply with the laws, rules, and watermaster guidance instruction.

Based on the above testimony and the evidence in the record, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The watermaster has been measuring and accounting for ground water within the current expectations of IDWR. Measurement and accounting for surface water deliveries is improving within the expectations of IDWR.
2. The watermaster is recording the amount of water being diverted into each of the canal headings which divert water from the Big Lost River.

3. The watermaster's current method of accounting distinguishes between natural flow, storage, and ground water flowing in the Big Lost River, its tributaries, and the canals diverting from the Big Lost River. However, the current method of accounting used by the watermaster needs to be improved to promote better clarity, timeliness, and transparency. The Department is working on a revised accounting process for improving water administration in the water district and will continue with this effort.

4. The watermaster maintains a list of water users who call for their water. These records need to be improved to promote better clarity, timeliness, and transparency.

5. The watermaster is complying with IDWR's expectations regarding installation of measuring devices at the Moore and Arco diversions. Some of the delays in construction were caused by inadequacies in original design plans and specifications. Measurement of Big Lost River flows at these locations during the 2013 irrigation season would not have promoted better water management because there was only a negligible quantity of water passing these points of diversion in the river channel during the 2013 irrigation season.

6. The record does not contain competent evidence of (a) use of water not authorized by valid water rights, (b) watermaster knowledge of the unauthorized use, and (3) failure by the watermaster to, "limit water use to the authorized places of use."

7. There is conflicting testimony about whether water was delivered to Jensens' when Jensens called for water from July 3 through July 5. There is evidence that during some of this time, the surface water right Jensens called for was not in priority. The written records support the deliveries testified to by Roger Totten and Jim Rindfleisch. The director finds, based on the testimony, Jensens did not prove that Roger Totten failed or refused to deliver water as asserted.

8. During the time the Big Lost River was administratively connected (rising to 750 cfs at the Howell gage, for three consecutive days), the watermaster failed to consider the river to be administratively connected. Even after IDWR instructed the watermaster to deliver water from the Big Lost River as a connected river, the watermaster continued to deliver water to junior water rights above Mackay Reservoir that should have been shut off when delivering Big Lost River water as a connected river. (Exhibit 17) Only after Nick Miller instructed him a second time did Roger Totten comply with the instruction. This refusal by the watermaster was in direct violation of the instructions from IDWR.

9. Roger Totten testified he continued to deliver water to water users above Mackay Reservoir because he believed curtailing diversions of junior water right holders above Mackay Reservoir would not increase inflows to Mackay Reservoir and, consequently would not increase available flows to senior water right holders downstream of Mackay Reservoir.

CONCLUSIONS OF LAW

1. Idaho Code §42-605(9) provides:

The director of the department of water resources *may* remove any watermaster whenever such watermaster fails to perform the watermaster's duty, upon complaint in that respect being made to the director in writing, by one (1) person owning or having the right to the use of a water right in such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources provided, that upon investigation the director, after a hearing with the other water users of said district, which shall be held in the district or at some location convenient to the water users of the district, finds such charge to be true, and the director may appoint a successor for the unexpired term. (*emphasis added*)

2. The word "may" indicates a duty that is permissive, not mandatory. *Rife v. Long*, 127 Idaho 841, 849, 908 P.2d 143, 150 (1995). The Director has discretion in deciding whether or not to remove a watermaster if the Director finds that the watermaster has failed to perform his duties.

3. Idaho statutes and case law make it clear that the scope of the watermaster's authority is limited to the distribution of water. Idaho Code §42-607 ("It shall be the duty of said watermaster to distribute the waters."); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("It is to be kept in mind that the authority of the watermaster in his district is to control the delivery of the water from the source of the supply into the respective ditches or canals leading from the main stream.")

4. Under Idaho law, the legal obligation to install or maintain a measuring device falls upon the water user, not the watermaster. *See* Idaho Code §42-701(1). IDWR, not the watermaster, has the initial authority to require construction and/or installation of measuring devices and controlling works. *Id.* IDWR also has the authority to determine what measuring devices are acceptable measuring devices. *Id.*

5. The Water Distribution Rules for Water District 34 (IDAPA 37.03.12) discuss a futile call determination for Water District No. 34 in Rule 20.04:

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.

6. Under the above cited rule, a futile call is determined by the director, not the watermaster. The watermaster may measure water to support a futile call and may request that the director determine whether there is a futile call, but the authority for determining a futile call is vested in the Director of IDWR.

7. The refusal of the watermaster to deliver water according to instructions of the Director constitutes grounds for the Director to remove Roger Totten as watermaster.

8. Nonetheless, the exercise of the Director's authority to remove a watermaster is discretionary. Removal of the watermaster at this juncture in the irrigation season would not solve any of the concerns raised by the Jensens. Also, removal would not remedy the improper deliveries of water to junior water right holders above Mackay Reservoir.

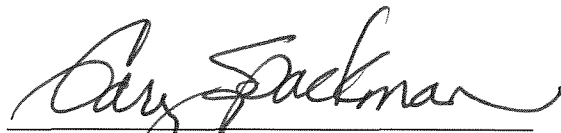
9. The Director has determined that it would not be productive to remove Roger Totten as watermaster during the 2013 irrigation season. Nonetheless, the Director expects the watermaster to strictly adhere to the general provisions and to adhere to IDWR instructions during the remainder of the 2013 irrigation season.

10. In addition, if Roger Totten is elected in 2014, as the watermaster at the annual meeting for Water District No. 34, the watermaster, with the help of IDWR and the Water District No. 34 Advisory Committee, will be required to more carefully and thoroughly address the concerns raised by the Jensens in the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed on June 12, 2013 is DENIED.

Dated this 17th day of July, 2013.



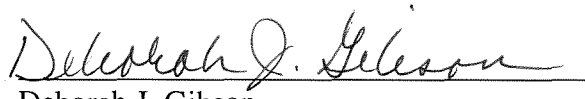
Gary Spackman
Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of July 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

ROBERT HARRIS
HOLDEN, KIDWELL, HAHN
& CRAPO P.L.L.C.
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rharris@holdenlegal.com

U.S. Mail, postage prepaid
 Facsimile
 Email



Deborah J. Gibson
Admin. Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.