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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Nelson Mackay Ranch, L.L.C.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF ROTATION
CREDIT IN WATER DISTRICT 34,
BIG LOST RIVER BASIN

SECOND AMENDED EXHIBIT
LIST

PLEASE TAKE NOTICE that Nelson Mackay Ranch, L.L.C., et al.¹ HEREBY amends its Amended Exhibit List to include Exhibit 47; letter form Gary Spackman to Patrick D. Brown, dated May 19, 2014 (attached).

DATED this 27 day of June, 2016.

HAEMMERLE LAW, P.L.L.C.


FRITZ X. HAEMMERLE

¹ Nelson Mackay Ranch, LLC et al includes Bell Smith, LLC; Byron Pehrson, Lanna Pehrson, Terry Pehrson, and Loy Pehrson; Harry J. and Beverly Crawford; Jennie M. and Orville E. Smith; John and Patrick Powers; Magee Family Trust; Mojanet J. and Deborah D. Broadie; Nelson Mackay Ranch, LLC; Notch Butte Farms, LLC; Peggy and Randy D. Pehrson; and Wight Enterprises, LLC.

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of June, 2016, I have caused to be presented the foregoing to the Department of Water Resources and Participants and will send notification of such filing to the following e-mail addresses and/or Post Office Boxes by United State Mail:

Original:

Gary Spackman
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
deborah.gibson@idwr.idaho.gov

Bell Smith, LLC
Byron Pehrson, Lanna Pehrson,
Terry Pehrson, and Loy Pehrson
Harry J. and Beverly Crawford
Jennie M. and Orville E. Smith
John and Patrick Powers
Magee Family Trust
Mojanet J. and Deborah D. Broadie
Nelson Mackay Ranch, LLC
Notch Butte Farms, LLC
Peggy and Randy D. Pehrson
Wight Enterprises, LLC
Represented by:
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Big Lost River Irrigation District
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Moore, Idaho 83255

Young Harvey Walker
2338 N. 2930 W.
Arco, Idaho 83213



FRITZ X. HAEMMERLE

Exhibit 2 (Second AMENDED EXHIBIT LIST)

1. IDWR Order Suspending Rotation Credits
2. Nelson Mackay Ranch, et al Brief and Objection
3. List of Participants with Partial Decrees
4. BWI 5 Notice of Intent to Participate Seth Beal (9/20/1999)
5. BWI 5 Motion for More Definite State (Sorenson, Beal and Walker) (12/17/1999)
6. BWI 5 Affidavit of Karl Dreyer (12/30/1999)
7. BWI 5 Proposed Order Requesting Supplemental Report on Basis of Recommendations (1/19/2000)
8. BWI 5 Proposed Order Setting Deadlines for IDWR to file Direct Testimony (1/20/2000)
9. BWI 5 State's Notice of Intent to Participate (1/25/2000)
10. BWI 5 Order Setting Mandatory Settlement Conference (2/16/2000)
11. BWI 5 2000 Supplemental Director's Report (3/27/2000)
12. BWI 5 Order Appointing Cushman as Settlement Facilitator (4/28/2000)
13. BWI 5 Settlement Conference Report (5/12/2000)
14. BWI 5 Minutes (5/23/2000)
15. BWI 5 Order to Show Cause (5/25/2000)
16. BWI 5 Trial Setting Order (6/13/2000)
17. BWI 5 Settlement Conference Report (9/15/2000)
18. BWI Order Requesting Dates (12/11/2000)
19. BWI 5 Available Dates Submitted by Sorenson, Walker and Beal (12/20/2000)
20. BWI 5 Minutes from Status Conference (1/16/2001)
21. BWI 5 Second Settlement Conference Report (2/20/2001)
22. BWI 5 Notice of Intent to Produce Evidence and Cross Sorenson, Walker & Beal (3/8/2001)
23. BWI 5 Witness List Sorenson, Walker and Beal (3/15/2001)
24. BWI 5 State of Idaho Witness List (3/15/2001)
25. BWI Witness List Sorenson., Walker and Beal (3/16/2001)
26. BWI 5 Pretrial Held (4/23/2001)
27. BWI 5 Order of Partial Decree for General Provisions (5/9/2001)
28. BWI 5 Certificate of Mailing, Notice of Appeal (6/18/2001)
29. BWI 5 Petition for Judicial Review, Sorenson, Walker and Beal (12/31/2002)
30. BLRID Position Statement (5/20/16) Supplemental BLRID Position Statement (6/3/2016)
31. Affidavit of John Lezamiz
32. 1999 Director's Report, Reporting Area 1, IDWR Basin 34
33. 1999 Supplemental Director's Report, Reporting Area 1, IDWR Basin 34
34. *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998)
35. IDAPA 37.03.12.040 (Rotation Credits)
36. Mackay et al. Motion in Limine
37. Current IDAPA 37.03-12.040
38. Statement of Gary Wight, Wight Enterprises, LLC
39. Statement of Harry and Beverly Crawford
40. Statement of Loy Pehrson
41. Statement of Lewene Clark, Personal Representative for Jennie Marie Smith Estate
42. Statement of Mojanet and Deborah Broadie

- 43. Statement of Randy and Peggy Pehrson
- 44. Statement of Randy Nelson
- 45. Deposition of Mathew Weaver (06/17/16)
- 46. Deposition of Timothy Luke (06/17/16)
- 47. Letter from Gary Spackman to Patrick D. Brown, dated May 19, 2014
- 47-50. Reserved for additional Mackay Exhibits
- 51-70. Reserved for IDWR Exhibits (See attached Exhibit List for IDWR Deposition)
- 71-90. Reserved of Participants Exhibits



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 53720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.J. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director



May 19, 2014

Patrick D. Brown
516 Hansen Street East
P.O. Box 125
Twin Falls, ID 83303

Re: Your correspondence dated May 5, 2014 regarding delivery of water above Mackay Reservoir in Water District 34

Dear Mr. Brown:

I have reviewed your correspondence of May 5, 2014 seeking clarification concerning delivery of water above Mackay Reservoir in accordance with the Snake River Basin Adjudication ("SRBA") General Provisions for Basin 34. Your letter specifically asks whether the Idaho Department of Water Resources ("IDWR" or "Director") and the Water District 34 watermaster will comply with General Provision ("GP") 6.c., concerning futile call determinations above Mackay Reservoir. You also ask that I provide my "position" on this matter.

The language in GP 6.c. is unambiguous. The provision states that flows of the Big Lost River will be measured at the Pense Bridge, and on Parsons Creek at the Donahue Bridge "for purposes of determining the amount of water being supplied to Mackay Reservoir from curtailment of diversions upstream from the reservoir." The provision further states that "These measurements will be used by the watermaster to make futile call determinations."

Your letter, implies that GP 6.c. authorizes the watermaster to solely determine a futile call. This interpretation ignores Idaho Code § 42-602, which requires the Director of IDWR to supervise the distribution of water by water district watermasters. General Provision 6.c. does not authorize the watermaster to unilaterally determine a futile call and cannot be interpreted to vitiate the Director's statutory duty to supervise the distribution of water by the Water District 34 watermaster. Allowing a watermaster to unilaterally determine a futile call also conflicts with Rule 20.04 of the Water District 34 Water Distribution Rules (IDAPA 37.03.12.020.04), which establishes a process for a determination of futile call by the Director. IDWR's interpretation of GP 6.c. does not conflict with Rule 20.04.

I am not aware that IDWR or the Water District 34 watermaster has intentionally "ignored" or "circumvented" GP 6.c. since it has been in effect. I am also not aware of any formal requests to IDWR from the watermaster or water users above the reservoir for a futile call determination. I am aware that the former watermaster may have attempted to determine a futile call last year without consulting IDWR in accordance with Rule 20.04 and IDWR watermaster instructions. Rule 20.04 clearly requires a determination by the Director of a futile call for delivery of surface water. The rule provides that the "Director may consult the Water District 34 advisory board, the Big Lost Irrigation District, and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile."

Mr. Brown
May 19, 2014
Page 2

Contrary to your assertion that IDWR has "ignored" and "circumvented" GP 6.c., IDWR recognizes the provision in its' *Water District 34 Procedures Manual - Water District 34 Guidelines for Operation*.¹ Section 7.6 of this document provides specific guidance to the water district and watermaster regarding futile call determinations, including implementation of GP 6.c. Consistent with Section 7.6.3.3 of this guidance document, "the watermaster should make a written request for a futile call determination to the Director." The guidance directs the watermaster to provide relevant information so that the Director can "quickly" determine whether a call for water from senior priority water right holders is futile.

Pursuant to GP 6.c., current water law, Rule 20.04 and standing IDWR watermaster guidance, the watermaster and IDWR will consider whether curtailment of junior priority surface water rights above Mackay Reservoir results in a futile effort to deliver senior rights. Before any determination, the watermaster should forward a written request to IDWR and report all diversions of water from the Big Lost River and Parsons Creek above the Pense and Donahue bridges and, measured flows of water at the two bridges so that the futile call requests can be evaluated (diversions are already reported during the irrigation season). IDWR will evaluate the information and coordinate with the watermaster as quickly as possible to determine if any continued curtailment of junior priority rights is futile.

In a footnote to your letter, you raised an issue about whether rotation to storage of natural flow water rights from the Big Lost River below the reservoir would be allowed during the period of time the river is above and below the reservoir is connected (or when rights above the reservoir are regulated in priority with rights below the reservoir). IDWR previously advised the watermaster and the water district that rotation of natural flow into Mackay Reservoir can be implemented when the river above and below the reservoir are administered separately as per the conditions of General Provision 6.a. and 6.b., but rotation cannot be implemented during the administratively connected period unless all rights senior to 10/1/1936 are satisfied.

Finally, your letter suggests that the Water District 34 Water Distribution Rules should be amended to reflect the requirement of GP 6.c. and presumably the other SRBA general provisions. To the extent there is a conflict between the rules and the General Provisions, the General Provisions supersede the rules. Although IDWR is not opposed to amending the rules, IDWR does not believe it is currently necessary to amend the rules unless there is broad support for amendment.

Respectfully,



Gary Spackman
Director

cc: Todd Perkes, WD34 Watermaster
Seth Beal, WD34 Advisory Committee Chairman
IDWR Eastern Region

¹ The Water District 34 Procedures Manual is available on IDWR's website using the following link:
http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/PDF/BL/WD34ProceduresManual2006_B.pdf