

**37.03.12 – IDAHO DEPARTMENT OF WATER RESOURCES WATER DISTRIBUTION RULES –
WATER DISTRICT 34**

000. LEGAL AUTHORITY.

Section 42-603, Idaho Code. (3-31-22)

001. Scope.

These rules set procedures for the distribution of surface and ground water within Water District 34, the Big Lost River Basin. (3-31-22)

002. -- 009. (RESERVED)

010. DEFINITIONS.

In addition to the definitions found in Section 42-111 and Section 42-1401A the following apply: (3-31-22)

01. 2-B Gage. The U.S. Geological Survey (USGS) gaging station located below Mackay Dam in the SW1/4SW1/4NE1/4, Section 18, Township 7 North, Range 24 East, B.M. (3-31-22)

02. Acre-Foot (AF). A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to three hundred twenty-five thousand eight hundred fifty (325,850) gallons. (3-31-22)

04. Arco Gage. The USGS gaging station located near the town of Arco in the SW1/4SE1/4SW1/4, Section 17, Township 3 North, Range 27 East, B.M. (3-31-22)

05. Cubic Foot Per Second (CFS). A rate of flow approximately equal to four hundred forty-eight and eight tenths (448.8) gallons per minute and also equals fifty (50) miner's inches. (3-31-22)

06. Delivery Call. A request from the water user for administration of water rights under the prior appropriation doctrine. (3-31-22)

07. Director. The Director of the Idaho Department of Water Resources. (3-31-22)

08. Eastside Canal. The Eastside Canal diverts from the east side of the Big Lost River in the NW1/4SE1/4SE1/4, Section 4, Township 5 North, Range 26 East, B.M. and extends southerly to the point it discharges back into the Big Lost River in the NW1/4NW1/4NW1/4, Section 26, Township 4 North, Range 26 East, B.M. (3-31-22)

10. Howell Gage. The USGS gaging station located above Mackay Reservoir in the SE1/4NE1/4NW1/4, Section 30, Township 8 North, Range 21 East, B.M. (3-31-22)

11. Rotation Credit. Water stored in Mackay Reservoir pursuant to a water right whose source of water is the Big Lost River and which does not include storage as a purpose of use. The storage of water as rotation credit is described in Rule Subsection 040.02. (3-31-22)

13. Storage Water. Water stored in a storage facility, including Mackay Reservoir, pursuant to a water right which includes storage as a purpose of use. (3-31-22)

14. Watermaster. The duly elected and appointed state watermaster of Water District 34 who is authorized to perform duties pursuant to Chapter 6, Title 42, Idaho Code. (3-31-22)

15. Water District. An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law.

16. Water User or Holder of a Water Right. The legal owner or user pursuant to a lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose.

011. -- 024. (RESERVED)

025. RIVER REACHES.

03. Gage Station or Other Flow Measuring Facility. The Howell, 2-B, Leslie Gage, and Arco gages shall be maintained as part of the USGS Cooperative Program, or equivalent measurement program, and operated continuously. Water District 34 shall contribute to the maintenance and operation of these gage sites. All other gauges shall be operated when water diversions, other than solely storage in Mackay Reservoir, are being made from the river. The cost of installation, operation, and maintenance of these other measuring facilities is the responsibility of Water District 34. (3-31-22)

026. -- 029. (RESERVED)

030. NATURAL FLOWS.

Natural flow shall be delivered through the natural river channel to the point of diversion of record except as provided in these rules. (3-31-22)

01. Eastside Canal. The watermaster, with the approval of the director and after consultation with the Big Lost River Irrigation District, may elect to deliver the natural flow of the river through the Eastside Canal when the following conditions are met: (3-31-22)

a. The full flow of the river, including stored water, to be delivered downstream of the Moore diversion is not greater than the capacity of the Eastside Canal. (3-31-22)

b. More natural flow water can be delivered to calls for natural flow than could be delivered by using the natural river channel. (3-31-22)

c. No water right is injured. (3-31-22)

d. Measuring devices of a type acceptable to the director are installed and maintained where the flow leaves the river channel and where it returns to the river channel. (3-31-22)

e. When used for the delivery of natural flow to the Arco diversion, the Eastside Canal is considered to be the river channel for water delivery accounting purposes and the watermaster shall protect the natural flow for delivery to prior water rights. Water rights diverting water from the river channel downstream from the point the Eastside Canal returns to the river channel shall be measured at their point of diversion from the river downstream from the Eastside Canal return. (3-31-22)

f. Conveyance losses in the Eastside Canal, when considered to be the river channel, shall be proportioned between the river flow, the diversions from the Eastside and pumps that inject ground water into the Eastside Canal. The proportioning will be based upon the ratio of total Eastside diversions and injected ground water to the total inflow to the canal. (3-31-22)

02. Alternate Point of Diversion. The watermaster may elect, with the approval of the director, to deliver natural flow water rights to the alternate point of diversion described in Rule Subsection 030.02.a. below when conditions in Rule Subsections 030.02.b. through 030.02.f. below are met: (3-31-22)

a. This rule may be used to deliver water rights through the Munsey diversion located in the NW1/4NW1/4NW1/4, Section 26, Township 4 North, Range 26 East, B.M. as an alternate point of diversion for water rights with a recorded point of diversion at the McLaughlin diversion located in the NE1/4NW1/4SE1/4, Section 12, Township 3 North, Range 26 East, B.M. (3-31-22)

b. The additional delivery losses through the natural channel to the recorded point of diversion for a water right prevents delivery of natural flow to one (1) or more other water rights then calling for water. (3-31-22)

c. The user receives the same amount of water at the field headgate from the natural flow water right that would be delivered to the field headgate had the natural flow right been delivered at the recorded point of diversion. (3-31-22)

d. Delivery of the water right at the alternate point of diversion is limited to the period of time the water right could have been delivered to the recorded point of diversion based upon the natural flow available at any time delivery is called for and the loss of the river channel at the time the alternate point of diversion began to be used for the delivery of this water right. (3-31-22)

e. No water right is injured by the use of the alternate point of diversion. (3-31-22)

f. The owner of the diversion works at the alternate point of diversion and the ditch(es) used to deliver the water to the field headgate from the alternate point of diversion concurs in the use of those facilities. (3-31-22)

031. -- 034. (RESERVED)

035. MEASURING DEVICES AND CONTROL WORKS.

01. Installation and Maintenance of Measuring Devices and Control Works. Except for domestic and stock water uses from ground water, each water user will install and maintain suitable measuring devices and controlling works at authorized water right points of diversion in accordance with Chapter 7, Title 42, Idaho Code. These devices will be installed and maintained at the water user's expense to administer water properly. The Director may prohibit the diversion of water by a water user who refuses or fails to comply with this Section in accordance with Chapter 7, Title 42, Idaho Code. (3-31-22)

02. Access to Diversion Works. Water users shall provide the water district staff continual access to all diversion works, measuring devices and control structures, except ground water diversions for small domestic and stock water uses. (3-31-22)

03. Diversions Which May Be Exempt. Diversions below the Chilly Bridge and above the Mackay Reservoir that divert water from the Big Lost River, whose place of use is within the flood plain of the Big Lost River as determined by the director, may be exempt from the requirement for measuring devices and control works with the approval of the director. Flow rates through exempt diversions will be estimated by the watermaster for accounting purposes by assuming the recorded flow rate of the water right is being diverted. (3-31-22)

036. -- 039. (RESERVED)

040. ALLOCATION OF NATURAL FLOW.

01. Administration of Surface Water Rights. Water not diverted or rotated for credit is available for the next in time water right. Natural flow rights are delivered to the point of diversion with no conveyance loss assessment. A natural flow water right delivered through a lateral or canal of a water conveyance entity shall be assessed the conveyance loss for the canal through which the water right is delivered. (3-31-22)

a. All water deliveries must be called for by the water user at least forty-eight (48) hours in advance of the actual water delivery. Water which can be delivered by the watermaster in less than forty-eight (48) hours may be used by the water user. (3-31-22)

b. The water user must notify the watermaster of the water users intent to use water as required by Rule Subsection 040.05. (3-31-22)

02. Rotation Credit. Water rights that do not include storage as a purpose of use may not be stored. Water rights whose source is Big Lost River with their point of diversion below the Mackay Dam and which are appurtenant to lands within Big Lost River Irrigation District (BLRID) may, however, be rotated for credit when such practice improves the efficiency of water use as contemplated by the Big Lost River Irrigation District's plan of operation. Rotation is subject to Approval by the Director, the General Provisions for Basin 34, and the following conditions: (3-31-22)

a. Natural flow must be available at the river headgate point of diversion for the water right requesting rotation credit. (3-31-22)

b. The water user must have operable delivery and use facilities and an actual need for the water on the land in the year rotation is sought. (3-31-22)

c. The watermaster may rotate natural flow rights at the beginning of the irrigation season, which would not otherwise be deliverable to their point of diversion, for credit of up to a combined total of three thousand five hundred (3,500) AF if natural flow cannot be delivered to a point of diversion, the watermaster determines rotation credit is needed to make possible the delivery of water rights, and BLRID determines there is room in Mackay Reservoir for rotation credit. The watermaster may release this storage from the reservoir to make natural flow rights deliverable to their point of diversion. (3-31-22)

e. Water rotated for credit may only be used on the land to which the water right being rotated is appurtenant. Water rotated for credit may not be marketed, except under the provisions of Section 42-222A, Idaho Code. (3-31-22)

f. A water user will forfeit to BLRID all rotation credits accrued when Mackay Reservoir fills, or would have filled except for flood operations, and the natural flow is sufficient to allow delivery to water rights with a priority date of 1905 or junior. If the natural flow does not allow delivery to water rights with a priority date of 1905 or junior after the reservoir fills, the water user will retain the rotation credit. For this rule, Mackay Reservoir will be considered full when the 4-day average elevation of the water in the reservoir reaches or exceeds the spillway crest's mean sea level elevation of 6,066.12 feet. (3-31-22)

g. Water rights being rotated must be identified to the watermaster as being rotated into Mackay Reservoir. Water rights identified as such will have the Mackay Reservoir as the temporary point of diversion during the time rotation is occurring. (3-31-22)

h. The rate of diversion for a water right being rotated for credit combined with other water rights for the same place of use being diverted at the same time cannot exceed the combined diversion limit specified in the listing of water rights. (3-31-22)

03. Assessment of Evaporation and Conveyance Losses to Stored Water. (3-31-22)

a. Evaporation losses from Mackay Reservoir shall be estimated daily by the watermaster by applying correlated evapotranspiration data and shall be assessed to all stored water. (3-31-22)

b. Conveyance losses in the natural channel shall be proportioned by the watermaster between natural flow and stored water. The proportioning shall be done on a river reach basis. (3-31-22)

i. Rotated water delivered to the Beck and Evan diversion located in the SW1/4SE1/4SW1/4, Section 11, Township 6 North, Range 25 East, B.M. Conveyance loss for this rotated water will be assessed the conveyance loss of the 2-B Gage to Leslie Gage reach (3-31-22)

04. Initiation and Duration of Surface Water Allocation for Irrigation. Any time on or after May 1, a water user can make a delivery call on the natural flow if water can be beneficially used for irrigation. If sufficient natural flow exists to deliver the water right in a useable amount to the water user's place of use, the watermaster shall deliver the right. In addition, the director may allow the diversion of rights or portions of rights for irrigation use from

the Big Lost River as early as April 20 and as late as October 31, and from surface water tributaries to the Big Lost River either before or after the period of use for irrigation described in the water right where: (3-31-22)

a. The water so diverted is applied to a beneficial use resulting in an immediate benefit to growing plants or is necessary to allow performance of an agricultural practice generally accepted in the community, as determined by the director. (3-31-22)

b. All surface water rights, regardless of priority, unless subordinated to the water right or class of rights being called existing at the time of diversion that are within their period of use can be satisfied. (3-31-22)

c. The diversion and use of water does not conflict with the public interest as determined by the director. (3-31-22)

05. Notice to Initiate Delivery. Water users must initiate delivery of their water right(s) by notifying the watermaster that they are ready to put water to beneficial use. (3-31-22)

06. Diversion of Additional Flows. The director may allow the diversion of surface water in addition to the quantity of surface water described in a water right for irrigation use to be diverted for irrigation of the described place of use where: (3-31-22)

a. The waters so diverted are applied to a beneficial use, as determined by the director. (3-31-22)

b. All surface water rights, regardless of priority, unless subordinated to the water right or class of water rights being called existing at the time of diversion that are within their period of use can be satisfied. (3-31-22)

c. The diversion and use of water does not conflict with the public interest as determined by the director. (3-31-22)

d. Additional flows diverted pursuant to Rule 040.06 are natural flows and will not be assessed as stored water. (3-31-22)

07. Mackay Dam Minimum By-Pass. Mackay Dam and Reservoir shall be operated to maintain a minimum flow of fifty (50) CFS at the 2-B gage. (3-31-22)

08. Canal or Lateral Delivery. A water user can request the watermaster to investigate if inappropriate delivery of natural flow is occurring on any lateral or canal. This request needs to be accompanied by reasonable evidence that the delivery causes injury to the water user's natural flow water right(s). In the event the watermaster determines that delivery of natural flow water rights within a lateral or canal is improper, he will: (3-31-22)

a. Notify the ditch rider and the water delivery entity of the results of his investigation and coordinate efforts to make proper delivery of the natural flow. (3-31-22)

b. If the situation has not been sufficiently resolved within forty-eight (48) hours, the watermaster may notify the director, who may take all actions authorized by law to remedy the situation. (3-31-22)

041. -- 054. (RESERVED)

055. WATER USAGE.

01. Incidental Stock Water. A water user holding a water right authorizing irrigation use, but not stock water use, may divert a portion of the quantity described for irrigation use to maintain a reasonable water supply for stock water use. This stock water use needs to utilize the same point of diversion, place of use, and season of use for the irrigation use on the water right. (3-31-22)

02. Winter (Non-Irrigation Season) Stock Water. During the non-irrigation season, from October 16 through April 30 except as modified by Rule 040.04, the storage of water in Mackay Reservoir is superior to all rights from the Big Lost River with points of diversion downstream from Mackay Dam, subject to minimum release. (3-31-22)

a. Water users holding water rights authorizing winter stock water use may call for the delivery of the water rights provided that the delivery does not interfere with storage in Mackay Reservoir. (3-31-22)

b. A water user calling for delivery of winter stock water must have access to a diversion point and delivery system to convey the right to the place of use recorded in the water right. If the headgate and delivery system is controlled by an entity other than the water user, the watermaster will only deliver the water with the concurrence of the owner of the headgate and delivery system and then only when such delivery does not constitute unreasonable waste as determined by the director. (3-31-22)

056. -- 059. (RESERVED)

060. ACCOUNTING FOR WATER DELIVERY.

Water diversions shall be accounted for continuously throughout the year by the watermaster. (3-31-22)

061. -- 999. (RESERVED)

Written comment from Mike Telford

Comments: One of the most important issues in the Big Lost is the breaking of the river. The Guidelines address how to do that. The Rule doesn't even mention it.

IDWR Response: "Breaking of the river" is also known as a "futile call." Futile call procedures are the same for all river basins in Idaho. We don't need to add rules related to futile calls to these rules.

Written comment from Norm Semanko – BLRID

Comments:

1) Support for the Department's Strawman Draft (Version 1.0). To be clear, BLRID does not oppose the redline revisions proposed by the Department in the Version 1.0 strawman draft distributed at the first rulemaking meeting.

IDWR Response: None

2) Opposition to Wholesale Deletion or Broad Substantive Repeal. While we support modest clarification efforts, we strongly oppose any proposal to eliminate or consolidate the Water District 34 rules into more general statewide rules, as was discussed conceptually during the initial stakeholder meeting.

IDWR Response: Due to BLRID's opposition, IDWR will not pursue repealing these rules.

3) Recommended Clarification: Define "Impounded Water" in Rule 010 Although we support the Department's current draft, we recommend a targeted clarification to further improve the rules: explicitly define "impounded water" in Rule 010. This term is used in Rule 040.03 in connection with conveyance and evaporation losses and other places within the rules, yet it is not currently defined—leaving room for future misinterpretation. We propose the following addition of a definition to Rule 010:

Impounded Water. For purposes of these rules, "impounded" water refers solely to water held in Mackay Reservoir as rotation credit pursuant to Rule 040.02. It does not include water stored under a water right with "storage" as a purpose of use. See *Nelson v. Big Lost River Irrigation District*, 147 Idaho 579 (2009)

IDWR Response:

There is no historical precedent that warrants limiting the use of the term "impounded water" solely to water held in Mackay Reservoir as rotation credit.

The proposed definition may create confusion with the terms "impounded water," "impounded," or "impoundment" throughout the Rule. The proposed definition may necessitate replacing these terms in many places of the document because these terms seem to be used interchangeably with the terms "storage" or "storage water."

In the WD34 Rules and the Nelson case, the terms "impounded water," "impounded," "storage water," and "storage" appear to be used interchangeably. The Nelson case does not discuss rotation credit. It focuses on whether BLRID can apply the "universal shrink" method in assessing conveyance losses to storage (impounded) water. The court ruled that BLRID can apply the universal shrink method and that Rule 40.03.b does not require BLRID to assess such losses by river reach. Specifically, the court stated that "the Irrigation District is not required to allocate conveyance loss among its water users in the same manner in which the Department must account for conveyance losses [pursuant to Rule 40.03.b] in order to administer water in the river."

To address confusion associated with the definition of the terms "impound" and "impoundment," IDWR replaced these terms with "stored" and "storage."