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Attorney for Petitioners

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BUTTE**

MOJANET and DEBORAH BROADIE;)	
HARRY and BEVERLY CRAWFORD;)	Case No. CV-2016-092
NOTCH BUTTE FARMS LLC; MAGEE)	
FAMILY TRUST; NELSON MACKAY)	PETITIONERS' OPENING BRIEF
RANCH LLC; BYRON PEHRSON;)	
LANA PEHRSON; TERRI PEHRSON;)	
LOY PEHRSON; PEGGY and RANDY)	
PEHRSON; JENNIE and ORVILLE)	
SMITH; WIGHT ENTERPRISES LLC;)	
BELL SMITH LLC; JOHN and)	
PATRICK POWERS; LAST RANCH)	
LLC; and JOHN LEZAMIZ FAMILY)	
LIMITED PARTNERSHIP,)	
)	
)	
Petitioners,)	
vs.)	
)	
)	
IDAHO DEPARTMENT OF WATER)	
RESOURCES and GARY SPACKMAN, in)	
his official capacity as Director of the Idaho)	
Department of Water Resources,)	
)	
)	
Respondent.)	

COMES NOW, Harry and Beverly Crawford, Notch Butte Farms LLC, Magee Family Trust, Nelson Mackay Ranch LLC, Byron Pehrson, Lana Pehrson, Terri Pehrson, Loy Pehrson, Peggy and Randy Pehrson, Jennie and Orville Smith, Wight Enterprises LLC, Bell Smith LLC, John And Patrick Powers, Last Ranch LLC, and John Lezamiz Family Limited Partnership, (collectively "Petitioners"), by and through their attorney of record, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and files this Petitioners' *Opening Brief*.

I. SUMMARY

The Director of the Idaho Department of Water Resources' ("Director" or sometimes referred to as "Department") "Final Order Re: Suspension of Rotation Credit in Water District 34" ("Final Order"), in which he ruled that General Provision 3 authorizes him to suspend the practice of rotation credit is not consistent with the General Provisions Decreed for Basin 34 ("General Provisions"). The ruling also inserts additional requirements that are not mentioned or contained in the General Provisions. As such, the Director has exceeded its authority and created a *de facto* amendment to the Snake River Basin Adjunction ("SRBA") Decree and General Provisions Decreed for Basin 34. The Director's ruling should be REVERSED.

Even if the Director's ruling in the *Final Order* was not contrary to the Decree, the post SRBA Decree facts do not justify the modification of the Decree; or in the alternative, this matter should be remanded back to the Department because this case is not final.

II. FACTS

1. Each and every Petitioner owns water rights that include rotation credits in the Lost River Basin, Basin 34. (R., Exh. 3, pp. 41-133) The water rights include a mix of surface and groundwater rights. *Id.*

2. Part and parcel of each and every Petitioner's water right is General Provision 3 regarding rotation credits and it provides:

Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the Big Lost River Irrigation District when such practice improves the efficiency of water use.

Such rotation is subject to the following conditions and review and approval by the Director of the Idaho Department of Water Resources.

- a. Water may only be rotated into storage if it will be beneficially used at the place of use under the water right during the year in which it is stored.
- b. Rotation into storage cannot occur prior to the reasonable need for irrigation water.
- c. Rotation into storage can only occur when the water is otherwise deliverable to the place of use under the water right.
- d. The diversion rate of water rights being rotated into storage shall be included in the calculation of total combined diversion rate limitations.
- e. If the reservoir fills after water has been rotated into storage, all water in the reservoir at the time it fills becomes storage water of the Big Lost River Irrigation District.
- f. Any water stored under such rotation that is not used in the same irrigation season in which it is stored shall become storage water of the Big Lost River Irrigation District at the end of the irrigation season.
- g. When the river is connected as specified in General Provision No. 6, while a right is rotated into storage, it is subordinate to all rights diverted above Mackay Reservoir with a priority date earlier than October 1, 1936.

(R., Exh. 27, pp. 775-776)

3. General Provision 3 came about because in the SRBA, the Director recommended that the “plan of operations” for the rotation credits that had been in effect since 1936 be preserved in the SRBA decree. (R., Exh. 11-1, p. 184) The Director stated that General Provision 3 was substantially based upon that “plan of operations.” (*Id.*) The Director stated that “plan of operations” described how water was to be administered between storage water and natural flow and that administration of water rights in Basin 34 could not be accomplished *efficiently* without it. (*Id.*) The Director further stated in 2000 in the SRBA:

Also, because the rotation into storage practice has gone unchallenged for the past several decades, and entities have invested time, money, and other resources in reliance upon the continuation of the practice, IDWR believes that its recommended general provisions must respect such historical reliance.

Hence, to meet its charge to efficiently administer water rights, IDWR recommends that the water in Basin 34 be distributed in much the same manner as provided by the UC Decree and the “plan of operations.”

(*Id.*) (Emphasis added).

4. On April 29, 2016, in a *Preliminary Order*, Deputy Director Matt Weaver suspended the rotation credits for each and every Petitioner, and all water right holders subject to General Provision 3, ruling that he “may consider allowing the practice of rotation credit in any subsequent year if the Big Lost River Irrigation District [BLRID] annually consents to the practice in writing and develops a plan of operation for rotation credit that improved the efficiency of water use.” (R., Exh. 1, p. 8). The *Preliminary Order* was significant in that it added a new clause to the General Provision 3 by requiring the BLRID to “develop a plan of operation that improved the efficiency of water use.” *Id.*

5. On July 18, 2016, the Director issued six additional pages of detailed requirements regarding the operation, use, and administration of the rotation credits. (R., OCR-Bates 20160718, pp. 202-210) He called these the WD 34 Instructions. *Id.*

6. After three days of hearings on the *Preliminary Order*, the Director issued his *Final Order* reversing the *Preliminary Order*. While he did not affirm the Deputy Director or uphold the *Preliminary Order*, the Director did hold that he had the absolute right to suspend the practice of rotation credit if it wasn't occurring consistent with the specified conditions or if it wasn't occurring in a way that improved the efficiency of water use. (R., OCR-Bates 20161103, pp. 261-269). In his *Final Order*, the Director reversed the *Preliminary* because of his new Order regarding rules to WD34 and to the BLRID.

7. The Director held that he had a right to suspend the General Provisions even though, in this case, there were no facts in the record that show that any particular Petitioner was in violation of any of the conditions of their water right. Both Deputies Director Matt Weaver and Tim Luke testified that they do not know whether or not the General Provisions were being followed. (R., Tr, Vol. I, p. 138, ll. 20-25; p. 139, ll. 1-2; and Vol. II, p. 387, ll. 12-15).

8. There are no facts in the Record to show that the rotation credit practice is inefficient or that any particular owner is using its water inefficiently or wasting water. (R., Tr., Vol. I, p. 142, ll. 21-25; p. 143, l. 1-12)

9. Each and every Petitioner's substantial property rights are prejudiced by the Director's *Final Order*. (R., Exhs. 31, 32, 38, 39, 40, 42, 43, 44 and 201, pp. 800-826, 879, 880-887, 1871-1877).

III. STANDARD OF REVIEW

The district court must set aside an agency's decision if the agency's findings, inferences, conclusions, or decisions:

- (a) violate constitutional or statutory provisions;
- (b) exceed the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77.

Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3).

The factual determinations of the agency are binding on the reviewing court if they are not clearly erroneous and if they are supported by substantial competent evidence in the record. *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).

IV. ARGUMENT

- A. THE DECREED ROTATION CREDIT PROVISIONS CANNOT BE SUSPENDED BECAUSE THEY ARE PART OF THE PETITIONERS' REAL PROPERTY RIGHTS.**

Early in the SRBA, the Department, through its Director, recommended certain General Provisions in Basin 34. Those same General Provisions were ultimately decreed by the SRBA Court.

However, before they were decreed, the SRBA Court elected not to include the rotation credit provisions (hereinafter "provisions") because the District Court held that the provisions were not necessary to define the water rights, or for the administration of the water rights. The District Court specifically held that the provisions were not necessary because they were already part of the Department's rules.

The State of Idaho appealed that decision. The Idaho Supreme Court *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998), reversed the District Court, holding:

The IDWR has the power to issue 'rules and regulations as may be necessary for the conduct of its business.' I.C. § 42-1734(19) (1996). These rules and regulations are subject to amendment or repeal by the IDWR. I.C. § 67-5201(20) (1997). Additionally, the IDWR's Director is in charge of distributing water from all natural water resources or supervising the distribution. I.C. § 42-602 (1996). Including these General Provisions in a decree will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed *at the sole discretion* of the Director of the IDWR.

Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Additionally, pursuant to Idaho Code section 42-220, all rights that are decreed pass with conveyance of the land and therefore the land could be sold with the certainty that the water would be distributed as decreed. **Further, these General Provisions describe common practices in the Big Lost which are unique and sometimes contrary to general water distribution rules.**

A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. *Stethem v. Skinner*, 11 Idaho 374, 379, 82 P. 451, 452 (1905). If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree. I.C. § 42-607 (1997).

Additionally, we conclude that the General Provisions provided by I.C. § 42-1412(6) should be included in a decree if they are deemed necessary for the efficient administration or to define a water right. Provisions necessary for the efficient administration of water rights should be preserved in the SRBA decree, not merely in the Administrative rules and regulations.

Id. at Idaho 16. (Emphasis added).

The fundamental holdings in *Nelson* were all acknowledged and included in the Supplemental Director's Report for the provisions. (R.¹, Exh. 11, Part 1, p. 181). They are:

- Water rights are real property rights.
- General provisions, if decreed, are part-and-parcel of the description of the water right.
- Including general provisions in decrees provides finality, which is necessary to **“avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director of the IDWR.”**

By suspending the rotation credits and ruling that he can do so at will, the Department has fundamentally altered the owners' property rights. The alteration is tantamount to a change in the legal description of the property rights. The change has caused the Petitioners to suffer substantial injury by reducing the value of the Petitioners' real property rights, and/or by causing the Petitioners' to suffer increased cost of operation

¹ Agency Record and Hearing Transcripts, As Lodged with the District Court, January 17, 2017. Exhibit page numbers refer to the Bates Stamp number on each page.

and corresponding loss of profits. (R., Exhs. 31, 32, 38, 39, 40, 42, 43, 44 and 201, pp. 803-826, 879, 880-887, 1871-1877).

Since the General Provisions are part and parcel of the water users' real property rights, the Director needs to be very careful on how to administer the General Provisions. The Director's ruling that he can unilaterally suspend the real property rights of Petitioners, as applied to the facts of this case, amounts to an unconstitutional taking without just compensation, exceeds the Department's authority, was an unlawful procedure, and arbitrary, capricious and an abuse of discretion.

B. THE DEPARTMENT CANNOT USE RULES AND REGULATIONS TO AMEND, SUPERSEDE, OR ADD ADDITIONAL REQUIREMENTS TO THE DECREED GENERAL PROVISIONS.

The Deputy Director in his *Preliminary Order* suspended the rotation credits and required the BLRID to "develop a plan of operations for rotation credit[s] that improve the efficiency of water use." (R., Exh. 1, p. 8). The Deputy Director relied on the IDAPA WD34 Rules ("Rules") for that part of his Order.

The reference to "plan of operations" is found in the Department's Rules for WD 34, which were in place both before and after the SRBA Court decreed the General Provisions. In fact, the items listed in General Provision 3 come almost verbatim from the WD 34 Rules. Yet, there is no mention of a "plan of operations" in the decreed General Provision 3. (R., Exhs. 35 and 37). It can only be concluded that if the Department believed that the General Provisions would be subject to the "plan of operations" referred to in the Rules it would have included that requirement. It did not.²

² The reason a "plan of operations" was not included is because the General Provisions themselves have always been considered as the "plan of operations" for rotation credits. The General Provisions themselves constitute the "plan of operations." (R. OCR Bates 20160913, *Nelson et al. Post Hearing Brief*, 246-249).

Again, in the SRBA litigation process, the Supreme Court in *State v. Nelson, supra*, cited the need for general provisions to provide for finality and *prevent the Department from altering decreed general provisions through rules and regulations.*

The IDWR has the power to issue "rules and regulations as may be necessary for the conduct of its business." I.C. § 42-1734(19) (1996). These rules and regulations are subject to amendment or repeal by the IDWR. I.C. § 67-5201(20) (1997). Additionally, the IDWR's Director is in charge of distributing water from all natural water resources or supervising the distribution. I.C. § 42-602 (1996). **Including these General Provisions in a decree will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director of the IDWR.**

Id. 131 Idaho at 16.

This is exactly what the Director is now trying to do. The Director cannot administratively impose new requirements to the General Provisions, which could have been, but were not, included in the SRBA Decree. This is particularly important when the Department administratively adds new requirements, which substantively alter the terms of the decreed General Provisions.

Requiring the parties to essentially relitigate the decreed General Provisions before an executive branch of government also violates the Idaho Constitutional provisions addressing separation of powers. IDAHO CONS., art. II, Sec. 1. Courts have described the dangers of agencies invading the powers of the court as an "evil" which needs to be avoided. The "evil" the separation of powers seeks to avoid is the ability of administrative agencies to constantly require parties to relitigate or evaluate issues, which have already been decided by the courts.

The judicial power of this state is specifically conferred by the Idaho Constitution upon the courts, and cannot be constitutionally conferred upon any other department or agency. *State v. Finch*, 79 Idaho 275, 281, 315 P.2d

529, 531 (1957) (“Judicial power cannot be conferred upon any agency of the executive department, in the absence of constitutional authority, where the constitution has specifically provided for the creation of a judicial system.”). . . .

“It should always be kept in mind that the *evil of administrative action* which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of a property right. Such is the full exercise of judicial power, and such power in this state can be exercised only by one of the enumerated courts.”

In Re SRBA, 128 Idaho 246, 912 P.2d 614 (1995). (Emphasis added).

In this case, the Idaho Legislature specifically authorized the courts to decide on the necessity of general provisions. The SRBA court exercised that authority and decreed the provisions. The decreed General Provisions ultimately helped define, and became a part of, the parties’ real property rights. Depriving the parties of the benefit of or altering those decreed provisions not only changes the nature of the property rights, but forces the parties to once again address the need, necessity, extent, and applicability of the general provisions, the ultimate “evil” which the courts have recognized in its separation of powers decisions (i.e. no finality, allowing administrative agencies to interfere with property rights, etc.).

The Director is not authorized to administratively add new provisions to the decreed General Provisions, which have been decreed in the SRBA.

C. THE ATTEMPT TO SUSPEND THE ROTATION CREDITS AND ADD NEW PROVISIONS VIOLATES ALL PRECLUSION PRINCIPLES.

The attempt of both the Department and parties to change and alter the provisions violates all known preclusion principles. The well-established principle of *res judicata* provides:

The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action ... which might have been made.' *Id.* Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. Separate tests are used to determine whether claim preclusion or issue preclusion applies. *Res judicata* serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims.

Ticor Title Co. v. Stanion, 144 Idaho 119, 157 P.3d 613 (2007). (Citations omitted).

In this case, the State of Idaho, through the Attorney General, appeared during the litigation of the general provisions for Basin 34 "in its proprietary, sovereign and representative capacities. Only the State of Idaho through the Office of the Attorney general will participate in these Subcases on behalf of all units of state government." (R., Exh. 9, pp. 169-170). The State of Idaho agreed to, and supported, the provisions.

The State, cannot now, through an administrative process, disregard, modify or alter the SRBA Decree. This fact was acknowledged by the Legislature, which provided in Idaho Code Section 42-1413(2) that "[u]pon entry of a final decree, the director shall administer the water rights by distributing water in accordance with the final decree and Title 42, Idaho Code."

The Department cannot elect to disregard the decreed provisions and invoke its own Rules to override or modify the provisions.

D. THERE ARE NO POST SRBA FACTS TO SUPPORT THE SUSPENSION OF THE PROVISIONS.

- 1. There are no substantial facts supporting the determination that the conditions are not being followed.**

On their face, the Petitioners' acknowledge that the General Provisions read that that the use of the rotation credit is "subject to" to the General Provisions. The provisions, as a whole, establish various objective criteria for the administration of the General Provisions. Despite the very objective nature of the provisions, the General Provisions were suspended without any evidence about whether the General Provisions were being followed.

Deputy Director Matt Weaver testified:

Q. So what we know is based on what you just told me is, there [are] specific provisions for rotation credit that were decreed. You don't know if they are being followed in most cases, you are recommending suspension of these provisions?

A. I think that's what I've said, yes. It's a pretty general characterization of a lot of testimony, but ...

(R., Tr., Vol. I, p. 138, ll. 20-25; p. 139, ll. 1-2).

Similarly, Tim Luke testified:

Q. (BY MR. HAEMMERLE) So to be sure, you have testified, you in your mind want more clarity. But you don't know if A, B, C, or D are being followed?

A. I think that a pretty fair assessment.

(R., Tr., Vol. II, p. 387, ll. 12-15).

In this case, the Department's witnesses had no factual basis for determining whether the General Provisions were being followed. If the Director decides to take any action on the General Provisions, he should: (1) have a factual basis that the provisions are not being followed; and (2) if the General Provisions are not being followed by a particular users, then any administrative action should be directed at the particular users who fails to comply with the General Provisions.

The fact that the Deputy Director suspended the provisions universally, without any knowledge of whether they are being administered or followed, is clear evidence that the Director is now second guessing the recommendation made to include the provisions in the SRBA Decree.

4. There are no facts supporting a conclusion that the use of rotation credits leads to the inefficient use of water.

The *Preliminary Order* required the parties to develop an "efficient" plan as a condition to lift the suspension of the RCP. The *Order* read:

2. The Department may consider approving the practice of rotation credit in any subsequent year if the Big Lost River Irrigation District annually consents to the practice in writing and develops a plan of operation for rotation credit that improves the efficiency of water use.

Order, p. 8.

In the *Final Order*, the Director set aside the suspension to allow time for the watermaster to implement the WD 34 Instructions to ensure the practice of rotation credits was occurring in accordance with the provisions and "improving the efficiency of water use."

Yet, there was no finding or conclusion that the use of the provisions leads to the inefficient use of water. Deputy Weaver testified as follows:

Q. What does "efficiency" mean to you?

A. "Efficiency" means that there is not waste involved in the utilization of the water, or that you tried to minimize waster. Maybe it would be better to say, that there is no excessive waste, because there is always going to be some waste.

Q. Where anywhere in your findings, do you conclude that there us waste of water caused by the implementation of rotation credits?

A. That's not in the Order. You asked me a separate question here about inefficiency, not language in the order.

Q. Okay. So you are not making a finding that parties are in anyway wasting water, but you want them to come up with an efficient plan to make sure they are not wasting water, is that your testimony.

A. That's what the provision says, is it not?

(R., Tr., Vol I, p. 142, ll. 21-25; p. 143, l. 1-12).

The parties are placed in a no-win situation. The provisions were decreed based on the Director's recommendation in 2000 that the use of the provisions leads to the "efficient" use of water.

This general provision defines the conditions that must be met in order for a right to be rotated into storage. The general provision allows the holder of a natural flow water right to exercise flexibility in delivery, through temporary storage of water in Mackay Reservoir, to increase the efficiency of use of water. **The larger rates of flow taken for shorter time periods increase delivery and application efficiencies.**

(R., Exh. 11-1, p. 189). (Emphasis added).

To the extent that the General Provisions were included in the Decree for the purpose of "efficiently" administering water rights, the Director cannot suspend the same General Provisions on some theory that the users need to adopt a whole new plan to "efficiently" use rotation credit water. By doing this very thing, the Department is ignoring the Decree, and it is forcing the parties to convince an administrative agency that its use of the rotation credits is "efficient, which has already been decided by the judicial branch of government.

To make matters worse, even if the Petitioners had been forced to develop "a more efficient plan," the Deputy Director styled the *Preliminary Order* in such a way that the Department maintained its discretion to disallow the rotation credits to continue. In the *Preliminary Order*, the Department said it "may" allow the continued use of rotation

credits. The use of the word “may” evidences the Departments view that it may unilaterally terminate the General Provisions in its unfettered discretion.

The Petitioners cannot continuously be put in a position of proving their “efficient” use of water. The only requirement of the Petitioners is to follow and abide by the General Provisions, as decreed.

E. THE MATTER SHOULD BE REMANDED BACK TO THE DEPARTMENT BECAUSE THE ISSUE OF THE USE OF ROTATION CREDITS IS STILL BEFORE THE DEPARTMENT.

Again, the reason the Director did not uphold the *Preliminary Order* is that he issued an entirely new Order of instructions to WD34 and to BLRID. The Director in that Order stated that he “will set aside the Preliminary Order to allow time for implementation of WD34 Instructions.” (R., OCR Bates 20161103, 264). Many of the issues in that case are the same. To avoid piece meal litigation, the Court should remand this entire matter to the Director until the WD34 and BLRID Rule case has been completed, and that Order becomes final.

V. SUBSTANTIAL RIGHTS OF THE PETITIONERS HAVE BEEN PREDJUDICED

Each and every Petitioner has rotation credits as a part of their decreed water right that are tantamount to a legal description of his real property. The Director’s ruling that he can unilaterally and universally suspend the rotation credits of each Petitioner is the same as changing the legal description of each Petitioner’s property. This causes each and every Petitioner to suffer substantial injury by reducing the value of his real property rights, by causing uncertainty as to the legal description of that water right, by requiring relitigation of the decreed general provisions before an executive branch of government, and by causing increased cost of operation and corresponding loss of profits for each Petitioner.

(R., Exh. 31, 32, 38, 39, 40, 42, 43, 44 and 201, pp. 800-826, 879, 880-887, 1871-1877).

There is no dispute as to the substantial injury suffered by each Petitioner as a result of the director's ruling.

VI. PETITIONERS ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES AND COSTS

A district court shall award attorney fees to a party who brings a successful civil suit against a state agency that has acted without a reasonable basis in fact or law. I.C. § 12-117(a). When an agency ignores statutes and rules and parties contest those actions, the prevailing party is entitled to attorney's fees and costs. *See e.g., Fisher v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law. *Id. citing Moosman v. Idaho Horse Racing Commission*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990). If the agency's actions are based upon a reasonable, but erroneous interpretation of an ambiguous statute, then attorney fees should not be awarded, but where an agency acts without authority, it is acting without a reasonable basis in fact or law. *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 172 P.3d 1081 (2007).

In this case, in the earlier SRBA proceedings, the Director insisted that rotation credits be included in decrees and that the General Provisions *are* the "plan of operations." The Idaho Supreme Court ruled consistent with those assertions and ruled that the rotation credits are part and parcel of real property rights.

However, the Director has now turned 180 degrees and ruled that he can universally and unilaterally suspend those rotation credits and require a new plan of operations on water right owners that he deems more efficient based upon no facts whatsoever, without any evidence that any particular Petitioner is violating the provisions in his decree, and

without any evidence that the practice deemed efficient in 2000 is no longer efficient. In so ruling, the Director exceeded his authority, and thus, acted without a reasonable basis in fact or law. Therefore, Petitioners are entitled to attorney fees and costs incurred in this appeal.

V. CONCLUSION

For all the above reasons, the Director's *Final Order* that he can suspend the Petitioners' rotation credits universally and unilaterally and without any factual basis that any particular Petitioner is violating the conditions of his decree is null and void. The Order in this regard should be REVERSED or, as a matter of law, or MODIFIED to state:

1. The Department cannot use administrative rules and regulations to amend, supersede, or add additional requirements to the decreed General Provisions;
2. The Department cannot force the Petitioners to revolve "efficiency" issues as a condition to use rotation credit water under the terms of the General Provisions as decreed; or
3. In the alternative, this matter should be remanded back to the Department.

DATED this 3rd day of April 2017.


FRITZ X. HAEMMERLE
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2017, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Garrick L. Baxter
Emmi L. Blades
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
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FRITZ X. HAEMMERLE