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Attorneys for Respondents

**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,  
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,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN, in  
his capacity as Director of the Idaho  
Department of Water Resources,

Respondents.

Case No. CV-2016-092

**STIPULATION TO AUGMENT  
THE AGENCY RECORD**

COME NOW Respondents, the Idaho Department of Water Resource and Gary Spackman in his capacity as Director of the Idaho Department of Water Resources (collectively, "Department"), and Petitioners, Nelson Mackay Ranch, LLC et al., and stipulate to augment the record in this appeal by inclusion of the *Interlocutory Order Regarding Instructions to Water District 34 Watermaster; Order Vacating Deadline and Hearing Dates; Notice of Status Conference* ("Order"), issued on April 7, 2017, in the administrative proceeding before the Department regarding watermaster instructions in Water District 34.

The Department filed its *Notice of Lodging the Settled Agency Record and Transcript with the District Court* in the above-captioned matter on January 17, 2017. The settled agency record lodged with the Court includes a *Final Order Regarding Instructions to Water District 34 Watermaster* ("WD34 Instructions"). R. at 202-14. The settled agency record also includes a *Notice of Pre-Hearing Conference* and *Notice of Hearing; Order Authorizing Discovery; Scheduling Order* related to the WD34 Instructions matter. R. at 270, 281. The settled agency record does not include the Order issued April 7, 2017, which reflects the current status of the WD34 Instructions matter. The Department and Petitioners respectfully request the Court enter an order augmenting the record in this appeal with the Order attached hereto as Attachment A.

DATED this 28<sup>th</sup> day of April 2017.

LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG  
Chief, Natural Resources Division



Emmi L. Blades  
Deputy Attorney General  
Idaho Department of Water Resources

DATED this 27 day of April 2017.

NELSON MACKAY RANCH, LLC et al.

By:   
FRITZ X. HAEMMERLE  
*Attorney for Nelson Mackay Ranch, LLC et al.*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of April 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

*Original to:*

SRBA DISTRICT COURT  
253 3<sup>RD</sup> AVENUE NORTH  
PO BOX 2707  
TWIN FALLS ID 83303-2707  
Facsimile: (208) 736-2121

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

FRITZ X HAEMMERLE  
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- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email



Emmi L. Blades

Deputy Attorney General

# **Attachment A**

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

IN THE MATTER OF THE	)	<b>INTERLOCUTORY ORDER</b>
ADMINISTRATION AND ACCOUNTING	)	<b>REGARDING INSTRUCTIONS</b>
OF THE PRACTICE OF ROTATING	)	<b>TO WATER DISTRICT 34</b>
NATURAL FLOW WATER RIGHTS INTO	)	<b>WATERMASTER; ORDER</b>
MACKAY RESERVOIR FOR STORAGE	)	<b>VACATING DEADLINE AND</b>
	)	<b>HEARING DATES; NOTICE OF</b>
	)	<b>STATUS CONFERENCE</b>

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The practice of rotating natural flow water rights whose source is the Big Lost River into storage (sometimes referred to as “rotation into storage” or “rotation for credit”) in Water District 34 has been scrutinized by the Idaho Department of Water Resources (“Department”) in recent years for two reasons: (1) some water users in Water District 34 (“WD34”) have voiced concerns that the practice is being implemented in a manner inconsistent with the *Order of Partial Decree for General Provisions in Administrative Basin 34, Snake River Basin Adjudication, May 8, 2001* (“General Provisions”)<sup>1</sup> authorizing the practice; and (2) the Department has undertaken a multi-year effort to modernize, update, and augment the computerized accounting programs and practices for WD34, including accommodating the practice of rotation for credit.

Proper implementation of rotation for credit requires close coordination between WD34 and Big Lost River Irrigation District (“BLRID”). In the past, administration and implementation of rotation for credit has been disorganized and not well documented. As a result, rotation for credit has not always been administered in conformance with the conditions described in the General Provisions or the Idaho Department of Water Resources’ Water Distribution Rules- Water District 34 (“WD34 Rules”). To ensure conformance with the General Provisions and WD34 Rules it is necessary to issue detailed instructions regarding the implementation of rotation for credit.

**APPLICABLE PROVISIONS OF LAW**

The practice of rotation for credit in WD34 is authorized by the General Provisions and WD34 Rules.<sup>2</sup>

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<sup>1</sup> On July 7, 2004, the Snake River Basin Adjudication District Court issued an *Order Amending Partial Decree for General Provisions in Administrative Basin 34 to Include General Provision 7 on Connected Sources*. The amended order did not modify the general provision related to the practice of rotation credits.

<sup>2</sup> The General Provisions govern in the event there is a conflict between the General Provisions and WD34 Rules.



Provision 3 of the General Provisions, states in pertinent part:

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.

Rule 40.02 of the WD34 Rules, states in pertinent part:

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 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 subject to the following conditions:

- a. Rotation for credit must be approved by the director as provided by these rules.
- b. Rotation for credit must be pursuant to the Big Lost River Irrigation District's approved plan of operation.
- c. Any water credited under such a rotation, if not used in the same irrigation season in which it is credited, shall become storage water of the Big Lost River Irrigation District.
- d. Rotation for credit cannot occur prior to the need for irrigation water on the land, as determined pursuant to these rules, in any year.

- i. Natural flow must be available at the river headgate point of diversion for the water right requesting rotation credit.
  - ii. 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.
  - iii. If natural flow cannot be delivered to a point of diversion at the beginning of the irrigation season and the watermaster determines rotation credit is needed to make possible the delivery of water rights being called for, and there is room in Mackay Reservoir for rotation credit, the watermaster may rotate natural flow rights, 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 to be released from the reservoir under the control of the watermaster to make natural flow rights deliverable to their point of diversion. The watermaster may use storage water to assist the delivery of natural flow water rights at the beginning of the irrigation season when requested to do so by the storage holder.
- 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.
- f. If the reservoir fills after rotation has begun in any year, (or would have filled except for flood operations) and the natural flow is sufficient to allow diversion of water by 1905 or junior water rights while the reservoir is full, all rotation credits accrued at that time are lost and all water in Mackay Reservoir at that time becomes storage water of the Big Lost River Irrigation District for reallocation. For purposes of this rule Mackay Reservoir will be considered full when the elevation of the water in the reservoir reaches or exceeds a four (4) day average of six thousand sixty-six and twelve one hundredths (6,066.12) feet MSL (spillway crest). Rotation for credit stops at the time Mackay Reservoir fills, and while it remains full, but if the natural flow does not increase sufficiently to allow 1905 or junior water rights to divert after the reservoir fills the rotation credit in the reservoir shall remain the credit of the water user(s) who accrued the rotation credit.
- 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.
- 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. This rule does not limit the rate at which rotation credit, once impounded, can be used.



## ANALYSIS

The practice of rotation for credit in WD34 is unique in water right administration in Idaho. The practice allows the holder of a natural flow water right whose source is the Big Lost River to cease diverting the water right for direct irrigation purposes and instead store the water in Mackay Reservoir. The water stored in Mackay Reservoir can then be released and delivered at the request of the water right holder for use on the land to which the natural flow water right is appurtenant.

The Mackay Reservoir is owned, maintained, and operated by the BLRID for the benefit of its storage space holders. The BLRID manages the water that is stored in Mackay Reservoir pursuant to BLRID's storage water rights and also manages the storage added to Mackay Reservoir by rotation into storage. When the water rotated into storage in Mackay Reservoir is released, the water is comingled with natural flow and BLRID storage water in the Big Lost River. This requires administration and accounting by both the watermaster and the BLRID. The requirement of joint administration is recognized in the General Provision and the WD34 Rules, wherein both documents describe an oversight role for the Director, and by extension the watermaster, and BLRID. The water rights issued by the SRBA District Court are conclusive as to the nature and extent of the water right. *In Re SRBA Case No. 39576 Final Unified Decree* ("Final Unified Decree"), at 7, 9 (Aug. 26, 2014); *Idaho Ground Water Assoc. v Idaho Dep't of Water Res.*, 160 Idaho 119, 369 P.3d 897, 905 (2016). This includes the General Provisions. *Final Unified Decree* at 10. BLRID was a party to the adjudication and thus is bound by the decrees and the general provisions. *See Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 201 (2016) (Rangen is bound by the decrees of the Court). Effective administration of the practice of rotation for credit consistent with the conditions of the General Provisions and WD34 Rules requires close communication and coordinated oversight and accounting by both the watermaster and BLRID. To ensure that water rights are properly administered consistent with the General Provisions and WD34 Rules, the Director must issue an order outlining the proper procedures and steps to account for and administer rotation into storage.

## ORDER

IT IS HEREBY ORDERED that the following instructions shall be implemented by the WD34 watermaster in the administration and accounting of rotation for credit. Rotation for credit is only allowed for water users conforming to the requirements detailed in the following instructions.

1. On or before May 1, any water user planning to rotate a natural flow water right into storage in the up-coming irrigation season is required to completely fill out and submit to the watermaster a notice of intent to rotate a natural flow water right into storage. The watermaster shall prepare a standard form for notice of intent to rotate Big Lost River rights into storage ("NOI").

2. The NOI must contain the following information:
  - A list of all natural flow water rights the water user plans to rotate during the irrigation season;
  - Identification of all surface and ground water rights, excluding BLRID storage rights, with places of use overlapping the place of use described by the water right(s) for which rotation into storage notice is being submitted;
  - A map of the irrigated lands to which the natural flow water rights are appurtenant (maps should be on 8.5" x 11" attachments);
  - Personal attestation by the water user in writing of his/her intent to beneficially use the water rotated into storage during the year in which the water is rotated and acknowledgement that rotated water will only be used on the place of use described by the water right.
3. In addition to the NOI form, during the irrigation season, a water user must notify the ditch rider each time the user wants to rotate natural flow into storage. Requests by water users to rotate natural flow into storage must be made 48 hours in advance, but no more than 72 hours in advance, of the calendar date on which rotation into storage is requested to occur. The ditch rider must submit written documentation of water user requests to rotate natural flow into storage to the BLRID, and BLRID must submit written documentation of such requests to the watermaster, the same day requests are made. The watermaster shall identify and record the water rights and diversion rate to be rotated. The calendar dates on which rotation of natural flow into storage is requested to occur cannot predate the date of the water user's request. A water user is not required to provide additional notice to the ditch rider if the water user's water right goes out of priority and subsequently comes back into priority.
4. Prior to approving rotation into storage requests, the watermaster shall confirm on an individual water right basis the following:
  - Whether the water user can beneficially use the rotated water on the land identified on the standard NOI form by the end of the current irrigation season;
  - Whether there is a "reasonable need for irrigation water" on the land identified;
  - Whether the water user has operable diversion, delivery, and application facilities;
  - Whether the water is deliverable to the water right place of use and the irrigated lands identified;
  - Whether the Big Lost River is disconnected as described by the General Provisions, or if connected that the priority date on the river is October 1, 1936, or junior;

- Whether the diversion rate of the water rights being rotated into storage conforms to all total diversion rate limitations including diversion rate limitations on overlapping ground water rights;
  - Whether the water right(s) being rotated overlap with supplemental ground water rights with provisions requiring the user to make full beneficial use of all surface water available to the user for irrigation prior to utilizing supplemental ground water. Supplemental ground water rights with these provisions will be limited according to the supplemental ground water right conditions when overlapping surface water rights are being rotated into storage; and
  - That the rotation conforms to all conditions of the General Provisions and the WD34 Rules.
5. If the watermaster determines that rotation can be approved, the watermaster will document the analysis supporting approval. If the watermaster determines rotation cannot be approved, the watermaster will notify the water user and BLRID in writing and explain the basis for the denial. Water users dissatisfied with denial of rotation into storage requests may petition the Director for reconsideration of the watermaster's denial.
  6. During the irrigation season, water users with rotation storage balances that want rotation storage delivered must notify the ditch rider when the user wants rotation storage delivered. The ditch rider must receive requests for delivery of rotation storage 48 hours in advance, but no more than 72 hours in advance, of the calendar date on which delivery of rotation storage is requested to commence. The ditch rider must record each request for rotation storage delivery into a ditch rider log which must be submitted to the BLRID and watermaster daily. BLRID must submit a written report daily to the watermaster documenting delivery requests. The watermaster will review delivery requests to ensure that rotation storage will be beneficially used at the same place of use described by the water right for which natural flow was rotated into storage.
  7. For delivery of rotation storage, the watermaster will consult with the BLRID and determine the total amount of rotation storage to be released from the reservoir, the amount of rotation water to be released for each user and for each point of diversion, and the dates when rotation storage will be delivered. The watermaster shall assess losses to the delivery of rotation storage consistent with WD34 Rule 40.03.
  8. The watermaster will retain the following information in the Water District archives and make it available for public review:
    - All NOI forms submitted by water users;

- All written correspondence submitted to the watermaster by BLRID documenting in-season requests by water users to rotate natural flow into storage or have rotation storage delivered;
  - All written watermaster correspondence denying requests for rotation for credit and/or denying requests for delivery of rotation storage; and
  - The annual rotation for credit summary report submitted by BLRID.
9. A summary of rotation for credit for the irrigation season will be included in the watermaster's annual report. The intent of the summary is to provide transparency so water users in WD34 understand how rotation for credit was implemented during the irrigation season. The watermaster has discretion concerning the content and format of the summary report. The report may vary from year to year based on the circumstances of the irrigation season, but at a minimum it should include the following information:
- Identification of each user that rotated natural flow into storage, by canal or point of diversion;
  - Volume of water under each natural flow water right rotated for credit and rotation storage released associated with each natural flow water right from the reservoir for each user at each point of diversion;
  - Volume of any unused rotation storage that remained in Mackay Reservoir at the end of the irrigation season for each user for each point of diversion;
  - Each user who was denied rotation for credit and a discussion of reasons for denying rotation for credit;
  - A discussion of positive and negative input received from water users regarding how rotation for credit is being implemented; and
  - Recommendations by the watermaster and/or water district advisory committee for improving implementation of rotation for credit.

IT IS FURTHER ORDERED that the following instructions shall be implemented by the BLRID in the administration and accounting of rotation for credit:

1. The BLRID must adopt and implement accounting procedures to track rotation for credit and the subsequent delivery of rotated storage that produce data that can be shared with and used by WD34 for administrative and accounting processes. Accounting procedures implemented by the BLRID must:
  - a. Identify individual water right rotation storage balances on a daily time step and publish such information on a weekly basis to its webpage;

- b. Apply losses to the storage and delivery of rotation storage as determined by the watermaster consistent with WD34 Rule 40.03;
- c. Prohibit negative rotation storage balances;
- d. Prohibit cancellation of negative storage water account balances with rotation storage balances;
- e. Prohibit the use of rotation storage on lands separate from the place of use under the rights rotated into storage (rotation storage must be used on the same land as the rights rotated to storage);
- f. Ensure that if the Mackay Reservoir fills after water has been rotated into storage, all water in the reservoir at the time it fills becomes storage water of the BLRID; and
- g. Ensure any water stored under rotation for credit that is not used in the same irrigation season in which it is stored shall become storage water of the BLRID at the end of the irrigation season.
- h. Each year, after the end of the irrigation season, but no later than December 15, the BLRID will prepare and submit an annual report to the watermaster and the Director summarizing rotations for that year. The written summary must include daily rotation storage balances and storage water right balances for all water rights for which rotation for credit occurred. The summary must also include year-end rotation storage balances and storage water right balances for all water rights for which rotation occurred.

The following standards shall be used for determination by the watermaster that rotation into storage improves the efficiency of water use as required by the General Provisions:

- 1. Water rotated into storage must be used in the same irrigation season in which it is rotated.
- 2. On or about September 1 of each year, the watermaster will notify water users of their rotation storage balances. Following notification of rotation storage balances, individual water users will only be allowed to rotate additional natural flow into storage if they: (1) declare in writing their intent to continue to rotate natural flow into storage; and (2) demonstrate to the watermaster that all water already rotated into storage and any additional rotation storage can be beneficially used by the end of the irrigation season.
- 3. The watermaster shall review BLRID storage account balances during the irrigation season that are associated with the same places of use for which Big Lost River water right rotation into storage requests are made. The watermaster may request additional written justification for rotation into storage requests when the water user has a



significant BLRID storage account balance and/or has used little to no water under the BLRID storage account balance. The watermaster may deny rotation into storage requests when the watermaster concludes that storage account balances and/or rotation storage balances will not be beneficially used during the year in which the water is stored. Water users dissatisfied with denial of rotation into storage requests may petition the Director for reconsideration of the watermaster's denial.

4. In the event that a futile call determination on the Big Lost River below the Beck Canal diversion is imminent or likely, the watermaster shall contact water users with diversions below the Beck Canal diversion who have rotation storage balances and request whether the users wish to release rotation storage.

IT IS FURTHER ORDERED that these instructions may be modified as necessary to implement the General Provisions and WD34 Rules and improve the efficiency of water use.

IT IS FURTHER ORDERED that the April 4, 2017, deadline for parties to serve exhibits upon the Department and other parties and the April 11-13, 2017, hearing dates set forth in the Director's December 2, 2016, *Notice of Hearing, Order Authorizing Discovery; Scheduling Order* are VACATED.

### NOTICE OF STATUS CONFERENCE

The Director hereby notifies the parties that a status conference will be held on **November 14, 2017, at 11:00 a.m. (MST)**, at the offices of the Department located at 322 E. Front Street, 6th Floor, Boise, Idaho. The purpose of the status conference will be to evaluate how the watermaster instructions regarding rotation for credit in WD34 worked for the 2017 irrigation season. The presiding officer will be the Director, Gary Spackman.

All parties to the matter must be represented at the status conference in person or by telephone (please dial **1-720-279-0026** and enter guest code when prompted: **581193#**).

The status conference will be held in accordance with provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the Department, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at: <https://adminrules.idaho.gov/rules/current/37/0101.pdf>.

The status conference will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please contact Kimi White at (208) 287-4815, no later than five (5) days prior to the conference.

Dated this 7<sup>th</sup> day of April 2017.


  
GARY SPACKMAN  
Director



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7<sup>th</sup> day of April 2017, the above and foregoing was served on the following by the method(s) indicated below:

Lucus Yockey P.O. Box 53 Mackay, Idaho 83251	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Fritz X. Haemmerle Haemmerle Law, PLLC P.O. Box 1800 Hailey, Idaho 83333 <a href="mailto:fxh@haemlaw.com">fxh@haemlaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher Fletcher Law Offices P.O. Box 248 Burley, Idaho 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Mitchell D. Sorensen 3871 W. 2500 N. Moore, Idaho 83255 <a href="mailto:soremd@gmail.com">soremd@gmail.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Young Harvey Walker 2338 N. 2930 W. Arco, Idaho 83213 <a href="mailto:why@atcnet.net">why@atcnet.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

  
Kimi White