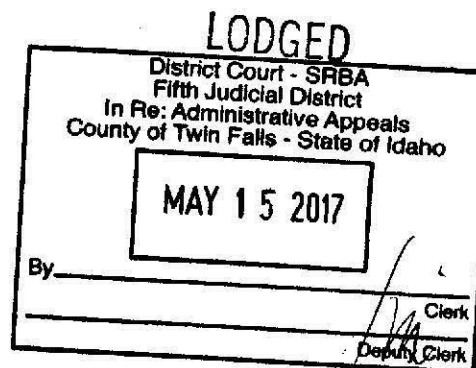


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Attorney for Petitioners



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

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.

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

Respondent.

Case No. CV-2016-092

PETITIONERS' REPLY BRIEF

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 Law, P.L.L.C., and files this *Petitioners' Reply Brief*.

I. REPLY ARGUMENT

A. THE DIRECTOR CANNOT SUSPEND ROTATION CREDITS ABSENT A SHOWING THAT THE USE OF WATER IS NOT CONSISTENT WITH THE TERMS OF THE ROTATION CREDIT GENERAL PROVISIONS.

The Director held that he can suspend rotation credits when: (1) the credits are not being used pursuant to conditions a-g outlined in the General Provisions; or (2) where the use does not improve the "efficiency" of water use. The Petitioners partially agree with the Director in that he should be able to suspend particular users rotation credits when that user is not complying with conditions a-g of the General Provisions. However, if the users are complying with conditions a-g of the General Provisions, the Director should not be able to suspend the rotation credits because he believes the use of rotation credits is not an "efficient" practice.

In this case, Director held that he can suspend rotation credits whenever he wishes if he makes a determination that the rotation credits do not lead to the "efficient" use of water. (R., p. 263). The difficulty with this holding is that the Court, in the SRBA process, Decreed the General Provisions and Rotation Credits based on a finding that general provisions were necessary for the efficient administration of water in Basin 34." (R., Exh.

27, p. 771). Allowing the Director to disregard the judicial finding that the use of rotation credit is an "efficient" use of water is a blatant collateral attack on the SRBA Decree.¹

To be sure, during the SRBA the Department fought hard to include the General Provisions based on the very fact that the use of rotation credits was an "efficient" water practice. In the SRBA, the Department insisted that the rotation credits be decreed. This is reflected in the Department 706 Report (R. Exh. 11), wherein under the Section entitled "Need for General Provisions," The Director stated:

IDWR recommends that the long-standing, historical reliance on the provisions of the UC Decree and the "plan of operations" by holders of water rights and IDWR be preserved in the SRBA decree. IDWR also concludes that administration of water rights in Basin 34 cannot be accomplished efficiently without these provisions.

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

The 706 Report also contained a specific section entitled "General Provisions 3 – "Rotation into Storage." In this Section, the Department reiterates the need for the "plan of operations" (Conditions a-g) and how this plan results in the efficient use of water.

IDWR has extensively reviewed BLRID's historical reliance on the "plan of operations" in implementing rotation into storage, which has been utilized in Basin 34 for more than 60 years. If rotation into storage is not continued, IDWR, Water District 34, BLRID, and the water right holders will have to attempt to develop and implement new procedures that may not be as well adapted to efficient water use as those that have been relied upon for the past 60 years. The process of developing and implementing new procedures would not likely be completed without significant controversy and disruption.

¹ The additional problem with the Department requiring the Petitioners to prove their "efficient" use of water, is that the term "efficient" tends to morph over time. In this case, when pressed to give a definition of "efficient," the Department witnesses defined "efficient" as being the use of water in a non-wasteful manner. (R., Tr., Vol. 1, p. 142, ll. 21-25; p. 143, l. 1-12). The Petitioners, like all water users, agree that they should not be able to waste water.

(R., Exh. 11-1, p. 187).

In this case, the SRBA Court relied entirely on the Department's 706 Report as *prima facie* evidence for the General Provisions. Presumably, the Court relied on the Department's conclusion that the "administration of water rights in Basin 34 cannot be accomplished efficiently without these provisions." Given the importance of rotation credits as described by the Department, and the conclusions that water rights in Basin 34 cannot be used efficiently without the use of rotation credits, how could the Department ever suspend rotation credits on a theory that the use of rotation credits does not, post SRBA Decree, lead to the "efficient" use of water?

With respect to this very SRBA Court process, the Idaho Supreme Court held that the Court has the ultimate fact-finding power, and that fact-finding power cannot be usurped or superseded by the Department to deprive users their property rights.

"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). The conclusiveness and ultimate fact concluded by the Court, supported by the Department in its 706 Report, is that the use of Rotation Credits results in an "efficient" use of water. This fact cannot be changed.

The use of rotation credits under conditions a-g of the General Provisions leads to "efficient" use of water. Once the Court determined that the conditions establish the efficient use of water, the Director cannot make a contrary finding that the use of rotation credits leads to the inefficient use of water, allowing the Director to suspend entirely the

practice of rotation credits. Allowing the Director to make an administrative decision that the use of rotation credits does not lead to the efficient use of water would simply grant the Director the right to amend the SRBA Decree, without any involvement of the SRBA Court. This is would be a collateral attack on the SRBA Decree. Again, our Idaho Supreme Court has described this type of administrative action an "evil" which needs to be avoided.²

Conditions a-g were decreed to provide for the efficient use of rotation credits. So long as the rotation credits are being used under conditions a-g, the use of water is "efficient" and the user may use his rotation credits. The Director does not have an independent ability to suspend rotation credits, based on some belief that the water is being used inefficiently, if the user is complying with conditions a-g of the General Provisions.

B. The issues are not moot.

At the hearing in this matter, the Petitioners presented ample evidence of their substantial injury when the Deputy Director suspended rotation credits. (R., Exhs. 31, 32, 38, 39, 40, 42, 43, 44 and 201, pp. 800-826, 879, 880-887, 1871-1877). The State argues that since the Director reversed the Decision of the Deputy Director, the Petitioners do not have standing to be before the Court because they lack a substantial injury.

² If the Department suspended the users rotation credits based on a finding that such practice is not "efficient," what type of evidence would the users present to regain their real property right to rotation credits? Citing the record in the SRBA, the users would merely cite the Department's findings "that administration of water rights in Basin 34 cannot be accomplished efficiently without these provisions."

The injury still exists if the Department again attempts to suspend rotation credits, without any authority. Rotation credits are part of the Petitioners' property rights. *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). Depriving the Petitioners of their property rights is still at issue in this Appeal.

The Petitioners choose to characterize the State's argument in terms of mootness. The general rule of mootness doctrine is that, to be justiciable, an issue must present a real and substantial controversy that is capable of being concluded through a judicial decree of specific relief. *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996). However, there are exceptions to the mootness doctrine. Those exceptions are as follows:

An otherwise moot issue, however, remains justiciable if it falls within one of three recognized exceptions to the application of mootness doctrine. First, a mootness exception applies where the challenged conduct persists in causing collateral legal consequences for the challenger. Second, an exception exists where the challenged conduct is likely to evade judicial review and thus is capable of repetition. In considering this "evasive of review" exception, the Court does not limit its consideration of the recurrence element to the individual challenger, but may look to others who are or will be in a similar position. Third, an exception applies where an otherwise moot issue raises concerns of substantial public interest.

Freeman v. Idaho Dept. of Correction, 138 Idaho 872, 71 P.3d 471 (Ct. App. 2003).

(Citations omitted).

In this case, all three exceptions apply. The Director reversed the Deputy Director's blatant illegal decision. However, the Director, in a clever Decision, nevertheless held that he had the right to suspend rotation credits, without setting any parameters on his authority. By making this ruling, the Director attempts to evade appeal, while attempting to preserve his right to arbitrarily deprive the Petitioners their real

property rights if the post-SRBA Decree elects to find that the use of rotation credits does not lead to the "efficient" use of water.

Once again, the Director should not be able to "suspend" rotation credits unless he is convinced that individual water right holders are not using rotation credits under the conditions set forth conditions a-g of the General Provisions, and then only as to particular users who might be using water inconsistent with conditions a-g of the General Provisions.

C. The State is not entitled to attorney's fees and costs.

Idaho Code 12-117 allows attorney's fees when it "finds that the non-prevailing party acted without a reasonable basis in fact or law." In this case, the Department is not entitled to fees. The State maintains that it can, post SRBA Decree, take away the Petitioners' real property right to use rotation credits when it finds that water use is not efficient. The Court has already decreed that the use of rotation credits results in the "efficient" use of water. The Department, as an administrative agency, cannot alter a Decree.

II. CONCLUSION

The Director, in making a decision that he can "suspend" the use of rotation credits, when such practice is deemed inefficient gives the Director boundless authority to deprive the Petitioners of their property right to use rotation credits.

DATED this 15th day of May 2017.




FRITZ X. HAEMMERLE
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2017, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

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