

19 May, 2016

To: Mr. Tim Luke

Water Compliance Bureau

State of Idaho Department of Water Resources (IDWR)

322 East Front Street

Boise, Idaho 83702

CC: Mr. MAT WEAVER, PE - IDWR

CC: Ms. Sarah Shaul, Technical Records Specialist - IDWR

CC: Ms. Kimi White, Certificate of Service - IDWR

RECEIVED

MAY 20 2016

DEPARTMENT OF
WATER RESOURCES

1. Re: Letter from Melvin Marx Hintze and Darla Ann Hintze received on 11May2016 at IDWR serving as a formal Petition for Reconsideration Exception and Denial of Preliminary Order pursuant to Rule of Procedure 730.02.
2. Re: May 2, 2016 Cover Letter from Mr. Tim Luke, Water Compliance Bureau addressing "Preliminary Order suspending Rotation Credit in Water District 34, Big Lost River."
 - a. Attachment to Letter from Mr. Tim Luke: **"BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO – (IN THE MATTER OF ROTATION CREDIT IN WATER DISTRICT 34, BIG LOST RIVER BASIN) – PRELIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34"**, Dated this 29th day of April 2016, Signed by Mr. MAT WEAVER, Deputy Director
 - i. **PRELIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34"**, Dated this 29th day of April 2016, Signed by Mr. MAT WEAVER, Deputy Director, **FINDINGS OF FACT**

This is a Technical Letter, in addition to and supplementing Reference Number 1. Above.

Background: The IDWR May 2, 2016, **PRELIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34**, attached to Mr. Tim Luke's letter (Reference 2. Above), list numerous **"FINDINGS OF FACT"** (Reference 2.a.i. Above), which are assumed to justify and document the IDWR's Director's ("Director") Preliminary Order suspending **Rotation Credit** within Water District 34 of the Big Lost River Basin.

Technical Discussion relative to; 2.a.i above, "FINDINGS OF FACT":

1. ***Only a few ground water wells were present in the Big Lost River Valley prior to 1960. Johnson, G.S., Ralston, D.R., Mink, L.L., Ground Water Pumping Impacts on Surface Water Irrigation Diversions from Big Lost River at 18, Idaho Water Resources Research Institute, University of Idaho, Moscow, Idaho, at 18 (1991). Ground water development in the Big Lost River basin grew rapidly in the early 1960's and again in the early to middle 1970's. Id.***
 - a. This "FINDING OF FACT" has no relevance with respect to "Rotation Credit" and "Surface Irrigation Water Rights". Starting in the early 1950's my family and our neighbors in the Big Lost River Valley, implemented "Ground Water Pumping" for use as a supplement to "Surface Water Flood Irrigation", thus insuring farming success during seasons of severe low

natural Big Lost River water. Irrigation surface water shortages, due to low natural surface water conditions were common to many other farming areas in Idaho also and developing wells and pumping thus utilizing the ground water resource was a very common practice throughout. However, "Ground Water Pumping" did not significantly impact the Big Lost River Surface Water resource until the advent and or evolution of "Sprinkler Irrigation" which began in the mid 1970's. Sprinkler Irrigation (Pivots, Wheel Lines, Hand Lines, Etc.) are a natural evolution and improvement in labor and productivity of agriculture and changes will continue. These continuously changing irrigation practices coupled with the drought environmental which are impacting surface and ground water conditions, have no relevance to "Rotation Credit".

2. ***Rule 50.04.c. of the Department's WD 34 Rules states that depletion to the Big Lost River from ground water pumping is estimated to be 13% of average annual pumping and the average annual pumping is estimated at 47,000 acre-feet ("AF") per year, or a depletion of 6,110 AF per year. IDAPA 37.03.12.050.04(c). The average annual use was estimated by the University of Idaho for the period of 1984 through 1990. Johnson, G.S. Ralston, D.R., Mink, L.L, Ground Water Pumping Impacts on Surface Water Irrigation Diversions from the Big Lost River at 18, Idaho Water Resources Research Institute, University of Idaho, Moscow, Idaho, at 35-38 (1991).***
 - a. This second (2.) "FINDING OF FACT" also has no relevance with respect to "Rotation Credit" and "Surface Irrigation Water Rights". Complete and exact measurements of "Ground Water Pumping" in WD 34 has only been implemented for the last few years. Therefore, reliable and real data trending is not available. Historically, during the farming seasons prior to "Sprinkler Efficiency", "Flood Irrigation" recharged the ground water throughout WD 34 and "Rising Water" or "Springs" were common year around along or adjacent to the Big Lost River. Today's efficient irrigation methods are not unique to WD 34 and have been implemented and are practiced state wide. WD 34 will never return to "Flood Irrigation" and its respective Ground Water Aquifer Recharge. All of this estimated information presented in the second (2.) "FINDING OF FACT" **does not in any way support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".**
3. ***Average annual ground water pumping in WD 34 for 2014 and 2015 was about 102,000 acre-feet.***
 - a. This third (3.) "FINDING OF FACT" also has no relevance with respect to "Rotation Credit" and "Surface Irrigation Water Rights". Both 2014 and 2015 irrigation seasons had below average Big Lost River flows. Ground Water Pumping was a very valuable resource. This information presented in the third (3.) "FINDING OF FACT" **does not in any way support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".**
4. ***Starting in 2014 the Department undertook efforts to modernize, update, and augment the computerized accounting programs and practices in WD 34. The Department's recent water right accounting efforts have led to a detailed review of the computerized accounting program code and procedures, WD34 records, Big Lost River Irrigation District records, WD 34 Rules, and the practice of rotation of natural flow water rights into storage.***
 - a. This fourth (4.) "FINDING OF FACT" also has no relevance with respect to "Rotation Credit" and "Surface Irrigation Water Rights". All of these afore mentioned available records, reviews, procedures and practices related to "Rotation of Natural Flow Water Rights into Storage" in the Mackay Dam are open to the public, are correct and without fault and have been followed since 1935. This information presented in the fourth (4.) "FINDING OF FACT" **does not in any way support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".** This storage of Rotation Credit in Water District 34, which has been successfully used since 1935, has several documents clearly establish the legal

precedent upon which this practice is based. Again, this unique practice was first established on April 01 of 1935 in the Plan of Operations for the Big Lost River Irrigation District by and through the Department of Reclamation for the State of Idaho. This is a contractual requirement of the Big Lost River Irrigation District and for the benefit of users within that District. Legal precedent since at least 1935 has allowed Rotation Credit and its respective system to legally function in Water District 34 with the knowledge and legal acceptance of IDWR and its predecessor organizations. This important system was reaffirmed by the Idaho Supreme Court in the Case of State v Nelson (951 P.2d 943 (Idaho 1998) 131 Idaho 12) and through the Snake River Basin Adjudication (SRBA) and referenced in the Idaho Law Review, Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53 (2016). Both this case brought before the Idaho Supreme Court and the SRBA held that the General Provisions from the Big Lost River Decrees were not necessary for the definition or administration of recommended water rights. In other words, the proposed preliminary order set forth by IDWR has no legal basis in which to impose suspension of Rotation Credit. Both the Idaho Supreme Court and the Snake River Basin Adjudication (SRBA) have firmly established an exception for Basin 34 in the use of this practice. Therefore, IDWR cannot legally suspend Rotation Credits in this District.

5. ***Starting in December 2015, the Department participated in a series of discussions with WD 34 water users and Idaho legislators to address mounting concerns regarding the sufficiency of the water supply in Basin 34.***
 - a. This fifth (5.) "FINDING OF FACT" also has no relevance with respect to "Rotation Credit" and "Surface Irrigation Water Rights" because these "series of discussions with WD 34 water users and Idaho Legislators to address mounting concerns regarding the sufficiency of the water supply in Basin 34", did not follow the terms and conditions of the Idaho Administrative Procedures Act. No proper hearing, agenda, or announcement was made by the IDWR to allow Basin 34 Water Rights Holders to participate in these "series of discussions". Therefore, this fifth (5.) "FINDING OF FACT" does not in any way support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".
6. ***Average annual pumping in WD 34 from 1990 to 2015 more than doubled from 47,000 AF to 102,000 AF. Consequently, river depletions from ground water pumping have a least doubled during the same period. As a result, there is less surface water available in the river for diversion by Big Lost River priority rights.***
 - a. This sixth (6.) "FINDING OF FACT" has no relevance with respect to "Rotation Credit". True, there has been "less surface water available in the Big Lost River for diversion", but that fact is largely due to efficient use of water by sprinkler irrigation (little or no recharge into the underground) and lack of adequate annual moisture from Mother Nature. It is not at all related to "Rotation Credit" practices. Therefore, this sixth (6.) "FINDING OF FACT" does not lend meaningful support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".
7. ***With respect to the practice of rotation credit, General Provision 3 from the Amended Partial Decree for General Provisions in Administration Basin 34 states, in pertinent part: Water rights from the Big Lost River diverted below the 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 [Department].***

Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014) at Attachment 3.

- a. This seventh (7.) "FINDING OF FACT" has relevance with respect to "Rotation Credit" and the respective related "Surface Irrigation Water Rights". All of the Rotation Credit practices required by the "Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014 – ERIC J. WILDMAN Presiding Judge - SRBA) at Attachment 3, have been strictly adhered to by WD 34/BLRID/Water Rights holders, with no exceptions. Therefore, this seventh "FINDING OF FACT" does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".
8. ***Rule 40.02 of the WD 34 Rules also describes the practice of rotation credit, stating, in pertinent part: 02. 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. IDAPA 37.03.12.040.02(a-b).***
 - a. This eighth (8.) "FINDING OF FACT" also has relevance with respect to "Rotation Credit" and the respective related "Surface Irrigation Water Rights". All of the Rotation Credit practices required by the "Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014 – ERIC J. WILDMAN Presiding Judge - SRBA) at Attachment 3, have been strictly adhered to by WD 34/BLRID/Water Rights holders, with no exceptions. This eighth "FINDING OF FACT" reinforces Rotation Credit as a viable practice in WD 34. Therefore, this eighth "FINDING OF FACT" also does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34".
9. ***To be consistent with General Provision 3 and the WD 34 Rules, therefore, the practice of rotation credit in WD 34 must "be pursuant to the Big Lost River Irrigation District's approved plan of operation," improve "the efficiency of water use," and be "approved by the Director."***
 - a. This ninth (9.) "FINDING OF FACT" also has relevance with respect to support for "Rotation Credit" and the respective related "Surface Irrigation Water Rights". All of the Rotation Credit practices required by the "Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014 – ERIC J. WILDMAN Presiding Judge - SRBA) at Attachment 3 and also as required by original (1935) Big Lost River Irrigation District's Plan of Operation have been strictly adhered to by WD 34/BLRID/Water Rights holders, with no exceptions. This ninth (9.) "FINDING OF FACT" reinforces Rotation Credit as a viable practice in WD 34. Therefore, this "FINDING OF FACT" also does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."
10. ***The Big Lost River Irrigation District's original plan of operation was adopted by the District's Board of Directors on April 1, 1935. This plan of operation includes just two references to "rotation" as follows: It is planned that by this District having the property in and control of the above amount of water, which will be used to furnish a supplemental water supply to lands in the District and now having insufficient water supply, and the employment of a rotation system of water for irrigation purposes, and the storage of natural flow rights, privately owned, at different times in the said Mackay Dam, the District will enabled to save and conserve large amounts of water and make a successful project out of one that heretofore been short of water. The use and control, under proper management, of the reservoir, the dam and the other construction works referred to elsewhere, will make possible the operation of an efficient system***

of rotation among the users themselves, and thereby further increasing the duty of water and conserving the same....."Minutes of the Adjourned Regular Meeting of Board of Directors of the Big Lost Irrigation District, Butte and Custer Counties, Idaho, April 1 1935, adopting the Proposed Plan of Operations, Big Lost River Irrigation District, J. Ray Weber, March 30, 1935, Exhibit A, p. 2, 8."

- a. This tenth (10.) "FINDING OF FACT" also has relevance with respect to supporting "Rotation Credit" and its connection to the respective related "Surface Irrigation Water Rights". Again, all of the Rotation Credit practices required by the "Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014 – ERIC J. WILDMAN Presiding Judge - SRBA) at Attachment 3 and also as noted in this tenth "FINDING OF FACT." The detailed directions set forth in the original (1935) Big Lost River Irrigation District's Plan of Operation were unambiguous and have been strictly adhered to by WD 34/BLRID/Water Rights Holders since Rotation Credit's inception. This tenth (10.) "FINDING OF FACT" also greatly reinforces Rotation Credit as a legal viable practice in WD 34. Therefore, this tenth "FINDING OF FACT," with certainty, also does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."
11. *The 1935 plan of operations was developed in connection with the Big Lost River Irrigation District's loan application to purchase the Mackay Dam and the water rights from the Utah Construction Company, as well as the Company's Carey Act project near Arco. Id. at 2-6. The purchase allowed the irrigation district to use the storage water from Mackay Reservoir to supplement lands in the district irrigated with private natural flow rights from the Big Lost River.*
 - a. This eleventh (11.) "FINDING OF FACT" supports the legal, authorized, well defined plan of operation and consistent practice of "Rotation Credit" by the Big Lost River Irrigation District and its patrons historically. The current irrigator's predecessors helped retire the financial obligation to purchase the Mackay Dam and other related Water Works with Rotation Credit from this Legal Contract as a permanent water rights property. Therefore again, this eleventh (11.) "FINDING OF FACT," with certainty, also does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."
12. *The Big Lost River Irrigation District's current Operation Plan for Mackay Dam and Reservoir, 2002, includes no information about the practice of rotation credit.*
 - a. This twelfth (12.) "FINDING OF FACT" states that the Big Lost River Irrigation District's Operation Plan includes no information about the practice of Rotation Credit. The Big Lost River Irrigation District has followed all of the practices and rules called out in the "Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014 – ERIC J. WILDMAN Presiding Judge - SRBA) at Attachment 3, and also by the detailed directions set forth in the original (1935) Big Lost River Irrigation District's Plan of Operation. Rotation Credit methodology noted in these two directives has been strictly adhered to by WD 34/BLRID/Water Rights Holders.
13. Finding of Fact 13., of the "Preliminary Order Suspending Rotation Credit – Water District 34, Big Lost River, documents "Unused Rotation Credit (AF) for the Irrigation Season Year's 2010 through 2015.
 - a. All of this unused Rotation Credit Storage in the Mackay Dam became the property of the Big Lost River Irrigation District, at the conclusion of each respective Irrigation Seasons, as stipulated in the afore mentioned rules, regulations and plan of operation. It was not wasted and was retained for use in the next Irrigation Season. Therefore again, this thirteenth eleventh (13.) "FINDING OF FACT," has no relevance and does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."

14. Finding of Fact 14., of the "Preliminary Order Suspending Rotation Credit – Water District 34, Big Lost River, discusses "Unused Rotation Credit (AF) for the Irrigation Season Year's 2012.
- a. All of this unused Rotation Credit Storage in the Mackay Dam for the 2012 Irrigation Season became the property of the Big Lost River Irrigation District, at the conclusion of that respective Irrigation Season, as stipulated in the afore mentioned rules, regulations and plan of operation. It was not wasted and was retained for use in the 2013 Irrigation Season. **Therefore again, this fourteenth (14.) "FINDING OF FACT," has no relevance and does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."**
15. Finding of Fact 15., of the "Preliminary Order Suspending Rotation Credit – Water District 34, Big Lost River, discusses "Unused Rotation Credit (AF) for the Irrigation Season Year's 2015.
- a. All of this unused Rotation Credit Storage in the Mackay Dam stored from the 2015 Irrigation Season became the property of the Big Lost River Irrigation District, at the conclusion of that respective Irrigation Season, as stipulated in the afore mentioned rules, regulations and plan of operation. It was not wasted and was retained for use in the present 2016 Irrigation Season. As of the date of this Engineering Analysis, the Mackay Dam has not topped its spillway and again so far, **this fifteenth (15.) "FINDING OF FACT," has no relevance and does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34." Hindsight is worthless and Mother Nature is uncertain.**
16. *Keeping rotation credit in storage through the end of the irrigation season depletes the natural flow of the Big Lost River below Mackay Reservoir, thereby reducing the amount of water available for appropriation by other water users during the irrigation season. For example, leaving 3000 AF of unused rotation credit in the reservoir, as occurred in 2014, equates to a flow rate of approximately 50 cubic feet per second ("CFS") diverted for one month that could have been added to the Big Lost River during the irrigation season. This flow and corresponding volume is enough water to irrigate an additional 858 acres per year assuming a field head gate delivery of 3.5 acre-feet per acre and no conveyance losses. Even at 50% conveyance loss, the unused rotation credit is enough water to irrigate an additional 428 acres.*
- a. The sixteenth (16.) "FINDING OF FACT," or discussion of "Keeping Rotation Credit" in storage through the end of the irrigation season, has no relevance justifying suspension of Rotation Credit practices. Rotation Credit Storage is the sole property of its respective Water Rights Owner and yes if foresight were available during the 2014 Irrigation Season, those respective quantities of water could or might have been applied to crops and possible allowed pumps to be turned off or decree waters to be delivered to the next water right in time. Rotation Credit Storage is used by irrigators to act as deemed necessary if a decree water right is not available, Etc. It is like extra money in the bank to be used when and if necessary. In addition, 2014 experienced a "Broken River" at Darlington and the 3000 AF of unused rotation credit water was undeliverable as "Futile Call" was in place and all most all natural decree rights in the upper valley below the Dam were on. **This sixteenth (16.) "FINDING OF FACT," does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."**
17. Finding of Fact 17., of the "Preliminary Order Suspending Rotation Credit – Water District 34, Big Lost River, discusses "Unused Rotation Credit.
- a. See 16 a. above. This is a management issue to be resolved by the Big Lost River Irrigation District and its respective patrons. No rules, practices, policy or elements of the plan of operation were violated. **This seventeenth (17.) "FINDING OF FACT," does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."**

18. Finding of Fact 18., discusses "Unused Rotation Credits" for 2015.

- a. See 13. Through 17. Above. **"FINDING OF FACT" 18., does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."**

19. *Rotating natural flow water rights from the Big Lost River to the reservoir during the irrigation season diminishes the available flow of water in the river below the reservoir to fill natural flow priority water rights. Review of Big Lost River Irrigation District daily delivery records (ditch rider logs) for July, 2015 shows that Big Lost River natural flow water rights were rotated to the reservoir at an average rate of 10 CFS per day, while deliveries below the reservoir were regulated or limited to water rights with priority dates of May 31, 1884. An additional daily flow of 10 CFS in the river during July could have been used to minimize river conveyance losses or deliver some portion of the next available priority water rights bearing a priority date of June 1, 1884.*

- a. Respectively, "FINDING OF FACT" 19. Is without foundation. During July, 2015, the Big Lost River was "Broken" near Darlington, a "Futile Call" was in place, and another 10 CFS in the river would have helped no one. **This eighteenth (18.) "FINDING OF FACT," has no basis and does not support IDWR's "PRILIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."**

CONCLUSION

None of the "FINDINGS OF FACT," One (1.) through nineteen (19.), justify the "PRELIMINARY ORDER SUSPENDING ROTATION CREDIT IN WATER DISTRICT 34."

On 19 May 2016, I received via email an IDWR "ORDER GRANTING REQUESTS FOR HEARING; NOTICE OF PRE-HEARING AND HEARING." The PRE-HEARING conference is scheduled to be held May 26, 2016 at 2 p.m. (MDT), at the Butte County High School Auditorium.

I respectfully request that IDWR address my concerns discussed in this correspondence at the afore mentioned PRE-HEARING.

My understanding is that IDWR lacks a legal and technical basis to suspend our Rotation Credit Water Rights.

Sincerely,

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