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

**IN THE MATTER OF THE
ADMINISTRATION AND
ACCOUNTING OF THE PRACTICE
OF ROTATING NATURAL FLOW
WATER RIGHTS INTO MACKAY
RESERVOIR FOR STORAGE**

**PETITION FOR
RECONSIDERATION; and/or
REQUEST FOR HEARING**

COMES NOW the Protestants, Nelson Mackay Ranch, LLC, *et al.*, (See list of Water Right Holders attached as Exhibit 1), by and through its attorney, Fritz X. Haemmerle, of Haemmerle Law, P.L.L.C., and hereby files this Petition for Reconsideration of the *Final Order of Administration and Accounting of the Practice of Rotating Natural Flow Water rights into the Mackay Reservoir for Storage*, dated July 21, 2016, (hereinafter "*Order*").

GENERAL OBJECTION

The *Order* is not consistent with the General Provisions Decreed for Basin 34 (hereinafter "General Provisions"). The Order inserts additional requirements, which are not mentioned or contained in the General Provisions. *See*, Order on Basin-Wide Issue 5,

Basin 34, *Order on Partial Decree for General Provisions in Administrative Basin 34* (“*BWI 5 Order*” or “General Provisions”). As such, the Department has exceeded its authority in creating a *de facto* amendment to the Snake River Basin Adjunction (“SRBA”) Decree and General Provisions Decreed for Basin 34. In many other cases, the Department has taken the position that the SRBA Decree is final and should be administered pursuant to the express provisions of the Decree.

To the extent that the *Order* changes terms of the Decree and instructs the water master contrary to the express terms of the Decree, the *Order* violates Idaho law. Under Idaho law, watermasters are required to deliver water under the terms of the Decree. “Where a water right is clear upon its face as to the stream from which diversion and distribution shall be made, a water-master will not be required to look beyond the decree and examine findings for directions or authority.” *Stethem v. Skinner*, 11 Idaho 374, 82 P. 451 (1905), cited with favor in *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998).

Furthermore, once General Provisions are Decreed, the Director loses authority to change or alter Decreed provisions. “Including general provisions in a decree will provide finality to water rights, and avoid the possibility that the rulers and regulations could be changed at the sole discretion of the Director of the IDWR.” *State v. Nelson, supra* at 11 Idaho 16.

Even if *the* Director had authority to enact provisions outside of the Decree and instruct his water master, he is required to go through rule making procedures as set forth under chapter 52, title 67, Idaho Code. I.C. § 42-603. In this case, the Director has not followed rule making procures in adopting rules and regulations in the *Order*.

Many of the provisions modify the General Provisions so severely that the modifications constitute a taking of property. *Follett v. Taylor*, 77 Idaho 416, 294 P.2d 1088 (1956); Idaho Const., art 15, § 4.

Finally, the State of Idaho appeared during the settlement of the General Provisions in the SRBA. The State settled the General Provisions and, therefore, principles of *res judicata* prevent the State from taking action to amend or modify the General Provisions, which have been Decreed.

This *Order* is contrary to the General Provisions Decreed for Basin 34 and effectively modifies the SRBA Decree regarding those General Provisions and, therefore, should be REVERSED.

SPECIFIC OBJECTIONS

WD34 WATERMASTER INSTRUCTIONS (pgs. 1-7)

1. **Paragraph 4.**

Second Bullet. The reasonable need is a requirement under the General Provisions; however, footnote 2 contains an additional requirement that before water can be rotated, “the user must either have fully irrigated the place of use with the natural flow water right or fully irrigate the place of use with another source of water (i.e. ground water) prior to rotating the natural flow water into storage.” The requirement that the user “fully irrigate” is an additional requirement which is not contained in the General Provisions. Concepts of “reasonable need” and “beneficial use” are not concepts which require users to “fully irrigate” lands upon which water rights are appurtenant.

Fourth Bullet. This bullet requires that water be “deliverable to the water right place of use” prior to rotation. This requirement is a General Provision and is duplicative

and unnecessary. However, wherever this requirement appears, the Department must recognize that instead of running water in an inefficient manner, rotation credits are utilized to provide an efficient method of water delivery. This notion of “efficiency” was recognized in the Director’s Report for the General Provisions in Basin 34. When water delivery becomes inefficient, users rotate water to storage in order to provide an efficient delivery of water. Water is then deliverable in an efficient manner for a period of time. Then, once the water is no longer efficiently deliverable, users rotate water into storage so water may be efficiently deliverable once again.

Recognizing this reality and historical water delivery, the Director in the Supplemental Directors Report for General Provisions 5-34 stated:

The general provision allows the holder of a natural flow water right to exercise flexibility in delivery, through temporary storage of water in the Mackay Reservoir, to increase the efficiency of use of water. The larger rates of flow taken for shorter time periods increase the delivery and application efficiencies. . . [w]ithout rotation into storage, the holder of the senior priority water right would need to divert continuously. . . “

2000 Supplemental Director’s Report for Basin-Wide Issues 5-34 Pursuant to SRBA Order dated January 27, 2000.

Sixth Bullet. This provision addresses combined uses. First, the users object to this provision because it is unclear as to what is required. Second, there is a statement about “overlapping ground water rights,” which suggests that all overlapping ground water rights, whether they are combined or not, will be treated as combined. It is very likely that some of the users have Decreed or licensed ground water rights which are not “combined” with other water rights. Combining these rights by this *Order* would violate the Decreed water rights, when the ground water rights are not combined with other water rights.

Seventh Bullet. This provision states that supplemental ground water rights may not be used when water is rotated into storage. This provision violates conditions with respect to supplemental group water rights. For example, the conditions of water right 34-10885 reads:

The right holder shall make full beneficial use of all surface rights to the right holder for irrigation of the lands authorized to be irrigated under the his right. **The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface supply is not reasonably sufficient to irrigate the place use of use authorized under this right.**

Once again, because of conveyance losses, the surface water is generally not available until rotation credits are built-up to provide a sufficient flow of water. Unless there is the necessary flow, the surface water “is not available or the surface supply not reasonably sufficient to irrigate the place of use.” In this scenario, the user is fully entitled to use the supplemental ground water under the conditions of their rights. To determine otherwise, would violate the user’s rights under their respective supplemental ground water right.

Eighth Bullet. The Order requires conformance with IDAPA WD34 rules. The rules were available when the rotation credit provisions were decreed by the Court. To the extent that the WD34 Rules were not included in the Decree, any attempt to modify the rotation credit provisions with the WD34 rules would violate the Decree and result in a violation of the separation of powers.

2. Paragraph 5. The Petitioners object to the water master being able to deny credits “for any reason.” However, to the extent the water master denies rotation credits, there should be a meaningful appeal.

3. Paragraph 8. This paragraph states that "[t]he BLRID and watermaster shall assess the same conveyance losses to the delivery of rotation storage as BLRID storage water from the Mackay Reservoir." The Director has no authority to assess the delivery of rotation water the same as storage water.

First, the General Provisions do not allow any assessment of rotation credit water.

Second, unlike *Nelson v. Big Lost River Irrigation District*, 148 Idaho 157, 219 P.3d 804 (2009), the BLRID does not own the rotation credit water, and therefore, has no authority to make similar assessments under Idaho Code Section 43-304, as authorized under the *Nelson* case. In this case, the users own the rotation credit water.

Third, assuming for the sake of argument, that the Director has any authority to require assessments, his power to assess stems from this authority to adopt rules and regulations under Idaho Code Section 42-603. Under Section 42-603, the Director must comply with the rules making procedures under chapter 52, title 67, of the Idaho Code, to adopt such rules. In this case, he has not gone through that procedure. In this case, the Director has not gone through appropriate rule making.

Finally, if there is an applicable administrative rule, that rule is IDAPA 37.03.12.40.3. Under Rule 40.3, conveyance losses, for purposes of rotation credits, are determined by reaches. That Section reads:

b. Conveyance losses in the natural channel shall be proportioned by the watermaster between natural flow and impounded water. **The proportioning shall be done on a river reach basis. Impounded water flowing through a river reach that does not have a conveyance loss will not be assessed a loss for that reach. Impounded water flowing through any river reach that does have a conveyance loss will be assessed the proportionate share of the loss for each losing reach through which the impounded water flows.** To avoid an iterative accounting procedure, impounded water conveyance loss from the previous day shall be assessed on the current day.

(Emphasis added).

Stated differently, if there is an applicable rule, Rule 40.3 allows an assessment for a river reach through which the water flows. The only authorized assessments are for reaches, provided the water flows through the particular reach being assessed.

Otherwise, the assessment procedure under Rule 40.3 was adopted prior to the SRBA Decree. The rule could have been included in the Decree, but was not. Because the Rule 40.3 provisions were not included, the provisions have no applicability.

INSTRUCTIONS TO BLRID (pgs. 7-8)

Instructions a-f. These provisions are not part of the Decree and, therefore, violates the Petitioners' rights under the Decree to the full use of their rights. In particular, Instruction c requires the BLRID to "apply conveyance losses associated with the delivery of rotation water." Without more information, the Petitioners lack a clear understanding of what this instruction is designed to address.

STANDARDS (pgs 8-9)

Standard 3. "Rotation to storage shall not be allowed after September 15th." There is no restriction in the General Provisions, and this provisions deprives the Petitioners their full use of their property right as guaranteed in the Decree.

Standard 4. This provision allows the watermaster to deny storage requests when storage account balances and/or rotation credit balances are not being used. Again, there is no such restriction in the General Provisions. Even if there was authority under this provision, the provision is too broad and there are no parameters and objective boundaries on the extent of "credit balances" necessary to deprive a user of rights under the Decree.

SUBSTANTIAL INJURY

The General Provisions set forth how the Objectors may use their water rights, which constitute real property rights. *Follett v. Taylor*, 77 Idaho 416, 294 P.2d 1088 (1956); Idaho Const., art 15, § 4. The *Order* negates the Objectors' rights to use the rotation credits, when such right to rotation were included in the General Provisions for Basin 34.

The *Order*: (1) deprives the Objectors their rights under the Decree; (2) increases the cost of irrigation; and (3) reduces the ability of the users to obtain profits for ranching and farming operations.

REQUEST FOR HEARING

The adoption of the Order prior to giving the Petitioner notice and opportunity to be heard, deprives the Petitioners of their procedural and fundamental due process rights guaranteed under the Constitution of the United States and State of Idaho. The Petitioners request a hearing.

CONCLUSION

For all these reasons, the *Order* is null and void. The *Order* should be REVERSED.

DATED this 27 day of July, 2016.



FRITZ X. HAEMMERLE

Attorney for Nelson Mackay Ranch, LLC et al.

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 29 day of July, 2016 he caused a true and correct copy of the foregoing document to be served upon the following by the method indicated:

Original: Gary Spackman 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
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Fritz X. Haemmerle

EXHIBIT 1

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