Fritz X. Haemmerle (ISB No. 3862)
HAEMMERLE LAW, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com

Attorneys for Nelson Mackay Ranch, LLC et al.

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	**NELSON *ET AL.* POST HEARING BRIEF**

COMES NOW the Protestants, Nelson Mackay Ranch, LLC *et al.*, by and through its attorney, Fritz X. Haemmerle, of Haemmerle Law, P.L.L.C., and hereby submits this *Post Hearing Brief* in opposition to the *Preliminary Order Suspending Rotation Credit in Water District 34,* issued by Deputy Director Matt Weaver, dated April 29, 2016, (hereinafter "*Order*").

I. SUMMARY

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. 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

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.

Even if the Order was not contrary to the Decreed, the post SRBA Decree facts do not justify the modification of the Decree.

II. ARGUMENT

A. THE DECREED ROTATION CREDIT PROVISIONS CANNOT BE SUSPENDED BECAUSE THEY ARE PART OF THE PARTIES' 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.

Before the general provisions were decreed, the SRBA Court elected not to include the rotation credit provisions (hereinafter "provisions") because the District Court held that the provision were not necessary to define the water rights, or for the administration of the water rights. Specifically, the District Court 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 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.

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). (Emphasis added).

There are several fundamental holdings in *Nelson,* all of which were acknowledged and included in the Supplemental Director's Report for the provisions. (Exh. 11, Part 1, p. 3). First, water rights are real property rights. Second, general provisions, if decreed, are part-and-parcel of the description of the water right. Third, including general provisions 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 provisions, the Department has fundamentally alerted the users' property rights. The alteration, caused by the suspension, has caused the Objectors to

suffer substantial injury by either reducing the value of the Objectors real property rights, and/or by causing the Objectors' to suffer increased cost of operation and corresponding loss of profits. (See, Exh.'s 32, 38, 40, 42, 43, 44 and 201).

B. THE DEPARTMENT DOES NOT NEED A "PLAN OF OPERATIONS" FROM THE BLRID BECAUSE THE "PLAN OF OPERATIONS" WAS DECREED IN THE FORM OF THE ROTATION CREDIT PROVISIONS.

1. The Department cannot use Rules and Regulations to amend or supersede the decreed general provisions.

The Hearing Officer suspended the provisions, and then required the Big Lost River Irrigation District ("BLRID") to "develop a plan of operations for rotation credit[s] that improve the efficiency of water use." (Exh 1, p. 8). The Hearing Officer relied on the IDAPA WD 34 Rules ("Rules") for this part of his Order.

The problem with the Hearing Officer's conclusions is that there is nothing in the decreed provisions which requires the BLRID to "develop a plan of operations." Only the Rules for WD 34 requires a "plan of operations" by the BLRID. The SRBA Decreed does not require the BLRID to adopt a "plan of operations."

The Rules relied on by the Hearing Officer were in place both before and after the SRBA Court decreed the general provisions. (See Exh.'s 35 and 37). Presumably, if the Department believed the Rules should have been included in the decreed provisions, it would have recommended any of those Rules in its Director's Reports. It did not.

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 form altering decreed general provisions with 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.**

State v. Nelson, 131 Idaho at 16.

The important point that has apparently been lost on the Department is that it cannot invoke new rules, or apply old rules, which could have been, but were not, included in the SRBA Decree administer the rotation credits.

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 invasion of judicial power by executive agencies 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 provision. The SRBA court exercised its authority and decided to decree the provisions. The decreed provisions ultimately helped define, and became a part of, the parties' real property rights. Depriving the parties of those decreed provisions not only alters the nature of the users' property rights, but forces the parties to face the "evil" of having to readdress the issue of "efficiency," which was once and finally decided by the SRBA Court.

2. The decreed provisions constitute the one-and-only "plan of operations."

Both before and after *State v. Nelson*, consistent with Idaho Code Section 42-1321(6), the Department as the Court's independent expert, recommended the provisions as being essential of the define of the water rights and administration of the water rights. The Department relied heavily on the fact that the provisions were part of a **"plan of operations"** dating back to 1936 and that the water users had relied on the use of the provisions and made investment decisions based on the provisions.

> As early as 1923, in the lawsuit, *Utah Construction* Co. v. *Abbott*, Equity No. 222 (D.E. Id. 1923), herein referred to as the "UC Decree", the Federal District Court recognized the need for provisions to define and provide for the administration of water rights in the Big Lost River basin, given its hydrologic complexities. In about 1936, a second lawsuit was prosecuted by the Big Lost River Irrigation District ("BLRID") and its individual members concerning the purchase of the Mackay Dam from the Utah Construction Company. *In the Matter of the Big Lost River Irrigation District*, (Idaho 6th Jud. Dist. 1936), herein referred to as "1936 Order." The 1936 Order confirmed the BLRID's **"plan of operations"** that described how water was to be administered between storage water and natural flow. The general provisions currently recommended by IDWR are based substantially on the UC Decree and the **"plan of operations"** confirmed by the 1936 Order. Changes in the wording of the provisions from the UC Decree have been recommended by IDWR only for the sake

of clarity to reduce the potential for future conflict. 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.

The issuance and long-standing, historical reliance on the provisions of the UC Decree and the **"plan of operations"** by water right holders provide IDWR the basis for the proposed general provisions. In 1923, the Federal District Court ordered specific provisions in the UC Decree concerning the administration of water in Basin 34, as well as decreeing individual water rights. The general provisions that IDWR recommended in its 1999 Supplemental Director's Report are substantially the same as provisions in the UC Decree.

The **"plan of operations"** confirmed by the 1936 Order described how water was to be administered between storage water and natural flow. IDWR's understanding is that as a result of the **"plan of operation,"** the concept of rotation into storage was developed and implemented by the water users in Basin 34. IDWR based its recommendation for general provision number 3, which continues rotation into storage, upon the historical practice existing in the basin as authorized by the 1936 Order.

(Exh. 11, part 1, p. 6).

* * *

When recommending the general provisions in Basin 34, IDWR based its recommendations primarily on findings and conclusions issued in the UC Decree and the **"plan of operations."** In the 1936 Order, District Court held that "the basic rules and regulations governing the use and distribution of water upon lands within said district, whereby the apportionment and distribution of benefits were had and made upon the lands in said district...were just and equitable, and were regularly and legally done...." *In The Matter of the Big Lost River Irrigation District, Judgment and Decree, §* IX (6th Jud. Dist. 1936). IDWR understands that the concept of "rotation into storage" was part of the BLRID's "rules and regulations" and **"plan of operation"** referred to in the 1936 Order and attachments thereto. **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*).

IDWR concludes the general provisions are necessary to define the water rights and for the efficient administration of the water rights because of the unique and complex hydrologic conditions in Basin 34.

> The general provision governing rotation into storage is necessary to define water rights by recognizing the long-standing, historical reliance by water right holders on the **"plan of operations."** The BLRID and Water District 34 have developed and implemented procedures to efficiently account for delivery of natural flow and stored water under this historical reliance on the **"plan of operations."** The general provision is also necessary for efficient administration because (1) the ownership pattern of water rights, water diversions and delivery facilities, and (2) the role of the BLRID, are unique.

(Exh. 11, part one, p. 8).

The Department believed that it was important to upheld and continue the 1936 "plan of operations " for two important reasons: (1) because it would have been too difficult to revise the plan; and (2) including the 1936 Plan of Operation led to the most efficient use of the water.

> IDWR has extensively reviewed BLRI D'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.**

(*Id.*)

In 2001, relying on the Director's Report (Exh. 11), the Court decreed the provisions. The findings supporting the BWI 5 Order, and resulting General Provisions for Basin 34, expressly acknowledged that there has always been a "plan of operations" for rotation credits, and that "plan" was adopted in the General Provisions for Basin 34. The *BWI 5 Order* adopting the General Provisions reads:

> 4. In a prior decree, *Utah Construction Co. v. Abbott, Equity* No. 222 (D.E. 1923), the federal district court acknowledged the need for such provisions to provide for the administration of rights in the Big Lost River Basin in light of the attendant hydrologic complexity.
>
> 5. **The plan of operations** for the administration of water rights was also confirmed by and order of the State district court. See Findings of Fact and Conclusions of Law, *In the Matter of the Big Lost River Irrigation District* (Idaho Sixth District Judicial District, Custer County, Jan. 25, 1936.
>
> 6. **Since 1936 the water has been administered according to this confirmed plan. Water users subject to the administrative plan have e relied on the same plan since its inception.**
>
> 7. The current recommended Provisions are based sustainably on the *UC Decree* and **the administrative plan confirmed in 1936**. Subsequent modifications to the wording as contained in the current recommendations were negotiated by the parties and confirmed with by IDWR.
>
> 8. Subsequent modifications to the recommendations were negotiated by the parties and concurred with by IDWR.

(See, Exh. 27). (*BWI 5 Orde*r, Review, Finding and Conclusions, Findings 1 through 9, pgs. 4-5). (Emphasis added).

Over-and-over, the Director's Report for the general provisions (Exh 11) and SRBA Decree (Exh. 27) refers to the provisions as being the "plan of operations." Based on a review of the Department's recommendations made in the SRBA and the SRBA Court's Decree, it is clear that the decreed provisions are the "plan of operations," and there are no other "plan of operations" contemplated or required.

C. THE ATTEMPT TO SUSPEND THE, AND THE ADDITION OF 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 principles 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." (Exh. 9). The State of Idaho agreed to, and supported, the provisions.

The State, by and through the Department or the Attorney General's Office in an administrate process, cannot now seek to 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 modify the provisions.

Of course, *res judicata* likewise prevents any water right holder from now arguing against the provisions. The water rights holders had their "day -in-court" in the SRBA, and most of the participants in this Hearing actually participated in the hearings which led to the Order Decreeing the General Provisions for Basin 34. In particular, Mitch Sorensen participated heavily in the SRBA Court (See, Exh.'s 5, 17-26). Mr. Sorenson, characterizing himself, Y. Harvey Walker and Seth Beal, as the "watchman over the general provisions" believed that the provisions should be decreed as written:

> The Court should use extreme care in preserving the interest and substance of the provisions. No other provision in Basin 34 is as controversial or as likely to be misused to the benefit of some and detriment of others as this practice. Rotation for credit is a practice that conserves water supplies and givens water users needed flexibility in water usage. . .. Allowing this practice has . . . allow[ed] [the user] to efficiently manage his water supply. To remove this practice would force him to limit his rotation with other water users with various priority dates and volumes in a common canal which would provide irregular and unstable supplies. The resulting uncertainly would effectively force his to change from flood irrigation to sprinkler irrigation.

(Exh. 5, p. 4).

Allowing Mr. Sorensen and others to argue against the provisions is a monumental miscarriage of justice. Mr. Sorenson and the other users had their day in court, and they are all bound by the decreed provisions.

D. POST SRBA FACTS DO NOT SUPPORT THE SUSPENSION OF THE PROVISIONS.

1. Before the department recommends suspension of the provisions, it should have information about whether the provisions are being followed

The provisions, as a whole, establish various objective criteria for their application. Despite the very objective nature of the provisions, the Department has no knowledge of whether the provisions are 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 cauterization of a lot of testimony.

(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 is a fair assessment.

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

In this case, the Department's witnesses have no factual basis for determining that the provisions are being followed. Before the Department makes any attempt to suspend the provisions, it is axiomatic that it should make sure the provisions are being followed before it attempts to suspend them. The fact that the Department is seeking to suspend the provisions, without any knowledge of whether they are being administered or followed, is clear evidence that the Department is now second guessing the recommendations it made to include the provisions in the SRBA Decree

2. There are no facts supporting the Hearing Officer's conclusion that the use of the provisions leads to "excess" storage.

One of the reasons for suspending the provisions is the perception that the use leads to "excess" water being stored in the Mackay Reservoir at the end of the irrigation season. This fact is not relevant for various reasons.

First, the decreed provisions, on their face, provide for what happens if there is unused rotation credit water.

> 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 as the end of the irrigation season.

(Exh. 27, Exh. A) If there is unused water, the water simply becomes the property of the Big Lost River Irrigation District. Accordingly, the fact that there is unused rotation credit water at the end of the irrigation season is not unanticipated, and the fact of such storage at the end of the irrigation season is not relevant.

Second, even if the fact of unused water was relevant, the Department has no facts leading to any concluding that the use of the provisions leads to "excess" storage. The Department has no factual basis on how much rotation credit water was stored in the Reservoir when the provisions were Decreed. Therefore, there is no way to determine if the storage, post-decree, is "excessive." In fact, the Department's own data indicates that there was more water stored in the Reservoir at the end of the irrigation season immediately before the provisions were decreed in 2001, as compared to the last few years (2013-2015) before the Department elected to suspend the provisions. Tim Luke testified:

> Q. (BY MR. HAEMMERLE) Okay. If we just look at the red column (Ex. 48) which is reservoir content, for example in 2013, '14, and '15. are less than they were in '95, '96 – or I stand corrected – less than they were in '93, '95, '97, '98, and '99, correct?
>
> A. I would agree.

(Tr. Vol II, p. 369, l. 14-19).

* * *

> Q. You have no idea with respect to reservoir content prior to 2001, how much of the total reservoir contents were related to rotation credits, correct?

A. Correct, I didn't look at that.

Q. Okay. So there is no apples to apples, oranges to organs comparison is there? You just have some data over the last three years, relative to what you think, how much rotation credits were stored in the end of the year, correct?

A. It's an observation, correct.

(Tr. Vol II, p. 370, ll. 23-25; p. 371, ll. 1-7).

The observation that the use of rotation credits leads to "excessive" storage is a bogus finding. There was more storage of water at the end of the irrigation season in the years preceding the Decree of the provisions in 2001. The Department has no way of knowing if the current storage, as compared to storage before 2001, relates to the storage of rotation water. Accordingly, the finding that there is "excess" storage is unsubstantiated and should not be accorded any weight.

3. The use of groundwater rights is not relevant to the use of the provisions.

Another basis for suspending the provisions was the alleged "excess use" of groundwater rights. This basis is not supported in fact or law.

First, it is concerning that the Department relied on a 1991 IWRI Report (Exh. 1, p. 1) in its *Order*, which is the very same report it relied on when it recommended the provisions in the SRBA Decree. (See, Exh. 11, Part 9). The Department expresses concern over groundwater pumping increases form 1990 through 2015. Yet, in 2000, in the middle of those increases of ground water pumping, the Department happily recommended the provisions in the SRBA Court.

Second, the Department is critical of the way groundwater rights are being used. The groundwater rights, like any other water rights, are property rights. The rights may be used as they were decreed or licensed. Some of the groundwater rights are stand-alone

rights.[1] Some of the groundwater rights are supplemental, which means the rights can be used only when the surface rights are unavailable.[2] Some of the groundwater rights have combined use provisions.[3]

If there are combined use provisions in individual water rights statement, the rotation of storage can never lead to the excess use of water because when the user is rotating into storage or using groundwater rights, both uses are counted against the diversion limits. One of the provisions reads as follows: "d. The diversion rate of water rights being rotated into storage shall be included in the calculation of total combined diversion rate limitations." (Exh. 27, Exh. A). If the user is within combined limits, there is can be no "excess" use of water.

The point is that the water right holders are using the groundwater rights, as they were authorized, either in the SRBA Decree, or as they were licensed. Unless the Department has evidence that the users are violating the terms of their groundwater rights, the groundwater rights are being used as authorized. The Department, absent such a showing, cannot conclude that there is an "excess" use of groundwater rights caused by use of the provisions.

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

The Deputy Director required the parties to develop a more "efficient" plan as a condition to lift the suspension of the provisions. The *Order* reads:

> 2. The Department may consider approving the practice of rotation credit in any subsequent year if the Big Lost River Irrigation District

[1] See, 34-02380.
[2] See, 34-02428. This right is a supplemental groundwater right. One must search far and wide for Basin 34 supplemental groundwater rights. Otherwise, the users are free to use either surface or groundwater, depending on needs.
[3] See, 34-02325.

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.

Oddly, the Deputy Director's *Order* does not conclude, in anyway, 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 wager, but you want them to come up with an efficient plan to make sure they are not wasting water, is that you testimony.

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

(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 Department's conclusions 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.**

(Exh. 11, part one, p. 11). (Emphasis added).

Then the Department suspends the same provisions without any contrary finding that the provisions lead to the inefficient use of water. By requiring the parties to derive an more "efficient" plan of operations, the Hearing Officer is requiring the parties to reestablish a fact that had already been decided by the judicial branch of government in the SRBA Court. Again, in order to decree the general provisions, the statue required the court to find that the provisions were necessary for the "efficient administration" of water. *See, Infra*, § A. This, as previously argued herein, violates the Idaho Constitutional provisions addressing the separation of powers. *See, Infra*, § B(1).

Additionally, the Hearing Officer is requiring the water users to develop a more efficient plan of operations, without advising what type of plan is required. This is problematic because the State, through the Department, has deprived the water users of their property right, without giving some direction as to how the objectors might require the rights. If the Department is set on depriving the Objectors their rights, then they must inform the Objectors of what is required to regain their rights.[4]

---

[4] With respect to the enactment of laws, and the importance of acknowledging due process rights, the Idaho Supreme Court has stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . The due process clause of the fourteenth amendment to the Constitution of the United States requires that a city ordinance must be definite and certain in its statement of prohibited conduct to enable a person of ordinary intelligence who reads the ordinance to understand what activity is proscribed and govern his actions accordingly. The Constitution of the State of Idaho also

In depriving the Objectors of their rights under the SRBA Decree, at the very least, the Department must explain precisely what type of "plan" is necessary to "improve the efficiency of water use." Without such a definition, the users and District are subject to *ad hoc* arbitrary and discriminatory enforcement of the rotation credit provisions contained in the SRBA Decree. Worse, yet, even if the users are able to read minds and decipher the secret to satisfying the Department's concept of efficiency, the Department reserves the right to reinstate the Order, or not.

III. CONCLUSION

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

DATED this 13 day of September, 2016.

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

---

requires that city ordinances demonstrate a definiteness and certainty sufficient to permit a person to conform his conduct thereto.

State v. Bitt, 118 Idaho 584, 585, 798 P.2d 43 (1990).

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2016, I have caused to be presented the foregoing to the Department of Water Resources and Participants and will send notification of such filing to the following e-mail addresses and/or Post Office Boxes by United State Mail:

Original:
Gary Spackman
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
deborah.gibson@idwr.idaho.gov

Bell Smith, LLC
Byron Pehrson, Lanna Pehrson,
Terry Pehrson, and Loy Pehrson
Harry J. and Beverly Crawford
Jennie M. and Orville E. Smith
John and Patrick Powers
Magee Family Trust
Mojanet J. and Deborah D. Broadie
Nelson Mackay Ranch, LLC
Notch Butte Farms, LLC
Peggy and Randy D. Pehrson
Wight Enterprises, LLC
Represented by:
Fritz X. Haemmerle
Haemmerle Law, PLLC
P.O. Box 1800
Hailey, Idaho 83333
fxh@haemlaw.com

Big Lost River Irrigation District
Represented by:
W. Kent Fletcher
Fletcher Law Offices
P.O. Box 248
Burley, Idaho 83318
wkf@pmt.ort

Marshal Todd Perkes
2790 N 3325 W
Moore, Idaho 83255

Melvin Marx Hintze, PE

Darla Ann Hintze
4372 W. Houston Road
Mackay, Idaho 83251
marxhintz@hintze.net

Mike Telford
Telford Lands, LLC
1450 W. Highway 24
Paul, Idaho 83347-8666

Mitchell D. Sorensen
3871 W. 2500 N.
Moore, Idaho 83255

Seth Beal
2827 N. 3375 W.
Moore, Idaho 83255

Young Harvey Walker
2338 N. 2930 W.
Arco, Idaho 83213

FRITZ X. HAEMMERLE