

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

IN THE MATTER OF ROTATION)	FINAL ORDER RE:
CREDIT IN WATER DISTRICT 34,)	SUSPENSION OF
BIG LOST RIVER BASIN)	ROTATION CREDIT IN
)	WATER DISTRICT 34
)	

PROCEDURAL BACKGROUND

On April 29, 2016, the Idaho Department of Water Resources (“Department”) issued the *Preliminary Order Suspending Rotation Credit in Water District 34* (“Preliminary Order”). The Preliminary Order suspended the “current practice of rotation credit” in Water District 34 (“WD 34”) because it “does not ‘improve the efficiency of water use’ as required by” General Provision 3 of the *Order of Partial Decree for General Provisions in Administrative Basin 34* (“Order of Partial Decree”) issued by the Snake River Basin Adjudication (“SRBA”) District Court on May 9, 2001. *Preliminary Order* at 7-8.¹ The Department received multiple requests for hearing regarding the Preliminary Order. On May 17, 2016, the Director of the Department (“Director”) issued an *Order Granting Requests for Hearing; Notice of Pre-Hearing and Hearing* granting the requests for hearing and establishing a hearing date.

On June 28 and 29, 2016, the Director conducted a hearing. At the beginning of the hearing, the Director was asked to stay the Preliminary Order. The Director took the motion under advisement. At the conclusion of the second day of the hearing, the parties agreed to continue the hearing to August 2, 2016, and the Director verbally granted the motion to stay the Preliminary Order. On July 1, 2016, the Director issued a *Notice of Continued Hearing; Order Staying Preliminary Order* continuing the hearing to August 2, 2016; staying the Preliminary Order “pending issuance of the final order in this matter;” and informing the parties that the Director would “issue additional instructions to the [WD 34] watermaster and Big Lost River Irrigation District [“BLRID”] regarding administration of rotation credit in [WD 34], in accordance with General Provision 3” of the Order of Partial Decree. On July 18, 2016, the Director issued the *Final Order Regarding Instructions to Water District 34 Watermaster, In the*

¹ On July 7, 2004, the SRBA 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 provisions related to the practice of rotation credit.

Matter of the Administration and Accounting of the Practice of Rotating Natural Flow Water Rights into Mackay Reservoir for Storage (“WD 34 Instructions”).²

On August 2, 2016, the Director conducted the final day of the hearing. At the close of the hearing, the Director set September 13, 2016, as the deadline for parties to submit post-hearing briefs. A post-hearing brief was timely submitted by Nelson Mackay Ranch, LLC, et al. (“Nelson”).

ANALYSIS

Development of the General Provisions for Basin 34.

Idaho Code § 42-1411 requires that the Director “prepare a director’s report on the water system” that “may include such general provisions . . . as the director deems appropriate and proper, to define and to administer all water rights.” Idaho Code § 42-1412(6) states “[t]he decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights.”

On June 24, 1999, the Department filed the *Supplemental Director’s Report, Reporting Area 1, IDWR Basin 34, Regarding Revisions of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provision*, (“Supplemental Director’s Report”) “which recommended general provisions necessary for the efficient administration of water in Basin 34.” *Order of Partial Decree* at 4. On March 27, 2000, the Department filed a *Supplemental Director’s Report Regarding Basin-Wide Issues 5-34 (Conjunctive Management General Provisions)* (“706 Report”) explaining the bases for the recommended general provisions, including General Provision 3 regarding the practice of “rotating natural flow rights into storage in Mackay Reservoir for use at a later time.” *706 Report* at 4-19. The 706 Report states that the Department “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.” *Id.* at 6. On May 9, 2001, the SRBA District Court issued the Order of Partial Decree, ordering that the general provisions recommended by the Department in the Supplemental Director’s Report are “partially decreed and shall be confirmed in any final unified decree entered in SRBA Case No. 39576.” *Order of Partial Decree* at 6.

The Director may Suspend the Practice of Rotation Credit Consistent With General Provision 3.

Nelson asserts the Director cannot suspend the practice of rotation credit in WD 34. *See Nelson Post Hearing Brief* at 2-6. Contrary to Nelson’s argument, the Director may suspend the practice of rotation credit consistent with General Provision 3 of the Order of Partial Decree. Specifically, General Provision 3 states:

Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the [BLRID] *when such practice*

² On July 29, 2016, Nelson Mackay Ranch, LLC, et al., filed a *Petition for Reconsideration; and/or Request for Hearing*. On August 18, 2016, the Director issued an *Order Granting Request for Hearing*.

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.

(emphasis added). The plain language of General Provision 3 emphasized above subjects the practice of rotation credit to several “conditions” and “review and approval by the Director.” The plain language of General Provision 3 also explains that water rights may be rotated into storage only when the rotation into storage practice “improves the efficiency of water use.” Accordingly, General Provision 3 authorizes the Director to review the practice of rotation of water rights into storage in WD 34 and suspend the practice if the Director determines it is not occurring in accordance with conditions set forth in General Provision 3 or in a way that improves the efficiency of water use.

By statute, “decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” Idaho Code § 42-1420(1). Again, Idaho Code § 42-1412(6) instructs that a general provision should be included in a water right decree if the general provision is necessary to define or efficiently administer water rights. The Supplemental Director’s Report recommended General Provision 3 and the 706 Report explained that General Provision 3 is necessary to define the water rights and for the efficient administration of water rights in Basin 34. The SRBA District Court partially decreed General Provision 3 in the Order of Partial Decree. The plain language of General Provision 3 that authorizes the Director to suspend the practice of rotation credit if it is not occurring consistent with the specified conditions or in a way that improves the efficiency of water use is a component of water rights decreed in Basin 34. As a result, the Director may suspend the practice of rotation credit pursuant to General Provision 3 if the Director determines the rotation

of natural flow water rights into storage does not adhere to the specified conditions or does not improve the efficiency of water use.

Nelson argues that, by suspending the practice of rotation credit in WD 34, “the Department has fundamentally [altered] the users’ property rights” and, therefore, “caused” the water users “to suffer substantial injury by either reducing the value of the” water users’ “real property rights, and/or by causing the” water users “to suffer increased cost of operation and corresponding loss of profits.” *Nelson Post Hearing Brief* at 3-4. However, as explained above, the plain language of General Provision 3 that authorizes the Director to suspend the practice of rotation credit if it is not occurring consistent with the specified conditions or in a way that improves the efficiency of water use is a component of water rights decreed in Basin 34. The Director may review and suspend the practice of rotation credit without altering the water rights decreed in Basin 34.

Nelson also argues the Director cannot suspend the practice of rotation credit because it “forces the parties . . . to readdress the issue of ‘efficiency,’ which was once and finally decided by the SRBA Court.” *Nelson Post Hearing Brief* at 6. When the SRBA District Court partially decreed General Provision 3 as necessary for the efficient administration of water rights in Basin 34, the Court did not guarantee, in perpetuity, the right to rotate water. The terms “may” and “when” in General Provision 3 establish that the rotation of water rights is conditional. Water rights “may” be rotated “when such practice improves the efficiency of water use.” (emphasis added). Because the rotation into storage is subject to “review and approval by the Director,” rotation into storage may be suspended when the Director concludes it does not “improve the efficiency of water use” or is not conducted consistent with specified conditions.

The Director Will Set Aside the Preliminary Order to Allow Time for Implementation of the WD 34 Instructions.

Testimony presented at hearing established that the Department has scrutinized the practice of rotation credit in WD 34 in recent years for two reasons: (1) some water users in WD 34 have voiced concerns that the practice is being implemented in a manner inconsistent with the general provision 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 WD 34, including accommodating the practice of rotation for credit. *See* Tr. Vol. I at 44, 80, 136; Tr. Vol. II at 348, 351-55. Therefore, the Director issued the WD 34 Instructions to ensure the practice of rotation credit is implemented in conformance with the General Provisions. *WD 34 Instructions* at 1. General Provision 3 authorizes the Director to suspend the practice of rotation credit. Nonetheless, the Director will set aside the Preliminary Order to allow time for the watermaster to implement the WD 34 Instructions and ensure the practice of rotation credit is occurring in accordance with conditions set forth in General Provision 3 and improving the efficiency of water use.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Preliminary Order is set aside.

Dated this 3rd day of November, 2016.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November 2016, I served a true and correct copy of the foregoing document on the following by the method indicated below:

Fritz X. Haemmerle Haemmerle Law, PLLC P.O. Box 1800 Hailey, Idaho 83333	<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	<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
Marshal Todd Perkes 2790 N 3325 W Moore, Idaho 83255	<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
Melvin Marx Hintze, PE Darla Ann Hintze 4372 W. Houston Road 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 checked="" type="checkbox"/> Email
Mike Telford Telford Lands, LLC 1450 W. Highway 24 Paul, Idaho 83347-8666	<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	<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

<p>Seth Beal 2827 N. 3375 W. Moore, Idaho 83255</p>	<p><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</p>
<p>Young Harvey Walker 2338 N. 2930 W. Arco, Idaho 83213</p>	<p><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</p>



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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.