

B. Course of proceedings and statement of facts.

This matter involves the practice of rotation credit in Water District 34. Various water users hold natural flow water rights to divert water from the Big Lost River below Mackay Reservoir. The practice of rotation credit allows them to rotate their natural flow water rights into Mackay Reservoir for storage and use at a later date subject to various conditions and limitations. The practice was codified in the Snake River Basin Adjudication (“SRBA”) as General Provision 3 for Basin 34. Ex. 27. Starting in 2015, the Department participated in a series of discussions with water users to address concerns regarding the sufficiency of the water supply in the basin. R., 2. In conjunction with these discussions it reviewed the practice of rotation credit. Deputy Director Mat Weaver issued a *Preliminary Order* in April 2016 suspending the practice indefinitely on the basis it was not improving the efficiency of water use in Water District 34.¹ *Id.* at 1-13.

Multiple water users asked the Director for a hearing on the *Preliminary Order*. *Id.* at 14-45. The Director subsequently held a hearing and issued the *Final Order*. Although he held he may suspend the practice of rotation credit in Water District 34 under certain circumstances, the Director determined that a suspension was not warranted at this time and set aside the *Preliminary Order*. *Id.* at 264. The Petitioners subsequently filed a *Petition* with this Court seeking judicial review of the Director’s *Final Order*. The Petitioners challenge the Director’s finding that he may suspend the practice of rotation credit. A hearing on the *Petition* was held before the Court on May 25, 2017.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c)

¹ The *Preliminary Order* is not before the Court on judicial review.

made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. History.

The practice of rotation credit has occurred in Basin 34 for some time. The practice stems from a 1936 decree approving the formation of the Big Lost River Irrigation District ("BLRID").² *In the Matter of the Big Lost River Irrigation District* (Idaho 6th Jud. Dist. 1936). In that decree, the district court confirmed a plan of operation presented by BLRID that described how water in the Big Lost River was to be administered between storage water and natural flow. Ex. 11-3, pp. 326-328. As a result of that plan of operation "the concept of rotation into storage was developed and implemented by water users in Basin 34." R., p.184. The Department codified the practice in its *Water Distribution Rules – Water District 34* in 1994. IDAPA 37.03.12.040.02.

The issue of rotation credit was raised in the SRBA in 1992 when the Director filed a Director's Report recommending the following general provision in Basin 34 regarding the practice:

Water rights that do not include storage as a purpose of use may not be stored. Surface water rights may, however, be rotated into storage, with the approval of the director and the Big Lost River Irrigation District, when such practice improves the efficiency of water use as contemplated by the Irrigation District's plan of operation. Any water stored under such a rotation, if not used in the same

² Copies of the *Judgment and Decree* and *Findings of Fact and Conclusions of Law* entered in *In the Matter of the Big Lost River Irrigation District* (Idaho 6th Jud. Dist. 1936) are located in the record as Exhibits 11-3 and 11-4.

irrigation season in which it is stored, shall revert to the Big Lost River Irrigation District at the end of the irrigation season. Rotation into storage cannot occur prior to the need for irrigation water on the land, as determined by the director, in any year; water rotated into storage may only be used on the land to which the water right being rotated is appurtenant (water rotated into storage may not be marketed); if the reservoir fills after rotation has begun in any year all rotation credits are lost and all water in the reservoir at the time it fills reverts to the Big Lost River Irrigation District.

Ex. 11-10.³ Various parties objected to the recommended general provision.

In 2000, the Court ordered the Department to file a supplemental report setting forth the basis for its recommendation. The Director responded on March 27, 2000, by filing a Supplemental Director's Report wherein he summarized the practice of rotation credit and set forth the basis for his recommendation. The Court includes the Director's summary herein in pertinent part to provide a more detailed description of the practice of rotation credit and to set the stage for the analysis that follows:

This general provision describes the diversion into storage under water rights for natural flow. In Basin 34, rotation into storage consists of allowing the holder of a natural flow water right to cease diverting and using all or part of the water right for direct irrigation purposes and instead, receive a storage credit in Mackay Reservoir for the volume of water that is not diverted under the right for direct irrigation uses. The water credited to storage can then be released and used at the request of the water right holder for use on the land to which the natural flow water right is appurtenant.

This is different from the common practice of rotating individually held water rights among water users on a lateral or canal. The latter type of rotation provides for the distribution of irrigation water between water users. Rotation generally occurs when the water users divert the available water supply from a common source pool. For a certain number of hours or days, the water users in a rotation agreement shut off their use while another user in the rotation beneficially uses all the water pooled in the agreement. Each user receives a larger head of water with which to irrigate their respective lands. Rotation allows a single water user to irrigate more efficiently using a larger head of water for a shorter period of time. The practice of pooling water between water users, while different from the practice in the Big Lost River valley of rotating water into storage, commonly referred to as "rotation credits," has a similar effect of conserving water and encouraging the maximum benefit from the water.

³ The 1992 Director's Report was followed by an Amended Director's Report in 1995 which made minor changes to the recommended general provision. Ex. 11-12.

Rotation into storage in Mackay Reservoir allows BLRID to manage water supplies as if it owns both the natural flow and stored water by delivering water to an individual irrigator and accounting for the total delivery to the irrigator. Under this procedure, the watermaster determines the natural flow available under the priority of each individual water right at the river headgate. BLRID then accounts for the water available to each irrigator using a credit and debit system. Credits are accumulated based upon the irrigator's share of the water stored in Mackay Reservoir under the BLRID rights and from natural flow available under the individual irrigator's water rights. Debits are charged as the accumulated water is subsequently released from storage and diverted by the water user.

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. The irrigators own the natural flow water rights appurtenant to their lands. The BLRID owns and controls the water stored in Mackay Reservoir under the rights claimed by the BLRID and has a duty to deliver these waters to its members. The BLRID also owns, controls, and maintains the diversion and distribution system used by the irrigators. To determine the rate of diversion and use of only natural flow by an individual water user, the Water District 34 watermaster would have to go beyond his statutory authority by traveling down the canal or lateral to measure the rate of diversion at the irrigator's turnout from the BLRID canal.

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

Ex.11-1, 186-187.⁴

Following the filing of the Director's Supplemental Director's Report, the parties reached a settlement as to the form and content of a general provision authorizing the practice of rotation

⁴ The term "plan of operations" used by the Director in his Supplemental Director's Report refers to the Big Lost River Irrigation District plan of operation confirmed by the District Court in *In the Matter of the Big Lost River Irrigation District* (Idaho 6th Jud. Dist. 1936).

credit. Ex. 21. On May 9, 2001, the Court decreed the following general provision consistent with the parties' settlement:

Water rights from the Big Lost River diverted below 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 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.

Ex. 27, 775-776. The provision was decreed as General Provision 3 in Basin 34. *Id.*

B. The *Final Order* is affirmed.

The Director's *Final Order* sets aside the Department's *Preliminary Order* suspending the practice of rotation credit. R., 264. No one seeks review of the Director's determination to set aside the *Preliminary Order*. However, in conjunction with the set aside the Director examined the circumstances under which he may suspend the practice of rotation credit. He held he may suspend the practice "pursuant to General Provision 3 if [he] 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.” Id. at 263-264 (emphasis added). The Petitioners concede the Director may suspend the practice if it is conducted in violation of conditions a-g of General Provision 3. However, they seek judicial review of the Director’s determination that he may suspend the practice if he determines it does not improve the efficiency of water use.

i. The plain language of General Provision 3 authorizes the Director to suspend the practice of rotation credit when it does not improve the efficiency of water use.

The Director’s determination that he may suspend the practice of rotation credit when it does not improve the efficiency of water use is based on the plain language of General Provision 3. The same rules of interpretation applicable to contracts apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). If a decree’s terms are clear and unambiguous, the decree’s meaning and legal effect are questions of law to be determined from the plain meaning of its own words. *Cf., Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf., Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). Whether a decree is ambiguous is a question of law over which this Court exercises free review. *Id.*

The language of General Provision 3 is plain and unambiguous. It subjects the practice of rotation credit to several express conditions and limitations. Certainly, the practice is subject to conditions a-g set forth in General Provision 3. This is undisputed. It is also subject to the consent of BLRID. However, the practice is subject to additional conditions under the decree’s plain language that the Petitioners fail to recognize. First, the General Provision provides that water rights may be rotated into storage “when such practice improves the efficiency of water use.” Ex. 27 at 775. This language plainly constitutes an additional express condition on the exercise of the practice. Where the rotation of water rights into storage does not improve the efficiency of water use, the General Provision is clear that the practice may not be exercised even if conditions a-g of the general provision are otherwise met and the BLRID consents to the practice.

Second, the general provision provides the practice is subject to “review and approval by the Director of the Idaho Department of Water Resources.” *Id.* at 776. Again, this language

constitutes an additional express condition on the exercise of the practice. The Director may review and either approve or disapprove the practice of rotation credit. If he disapproves the practice because one of the General Provision's express conditions are not being met, the practice may not be exercised. Therefore, the Director's determination he may suspend the practice "pursuant to General Provision 3 if [he] 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" is consistent with the plain language of the General Provision and must be affirmed.

ii. The Director's determination is not barred by principles of res judicata.

The Petitioners argue the Director is barred by principles of res judicata from finding that the practice of rotation credit does not improve the efficiency of water use. The doctrine of res judicata covers both claim preclusion and issue preclusion. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). 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. *Id.*

The Petitioners' res judicata argument relies upon Idaho Code § 42-1412(6) and the Idaho Supreme Court's directive in *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998). Idaho Code § 42-1412(6) directs that the SRBA District Court may decree such general provisions "necessary for the definition of the rights or for the efficient administration of the water rights." I.C. § 42-1412(6). *Nelson* addressed the issue of general provisions in Basin 34, including the recommended general provision on rotation credit. In *Nelson*, the Idaho Supreme Court remanded the case with the following directive:

If the provision is necessary for the efficient administration of a water right, we hold that the provision should be included in the decree, and remand for further factual findings as to the necessity of this provision either to the definition or the administration of these water rights.

Id. at 131 Idaho at 16, 951 P.2d at 947. It is the Petitioners' position that the SRBA District Court judicially determined that the practice of rotation credit is necessary for the efficient administration of water rights in Basin 34 when it decreed General Provision 3. As a result, they

argue the Director is barred from re-examining whether the practice does or does not improve the efficiency of water use under principles of *res judicata*. This Court disagrees.

The Petitioners' *res judicata* argument may have had merit if the language of General Provision 3 was absolute and without condition in its authorization of the practice of rotation credit. But a simple reading of the General Provision establishes that is not the case. The SRBA District Court did not decree an absolute right to exercise the practice of rotation credit. And, an absolute right is not what the parties to the SRBA agreed to when they stipulated to the language of General Provision 3. Rather, the SRBA District Court decreed a conditional right to exercise the practice of rotation credit. In so decreeing that conditional right, the court certainly did not judicially determine, as argued by the Petitioners, that the practice of rotation credit always improves the efficiency of water use. This characterization by the Petitioners of the SRBA District Court's finding is far from accurate. The SRBA District Court determination only that the General Provision, as stipulated to by the parties with its conditions and limitations, is necessary for the efficient administration of water rights in Basin 34. Ex. 27 at 772.

A review of the plain language of the General Provision refutes the Petitioners' assertion that the SRBA District Court determined the practice of rotation credit always improves the efficiency of water use. Indeed, the general provision expressly recognizes there may be situations where the practice does not improve the efficiency of water use. *Id.* at 775. In those situations the practice is not authorized. The General Provision is clear that the practice may occur only where "it improves the efficiency of water use," thereby recognizing that when the practice does not improve the efficiency of water use it is not authorized. *Id.* In interpreting a decree, effect must be given to all its words so that none will be void or superfluous. *Cf. Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 897, 265 P.3d 502, 510 (2011). Under the Petitioners' argument, the language that water may be rotated into storage "when such practice improves the efficiency of water use" becomes wholly superfluous.

The Petitioners have failed to carry their burden of showing that Idaho Code § 67-5279(3) has been violated by the Director's *Final Order*. They have also failed to show that their substantial rights have been prejudiced. Therefore, under Idaho Code § 67-5279(3) the Director's *Final Order* must be affirmed by this Court.

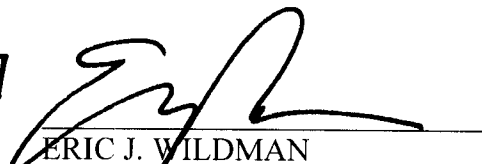
C. Attorney fees.

The Petitioners seek an award of attorney fees and costs under Idaho Code § 12-117. The Petitioners have not prevailed in this matter. As such, they are not entitled to an award under the statute. I.C. § 12-117(1). The Respondents likewise seek an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a “legitimate question for this Court to address.” *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). The Court holds that the Petitioners have presented legitimate issues for this Court to address. These include issues of decree interpretation and the issue of *res judicata* under the facts and circumstances presented. The Court does not find the Petitioners’ arguments on these issues to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies the Respondents’ request for attorney fees.

**IV.
ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the Director’s *Final Order* is hereby affirmed.

Dated June 29, 2017


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on June 29, 2017, with sufficient first-class postage to the following:

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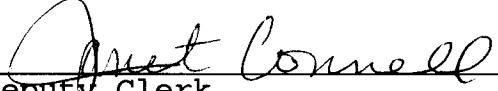
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MEMORANDUM DECISION AND ORDER

Page 11 6/29/17

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