



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

STATE OF IDAHO, IN AND FOR THE COUNTY OF BUTTE

MOJANET and DEBORAH BROADIE,  
HARRY and BEVERLY CRAWFORD,  
NOTCH BUTTE FARMS LLC, MAGEE  
FAMILY TRUST, NELSON MACKAY  
RANCH LLC, BYRON PEHRSON, LANA  
PEHRSON, TERRI PEHRSON, LOY  
PEHRSON, PEGGY and RANDY PEHRSON,  
JENNIE and ORVILLE SMITH, WIGHT  
ENTERPRISES LLC, BELL SMITH LLC,  
JOHN AND PATRICK POWERS, LAST  
RANCH LLC, and JOHN LEZAMIZ  
FAMILY LIMITED PARTNERSHIP,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
capacity as Director of the Idaho Department  
of Water Resources,

Respondents.

Case No. CV-2016-092

RESPONDENTS' BRIEF

**ATTORNEYS FOR RESPONDENTS**

**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL

**CLIVE J. STRONG**  
Deputy Attorney General  
Chief, Natural Resources Division

**GARRICK L. BAXTER, ISB #6301**  
**EMMI L. BLADES, ISB #8682**

Deputy Attorneys General  
P.O. Box 83720  
Boise, ID 83720-0098  
Telephone: (208) 287-4800  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[emmi.blades@idwr.idaho.gov](mailto:emmi.blades@idwr.idaho.gov)

*Deputy Attorneys General for Idaho  
Department of Water Resources and Gary  
Spackman*

**ATTORNEY FOR PETITIONERS**

**FRITZ X. HAEMMERLE**  
HAEMMERLE LAW, PLLC  
P.O. Box 1800  
Hailey, Idaho 83333  
Telephone: (208) 579-0520  
[fxb@haemlaw.com](mailto:fxb@haemlaw.com)

*Attorney for Mojanet and Deborah Broadie,  
Harry and Beverly Crawford, Notch Butte  
Farms, LLC, Magee Family Trust, Nelson  
Mackay Ranch, LLC, Byron Pehrson, Lana  
Pehrson, Terri Pehrson, Loy Pehrson,  
Peggy and Randy Pehrson, Jennie and  
Orville Smith, Sight Enterprises LLC, Bell  
Smith LLC, John and Patrick Powers, Last  
Ranch LLC, and John Lezamiz Family  
Limited Partnership*

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## I. STATEMENT OF THE CASE

### A. NATURE OF THE CASE

Petitioners challenge a final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) wherein the Director: 1) determined he may suspend the practice of rotation credit<sup>1</sup> in Water District 34 (“WD34”) consistent with the Basin 34 general provisions decreed by the Snake River Basin Adjudication (“SRBA”) Court, and 2) set aside a preliminary order issued by Department staff that suspended the practice. The order appealed is the *Final Order Re: Suspension of Rotation Credit in Water District 34* (“Final Order”). The Court should affirm the Final Order because the Director’s determination he can suspend the practice of rotation credit is consistent with the plain language of the general provisions. Further, the Final Order does not prejudice Petitioners’ water rights. The Court should also award the Department reasonable attorney fees because Petitioners’ arguments are without a reasonable basis in fact or law.

### B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

#### General Provisions in Basin 34 & the Department’s Water Distribution Rules - WD34

Idaho Code § 42-1411 requires 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.” On June 24, 1999, the Department filed a director’s report with the SRBA Court recommending “general provisions necessary for the efficient administration of water in Basin 34.” Exhibit 27 at 771. On May 9, 2001, the SRBA Court issued its *Order of Partial Decree for General Provisions in Administrative Basin 34*,

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<sup>1</sup> Rule 10.12 of the Department’s *Water Distribution Rules- Water District 34* defines “Rotation Credit” as “water impounded in Mackay Reservoir pursuant to a water right whose source of water is the Big Lost River and which does not include storage as a purpose of use.” IDAPA 37.03.12.010.12.

ordering that General Provisions 1 through 6 (“General Provisions”) recommended by the Department “are to be included in the decree determining water rights to water from Basin 34.”

*Id.* at 768.<sup>2</sup>

The General Provisions authorize the practice of rotation credit in WD34. General Provision 3 states, in pertinent part:

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.

*Id.* at 775-76.

The Department’s Water Distribution Rules - Water District 34 (“WD34 Rules”) also address the practice of rotation credit. Rule 40.02 of the WD34 Rules states the practice may occur when it “improves the efficiency of water use.” IDAPA 37.03.12.040.02. The WD34

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<sup>2</sup> On July 7, 2004, the SRBA Court issued an *Order Amending Partial Decree for General Provisions in Administrative Basin 34 to Include General Provision 7 on Connected Sources*. This order did not modify General Provision 1 through 6.

Rules also subject the practice of rotation credit to several conditions, including that it “must be approved by the director” and “pursuant to the Big Lost River Irrigation District’s approved plan of operation.” IDAPA 37.03.12.040.02(a-b).

### **Preliminary Order Suspending the Practice of Rotation Credit**

On April 29, 2016, the Department’s Deputy Director Mathew Weaver issued a *Preliminary Order Suspending Rotation Credit in Water District 34* (“Preliminary Order”). R. at 1-13.<sup>3</sup> Weaver issued the Preliminary Order in response to concerns raised by WD34 water users and increased scrutiny of water right accounting in WD34. *Id.* at 6. Weaver evaluated the “current practice of rotation credit” and determined it is not being implemented in a way that improves “‘the efficiency of water use’ as required by General Provision 3 and Rule 40.02 of the WD34 Rules.” *Id.* at 7. In addition, Weaver could not determine whether the practice is occurring “‘pursuant to the Big Lost River Irrigation District’s approved plan of operation’ in compliance with the WD34 Rules.” *Id.* Therefore, Weaver suspended the practice of rotation credit “for the 2016 irrigation season,” but ordered the practice “may” be approved “in any subsequent year if the Big Lost River Irrigation District annually consents to the practice in writing and develops a plan of operation for rotation credit that improves the efficiency of water use.” *Id.* at 8.

The Department received requests for hearing on the Preliminary Order. *Id.* at 261. The Director issued an order granting the requests and scheduled a prehearing conference on May 26, 2016, and a hearing on June 22-23, 2016. *Id.* at 84. Based upon discussions at the May 26 prehearing conference, the Director amended the hearing dates to June 28-June 29, 2016. *Id.* at 85.

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<sup>3</sup> Citations to the record herein refer to the Bates Stamp numbers of the agency record lodged with the Court.

At the start of the first day of the hearing, one party asked the Director to stay the Preliminary Order. *Id.* at 198. The Director took the motion under advisement. *Id.* At the hearing, Department staff testified that water users have been complaining to the Department and alleging the practice of rotation credit is not administered in accordance with the General Provisions or WD34 Rules. Tr. Vol. II, p. 351-55. Department staff and water users testified they need better documentation and “more transparency” regarding how the practice is “implemented”. Tr. Vol. II, p. 354-56, 534-36; Tr. Vol. III, p. 800.

When the hearing was not concluded by the end of the second day, the parties agreed to continue the hearing to August 2, 2016. R. at 198. The Director verbally granted the motion to stay the Preliminary Order and told the parties he would issue a written order documenting that decision. *Id.* The Director also told the parties he would “instruct the watermaster regarding administration of” the practice of rotation credit. *Id.* Thereafter, the Director issued an order continuing the hearing to August 2, 2016, and documenting the stay of the Preliminary Order. *Id.* at 198-99. The Director also ordered he would issue “instructions to the [WD34] watermaster and Big Lost River Irrigation District regarding administration of rotation credit in [WD34], in accordance with General Provision 3 . . . .” *Id.* at 199.

On July 18, 2016, the Director issued the *Final Order Regarding Instructions to Water District 34 Watermaster* (“WD34 Instructions”). *Id.* at 202-14. The Director issued the WD34 Instructions to outline “the proper procedures and steps to account for and administer rotation into storage” in order “[t]o assure that water rights are properly administered consistent with the General Provisions.” *Id.* at 205. Petitioners requested a hearing on the WD34 Instructions. *Id.*



at 222. The Director granted the request and scheduled a hearing for April 11-13, 2017. *Id.* at 236, 281.<sup>4</sup>

On August 2, 2016, the Director conducted the final day of the hearing on the Preliminary Order. Thereafter, Petitioners submitted a post-hearing brief asking the Director to set the Preliminary Order aside and asserting the Director cannot suspend the practice of rotation credit. *Id.* at 242-44, 258.

On November 3, 2016, the Director issued the Final Order setting the Preliminary Order aside. The Director explained he wanted to “allow time for the watermaster to implement the WD34 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.” *Id.* at 264-65. As to Petitioners’ assertion the Director cannot suspend the practice of rotation credit, the Director cited the plain language of General Provision 3 and rejected Petitioners’ assertion. The Director stated that General Provision 3 authorizes the practice of rotation credit “when such practice improves the efficiency of water use” and subjects the practice to “review and approval by the Director.” *Id.* at 262-63. The Director concluded the plain language of “General Provision 3 authorizes the Director to review the practice of [rotation credit] 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.” *Id.* at 263.

On December 1, 2016, Petitioners filed their *Petition for Judicial Review* challenging the Final Order. *Id.* at 275-80.

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<sup>4</sup> As a result of settlement discussions, on April 7, 2017, the Director issued revised instructions to the watermaster of WD34 and vacated the April 2017 hearing dates. *See Stipulation to Augment the Record* at Attachment A (filed April 28, 2017). The revised instructions will be implemented this year and reviewed after the 2017 irrigation season. *Id.* at 9.

## II. ISSUES ON APPEAL

Petitioners do not include a statement of issues on appeal in their opening brief.

Respondents' formulation of the issues on appeal is as follows:

1. Whether the Director may suspend the practice of rotation credit pursuant to the plain language of General Provision 3.
2. Whether the Final Order should be affirmed because Petitioners have failed to establish prejudice to their water rights.
3. Whether the Court lacks jurisdiction to address Petitioners' arguments regarding the Preliminary Order because the Preliminary Order is not the agency action subject to judicial review.
4. Whether the Court should address issues raised by Petitioners regarding the Final Order in this appeal and affirm, not remand, the Final Order.
5. Whether the Court should deny Petitioners' request for attorney fees but award the Department reasonable attorney fees because Petitioners' arguments are without a reasonable basis in fact or law.

### III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the Act, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds 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) 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

#### IV. ARGUMENT

##### A. General Provision 3 Authorizes the Director to Suspend the Practice of Rotation Credit.

As discussed above, Deputy Director Weaver reviewed the practice of rotation credit and issued the Preliminary Order suspending the practice in response to water user concerns and increased scrutiny of water right accounting in WD34. Weaver concluded the practice of rotation credit is not being implemented in a way that improves “‘the efficiency of water use’ as required by General Provision 3 and Rule 40.02 of the WD34 Rules.” R. at 7. The Director held a hearing on the Preliminary Order. At the end of the second day of the hearing, the Director stayed the Preliminary Order’s suspension of the practice of rotation credit. *Id.* at 198. Thereafter, the Director issued the Final Order wherein he set the Preliminary Order aside and determined that, contrary to Petitioners’ assertion, he may suspend the practice of rotation credit pursuant to the plain language of General Provision 3. *Id.* at 263-64. The Petitioners challenge that determination in this appeal.

The Director correctly determined he may suspend the practice of rotation credit pursuant to the plain language of General Provision 3. SRBA partial decrees must be interpreted consistent with their plain language. *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, \_\_\_\_, 367 P.3d 193, 201 (2016). General Provision 3, made applicable to partial decrees for water rights in Basin 34 by SRBA Court order, states:

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.*

Exhibit 27 at 775-76 (emphasis added). Therefore, General Provision 3 plainly authorizes the practice of rotation credit only “when such practice improves the efficiency of water use.”

General Provision 3 also plainly subjects the practice to “review and approval by the [Director]” and the specified conditions. This plain language of General Provision 3 expressly authorizes the Director to review and either approve or disapprove (i.e. suspend) the practice of rotation credit.

Petitioners argue the Director’s determination he can suspend the practice of rotation credit “is not consistent with the General Provisions.” *Petitioners’ Opening Brief* at 2. Petitioners assert the practice of rotation credit “cannot be suspended.” *Id.* at 6. These arguments are contrary to, and ignore, the plain language of General Provision 3. Again, the plain language authorizes the practice when it “improves the efficiency of water use” and “subject to” the Director’s “review and approval” and the specified conditions. If the practice of rotation credit could not be suspended as Petitioners assert, General Provision 3 would have simply stated: “Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage.” The Court must give meaning to each word of General Provision 3 and reject Petitioners’ arguments as they attempt to render the “review and approval” language of General Provision 3 superfluous. *See Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009) (“[T]he Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant.”). The Court should affirm the Director’s determination that he can suspend the practice of rotation credit pursuant to the plain language of General Provision 3.

**B. The Final Order Does Not Prejudice Petitioners’ Water Rights.**

In this judicial review proceeding, the Court must affirm the Final Order unless Petitioners demonstrate the Final Order prejudiced their substantial rights. *See Idaho Code* § 67-5279(4) (“agency action shall be affirmed unless substantial rights of the appellant have been

prejudiced). Petitioners argue the Director's determination he can suspend practice of rotation credit prejudiced their water rights. *Petitioner's Opening Brief* at 6, 8.

Petitioners' argument again ignores the plain language of General Provision 3. 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). The SRBA Court ordered the General Provisions are "included in the decree determining water rights to water from Basin 34." Exhibit 27 at 768. The plain language of General Provision 3 is a defining feature of all water rights decreed in Basin 34, including Petitioners'. As the Director determined in the Final Order, that plain language authorizes the Director to suspend the practice of rotation credit. R. at 263-64. Contrary to Petitioners' argument, the Director's determination has not "fundamentally altered," "reduc[ed] the value," changed "the legal description of," or resulted in "an unconstitutional taking" of Petitioners' water rights. *Petitioners' Opening Brief* at 8-9.<sup>5</sup> Petitioners have failed to establish their water rights have been prejudiced by the Final Order. The Final Order must be affirmed. *See* Idaho Code § 67-5279(4).

**C. The Court Lacks Jurisdiction to Consider Petitioners' Arguments Regarding the Preliminary Order.**

Petitioners devote a great deal of briefing to arguments regarding the Preliminary Order. *Petitioners' Opening Brief* at 9-16. Petitioners complain the Preliminary Order required Big Lost River Irrigation District to develop "a plan of operation for rotation credit that improves the efficiency of water use." *Petitioners' Opening Brief* at 9. Petitioners note General Provision 3 does not reference a "plan of operations" and assert "the *Director* is now trying" to "administratively add new provisions to the decreed General Provisions" and force the parties to

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<sup>5</sup> Petitioners assert the Preliminary Order's suspension of the practice of rotation credit caused Petitioners "to suffer increased cost of operation and corresponding lost profits." *Petitioners' Opening Brief* at 8-9. The Department disputes the validity of these claims. Further, Petitioners must pursue claims for damages in accordance with the Idaho Tort Claims Act, Idaho Code § 6-905, not in this appeal.

“relitigate the decreed General Provisions.” *Id.* at 9-12 (emphasis added). Petitioners also assert the Preliminary Order suspended the practice of rotation credit “without any evidence about whether the General Provisions were being followed,” which constitutes “clear evidence that the *Director* is now second guessing” the Department’s recommendation to include the General Provisions in the SRBA partial decrees for Basin 34. *Id.* at 13-14 (emphasis added). Finally, Petitioners complain the Preliminary Order stated the Department “may” allow the practice of rotation credit to resume upon certain conditions. *Id.* at 15-16.

Petitioners seem to overlook that the Director issued the Final Order, not the Preliminary Order. The Final Order did not mention a “plan of operations” or include any determination regarding whether the practice of rotation credit is being implemented consistent with the General Provisions. The Director also did not suspend the practice, but allowed it to continue. R. at 264.

The Court lacks jurisdiction to consider Petitioners’ arguments regarding the Preliminary Order because it is not the agency action subject to judicial review in this appeal. Rather, it is the Final Order issued by the Director pursuant to Idaho Code § 67-5246(3) following his review of the Preliminary Order that is the agency action subject to judicial review. *See* I.C. § 67-5270(3) (“A party aggrieved by a *final order* in a contested case decided by an agency ... is entitled to judicial review.” (emphasis added)); *see also* I.C. § 67-5245 (discussing preliminary orders and final orders). The Final Order set the Preliminary Order aside. Once the Director issued the Final Order, Petitioners were entitled to seek judicial review of the Final Order, not the Preliminary Order. Idaho Code § 67-5270(3). Petitioners seek judicial review of the Final Order “pursuant to Idaho Code Sections 67-5270 through 67-5279.” R. at 275-76. Petitioners did not seek, and were not entitled to seek, judicial review of the Preliminary Order. Therefore, the Court should decline to address Petitioners’ arguments regarding the Preliminary Order.

**D. The Court Should Address Issues Raised by Petitioners Regarding the Final Order and Affirm, Not Remand, the Final Order.**

Petitioners assert “[m]any issues” in this case and the administrative case before the Department regarding the WD34 Instructions “are the same.” *Petitioner’s Opening Brief* at 16. Petitioners conclude that, “[t]o avoid piece meal litigation, the Court should remand this entire matter to the Director” until the administrative matter regarding the WD34 Instructions “has been completed, and the [WD34 Instructions] become final.” *Id.*

A review of the Final Order and WD34 Instructions reveals the two matters address distinct issues. The Final Order did two things: 1) set the Preliminary Order aside and 2) rejected Petitioners’ argument that the Director cannot suspend the practice of rotation credit. R. at 263-65. The Final Order became appealable pursuant to Idaho Code § 67-5270 after the Director held the hearing on the Preliminary Order and issued the Final Order. *Id.* 268-69. Petitioners timely filed their *Petition for Judicial Review* seeking judicial review of the Final Order. The Court’s decision in this appeal should resolve the issues raised by Petitioners regarding the Final Order—whether the Director correctly determined he has authority to suspend the practice of rotation credit consistent with the General Provisions and whether the Final Order should be affirmed.

In contrast, the WD34 Instructions do not address whether the Director has authority to suspend the practice of rotation credit. The Director issued the WD34 Instructions to outline “the proper procedures and steps to account for and administer rotation into storage” and “ensure that water rights are properly administered consistent with the General Provisions.” *Id.* at 202, 205. The WD34 Instructions do not include any determination regarding whether the Director has authority to suspend the practice of rotation credit.



The Director determined the issue of whether he may suspend the practice of rotation credit in the Final Order. Petitioners challenge that determination in this appeal. The Court should address the issue here where it is a live and not remand the Final Order as Petitioners' request.

**E. Petitioners are Not Entitled to Attorney Fees.**

Petitioners assert they "are entitled to attorney fees" pursuant to Idaho Code § 12-117. *Petitioners' Opening Brief* at 17-18. Idaho Code § 12-117(1) states the Court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Petitioners assert the Director "acted without a reasonable basis in fact or law" because he "exceeded his authority" by determining he can suspend the practice of rotation credit "and require a new plan of operations." *Petitioners' Opening Brief* at 17-18.

Petitioner are not entitled to attorney fees. The Director correctly determined the plain language of General Provision 3 authorizes him to suspend the practice of rotation credit. The Director also set the Preliminary Order aside as the Petitioners requested, including the requirement that the Big Lost River Irrigation District develop a plan of operation. The Director acted with a reasonable basis in fact and law in issuing the Final Order. The Court should deny Petitioners' request for attorney fees.

**F. The Court Should Award the Department Reasonable Attorney Fees Because Petitioners' Arguments are Without a Reasonable Basis in Law or Fact.**

Petitioners argue the Final Order prejudiced their water rights. *Petitioner's Opening Brief* at 6, 8. But the Final Order granted Petitioners' request to set the Preliminary Order aside and allowed the practice of rotation credit to continue. Further, Petitioners' argument that their water rights are prejudiced because the Director cannot suspend the practice of rotation credit is

contrary to the plain language of General Provision 3 and attempts to render the “review and approval” language of General Provision 3 superfluous. Petitioners’ arguments regarding the Preliminary Order are not properly before the Court because the Preliminary Order is not the agency action subject to judicial review in this appeal. Accordingly, Petitioners’ arguments are without a reasonable basis in fact or law. Because the Department has been forced to expend time and expense to defend against this appeal that lacks any basis in fact or law, the Court should award the Department reasonable attorney fees pursuant to Idaho Code § 12-117(1).

**V. CONCLUSION**

The Director correctly determined he may suspend the practice of rotation credit pursuant to the plain language of General Provision 3. The Final Order does not prejudiced Petitioners’ water rights because the Director set the Preliminary Order aside and his determination he can suspend the practice of rotation credit is consistent with the plain language of General Provision 3. The Court lacks jurisdiction to consider Petitioners’ arguments regarding the Preliminary Order because it is not the agency action subject to judicial review in this appeal. The Court should address issues raised by Petitioners regarding the Final Order and affirm the Final Order. Petitioners are not entitled to attorney fees, but the Court should award the Department reasonable attorney fees because Petitioners’ arguments are without a reasonable basis in fact or law.

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RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May 2017.

LAWRENCE G. WARDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division



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EMMI L. BLADES  
Deputy Attorney General  
Idaho Department of Water Resources

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18<sup>th</sup> day of May 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

*Original to:*  
SRBA District Court  
253 3rd Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707  
Facsimile: (208) 736-2121

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

FRITZ X HAEMMERLE  
HAEMMERLE LAW OFFICE  
PO BOX 1800  
HAILEY ID 83333  
[fxh@haemlaw.com](mailto:fxh@haemlaw.com)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



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Emmi L. Blades  
Deputy Attorney General