

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

IN THE MATTER OF WATER RIGHT NOS.
34-182 AND 34-381A (MOSS FARMS, INC.)

Docket No. P-DR-2024-001

IN THE MATTER OF USE OF NATURAL
FLOW FROM THE BIG LOST RIVER AND
STORAGE RELEASES FROM MACKAY
RESERVOIR

**PRELIMINARY ORDER ON
DISPOSITIVE MOTIONS**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively, “Pehrsons”) submitted a *Petition for Declaratory Ruling for Watermaster Instructions* (“*Petition*”) with the Idaho Department of Water Resources (“Department”). *Petition*, at 1. The Pehrsons sought a declaratory ruling from the Department to issue two watermaster instructions requiring the Water District No. 34 Watermaster (1) to curtail diversions from a specific alternative point of diversion when the natural flow was at a certain level and (2) to issue futile call determinations as though storage water is unavailable to be added to natural flow. *Id.* at 2.

On February 23, 2024, Moss Farms, Inc. (“Moss”) filed an objection to the *Petition*. In addition, the Hearing Officer allowed the Big Lost River Irrigation District (“BLRID”) and Moore Canal Users¹ (“Moore”) to intervene in the case.

On January 13, 2025, Moore filed a motion to dismiss the *Petition*, which was joined by BLRID. On February 21, 2025, a dispositive motion hearing was held. The Hearing Officer made oral rulings on the record that were later memorialized and expounded upon in a *Preliminary Order: Granting and Denying in Part Motion to Strike; and Dismissing Petition for Declaratory Ruling Without Prejudice* (“*Preliminary Order*”), issued February 28, 2025. Upon concluding that “[t]he Pehrsons failed to support the *Petition* with any statute, rule, or order which allows the Hearing Officer to consider issuing a declaratory ruling,” the Hearing Officer granted Moore’s motion to dismiss, dismissing the *Petition* without prejudice. *Preliminary Order*, at 7.

On March 5, 2025, the Pehrsons filed a *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite* (“*Motion*”) along with an *Amended Petition for Declaratory Ruling* (“*Amended Petition*”). In lieu of dismissal, the Pehrsons requested that their *Motion* be granted, and this case be allowed to move forward based on the issues raised in the *Amended Petition*. *Motion*, at 2. The *Amended Petition* requested the Department declare how futile call is determined and whether storage water can defeat futile call. *Amended Petition*, at 2. Also, in addition to the two instructions requested in the *Petition*, the *Amended Petition* sought issuance of a third watermaster instruction

¹ “Moore Canal Users” collectively refers to Moore Canal Water Users’ Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline.

preventing the watermaster from delivering storage water to a point of redirection not listed on the BLRID's storage water rights. *Id.*

On March 14, 2025, Moss, BLRID, and Moore filed responses in opposition to the *Motion*, and the Pehrsons filed a reply on March 18, 2025. The *Motion*, as it concerns the request to amend the *Petition* and reconsider the *Preliminary Order*, came before Hearing Officer Burdick for hearing on March 21, 2025.

On March 28, 2025, Hearing Officer Burdick issued an order granting the *Motion* only in part. *Order Granting Mot. to Am. & Withdr'g Prelim. Order Dismissing Pet.; Order Vacating Hr'g & Am. Schedule*, at 3 (hereinafter "*Order Granting Motion to Amend*"). The *Order Granting Motion to Amend* identified two primary issues presented in the *Motion* regarding (1) futile call determinations and (2) an authorized diversion issue. *Id.* The Hearing Officer declined to consider the futile call issue and concluded that the sole issue to be determined in this matter is "whether diverting BLRID storage water at a point of diversion or redirection not listed on its decreed water rights violates Idaho law." *Id.* at 3, 6. Accordingly, the Hearing Officer accepted the *Amended Petition* into the record and withdrew the *Preliminary Order* dismissing the matter. *Id.* at 6–7.

On April 7, 2025, in response, Moss filed an objection requesting the Hearing Officer dismiss the *Amended Petition* with prejudice and asserted that the Director does not have the authority to grant the Pehrsons' requested relief. *Obj. to Am. Pet. for Decl'y Ruling*, at 11. The Pehrsons filed a reply on April 10, 2025, requesting that the matter be allowed to proceed to determine the issue identified in the *Order Granting Motion to Amend*. *Reply to Moss Resp. to Am. Pet. for Decl'y Ruling*, at 12.

On April 23, 2025, the Department received three dispositive motions: (1) *Moss Farms' Motion to Dismiss*; (2) *Pehrsons' Motion for Summary Judgment*; and (3) a *Motion for Summary Judgment* filed by BLRID. Moss seeks dismissal of the *Amended Petition* with prejudice because the issue identified for hearing by the Hearing Officer would involve interpreting the language of BLRID's storage water rights, which are neither statutes, rules, nor orders that the Director is authorized to determine the applicability of when making a declaratory ruling under Idaho Code §§ 67-5232 or 67-5255. *Moss Mot. to Dismiss*, at 3, 7. In the alternative, Moss asks that the Department be ordered to publish notice of this matter and provide storage water right owners throughout the Snake River Basin the opportunity to participate in this proceeding. *Id.* at 7.

The Pehrsons request the Hearing Officer hold that BLRID's storage water rights cannot be diverted by Moss at the River Diversion (i.e., T06N, R26E, S32, SENW), because that point of redirection is not listed on BLRID's storage water rights. *Mem. in Supp. of Pehrsons' Mot. for Summ. J.*, at 16, 20, 24 [hereinafter "*Pehrsons' Memorandum*"]; see also *Amended Petition*, at 2, 8 (identifying the location of the "River Diversion").

BLRID requests the Hearing Officer dismiss the *Amended Petition* and hold that Idaho law does not require storage water rights to specify points of redirection, claiming that storage water can be commingled with a natural channel and reclaimed along the natural channel. *Mem. in Supp. of Mot. for Summ. J.*, at 9, 11–12 [hereinafter "*BLRID's Memorandum*"]

The Department received the following responses and replies filed in relation to the three dispositive motions described above:

- (1) *Response in Support of Moss Farms' Motion to Dismiss* filed by BLRID on May 7, 2025;
- (2) *Opposition to Pehrson's Motion for Summary Judgment ("BLRID's Opposition to Pehrsons' Motion")* filed by BLRID on May 7, 2025;
- (3) *Response and Joinder in Support of BLRID's Motion for Summary Judgment;² Opposition to Pehrsons' Motion for Summary Judgment; Rule 56(d) Motion; and Motion for Order Authorizing Limited Discovery ("Moss's Opposition to Pehrsons' Motion")* filed by Moss on May 7, 2025;
- (4) *Pehrson Response to Moss Motion to Dismiss* filed on May 7, 2025;
- (5) *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment ("Pehrsons' Response to BLRID's Motion")* filed on May 7, 2025;
- (6) *Pehrson Response to Moss Motion for Discovery, Response to Moss IRCP 56(d) Motion, and Response to Opposition to Motion for Summary Judgment ("Pehrsons' Reply to Moss's Opposition")* filed on May 9, 2025;
- (7) *Reply in Support of Big Lost River Irrigation District's Motion for Summary Judgment ("BLRID's Reply")* filed by BLRID on May 14, 2025;
- (8) *Moss Farms Reply to Pehrsons' Response to Motion to Dismiss; Reply to Pehrson Response to Rule 56(d) Motion; Reply to Pehrson Response to Motion for Limited Discovery; and Sur-Reply to Pehrson Response to Moss Farms Opposition to Pehrson Motion for Summary Judgment ("Moss's Reply")* filed on May 14, 2025; and
- (9) *Reply to BLRID Opposition to Pehrsons' Motion for Summary Judgment ("Pehrsons Reply to BLRID's Opposition")* filed by the Pehrsons on May 14, 2025.

On May 19, 2025, a hearing in this matter was held and all parties were represented by counsel. During the hearing Moss withdrew its Idaho Rules of Civil Procedure Rule 56(d) motion and modified its motion for limited discovery to a standing discovery motion requesting an opportunity to depose James Cefalo, the Department's Eastern Region Manager, only if the *Amended Petition* is not dismissed and the issue identified for hearing is not fully resolved on summary judgment. After hearing oral argument on Moss's modified discovery motion and all three dispositive motions, the Hearing Officer took the matter under advisement.

² In the May 9, 2025 *Notice of Motion Hearing* the Hearing Officer noted that the deadline to file dispositive motions passed on April 23, 2025, therefore, the joinder was untimely and would not be considered. *Notice of Mot. Hr'g*, at 1 n.1.

FINDINGS OF FACT

A. BLRID Storage Water Rights

1. On October 15, 2001, the Snake River Basin Adjudication (“SRBA”) District Court issued partial decrees for storage water rights held in Mackay Reservoir for water right numbers 34-12,³ 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, and 34-10935 (collectively the “BLRID Storage Rights”). *Tuthill Decl.* Ex. 6.
2. The BLRID Storage Rights list one point of diversion, sixteen points of rediversion, and a remark describing the point of diversion and various points of rediversion under the point of diversion element:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id.

3. BLRID’s point of diversion is the Mackay Dam. *Id.*
4. BLRID’s By-Laws and Policies’ Statement of Objectives states its purpose is “to store and deliver irrigation water as required by the landowners within the Irrigation District.” *Johns Decl. in Supp. of Mot. to Strike Ex. A.*, at 2.
5. BLRID’s general manager “shall have general charge of the distribution of water furnished by the District to consumers” *Id.* at 11.

³ Water right no. 34-12 is emblematic of the other water rights.

B. Moss Water Rights

1. Moss's natural flow surface water rights⁴ include Water Right Nos. 34-182 and 34-381A (collectively "Moss Water Rights"). *Tuthill Decl.* Ex. 2.

Water Right No.	Priority Date	Quantity (cfs)	Point of Diversion
34-182	6/1/1883	1.60	3 in 1 Ditch, River Diversion
34-381A	9/26/1894	2.4	3 in 1 Ditch, River Diversion

2. The location of the Moss Water Rights point of diversion as decreed was the 3 in 1 Ditch.⁵ *Id.*
3. On April 6, 2015, Moss filed an Application for Transfer No. 80488 with the Department, seeking to add the River Diversion as an alternate point of diversion for the Moss Water Rights. *Johns Decl. in Supp. of Mot. for Summ. J.* Ex. C.
4. On June 30, 2015, the Department approved Moss's Application For Transfer No. 80488 and added the River Diversion as an alternate point of diversion for the Moss Water Rights. *Id.* Ex. I.

C. Pehrson Water Rights

1. Byron and Loy Pehrsons' water rights include:

Water Right No.	Priority Date	Quantity (cfs)	Point of Diversion
34-28G	8/31/1884	0.80	3 in 1
34-638A ⁶	10/12/1884	0.15	3 in 1
34-14189	6/1/1885	1.54	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

B. Pehrson Decl., at 2; *L. Pehrson Decl.*, at 2.

⁴ Moss also has water right no. 34-2378F which is a ground water right that is not at issue in this matter. *Tuthill Decl.*, at 3.

⁵ Moss's Water Rights were originally decreed to Catherine and Lee Watson; Moss filed a change of ownership request with the Department for those water rights on November 13, 2012. *Tuthill Decl.* Ex. 2, 5.

⁶ Byron and Loy recently purchased a portion of this water right, and the Department has not yet updated its records regarding ownership of this water right. *B. Pehrson Decl.*, at 2; *L. Pehrson Decl.*, at 2.

- Randy Pehrson's water rights include:

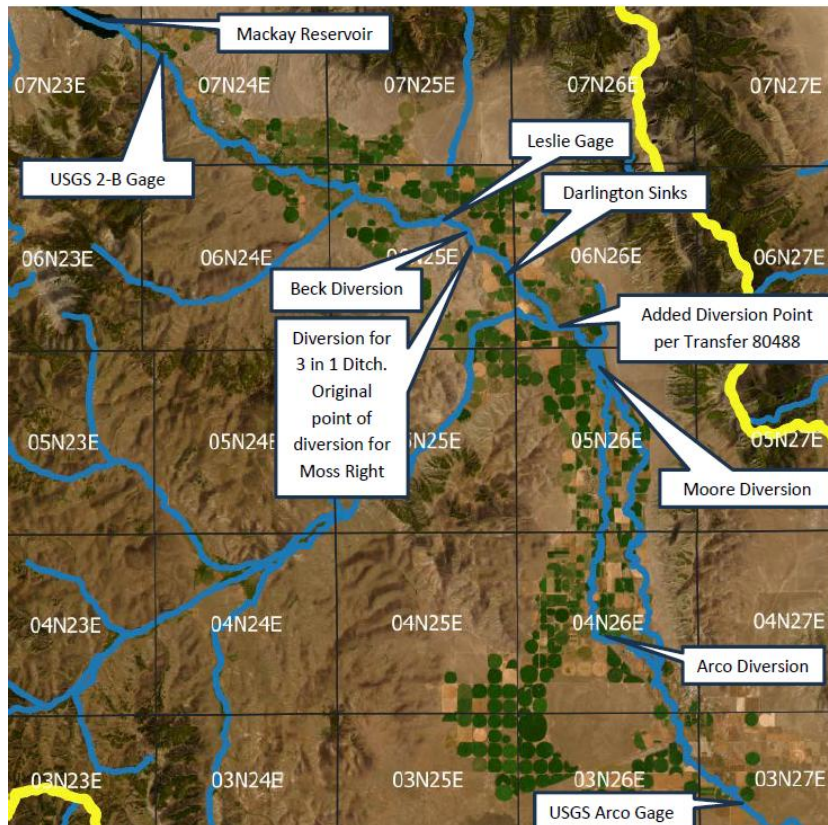
Water Right No.	Priority Date	Quantity (cfs)	Point of Diversion
34-733	7/21/1886	1.44	Burnett
34-10236	5/30/1885	2.00	Darlington
34-10933	4/22/1884	1.63	Darlington
34-10950	5/31/1884	0.72	Darlington
34-13874	7/21/1886	1.00	Burnett
34-14389	4/22/1884	0.55	Darlington

R. Pehrson Decl., at 2.

- Byron, Loy, and Randy Pehrsons' water rights listed above (collectively the "Pehrson Water Rights") are junior to Moss's water right no. 34-182 and senior to Moss's water right nos. 34-381A and 34-2379F. *B. Pehrson Decl.*, at 3; *L. Pehrson Decl.*, at 3; *R. Pehrson Decl.*, at 2.

D. The physical relationship between the Pehrson Water Rights, Moss Water Rights, BLRID Storage Rights, and Moore Canal

- The following map identifies relevant areas used in analyzing the parties' motions.



Tuthill Decl., at 2.

2. The River Diversion is located approximately 5.9 miles downstream from the 3 in 1 Ditch on the Big Lost River. *Tuthill Decl.*, at 5.
3. The Darlington Sinks is a losing reach within the Big Lost River and exists between the 3 in 1 Ditch and the River Diversion. *Tuthill Decl.*, at 2; *Yockey Decl.*, at 4; *Marcroft Decl.*, at 2–3.
4. The points of diversion for the Pehrson Water Rights are upstream of the Darlington Sinks. *B. Pehrson Decl.*, at 2; *L. Pehrson Decl.*, at 2; *R. Pehrson Decl.*, at 2.
5. The Moore Canal is downstream from the River Diversion. *Tuthill Decl.*, at 2.
6. The Pehrsons and Moss hold storage water interests in the BLRID. *B. Pehrson Decl.*, at 3; *L. Pehrson Decl.*, at 3; *R. Pehrson Decl.*, at 3; *Marcroft Decl.*, at 2; *Yockey Decl.*, at 2.

MOTION TO DISMISS

Moss argues that the Administrative Procedures Act (“APA”) does not grant the Department authority to issue declaratory rulings interpreting water rights because water rights are property rights, and not statutes, rules, or orders for the Department to consider when resolving this matter. *Moss Mot. to Dismiss*, at 3. Moss also argues that the Department does not have jurisdiction to interpret water rights because only the SRBA District Court has the authority to do so. *Id.* at 5. In the alternative, Moss requests the Hearing Officer issue an order directing the Department to provide notice and an opportunity for all interested parties to participate in this matter. *Id.*

I. The Director has authority and jurisdiction to issue declaratory rulings interpreting and administering water rights.

First, Moss argues that Pehrsons’ *Amended Petition* should be dismissed because the Department lacks authority under Idaho Code §§ 67-5232 and 67-5255 to issue a declaratory ruling interpreting a water right. *Moss Mot. to Dismiss*, at 3. Moss claims that water rights are property rights under Idaho Code § 55-101, and not statutes, rules, or orders that the Department can determine the applicability of under its declaratory ruling authority. *Id.* To further support this claim, Moss asserts that resolving whether BLRID’s storage water may be diverted at a point of rediversion not listed on the storage right collaterally attacks Moss’s decreed rights by interpreting them, and “will effectively create an instruction for the Director as to how [BLRID’s] right is to be administered/used.” *Id.*

It is undisputed that water rights are real property rights. *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977). However, water itself remains the property of the State. *Id.* (citing I.C. § 42-101). The Idaho Constitution granted the Legislature the “authority to regulate and restrict the use of public waters in this state.” *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 80, 856 P.2d 868, 870 (1993) (citing Idaho Const. art. XV, § 1). To this end, the Legislature enacted Title 42, Idaho Code, which grants the Department “exclusive authority over the appropriation of the public surface and ground waters of the state.” I.C. § 42-201(7). The

Department must act “within the scope of the authority conferred upon it” by the Legislature. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007). Such authority delegated to the Director includes distributing water in priority within water districts and promulgating rules to effectuate that duty. I.C. §§ 42-602, 42-603.

Accordingly, the APA permits any person to file a petition for declaratory ruling with an agency regarding the applicability of a statute, rule, or order administered by the agency. I.C. §§ 67-5232(1), 67-5255(1). An agency may then issue a declaratory ruling clarifying how the applicable laws apply under specific factual circumstances, especially in the event those circumstances are likely to reoccur. *See Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys. of Idaho*, 169 Idaho 34, 47, 490 P.3d 1142, 1155 (2021).

Here, it is undeniable that a declaratory action is appropriate when the Department must interpret the applicability of the statutes and rules it administers when determining whether a person's rights are interfered with when there is a high likelihood that specific actions are likely to reoccur. Despite Moss's assertion that resolving this issue is a collateral attack of its approved transfer in 2015, the request for declaratory relief does not ask the Hearing Officer to deny Moss its decreed natural flow rights at the River Diversion. Instead, the Pehrsons request for declaratory relief asks the Hearing Officer to consider the statutes and rules the Department administers to determine whether a storage right holder is diverting water according to the elements listed on their decreed water rights, given the likelihood that BLRID will likely deliver storage water at the River Diversion again in the future. *Amended Petition*, at 27.

Moreover, Moss's assertion that the Director does not have authority to interpret water rights in accordance with his authority to administer water in priority would denude the Department from any enforcement of its administrative authority. To end up in district court any time a question over the interpretation of water rights comes up would be unduly burdensome on the judicial system. Moss's assertion further undermines the need for the statutory framework under the APA and Title 42, both of which govern the Department's authority to administer and conduct administrative hearings. Simply claiming water rights are property rights does not strip away the Department's authority to interpret and determine the effects Idaho law has on water rights.

Second, Moss argues that only the SRBA District Court has jurisdiction to interpret water rights because this issue “concerns an adjudication of a right to the use of water in the Snake River Basin.” *Moss Mot. to Dismiss*, at 5 (quoting *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994)). To support this jurisdictional claim, Moss asserts that interpreting BLRID's Storage Rights is outside the Department's declaratory ruling authority because water rights are constitutional rights and not statutory rights. *Moss's Reply*, at 3–4. This argument misconstrues the Department's declaratory ruling authority and its jurisdiction under Idaho law.

The *Final Unified Decree* culminated the finality of the SRBA and issued thousands of “judicially decreed property right[s]” into one final order. *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). The *Final Unified Decree* is “conclusive as to the nature and extent of all water rights in the adjudicated water system” and “is binding against all

persons.” *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 741, 451 P.3d 446, 454 (2019) (citations omitted). The *Final Unified Decree* even recognized the Department’s jurisdiction to review issues covered by the APA and the Department’s rules. *Final Unified Decree* ¶ 17, at 13, *In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Aug. 26, 2014). The *Final Unified Decree* also acknowledges the Department’s authority to administer water in accordance with the prior appropriation doctrine. *Id.* ¶ 15. Such authority includes the Director’s “‘clear legal duty to distribute water’ according to decreed water rights.” *City of Blackfoot*, 162 Idaho at 309, 396 P.3d at 1191.

Moreover, *Devil Creek Ranch* does not support Moss’s claim because it involved a private water right dispute that should have been resolved in the general adjudication since the SRBA had already commenced. *Devil Creek Ranch*, 126 Idaho at 206, 879 P.2d at 1139. Accordingly, the SRBA District Court adjudicates water rights, not the Department. Given the Department’s authority to regulate the State’s water resources and administer water in priority, the Department is authorized to issue a declaratory ruling interpreting the statutes or rules it administers to determine whether a water user is diverting water in accordance with a valid water right. Therefore, the Hearing Officer concludes the Department has authority and jurisdiction to issue a declaratory ruling interpreting whether the statutes and rules it administers permit a water user to deliver storage water at a point of redirection not listed on a decreed water right. The Hearing Officer denies *Moss Farms’ Motion to Dismiss*.

II. In the alternative, the Department does not need to notify or provide an opportunity for all interested parties to participate in this proceeding.

In the alternative, Moss asks the Hearing Officer to issue “an order directing the Department to publish notice to all storage right owners in the SRBA and providing them an opportunity to participate in this proceeding” in the event the Hearing Officer does not dismiss the *Amended Petition*.⁷ *Moss Mot. to Dismiss*, at 5.

Rule 301 of the Department’s Rules of Procedure states: “The agency *may* provide notice of a petition for declaratory ruling in a manner designated to call its attention to persons likely to be interested in the subject matter of the petition.” IDAPA 37.01.01.301 (emphasis added). This is permissive language, not mandatory. The Department is not required to publish notice. Moreover, both BLRID and Moore are intervenors in this matter. Their involvement represents a broad range of interests for water users in Water District 34. Other interested water users had the opportunity to seek intervention when the petition was originally filed. Therefore, the Hearing Officer declines to issue an order directing the Department to publish notice of the *Amended Petition* and denies Moss’s alternative request.

⁷ The Hearing Officer declines to consider Moss’s argument regarding adding required parties to an action under Rule 19(a) of the Idaho Rules of Civil Procedure because those rules do not apply to contested cases before the Department. IDAPA 37.01.01.051.

MOTIONS FOR SUMMARY JUDGMENT

I. Preliminary Matters

A. Moss's Incorporation of Prior Arguments and Support Into Its Opposition to Pehrsons' Motion for Summary Judgment

In the *Order Granting Motion to Amend*, the Hearing Officer declined to consider Moss's January 24, 2025 summary judgment motion, given the central issue in the matter changed with the acceptance of the *Amended Petition. Order Granting Motion to Amend*, at 6. However, Moss was informed that the prior determination that its summary judgment motion was moot, made within the now withdrawn *Preliminary Order*, did "not preclude Moss from *refiling* their *Motion for Summary Judgment*." *Id.* (emphasis added).

In Moss's *Opposition to Pehrsons' Motion*, Moss did not ask the Hearing Officer to refile its summary judgment motion. Instead, Moss asked to incorporate into its opposition to *Pehrsons' Motion for Summary Judgment*, the arguments it made in Section III.A.3-5 of its *Reply in Support of Motion for Summary Judgment* and the entirety of its accompanying *Declaration of Skyler C. Johns*, both filed on February 14, 2025. *Moss's Opposition to Pehrsons' Motion*, at 2. The Pehrsons opposed Moss's incorporation of prior arguments as untimely. *Pehrsons' Reply to Moss's Opposition*, at 5.

Pursuant to Rule 220 of the Department's Rules of Procedure, Moss had 14 days to file its opposition to *Pehrsons' Motion for Summary Judgment*. IDAPA 37.01.01.220. Moss timely filed its opposition requesting to incorporate its prior arguments and supporting declaration. Therefore, in issuing this order, the Hearing Officer took into consideration Moss's arguments from Section III.A.3-5 of its February 14, 2025 reply and its supporting declaration.

B. Pehrsons' Request for the Hearing Officer to Take Official Notice of an Exhibit

During the dispositive motion hearing, the Pehrsons introduced an exhibit and requested the Hearing Officer to take official notice of the exhibit. Hr'g Audio 51:11–52:14, 52:39–55:56. BLRID and Moss objected to the introduction of the exhibit, claiming the documents are irrelevant and there is no time to review them. *Id.* at 52:14–52:38. The Hearing Officer did not review the proposed exhibit at the hearing and informed the parties that he would determine whether he will take judicial notice of that exhibit later. *Id.* at 51:48–54, 55:23–43.

Rule 602 of the Department's Rules of Procedure states: "The presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency." IDAPA 37.01.01.602. The Hearing Officer reviewed the exhibit and does not find it particularly helpful in resolving this matter. Therefore, the Hearing Officer declines to consider the exhibit, and it is not added to the record.

II. Legal Standard

The Department's Rules of Procedure, IDAPA 37.01.01, govern the pending motion in this case. Rule of Procedure 220.03 authorizes motions for summary judgment and states that "Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency." IDAPA 37.01.01.220.03.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Lee v. Litster*, 161 Idaho 546, 549, 388 P.3d 61, 64 (2017) (quoting I.R.C.P. 56(c)). The moving party bears the burden of establishing the absence of a genuine issue of material fact belongs to the moving party. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996).

If the movant meets its burden, the movant is entitled to summary judgment unless the nonmovant presents "specific facts that demonstrate the existence of a genuine issue for trial"—a "mere scintilla of evidence" or "slightest doubt as to the facts" will not do. *Haight v. Idaho Dep't of Transp.*, 163 Idaho 383, 387, 414 P.3d 205, 209 (2018). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Major v. Sec. Equip. Corp.*, 155 Idaho 199, 202, 307 P.3d 1225, 1228 (2013). "If the evidence reveals no disputed issues of material fact, then only a question of law remains . . ." *Lee*, 161 Idaho at 549, 388 P.3d at 64 (quoting *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002)).

III. Analysis

The central issue in this matter is whether diverting BLRID storage water at a point of redirection not listed on its decreed rights violates Idaho law. The Pehrsons argue that BLRID cannot deliver its storage water at the River Diversion because that point of redirection is not listed on its Storage Rights. *Pehrsons' Memorandum*, at 16. On the contrary, BLRID argues that points of redirection are not legal elements of water rights, and Idaho Code §§ 42-105(1) and 42-801 authorize BLRID to commingle its storage water with the natural flow of the Big Lost River to convey its already appropriated storage water to landowners within the district. *BLRID's Memorandum*, at 9, 11–12.

A. Storage water right decrees are different from a natural flow water right because storage water becomes the property of the appropriator and may be delivered to individual storage water users not listed on the decree itself.

The Pehrsons argue that BLRID cannot deliver its storage water at the River Diversion because that point of redirection is not listed on its Storage Rights. *Pehrsons' Memorandum*, at 16. The Pehrsons claim that storage water being delivered at the River Diversion is an unauthorized diversion because the plain language of the BLRID Storage Rights do not list the River Diversion as a point of redirection. *Id.* at 19–21. Accordingly, the Pehrsons assert that BLRID needs to file a transfer application pursuant to Idaho Code § 42-222(1) to add the River Diversion as a point of redirection on its storage water rights. *Id.* at 23.

On the contrary, BLRID argues that because points of rediversion are not a legal element of a water right, BLRID is not limited to delivering storage water at the listed points of rediversion on its decreed rights. *BLRID's Memorandum*, at 9.

i. Storage water rights become the property of the appropriator.

In Idaho, a water right is needed to divert water and apply it to beneficial use. I.C. § 42-201(2). The SRBA was implemented to identify and decree water rights within the Snake River Basin “to allow for fair and efficient administration of the limited water supply.” I.C. § 42-1427(1)(a)–(b). As part of the adjudication process, the State standardized the elements of water rights to include the claimant’s name, water source, quantity, point of diversion, purpose of use, period of use, and place of use. I.C. § 42-1411(a)–(h). Remarks and conditions were also added to the water rights to further define the listed elements. *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 263, 509 P.3d 1180, 1192 (2022) (citing I.C. § 42-1411(2)(i)–(j)).

On August 25, 2014, the presiding judge of the SRBA District Court executed the *Final Unified Decree* which culminated in the finality of the SRBA and issued thousands of judicially decreed property rights into one final order. *Final Unified Decree, In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Aug. 26, 2014); *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). The *Final Unified Decree* is “conclusive as to the nature and extent of all water rights in the adjudicated water system,” Idaho Code § 42-1420(1), and “is binding against all persons,” *Black Canyon Irrigation District v. State*, 163 Idaho 144, 150, 408 P.3d 899, 905 (2017).

These judicially decreed property rights include storage water rights. I.C. § 42-1427(1)(a); *see, e.g., Tuthill Decl. Ex. 6*. “Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs.” *A & B Irr. Dist. v. State*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014). “A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam.” *Id.* Storage water is “already diverted and appropriated and are no longer ‘public waters.’” *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 946 (1935) (quoting *Rabido v. Furey*, 33 Idaho, 56, 190 P. 73 (1920)). Storage water rights are entitled to the same protections as other property rights and are “still subject to other requirements of the prior appropriation doctrine.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007).

Here, BLRID Storage Rights are diverted at the Mackay Dam which is the listed point of diversion on its decreed rights. *Tuthill Decl. Ex. 6*. Accordingly, the appropriated storage water becomes BLRID’s property.

ii. Interpreting decrees for storage water is different than interpreting decrees for natural flow water.

First, the Pehrsons argue that *Rangen, Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016), established a brightline rule “that if a water right does not plainly authorize the use of water at a particular location, such diversion is unlawful.” *Pehrsons’*

Memorandum, at 20. In *Rangen*, when the Department curtailed junior ground water rights in response to a delivery call in the ESPA, it also found that the source of water and point of diversion elements of Rangen’s water rights were smaller in scope than it historically used. *Rangen*, 159 Idaho at 801, 367 P.3d at 196. The Court reviewed the plain language of Rangen’s water right decrees and affirmed the Director’s order that Rangen was only entitled to divert its natural flow water right from the source emanating from the Martin-Curren Tunnel, as opposed to the entire springs complex, and that Rangen could only divert from the ten-acre tract depicted on the decree itself, not the Bridge Diversion that lies outside the decreed ten-acre tract. *Id.* at 806, 367 P.3d at 201. The Court reasoned that the appropriate forum for Rangen to contest its decreed elements was during the SRBA after the Director recommended the elements of its water rights to the SRBA District Court. *Id.*

Second, the Pehrsons argue that the Court in *Whittaker v. Idaho Department of Water Resources*, 551 P.3d 729 (2024), affirmed the brightline rule established in *Rangen*. *Pehrsons’ Memorandum*, at 20. In *Whittaker*, the Court resolved an issue regarding whether the Director was correct in using the historical confluence as opposed to the modern confluence in approving an alternate point of diversion on a transfer application of a natural flow water right. *Whittaker*, 551 P.3d at 736. In interpreting whether the historical or modern confluence was appropriate for the transfer analysis, the Court found that a neighboring water right holder that diverted the natural flowing creek that contributed to the historic confluence at the West Springs Ditch was an unauthorized diversion. *Id.* at 740–41. The Court reasoned that the West Springs Ditch was an unauthorized diversion because it was not listed on their natural flow decreed water right since they failed to claim it during the SRBA. *Id.*

Both the *Rangen* and *Whittaker* cases addressed natural flow rights, not storage rights. In contrast, BLRID’s Storage Rights are fully diverted at the Mackay Dam—the authorized point of diversion on its decreed water rights. *Tuthill Decl. Ex. 6*.

iii. *Decrees for storage water do not require the exact specificity of the identity and quantity of storage water that users are entitled to receive.*

Decrees for storage water rights are not required to specify which irrigation districts are authorized to distribute the storage water or the exact amounts they are entitled to receive. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 116, 157 P.3d 600, 610 (2007). There, the Court affirmed the irrigation districts’ legal interests in receiving storage water from the Bureau of Reclamation (“BOR”) who owns the federally managed reservoir and storage facilities. *Id.* at 111, 114–15, 157 P.3d at 604, 608–09. The irrigation districts’ legal interests include receiving the storage water in trust for the landowners to apply the storage water to beneficial use for irrigation purposes. *Id.* at 114, 157 P.3d at 608. This legal relationship is affirmed in the following remark that was added to the BOR decrees, which states, in pertinent part:

[A]s a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. *The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the*

landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Id. at 115, 157 P.3d at 609 (emphasis added). The remark acknowledges the irrigation districts' legal interests in receiving the storage water and clarifies that the quantity of storage water each irrigation district is entitled to receive is based on the contracts between the BOR and the districts. *Id.* at 116, 157 P.3d at 610. The Court reasoned that storage "water rights have been administered successfully" without specifying the identity of the irrigation districts and the quantity of storage water each is entitled to receive within the decree itself. *Id.* In other words, irrigation districts act on behalf of the landowners in trust to administer the storage water according to the amounts identified in the contracts between the BOR and the irrigation districts on behalf of the individual landowners applying the storage water to beneficial use.

Here, BLRID represents the interests of the individual landowners within the district that receives storage water. Although BLRID has no contract with BOR or another entity, the concept is the same; the storage water is already appropriated and becomes the property of BLRID. This concept is one of ownership at the point of diversion. As the property of BLRID, storage water can be administered without naming the individual users of storage water or their entitled amount to the storage water on the decree itself.

B. Idaho Code §§ 42-105(1) and 42-801 provide supplemental statutory authority governing the distribution of storage water.

BLRID argues that Idaho Code §§ 42-105(1) and 42-801 authorize BLRID to use the natural flow of the Big Lost River to convey its already appropriated storage water. *BLRID's Memorandum*, at 11–12. BLRID claims these statutes "grant water users the right to commingle and reclaim water in natural watercourses and impose no requirement to list redirection points in the water right itself." *Id.* at 12. On the contrary, the Pehrsons argue that nothing in Idaho Code §§ 42-105(1) or 42-801 authorize storage water right holders to ignore the decreed elements of a water right. *Pehrsons' Response to BLRID's Motion*, at 18–19.

The Director has a "clear legal duty to distribute water according to decreed water rights" under the prior appropriation doctrine. *City of Blackfoot*, 162 Idaho at 309, 396 P.3d at 1191 (internal quotations omitted) (quoting *A & B Irr. Dist.*, 157 Idaho at 393, 336 P.3d at 800). This includes the authority to "direct[] and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom." I.C. § 42-602.

The Director must also administer water in accordance with Title 42 of the Idaho Code. *Sylte v. Idaho Dep't of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019) (quoting I.C. § 42-1413(2)). Title 42 includes supplemental authority to the general distribution requirement that directly affects the rights and duties of storage water right holders. *See* I.C. §§ 42-105(1), 42-801.

- i. *Storage water may be commingled with natural flow water and reclaimed downstream pursuant to Idaho Code § 42-105(1).*

Idaho Code § 42-105(1) states:

The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.

A water user may commingle its already diverted water with natural flow water and reclaim its diverted water downstream at a more efficient location. *Keller v. Magic Water Co.*, 92 Idaho 276, 285, 441 P.2d 725, 734 (1968). There, Magic Water diverted its natural flow water right from the natural flowing creek at a dam which was the listed point of diversion on the water right. *Id.* at 279, 441 P.2d at 728. After being diverted at the dam, the water was conveyed to Pump Unit A where the water either (a) discharged into a pond to be distributed to water users via canal, or (b) overflowed into a spillway which returned to the natural flowing creek channel and was reclaimed downstream at a second Pump Unit B. *Id.* The Court held that the dam was the single point of diversion, and the two pumping units were not two separate points of diversion. *Id.* at 285, 441 P.2d at 734. The Court reasoned that Idaho Code § 42-105(1) entitled Magic “to use the natural channel of the creek to transport the water which it diverts further downstream to the point where its pumps can most advantageously discharge the water.” *Id.* In other words, a water user may commingle its already diverted water with the natural flowing water and reclaim it further downstream at a more efficient and practical location to receive the water.

Here, BLRID’s storage water is impounded in the Mackay Reservoir and diverted at the Mackay Dam, which is the identified point of diversion on the BLRID Storage Rights. *Tuthill Decl.* Ex. 6. Once the storage water is diverted at Mackay Dam, the storage water may commingle with the natural flow in the Big Lost River to be reclaimed downstream at different points of delivery. However, pursuant to Idaho Code § 42-105(1), BLRID must inform the watermaster the amount of storage water that is added to the Big Lost River.

- i. *A storage right holder must notify the Department when it will use a natural watercourse to convey storage water to its users under Idaho Code § 42-801.*

Idaho Code § 42-801 states, in pertinent part:

Whenever the owner of a reservoir shall desire to use the bed of a stream, or a natural water course, for the purpose of carrying stored water, he shall in writing notify the [Department], giving the date when it is proposed to discharge the water, its volume in acre feet, and in cubic feet per second at the point of discharge, *and the persons and ditches entitled to its use*. The . . . appointed watermaster and his assistants may be instructed to make the delivery of the stored water without further appointment, whose duty it shall be to adjust the headgates of all ditches not entitled to the stored water, and in such manner that those having the right to the use of such water shall secure the volume to which they are entitled.

Idaho Code § 42-801 authorizes an irrigation district that holds storage water rights to use natural flow to carry storage water. Use of the natural flow allows the irrigation district to deliver the storage water, held in trust for landowners within the district, at various diversion points along the river. *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 158 n.1, 159, 219 P.3d 804, 805 n.1, 806 (2009). However, the irrigation district must account for any conveyance loss when reclaiming the storage water to ensure that the natural flow available to natural flow users is not diminished. *Id.* The Court held that the conveyance loss for storage water should be “apportioned under the universal shrink method so that all water users receiving the storage water bear their proportionate share of the conveyance loss.” *Id.* at 165, 219 P.3d at 812. In coming to that conclusion, the Court reviewed a decree from 1936 and the Department’s Water District 34 Rules.

First, the Court reviewed a 1936 decree concerning BLRID’s issuing and selling of bonds to obtain supplemental rights and irrigation works after acquiring the Mackay Reservoir and Dam to determine whether that decree addressed the appropriate conveyance loss calculation method. *Id.* at 160–61, 219 P.3d at 807–08; *see also State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943, at 944 (1998). Although the decree did not address the appropriate conveyance loss calculation method, the Court found that the decree recognized the legal authority of the BLRID Board of Directors to apportion the benefits of storage water among landowners within the district. *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho at 161, 219 P.3d at 808. This authority acknowledges the irrigation district’s role in managing the delivery of storage water based on “the amounts of apportionment, the factors considered in making the apportionment, and the basic rules and regulations governing the use and distribution of water upon the lands in the District” *Id.*

Second, the Court considered the Department’s Water District 34 Rules to determine the proper calculation of conveyance loss. *Id.* at 163, 219 P.3d at 810. Rule 40.03.b outlines how the watermaster allocates conveyance loss for natural flow water along the Big Lost River. *Id.* It further directs the watermaster to measure the amounts of both natural flow and storage water at various diversion points along the river to ensure that storage water users do not receive natural flow water, and vice versa. *Id.*; *see* IDAPA 37.03.12.040.03.b.

For the watermaster to calculate conveyance loss of the natural flow water, the watermaster must know the amount of storage water being delivered. When the storage right holder requests the watermaster to release its storage water, the volume of storage water must first be measured at the reservoir. *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho at 161, 219 P.3d

at 808. The downstream conveyance loss is then deducted from that original volume. *Id.* In addition, because storage water users do not receive equal or simultaneous deliveries, individual allotments are calculated and measured at the reservoir based on the amounts provided by the irrigation district. *Id.* at 162, 219 P.3d at 809. Moreover, irrigation districts deliver appropriated storage water pursuant to its authority “to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land [within the District], as may be necessary and just to secure the just and proper distribution of the same.” *Id.* at 163, 219 P.3d at 810 (alteration in original) (quoting I.C. § 43–304). In other words, the irrigation district may establish bylaws outlining rules for distributing storage water to the landowners within the irrigation district. However, the irrigation district must also notify the Department when it will release storage water, where the storage water will be delivered, how much storage water will be delivered, and the persons entitled to receive the storage water pursuant to the supplemental distribution authority under Idaho Code §§ 42-105(1) and 42-801.

Here, BLRID is an irrigation district governed by an elected Board of Directors under Title 43 of the Idaho Code. *See* I.C. §§ 43-301 to -343. BLRID has the authority to establish bylaws that inform how storage water is to be distributed to water users within the district. Accordingly, BLRID’s adopted bylaws are instructive as to the district’s authority to deliver storage water. *See Johns Decl. in Supp. of Mot. to Strike Ex. A.*, at 2. Within the bylaws, the statement of objectives state BLRID’s authority “to deliver storage water of the Irrigation District to landowners within the district in the amounts to which said storage water has been apportioned to the lands within the district, all in the most efficient manner and consistent with good management practices.” *Id.* The bylaws also govern the General Manager’s authority to distribute storage water. *Id.* at 11. It states:

The Mackay Dam and Reservoir, and the control and diversion gates at said Mackay Dam and Reservoir, and all main canals and laterals and all diversion and distribution of water, and all storage and natural flow rights owned by Big Lost River Irrigation District, shall be under the direction and supervision of the General Manager, whose duty it shall be to distribute water to the consumer thereof according to their rights under these By-Laws and the laws of the State of Idaho, and under such special rules as may be from time to time made by the Board of Directors in any emergency.

Id.

Although BLRID can establish bylaws governing the distribution of storage water under Idaho Code § 43-304, it must still abide by the notification and measurement requirements of Idaho Code §§ 42-105(1) and 42-801. BLRID must notify the Department and watermaster when it desires to release the storage water, who will receive the storage water, where the storage water will be delivered, and the quantity of storage water to be delivered. The purpose of this notification requirement ensures that the watermaster can distribute the natural flow water in priority be measuring the difference between the commingled natural flow and storage water and calculating the conveyance loss of the natural flow water.

Once the storage water has been appropriated and commingled with the natural flow, BLRID delivers the storage water to the landowners within the district based on its bylaws so long as BLRID notifies the Department and watermaster when the storage water is to be released, who will receive the storage water, the quantity of storage water to be delivered, and where the storage water will be delivered. This ensures the watermaster will be able to calculate the conveyance loss of the natural flow water and to distribute the natural flow water in priority in accordance with the Director's authority. Therefore, so long as BLRID informs the watermaster where the storage water is being delivered for the watermaster's accounting practices, BLRID is authorized to deliver storage water at the River Diversion.

MOSS'S DISCOVERY AND EVIDENCE MOTIONS

I. Moss's Standing Discovery Motion

At the dispositive motion hearing, Moss orally made a standing motion for a limited order authorizing discovery to depose Mr. Cefalo in the event the Hearing Officer does not fully resolve the issue identified in this matter via his ruling on the subject dispositive motions. Hr'g Audio 1:48–2:14, 2:29–3:41.

A matter “becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Goodson v. Nez Perce Cnty. Bd. of Cnty. Comm'rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). Consistent with the above analysis concerning the motions for summary judgment and the order below granting BLRID's *Motion for Summary Judgment*, the only issue identified for hearing in this matter is no longer live and ruling on Moss's standing motion would have no practical effect on the decision in this matter. Therefore, Moss's standing motion is moot.

Moreover, this matter always involved an issue of whether storage water could be delivered at the River Diversion. The Hearing Officer imposed a February 28, 2025 deadline for the parties to complete depositions. *Order and Notice of Hearing*, at 3. Accordingly, Moss could have deposed Mr. Cefalo prior to that deposition deadline if it believed Mr. Cefalo's testimony would have assisted the Hearing Officer in determining whether BLRID's Storage Rights could be delivered at the River Diversion. However, Moss failed to do so. Instead, Moss waited to request an order authorizing limited discovery well after the deposition deadline, which would only be used to cause further administrative delay in this matter. Therefore, even if Moss's standing motion had not been rendered moot, the Hearing Officer would have denied Moss's request for a limited order authorizing discovery as untimely.

II. Moss's Motion for the Hearing Officer to take Judicial Notice Pursuant to the Idaho Rules of Evidence

To the extent that Moss's motion to take “judicial notice of the fact that the East Region Office for IDWR administers transfer applications in East Idaho” was made independent from its withdrawn Rule 56(d) motion, it is denied. *Moss's Opposition to Pehrsons' Motion*, at 2. Moss made its judicial notice motion pursuant to Rule 201(b) of the Idaho Rules of Evidence. *Id.* The Hearing Officer is not bound by the Idaho Rules of Evidence and may decline to consider

evidence that is irrelevant. IDAPA 37.01.01.600; *see also* IDAPA 37.01.01.602. Moss's transfer application is not at issue in this matter, and Moss did not choose to clarify its motion for judicial notice when given the opportunity to offer oral argument on its preliminary motions. *See* Hr'g Audio at 1:40–7:00. Therefore, the Hearing Officer declines to take judicial notice as requested by Moss.

CONCLUSION

Consistent with the foregoing, the Hearing Officer concludes that BLRID is authorized to deliver storage water at the Moss River Diversion pursuant to Idaho Code §§ 42-105(1) and 42-801, which authorize the use of natural flow water to carry already appropriated storage water for delivery to landowners within the irrigation district. This authority is subject to the measuring and reporting requirements outlined in those statutes and requires BLRID to inform the watermaster: (1) when storage water will be released, (2) which users are entitled to receive the storage water, (3) the quantity of storage water being delivered to each user, and (4) where the storage water will be delivered.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that:

1. *Moss Farms' Motion to Dismiss* is DENIED.
2. The Big Lost River Irrigation District's *Motion for Summary Judgment* is GRANTED.
3. The *Pehrsons' Motion for Summary Judgment* is DENIED.

DATED this 23rd day of June 2025.



ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Sara Ajeti
Deputy Attorney General

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 53 and 202.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5246(3), and 67-5270 through 67-5279, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.