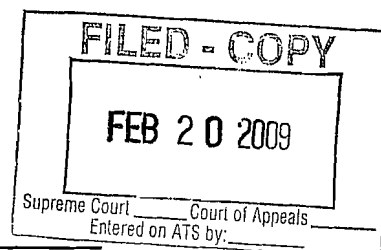


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Docket No. 35543-2008



IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID NELSON and LOY PHERSON, et al.

Plaintiffs-Counterdefendants-Appellants,

vs.

BIG LOST RIVER IRRIGATION DISTRICT; Board of Directors, RICHARD REYNOLDS,  
CHARLIE HUGGINS, KENT HARWOOD, JOEL ANDERSON, M. MARX HINTZE, IDAHO  
DEPARTMENT OF WATER RESOURCES, and DAVID R. TUTHILL, JR., Director,

Defendants-Counterclaimants-Crossdefendants-Respondents,

and

ROBERT WADDOUPS, et al., JAY F. PEARSON, et al.,

Intervenors-Counterclaimants-Crossclaimants-Respondents.

IDAHO DEPARTMENT OF WATER RESOURCES RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for the County of Custer  
The Honorable Jon J. Shindurling, District Judge, presiding.

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## STATEMENT OF THE CASE

### A. Nature of the Case

This case involves a dispute over the method used by the Big Lost River Irrigation District (“BLRID” or “district”) to apportion among its patrons river conveyance losses or “shrink” incurred when water stored by the district in Mackay Reservoir is released and conveyed through the channel of the Big Lost River for distribution to its members located at varying distances from the reservoir. The appellant water users (“Plaintiffs”), who are located closest to the reservoir, brought an action in district court challenging the irrigation district’s practice of allocating the conveyance losses equally on a *pro rata* basis among all members of the district. The Plaintiffs appeal the district court’s determination that a water distribution rule for Water District 34, encompassing the Big Lost River drainage basin, does not apply to the BLRID’s apportionment of river conveyance losses among its members. The Plaintiffs also argue that a 1936 judgment and decree in a confirmation proceeding for a bond issuance for Mackay Reservoir fixed how conveyance losses should be assessed among the district’s patrons.

### B. Statement of Facts

The BLRID is a water distribution organization established by landowners pursuant to the provisions of title 43 of the Idaho Code. R. I, Vol. I, pp. 2, 20, L. 25.<sup>1</sup> In 1936, a judgment and

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<sup>1</sup> On August 5, 2008, this Court issued an Order Taking Judicial Notice of the Clerk’s Record and Reporter’s Transcript filed in prior appeal No. 34203, *Nelson v. Big Lost River Irrigation District*. Documents in the Clerk’s Record for Case No. 34203 will hereinafter be referred to as R. I, followed by the volume and page number. Documents in the Clerk’s Record for Case No. 35543 will hereinafter be referred to as R. II, followed by the volume and page number.

decree<sup>2</sup> was entered by the Custer County District Court in a confirmation proceeding for a bond issuance that confirmed the assessment and apportionment of benefits to BLRID lands under a plan of operation adopted by the district. R. II, Vol. I, pp. 29-68, 70-84. Pursuant to title 43, the BLRID is governed by a Board of Directors (“Board”) elected by the property owners within the district. Idaho Code §§ 43-301 to -343.

The district owns Mackay Dam and Reservoir and storage water rights from the Big Lost River that are diverted and stored in the reservoir. R. I, Vol. I, p. 44, Ls. 10-12. The BLRID manages the delivery of impounded water to the patrons of the district. R. I, Vol. I, p. 44 Ls. 16-20. Impounded water includes both storage water held by the BLRID and rotation credit water owned by the holders of certain natural flow water rights in Water District 34. *See* IDAPA 37.03.12.010.12 and .15 and 37.03.12.040.02.

The BLRID does not own conveyance facilities for delivery of its storage water from the reservoir to its sixteen diversion facilities downstream that convey water within district lands to patrons’ individual headgates. As a consequence and pursuant to Idaho Code § 42-801, the BLRID uses the channel of the Big Lost River to convey its impounded water to its downstream diversion facilities. Tr. R. II, Vol. II, p. 29, Ls. 2-13; *Shaffer Aff.*<sup>3</sup>, p.3, Ls. 1-15. Idaho Code § 42-801 allows the owner of a reservoir to use the bed of a “natural water course” to carry storage water under certain conditions:

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<sup>2</sup> The full case caption of the judgment and decree is set forth at R. II, Vol. I, p. 170 and will hereafter be referenced as the “1936 Judgment and Decree.”

<sup>3</sup> *See* Respondents Big Lost River Irrigation District, et al., *Motion to Augment* that includes the *Affidavit of Bob Shaffer*, (“*Shaffer Aff.*”).

**42-801. Conveyance of stored water through natural channel--Appointment of special deputy and assistants.**

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 of water resources, 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 department shall then appoint a special deputy, unless a state watermaster has already been appointed to deliver the waters from said stream, in which event 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. The statute requires the owner of a reservoir using the services of the water district to compensate the watermaster for the cost of delivery upon approval by the Idaho Department of Water Resources ("Department"). *Id.*

Water districts are instrumentalities of the state established pursuant to Idaho Code § 42-604 for the purpose of assisting the Department in carrying out its responsibility to distribute the public waters of the state in accordance with the laws of the state of Idaho. Water District 34 is an entity created by the Director of the Department pursuant to Idaho Code § 42-604 to distribute by priority water rights within the entire Big Lost River drainage basin, including the rights held by the BLRID. Although the irrigation district uses the river and the assistance of the watermaster in the delivery of its impounded water to the district's patrons, Water District 34's primary function is to distribute natural flow and ground water rights to water right holders in the Big Lost River drainage basin in order of priority. Idaho Code § 42-607.

At any given time, water in the Big Lost River channel can be comprised of natural flow or the BLRID's impounded water released from Mackay Reservoir, or a combination of both. As a result, the watermaster must determine the amount of impounded water and the amount of natural flow water that is available for delivery. To ensure that water users receive the amount of water they are entitled to when it is commingled in the channel of a natural waterway, Idaho law requires measurement of commingled water, including the amount of loss incurred through evaporation and conveyance, and the supervision of distribution by the Department. Idaho Code § 42-105 provides, in relevant part:

**42-105. Use of natural waterways – Measurement of commingled water – Approval of right to exchange water.** – (1) 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.

Determining the amount of impounded water and the amount of natural flow water that is available for delivery in Water District 34 is no easy task because the Big Lost River has large gravel deposits and porous soils, which allow varying amounts of water to seep into the ground at various places along the river channel. This seepage is generally referred to as conveyance loss or "shrink," which, broadly defined, means the amount of water that is lost in transport through a conveyance channel, which in this case is the Big Lost River. *Shaffer Aff.*, p. 3, Ls. 21-24. Conveyance loss is comprised of evaporation from the water surface in the conveyance



channel, transpiration from vegetation along channel banks, operational waste, and seepage loss through the bottom of the conveyance channel. Seepage loss comprises the single largest component of conveyance loss in the Big Lost River. Tr. R. II, Vol. II, p. 29, Ls. 14-23; *Shaffer Aff.*, p. 3, Ls. 21-24.

Since acquiring Mackay Dam and Reservoir, the BLRID has used various methodologies to apportion among its patrons the conveyance loss incurred when the district's water is delivered through the channel of the Big Lost River. One method used immediately after purchasing Mackay Dam and Reservoir, and for several decades thereafter, compensated for conveyance loss by estimating the amount of loss that would occur in delivery and then pre-shrinking the amount of water in each individual's storage account, regardless of reach. For example, if a water user had an account for 1,000 inches of storage water and the estimated conveyance loss throughout the entire river was 40%, only 600 inches of storage water would be available to that water user.<sup>4</sup> R. I, Vol. I, p. 16; R. II, Vol. I, pp. 181-183; Tr. R. II, Vol. II, p. 130, Ls. 1-20. As technology for measurement improved, calculated conveyance loss figures rather than estimates were used to arrive at a shrink rate applied on a *pro rata* basis to all water users in the district. Tr. R. II, Vol. II, p. 120, Ls. 14-15. Under this "universal shrink" formula, water users share in the losses of water flow in the Big Lost River, regardless of the location of each water user's point of diversion. Beginning in 1994, the BLRID used, for the most part, a formula in which conveyance losses were apportioned only to water users whose water passed through a particular reach of the river. R. I, Vol. I, p. 16.

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<sup>4</sup> The BLRID uses the term "inch" to refer both to a flow rate (a miner's inch, equal to 1/50 of a cubic foot per second) and a volume (1/50 of a 24-hour second foot).

In 1994, the Department initiated negotiated rulemaking to resolve numerous water distribution concerns of water users in the Big Lost River drainage basin and promulgated the *Idaho Department of Water Resources Water Distribution Rules for Water District 34*, IDAPA 37.03.12 *et seq.* At issue in this appeal is whether IDAPA 37.03.12.040 (“Rule 40”) entitled Allocation of Natural Flow, and more specifically, IDAPA 37.03.12.040.03.b (“Rule 40.03.b”) entitled Assessment of Evaporation and Conveyance Losses to Impounded Water, governs the way the BLRID must assess conveyance loss to its patrons. The rules provide, in relevant part:

**001. TITLE AND SCOPE (Rule 1).**

This chapter contains the rules which shall govern the distribution of surface and ground water within Water District 34, the Big Lost River Basin, by the duly appointed watermaster pursuant to the provisions of Chapter 6, Title 42, Idaho Code, and applicable court decrees.

....

**25. RIVER REACHES (Rule 25).**

**01. Divisions of the Big Lost River.** For the purposes of quantifying river gains, losses, and calculating and accounting for natural flow...the Big Lost River shall be divided into the reaches identified below. . . .

....

**02. River Reach Computations.** For each reach of the river the natural flow will be computed as the natural flow entering the reach plus gains entering the reach minus losses from the reach. The natural flow thus calculated will be allocated as described in Rule 40.

....

**40. ALLOCATION OF NATURAL FLOW (Rule 40).**

**01. Administration of Surface Water Rights.** Administration of surface water rights is based upon the list of water rights approved for interim

administration by the court or as subsequently decreed by the court in the SRBA. Water not diverted or rotated for credit is available for the next in time water right. Natural flow rights are delivered to the point of diversion with no conveyance loss assessment. A natural flow water right delivered through a lateral or canal of a water conveyance entity shall be assessed the conveyance loss for the canal through which the water right is delivered.

a. All natural flow will be allocated based upon a four (4) day moving average of the natural flow computed by the water master.

....

### **03. Assessment of Evaporation and Conveyance Losses to Impounded Water.**

a. Evaporation losses from Mackay Reservoir shall be estimated daily by the watermaster by applying correlated evapotranspiration data from the Aberdeen hydromet station to the Mackay Reservoir and shall be assessed to all impounded water. (10-26-94)

b. Conveyance losses in the natural channel shall be proportioned by the watermaster between natural flow and impounded water. The proportioning shall be done on a river reach basis. Impounded water flowing through a river reach that does not have a conveyance loss will not be assessed a loss for that reach. Impounded water flowing through any river reach that does have a conveyance loss will be assessed the proportionate share of the loss for each losing reach through which the impounded water flows. To avoid an iterative accounting procedure, impounded water conveyance loss from the previous day shall be assessed on the current day. (10-26-94)

IDAPA 37.03.12.040.03.b. (emphasis added).

In 2005, the Board considered changing the formula for assessment of conveyance loss. Tr. R. II, Vol. II, pp. 133-136; *Shaffer Aff.* p. 3, Ls. 26-28, p. 4, Ls. 1-17. On April 25, 2005, the Board obtained a letter from Department employee Steve Burrell, Water Distribution Engineer, stating that the BLRID has the authority to determine how it allocates the conveyance loss incurred delivering storage water through the Big Lost River. R. I, Vol. I, pp. 25-27. On May 5,

2005, the Board adopted a universal shrink formula to assess conveyance loss to its patrons. R. I, Vol. I, p. 21, Ls. 3-8; *Shaffer Aff.*, p. 4, Ls. 17-23 and Exhibits F and G. This change was apparently precipitated by a series of drought years which resulted in patrons on the lower reaches of the Big Lost River not receiving their allotment of storage water. Tr. R. II, Vol. II, p. 133, Ls. 7-25, p. 134, Ls. 1-4. The practical application of this change was that all water users located within the BLRID were assessed an equal amount of shrink, regardless of their location on the river. *Shaffer Aff.*, p. 4, Ls. 17-23.

### **C. Course of Proceedings**

The Plaintiffs are patrons of the BLRID who use impounded water and natural flow water for irrigation along the upper reaches of the Big Lost River, where there is little if any conveyance loss. R. I, Vol. I, p. 3. On July 28, 2005, the Plaintiffs filed suit seeking to enjoin the Board from applying the universal shrink rule to water users within the district. R. I, Vol. I, pp. 1-19. The Plaintiffs' key claim was that Rule 40.03.b governed the dispute between the Plaintiffs and the Board concerning the formula for assessing conveyance loss. The Plaintiffs asserted that the Water District 34 distribution rules required the Board to apportion conveyance losses by reach. R. I, Vol. I, pp. 1-19. The district court granted the injunction on August 11, 2005. R. I, Vol. I, pp. 28-34.

After further proceedings,<sup>5</sup> the district court ordered the Plaintiffs to join the Department as a necessary party to comply with Idaho Code § 67-5278(2) requiring the agency to be a party to an action declaring the applicability of its rules. R. I, Vol. I, pp. 54-63. After the Department

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<sup>5</sup> A detailed history of the proceedings before the district court up and until October 30, 2006, is set forth at R. I, Vol. I, pp. 145-150.

was joined as a party, a hearing was held on cross-motions for summary judgment. Tr. R. II, Vol. II, pp. 173-304. The Plaintiffs requested a declaratory judgment ruling that the Department's water distribution rules for Water District 34, specifically Rule 40.03.b, applied to the BLRID and required that allocation of conveyance loss to its patrons be done by reach. R. I, Vol. I, p. 71. The BLRID requested that the court enter a judgment that Rule 40.03.b governs the distribution of surface and ground water water by the watermaster and does not restrict or mandate the bylaws, rules and regulations established by the Board for the distribution and use of water within the district. R. I, Vol. I, p.117, Ls. 14-24. The Intervenor<sup>6</sup>s requested a ruling that the BLRID is required to apportion conveyance losses incurred in the delivery of storage water on a universal basis. R. I, Vol. I, p. 98. The Department limited its argument in the case to the application of Rule 40.03.b, and asserted that the rule governs the watermaster's duties in Water District 34 and does not govern the conduct of the BLRID. R. I, Vol. I, pp. 126-136.

The district court ultimately determined that Rule 40.03.b is specifically directed to the "duly appointed watermaster" and "applies to the distribution of water by the IDWR to appropriators within Water District 34." R. I, Vol. I, pp. 155, L. 5, p. 157, Ls. 1-2. The district court further held that the "BLRID Board is not mandated to distribute storage water within the BLRID according to the watermaster's calculation in Rule 40.03.b." R. I, Vol. I, p. 157, Ls. 2-3. The Plaintiffs' Motion for Reconsideration was denied on March 23, 2007. R. I, Vol. I, pp. 177-182. On appeal, this Court issued a December 24, 2007 *Order of Dismissal Without Prejudice*

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<sup>6</sup> Initially, the district court denied Waddoups, et al., Pearson, et al., and Butte County's motion to intervene due to the close proximity to trial, but permitted participation as *amici curiae*. R. I, Vol. I, p. 149. On April 18, 2006, the district court granted the second motion to intervene filed by Waddoups, et al. and Pearson et al. Butte County's motion to intervene was denied but the county was permitted to participate as *amicus curiae*. R. I, Vol. I, p. 149.

based on the parties' stipulation that the district court had not resolved the Intervenor's counterclaim and the judgment had not been certified under I.R.C.P. 54(b).

After remand, the district court entered an order, judgment, and decree based upon the stipulation of the BLRID and Intervenor, requiring that universal shrink be used by the district in allocating river losses when delivering storage water. R. II, Vol. I, pp. 1-5, 9-13. On March 3, 2008, the Plaintiffs filed motions and objections pursuant to Idaho Rules of Civil Procedure 11(a)(2)(B), 59(a)(1)(6)(7) & (b), and 60(b). R. II, Vol. I, pp. 14-21. The Plaintiffs continued to advance the argument that Rule 40.03.b applied to the BLRID's allocation of conveyance loss among its patrons and prohibited the use of a universal shrink formula. R. II, Vol. I, pp. 145-162. In addition, the Plaintiffs asserted that under the principles of *res judicata*, the 1936 *Judgment and Decree* fixed how conveyance loss was to be determined and prohibited the Board's adoption of a universal shrink formula for the conveyance loss incurred in delivery through the Big Lost River channel. *Id.* On June 12, 2008, the district court denied the Plaintiffs' motions and objections. R. II, Vol. I, pp. 199-204. This appeal followed.

#### ISSUES ON APPEAL

1. Whether Rule 40.03.b governs how the Board assesses among its patrons the conveyance loss incurred when its impounded water is delivered to its diversion facilities through the Big Lost River channel.

2. Whether the 1936 *Judgment and Decree* fixed the manner in which conveyance losses would be accounted for in the delivery of storage water from the reservoir through the Big Lost River channel.

## STANDARD OF REVIEW

When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the summary judgment motion. *McKinley v. Guar. Nat. Ins. Co.*, 144 Idaho 247, 250, 159 P.3d 884, 887 (2007). Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). When an action is tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Eye & Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005).

## ARGUMENT

### **I. There Is No Statutory Authority In Title 42, Idaho Code, Or Title 43, Idaho Code, For The Department To Promulgate A Rule Mandating The Method An Irrigation District Must Use To Assess Conveyance Loss Among Its Patrons.**

There is no statutory authority in title 42, governing water rights administration, or title 43, governing irrigation districts, for the Department to promulgate a rule directing how an irrigation district allocates responsibility for conveyance losses among its members. To be valid, an administrative regulation must be adopted pursuant to authority granted by the legislature. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 813, 41 P.3d 237,

241 (2002).<sup>7</sup> A regulation that is not within the expression of the statute is in excess of the agency's rulemaking authority and must fail. *Id.* (citations omitted).

In determining that Rule 40.03.b does not apply to the decisions of the Board, the district court first looked to chapter 6, title 42 of the Idaho Code, the enabling statute the Department's rules are meant to supplement. Chapter 6 entitled "Distribution of Water Among Appropriators," authorizes the Department to adopt rules for the "distribution of water from streams, rivers, lakes, ground water and other natural water sources." Idaho Code § 42-603. When the watermaster for Water District 34 is conveying the BLRID's storage water, under the direction of the Department and Idaho Code § 42-801, he or she is not distributing water from "streams, rivers, lakes, ground water and other natural water sources." Instead, the watermaster is delivering water that has already been diverted and is no longer available for appropriation. *See Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935). (The waters so impounded then become the property of the appropriators and owners of the reservoir.)<sup>8</sup> As allowed by Idaho Code § 42-801, the BLRID is simply using a water delivery method that includes the release of its impounded water into the Big Lost River channel to be conveyed downstream by the watermaster.

Once water from the Big Lost River is distributed to the BLRID through diversion and storage in Mackay Reservoir, chapter 6, title 42 no longer applies. Unlike natural flow water rights that have a specific diversion rate to be delivered under a certain priority, the storage water

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<sup>7</sup> *Roeder* was partially overturned on other grounds in *Ada County Bd. of Equalizers v. Highlands*, 141 Idaho 202, 108 P.3d 349 (2005).

<sup>8</sup> This property interest in storage water is a qualified one "impressed with the public trust to apply [the water] to a beneficial use." *Talboy* at 389, 43 P.2d at 945.



flowing in the river has already been diverted and is now simply being conveyed pursuant to the direction of the reservoir's owner as allowed by Idaho Code § 42-801. Under Idaho Code § 42-105(1), governing the measurement and distribution of commingled water, the watermaster is required to measure the amount of natural flow and impounded water that are commingled to ensure that water "to which prior appropriators may be entitled shall not be diminished." *Id.* For that purpose and pursuant to Idaho Code § 42-801, the Department, through Water District 34 and the watermaster, supervises and controls the delivery of impounded water.

Unlike the natural flow water in the river channel, the water diverted into Mackay Reservoir belongs to the BLRID and is managed in accordance with the provisions of title 43. Chapter 6, title 42 does not govern how water that has already been diverted and stored is distributed for use by the patrons of an irrigation district. Accordingly, the district court was correct in holding that the Department's rules for the administration of Water District 34 do not apply to the conduct of the BLRID.

The activities of the BLRID are, however, governed by the provisions of title 43. Unlike water districts created by the Director pursuant to Idaho Code § 42-604, an irrigation district is not organized to distribute water from public sources, but instead, its primary purpose is the acquisition and operation of an irrigation system for the benefit of landowners within the district. *Lewiston Orchards Irr. Dist. v. Gilmore*, 53 Idaho 377, 381, 23 P.2d 720, 722 (1933); R. II, Vol. I, p. 89. In addition to allowing for the creation of irrigation districts, title 43 sets forth the powers and duties of an irrigation district's board of directors. Among other things, the Board has the "power to manage and conduct the business and affairs of the district ... [and] establish

equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same.” Idaho Code § 43-304. The irrigation district holds property in trust for the uses authorized by statute. Idaho Code § 43-316. As the title holder to such property, the irrigation district board is authorized to “hold, use, acquire, manage, occupy and possess said property” as provided by statute. *Id.*

Title 43 makes clear that the board of directors of an irrigation district has authority to establish policies for water distribution within the jurisdiction of the district. With respect to the allocation of conveyance losses, the Board has exercised its powers and duties in various ways since 1936 depending upon circumstances and the policies in place at the time. Beginning in 1937, conveyance loss was estimated and pre-shrunk on a pro-rata basis. R. II, Vol. I, pp. 181-183. Later, more precise measurements were taken to calculate actual conveyance loss, but the universal shrink apportionment scheme continued. Tr. R. II, Vol. II, p. 120, Ls. 14-15. In 1994, the district began using a formula that assessed conveyance loss by reach. R. I, Vol. I, p. 16. On May 5, 2005, the Board once again adopted a universal shrink allocation of conveyance loss for its members. These policy decisions by the Board over more than six decades are an exercise of the Board’s authority under title 43.

Finally, the Plaintiffs’ argument that Idaho Code §§ 42-603 and -801 and Idaho Code § 43-304, when read together, mean that Rule 40.03.b requires the BLRID to assess conveyance loss among its members on a reach-by-reach basis must fail. The interpretation of statutes begins with the literal words of the statute. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139

Idaho 65, 69, 72 P.3d 905, 909 (2003). Those words must be given their plain, usual, and ordinary meaning and the statute must be construed as a whole. *Id.* If the statute is not ambiguous, the court does not construe it, but simply follows the law as written. *Id.* Construing statutes in *pari materia* is an extrinsic aid used to determine legislative intent where a statute is ambiguous. *Killeen v. Vernon*, 121 Idaho 94, 97, 822 P.2d 991, 994 (1991).

First, Idaho Code §§ 42-603 and -801 and Idaho Code § 43-304 are not ambiguous. Idaho Code § 42-603 explicitly authorizes the Department to promulgate rules for the distribution of public water, not storage water that has already been diverted by the water right holder. Idaho Code § 42-801 allows the owner of a reservoir to contract with the Department for delivery of stored water, requires the watermaster to deliver stored water to those entitled to it, and requires payment for the watermaster's services. Idaho Code § 43-304 explicitly governs the conduct of an irrigation district's board of directors. Even assuming some ambiguity, reading these statutes together does not lead to the conclusion that the legislature authorized the Department to promulgate a rule mandating how an irrigation district established under title 43 assesses conveyance loss among its members. Further, statutes relating to the same subject matter should be construed harmoniously to effect legislative intent. *Grand Canyon Dories v. Idaho State Tax Comm'n*, 124 Idaho 1, 4, 855 P.2d 462, 466 (1993). The purposes of Idaho Code §§ 42-603 and -801 are clear in their definition of the boundaries and authorities of the Department. Idaho Code § 43-304 is also clear with regard to governance of irrigation districts established pursuant to title 43. There is no inconsistency in the language or intent of these statutes.

**II. A Plain Reading Of Rule 40.03.b Demonstrates That The Rule Governs The Way In Which The Water District Must Assess Or Calculate Conveyance Loss In The Big Lost River For The Purpose Of Determining The Amount Of Flow Available For Delivery Of Natural Flow Water Rights And Impounded Water.**

The district court determined that the “crux of this declaratory judgment action” was the interpretation of Rule 40.03.b and whether the rule applied to the decisions of the BLRID Board. R. I, Vol. I, p. 151. In conducting its analysis, the district court observed that “the principles of statutory construction apply to administrative rules. *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001).” R. I, Vol. I, p. 152. The district court continued:

Interpretation of [an administrative rule] should begin ... with an examination of the literal words of the rule. ... The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning. ... In addition, this language should be construed in the context of the rule and statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.

R. I, Vol. I, p. 152 (citations and quotation marks omitted).

The district court was correct in determining that Rule 40.03.b applies to the distribution of water by the Department to appropriators within Water District 34 and that it would be improper for the court to read requirements into an unambiguous administrative rule contrary to the authorities set forth in title 42. R. I, Vol. I, pp. 154-156. A plain reading of the rule demonstrates that Rule 40, entitled Allocation of Natural Flow, addresses the administration of natural flow surface water rights within the water district. Due to the dynamic hydrology of the Big Lost River, Rule 40.03.b directs the watermaster to determine the proportionate amount of natural flow and storage water in the river on a reach-by-reach basis. As the district court observed, the Department’s “rules are specifically directed to the ‘duly appointed watermaster’

for Water District 34” not the BLRID. R. I, Vol. I, p. 155. Once the watermaster has assessed the amount of conveyance loss in a particular reach of the river that can be assigned to impounded water, the watermaster knows how much natural flow water is available for delivery to individual water right holders and how much impounded water is available for delivery to the BLRID’s diversions.

Although the watermaster is controlling all of the water within the Big Lost River channel, his actions in delivering natural flow rights and storage water rights are different. Natural flow water rights are delivered to the point of diversion with no conveyance loss assessment. *See* IDAPA 37.03.12.040.01. Instead, they are delivered in priority and any conveyance loss is borne by junior users, which may cause their water rights to be out of priority. For the storage water rights, however, the watermaster, at the request of the district, delivers a specific volume of water to the downstream diversion facilities. The watermaster informs the BLRID how much of the water flowing in the river is storage water and the BLRID tells the watermaster how much of that water should be delivered to each diversion. R. I, Vol. I, pp. 25-27; Tr. R. II, Vol. II, p. 23, Ls. 7-11, p. 95, Ls. 6-25, p. 96, Ls. 1-13.

Calculating the shrink incurred by impounded water assures that natural flow water and storage water absorb their proportionate amount of loss, as required by Idaho Code § 42-105 and Rule 40.03.b. The calculated natural flow is then used to determine which decreed rights are “on.” If only natural flow is present in the river reach, the river shrink is essentially deducted entirely from natural flow and the rights are delivered in priority until natural flow is no longer available. But, if both natural flow and impounded water are present in the river, Rule 40.03.b

simply provides a way for the watermaster to divide conveyance loss between the BLRID's impounded water and the natural flow water so that the watermaster can deliver the amount each water right holder is entitled to under his or her water right.

In summary, neither title 42 nor Rule 40.03.b authorizes the Department to determine how conveyance losses must be assessed among the patrons of the BLRID. The Water District 34 rule governing the watermaster's calculation of conveyance loss for distributing impounded and natural flow water, promulgated under the authority of title 42, does not govern internal disputes among the district's members concerning the Board's policy decisions. As noted by the district court, to declare that the water distribution rules for Water District 34 mandate the application of a specific formula for conveyance loss assessment within the BLRID would not only exceed the Department's authority, it would also violate the Board's statutory authority set forth in title 43. R. I, Vol. I, p. 156.

### **III. The 1936 Judgment and Decree Does Not Fix How The BLRID Board Must Apportion Conveyance Losses Among District Patrons.**

The Plaintiffs assert that the use of universal shrink for apportioning river losses is precluded by the *1936 Judgment and Decree* entered by the Custer County District Court in a confirmation proceeding for a bond issuance that confirmed the assessment and apportionment of benefits to BLRID lands under a plan of operation adopted by the district. *See* R. II, Vol. I, pp. 70-84. A review of the Findings of Fact and Conclusions of Law in the confirmation proceeding does not support this assertion. R. II, Vol. I, pp. 29-68. In the Findings of Fact, the court approved a plan of operations adopted by the BLRID Board to equitably apportion the benefits

of supplemental storage to lands within the district based upon the need for water. R. II, Vol. I, pp. 50-53. The determination of the need for supplemental water on the district lands was based upon the priority dates of existing natural flow water rights appurtenant to the various lands. Importantly, the distance of the lands from the reservoir was not taken into consideration. *Id.*

Neither the court's Findings of Fact and Conclusions of Law nor the *Judgment and Decree* addresses the specific manner in which conveyance losses would be accounted for in the delivery of storage water from the reservoir. Although the Plaintiffs are correct in stating that a decree of confirmation is conclusive as to all matters embraced in the proceedings, *American Falls Reservoir District v. Thrall*, 39 Idaho 105, 228 P. 236 (1924), the principles of *res judicata* do not apply here. Under Idaho law, *res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002).

Claim preclusion has three elements: (1) same parties or their privies; (2) same claim; and (3) final judgment. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). With respect to collateral estoppel or issue preclusion, five factors must be evident in order to bar litigation of an issue addressed in a prior proceeding:

(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

*D.A.R. Inc. v. Sheffer*, 134 Idaho 141, 145, 997 P.2d 602, 605 (2000).

Both theories require that an issue be actually decided in the prior litigation. The problem with the Plaintiffs' *res judicata* argument is evident. How conveyance loss was to be apportioned among the landowners was not addressed in the 1936 confirmation proceedings before the Custer County District Court. The court approved the BLRID's plan to equitably apportion the benefits of supplemental storage to lands within the district based upon the need for water. R. II, Vol. I, pp. 50-52. In carrying out its responsibilities, the Board initially compensated for estimated conveyance loss by pre-shrinking the amount of water in each individual's storage account. R. II, Vol. I, pp. 181-183. The shrink was applied uniformly to all storage accounts at the beginning of the irrigation season, regardless of reach. The Board continued that practice, but used actual calculations to allocate shrink throughout the irrigation season. Tr. R. II, Vol. II, p. 75, Ls. 10-16; p. 120, Ls. 14-25. In 1994, the Board began using a formula assessing conveyance loss by reach. R. Vol. I, p. 16. In 2005, a universal shrink formula was adopted for use in allocating conveyance loss among the Board's patrons. As authorized by chapter 2, title 43, the Board has addressed the problem of assessing conveyance loss in various ways. There is nothing in title 43 to suggest that exercising its discretion in this manner is inconsistent with statutory requirements or the *1936 Judgment and Decree*.

Finally, the Plaintiffs' assertion that the bylaws and policies of the Board adopted in 2004 prohibit the adoption of a universal shrink conveyance formula is not supported by the record. The section of the bylaws and policies relied upon for this argument simply states that water consumers within the district who own a water right under the *1936 Judgment and Decree* have the right to storage water and natural flow water belonging to them under the "assessment and



apportionment of benefits in the district's reservoir." R. II, Vol. I, p. 99. The document also states that the Board has the power to reduce the quantity of storage water demanded in case of shortage, or for certain other reasons, on a *pro rata* basis and that all users of storage water will be charged with their portion of evaporation loss in Mackay Reservoir. *Id.* There is no mention or reference whatsoever as to how conveyance losses incurred in the delivery of storage water through the Big Lost River channel will be assessed. Thus, there is no legal basis upon which to conclude that the bylaws and policies adopted by the Board in 2004 fix how conveyance loss must be apportioned among the district's members.

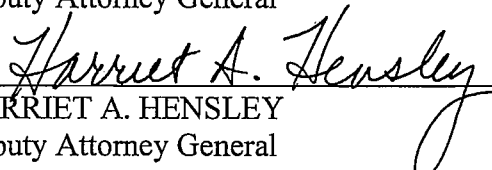
### CONCLUSION

For the reasons set forth above, the Department respectfully requests that this Court affirm the district court's ruling that Rule 40.3.b does not govern how the BLRID assesses among its members the conveyance loss incurred in the delivery of impounded water to its diversions through the Big Lost River channel.

DATED this 20<sup>th</sup> day of February 2009.

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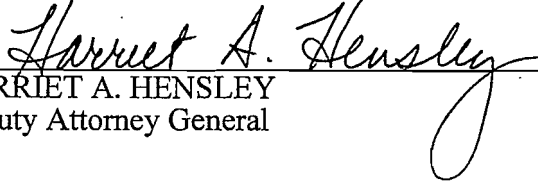
**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of February 2009, I caused to be served two true and correct copies of the foregoing IDAHO DEPARTMENT OF WATER RESOURCES RESPONDENT'S BRIEF, by U.S. Mail, postage prepaid, to the addresses listed below:

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