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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,
Case No. 39576

Subcase No. 63-03174

**BRIEF IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Water right claimants Jerry Tlucek and Mary Lou Tlucek hereby file this Brief in Support of Motion for Summary Judgment, pursuant to Idaho Rule of Civil Procedure 56. The Tluceks have filed the Motion for Summary Judgment and an Affidavit of Scott L. Campbell in Support of Motion for Summary Judgment contemporaneously herewith.

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I. STATEMENT OF THE CASE

A. Nature of the Case

This subcase arises in the context of the Snake River Basin Adjudication (the “SRBA”). Water right claimants Jerry Tlucek and Mary Lou Tlucek object to the inclusion of an annual diversion volume limitation on their water right 63-3174 (the “Water Right”) by the Idaho Department of Water Resources (the “Department” or “IDWR”).

B. Course of Previous Proceedings

The Tluceks filed a claim to the Water Right in the SRBA on September 13, 1989, which they amended on August 8, 1990. The Department issued its Director’s Report recommendation for the Water Right on December 16, 2005, and the Tluceks timely objected to the inclusion of the annual diversion volume limitation therein on April 18, 2006. No other parties objected to the recommendation of the Water Right.

Based on the Tluceks’ objection, on April 25, 2007, this Court requested that the Department prepare a Supplemental Director’s Report explaining the basis for including the annual diversion volume limitation, pursuant to Administrative Order 1 (“AO1”) Section 10(g)(3), Idaho Rule of Evidence 706, and Idaho Code Section 42-1401B. The Department issued its Supplemental Director’s Report on September 14, 2007. (*See* Exhibit F to the Campbell Aff.)

C. Statement of Facts

The Tluceks base their claim upon a water right license issued by the state of Idaho on June 26, 1967. (*See* Exhibit D to the Campbell Aff.) When the state issued the license, it included no annual diversion volume limitation. *Id.* Instead, the state defined the quantity element of the Water Right as 1.85 cubic feet per second (cfs). *Id.*

However, when it issued its Director's Report recommendation for the Water Right, the Department included an annual diversion volume limitation of 513.00 acre feet ("AFY" or "AFA"). (*See* Exhibit E to the Campbell Aff.) The Tluceks object to the Department's imposition of this new limitation on their Water Right, when this limitation was not included in the previous license.

II. ISSUES PRESENTED

The Tluceks request that this Court invalidate the annual diversion volume limitation imposed by the Department on their Water Right. This requires this Court to address the following broad issues:

1. Whether the Supplemental Director's Report complies with the Idaho Rules of Evidence;
2. Whether the Department has the legal authority to impose an annual diversion volume limitation on a previously-licensed water right, even though Idaho Code Section 42-220 states that such licenses are "binding upon the state" and "prima facie evidence as to such right";
3. If the Department has such general legal authority, whether the Department has sufficiently investigated and demonstrated the factual basis for its imposition of the new, restrictive annual diversion volume limitation; and
4. Whether the Department may file any responsive briefing in this matter in contravention of Idaho Code Section 42-1401B and related rules of procedure.

III. STANDARD OF REVIEW

The Tluceks file this Motion pursuant to Rule 56 of the Idaho Rules of Civil Procedure. As this Court has stated, summary judgment is appropriate when the pleadings, depositions, admissions and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See In Re SRBA*, Case No. 39576, Consd. Subcase No. 91-63, Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 10-11 (5th Dist. Sept. 2, 2004) (Melanson, J.) (citing IDAHO R. CIV. P.

56(c); *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383 (1995)); *see also United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 109, 157 P.3d 600, 603 (2007).

In addition, summary judgment is appropriate to dismiss a claim when a party fails to submit evidence to establish an essential element of their claim. *Ambrose ex. rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994); *Nelson ex. rel. Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1113 (1996). Facts in dispute cease to be material facts when a claimant fails to establish a *prima facie* case; in such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992); *Ambrose ex. rel. Ambrose, supra*.

Typically, the nonmoving party is entitled to the benefit of all inferences which might reasonably be drawn from the evidence. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Kline v. Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). However, the nonmoving party may not rest on mere allegations or denials of that party's pleadings to avoid summary judgment. *Theriault v. A.H. Robbins Co.*, 108 Idaho 303, 698 P.2d 365 (1985). The nonmoving party's case must not rest on mere speculation, because a "scintilla of evidence" is not enough to create a genuine issue of material fact. *G&M Farms, supra; Kline, supra*.

In addition, in the Snake River Basin Adjudication proceedings, cases are tried without a jury. IDAHO CODE § 42-1412(5). In such circumstances:

When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is "free to arrive at the most probable

inferences to be drawn from uncontroverted evidentiary facts.”
[Citations omitted].

Land O’ Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003).

This case may be resolved as a matter of law and may be properly decided on summary judgment. The Tluceks’ argument will show that the Department’s inclusion of an annual diversion volume limitation in the Director’s Report recommendation for the Tluceks’ Water Right lacks any factual support and is contrary to Idaho water law, including statutes which state that a water right license is binding on the State.

IV. ARGUMENT

A. The Supplemental Director’s Report Should Not Be Considered Because It Violates the Rules of Evidence for Expert Testimony

The Department’s Supplemental Director’s Report violates the Idaho Rules of Evidence regarding expert testimony. First, the Report is a legal brief, lacking any discussion of “facts” or “evidence,” as required by Idaho Rule of Evidence 702. Second, Department attorneys wrote the Report, not qualified experts with specialized scientific or technical expertise. Therefore, this Court should totally disregard the Supplemental Director’s Report.

When this Court requested the Department’s assistance in this subcase, it did so pursuant to AO1, the Idaho Rules of Evidence, and Idaho statute. (*See* Order Requesting 706 Report from IDWR of April 25, 2007.) More specifically, AO1 § 10(g)(3) provides that, “[n]othing herein shall prevent the Presiding Judge or Special Master from calling a representative of IDWR as its own witness consistent with I.R.E. 706 or 614 for Class One or Class Two subcases.” Idaho Rule of Evidence 706, in turn, states that “[t]he court . . . may appoint expert witnesses of its own selection.” And, Idaho Code Section 42-1401B provides that the Director is “not a party to an adjudication.” Instead, he serves as “an independent expert and technical assistant” within the context of the SRBA. *Id.*

Despite this statutory designation, however, the Idaho Supreme Court has specifically held that in the context of the SRBA, Idaho Rule of Evidence 702 governs:

[T]he means by which a witness may be qualified as an expert, and the determination of whether a witness has been so qualified is left with the district court.

State v. Higginson, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995) (citing *State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993)) (emphasis added).

More specifically, in *Higginson*, the Idaho Supreme Court ruled that Idaho Code Section 42-1401B “is of no effect . . . to the extent [it] constitutes a legislative determination as to the Director’s status as an expert.” *State v. Higginson*, 128 Idaho at 258, 912 P.2d at 626 (1995). Consequently, despite Section 42-1401B, this Court must independently determine that the Director qualifies as a reliable expert pursuant to Idaho Rule of Evidence 702. And, Rule 702 speaks clearly:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Emphasis added.)

After the Court decides a given situation warrants expert testimony, it must determine admissibility by applying the following four (4) part test:

1. the witness is a qualified expert in the field;
2. the evidence will be of assistance to the trier of fact;
3. experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion; and
4. the probative value of the opinion testimony would not be substantially outweighed by its prejudicial effect.

Ryan v. Beisner, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct. App. 1992); *see also* IDAHO R. EVID. 703.

“A qualified expert is one who possesses ‘knowledge, skill, experience, training, or education.’ I.R.E. 702. Formal training is not necessary, but practical experience or special knowledge must be shown to bring a witness within the category of an expert.” *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 836, 153 P.3d 1180, 1182 (2007) (citing *Warren v. Sharp*, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003)); *see also West v. Sonke*, 132 Idaho 133, 138-39, 968 P.2d 228, 233-34 (1998).

Also, admissibility of expert testimony “depends on the expert’s ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion.” *Ryan v. Beisner*, 123 Idaho at 46, 844 P.2d at 28. Therefore, “the key to admission of the [expert] opinion is the validity of the experts’ reasoning and methodology.” *Id.* As a result, any “expert opinion [testimony] which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence.” *Id.* (citing IDAHO R. EVID. 702).

In this case, deposition testimony from Department employees Donald Shaff and Jan Shurte establishes attorneys Andrea Courtney and Garrick Baxter prepared the Supplemental Director’s Report requested by this Court. Mr. Shaff’s testimony illustrates this fact:

Q. Could you describe for me the procedure that you followed after you received the order from the Special Master to generate this document, Exhibit No. 1 [the Supplemental Director’s Report]?

A. Exhibit No. 1 was prepared with the person, Jan Shurte, S-h-u-r-t-e, who had knowledge of Water Right Claim 63-3174 and with assistance from the Deputy Attorney General’s staff.

Q. And who with the Deputy Attorney General's staff assisted her?

A. Ms. Andrea Courtney, who is a Deputy Attorney General, assisted in preparing Exhibit No. 1.

Q. Do you know if anyone else besides Ms. Andrea Courtney assisted in the preparation of Exhibit No. 1 with the Attorney General's staff?

A. I believe Mr. Garrick Baxter reviewed the document, as well -- Deputy Attorney General.

(Shaff Dep., 16:12-17:2 (emphasis added).)

And, Ms. Shurte testified:

Q. Can you tell me whether or not you had any role in the preparation of this document, Exhibit No. 1 [the Supplemental Director's Report]?

* * *

A. . . . Yes, I did.

Q. Can you describe that for me, please?

A. I, basically, spoke with the attorneys concerning how the recommendation was made, just the steps that were taken to go through the recommendation, and what was in the claim file. That was about it.

(Shurte Dep., 10:3-10:4, 10:8-10:13 (emphasis added).)

Q. And can you identify the attorneys that you worked with to produce Exhibit No. 1?

A. I worked with Andrea.

Q. Andrea Courtney?

A. Uh-huh. Andrea Courtney.

(Shurte Dep., 12:8-12:12.)

Q. Ms. Shurte, can you tell me how many drafts of Exhibit 1 you actually reviewed?

* * *

THE WITNESS: Probably, two. I would say two, to the best of my recollection.

BY MR. CAMPBELL:

Q. Who generated those drafts?

A. Andrea [Courtney].

(Shurte Dep., 14:5-14:6, 14:14-14:18 (emphasis added).)

This testimony demonstrates that attorneys, not the technical qualified experts mandated by Rule 702, prepared the Supplemental Director's Report. Indeed, the Report reads like a legal brief, lacking any substantive factual discussion of the Tluceks' historical water use practices or the scientific basis for including the annual diversion volume limitation.

Pursuant to Rule 702 and the judicial cases implementing it, a Supplemental Director's Report should serve as an expert opinion that will "assist the trier of fact to understand the evidence or to determine a fact issue." It cannot consist of a legal brief on whether the Department has general authority to impose new annual diversion limitations in the SRBA. Simply put, the Supplemental Director's Report fails to meet the Rule 702 standard because it consists of legal argument and does not provide expert evaluation of "facts" or "evidence."

Moreover, the Department provides no facts which demonstrate the attorneys who prepared the Supplemental Director's Report qualify as reliable experts, pursuant to the four-part test mandated by the Idaho appellate courts. Therefore, because no qualified experts prepared the Report, this Court should completely ignore its findings and recommendations.

B. Idaho Code Section 42-220 Prohibits the Inclusion of the New Annual Diversion Volume Limitation Because It States that Water Right Licenses Are Binding Upon the State

1. The Plain Language of Section 42-220 Demonstrates that the Department Cannot Use the SRBA to Impose a New Restrictive Annual Diversion Volume Limitation

The Department cannot use the SRBA process to add a new restrictive condition onto a water right license, because doing so is specifically prohibited by Idaho Code Section 42-220. That statute provides in its entirety:

42-220. EFFECT OF LICENSE. Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water.

IDAHO CODE § 42-220 (emphasis added).

Of critical importance is the first clause of this statute, which provides that a water right license “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein” *Id.* (emphasis added). This statutory language unambiguously provides that a water right license is binding upon the state, except in a few limited circumstances.

More specifically, “[t]he right to continue the beneficial use of such waters shall never be denied,” except in certain limited circumstances. *Id.* (emphasis added) These are: (1) when there has been a failure “to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water;” (2) when the use of water exceeds the beneficial use of water; (3) when the license provides for the irrigation of “more than one second foot of water for each fifty (50) acres of land;” or (4) “for other reasons set forth in this title.” *Id.* There has been no allegation that the Tluceks have failed to pay any applicable water right assessments, so the remainder of this section will discuss the remaining three potential bases for restricting a water right license.

At the outset, it is helpful to note that Section 42-220 states that a water right license is “prima facie evidence as to such right,” implying that such evidence can be rebutted. However, as Section IV.A of this Brief has already explained, the Supplemental Director’s Report does not effectively rebut the license because it is strictly legal in nature. The Department has produced no factual evidence to rebut the terms of the original license for the Water Right.

a. “Beneficial Use” Is Not a Proper Basis for Imposing the Limitation Because the Department Has Not Investigated the Tluceks’ Historical Use of Water

Simply put, there has been no allegation or demonstration that the Tluceks’ full use of their Water Right for irrigation purposes has not been a “beneficial use” of that Right.

Both the transcript of the Tuthill deposition and the Supplemental Director's Report demonstrate that the Department engaged in little if any factual investigation into the Tluceks' historical water use practices. For example, in describing his likely actions in preparing the initial recommendation for the Water Right, Mr. Tuthill stated:

So while I don't remember my actions on this particular water right at the time, my actions at the time would have been to review the license and the claim and the maps and the other information available and to make a recommendation for this water right.

(Tuthill Dep., 10:6-10:10.)

Importantly, while the examination of aerial photos may reveal which acres are being irrigated, it would not necessarily reveal how much water is applied to those particular acres. Therefore, when it prepared its initial recommendation, the Department failed to establish a factual basis for including the new annual diversion volume limitation.

And, the previously-quoted portions of the Shaff and Shurte depositions demonstrate that the process for preparing the Supplemental Director's Report was entirely a legal exercise, not a factual one. Particularly important in this regard is the following exchange during the Shaff deposition regarding the need for including an annual diversion limitation on the Tluceks' Water Right:

Q. Thank you. Now, in that paragraph, it describes a portion of the Revised Claims Manual. At the end of the paragraph, it states, quote, "Here, an annual volume limit is critical because of the need to protect junior priority rights in the Treasure Valley where ground water supplies are limited," end quote. Did I read that correctly?

A. Yes.

* * *

Q. And do you know where Water Right 63-3174 is located in proximity to the Eagle area?

A. With my knowledge of the general description from the Public Lands Survey description on Water Right 63-3174, I would place it south and west of Eagle but in the Treasure Valley -- "Treasure Valley" being the Boise River Valley.

Q. Would this water right be south of the Boise River?

A. I think so.

Q. So in the preparation of this sentence that we have been talking about, did you undertake any investigation of the number of junior priority rights in the Treasure Valley?

A. No, I did not.

Q. Do you know if anyone did?

A. No one, to my knowledge, did an accounting of how many water rights are junior to Water Right 63-3174.

(Shaff Dep., 78:19-79:1, 79:21-80:13 (emphasis added).)

In other words, the Department asserts that inclusion of an annual diversion volume limitation is necessary to protect junior priority water rights, but admits that it never investigated the extent to which the Tluceks' Water Right may impact those rights. This oversight illustrates that the Department's inclusion of the annual diversion volume limitation is an arbitrary one, lacking any factual support.

Similarly, the following exchange also took place during the deposition of Mr. Shaff:

A. Would you -- the 513 acre feet per year, in my opinion, defines the extent of beneficial use that Water Right 63-3174 has been put to beneficial use.

Q. And what do you base that upon, Mr. Shaff?

A. The extent of number of acres irrigated, the location that it's irrigated, the temperature, the freeze periods, and the temperature and wind factors, the weather factors in the area where the crops are grown.

Q. And have you conducted an evaluation of all of those factors for this particular water right?

* * *

What I am asking you is: Did you make any of those calculations for this water right?

A. I did not.

(Shaff Dep., 110:1-110:11, 111:8-111:11 (emphasis added).)

Here, the Department asserts that inclusion of the annual diversion volume limitation is necessary to quantify the beneficial use of the Water Right. However, this testimony demonstrates that the annual diversion volume limitation was imposed on the Tluceks' Water Right as a matter of routine and not based upon any actual investigation into the Tluceks' historical beneficial use of water in accordance with their license. Therefore, beneficial use is not a legitimate basis for restricting their Water Right.

Section 42-220 was originally enacted in 1903, and amended in 1905. S.L. 1903, p. 223, § 9; S.L. 1905, ch. 166, § 1. Therefore, the Department had the authority to impose a volumetric limitation upon the Water Right when it issued the license in 1979, if it believed that doing so was necessary in order to ensure that water would not be used in excess of the beneficial use requirement. It did not do so. Accordingly, the Department cannot use the SRBA to impose a new, restrictive annual diversion volume limitation on the Water Right after the fact.

And, importantly, even if annual diversion volume is not specifically delineated in the Water Right, the Tluceks do not have the authority to use water in excess of beneficial use requirements—no water user has this authority, regardless of the specific terms of the water right. *See* IDAHO CONST. art. XV, § 3 (“[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . .”); IDAHO CODE § 42-104 (“[t]he appropriation must be for some useful or beneficial purpose, and when the

appropriator or his successor in interest ceases to use it for such purpose, the right ceases”).

Therefore, inclusion of the annual diversion volume limitation is unnecessary, because beneficial use requirements apply to every water right in Idaho.

b. The Water Right as Licensed Complies With the Duty of Water Requirements of Section 42-220

As licensed, the Water Right allows for the irrigation of up to 114 acres of land. (See Exhibit D to the Campbell Aff.) Section 42-220 provides for a duty of water limitation of “one second foot of water for each fifty (50) acres of land so irrigated,” *i.e.*, 0.02 cfs per acre of irrigation. At 114 acres of irrigation, Section 42-220 would allow for a diversion rate of up to 2.28 cfs. Therefore, the Water Right’s licensed diversion rate of 1.85 cfs is well within the duty of water requirements established by Section 42-220. And, notably, there is no reference in Section 42-220 to limitations based on acre-feet per year.

c. There Are No “Other Reasons Set Forth in this Title” Authorizing the Department to Impose the Limitation

As Section IV.C of this Brief will explain, the adjudication statutes in Idaho Code Title 42, Chapter 14 do not provide the Department with authority to impose the volumetric limitation on the Tluceks’ Water Right. The only remaining basis in “this Title” for imposing this restrictive condition would be Section 42-222(2), which authorizes the Department to find that a water right represented by a license has been forfeited in whole or in part, and, accordingly, to recommend a reduced water right in the SRBA. However, as has been explained, the Supplemental Director’s Report and the Department’s testimony demonstrate that there was no fact-based inquiry into the use of water by the Tluceks after the license was issued during the SRBA claim investigation process.

2. This Court Has Already Held that Section 42-220 Prohibits the Department from Using the SRBA to “Redefine the Use of a Previously Issued License”

This Court has already addressed a similar issue and held, based upon the language of Section 42-220, that the Department cannot use the SRBA to impose a new condition that would “redefine the use of a previously issued license. . . .” *In Re SRBA*, Case No. 39576, Subcase No. 36-02708, *et al.*, Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue, pp. 14-18 (5th Dist. Dec. 29, 1999) (Wood, J.) (hereinafter, the “Facility Volume Order”).

In the Facility Volume case, one of the issues to be decided by this Court was whether the Department could use the SRBA to impose a facility volume limitation on a previously issued water right. Facility Volume Order, pp. 6-8, 14-18. In some cases, the licenses on which the recommendations were based had already included a facility volume limitation; in others, the licenses did not include such limitations. *Id.* at 14. In addressing when the inclusion of such a limitation was permissible, then-Special Master Haemmerle stated:

As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director’s Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right.” I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the “state” as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use of a

licensed water right. Under these circumstances, the question is which statute controls.

The inquiry involves principles of statutory construction. “It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute.” *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). “[T]o the extent that two statutes conflict, the more specific governs over the more general.” *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state [footnote 4 cited].

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), [131] Idaho [12], 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: “Finality in water rights is essential. ‘A water right is tantamount to a real property right, and is legally protected as such.’ An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property.” *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be “tantamount” to altering a real property right. In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued.

Id. at 14-15 (quoting *In Re SRBA*, Case No. 39576, Subcase No. 36-02708, *et al.*, Supplemental Findings of Fact and Conclusions of Law (Facility Volume) (5th Dist. July 31, 1998) (Haemmerle, S.M.)) (footnotes omitted) (emphasis added).

Then-Presiding Judge Wood upheld and adopted Special Master Haemmerle's analysis. Facility Volume Order, p. 18. In summary, this Court relied upon Section 42-220 in holding that water rights licenses are binding upon the Department in the SRBA. The Department can impose a new condition that was not previously included in the original license if it is necessary to "define, clarify, or administer" the water right. *Id.* at 14. The Department cannot, however, impose a new condition that would "alter or restrict the use of the license." *Id.* at 15.

As the Department readily admits, any diversion rate expressed in cubic feet per second is easily converted into an annual diversion volume expressed in acre-feet per year. (Supplemental Director's Report, p. 6, n.5; Shaff Dep., 106:14-107:13.) In the case of the Water Right, that annual diversion volume would be 903 AFY, given its 246-day period of use. Accordingly, it cannot be disputed that the imposition of the new limitation of 513 AFY impermissibly "restrict[s] the use of the license" pursuant to the Facility Volume Order.

The Department's treatment of the Facility Volume Order in the Supplemental Director's Report is vague and ineffective because it ignores the express language quoted above. (Supp. Dir. Rep. pp. 6-7.) The Department points out that the Facility Volume Order explains that facility volume is not a "third parameter" to the quantity element and does not discuss Section 42-1427, in an apparent attempt to distinguish that case from this one. *Id.* at 7. Unfortunately for the Department, those distinctions do not change the fundamental point of that case: that the Department cannot use the SRBA to impose a new limitation on a water right that would "alter or restrict the use of the license." Facility Volume Order, p. 15.

C. None of the Adjudication Statutes Relied Upon by the Department Provide a Basis For Imposing the Annual Diversion Volume Limitation

The Supplemental Director's Report relies upon several of the water rights adjudication statutes in Idaho Code Title 42, Chapter 14 to support its inclusion of the annual diversion volume limitation in the Tluceks' Water Right. For the reasons explained below, none of those statutes authorize the Department to impose such a restriction on the Water Right.

a. Sections 42-1209 and 42-1427 Simply Require the Department to Define the Quantity Element, Not Annual Diversion Volume

In the Supplemental Director's Report, the Department asserts that paragraphs (1)(a) and (1)(b) of Section 42-1427 provide it with authority to impose the restrictive annual diversion volume limitation at issue in this case. (Supp. Dir. Rep., pp. 3-5.) Unfortunately, the Department neglected to explain that those two provisions are simply the legislative findings explaining the purpose of subsection (2), which is the only provision in Section 42-1427 containing an actual legal requirement. It provides:

If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

IDAHO CODE § 42-1427(2) (emphasis added).

In other words, because some old water rights licenses and decrees lacked some elements that are now required to be described in a water right, the Idaho Legislature enacted Section 42-1427 to ensure that the Department would include recommendations for any previously undefined elements. Accordingly, Section 42-1427(2) incorporates Section 42-1209 as the list of elements that are required to be included in the Director's Report. With respect to the quantity element, Section 42-1209 provides:

The director shall prepare and furnish on request a standard notice of claim form. The notice of claim form shall include the following: . . . (c) the quantity of water claimed: (i) the quantity of water claimed to be used for water rights acquired under state law shall describe the rate of diversion . . . in cubic feet per second or the annual volume of diversion of water for use or storage in acre-feet per year, or both

IDAHO CODE § 42-1209(1)(c)(i) (emphasis added).

In other words, an annual diversion volume is not a required element under Section 42-1409. From the Idaho Legislature’s perspective, it is perfectly acceptable for a water right to be recommended with a diversion rate expressed only in cubic feet per second.

Therefore, the relevant “element[] of a water right required in section 42-1409” referred to in Section 42-1427(2) is simply the quantity element—not the annual diversion volume.

Here, the license for the Water Right already included a quantity element: 1.85 cfs. (*See* Exhibit D to the Campbell Aff.) Because quantity was already specified, Section 42-1427’s requirement that the Director recommend previously undefined elements is inapplicable.

b. Section 42-1411 Simply Requires the Department to Define the Quantity Element, Not Annual Diversion Volume

Next, the Department argues that under Section 42-1411(2)(c), “the director’s report recommendation must include a quantity element.” (Supp. Dir. Rep., p. 5 (emphasis added).) That provision provides:

The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law: . . . (c) the quantity of water used describing the rate of water diversion . . . in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right

IDAHO CODE § 42-1411(2)(c) (emphasis added).

Again, as has been discussed with regard to Sections 42-1409 and 42-1427, this provision does not require the Department to impose an annual diversion volume limitation on the Water Right because it states that the quantity element shall be expressed in terms of cubic feet per second “or” acre-feet per year. *Id.* The license on which the Water Right is based already had the quantity element expressed in cubic feet per second.

And, as Mr. Shaff admits in his deposition transcript, the licensed diversion rate of 1.85 cfs is easily converted into an annual volume limitation of 903 acre-feet per year. (Shaff Dep. 107:4-107:13.) Accordingly, the Department cannot rely upon the authority under Section 42-1411(2)(c) to define quantity “as necessary for the proper administration of the water right,” because the Water Right has always been limited to the withdrawal of no more than 903 acre-feet per year.

c. Section 42-1401B Cannot Be Applied Retroactively, and Does Not Apply Because the Department Does Not Use “Uniform Parameters” for Quantifying Beneficial Use

The Department also notes that pursuant to Section 42-1401B(1), “[t]he Director is charged with making recommendations to the extent of beneficial use and is specifically authorized to ‘use uniform parameters for quantification of beneficial use.’” (Supp. Dir. Rep., p. 5.) As an initial matter, it should be noted that Section 42-1401B was enacted in 1994, S.L. 1994, ch. 454, § 3, and was therefore not in effect when the Tluceks filed their amended claim to the Water Right on August 8, 1990. (*See* Supp. Dir. Rep., p. 1.) Therefore, reliance upon that statute constitutes the retroactive application of the statute to the Water Right in violation of the Idaho Code and the Idaho Constitution.

Under Idaho law, “[n]o part of [Idaho’s statutory code] is retroactive unless expressly so declared.” IDAHO CODE § 73-101; *see also City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983). Simply put, there is nothing in the legislation

enacting Section 42-1401B indicating that it should be applied retroactively to a previously filed claim. *See* IDAHO CODE § 42-1401B; S.L. 1994, ch. 454. In addition, in Idaho, the retroactive application of a statute is impermissible when it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past.” *Ohlinger v. U. S.*, 135 F. Supp. 40, 42 (D.C. Idaho 1955) (citation omitted). *See also I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001); *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981). Use of Section 42-1401B to impose the new annual diversion volume on the Tluceks’ Water Right certainly “impairs vested rights” because it is a new restriction upon the Tluceks’ use of that right. Again, the state issued the license to the Water Right in 1967, and the Tluceks filed their amended claim to the Water Right in 1990—both well before the enactment of Section 42-1401B. That statute cannot, therefore, be used to impose a new, restrictive condition on that right.

The Department’s reliance upon Section 42-1401B is also ineffective because it most certainly has not used “uniform parameters” for quantifying beneficial use as the statute itself requires. For example, it is the Department’s policy to impose annual diversion volume limits on irrigation water rights from groundwater, even if the original license did not have any such limitation. *See* Claims Investigation Manual, ch. 6, pp. 2-3 (attached as Exhibit 3 to the Tuthill Dep., which is attached as Exhibit B to the Campbell Aff.) (“[t]he agent should recommend an annual volume for all groundwater irrigation rights”). By contrast, it is the Department’s policy not to impose annual diversion volume limits on municipal water rights from groundwater, unless such a limit was included in the previous license. *Id* at ch. 6, p. 3

("[m]unicipal water rights should not be recommended with an annual volume unless contained in a license, transfer or reasonable decree").

The withdrawal of a certain volume of water from an aquifer has the same effect upon that water resource regardless of the use designated on the water right. And, one could even argue that the withdrawal of a certain amount of groundwater for irrigation purposes has less effect upon the water source than the withdrawal of the same amount for municipal purposes, because some of the irrigation water seeps back into the aquifer. Moreover, as the Department acknowledges, water rights that are designated with a municipal purpose of use include an irrigation component for potable water that is used to irrigate lawns:

Q. . . . You indicated that municipal water rights do not have an annual diversion volume in the recommendations unless they had that element in licenses; is that correct?

A. Correct.

Q. And municipal water rights include irrigation; correct?

A. They may.

* * *

May somebody irrigate their lawn with the potable water? Yes, they may. I do.

Q. So that is irrigation; right?

A. It is irrigation. Yes, sir.

(Shaff Dep., 115:14-115:21, 116:7-116:10 (emphasis added).)

Despite these factors, the Department's policy is to impose annual diversion volume limits on the rights that are designated with a purpose of use of "irrigation," but not on rights that are designated as "municipal." Far from being a "uniform parameter," annual

diversion volume limits appear to be applied arbitrarily by the Department, which vitiates any such authority possibly provided by Section 42-1401B.

D. The Department's Internal Policies Have Not Been Formally Adopted and Therefore Lack Legal Force

As the previous sections of this Brief have explained, the Department lacked statutory authority to use the SRBA to impose a new restrictive annual diversion volume limitation on the Tluceks' Water Right. And, importantly, the Department has not promulgated any rules or regulations that could provide such authority in the SRBA. To the contrary, as the Shaff and Tuthill depositions demonstrate, the primary support relied upon by the Department are internal guidances and memoranda. Specifically, the Department relies upon the 1990 Claims Investigation Manual, the Updated Claims Investigation Manual (1999), the Operations Division Administrator's Memorandum (Dunn, Apr. 7, 1975), the Administrator's Memorandum (Young, Nov. 5, 1979), and the Administrative Memorandum (Saxton, June 14, 1979). (*See, e.g.,* Supp. Dir. Rep. p. 4; Shaff Dep. 42:23-43:11, 47:2-47:14, 68:15-68:17; Tuthill Dep. 11:9-11:21, 29:25-30:5, 39:8-40:21.)

In this regard, it is important to emphasize that the Department policies relied on in support of such limitations do not represent persuasive authority, because they are merely internal agency guidelines, and not rules pursuant to the Idaho Administrative Procedure Act. *See* IDAHO CODE § 67-5201(19)(b)(iii) (excluding intra-agency memoranda from definition of rule). While Idaho case law provides little discussion regarding the weight of authority given to such agency guidelines, the Idaho Administrative Procedure Act is analogous to the federal Administrative Procedure Act, and federal case law addressing similar issues provides helpful guidance for this Court.

The U.S. Supreme Court has held that agency statutory interpretations “contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law,” are entitled only to “respect”—not to the substantial deference that is generally accorded to rulemakings. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000); *see also Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 2027 (1995) (an “internal agency guideline” is only entitled to “some deference.”). In addition, both Idaho and federal courts have firmly established that even properly promulgated administrative rules that have undergone notice and comment proceedings are subject to judicial review and interpretation, because “[i]t is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law.” *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (citing *J.R. Simplot Co. v. Tax Comm’n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991)) (emphasis added); *see also Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 177, 2 L. Ed. 60, 73 (1803).

In the present case, the Department acknowledges that it did not adopt the internal policies relied upon to support the inclusion of an annual diversion volume limitation as official rules pursuant to the Idaho Administrative Procedure Act. (Shaff Dep., 72:1-72:11, 72:18-73:1; Tuthill Dep., 20:19-20:23.) The only instance in which similar policies regarding annual diversion volume limitations have been adopted as official rules is in the Beneficial Use Examination Rules, which are inapplicable to the present case because they apply only to beneficial use field examinations conducted for new water right applications. (Tuthill Dep., 11:25-12:6); IDAPA 37.03.02. In addition, the Department’s Adjudication Rules, which govern the SRBA, do not have a provision requiring the inclusion of a volumetric limitation. (Shaff Dep., 101:5-101:6); IDAPA 37.03.01.

In summary, the Department's internal policies do not represent official administrative rules and have little if any persuasive authority and have no binding effect on the Tluceks or this Court.

E. The Department Mischaracterizes the Effects of Invalidating the Annual Diversion Volume Limitation

In the Supplemental Director's Report, the Department makes a couple of arguments in support of its inclusion of the annual diversion volume limitation that are based upon practical considerations. However, neither of these arguments has merit. First, the Department argues that inclusion of this limitation is necessary for water resource administration purposes because it is necessary to define the maximum volume per year that can be withdrawn from the groundwater resource. (Supp. Dir. Rep., p. 6.) As this Brief has already explained, however, this argument is disingenuous because a diversion rate expressed in cubic feet per second is easily converted into an annual diversion volume expressed in acre feet per year. So, even though the original license for the Water Right did not include an annual diversion volume limitation, there has in reality always been one on the Water Right.

Second, the Department argues that a ruling by this Court invalidating the annual diversion volume limitation on the Tluceks' Water Right would open up to re-examination hundreds of partial decrees that have already been issued. (Supp. Dir. Rep., p. 7.) As an initial matter, it is important to clarify that the Tluceks are not bound by those prior proceedings. Perhaps if this precise issue had already been litigated and decided, the Department could argue that *stare decisis* should preclude this challenge. However, neither the Tluceks nor their counsel are aware of any such prior resolution.

And, to address the Department's concerns more directly, resolution of this particular subcase would not subject previous partial decrees to re-examination because doing so

would be barred by the rules of procedure and *res judicata* principles. Water right claimants for whom partial decrees have already been issued are bound by the terms of those decrees, whether they challenged the inclusion of an annual diversion volume limitation or not. Section 14(d) of this Court's Administrative Order 1 provides:

Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b). Partial decrees are final judgments and cannot be modified by an administrative proceeding except as provided in I.C. § 42-222.

AO1 § 14(d) (emphasis added).

Rule 60(a) is only available to correct “[c]lerical mistakes” in partial decrees and therefore would not be a proper means for challenging the inclusion of an annual diversion volume limitation. Rule 60(b) may be used to correct partial decrees under certain limited circumstances, and is available only within 6 months after the issuance of the partial decree. Moreover, because partial decrees are “final judgments” pursuant to AO1, *res judicata* would bar a claimant’s objection to an annual diversion volume limitation contained in a partial decree, because such an objection should have been raised prior to the issuance of that decree. *See, e.g., U.S. Bank Nat’l Ass’n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000) (“[i]t is ‘well established’ in Idaho law that ‘in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit’”). Therefore, the Department’s concern regarding the potential re-examination of previously issued partial decrees is totally unfounded.

F. The Department Should Not Be Allowed to File a Responsive Brief Because It Is Not a Party to the Subcase

The Tluceks object to the filing of any responsive documents in this matter by the Department because, according to Idaho statute, the Department is not a party to the SRBA.

Idaho Code Section 42-4101B specifically provides:

The director's role under this chapter is as an independent expert and technical assistant. . . . The director shall not be a party to an adjudication.

IDAHO CODE § 42-4101B (emphasis added).

Pursuant to Idaho Rule of Civil Procedure 56(c), only an “adverse party” may respond to a motion for summary judgment. Therefore, the Department is specifically prohibited by statute and rule from filing a response to the Tluceks’ Motion for Summary Judgment.

Similarly, Section 10(k) of AO1 allows “[a]ny party to the adjudication who is not a party to a subcase [to] seek leave to participate in a subcase by filing a timely *Motion to Participate*,” which this Court treats as a motion to intervene under Idaho Rule of Civil Procedure 24. Again, because the Idaho Legislature has specifically stated in Idaho Section 42-1401B that the Department is not a party to an adjudication, the Department cannot seek leave to participate pursuant to Section 10(k) of AO1.

In summary, there is simply no legal basis for allowing the Department to file any responsive documents to the Tluceks’ Motion for Summary Judgment. Therefore, this Court should not consider any such responses filed by the Department.

V. CONCLUSION

In summary, this Court may decide this case as a matter of law, because there are no disputed issues of fact. As this Brief has explained, the Department lacks legal authority to impose a new, restrictive annual diversion volume limitation on the Tluceks’ Water Right

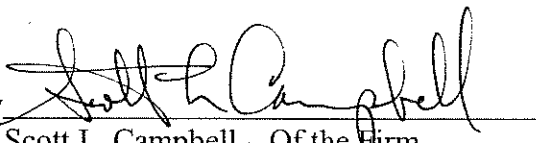
because it is represented by a water right license which, according to Section 42-220, is “binding upon the state” and constitutes “prima facie evidence as to such right.” Pursuant to this Court’s prior decisions, the Department may not use the SRBA to impose new restrictions on water rights previously established by license.

Perhaps the Department’s inclusion of this new limitation would be appropriate if it were based upon the Tluceks’ use of water after the license was issued. However, this is simply not the case. As this Brief has established, and based upon the testimony of multiple Department employees, the Department conducted little if any factual investigation into the historical use of the Water Right. Instead, it imposed the new limitation on the Water Right based only upon its own internal guidelines and procedures that have not been formally adopted as law, rule, or regulation. And, the Supplemental Director’s Report provides no legal support for the Department’s position. That Report is a legal document prepared by attorneys, not a technical document prepared by experts, and therefore violates the Idaho Rules of Evidence.

Simply put, the Department has no factual or legal basis for imposing an annual diversion volume limitation on the Tluceks’ Water Right. The Tluceks respectfully request that this Court grant their Motion for Summary Judgment and invalidate the annual diversion volume limitation imposed on their Water Right.

DATED this 3rd day of January, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

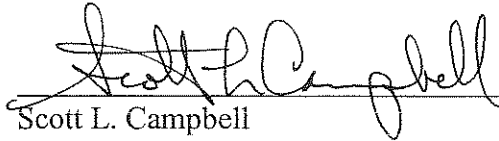
By 
Scott L. Campbell – Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January, 2008, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
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Boise, ID 83720-0098
Fax: 208-287-6700

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



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