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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 Nos. 63-02529 63-03323
 63-03324 63-10435

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

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Water right Claimants Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek, through undersigned counsel of record, hereby file this Brief in Support of Motion for Summary Judgment, pursuant to Idaho Rule of Civil Procedure 56(c) and Rules 1 and 10 of this Court's Administrative Order 1. This brief is supported by the Affidavit of Dylan B. Lawrence (the "Lawrence Affidavit") and the Affidavit of Scott N. King, P.E. (the "King Affidavit"), filed contemporaneously herewith.

I. INTRODUCTION

Idaho Code Section 42-220 specifically states that water right licenses "shall be binding upon the state." This Court, in its Facility Volume decision, relied upon Section 42-220 to invalidate new facility volume limitations on previously-licensed water rights that did not include such limitations. Essentially, the Court reasoned that, given the prohibition of Section 42-220, the SRBA was intended to catalog existing water right licenses, not to impose new restrictions on existing licenses. Therefore, the Idaho Department of Water Resources (the "Department" or "IDWR") could insert facility volumes on those water rights in the SRBA, but only for informational purposes—*not* as new restrictions on the use of those water rights.

Despite the legislative prohibition of Section 42-220, and this Court's confirmation of and reliance upon that statute in Facility Volume, IDWR included annual diversion volume limitations in all of the Director's Reports for these water rights. With one minor exception, all of the water rights involved in this proceeding are based upon previous licenses that do not include an annual diversion volume limitation, in violation of Section 42-220 and the Facility Volume Case.

More fundamentally, Idaho Code Section 42-1401B specifically states that, “[t]he director [of IDWR] shall not be a party to an adjudication.” In this regard, the record in this proceeding demonstrates that the policy of including annual diversion volumes on previously-licensed water rights was developed by IDWR, and that the State of Idaho filed responses in these subcases on behalf of IDWR in order to promote that policy. This violates Section 42-1401B. Therefore, the responses filed by the State of Idaho should be dismissed, and these subcases should all proceed as one-party subcases.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. General Description And Background To This Consolidated Proceeding

All of the water rights involved in this proceeding are originally based upon water right licenses previously issued by the Department. In all but one instance,¹ all of these licenses express the quantity element in terms of cfs, lacking any express reference to volume-based limitations. Based upon these licenses, the Claimants filed claims in the SRBA, none of which claimed annual diversion volume as an element.

However, in each of these subcases, the Department’s Director’s Report contains an annual diversion volume limitation. In all but one of these subcases,² the annual diversion volume limitation is based upon a standard developed by the Department, limiting all of the rights to the irrigation of 4.5 acre-feet of water per acre per year (hereinafter referred to generally as the 4.5 AFA standard).

¹ Discussed in more detail in Section II.B.4 of this Brief.

² Discussed in more detail in Section II.B.1 of this Brief.

In all of these subcases, the Claimants filed objections to the inclusion of these annual diversion volume limitations, and the State of Idaho filed responses on that discrete issue. For the sake of efficiency, the Claimants and the State agreed to consolidate these subcases for the specific purpose of resolving whether the Department has the legal authority to include annual diversion volume limitations upon these water rights (Joint Stip. and Mot. for Order Governing Consol. Proc. of Oct. 2, 2008), which the Court approved. (Order Granting Joint Stip. and Mot. for Order Governing Consol. Proc. of Nov. 3, 2008.)

B. Description Of The Water Rights Involved In This Consolidated Proceeding

1. Water Right 63-02529

The Department issued the underlying license for water right 63-02529 on or about February 6, 1943. Lawrence Aff., ¶ 2, Ex. A. The quantity element specified in that license is 87.1 cfs³ of water. *Id.* There are no other express limitations upon the quantity of water that may be used under that water right. *Id.*

On or about March 1, 2005, Pioneer Irrigation District filed its Amended Notice of Claim to water right 63-02529. Lawrence Aff., ¶ 3, Ex. B. In accordance with the license, Pioneer claimed a quantity of 87.1 cfs of water. *Id.* Pioneer did not claim an annual diversion volume. *Id.*

On or about December 14, 2006, the Department issued its Director's Report for water right 63-02529. Lawrence Aff., ¶ 4, Ex. C. The quantity element expressed in that Director's Report consists of the licensed and claimed diversion rate of 87.1 cfs, as well as a new annual diversion limitation of 44,918.3 AFY.⁴ *Id.* That limitation was calculated by multiplying

³ As used in this brief, "cfs" refers to "cubic feet per second."

⁴ As used in this brief, "AFY" refers to "acre-feet per year."

the original diversion rate of 87.1 cfs by the conversion factor of 1.9835 AFD⁵/cfs and by the 260-day period of use. Pioneer timely objected to the inclusion of that new annual diversion volume limitation. (Standard Form 1 Objection of June 19, 2007 filed by Pioneer Irrigation District, Subcase No. 63-02529.)

2. Water Right 63-03323

The Department issued the underlying license for water right 63-03323 on or about February 11, 1965. Lawrence Aff., ¶ 5, Ex. D. The quantity element specified in that license is 2.4 cfs of water. *Id.* There are no other express limitations upon the quantity of water that may be used under that water right. *Id.* The license also authorizes the irrigation of up to 247 acres.

On or about October 12, 2006, Jerry L. and Mary Louise Tlucek filed their Notice of Claim to water right 63-03323. Lawrence Aff., ¶ 6, Ex. E. In accordance with the license, the Tluceks claimed a quantity of 2.4 cfs of water. *Id.* They also claimed an expanded irrigated place of use of 285.5 acres, based upon an accomplished transfer pursuant to Idaho Code Section 42-1425. *Id.* They did not claim an annual diversion volume. *Id.*

On or about December 14, 2006, the Department issued its Director's Report for water right 63-03323. Lawrence Aff., ¶ 7, Ex. F. That Director's Report recommends a permissible place of use of 285 acres, limited to the irrigation of 247 acres in a single irrigation season. *Id.* The quantity element expressed in that Director's Report consists of the licensed and claimed diversion rate of 2.4 cfs, as well as a new annual diversion limitation of 1,111.5 AFY. *Id.* The Tluceks timely objected to the inclusion of that new annual diversion volume. *See*

⁵ As used in this brief, "AFD" refers to "acre-feet per day."

Standard Form 1 Objection of June 19, 2007, filed by Jerry L. and Mary Lou Tlucek, Subcase No. 63-03323.

The new annual diversion volume limitation of 1,111.5 AFY was calculated by multiplying the 247-acre place of use by the Department's standard of 4.5 acre-feet per acre per year. Converting the licensed diversion rate into AFY would have resulted in an annual diversion volume of 1,237.7 AFY (2.4 cfs x 1.9835 AFD/cfs x 260 days).

3. Water Right 63-03324

The Department issued the underlying license for water right 63-03324 on or about February 11, 1965. Lawrence Aff., ¶ 8, Ex. G. The quantity element specified in that license is 2.03 cfs of water. *Id.* There are no other express limitations upon the quantity of water that may be used under that water right. *Id.* The license also authorizes the irrigation of up to 247 acres.

On or about October 12, 2006, Jerry L. and Mary Louise Tlucek filed their Notice of Claim to water right 63-03324. Lawrence Aff., ¶ 9, Ex. H. In accordance with the license, the Tluceks claimed a quantity of 2.03 cfs of water. *Id.* They also claimed an expanded irrigated place of use of 285.5 acres, based upon an accomplished transfer pursuant to Idaho Code Section 42-1425. *Id.* They did not claim an annual diversion volume. *Id.*

On or about December 14, 2006, the Department issued its Director's Report for water right 63-03324. Lawrence Aff., ¶ 10, Ex. I. That Director's Report recommends a permissible place of use of 285 acres, limited to the irrigation of 247 acres in a single irrigation season. *Id.* The quantity element expressed in that Director's Report consists of the licensed and claimed diversion rate of 2.03 cfs, as well as a new annual diversion limitation of 1,111.5 AFY. *Id.* The Tluceks timely objected to the inclusion of that new annual diversion volume. *See*

Standard Form 1 Objection of June 19, 2007, filed by Jerry L. and Mary Lou Tluczek, Subcase No. 63-03324.

The new annual diversion volume limitation was calculated by multiplying the 247-acre place of use by the Department's standard of 4.5 acre-feet per acre per year. Converting the licensed diversion rate into AFY would have resulted in an annual diversion volume of 1,046.9 AFY (2.03 cfs x 1.9835 AFD/cfs x 260 days). According to the Department, this was error, and the annual diversion volume should have been recommended as the lower of these two figures, 1,046.9 AFY.

4. Water Right 63-10435

The Department issued the underlying license for water right 63-10435 on or about December 12, 1990. Lawrence Aff., ¶ 11, Ex. J. The quantity element specified in that license consists of a maximum diversion rate of 0.74 cfs and an annual diversion volume limitation of 306.0 acre-feet. *Id.* The license also authorizes the irrigation of up to 68 acres. *Id.*

The annual diversion volume limitation of 306.0 acre-feet was calculated by multiplying the 68-acre place of use by the Department's standard of 4.5 acre-feet per acre per year. Converting the diversion rate expressed in cfs into AFY would have resulted in an annual diversion volume of 361.1 AFY (0.74 cfs x 1.9835 AFD/cfs x 246 days).

In addition to the water right terms already discussed, Condition 1 of the license also contains the following language:

The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

Id.

On or about September 14, 2006, Byron, Kevin, Rebekah, and Shelley Tlucek filed their Notice of Claim to water right 63-10435. Lawrence Aff., ¶ 12, Ex. K. In accordance with the license, the Tluceks claimed a quantity of 0.74 cfs of water and an irrigated place of use of 68 acres. *Id.* They did not claim an annual diversion volume. *Id.*

On or about December 14, 2006, the Department issued its Director's Report for water right 63-10435. Lawrence Aff., ¶ 13, Ex. L. Consistent with the license and claim, the Director's Report consists of an irrigated place of use of 68 acres. *Id.* The quantity element expressed in that Director's Report consists of the licensed and claimed diversion rate of 0.74 cfs, as well as the licensed annual diversion limitation of 306.0 AFY. *Id.* However, the Director's Report does not contain the above-quoted language from Condition 1 of the license. *Id.* Therefore, the Tluceks timely objected to the inclusion of the annual diversion volume limitation. *See* Standard Form 1 Objection of June 19, 2007, filed by Rebekah, Kevin, Shelley & Byron Tlucek, Subcase No. 63-10435.

III. STANDARD OF REVIEW

The Claimants file their 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 Claimants' arguments will show that the Department's inclusion of an annual diversion volume limitation in the Director's Report recommendation for the their water rights 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. LEGAL ARGUMENT

A. The Responses Filed By The State Of Idaho Are Barred By The Procedural Statutes Governing The SRBA

Idaho Code Section 42-1401B defines the role of the Director and IDWR in the SRBA. Subsection (3) of that statute specifically states that, "[t]he director *shall not be a party* to an adjudication." IDAHO CODE § 42-1401B(3) (emphasis added). This is a plain, unequivocal expression of the Idaho Legislature's intent that IDWR limit its role in the adjudication to that of "an *independent* expert and technical assistant," *id.* at § 42-1401B(1), and that IDWR not act as a "party" in litigation by filing objections and responses and taking legal positions adverse to Idaho's citizens and water users. *See* Administrative Order 1, Rule 2(p) (defining "party to a subcase" to include claimants, objectors, respondents, and other parties granted leave to participate). As the Idaho Supreme Court has stated:

The director is really a disinterested party. The only interest the director has is to see that all rights are accurately adjudicated. *The director does not oppose a claim, trying to subvert a valid claim.* Nor does the director stand to gain if a claim is invalidated.

In Re SRBA, 128 Idaho 246, 257 (1995) (quoting *Idaho Dep't of Water Resources v. U.S.*, 122 Idaho 116, 122-23 (1992)) (emphasis added).

The record in this consolidated proceeding establishes not only that IDWR developed the policy for imposing ADV limitations on licensed water rights, but that the "State

of Idaho” filed its responses in these subcases on behalf of IDWR. The Claimants in this proceeding originally noticed two depositions: one of the State of Idaho, as the respondent, and one of IDWR, as the independent technical expert. (Not. of Rule 30(b)(6) Dep. Duces Tecum of IDWR; Not. of Rule 30(b)(6) Dep. Duces Tecum of State of Idaho.) The State of Idaho filed a motion for a protective order on the basis that only one of those depositions would be necessary. (Mot. for Prot. Order and Req. for Expedited Consideration.) In its brief in support of that motion, the State of Idaho specifically states that, “[t]he State intends to appear [in these subcases] solely for the purpose of presenting legal argument in support of the policy set forth in the Director’s recommendations for these water rights.” (Br. in Supp. of Idaho’s Mot. for Prot. Order, p. 5.) This is consistent with the deposition testimony of Director Tuthill, in which he describes IDWR’s role in these subcases:

A. Well, resolution of an objection is unique to that objection. We have a huge variety of resolutions that are available. If the objection is relative to a policy, then the policy-maker is involved.

If the resolution is related to a factual matter, then the fact-finder is involved. In these particular cases, because we are discussing a policy matter, the policy-makers are more involved.

Q. Can you describe who those policy-makers are? I mean, who are we talking about?

A. Well, in this case, because this is a fundamental policy of the agency, it is appropriate for the Director to be involved. I am not involved in many objection resolutions.

Q. Right. I imagine, when it comes to whether somebody’s place of use overlaps by .2 acres with federal land, that is not something you need to get involved in.

In this case, is it fair to say that you are the decision-maker, as far as pursuing these annual diversion volume limitations?

A. Yes.

Tuthill Dep., p. 63, LL. 4-25 (emphasis added).⁶

Simply put, the record demonstrates that IDWR is attempting an unlawful “end run” around Section 42-1401B by having the Attorney General’s office file responses and engage in litigation in support of IDWR’s policy regarding annual diversion volumes. When the Idaho Legislature directed that IDWR “shall not be a party” to the SRBA, it did not intend for IDWR to still *act* as a party, as it has in these subcases. The record demonstrates that the responses filed by the “State of Idaho” are really on behalf of IDWR. This violates Section 42-1401B and, therefore, those responses should be dismissed, and these subcases should proceed as one-party subcases.

B. IDWR Lacks Authority To Impose New ADVs In The SRBA On Previously Licensed Water Rights

1. Section 42-220 States That Water Right Licenses Are “Binding Upon The State”

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*

⁶ Relevant excerpts of the deposition of IDWR Director David R. Tuthill Jr. are attached to the Lawrence Affidavit as Exhibit M.

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; or (3) “for other reasons set forth in this title.” *Id.* There has been no allegation that any of the Claimants have failed to pay any applicable water right assessments, so the remainder of this section will discuss the remaining two potential bases for restricting a water right license.

a. “Beneficial Use” Is Not A Proper Basis For Imposing The Limitation Because The Department Has Not Investigated The Claimants’ Historical Use Of Water

Simply put, there has been no allegation or demonstration that the Claimants’ full use of their water rights for irrigation purposes has not been a “beneficial use” of those rights. The Tuthill deposition demonstrates that the Department engaged in little if any factual investigation into the Claimants’ historical water use practices during its claim review and recommendation process. More specifically, in describing the Department’s actions in preparing the recommendations for the water rights, Mr. Tuthill stated in his deposition:

So my expectation is that field examinations were not conducted on any of these rights at issue. I do not see evidence of a field exam in the files.

Tuthill Dep., p. 34, LL. 2-4.

Presumably, the Department and the State assert that inclusion of the annual diversion volume limitation is necessary to quantify the beneficial use of the water rights. However, this testimony demonstrates that the annual diversion volume limitations were imposed on the Claimants’ water rights as a matter of routine and not based upon any factual investigations into the Claimants’ historical beneficial use of water in accordance with their licenses. Therefore, “beneficial use” as that phrase is used in Section 42-220, is not a legitimate basis for restricting these water rights.

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 rights when it issued the licenses beginning in 1943, 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 rights after the fact.

And, importantly, even if an annual diversion volume limitation is not specifically delineated in the water rights, the Claimants 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”); IDAHO CODE § 42-220 (“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”). Therefore, inclusion of the annual diversion volume limitation is unnecessary, because beneficial use requirements apply to every water right in Idaho.

While the license for water right 63-10435 did include an annual diversion volume limitation, as Section II.B.4 of this brief has explained, that license also included specific language providing flexibility for the adjustment of that annual diversion volume. That language was not carried forward by IDWR in its Director’s Report for that water right. Therefore, Section 42-220 requires the annual diversion volume on that water right to be removed, as well.

**b. There Are No “Other Reasons Set Forth In This Title”
Authorizing The Department To Impose The Limitation**

As the remainder 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 annual diversion volume limitations on the Claimants’ water rights. The only remaining basis in “this title” for imposing these restrictive conditions 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 Director's testimony demonstrates that there was no fact-based inquiry into the use of water by the Claimants during the SRBA claim investigation process.

2. The SRBA Court's Opinion In The Facility Volume Case Prohibits New Restrictions On Previous Water Right Licenses

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 right 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.

Any diversion rate expressed in cubic feet per second is easily converted into an annual diversion volume expressed in acre-feet per year. In the case of water rights 63-03323 and 63-10435, as this Brief has already explained, the recommended ADVs are less than the ADVs derived from converting cfs into AFY. Accordingly, it cannot be disputed that the imposition of the new limitation impermissibly "restrict[s] the use of the license[s]" pursuant to the Facility Volume Order.

3. Idaho's Statutes Governing Adjudication Claims And Recommendations Do Not Require IDWR To Recommend ADVs

a. Sections 42-1409 And 42-1427 Simply Require The Department To Define The Quantity Element, Not Annual Diversion Volume

Section 42-1427(2) 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 licenses for the water rights at issue already included a quantity element expressed in cfs. 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

Section 42-1411(2)(c) 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 rights because it states that the quantity element shall be expressed in terms of cubic feet per second “or” acre-feet per year. *Id.* The licenses on which the water rights are based already had the quantity element expressed in cubic feet per second.

And, as has already been explained, the licensed diversion rates are easily converted into annual volume limitations. 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 rights have always been limited to the withdrawal of no more than a given volume of water per year.

4. Section 42-1401B Does Not Provide IDWR With Authority To Impose New Restrictions

a. Section 42-1401B Cannot Be Applied Retroactively

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 licenses for these water rights were issued. Therefore, reliance upon that statute to support inclusion of annual diversion

limitations on these water rights would constitute the retroactive application of the statute to these water rights 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 Claimants’ water rights certainly “impairs vested rights” because it is a new restriction upon the use of those rights, which are represented by water right licenses that are considered real property rights under Idaho law. That statute cannot, therefore, be used to impose a new, restrictive condition on those rights.

b. The Department’s Standard Does Not Quantify Beneficial Use

As this brief has already established, the annual diversion volumes imposed by IDWR in most of these subcases are based upon IDWR’s 4.5 AFA standard for Basin 63. However, this standard is an unreliable metric for quantifying beneficial use under Section 42-1401B, and should therefore not provide a basis for imposing a new restriction on previously-licensed water rights.

During his deposition, Director Tuthill repeatedly testified to his belief that the 4.5 AFA standard is more than adequate for irrigation purposes in Basin 63. For example:

A. Well, we have a computational ability to measure evapotranspiration. So we can remotely measure the amount of water actually consumed by the crops.

We have not done that in this area, but we have done that in many areas. Our experience, through those remote computations and matching that information with *on-the-ground measurements, which we do in some areas*, and comparing those data with the amounts of water that we have allowed for diversion volumes, has led to an understanding that the 4.5 acre-feet per acre that we allow for an area like this, in my experience, always overstates the amount of water that is actually diverted from the source for the beneficial use.

It could be that there is an exception because we have not looked at every system. But every system that I have looked at has resulted in a determination that the amount allowed for beneficial use is a very generous cap on that beneficial use.

It would be highly unusual to see an amount diverted which exceeds that cap that we have identified. *So we have not found a need to go out and measure and compute.*

Tuthill Dep., p. 35, L. 5 – p. 36, L. 1.

Further, Director Tuthill stated:

So I would think it highly unlikely that a scenario could be envisioned where more than 4.5 acre-feet per acre would be required.

Tuthill Dep., p. 59, LL. 23-25.

However, and critically, this underlying assumption regarding the flexibility of the 4.5 AFA standard is flawed. Expert testimony demonstrates that there are scenarios under which a Basin 63 water user can beneficially use more than 4.5 AFA, even when utilizing reasonable irrigation efficiencies. *See King Aff.*, ¶¶ 4-15. If the climate is indeed becoming

hotter and drier over time as many experts predict, then the 4.5 AFA standard is even less reliable and more restrictive upon the real property rights of the Claimants.

To the contrary, the 4.5 AFA standard does *not* quantify historical beneficial use. Rather, at IDWR's own admission, the underlying purpose of the 4.5 AFA standard is to force water users to adopt more efficient irrigation systems into the future—a concept that is totally antithetical to the SRBA, which is supposed to catalog water rights as they existed as of the commencement of the adjudication in 1987. This is illustrated by the following exchange during the Director's deposition:

Q. It sounds like part of the goal—maybe most of the goal is to promote more efficient irrigation systems. Is that a fair summary of the Department's ultimate purpose in including these?

A. Yes.

Tuthill Dep., p. 42, LL. 7-11.

The Director even tacitly admits that the 4.5 AFA standard does not necessarily provide enough water in all cases. The following exchange took place during Director Tuthill's deposition, which essentially explains that even under IDWR's assumptions about irrigation efficiency and crops, the 4.5 AFA standard will not provide sufficient water for irrigation in one out of every 10 years, based upon historical climate data:

I know you have said, on a number of occasions, that the 4.5-acre-foot-per-year standard, itself, is very conservative and that there is room for error and it will not usually act as an actual restriction on a water user.

As far as the climate data goes, is it geared towards trying to address, you know, the worst case scenario, as far as a real hot and dry year; or is it supposed to provide enough water for four out of five years? Nine out of ten years?

Can you answer that question, if I have articulated it in some reasonable way?

A. The period of use was originally computed on an 80 percentile basis. So March 15 to November 15 would be adequate, given the parameters identified for 80 percent of the time.

We moved to a broader data set and a 90 percentile computation, and that resulted in an extension of the period of time to March 1 as a start time and still November 15 as an end time. So that is based on a 90 percentile adequacy.

Tuthill Dep., p. 44, L. 22 – p. 45, L. 17.

c. Section 42-1401B Is Inapplicable Because The Department's ADVs Are Not Based Upon "Uniform Parameters"

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 (Lawrence Aff., ¶ 15, Ex. N). 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 recharges 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., p. 115, LL. 14-21; p. 116, LL. 7-10 (emphasis added).⁷

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. Simply put, there is no basis in Section 42-1401B for differentiating among uses in this manner; therefore, that statute cannot

⁷ This is an excerpt from the deposition of Donald V. Shaff, IDWR's Adjudication Bureau Chief, that took place on October 25, 2007, in subcase 63-03174. That subcase involved a similar challenge to annual diversion volume limitations, but settled on other grounds and prior to a judicial resolution of this issue. Therefore, in order to avoid having to re-depose Mr. Shaff, the parties stipulated that the portions of that deposition that deal with the policy behind imposing annual diversion volume limitations are relevant to this proceeding and may be relied upon by any of the parties in this proceeding. (Joint Stip. and Mot. for Order Governing Consol. Proceedings of Oct. 2, 2008, pp. 2-3.) That stipulation was approved by this Court. (Order Granting Joint Stip. and Mot. for Order Governing Consol. Proceedings of Nov. 3, 2008.). The quoted excerpts of that deposition are attached to the Lawrence Affidavit as Exhibit O.

provide the legal basis for IDWR's inclusion of annual diversion volume limitations on these water rights.

This inconsistency is further illustrated by IDWR's disparate treatment of groundwater and surface water rights in different areas of the state. According to Director Tuthill:

The reason that we removed the acre-foot amount from the surface diversions in the Lemhi was that those diversions could not achieve that level of efficiency.

The efficiencies might be 25 percent with the long delivery systems and ditch losses, et cetera. So the acre-foot amount there was insufficient for the existing systems.

For a groundwater system in the Boise River Basin, there is an expectation of efficient use. Having a diversion volume does require that water be delivered with at least that level of efficiency.

Tuthill Dep., p. 41, LL. 10-20.

During further discussion regarding IDWR's decision not to include annual diversion volumes on surface water rights in the Lemhi Basin, the following exchange took place:

Q. . . . You have said a couple of times, I believe, in the context of the Lemhi Adjudication and then, maybe, just in general, the annual diversion volumes are not included on recommendations of surface diversions because they cannot meet the efficiency.

Why doesn't the Department simply have a standard that is more forgiving for surface systems and include that?

I mean, what makes it fundamentally different about groundwater diversions that there still needs to be an annual diversion volume limitation and not one on surface sources, aside from the fact that they are different irrigation efficiencies?

A. My understanding of how this system grew and how the policy evolved in Idaho is that we acknowledge that, historically, rivers were diverted, canals were built with horses, and canal losses were great.

While, on one hand, that provides for a very inefficient system, on the other hand, it provides for groundwater recharge that is hugely valuable around the state.

So as a state policy, we have chosen not to restrict those types of diversions, as evidenced in the way we have adjudicated water rights, as we discussed, in the Lemhi, Payette, and the Snake River Basin.

So that leads to a standard relative to historic use of surface water that the state has chosen not to change and not -- or we have chosen not to force these systems to improve efficiency, recognizing that, on the other hand, on the other side of the coin, improved efficiency is less recharge to the groundwater systems.

Tuthill Dep., p. 51, L. 21 – p. 53, L. 2.

Again, Section 42-1401B does not differentiate between groundwater and surface water rights, nor does it establish different “expectation[s] of efficient use” in different areas of the state. Therefore, IDWR’s decision to impose annual diversion volume limitations on these rights cannot have been based upon Section 42-1401B, because that statute does not discuss or differentiate between these various factors.

d. ADVs Can Be Used For Informational Purposes, But Not As Restrictions

Again, Section 42-1401B simply provides IDWR with authority to “quantif[y]” beneficial use. Critically, this provision does not appear in Sections 42-1409 or 42-1411, the statutes which actually define the elements of water rights to be adjudicated in the SRBA. Based upon Section 42-220 and this Court’s holding in the Facility Volume case, the most reasonable interpretation of this provision is that it allows IDWR to quantify beneficial use for internal informational and planning purposes, but not as the basis for imposing new restrictions on

licensed water rights. Perhaps Section 42-1401B could even provide IDWR with the authority to impose annual diversion volume limitations on beneficial use claims and claims that are based upon old, incomplete judicial decrees.

However, given the explicit statement in Section 42-220 that water rights licenses “shall be binding upon the state,” the language of Section 42-1401B is not specific enough to “trump” Section 42-220. “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.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743 (1997) (citations omitted).

**e. Section 42-1401B Provides No Authority For Imposing An
ADV On The Pioneer Irrigation District Right**

Reliance upon Section 42-1401B to impose an annual diversion volume limitation on Pioneer Irrigation District’s water right 63-02529 makes even less sense. Pioneer is a water distribution entity required by statute to deliver water to the landowners within its boundaries for irrigation purposes. *See, e.g.*, IDAHO CODE § 43-316. In other words, it is the landowner, and not Pioneer, that actually applies the water for irrigation purposes.

Admittedly, as this brief has already explained, 63-02529 is unique among these subcases in that the annual diversion volume is based upon a simple conversion of cfs into AFY over the course of the 260-day irrigation season for Basin 63, rather than an application of the 4.5 AFA standard. The problem, however, is that IDWR has extended the irrigation season for Basin 63 in the past, and may do so again in the future:

Q. I think, in the previous deposition, you mentioned some updates [to the 4.5 AFA standard] in the 1996 to 1997 time frame. I do not think you and Scott [Campbell] really went into what those updates were. Can you summarize what the updates were that occurred in the late '90s?

...

A. What is happening is I am expecting that climate change will occur. We appear to be in climate change. I would expect that, over time, the season of use will perhaps lengthen some and that the growing units will perhaps modify some.

Tuthill Dep., p. 55, LL. 9-13; p. 59, LL. 7-11.

Once water right 63-02529 is decreed with the annual diversion volume limitation, that limitation is then forever a legally-binding restriction upon the use of that right. Knowing that seasons of use have been extended in the past, and may be extended again in the future, it makes little sense to impose a new annual diversion volume limitation upon that right, particularly where the owner is a water distribution entity with multiple water rights that are commingled for delivery to the landowners who actually apply that water for irrigation.

V. CONCLUSION

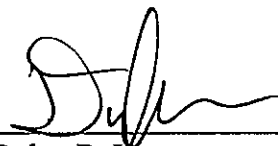
Pursuant to Idaho Code Section 42-1401B, “[t]he director [of IDWR] shall not be a party to an adjudication” such as the SRBA. Here, the State of Idaho filed responses on behalf of IDWR, in order to support IDWR’s imposition of annual diversion volume limitations on previously-licensed water rights. This violates Section 42-1401B. Therefore, the State’s responses in these subcases should be dismissed, and these subcases should then proceed as one-party subcases.

Further, Idaho Code Section 42-220 specifically states that water right licenses “shall be binding upon the state.” This Court, in its Facility Volume decision, relied upon Section 42-220 to invalidate new facility volume limitations on previously-licensed water rights that did not include such limitations. Here, with one minor exception, all of the water rights involved in this proceeding are based upon previous licenses that do not include an annual diversion volume limitation. This violates Section 42-220 and this Court’s Facility Volume

decision, and there is no other statutory authority for IDWR to impose annual diversion volume limits on these water rights. Therefore, these water rights should be decreed without annual diversion volume limitations as a binding part of the quantity element. To the extent annual diversion volumes remain on these water rights, they must remain for informational purposes only, and not as legally-binding terms of the water rights.

DATED this 11th day of March, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2009, 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:

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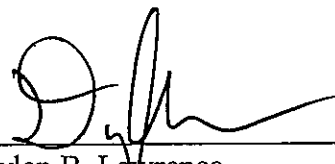
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