

RECEIVED

MAR 27 2009

DEPARTMENT OF
WATER RESOURCES

Attorneys for Claimants Pioneer Irrigation
District, Jerry L. Tlucek, Mary Lou Tlucek,
Shelly Tlucek, Byron Tlucek, Rebekah Tlucek,
and Kevin Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18946.0126

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

**RESPONSE IN OPPOSITION TO STATE OF
IDAHO'S MOTION FOR PARTIAL SUMMARY
JUDGMENT**

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 Response in Opposition to State of Idaho's Motion for Partial Summary
Judgment, pursuant to Idaho Rule of Civil Procedure 56(c) and this Court's Summary Judgment
Scheduling Order of November 3, 2008.

The State asks this Court to make two holdings:

1. That IDWR has the authority to add an annual diversion volume limitation to a licensed water right during the process of recommending that water right in a general stream adjudication even though the license did not include such a limitation when IDWR issued the water right license; and
2. That the Claimants' objection to the inclusion of an annual diversion volume limitation on the Director's Report for water right 63-10435 constitutes an impermissible collateral attack on the underlying license.

(State of Idaho's Mot. for Partial Summ. J., pp. 1-2.)

This Response will address each of these issues in turn.

I.

**IDWR DOES NOT HAVE AUTHORITY TO INCLUDE NEW
ANNUAL DIVERSION VOLUME LIMITATIONS IN THE
SRBA ON PREVIOUSLY LICENSED WATER RIGHTS**

**A. Idaho Code Section 42-1411 Does Not Grant IDWR With Authority To
Include Annual Diversion Volume Limitations On These Water Rights**

The State relies nearly exclusively on Idaho Code Section 42-1411 to support its position that IDWR has the authority to impose new annual diversion volume limitations on previously licensed water rights. (State's Br. in Supp., pp. 9-10.) As quoted by the State, Section 42-1411 provides in pertinent part:

(2) 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 *or*, in the case of an instream flow right, the rate of water flow 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).

While that provision does indeed refer to “annual diversion of volume,” the State fails to recognize the critical “or” that precedes that phrase. Distilled to its core language, Section 42-1411(2)(c) simply requires IDWR to include a quantity element in its Director’s Reports, expressed in terms of rate of water diversion “or” annual volume of diversion.

With the exception of 63-10435, all of these water right licenses already defined the quantity element in terms of rate of flow *only*. Accordingly, the plain language of Section 42-1411 does not provide IDWR with authority to impose a new annual diversion volume limitation in addition to rate of flow.

B. Idaho Code Section 42-220 Does Prohibit The Inclusion Of New Annual Diversion Volume Limitations On Previously Licensed Water Rights

1. The “Exceptions” Relied Upon By The State Do Not Provide IDWR With Authority To Impose New Annual Diversion Volume Limitations

The State argues that Idaho Code Section 42-220 does not prohibit IDWR from including new annual diversion volume limitations on previously licensed water rights, despite the fact that that statute specifically states that a water right license “shall be binding upon the state.” (State’s Br. in Supp., pp. 10-12.) In particular, the State relies upon two phrases from that statute that the State argues are applicable exceptions to this rule. (*Id.*, pp. 11-12.) As this Response will explain, neither of those phrases provides IDWR with the authority to impose annual diversion volumes on these water rights.

Again, Section 42-220 provides in its entirety:

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).

A careful reading of Section 42-220 is critical to understanding the weakness of the State's argument. As a textual matter, neither of the phrases relied upon by the State are actually enumerated exceptions to the requirement that licenses "shall be binding upon the state." Rather, each of the State's exceptions appear later in the statute, in different contexts. Critically, the first sentence of Section 42-220 states in its entirety that:

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.

IDAHO CODE § 42-220 (emphasis added).

Neither of the State's "exceptions" appear in this sentence. Rather, it is not until the next sentence of Section 42-220 that the first of the exceptions relied upon by the State appears. That sentence states:

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 ¹

IDAHO CODE § 42-220 (emphasis added).

So, the "for other reasons set forth in this title" language is not an exception to the rule that water right licenses "shall be binding upon the state." Instead, it is an exception to the statement that "[t]he right to continue the beneficial use of such waters shall never be denied nor prevented."

In this regard, examination of the only specifically enumerated exception to that same rule reveals that the Idaho Legislature did not intend for the second sentence of Section 42-220 to change the actual terms of an existing water right license. Essentially, this provision of Section 42-220 provides that the right to continue the beneficial use of water shall never be denied or prevented, unless the water right owner fails to pay assessments associated with the delivery or distribution of that right.

Critically, the failure to pay water right assessments does not result in some permanent restriction upon the use of that water right. It simply results in a suspension of deliveries until the assessments are paid. This is demonstrated by Idaho Code Section 42-617, which provides in pertinent part:

¹ The proviso relied upon by the State which follows will be discussed later in this Response.

Said water users at said meeting may also by resolution provide that no ditch, canal company, irrigation district or other water user shall have the right to demand and receive or to continue to receive any water and the watermaster shall not deliver water to any such user *until the amount due and payable from such user, as shown by the budget adopted at said meeting, has been paid.*

IDAHO CODE § 42-617 (emphasis added).

This language demonstrates that the failure to pay assessments simply suspends deliveries until the assessments are paid; it does not result in a permanent restriction upon the water right, or some change in the legal terms of the water right. As such, the Court should not presume that the other exception in this sentence—“or for other reasons set forth in this title”—was intended to provide IDWR with authority to impose new, permanent, restrictive terms upon a water right license. *See, e.g., State v. Hart*, 135 Idaho 827, 831 (2001) (“[o]ne of the maxims of statutory construction is the rule which holds that ‘where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated, usually designated the *ejusdem generis* rule’”). Yet, that is the interpretation of Section 42-220 being advanced by the State.

The other “exception” in Section 42-220 relied upon by the State is the statement that “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.” This is simply a restatement of the existing law in Idaho that water can never be used in excess of what can be applied to beneficial use. *See, e.g.,* 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”). The Claimants do not dispute that this is the case.

However, a restatement of the beneficial use requirement is not an authorization to impose new restrictions upon water right licenses under the guise of beneficial use. Simply put, there is no explicit authorization in Section 42-220 to impose new restrictions upon already licensed water rights.

2. The State's Analogy To Period Of Use Ignores That Period Of Use Is A Required Water Right Element

To support IDWR's inclusion of annual diversion volume limitations, the State analogizes to IDWR's inclusion of periods of use on three of the water rights for which the previous licenses did not specifically define period of use. This is not a valid analogy.

Idaho Code Section 42-1427 recognizes that some old water right licenses and decrees do not define all of the water right elements that are now required to be defined by Section 42-1411. Therefore, Section 42-1427 specifies that, for those now-required elements that were "not defined" in the old license or decree, IDWR may define those elements. This is a specific authority provided by Section 42-1427, and it is one that the Claimants do not challenge.

The distinction that the State fails to recognize is that the relevant element here—quantity—*was* already defined in the original licenses. Therefore, Section 42-1427 does not apply.

3. The State Ignores This Court's Facility Volume Decision

Perhaps the most important aspect of the State's analysis of Section 42-220 is its failure to discuss this Court's decision in the Facility Volume case. In *Re SRBA*, Subcase No. 36-02708, *et al.*, Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue (Dec. 29, 1999) (Wood J.). The Claimants specifically discussed that case in the brief in support of their motion for summary judgment. (Claimants' Br. in Supp. of Mot. for Summ. J., pp. 15-17.) The Claimants hereby specifically adopt and incorporate that

discussion into this Response. Therefore, it is unnecessary to repeat that analysis here in its entirety. To summarize, however, the Court in Facility Volume specifically relied upon Section 42-220 to invalidate new facility volume limitations imposed by IDWR on licensed water rights. This is very similar to the situation currently before this Court. However, the State has failed to discuss or distinguish that case, despite the fact that the State actually cites to it. (State's Br. in Supp., p. 12.)

II. THE CLAIMANTS OF WATER RIGHT 63-10435 ARE NOT COLLATERALLY ATTACKING THE WATER RIGHT LICENSE

The State asserts that the Claimants of water right 63-10435 are collaterally attacking the license for that water right, because an annual diversion volume was included on that license. (State's Br. in Supp., pp. 12-13.) What the State fails to recognize is that IDWR departed from the terms of that license when it issued its Director's Report.

While that license did indeed include an annual diversion volume, Condition 1 of that license provides that, "[t]he maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency." (State's Ex. 8.) Accordingly, there was flexibility specifically incorporated into the terms of that license that would have allowed for the "adjustment" of the annual diversion volume "to more accurately describe the beneficial use." That flexibility was not carried forward in IDWR's Director's Report. (State's Ex. 4.) Therefore, it is really IDWR that has collaterally attacked that license, not the Claimants.

III.
THE CLAIMANTS DISAGREE THAT A TRIAL IS NECESSARY
TO ADDRESS THE CORRECTNESS OF IDWR'S IRRIGATION
STANDARD OF 4.5 ACRE-FEET PER ACRE PER YEAR

The State suggests that a trial may be necessary to address the “correctness” of the 4.5 acre-feet per acre per year standard that forms the basis for the annual diversion volume limitations on three of these four water rights. To clarify, the Claimants do not agree that a trial on this standard is necessary.

The Claimants’ position is that IDWR does not have authority to impose annual diversion volume limitations on these water rights as new binding restrictions upon the quantity element of the rights and, therefore, that those annual diversion volumes should either be removed altogether, or adopted as non-binding remarks. This is perfectly consistent with the Court’s holding in the Facility Volume case. The Claimants do not challenge IDWR’s authority to include annual diversion volumes as non-binding remarks on the water rights for planning and administration purposes.

It is true that the Claimants raised technical issues with respect to the standard in its own summary judgment briefing. (Claimants’ Br. in Supp. of Mot. for Summ. J., pp. 20-23.) However, the Claimants’ purpose in identifying deficiencies in the standard is to demonstrate that it is an inappropriate standard to use as the basis for new, legally-binding restrictions on licensed water rights—not that the standard should not be used by IDWR altogether. Under these circumstances, it should not be necessary to have a trial to deal with the intricacies of the 4.5 acre-feet per acre per year standard.

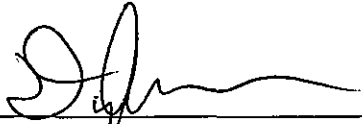
IV. CONCLUSION

Idaho Code Section 42-220 plainly states that a water right license “shall be binding upon the state.” This Court has relied upon that statute in its Facility Volume decision to invalidate new volume-based limitations on licensed water rights under very similar circumstances. Nothing in the State of Idaho’s brief refutes Section 42-220 or Facility Volume. The first “exception” cited by the State in its brief is not truly an exception to the rule that licenses “shall be binding upon the state,” and it certainly does not provide IDWR with specific authority to include new annual diversion volume limitations on licensed water rights. The second “exception” cited by the State is simply a restatement of the rule that water must be applied to a beneficial use. It also does not provide IDWR with specific authority to include new annual diversion volume limitations on licensed water rights.

In short, the State of Idaho has failed to identify any specific authority for IDWR to include new annual diversion volume limitations on these water rights. Further, the Claimants of 63-10435 are not collaterally attacking that license, because IDWR did not carry forward language in that license which provided flexibility to adjust the annual diversion volume when it issued its Director’s Report. Therefore, the State of Idaho’s Motion for Partial Summary Judgment should be denied.

DATED this 25th day of March, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By  _____

Dylan B. Lawrence – Of the Firm
Attorneys for Claimants Pioneer
Irrigation District, Jerry L. Tlucek,
MaryLou Tlucek, Shelly Tlucek, Byron
Tlucek, Rebekah Tlucek, and Kevin Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2009, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Representing: State of Idaho
David J. Barber
Office of the Attorney General
STATE OF IDAHO
700 West State Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Fax: (208) 854-8072

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

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

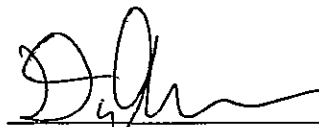
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Natural Resources Division Chief
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 44449
Boise, ID 83711-4449

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

UNITED STATES DEPARTMENT OF JUSTICE
Environment & Natural Resources
MSC 033
550 West Fort Street
Boise, ID 83724

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



Dylan B. Lawrence