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MAR 27 2009

DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

DAVID J. BARBER (ISB #2597)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

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	)	Subcase Nos. 63-02529, 63-03323, 63-03324, & 63-10435
	)	
	)	STATE OF IDAHO'S BRIEF IN RESPONSE TO
	)	CLAIMANTS' MOTION FOR SUMMARY
Case No. 39576	)	JUDGMENT
	)	
	)	

COMES NOW the State of Idaho, (hereinafter the "State"), by and through the undersigned deputy attorney general, and submits the STATE OF IDAHO'S BRIEF IN RESPONSE TO CLAIMANT'S MOTION FOR SUMMARY JUDGMENT in accordance with the SUMMARY JUDGMENT SCHEDULING ORDER entered on November 3, 2008.

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I. STATEMENT OF THE CASE

iii. Additional Statement of Facts

a. Issuance of Water Right Licenses by IDWR Related to the Facility Volume Case.

The *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcase Nos. 36-02708, 36-07201, 36-07218, 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-07427, 36-07720, 36-2659, 36-07004, 36-07080, and 36-07731 (hereinafter the "*Facility Volume Order*") included five water rights where the quantity was described by a rate of flow and by an annual volume of diversion limitation. Of those five water rights, two of them included a rate of flow and an annual volume of diversion limitation in the original water right license. The history of those five water rights may be summarized as follows:

The Idaho Department of Water Administration, a predecessor of IDWR, issued on February 21, 1973 water right license no. 36-2708 for fish propagation purposes. The rate of diversion was described as 200 cfs and the annual volume of diversion was described as 144,540 acre feet. Idaho Exhibit 12. The SRBA District Court issued a partial decree for water right no. 36-02708 on April 10, 2000. The quantity was described as 200.00 cfs and 144,540.0 afy. Idaho Exhibit 17.

The IDWR issued on March 15, 1978 water right license 36-07210 for fish propagation purposes. The rate of diversion was described as 45 cfs. An annual volume of diversion was not included in the water right license. Idaho Exhibit 13. The SRBA District Court issued a partial decree on April 10, 2000 for water right no. 36-07210. The quantity was described as 45.00 cfs and 32,521.5 afy. Idaho Exhibit 18.

The IDWR issued on March 9, 1978 water right license 36-07427 for fish propagation purposes. The rate of diversion was described as 52.3 cfs. An annual volume of diversion was not included in the water right license. Idaho Exhibit 14. The SRBA District Court issued a partial decree on April 10, 2000 for water right no. 36-07427. The quantity was described as 52.23 cfs and 37,746.6 afy. Idaho Exhibit 19.

The IDWR issued on May 9, 1983 water right license 36-07720 for fish propagation purposes. The rate of diversion was described as 37.1 cfs. An annual volume of diversion was not included in the water right license. Idaho Exhibit 15. The SRBA District Court issued a partial decree on April 10, 2000 for water right no. 36-07720. The quantity was described as 37.1 cfs and 26,812.2 afy. Idaho Exhibit 20.

The IDWR issued on September 30, 1992 water right license 36-07731 for fish propagation purposes. The rate of diversion was described as 15.00 cfs, and the annual volume of diversion was described as 10,745.2 afy. Idaho Exhibit 16. The SRBA District Court issued a partial decree on April 10, 2000 for water right no. 36-07731. The quantity was described as 15.00 cfs and 10,745.2 afy. Idaho Exhibit 21.

b. The Role of the State of Idaho in the Snake River Basin Adjudication.

The role of the State in the SRBA has been summarized as follows:

2. The State of Idaho has participated in the SRBA in several different capacities after the 1994 amendments to Chapter 14, Title 42, Idaho Code. The State of Idaho has filed objections to federal reserved water rights. . . . A second area has been to file objections or respond to objections to water rights at the request of a specific state agency. . . . A third area has been to file responses to objections to water rights that involve a private party challenge to a recommendation of the Director. Generally, the participation in support of a recommendation is on behalf of the State of Idaho, rather than a specific agency.

3. For the matters described in paragraph 2, the IDWR does not appear as a party on any of the papers filed with the SRBA. The IDWR does not participate as a party in those proceedings—that is the IDWR does not make the litigation decisions—such as whether to file an objection or a response or to settle a matter. However, the IDWR has attempted to facilitate settlement in some of the matters described in paragraph 2, as it does in many proceedings in the SRBA.

Affidavit of David J. Barber Dated March 25, 2009, at 2-3.

The claimants took the Deposition of David R. Tuthill, Jr. on February 3, 2009 and in that deposition asked questions about the role IDWR had in the filing of the responses by the State in these proceedings. Director Tuthill testified as follows:

Q. [By Mr. Lawrence] As the State of Idaho representative, do you feel that there is anything that needs to be revised or clarified or that you would disagree with, with respect to your previous testimony?

A. No.

...

Q. . . .What was the decision-making process like that led up to filing responses in these particular subcases?

...

A. Yes. I don't recall being personally involved with that. We have a large number of cases, as you know, in the SRBA. We are blessed with a wonderful staff of Deputies Attorney General that work in our offices on behalf of the Department.

In addition, the State of Idaho is represented by Deputies Attorney General at the Capitol. The determination by the State of Idaho to file a response—I wasn't involved with that in this consolidated case.

Q. Is it fair to assume, given what you were saying earlier about this being a high-level policy decision, that the ultimate decision to file responses was with you?

A. Well, I don't recall being involved in that decision-making. I can see where I would have been tasked to provide testimony on these cases because it is a policy matter. But the decision to file responses? I don't recall being involved with that.

Q. I mean, is it safe to assume that it was not the actual claims investigator at the Department that kind of said, 'Hey, we need to file responses in these subcase'?

A. No. The State of Idaho, as a party, has a separate review. How the State of Idaho decided to file responses—I don't know how that determination was made.

It would not have been a determination by one of our staff, nor would have been my determination. It would have been a State of Idaho determination.

Q. So when you say 'State of Idaho,' are you talking about the Attorney Generals at the Capitol?

A. Yes.

Affidavit of David J. Barber Dated March 25, 2009, Attachment I, Deposition of David R.

Tuthill taken on February 3, 2009, p. 65, L. 7-11; p. 66, L. 22 through p. 68, L. 9.

- c. The Beneficial Use Standard of 4.5 acre feet per acre per year in the Treasure Valley.

Director Tuthill testified about the 4.5 acre feet per acre per year standard in the Treasure Valley during the deposition taken on February 3, 2009 as follows:

Q. [By Mr. Lawrence] Can you kind of, in one place, summarize for me the redundancies that are built into the standard that make it so forgiving?

A. In the Eastern Snake Plane [sic] Aquifer, we have a great deal of experience, having measured many systems. There, the standard is 3.5 or 4 acre-feet per acre, depending on where a person is at. Generally, the amount of water that is diverted is about 2 acre-feet per acre.

As we look at other pumped systems from the Snake River, we don't find any systems that pump as many as 3 acre-feet per acre. They are all less than 3 acre-feet per acre.

So while surface diversions can greatly exceed 4.5 acre-feet per acre, due to system inefficiencies, any time a water payer is paying for pumping costs, we do not find diversions, in my experience, that exceed 3 acre-feet per acre.

So efficiency is encouraged by pumping costs, and not just power but equipment. So that is what leads me to described 4.5 acre feet per acre as being plenty of water in my experience.

Affidavit of David J. Barber Dated March 25, 2009, Attachment I, Deposition of David R.

Tuthill taken on February 3, 2009, p. 50, L. 15 through p. 51, L. 16.

The State offered the *Affidavit of Jeff Peppersack Dated March 11, 2009*, to explain the methodology used to develop the 4.5 acre feet per acre standard used by the IDWR. Mr.

Peppersack summarized the methodology as follows:

- a. Irrigation water is intended to make up for the deficiency in natural precipitation so that a target crop may be grown in an area. . . . The IDWR used average values for the most water consumptive crop in each area of the state where crop consumptive irrigation requirement data was available. The average values were rounded up to the next highest one-half acre foot value to account for variability between irrigation seasons.

b. The crop consumptive irrigation requirement is converted into a field headgate amount by projecting a certain efficiency for the irrigation system. If the crop consumptive irrigation requirement for a target crop was 3 acre feet per year and if the irrigation efficiency was 70 per cent, then the field headgate amount would be calculated by dividing the crop consumptive irrigation requirement of 3 acre feet by 0.70, which is equal to 4.29 acre feet per year. That amount was then rounded up to the nearest one-half acre foot value. Thus, in that example, the field headgate requirement would be rounded to 4.5 acre feet per year. The IDWR has expected irrigation systems to attain an efficiency of 70 to 75 percent based on published values for modern irrigation systems. After determining a field headgate amount for various locations in the state, the IDWR divided the state into several different areas with similar headgate amounts and assigned a single standard for field headgate volume to each area. Using this methodology, the IDWR determined that 4.5 acre feet per acre per year is a standard for the maximum amount of water that can be beneficially used in the Treasure Valley area. This determination was based on a study of crop consumptive irrigation requirement by Richard C. Allen, Ph.D., P.E. and Charles Brockway, Ph.D., P.E. Richard C. Allen, Ph.D., P.E. recently updated the analysis of the crop consumptive irrigation requirement for crops in Idaho. The IDWR has not re-evaluated standards for the Treasure Valley or other areas of the state based on this new work.

Id. at 3-4.

The State took the deposition of Terry M. Scanlan, P.E., P.G. on February 10, 2009. Mr. Scanlan explained his review of the water needs in the Treasure Valley and his analysis of the 4.5 acre feet per acre per year beneficial use standard used by the IDWR. He testified as follows:

Q. [By Mr. Barber] Okay. Good. Now, I want you to assume a hypothetical. That instead of being in private practice, you are working for the Department of Water Resources. And you just finished this work that is referenced in Deposition Exhibits 18 through 25, and you are to prepare a recommendation to the director of the Idaho Department of Water Resources about updating the 4.5 acre-feet per year that's allowed per acre in the Treasure Valley.

And my question to you is: What would you recommend to the director, instead of the 4.5 acre-feet per year value that exists right now?

A. You know, I don't know. I've never thought that one through. I guess I would recommend to the director, or consider any recommendation, that crops in the Treasure Valley can beneficially use more than four and a half acre-feet per year even with reasonable efficiencies, and would want to see some sort of limit that would be based on actual beneficial use, I suppose. But it's a hypothetical, and it's difficult question to answer.

Affidavit of David J. Barber Dated March 25, 2009, Attachment II, Deposition of Terry M. Scanlan taken on February 10, 2009, p. 105, L. 9 through p. 106, L 6.

The claimants offered the *Affidavit of Scott N. King, P.E.* to support an amount of water substantially in excess of 4.5 acre feet per acre per year beneficial use standard used by IDWR. Mr. King concluded as follows: "Provided that typical irrigation efficiency of sprinkler irrigation systems can range from 50% to 87%, total annual diversion water requirements for alfalfa and other highly consumptive crops when irrigated with typical sprinkler systems could range from 4.6 to 8 acre-feet per acre." *Id.* at 5.

- d. The Problem Soils at the Place of Use of Water Right Nos. 63-03324 and 63-03324.

Mr. Scanlan reviewed the place of use for water right nos. 63-3323 and 63-3324, among others, and testified about problem soils at this location as follows:

Q. (BY MR. BARBER) . . . And it purports to delineate the place of use of Water Right Nos. 63-3323 and 63-3324 on that site. . . .

So you can take a look at that Deposition Exhibit 36, and compare it with the outline that is shown on Deposition Exhibit 37, and confirm that at least it's a rough approximation of the two areas, the first page of each?

A. I would agree with that.

Q. (BY MR. BARBER) Now, you've just been handed the description from the soil survey for SdC Scism silt loam. And I would ask you to determine whether, in fact, there is a reference to duripan in that particular description?

A. Yes.

Q. And it's a little different than the past ones. Can you read that?

A. It says, 'Depth to restrictive feature 20 to 40 inches to duripan, 40 to 60 inches to lithic bedrock.'

Q. What's 'lithic bedrock' mean?

A. Well, in this case it's basalt, which is volcanic rock.

Q. And with this amount of restrictive features, are there any limitations with respect to irrigation?

A. Yes. It would limit how you would apply your irrigation.

Q. (BY MR. BARBER) You've just been handed what's been marked as Deposition Exhibit 41. Have you had a chance to look at that?

A. Yes.

Q. And under 'Properties and qualities,' it says 'Depth to restrictive feature,' we find something new here. Can you read that?

A. '8 to 20 inches to lithic bedrock.'

Q. If you have a soil that's only eight inches deep, does that have any issues with respect to irrigation, sir?

A. Yeah, that would be considered a very shallow soil, low water holding capabilities.

...

Q. (BY MR. BARBER) And with respect to [Exhibit] 42, what's the depth to restrictive features? Can you read that?

A. Yes, it says 8 to 20 inches to lithic bedrock.

...

Q. And if we look at the Trevino silt loam, the TrD symbol, it's the largest number of acres in the area of interest, is it not?

A. Yes.

Affidavit of David J. Barber Dated March 25, 2009, Attachment II, Deposition of Terry M. Scanlan taken on February 10, 2009, p. 120, L. 13 through p. 122, L. 13; p. 129, L. 17 through p. 130, L. 5; p. 131, L. 5 – 9.

Deposition Exhibit 37 includes a Map Unit Legend that describes the acres in the total area of interest defined in the map. The map symbol TrD, which represents the Trevino silt loam, shows a total area of 121.2 acres out of a total area of interest acreage of 294.4 acres.

Affidavit of David J. Barber Dated March 25, 2009, Attachment II, Deposition of Terry M. Scanlan taken on February 10, 2009, Deposition Exhibit 37.

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ARGUMENT

I. IDAHO CODE § 42-1401C AUTHORIZES THE STATE, THROUGH THE ATTORNEY GENERAL, TO APPEAR IN THE SNAKE RIVER BASIN ADJUDICATION, AND IDAHO CODE § 42-1401B DOES NOT LIMIT THE STATE OF IDAHO IN ANY MANNER.

Idaho Code §§ 42-1401B and 42-1401C describe the statutory authorizations for the participation of the Idaho Department of Water Resources and of the State of Idaho in a general adjudication of water rights.

Idaho Code § 42-1401B states:

Role of the director in an adjudication. – (1) The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

(2) **The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.**

(3) **The director shall not be a party to an adjudication.**

Idaho Code § 42-1401C states:

Role of state agencies other than the Idaho department of water resources in an adjudication. – (1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.

(2) **The attorney general may appear in any adjudication and shall represent the position of the state of Idaho.**

Emphasis Added. The claimants request the district court to conclude that the responses filed by the State are barred by the procedural statutes governing the SRBA. They argue that two matters justify this action by the district court. First, IDWR developed the policy for including annual diversion volume (hereinafter "ADV") limitations, and second the State "filed its responses in

these subcases on behalf of IDWR.”¹ *Brief In Support Of Motion for Summary Judgment*, (hereinafter “*Claimant’s Opening Brief*”), at 9-10. The issue raised is whether Idaho Code §§ 42-1401B and 42-1401C preclude the State’s participation in this matter where private claimants seek to challenge recommendations of IDWR. This issue is primarily an issue of statutory interpretation, and “[t]he interpretation of a statute is a question of law over which we [the court] exercise free review. . . . This Court must construe a statute to give effect to the intent of the legislature. . . . It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.” *Paolini v. Albertson’s Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006) (citations omitted). “Statutes that are *in pari materia* must be construed together to effect legislative intent. Statutes are *in pari materia* if they relate to the same subject.” *Id.* Here, the Idaho Legislature enacted Idaho Code §§ 42-1401B and 42-1401C in the same act, and both sections relate to the authority of the State to participate in a general adjudication of water rights. Thus, these two sections are *in pari materia* and must be construed together.

These two sections taken together grant a special role in a general adjudication to the IDWR to be “an independent expert and technical assistant” to the district court and to make “recommendations as to the extent of beneficial use of each water right under state law . . .” Idaho Code § 42-1401B. These two sections also prohibit two activities to the IDWR: (1) the IDWR shall not be a claimant and (2) the IDWR shall not be a party. The claimants’ arguments do not implicate the first prohibition; the issue becomes whether the State is precluded from participating in subcases involving private claimants simply because IDWR’s recommendation is

¹ The State does not agree with the characterization that the claimants have placed on the State of Idaho’s participation in this matter. Specifically, the IDWR has not made any litigation decisions related to the participation by the State of Idaho as a respondent, as explained *infra*.

being challenged. Claimants assert that the State's support of recommendations, which the State has independently determined is well founded, makes IDWR a *de facto* party.

A fundamental right of a client/party to litigation is to control the litigation occurring on behalf of that client/party. It is evident that that control is missing here. The State has filed objections and responses in three general areas: (1) federal reserved water rights, (2) representation of individual state agencies, and (3) subcases involving significant policy issues. Additional Statement of Facts (hereinafter "ASOF"), at 3-4. The IDWR does not make the litigation decisions related to these matters. ASOF at 3-5. The IDWR cannot be characterized as a party, if it does not make the litigation decisions that a client would normally make.

The claimants, nonetheless, argue that the IDWR has become a party by virtue of the responses filed by the State. The claimants state: "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." *Claimant's Opening Brief* at 11. The claimants also quote from Director Tuthill's deposition transcript and create the impression that the Director participated in the State's decision to file responses in this matter. *Claimants' Opening Brief* at 10-11. These quotes are taken out of context. Later, at the end of the deposition Director Tuthill made clear that IDWR did not participate in the State's decision to file responses in these matters. He testified as follows:

Q. Is it fair to assume, given what you were saying earlier about this being a high-level policy decision, that the ultimate decision to file responses was with you?

A. Well, I don't recall being involved in that decision-making. I can see where I would have been tasked to provide testimony on these cases because it is a policy matter. But the decision to file responses? I don't recall being involved with that.

Q. I mean, is it safe to assume that it was not the actual claims investigator at the Department that kind of said, 'Hey, we need to file responses in these subcase'?

A. No. The State of Idaho, as a party, has a separate review. How the State of Idaho decided to file responses—I don't know how that determination was made.

It would not have been a determination by one of our staff, nor would have been my determination.

ASOF at 4. While the IDWR created the ADV limitation and decides whether to continue to include that provision on water rights with a ground water source, those decisions are not the controlling decision in this matter. The decision to file a response in these subcases was made by the Office of the Attorney General in the name of the State. The IDWR does not have any control over that decision. ASOF, at 3-5. The quoted statement from the State's *Brief in Support of Idaho's Motion for Protective Order* and the testimony of the Director does not indicate any control over the policy decision to file responses in the pending subcases. Absent that control over the litigation, the district court has no basis to characterize the IDWR as a party to this litigation.

Claimants' position would effectively preclude the State's participation in any private subcase. The State, as a sovereign, has a right to be heard. In summary, these two sections provide that the Office of the Attorney General may appear and represent individual state agencies or the position of the State, as a whole. No restrictions appear in Idaho Code § 42-1401C on those actions; Idaho Code § 42-1401B only precludes the appearance of IDWR as a claimant or as a party. Here, the State made an independent policy decision to support the policy position represented in the Director's recommendations regarding ADV limitations. That decision by the State to support recommendations of the IDWR is not precluded by these two sections. The State possesses water rights, and therefore has a real interest in protecting those rights.

II. IDAHO CODE § 42-1411 GRANTS THE IDWR THE AUTHORITY TO INCLUDE AN ADV LIMITATION IN ITS RECOMMENDATION OF A WATER RIGHT IN AN ADJUDICATION.

A. Introduction

The claimants cite Idaho Code § 42-220 and Idaho Code § 42-1411 in support of their arguments that the IDWR does not have authority to include an ADV limitation in the recommended water rights, but then the claimants fail to analyze critical parts of the language. Significantly, they ignore that Idaho Code § 42-1411 gives the IDWR the authority to determine the elements of the water rights “to the extent the Director deems appropriate and proper.” The overlooking of this grant of discretion to the IDWR is a critical failure in their analysis. Moreover, while they acknowledge that Idaho Code § 42-220 recognizes exceptions related to beneficial use of water and for “other reasons set forth in this title,” they fail to conclude that these exceptions apply here. They offer the following six reasons to justify their analysis: (1) The IDWR cannot use the beneficial use exception to Idaho Code § 42-220 because the IDWR never conducted a field exam of the individual water rights. Thus, IDWR does not have a factual basis to include an ADV limitation in these water rights. Further, they argue that IDWR cannot use the beneficial use exception because Idaho law already makes beneficial use a limitation on every water right. Thus, the inclusion of an ADV limitation is unnecessary. *Claimant’s Opening Brief*, at 13-14. (2) The exception, “[o]ther reasons set forth in this title,” only applies to forfeiture, and there is no basis to conclude that forfeiture applies to any of these water rights. *Claimant’s Opening Brief*, at 14-15. (3) The Court’s opinion in the “Facility Volume” case prohibits new restrictions on previous water right licenses. *Claimant’s Opening Brief*, at 15-17. (4) Idaho Code § 42-1401B does not authorize IDWR to impose new restrictions. *Claimant’s Opening Brief*, at 19-20. (5) Idaho Code § 42-1401B does not apply because the IDWR’s ADVs are not uniform parameters. *Claimant’s Opening Brief*, at 23-26. (6) IDWR’s standard does not

quantify beneficial use. *Claimant's Opening Brief*, at 20-23. None of these reasons prohibit the inclusion of ADVs in these water rights.

B. The Beneficial Use Exception in Idaho Code § 42-220 applies here.

Beneficial use is and always has been a limitation on water rights developed in accordance with the prior appropriation doctrine in the West. The claimants and the State agree that this legal principle applies in Idaho. Claimants' Opening Brief, at 14. However, the definition of a water right in a general adjudication by simply stating that it is limited by beneficial use would present many problems in administration. A watermaster needs more information to administer a water right--a defined quantity, among other elements. Here, Idaho Code § 42-1411(c) authorizes four different measurements of beneficial use as it relates to quantity as follows: "The quantity of water used describing [1] the rate of water diversion *or*, [2] in the case of an instream flow water right, the rate of water flow in cubic feet per second *or* [3] annual volume of diversion of water for use [an ADV limitation] *or* [4] storage in acre-feet per year as necessary for the proper administration of the water right." Each of the four measurements are separated by the disjunctive "or." The first and third measurement methods apply to these water rights. Since an ADV limitation is an authorized element of a quantity description and since the IDWR has the authority to define in an adjudication all water rights acquired under state law "to the extent the Director deems appropriate and proper," the IDWR has the discretion to include an ADV limitation in a recommendation in a general adjudication. Thus, Idaho Code § 42-1411(c) expressly authorizes the IDWR to include an ADV limitation as a measurement of the beneficial use of a water right.

The arguments of the claimants that the IDWR did not conduct a field examination regarding the beneficial use for these four water rights and that the 4.5 acre feet per acre standard used by IDWR does not adequately describe the beneficial use raise factual issues. If the IDWR

has authority to include an ADV limitation here, is it necessary to conduct an individual study of each irrigated farm to determine the amount that is included in an ADV? Or, will a more general method provide a reasonable measurement of the beneficial use? The State asserts that those are factual issues that need to be tried.

C. The exception, “other reasons set forth in this title,” applies here.

The claimants acknowledge the existence of the exception, “other reasons set forth in this title,” but then argue without any analysis that that exception only applies to forfeiture. *Claimant’s Opening Brief*, at 14-15. The claimants then argue that no basis exists for a conclusion that the claimants had lost their rights by forfeiture. The State is aware of no basis for a conclusion of forfeiture. However, the very terms of this exception incorporates “any reason set forth in this title.” Thus, the claimants have no basis to limit their analysis of this exception to forfeiture. Idaho Code § 42-1411 is another provision in Title 42, and it provides the IDWR discretion to determine the elements of a water right as explained, *supra*. Simply put, the analysis of the claimants is incorrect.

D. The Facility Volume case does not prohibit the inclusion of annual volume of diversion limitations here.

The claimants cite Special Master Haemmerle’s *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* regarding subcase no. 36-2708 et al. and the *Facility Volume Order* for the conclusion that IDWR does not have the authority to include an ADV limitation for these four water rights. The claimants have failed to point out a major difference in this case and the *Facility Volume Order*. While Judge Wood stated that “[f]acility volume’ is not defined by statute or appellate case law and is not a specifically enumerated element of a water right under I.C. 42-1411(2)(a)-(j),” he did not preclude the use of an ADV limitation to define beneficial use. *Facility Volume Order* at 3. Rather, Judge Wood’s decision to reject IDWR’s

recommendation was based on the failure of IDWR to establish that facility volume was an adequate description of beneficial use in that case. *Id.* at 9. Thus, the beneficial use exception to Idaho Code § 42-220 could not apply. The issue became whether a facility volume remark could be added and what the legal effect of a facility volume remark was. Judge Wood analyzed concluded that “[t]he statute requires quantity to be measured by a rate of diversion or flow in cfs or afy. I.C. § 42-1411(2)(c) does not include facility volume as a prescribed method of measuring quantity.” *Id.* at 8 (emphasis added). Later, Judge Wood agreed with Special Master Haemmerle that a facility volume remark must remain in the partial decree of a water right under Idaho Code § 42-1411(2)(j), if the water right license contained a facility volume limitation, and that a further remark must be added under Idaho Code § 42-1411(2)(j) to make it clear that the facility volume remark did not limit the beneficial use in any manner. *Id.* at 16-17.

Finally, the State should point out that the SRBA district court later entered partial decrees for five of the water rights involved in the Facility Volume Order where the quantity was described by a rate of flow and by an ADV limitation. Of those five water rights, two of them included a rate of flow and an annual volume of diversion limitation in the original water right license; three of the water rights did not have an annual volume of diversion limitation in the original water right. Thus, the SRBA district court entered partial decrees completely inconsistent with the claimants’ analysis of the *Facility Volume Order*. The following table summarizes these five water rights:

Water right no.	Quantity in License	Quantity in Partial Decree
36-2708	200.00 cfs; 144,540.0 afy	200.00 cfs; 144,540.0 afy
36-7210	45.00 cfs	45.00 cfs; 32,521.5 afy
36-7427	52.23 cfs	52.23 cfs; 37,746.6 afy
36-7720	37.1 cfs	37.1 cfs; 26,812.2 afy
36-7731	15.00 cfs; 10,745.2 afy	15.00 cfs; 10,745.2 afy

ASOF, at 2-3. Accordingly, the claimants simply have the facts incorrect, and their analysis of the *Facility Volume Order* is likewise flawed. If the *Facility Volume Order* had precluded entry of a

partial decree with an annual volume of diversion limitation when the water right license did not include such a limitation, the SRBA district court would not have entered the partial decrees that it did in those subcases that were the subject of the *Facility Volume Order*. The *Facility Volume Order* does not have any impact on the authority of the IDWR to add an annual volume of diversion limitation to a licensed water right that did not originally include such a provision.

- E. The claimants incorrectly limit the authority of IDWR under Idaho Code § 42-1401B(1) to define water rights with “uniform parameters for quantification of beneficial use recommendations for rights within climatic regions of the state.”

The claimants make two arguments regarding Idaho Code § 42-1401B(1). First, Idaho Code § 42-1401B(1) does not authorize the IDWR to include new restrictions because a water right license is binding on the state, including IDWR, in accordance with Idaho Code § 42-220. “[T]he 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.” *Claimants’ Opening Brief* at 17. Second, since the IDWR does not apply its standards uniformly on users of ground water and of surface water, Idaho Code § 42-1401B(1) does not authorize the use of the standard used to determine the ADV limitations here. The claimants object to the use of the 4.5 acre feet per acre limitation used by IDWR in the determining of an ADV limitation.

The first argument proceeds on a incorrect assumption. The statement that “it cannot be disputed that the imposition of the new limitation impermissibly restricts the use of license” is not correct. A water right has always been measured by the amount of beneficial use, as conceded by the claimants.² Water right no. 63-3323 may used to illustrate the problem with claimant’s characterization of this issue. The IDWR recommended 1,111.50 AFY, which was

² Section 8 of the Reclamation Act succinctly stated this limitation as follows: “Beneficial use shall be the basis, the measure, and the limit of the right.” Reclamation Act of June 17, 1902, ch. 1120, 32 Stat. 388, 390.

calculated by multiplying the 247 acres in the place of use by the maximum beneficial use value of 4.5 acre feet per acre per year. The claimants have never demonstrated that the claimants have used more than 1,111.50 acre feet in a year for water right no. 63-3323. The claimants have not demonstrated that they needed more than 1,111.50 acre feet in a year for water right no. 63-3323. Neither one of these factual issues are resolvable on summary judgment.

The second argument also involves a couple of distinct issues: The claimants point out that the IDWR does not impose ADV limitation on municipal water rights from ground water, unless the original license contained an ADV limitation, even though the IDWR does impose an ADV on an irrigation water right from ground water. Claimants describe this difference as “arbitrary.” *Claimant’s Opening Brief*, at 23-24. Idaho law has long recognized that municipal providers of water need some modifications to the rules applicable to other users. For example, Idaho Code § 42-223(2) provides an exception to forfeiture for municipal providers. *See also, Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940). The IDWR’s policies are consistent with these policies. The claimants also point out that IDWR applies different rules to surface water users and ground water users. *Claimant’s Opening Brief*, at 25. Idaho Code § 42-1411(c) authorizes the IDWR “to determine the following elements[including quantity], to the extent the director deems appropriate and proper.” The Idaho Legislature has left those determinations to the sound discretion of the IDWR. The claimants have demonstrated nothing to suggest that the IDWR has abused its discretion in making these determinations.

III. DISPUTED ISSUES OF FACT EXIST WITH RESPECT TO THE BENEFICIAL USE STANDARD FOR ANNUAL VOLUME OF DIVERSION LIMITATIONS.

The IDWR has used the standard of 4.5 acre feet per acre per year as a standard to quantify the maximum of amount of water that a user of ground water can put to beneficial use. Mr. Peppersack summarized in his affidavit the process used by the IDWR in developing this

standard. Significantly, IDWR used irrigation efficiencies of 70 per cent. ASOF at 6. In contrast, the claimants urge an irrigation efficiency of 50 per cent and recommended an ADV of 4.6 to 8 acre feet per acre per year. ASOF at 7. Terry Scanlan, expert for the claimants, testified at his deposition that he could not recommend an ADV. He also acknowledged that the place of use for water right nos. 63-03323 and 63-03324 has significant impairments related to the shallow soils and other factors that limit irrigation. All of these factors preclude entry of summary judgment on these factual issues.

IV. CLAIMANTS REBEKAH TLUCEK, KEVIN TLUCEK, SHELLEY TLUCEK AND BYRON TLUCEK'S NEVER RAISED THE ISSUE REGARDING THE ABSENCE OF CONDITION 1 OF WATER RIGHT LICENSE NO. 63-10435 IN THE RECOMMENDATION FOR WATER RIGHT NO. 63-10435 AND THAT LEGAL ISSUE IS NOT BEFORE THE DISTRICT COURT.

The IDWR issued on December 12, 1990, water right license no. 63-10435. The amount was described as follows: "Maximum Diversion Rate: 0.74 CFS; Maximum Diversion Volume: 306.0 AF." A footnote was appended to the Maximum Diversion Volume, which stated under the title "Conditions/Remarks" as follows:

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

Statement of Facts, at 5.³ The claimants point out that "the Director's Report does not contain the above-quoted language from Condition 1 of the license." *Claimant's Opening Brief*, at 7. However, the claimants never raised this concern in their objection. The claimants stated in their objection, as follows:

³ This reference to the Statement of Facts is to the Statement of Facts contained in the *State of Idaho's Brief in Support of its Motion for Partial Summary Judgment*.

Rebekah Tlucek, Kevin Tlucek, Shelley Tlucek, and Byron Tlucek are objecting to inclusion of the annual volumetric limitation in the amount of 306.00 afy, as such appears under the Quantity and Purpose and Period of Use elements of the Director's Report.

Statement of the Case, at 4.⁴ Thus, the claimants never raised the issue in their objection that they described in the *Claimant's Opening Brief*. Thus, that legal issue about the appropriateness of the omission of Condition 1 of the license is not before the district court.

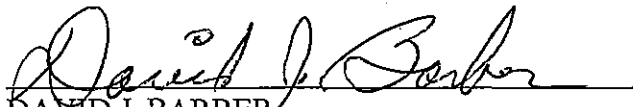
CONCLUSION

For the reasons stated, the district court should enter an order that declares that the IDWR has the authority to add an ADV limitation to a water right in an adjudication even though the original water right license did not include such a provision and that the claimants' objections to the inclusion of the ADV limitation for water right no. 63-10435 constitutes an impermissible collateral attack on water right license 63-10435.

RESPECTFULLY SUBMITTED this 26th day of March 2009

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO


DAVID J. BARBER
Deputy Attorney General

⁴ This reference to the Statement of the Case is to the Statement of the Case contained in the *State of Idaho's Brief in Support of its Motion for Partial Summary Judgment*.

CERTIFICATE OF SERVICE

I certify that on this 26th day of March 2009 I caused to be served the original and/or copy of the STATE OF IDAHO'S BRIEF IN RESPONSE TO CLAIMANTS' MOTION FOR SUMMARY JUDGMENT on each of the following persons by the indicated method:

1. Original and three copies to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 736-2121
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2. Copies to the following persons:

Special Master Theodore Booth
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
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- ☐ Facsimile: 345-8800
- ☐ Statehouse Mail

Jerry L. Tlucek and Mary Lou Tlucek
Rebekah Tlucek, Kevin Tlucek, Shelley
Tlucek & Byron Tlucek
Pioneer Irrigation District
c/o Scott L. Campbell & Dylan B. Lawrence
Moffat Thomas Barrett Rock & Fields,
CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (303) 312-7379
- ☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

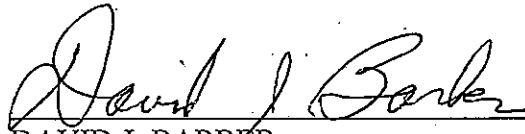
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- ☒ Statehouse Mail

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable

A handwritten signature in cursive script, reading "David J. Barber", written over a horizontal line.

DAVID J. BARBER
Deputy Attorney General