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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

**REPLY BRIEF IN SUPPORT OF CLAIMANTS'
MOTION FOR 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 Reply Brief in Support of Claimants' Motion for Summary Judgment, pursuant to Idaho Rule of Civil Procedure 56, Rules 1 and 10 of this Court's Administrative Order 1, and this Court's Summary Judgment Scheduling Order of November 3, 2008. This

brief is supported by the Second Affidavit of Dylan B. Lawrence, filed contemporaneously herewith (the “Second Lawrence Affidavit”), and the remainder of the record in this proceeding.

I.
**THE STATE INCORRECTLY ARGUES THAT THE FACILITY
VOLUME ORDER PRECLUDES THE CLAIMANT’S CHALLENGES
TO ANNUAL DIVERSION VOLUME LIMITATIONS**

In its Response Brief, the State notes that three of the water rights involved in the Facility Volume case were ultimately decreed with annual diversion volume limitations, despite the fact that such limitations did not appear on those licenses. (State’s Resp. Br., pp. 2-3, 16-17.) According to the State, “[i]f 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*.” (State’s Resp. Br., pp. 16-17.) This argument incorrectly assumes that *Facility Volume* involved a challenge to annual diversion volume limitations. It did not.

Facility Volume involved a challenge to a different volume-based limitation previously imposed by IDWR in the SRBA on licensed water rights for fish farm facilities, referred to generally as a facility volume limitation. *Facility Volume*, pp. 2-5, 6-8. There is no indication in the record of this proceeding or in the *Facility Volume* order itself indicating that any of the claimants in that proceeding were challenging annual diversion volume limitations. If they were, then *Facility Volume* would likely be *stare decisis* as to the Claimants’ challenge to annual diversion volume limitations in this proceeding. Because *Facility Volume* did not specifically deal with annual diversion volume limitations, then simply noting that three partial decrees were subsequently issued which included annual diversion volume limitations is of no legal consequence.

What is critical about the *Facility Volume* case is this Court's *analysis* of a similar issue and, ultimately, its reliance upon Section 42-220 to invalidate new volume-based limitations on previously licensed water rights. The State has not adduced any persuasive explanation as to why the analysis employed in *Facility Volume* does not apply in this proceeding.

II.
THE STATE'S ARGUMENTS REGARDING THE
ROLES OF IDWR AND THE ATTORNEY GENERAL
IN THE SRBA IGNORE CRITICAL FACTORS

A. The State's Reliance Upon Who Makes "Litigation Decisions" Mischaracterizes The Respective Roles of Attorneys And Clients

The State argues that IDWR is not acting as a party to these subcases because it has not made the "litigation decisions." (State's Resp. Br., p. 11.) However, the State has not explained the basis for its "litigation decisions" standard, which appears to be an inaccurate characterization of the general standards governing the respective roles of attorney and client in the attorney-client relationship.

The Idaho Rules of Professional Conduct generally provide that it is the client who makes decisions about the "objectives" of the representation, and that the attorney shall "reasonably consult" with the client about the means to achieve those objectives. Idaho R. Prof. Conduct 1.2, 1.4. The comments to those rules are even more on-point, stating that, "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, *particularly with respect to technical, legal and tactical matters.*" *Id.* at 1.2, cmnt. 2; *see also Evans v. Power County*, 50 Idaho 690, 705-06 (1931) ("[w]hile the general rule undoubtedly is that an attorney has authority, by virtue of his employment as such, to do on behalf of his client all acts, in or out of court, necessary or

incidental to the prosecution and management of the suit and affecting the remedy, he has no power to compromise or release the cause of action itself”).

In other words, it is generally the client that makes the major decisions about the objectives of the representation, while it is generally the attorney who makes decisions about the day-to-day strategy for accomplishing those objectives. Therefore, the State’s argument that IDWR is not acting as a party to these subcases because it is not making the “litigation decisions” is of no consequence.

The State’s arguments on this issue raise a more general point: Attorneys represent clients. They do not simply file documents with a court; they do so on a client’s behalf. While the Claimants acknowledge that the Attorney General’s office represents “the position of the state of Idaho” in the SRBA as a general matter, IDAHO CODE § 42-1401C(2), there must be some ultimate decision-maker who decided to file the State’s responses and to take a legal position adverse to the Claimants, regardless of the day-to-day “litigation strategy.” Critically, when the Claimants tried to depose that ultimate decision-maker by scheduling a 30(b)(6) deposition of the State of Idaho, the State requested, and the Court ordered, that the deponent should be Director Tuthill—*the director of IDWR*. (See State’s Mot. for Protective Order and Br. in Supp., Jan. 8, 2009; *see also* Second Lawrence Aff., ¶ 2, Ex. A.) Under these circumstances, the State’s argument that IDWR is not acting as a party to these subcases is untenable.

B. The Record Of This Case Demonstrates That IDWR Is Acting As A “Party” To These Subcases

The State’s argument that IDWR is not acting as a party in these subcases belies the record. As explained in the Claimants’ brief in support of their motion for summary judgment, during Director Tuthill’s deposition, he was specifically asked whether, “[i]n this case,

is it fair to say that you are the decision-maker, as far as pursuing these annual diversion volume limitations?” (Claimants’ Br. in Supp., p. 10.) His answer to this question was an unequivocal, “Yes.” *Id.* As the Claimants have also explained, the State’s brief in support of its Motion for Protective Order 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.” *Id.* And, the Court granted that motion, the result of which was that Director Tuthill testified *as the State of Idaho’s representative*. Taken together, all of these circumstances demonstrate that IDWR is acting as a party in these subcases.

C. The State’s Assertion That It Is Seeking To Protect Its Own Water Rights Belies the Record

In order to justify the State’s filing of responses in these subcases, the State argues that “[t]he State possesses water rights, and therefore has a real interest in protecting those rights.” (State’s Resp. Br., p. 12.) This justification was specifically rejected by Director Tuthill in his deposition as the 30(b)(6) representative of IDWR and the State of Idaho, during which the following exchange took place:

Q. [by Mr. Lawrence] Just to put a little bit of a finer point on it, a lot of times, in the SRBA, when the State of Idaho is involved -- when I see those words, “State of Idaho,” on some filing in the SRBA, it is usually associated with a particular agency, like Fish and Game or the Water Resource Board who has an instream flow right.

Is the State of Idaho representing any particular agency with an actual water right impacted?

A. [by Mr. Tuthill] No.

Tuthill Dep., p. 65, L. 18 – p. 66, L. 1, attached as Exhibit B to the Second Lawrence Affidavit.

In other words, during that deposition, Director Tuthill was specifically asked, as the 30(b)(6) representative of both IDWR and the State of Idaho, whether the State owns any

water rights impacted by this proceeding, and he specifically and unequivocally answered “No.” Therefore, the State’s argument that it is protecting its water rights in this proceeding lacks merit.

If the State’s responses in these subcases were filed for the purpose of protecting the State’s own water rights, then the responses should have been filed in the name of a particular state agency that owns the rights to be protected. *See generally* IDAHO CODE § 42-1401C(1). Instead, the responses simply identify the “State of Idaho” as the respondent. The argument that the State is acting to protect its own water rights is not supported by the record.

III. IDAHO CODE SECTION 42-1411 DOES NOT PROVIDE IDWR WITH AUTHORITY TO INCLUDE ANNUAL DIVERSION VOLUME LIMITATIONS ON THESE PREVIOUSLY LICENSED WATER RIGHTS

As with its own Motion for Partial Summary Judgment, the State relies primarily upon Idaho Code Section 42-1411 to support IDWR’s inclusion of the annual diversion volume limitations on these water rights. (State’s Resp. Br., pp. 13-18.) The Claimants have largely addressed this issue in their response to the State’s Motion for Partial Summary Judgment, and therefore specifically incorporate that discussion herein. (Claimants’ Resp. in Opp., pp. 2-8.)

At most, the State has created a conflict between Sections 42-220 and 42-1411 on this issue. However, in *Facility Volume*, this Court specifically held that as between Sections 42-220 and 42-1411, Section 42-220 is “the more specific and, therefore, controlling statute.” *Facility Volume*, p. 15. This resolution of the conflict between Sections 42-220 and 42-1411 is now the law of the case in the SRBA on this issue. *See, e.g., Frazier v. Nielsen & Co.*, 118 Idaho 104, 106 (App. 1990) (“[t]he decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation”).

IV.
**THE STATE IS ATTEMPTING TO MANUFACTURE IRRELEVANT
ISSUES OF FACT IN ORDER TO SURVIVE SUMMARY JUDGMENT**

The State is attempting to manufacture irrelevant issues of fact where there are none, in order to survive summary judgment. It is undisputed that IDWR included the annual diversion volume limitations on these water rights as a matter of policy and routine, and not based upon an individualized factual investigation into the pre-1987 use of these rights. (*See* Idaho Exhibit 9: Affidavit of Jan Shurte Dated March 11, 2009, ¶¶ 3(b), 4(c), 5(c), 6(b); *see also* Claimants' Br. in Supp., p. 13.) Therefore, IDWR either had the legal authority to include the new limitations as a matter of routine pursuant to its policy, or it did not.

To the extent that the State is attempting to create issues of fact, what it is really doing is attempting to provide IDWR with a second chance to conduct an investigation that it should have conducted prior to its issuance of the Director's Reports for these water rights in order to include the annual diversion volume limitations. However, the adjudication statutes delineate a specific sequence of events for claiming, investigating, and recommending water rights in the SRBA. *See* IDAHO CODE §§ 42-1409 – 42-1411. Rather than revisiting a factual issue that IDWR actually investigated during the claims investigation process, the State is trying to convert a purely legal issue into a factual one in order to survive summary judgment.

One particularly overt example of this attempt to create unnecessary issues of fact is the State's discussion of the soils at the place of use for water rights 63-3323 and 63-3324. (State's Resp. Br., pp. 7-8, 19.) Director Tuthill specifically testified that there are three components to the 4.5 AFA standard—climate, crops, and irrigation efficiency—as reflected in the following exchange during his deposition:

Q. [by Mr. Lawrence] So my recollection, based on that, is that there are maybe three components to the 4.5-acre-foot-per-

acre standard: Climate, an assumption about a crop, and irrigation efficiency which you have already referenced.

Is that a fair summary of the components of the 4.5 acre-foot standard?

A. [by Mr. Tuthill] Yes.

Tuthill Dep., p. 43, LL. 6-13, attached as Exhibit B to the Second Lawrence Affidavit.

In fact, soils were *never* discussed as a factor in the 4.5 AFA standard, either in the deposition of Director Tuthill in this proceeding, or in the deposition of Director Tuthill on the same issue in subcase 63-3174. (See Second Lawrence Aff., ¶¶ 4-6, Exs. C-E.) And, IDWR did not investigate soils when it prepared these Director's Reports, because it did not conduct field examinations of these water rights in the SRBA as previously explained. In fact, soils are not mentioned in either of the affidavits of Jan Shurte (Idaho Exhibit 9) or Jeff Peppersack (Idaho Exhibit 10). Because soils were not even considered by IDWR in making its recommendations, relying upon soils as a basis for the annual diversion volume limitations at this stage of the SRBA proceedings would be inappropriate, violative of the adjudication statutes, and irrelevant for these purposes pursuant to Idaho Rule of Evidence 402.¹ This issue is the subject of the Claimants' accompanying Motion to Strike.

The State's statement that, "[t]he 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," is

¹ To be clear, the Claimants do not argue that it was outside the scope of discovery for the State to inquire about soils during the deposition of the Claimants' expert witness Terry Scanlan. The Claimants recognize and acknowledge that the scope of discovery under Rule 26(c) is extremely broad. What the Claimants do argue is that relying upon soils at this stage of the SRBA to specifically support the annual diversion volume limitations on these water rights, when IDWR did not even consider soils in its claim investigations or the development of the 4.5 AFA standard, would be contrary to the procedures of Idaho Code Sections 42-1409 – 42-1411 and irrelevant under Idaho Rule of Evidence 402.

similarly egregious. (State's Resp., p. 18.) Here, the State is trying to manufacture an issue of fact by implying that the Claimants have had the responsibility for disproving the annual diversion volume limitations newly imposed by IDWR on these water rights in the SRBA. The flaw in this logic is that the Claimants were never put on notice that they needed to address this issue when they filed their SRBA claims. Based upon their water right licenses and Section 42-220, the Claimants were entitled to rely upon their licenses for the purposes of filing and proving the validity of their SRBA claims. They have never been aware of any need to demonstrate an annual diversion volume for the purposes of their SRBA claims.

To take the point even further, the water right licenses at issue have never required measuring and recording devices that could form the basis for such evidence. (*See* Lawrence Aff. of March 11, 2009, ¶¶ 2, 5, 8, 11; Exs. A, D, G, J.) And, according to Director Tuthill:

For a[n annual diversion] volume, *the only way to really determine the volume is to make a measurement of an annual diversion from a well.*

We do that in many areas of the state. We don't presently do that in the Boise River Basin.

Tuthill Dep., p. 36, L. 23 – p. 37, L. 2 (emphasis added), attached as Exhibit B to the Second Lawrence Affidavit.

Under these circumstances, the State's argument on this issue essentially requires the Claimants to "prove a negative." While the Claimants acknowledge that Section 42-1411 states that a Director's Report "shall constitute prima facie evidence of the nature and extent of the water rights," a Director's Report can only be "prima facie evidence" as to a factual issue, not a legal one. Here, because the annual diversion volume limitations are based upon an IDWR

policy applied as a matter of routine, and not upon an actual individualized investigation into the use of water under these rights, this is fundamentally a legal issue—not a factual one.

The State also mischaracterizes the testimony of Terry Scanlan, one of the expert witnesses for the Claimants, in order to try to create a factual issue regarding the 4.5 AFA standard. Without citation or further explanation, the State declares that, “Terry Scanlan, expert for the claimants, testified at his deposition that he could not recommend an [annual diversion volume].” (State’s Resp. Br., p. 19.) Presumably the State intends to characterize the deposition testimony excerpted on page 6 of its response brief. If so, it has done so inaccurately.

A plain reading of that excerpt demonstrates that Mr. Scanlan acknowledged that recommending an alternative to the 4.5 AFA standard to the director of IDWR is a “hypothetical...difficult question to answer,” but that he would note for the director 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....” (State’s Resp. Br., p. 6.)

As the Claimants have argued, it is not their responsibility to formulate, justify, and defend an alternative to the 4.5 AFA standard. Their expert witness has explained that more than 4.5 AFA per year can be beneficially used to irrigate certain crops in the Treasure Valley, even with reasonable irrigation efficiencies. (Aff. of Scott N. King, P.E.) Given Section 42-220’s statement that water right licenses “shall be binding upon the state,” and given the fact that the Claimants have never been put on notice of the need to affirmatively prove their annual diversion volumes, this is sufficient.

V.
**THE CLAIMANTS' ARGUMENTS REGARDING 63-10435 ARE
PROPERLY BEFORE THIS COURT; THE STATE'S RESPONSES
DO NOT COMPLY WITH THE ADJUDICATION STATUTES**

The State argues that the Claimants' arguments regarding Condition 1 in the license for water right 63-10435 are not properly before this Court, because Condition 1 was not discussed in their objection. (State's Resp. Br., pp. 19-20.) In making this argument, the State ignores that the mandatory standard objection forms in the SRBA do not provide the Claimants with an opportunity to specifically raise this issue.

More specifically, the objection forms allow objections to any of the specifically enumerated water right elements (name and address; source; quantity; priority date; point of diversion; instream flow beginning and end point; purpose of use; period of year; and place of use), or on the basis that a recommended water right should not exist, or conversely that a disallowed right should have been recommended.

Under these circumstances, the most appropriate element to object to is "quantity," because that is the element of the Director's Report that contains the annual diversion volume limitation. That is all that is required. Critical in this regard is Idaho Rule of Civil Procedure 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice."² In making its argument on this issue, the State has not provided any legal or practical justification for its position that the Claimants' arguments should not be heard. Under these circumstances, "substantial justice" would not be achieved by barring the Claimants from raising this issue on the hyper-technical basis set forth by the State.

² Pursuant to Rule 2(r) of this Court's Administrative Order 1, an objection in the SRBA is a "pleading" for the purposes of the Idaho Rules of Civil Procedure.

And, if the Court finds any merit in the State's argument on this issue, then it must also hold that the State's legal arguments are not properly before this Court for similar reasons. Critical in this regard is the language of Idaho Code Section 42-1412, which provides in pertinent part:

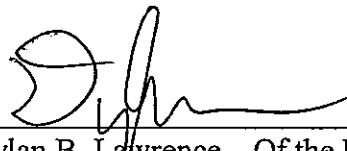
If a party other than the claimant or the objector desires to participate in the proceeding concerning a particular objection, the party shall file a response to the objection *that states the position of the party*.

IDAHO CODE § 42-1412(2) (emphasis added).

Here, the State is obviously not the claimant or an objector in any of these subcases. Accordingly, its responses were specifically required by statute to "state the position" of the State. However, in each of the State's responses in these subcases, the State simply "checked the box" of the objected water right elements it was responding to, with no further explanation of its "position." This violates Section 42-1412(2). If the Court concludes that the arguments raised by the Claimants of water right 63-10435 have not been properly raised, then it must also hold that the State's legal arguments have not been properly raised for failure to comply with this mandatory procedural statute.

DATED this 2nd day of April, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2009, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF CLAIMANTS' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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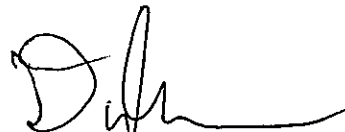
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