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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 REPLY TO
	)	CLAIMANTS' RESPONSE IN OPPOSITION TO
Case No. 39576	)	IDAHO'S MOTION FOR PARTIAL SUMMARY
	)	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 REPLY TO CLAIMANT'S RESPONSE IN OPPOSITION TO IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT in accordance with the SUMMARY JUDGMENT SCHEDULING ORDER entered on November 3, 2008.

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INTRODUCTION

The *State of Idaho's Brief in Support of its Motion for Partial Summary Judgment* and *State of Idaho's Brief in Response to Claimant's Motion for Summary Judgment* responded to most of the arguments made by the claimants in this matter. Only a short response is necessary to one matter set forth in the *Response in Opposition to State of Idaho's Motion for Partial Summary Judgment*, (hereinafter "*Claimant's Response Brief*").

ARGUMENT

- I. **IDAHO CODE § 42-220 CONTAINS FIVE EXCEPTIONS. TWO OF THE EXCEPTIONS AUTHORIZE THE IDAHO DEPARTMENT OF WATER RESOURCES TO ADD AN ANNUAL DIVERSION VOLUME LIMITATION TO A WATER RIGHT IN AN AJUDICATION EVEN WHEN THE ORIGINAL LICENSE DID NOT INCLUDE THE ANNUAL DIVERSION VOLUME LIMITATION.**

Idaho Code § 42-220 states, in part, as follows:

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 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 a 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 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 water.

Id. This section may be parsed into the following six phrases:

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. [First Phrase]

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 expenses for the delivery or distribution of such water, [Second Phrase]

[the right to continue the beneficial use of such waters shall never be denied nor prevented for any cause] or for other reasons set forth in this title: [Third Phrase]

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 [Fourth Phrase]

neither such licensee nor any one claiming a right under such a 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, [Fifth Phrase]

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 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 water. [Sixth Phrase]

Id. The claimants criticize the State's analysis of Idaho Code § 42-220 by arguing that the provisions relied upon by the State are not express exceptions to the first phrase, which contains the "binding on the state" limitation. *Claimant's Response Brief*, at 3. While the term "exception" does not appear in Idaho Code § 42-220, the omission of that word does not resolve the matter. Rather, the interpretation of a statute begins with its language. The language of the second through sixth phrases indicates that each phrase operates as a qualification or exception to the limitation in the first sentence. For example, the second phrase provides that the right to continue to beneficially use the water shall never be denied other than failure of the user to pay

the required charges or assessments. The third phrase provides the exception relied upon by the State in its opening brief. The fourth phrase concludes that the license issued by the Idaho Department of Water Resources (hereinafter "IDWR") cannot exceed the duty of one cubic foot per second for fifty acres unless the IDWR concludes that more water is needed. The fifth phrase, also relied upon by the State as an exception, limits a water right to the amount of beneficial use. Finally, the sixth phrase provides a further exception. Even if the IDWR issued a license for one cubic foot per second for fifty acres, this last phrase makes the license "subject to the local or community customs or rules . . . when such rules or regulations have for their object the economical use of such water." Thus, the sixth phrase makes the amount in an IDWR license subject to reduction based on local customs and rules. Therefore, the second through sixth phrases each provide an independent basis to reduce the amount authorized for diversion under a license issued by IDWR. The State's characterization of Idaho Code § 42-220 is correct; that section contains five exceptions. Two of the exceptions apply here for the reasons set forth in the *State of Idaho's Brief in Support of its Motion for Partial Summary Judgment*, at 8-12.

CONCLUSION

For the reasons stated in its three briefs, the district court should enter an order that declares that the IDWR has the authority to add an annual diversion volume 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 an annual diversion volume limitation for water right no. 63-10435 constitutes an impermissible collateral attack on water right license 63-10435.

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RESPECTFULLY SUBMITTED this 1st day of April 2009

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 1st day of April 2009 I caused to be served the original and/or copy of the STATE OF IDAHO'S BRIEF IN REPLY TO CLAIMANTS' RESPONSE IN OPPOSITION TO IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT on each of the following persons by the indicated method:

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253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

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253 Third Avenue North
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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

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Environment and Natural Resource Division
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Boise, ID 83724

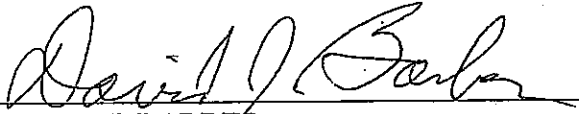
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Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID J. BARBER
Deputy Attorney General