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DEPARTMENT OF
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	)	Subcase Nos. 63-02529, 63-03323, 63-03324, & 63-10435
	)	
	)	STATE OF IDAHO'S BRIEF IN OPPOSITION TO
	)	MOTION TO STRIKE
Case No. 39576	)	
	)	
	)	

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 OPPOSITION TO MOTION TO STRIKE in accordance with I.R.C.P. 7(b)(3).

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I. ADDITIONAL STATEMENT OF THE CASE

ii. Additional Course of Proceedings

Claimants Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek, (hereinafter the “claimants”), filed their *Motion for Summary Judgment* on March 12, 2009, which stated in part as follows:

In short, the Claimants respectfully request that the Court dismiss the responses filed by the State of Idaho in these subcases as violative of Idaho Code Section 42-1401B, and further request that this Court remove the annual diversion volume limitations on these water rights as violative of Idaho Code Section 42-220.

This Motion is supported by a legal brief, an affidavit of counsel, and an affidavit of expert witness Scott N. King, P.E., all filed contemporaneously herewith.

Id. at 1-2. The claimants lodged their *Brief in Support of Motion for Summary Judgment*, which stated, in part, as follows:

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

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

Id. at 20 (emphasis added). In support of this factual claim, the claimants make reference to the *Affidavit of Scott N. King, P.E.* at 4-15. *Brief in Support of Motion for Summary Judgment*, at 21. Thus, the claimant’s *Motion for Summary Judgment* requested the district court to remove the annual diversion volume limitation based on their analysis that the 4.5 acre feet per acre limitation was an unreliable metric.

iii. Additional Statement of Facts

Mr. Jeff Peppersack summarized in *Idaho Exhibit 10: Affidavit of Jeff Peppersack Dated March 11, 2009*, the process for developing an annual diversion volume limitation for irrigation 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. Published studies were undertaken to determine the amount of deficiency in water for target crops at sites in Idaho. A detailed study would determine (i) the water needs of the target crop on a daily basis and (ii) the amount that that need is satisfied by precipitation for each day for the irrigation season. The difference between those two amounts is the deficiency that irrigation water must provide. The daily deficiencies are then added up to determine the amount of the water deficiency on an annual basis. Since each irrigation season differs in the amount of solar radiation striking the surface of the earth, the wind at the site in question, and the other factors affecting evaporation and transpiration for the target crop, the amount of the water deficiency will vary from year to year. 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.

Idaho Exhibit 10: Affidavit of Jeff Peppersack Dated March 11, 2009, at 2-4.

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ARGUMENT

I. THE 4.5 ACRE FEET PER ACRE LIMITATION USED BY THE IDAHO DEPARTMENT OF WATER RESOURCES AS IT APPLIES TO THE PLACES OF USE FOR THE CLAIMANTS' WATER RIGHTS PRESENTS FACTUAL ISSUES THAT REQUIRE A TRIAL.

The State filed its *Motion for Partial Summary Judgment* to resolve the following two legal issues in this proceeding:

1. The Director of the Idaho Department of Water Resources (hereinafter "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.
2. The claimants objections to water right no. 63-10435 constitutes an impermissible collateral attack on water right license 63-10435.

Id. at 1-2. The *State of Idaho's Brief in Support of its Motion for Partial Summary Judgment* did not raise any issues related to soils. That brief did review how the 4.5 acre feet per acre limitation was used to calculate the annual diversion volume limitations described in the respective water rights and made the following comment about that standard in Footnote number 2: "A technical issue may exist about the 4.5 acre feet per acre limitation used in the Treasure Valley. The correctness of the 4.5 acre feet per acre limitation may be an issue that needs to be tried." *Id.* at 12. In addition, the State filed the *Affidavit of Jeff Peppersack Dated March 11, 2009*, which provided information about the development of the 4.5 acre feet per acre limitation. *Additional Statement of Facts* (hereinafter "ASOF"), at 2-3. None of this information was intended to litigate the correctness of the 4.5 acre feet per acre limitation to the places of use of these four water rights. Rather, it was intended to provide the district court background information to better understand the context for the annual diversion volume limitation being challenged by the claimants here and to clarify that a disputed issue of fact exists. As our footnote concluded, the correctness of the 4.5 acre feet per acre limitation is a matter that needs to be tried.

The claimants offered the *Affidavit of Scott N. King, P.E.*, which challenges the accuracy of the application of the 4.5 acre feet per acre limitation. Mr. King concludes that much greater quantities per acre are needed in the Treasure Valley. For example, he claimed that 6.4 acre feet per acre is required for gravity irrigation of alfalfa at a 60% irrigation efficiency. *Id.* at 4.

Here, the district court has before it two very different views about the efficacy of the 4.5 acre feet per acre limitation applied in the Treasure Valley by IDWR. Mr. King concludes that a much greater quantity may be beneficially used in the Treasure Valley. Mr. Peppersack, also a registered civil engineer reaches the opposite conclusion. *ASOF* at 2-3. In addition, the quotes of the Director's testimony at his deposition indicates that he concluded that 4.5 afa standard is more than sufficient in the Treasure Valley. This conflict of views on the efficacy of the 4.5 afa standard creates a disputed issue of fact that requires a trial on this issue.

II. THE DISTRICT COURT HAS NO BASIS TO STRIKE THE STATE OF IDAHO'S BRIEF AND EVIDENCE RELATING TO SOILS BECAUSE IT RESPONDS TO FACTUAL ISSUES RAISED BY THE CLAIMANTS.

The claimants argue that the "above-enumerated references to and discussion of soil types that appear in the State's materials are not relevant to these summary judgment proceedings." Claimants' *Motion to Strike*, at 4. The State moved for summary judgment on two finite legal issues. *Additional Course of Proceedings* (hereinafter "*ACOP*"), at 2. The State did not include the soils information in support of its *Motion for Partial Summary Judgment*. The State included the information in response to claimants' arguments that the district court should remove the annual diversion volume limitation because it does not accurately describe beneficial use in the Treasure Valley. *ACOP* at 2. The point was very simple and straightforward. The State wanted to make sure that the district court understood that a trial of this matter was considerably more complicated than simply the efficacy of the 4.5 afa limitation. The claimants have put in issue the factual claim that they can use more than 4.5 afa on their own

land. The State wanted to make sure that the district court was aware that there are other factual issues related to the amount of water that the claimants can beneficially use on their land and that these factual issues could not be resolved by a summary judgment proceeding because of the existence of these material facts that the claimants' own expert acknowledged.

Idaho law has long recognized that "one may not successfully complain of errors one has acquiesced in, or invited." *Venedillin v. Costco Wholesale Corp.*, 140 Idaho 416, 434, 95 P.3d 34, 52 (2004). Here, the claimants have brought before the district court whether the claimants can beneficially use more than 4.5 afa of water by their *Motion for Summary Judgment*. Now that claimants have invited the district court to proceed down this factual quagmire in a summary judgment proceeding, they cannot complain that the State has pointed out that the claimants' own expert acknowledged that significant issues existed with respect to irrigation of the claimants' place of use. The State's reference to the problems with soils at the claimants' place of use was a direct and appropriate response to the issues raised by the claimants' *Motion for Summary Judgment* and supporting papers.

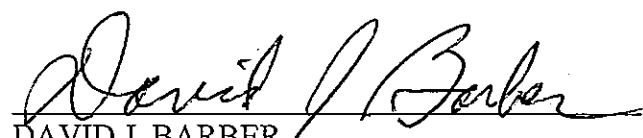
CONCLUSION

For the reasons stated, the district court should deny the claimants' *Motion to Strike*.

RESPECTFULLY SUBMITTED this 8th 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 8th day of April 2009 I caused to be served the original and/or copy of the STATE OF IDAHO'S BRIEF IN OPPOSITION TO MOTION TO STRIKE 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 (3 copies)
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121 (original)
- ☐ Statehouse Mail

2. Copies to the following persons:

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Snake River Basin Adjudication
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- ☐ Facsimile:
- ☐ 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
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United States Department of Justice
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550 West Fort Street, MSC 033
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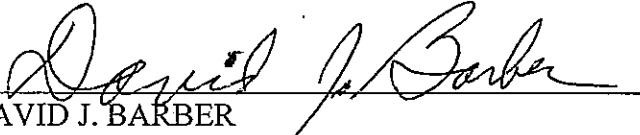
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Not Applicable



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