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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED 

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

)	Case No. 91-00001
In Re SRBA)	
)	MEMORANDUM DECISION AND ORDER
Case No. 39576)	ON BASIN-WIDE ISSUE NO. 1,
)	CONSTITUTIONALITY OF I.C. § 42-1416
)	AND I.C. § 42-1416A, AS WRITTEN
)	

Basin-Wide Issue No. 1 is designated as follows:

A. The constitutionality of I.C. § 42-1416, as written and

B. The constitutionality of I.C. § 42-1416A, as written.

HELD: I.C. § 42-1416 and I.C. § 42-1416A are declared unconstitutional, as written.

David J. Barber, Deputy Attorney General, for the State of Idaho.

K. Jack Haugrud and Daria Zane, United States Attorneys, Department of Justice, for the United States.

William R. Hollifield, Hollifield & Tolman, for Big Lost River Water Users Association.

Laird J. Lucas, Attorney, for Land and Water Fund of the Rockies.

Jeffrey C. Fereday, Givens, Pursley & Huntley, for Busch Agricultural Resources, Inc. and Boise Water Corporation.

William F. Ringert, Ringert Clark, for Nampa & Meridian Irrigation District, Grindstone Butte Mutual Canal Company, Rim View Trout Company and Others.

James P. Speck, Hogue, Speck & Aanestad, for Acequia, Inc. and Estate of Rosemary Haley.

Kent W. Fletcher, Parsons, Smith, Stone & Fletcher, for Minidoka Irrigation District.

Ray W. Rigby and Jerry R. Rigby, Rigby, Thatcher, Andrus, Rigby & Kam, for Mitigation Group and Freemont-Madison Irrigation District.

Scott L. Campbell, Elam & Burke, for Pioneer Irrigation District, Settlers Irrigation District and Owen Ranches

Blair J. Grover, Grover Law Office, for Certain Upper Valley Irrigators.

Don A. Olowinski, Hawley, Troxell, Ennis & Hawley, for Boise-Kuna Irrigation District, New York Irrigation District, Wilder Irrigation District and Big Bend Irrigation District.

Roger D. Ling, Ling, Nielsen & Robinson, for A&B Irrigation District, Burley Irrigation District, Falls Irrigation District and Aberdeen-Springfield Canal Company.

David B. Lincoln and Douglas A. Donohue, Elam & Burke, for Sun Valley Company.

I. PROCEDURAL HISTORY

Basin-Wide Issue No. 1 was initiated when Big Lost River Water Users Association filed a *Motion to Modify the Director's Report for Basin 34, and/or In the Alternative, a Restraining Order Requiring IDWR to Administer Water in Basin 34 According to Idaho Law (Motion to Modify)*. The Idaho Department of Water Resources (IDWR) moved to dismiss the *Motion to Modify*. At the scheduling conference, the Court and parties found it necessary to designate issues raised by the *Motion to Modify* as a "basin-wide issue." (In Re SRBA, Twin Falls County Case 39576, *SRBA Administrative Order 1, Rules of Procedure* (amended June 21, 1993), Section 10.)

The process to identify and ultimately designate Basin-Wide Issue No. 1 was begun when the Court served notice requiring all parties who appeared on the *Motion to Modify* to submit a statement of the issue(s) sought to be designated as a basin-wide issue. (In Re SRBA, Twin Falls County Case 39576, *Order Requiring Submission of Statement of Basin-Wide Issue; and*

Setting Hearing (May 4, 1993).) Notice of the order was also served on the Court's Certificate of Mailing.¹ Following submission and review of the proposed statements of basin-wide issue(s), the ***Notice of Intent to Designate Basin Wide Issue No. 1*** issued and hearing was set. (In Re SRBA, Twin Falls County Case 39576, Subcase 91-00001, ***Notice of Intent to Designate Basin-Wide Issue No. 1: Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A*** (May 28, 1993) (***Notice of Intent***).)

The ***Notice of Intent*** framed the issues as the constitutionality of I.C. §§ 42-1416 and 42-1416A, as written. It invited any party to the adjudication to respond by filing "***Comments to the Notice of Intent to Designate Basin-Wide Issue No. 1***" and required that service of the comments follow the ***General Docket Sheet Procedure*** (In Re SRBA, Twin Falls County Case 39576, ***SRBA Administrative Order 1, Rules of Procedure*** (amended June 21, 1993), Section 7 (Docket Sheet)) and be made on the parties who appeared on the original ***Motion to Modify***. Finally, the ***Notice of Intent*** afforded all parties to the adjudication the opportunity to reply to any comments received to the ***Notice of Intent***.

Following the submission of written comments and replies and a hearing, the ***Order Designating Basin Wide Issue No. 1*** issued notifying all claimants and counsel that claimants could become a party to Basin-Wide Issue No. 1 by filing a "***Motion to Participate in Basin-Wide Issue No. 1***" no later than 30 days following the date of publication in the Docket Sheet of the filing of the ***Order Designating***. (In Re SRBA, Twin Falls County Case 39576, ***Order Designating Basin-Wide Issue No. 1 and Setting Pre-Hearing Conference*** (July 26, 1993) (***Order Designating***).)

The Idaho Conservation League, Inc.; Idaho Rivers United, Inc.; Idaho Wildlife Federation, Inc.; and Northwest Resource Information Center, Inc. (Conservation Groups) filed a ***Motion to Intervene in Basin-Wide Issue No. 1; and Statement of Position (Motion to Intervene)***. Following a scheduling conference, the Court set a hearing on the Conservation Groups' ***Motion to Intervene***. (In Re SRBA, Twin Falls County Case 39576, ***Scheduling Order***

¹ The court Certificate of Mailing consists of parties and counsel who filed a notice of appearance in Twin Falls County Case 39576 pursuant to ***SRBA Administrative Order Re: SRBA Mailing Address, Telephone and Fax Numbers and Notices of Appearance***, dated December 17, 1991.

For Basin-Wide Issue No. 1 and Order Setting Hearing on Motion to Intervene (September 8, 1993) (Scheduling Order).)

The ***Scheduling Order*** clarified that the issue(s) to be tried initially would be the constitutionality of I.C. §§ 42-1416 and 42-1416A, as written, and would not test the statutes' constitutionality as applied.

Hearing was held on the Conservation Groups' ***Motion to Intervene***. It was opposed by several parties, with the State of Idaho taking no position. The Court granted the Conservation Groups permissive intervention under I.C. § 42-1416A.

At the pretrial conference, the parties were aligned only as to whether I.C. §§ 42-1416 and 42-1416A were constitutional or not. Parties advocating that the statutes are unconstitutional essentially agreed on the legal basis for their positions. Parties urging constitutionality of the statutes advocated markedly different grounds which defied any further alignment.

Hearing was held on Basin-Wide Issue No. 1 and all parties filing briefs were allowed to make oral presentations.

Therefore, this Court, having been presented with briefs and arguments by counsel or the parties and finding that notice has been made to all parties in the SRBA either personally or through the Docket Sheet, does hereby enter the following ***Memorandum Decision and Order***.

II. STATUTORY CONSTRUCTION

Parties challenging the constitutionality of I.C. §§ 42-1416 and 42-1416A, as written, set forth three essential bases for their claim:

- A. The statutes are vague, indefinite or uncertain in violation of the due process guarantees of the United States and Idaho Constitutions.
- B. The statutes violate the equal protection clauses of the United States and Idaho Constitutions.
- C. The statutes violate the Idaho Constitution, Article XV, Section 3, adopting the prior appropriation doctrine.

To resolve the constitutionality of I.C. §§ 42-1416 and 42-1416A, as written, the challengers' positions will be considered in the order presented.

VOID FOR VAGUENESS

The United States and Idaho constitutional guarantees of due process require lawmakers, in adopting statutes, to set reasonably clear guidelines for triers of fact in order to prevent arbitrary and discriminatory enforcement. Statutes that are vague, indefinite or uncertain violate these due process guarantees. The Idaho Supreme Court has defined the void for vagueness doctrine holding that when applied to civil statutes, the test is whether "persons of reasonable intelligence can derive core meaning" from the statutes. *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990).

In evaluating a constitutional challenge to a statute on the basis of void for vagueness, the Court must consider both the essential fairness of the law and the impracticability of drafting legislation with greater specificity. (Citations omitted.)

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards what is prohibited and what is not in each particular case Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. (Citation omitted.)

. . . .
However, a greater tolerance is permitted when addressing a civil or non-criminal statute as opposed to a criminal statute under the void for vagueness doctrine. (Citation omitted.) A civil or non-criminal statute is not unconstitutionally vague if persons of reasonable intelligence can derive core meaning from it. *Olsen v. J. A. Freeman, supra*, at 715-716. (Emphasis added.)

I.C. §§ 42-1416 and 42-1416A are neither criminal nor commercial regulatory statutes. The present case is more like *Olsen v. J. A. Freeman, supra*, requiring application of the standard it adopts. Therefore, the test to be applied in deciding Basin-Wide Issue No. 1 is whether persons of reasonable intelligence can derive core meaning from the statute with sufficient legal standards so as to avoid the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another. *Connally v. General Construction Co.*, 269 U.S. 385, 41 S. Ct. 126, 70 L. Ed. 322 (1926).

In reviewing the constitutionality of a statute, courts begin with the presumption of validity. A court is not authorized to substitute its judgment for that of the legislature on matters of policy, nor to strike down a statute which is not manifestly unconstitutional even though it may be considered unwise. *Sutherland Statutory Construction* § 2.01 (4th Ed., 1985 revision).

I.C. § 42-1416(1)

The first section of the presumption statute reads:

The holders of previously adjudicated water rights shall be presumed to have validly applied all water to beneficial use on the lands being irrigated at the time of basin-wide adjudication with no change in the priority dates of the original rights.

The briefs submitted reflect that each party supporting the constitutionality of I.C. § 42-1416(1) has advocated a meaning and application of the statute markedly different than the others. It is on this multiplicity of interpretations that those challenging its constitutionality rely. The challengers, for example, cite to a law review article on this very statute in which the author, Phillip Rassier, Deputy Attorney General, State of Idaho Department of Water Resources, identifies four possible interpretations of I.C. § 42-1416(1).²

² Rassier, *Idaho Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 520-525 (1990-91).

In his article Rassier concludes, as does the State of Idaho in this action, that I.C. § 42-1416(1) was intended to "correct ambiguous decrees." However, in making recommendations in three Director's Reports, IDWR followed an entirely different interpretation. Other defenders of the statute advance at least two additional interpretations.

Four possible interpretations of this subsection include:

1. That the first presumption applies when a decree is ambiguous regarding the description of the land irrigated under the decreed right with no expansion in acreage or in diversion volume or rate. This presumption can be rebutted by evidence of forfeiture or evidence that the land irrigated at the time of the adjudication was uncultivated at the time of the decree. (State of Idaho.)
2. That the first presumption applies when a decree is ambiguous regarding the description of the land irrigated under the decreed right with no expansion in acreage or in diversion volume or rate and would apply to changes in use made prior to 1969. This presumption would be rebutted by evidence that the land was not irrigated at the time of the decree or that the changes were illegally made. (Pioneer and Settlers Irrigation Districts and Owen Ranches.)
3. That the first presumption applies to blatant expansion of the decreed right as to both the number of acres irrigated and the volume of water diverted which can be rebutted only by a party showing that it is injured by the expansion. (IDWR; A&B, Burley and Falls Irrigation Districts and Aberdeen-Springfield Canal Company.)
4. That the first presumption applies to blatant expansion of the decreed right as to both the number of acres irrigated and the volume of water diverted except that a party need not show injury to rebut the presumption. The presumption can be rebutted by the production of evidence that the land on which the water right was decreed has been changed or that there is an increase in the volume of water used. (Freemont-Madison Irrigation District.)

As stated previously, this Court begins with the presumption of the statute's constitutionality. To answer the challenge raised to its constitutionality, the court is required to find the requisite core meaning of the statute as it was intended by the legislature. No party has produced any legislative history or other evidence reflecting the legislature's intent with respect to the two interpretations advanced by the State (one

by IDWR in the Director's Reports, one by the Attorney General in this action) or the two advanced by other defenders. The court is, therefore, left to choose an interpretation without any legislative guidance, either from the clear, plain meaning of the statute or from articulated standards contained in I.C. § 42-1416(1).

It is held that I.C. § 42-1416(1) is void for vagueness. Reviewing the statute, a person of reasonable intelligence cannot derive a core meaning from I.C. § 42-1416(1). Where the core meaning cannot be discerned, it would be improvident for this Court to adopt a meaning through contrivance or speculation. For a court to simply choose an interpretation in order to reach the legal conclusion that the subsection has a core meaning is an arbitrary act. Courts are not authorized to either legislate or fill a void left by legislative vagueness. Principles of due process and separation of powers prohibit courts from such active involvement in the legislative process.

If the court makes a selection between competing interpretations to determine a core meaning for I.C. § 42-1416(1), it places itself in the role of the legislature. Because the statute is vague, indefinite and uncertain, any application of it by this Court would violate the due process guarantees of the United States and Idaho Constitutions.

By finding I.C. § 42-1416(1) unconstitutional under the doctrine of void for vagueness, it is unnecessary to review it under the additional theories advanced by the challengers.

I.C. § 42-1416(2)

The second portion of the presumption statute reads:

Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

The parties challenging the constitutionality of I.C. § 42-1416(2), the second presumption, do so on the same basis as under the first presumption (I.C. § 42-1416(1)).

They allege it is void for vagueness under the due process provisions of the United States

and Idaho Constitutions. Specifically, they point to the complete lack of standards provided by the legislature for the court to apply the "expansion of use" and "absence of injury to other appropriators" provisions. They urge that absent any standards or guidelines, the court's application of this statute could only be arbitrary and capricious.

The standard under which this challenge is to be reviewed is the same as that applied to I.C. § 42-1416(1) above.

The phrase "expansion of use" has been defined and appropriate review standards adopted in other portions of the Idaho Code, I.C. § 42-222. There, expansion of use refers, generally, to changes which may be made to a permitted or licensed water right. Standards have been set for administrative review of such changes following application to IDWR. At the urging of IDWR, the Idaho Supreme Court has ruled that any changes allowed by statute also require a determination by the agency that the changes meet the local public interest standard. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

This Court has ruled on the necessity for a standard in determining how to apply I.C. § 42-1416(2). (In Re SRBA, Twin Falls County Case 39576, *Order Granting, in Limited Part, Motion to Reconsider Order Denying Motion for Leave to Intervene* (January 14, 1994).) In ruling on whether certain conservation groups could intervene with respect to water rights claimed or recommended pursuant to I.C. § 42-1416(2), this Court held they could intervene for the reason that the statute allows the same "changes" covered by the decision in *Hardy v. Higginson*, *supra*, and, therefore, required that the same factors be met as for changes under I.C. § 42-222, including the local public interest standard. In so holding, this Court noted it was not ruling on the constitutionality of I.C. § 42-1416 since that matter was at issue in Basin-Wide Issue No. 1.

What is significant about the decision on the Conservation Groups' *Motion to Intervene* is that a number of parties, including three who support the constitutionality of the statute here, have filed motions to reconsider urging that the standards in I.C. § 42-222 do not apply to I.C. § 42-1416(2). Therefore, these parties oppose the adoption of the only reasonable standard this Court can identify to arrive at a core meaning of the second presumption. Absent any definition of the term "expansion of use" or a standard

this Court may use to review claims or recommendations based on I.C. § 42-1416(2), the statute is unconstitutionally void for vagueness because no person of reasonable intelligence can derive its core meaning.

"Expansion of use" was also reviewed by this Court in the case of *State of Idaho v. Dickcon*, In Re SRBA, Twin Falls County Case 39576, *Memorandum Decision Re: Petition for Preliminary Injunction* (July 30, 1991). There IDWR sought an injunction against an irrigator in the SRBA who was pumping water at a rate in excess of his licenses. The issue presented was whether "expansion of the use" as used in I.C. § 42-1416(2) allowed a water user, who was a claimant in the SRBA, to increase the amount of water allowed under the licenses. It was concluded that an "expansion of the use" could not include more water. It was held that:

'Expansion of the use' as that term is used in I.C. § 42-1416 does not mean an expansion of the amount of water to which a user is entitled. To hold otherwise would be contrary to existing Idaho water law. Such a change in Idaho water law is so significant that it is presumed the legislature would have clearly stated such an intention if it existed. Unless the legislature specifically and unequivocally includes the right to increase the quantity of water to which one is entitled under I.C. § 42-1416, this court will not engraft such an interpretation onto the statute.

Dickcon, *supra*, at 17.

Further illustrating the lack of definition in the statute, IDWR has, in Director's Reports, recommended rights under I.C. § 42-1416(2) allowing a greater amount of water than permitted or licensed where it is measured by annual diversion volume or consumptive use, rather than by rate, as was the case in *Dickcon*. Such an expansive reading of I.C. § 42-1416(2) following the *Dickcon* decision is further evidence of the lack of articulated standards in the statute and, as such, the need for the court to not merely interpret it but to virtually redraft it by defining "expansion of use."³ From these

³ By referring to IDWR's interpretation of I.C. § 42-1416(2) which allows claimants more water when measured by annual diversion volume or consumptive use as opposed to rate, this Court in no manner endorses such interpretation.

confusing, contradictory and multifarious interpretations, no person of reasonable intelligence can arrive at a core meaning.

Similarly, the challengers point to the lack of definition and standards of application for the term "absence of injury to other appropriators" as rendering I.C. § 42-1416(2) unconstitutionally vague.

The "injury" standard is a factor to be reviewed for changes under I.C. § 42-222. However, those supporting constitutionality disagree that any of the I.C. § 42-222 factors apply to I.C. § 42-1416(2). Absent standards like those in I.C. § 42-222, when applying the absence of injury clause the courts can only guess to resolve such issues as (1) who must carry the burden of persuasion; (2) can several claimed expansions under this section be aggregated or taken together to establish injury; and (3) how immediate in point of time or amount must the effects of such expansion be to constitute injury. Absent legislative standards, this Court is left to speculate as to the lawmakers' intent. To find a core meaning based on speculation violates due process and renders this statute void for vagueness.

Therefore, I.C. § 42-1416(2) is held to be unconstitutionally vague. Reasonably intelligent people are left to guess at its core meaning and for this Court to do so would be arbitrary and violate the due process guarantees of the United States and Idaho Constitutions.

By finding I.C. § 42-1416(2) unconstitutional under the doctrine of void for vagueness, it is unnecessary to review it under the additional theories advanced by the challengers.

I.C. § 42-1416(3)

The third presumption at issue reads:

A prior decree adjudicating a tributary stream or subbasin within the basin shall be presumed correct, if:

- (a) It is or can be made substantially correct as to current water rights; and

(b) Contains all the elements necessary to adequately describe the water rights included in the decree.

As with the first two sections of the presumption statute, I.C. § 2-1416(3) must be reviewed under the same due process standard to determine its constitutionality under the void for vagueness doctrine. On its face, this section appears to be the most innocuous of the entire statute. Scrutiny of its provisions raises serious constitutional questions reaching beyond vagueness.

I.C. § 42-1416(3) requires the court to presume that a prior decree of a tributary stream or subbasin is "correct" if two specific conditions are met, the first being that it can be "made substantially correct as to current water rights." The legislature has neither defined nor provided standards to determine the meaning and application of this provision. The terms "correct" and "substantially correct" are not terms of art in the law which carry an established meaning to the statute. Whether "correct" refers to legal propriety, factual accuracy or both is undefined.

The lack of definition for the term "correct" becomes clearest when searching for guidance as to the point in time that must be used to determine whether the decree can be made substantially correct (i.e., at commencement of the SRBA, the date the claim is filed or the date of hearing on contested claims). This undefined provision prohibits determination of a core meaning by persons of average intelligence and its definition by the court would merely be an effort in endless speculation. It violates the due process protections of the United States and Idaho Constitutions.

The statute raises greater concern when viewed in light of what it attempts to accomplish even if the terms were found to be clear. The operation of the statute would allow the modification of a court judgment, a decree, by the subsequent course of conduct of one or more of the parties. In other words, if a claimant used water in a manner not wholly consistent with the decree, I.C. § 42-1416(3) could be read to require modifying the decree by making it "substantially correct" in light of current uses. Judgments of competent courts cannot be modified in this manner.

Further, if a prior decree does not meet the two statutory conditions, I.C. § 42-1416(3) implicitly requires that the decree be considered incorrect. This is

both illogical and contrary to the law of judgments. Whatever was intended by this presumption of correctness of prior decrees escapes understanding, rendering the provisions unconstitutionally vague.

The second condition, I.C. § 42-1416(3)(b), similarly prohibits finding the core meaning of this presumption. It requires that the prior decree be presumed correct if it "contains all the elements necessary to adequately describe the water right." There is no guidance as to which elements must be included. Whether these are the elements in I.C. § 42-1411, adopted in 1985, or elements which were legally required or sufficient on the date the prior decree was entered is not answered. This, again, requires the court to arbitrarily determine the core meaning of the statute.

If, as has been suggested, I.C. § 42-1416(3) is nothing more than a statement of the principles of *res judicata* and collateral estoppel, it misses the mark. The doctrines of *res judicata* and collateral estoppel are grounded upon the constitutional principles of due process and separation of powers. Application of the doctrine of *res judicata* under the unities of parties, claims and issues can, generally, only be done on a case-by-case basis. Due process requires no less. A statute requiring a collective determination of the effect of a prior judgment raises serious due process concerns.

I.C. § 42-1416(3) is unconstitutionally void for vagueness. Absent standards or definition, no core meaning is discernable to persons of average intelligence. A determination of core meaning by the court could only be based upon speculation, rendering that interpretation arbitrary and violative of the due process guarantees of the United States and Idaho Constitutions.

By finding I.C. § 42-1416(3) unconstitutional under the doctrine of void for vagueness, it is unnecessary to review it under the additional two theories advanced by the challengers.

I.C. § 42-1416(4)

This section of the statute declares that the presumptions established in subsections 1-3 are rebuttable. It reads:

(4) The presumptions established in this section are rebuttable.

Parties challenging the unconstitutionality of this entire statute point to this section as being one of the most offensive to the due process principles embodied in the vagueness doctrine. They postulate that to be given effect, the presumptions are really conclusive presumptions and are not rebuttable. They further point out that to give effect to the rebuttable nature of the presumption, each of the presumptions becomes self-rebutting. The difficulty presented by applying these rebuttable presumptions is that they render the entire statute meaningless.

For example, the first presumption begins with the presumed fact that the claimant holds a decreed water right and applied the water on irrigated lands at the time the basin-wide adjudication began. This presumption would work to establish the ultimate fact that water applied at the time of commencement of the SRBA is that allowed by the decree so that all water applied at the time of commencement is deemed to have the original priority date as decreed. This would serve to eliminate issues of expansion or forfeiture of the right since the entry of the decree.

The challengers postulate that the first presumption is self-rebutting. They point out that the original decree would be in evidence, along with the notice of claim showing the expanded use. Therefore, the unlawful expansion would be apparent on the face of the pleadings. This means claims for backdating water rights for expansions contemplated under the first presumption are automatically rebutted by the pleadings. They point out that if the evidence in the pleadings cannot be used to rebut the presumption, the presumption becomes conclusive rather than rebuttable.

The term "rebuttable presumption" is a term of art in the law of evidence. Idaho has adopted the "bursting bubble" theory of rebuttable presumptions. I.R.E. 301; *see Report of Idaho State Bar Evidence Committee*, Comment to Rule 301 (December 31, 1984). Under this theory the presumption evaporates when competent evidence to the contrary is placed of record. In this case, since the pleadings virtually rebut the presumption, under the "bursting bubble" theory, the challengers are correct that the presumption is self-rebutting if the legislature intended it to be rebuttable. This is equally true when applied to the second and third presumptions. The challengers,

correctly, identify several additional constitutional problems which arise if the presumptions were intended to be conclusive rather than rebuttable.

The issue presented to the court then is to determine what the legislature intended these presumptions to be, rebuttable or conclusive. While called rebuttable, the presumptions are self-rebutting and senseless. However, the legislature is presumed to have understood the difference between the two types of presumptions and it made these rebuttable, even though meaningless. It is noteworthy that legal scholars have drawn attention to the confused manner in which presumptions have been dealt with in the law. One scholar has expressed the quandary stating:

Every writer of sufficient intelligence to appreciate the difficulty of the subject matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair. Morgan, Presumptions, 12 Wash. L. Rev. 255 (1937).

Green and Nesson, *Problems, Cases, and Materials on Evidence* 793 (1983).

This Court finds that entire scheme of rebuttable presumptions fails for vagueness. No person of reasonable intelligence can determine any core meaning to the application of the rebuttable presumptions contained in the first three subsections of I.C. § 42-1416. There is no definition or standard provided by the legislature which would indicate its true intent with respect to this statutory scheme. Therefore, absent a core meaning, its application by this Court in the SRBA would be based on conjecture or speculation. Such an arbitrary determination would violate the due process guarantees of the United States and Idaho Constitutions.

In conclusion, I.C. § 42-1416 is void for vagueness. Subsections 1, 2 and 3 are not rendered void merely because they are subject to multiple interpretations, even if some of those interpretations are unconstitutional. *See, e.g., Cowles Publishing Co. v. Magistrate Court*, 118 Idaho 753, 759, 800 P.2d 640 (1990). They are void because a person of reasonable intelligence viewing each section of the statute would be unable to discern a core meaning. *Id.* To arrive at a core meaning for each of the subsections individually or to give operation to the rebuttable presumption set forth in subsection 4, this Court would have to enter into the realm of speculation and thereby redraft the

statute. It is necessary that this Court find I.C. § 42-1416 unconstitutional as written because absent this Court's complete redrafting of the statute, it is impossible to derive a core meaning which would uphold its validity. *Cowles* at 760; *Olsen v. J.A. Freeman*, 117 Idaho at 716. This the Court cannot do because such action is arbitrary and violates the due process guarantees of the United States and Idaho Constitutions. Therefore, I.C. § 42-1416 is declared unconstitutional in its entirety.

I.C. § 42-1416A

The constitutionality of I.C. § 42-1416A, the accomplished transfer statute, has been challenged on the following grounds:

1. I.C. § 42-1416A is void for vagueness because it lacks standards, criteria or guidelines as to how, when and what proof must be taken to assure the substantive criteria of I.C. § 42-222 are met.
2. I.C. § 42-1416A violates due process and equal protection guaranties;
3. I.C. § 42-1416A allows a "taking" of a property right from one person to the benefit of another;
4. I.C. § 42-1416A rewards noncompliance with the mandatory permit system and circumvents satisfying the safeguards which protect all water users.

The challenged statute reads:

Prior change in point of diversion, place of use, period of use, or nature of use of water right claimed in a general adjudication. -- (1) If any person entitled to the use of water has made a change in point of diversion, place of use, period of use or nature of use of all or a part of the water, including a change as part of an exchange as defined by section 42-105, Idaho Code, prior to entry of an order commencing a general adjudication pursuant to section 42-1408, Idaho Code, and the person entitled to the use of water has not complied with the requirements of sections 42-108 and 42-222, Idaho Code, regarding such changes, the following shall apply:

(a) the water right may be claimed in the general adjudication as changed and an application for change of the water right is not required to be filed pursuant to section 42-222, Idaho Code; and

(b) the water right may be determined by the director in the director's report pursuant to section 42-1411, Idaho Code, and decreed by the district court pursuant to section 42-1412, Idaho Code, as changed, if the change meets the substantive criteria of section 42-222, Idaho Code, for approval of such changes, provided that the change may be approved subject to conditions necessary to satisfy the substantive criteria of section 42-222, Idaho code, for approval of such changes.

(2) To the extent that the provisions of this section and section 42-1416, Idaho Code, are both applicable to the same water right, the two sections shall be applied conjunctively, if possible, but this section shall not be construed to limit the provisions of section 42-1416, Idaho Code. [I.C., § 42-1416A, as added by 1989, ch. 97, § 1, p. 226.]

I.C. § 42-1416A, the accomplished transfer statute, covers claimants who, prior to commencement of the SRBA, completed a change in their point of diversion, place of use, period of use or nature of use in violation of I.C. §§ 42-222 and 42-108. It purports to allow them to claim and have the use decreed as changed if the changed use complies with the requirements of I.C. § 42-222. As discussed in regard to I.C. § 42-1416(2), a number of parties, including three who support the constitutionality of the statute here, have filed motions to reconsider this Court's decision on intervention, *In Re SRBA, Twin Falls County Case 39576, Order Granting, in Limited Part, Motion to Reconsider Order Denying Motion for Leave to Intervene* (January 14, 1994), asserting that the criteria of I.C. § 42-222 do not apply to I.C. § 42-1416A.

The constitutionality of I.C. § 42-1416A has been challenged as void for vagueness. It must be reviewed under the same standard as applied in determining the constitutionality of I.C. § 42-1416, above.

The focus of inquiry of the vagueness challenge is the substantive criteria of I.C. § 42-222 which would be applied to claims or recommendations arising under I.C. § 42-1416A. These criteria are:

1. That no other water rights are injured;
2. The change does not constitute an enlargement in use of the original right;
3. The change is consistent with the conservation of water resources within the state of Idaho;
4. The change is in the local public interest as defined in Section 42-203A(5), Idaho Code; and
5. No change can be approved which is a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

I.C. § 42-222(1).

The immediate problem posed by the statute is the criteria relating to injury, local public interest and changes significantly affecting the agricultural base. Left completely unresolved by the statute is the point in time at which the court must focus its inquiry as to these factors. It could be at the time of completion of the change, the date the SRBA was commenced, that date of the claim or the date of the trial. This is significant because, using injury as an example, the answer to the time of inquiry raises both procedural as well as substantive questions. Procedurally, it will impact issues of notice and standing. Substantively, it can effect the ability of a party to meet its burden of persuasion because these changes can go as far back as the original effective date of I.C. § 42-222. This same problem also exists with application of the local public interest standard and the changes significantly affecting the agricultural base criteria.

I.C. § 42-1416A with its reference to I.C. § 42-222 contains no standards or guidelines notifying the claimants or the court as to when and how to apply the statute. Absent such guidance a person of reasonable intelligence is left to guess at its core meaning. A court is only able to apply the statute through speculation which, in the realm of statutory construction and application, constitutes arbitrary action. Absent a

core meaning, application of I.C. § 42-1416A in the SRBA would violate the due process protections of the United States and Idaho Constitutions. The statute is void for vagueness.

Having found I.C. § 42-1416A void for vagueness, it is unnecessary to address the remaining grounds on which the statute's constitutionality is challenged.

III. CONCLUSION

The designation of Basin-Wide Issue No. 1 requires this Court to resolve the constitutionality of I.C. §§ 42-1416 and 42-1416A, as written.


It is held that both I.C. §§ 42-1416 and 42-1416A are unconstitutional, as written. The resolution of this issue is made as a matter of law on a controverted question of constitutional construction and involves no substantial factual issues. *Sutherland Statutory Construction* § 2.06 (4th Ed., 1985 revision).

Reviewing both statutes in light of due process protections of the United States and Idaho Constitutions, it is held that they lack sufficient standards or guidance allowing a person of reasonable intelligence to find a core meaning. The statutes are, therefore, unconstitutional under the void for vagueness doctrine. Application of either statute in the SRBA would require the court to speculate as to their core meaning. Enforcement of a statute based on such speculation constitutes an arbitrary act prohibited by the due process guarantees of the United States and Idaho Constitutions.

As the United States Supreme Court has stated, the vice of statutes which fail to express legislative intent "lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another. . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391-394, 41 S. Ct. 126, 70 L. Ed. 322 (1926).

IT IS SO ORDERED.

DATED February 4, 1994.


DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

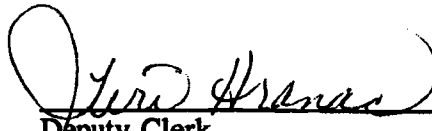
CERTIFICATE OF MAILING

I certify that a true and correct copy of the **MEMORANDUM DECISION AND ORDER ON BASIN-WIDE ISSUE NO. 1, CONSTITUTIONALITY OF I.C. § 1416 AND I.C. § 42-1416A, AS WRITTEN** was mailed on February 4, 1994, with sufficient first-class postage to the following:

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