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DEPARTMENT OF
WATER RESOURCES

Attorneys for Claimant and Objector
Pioneer Irrigation District

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18946.0137

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. 63-00166A 63-00166B
63-00167A 63-00167B
63-00179A 63-00179C
63-32580

MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MOTION TO REMAND

Pioneer Irrigation District, through undersigned counsel of record, hereby files
this memorandum in support of its Motion for Partial Summary Judgment and Motion to
Remand pursuant to SRBA Rule of Procedure 1 and Idaho Rules of Civil Procedure 7(b)

MEMORANDUM IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT AND MOTION TO REMAND - 1

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and 56(c). It is supported by the affidavits of Scott Campbell, Dawn Fowler, Dylan Lawrence, and Mark Zirschky, filed contemporaneously herewith.

I. INTRODUCTION

All three water rights 63-166B, 63-167B, and 63-179C were recommended with accomplished transfers of their points of diversion. The point of diversion for all three rights is Pioneer's Highline Canal. Pioneer objected to the point of diversion for all three water rights.

Idaho Code Section 42-1425 requires a subcase to be remanded back to IDWR when an objection is filed to a recommended accomplished transfer to determine whether any injury or enlargement has occurred. In addition, Section 42-1425 and 42-108 require the consent of the irrigation district to an accomplished transfer that involves the district's facilities. Here, the procedures of Section 42-1425 were not followed, and Pioneer never granted any such consent.

II. STATEMENT OF FACTS

Pioneer Irrigation District owns and operates the Caldwell Highline Canal, also known as the Caldwell Canal or the Highline Canal. (Aff. of Pioneer Secretary/Treasurer Dawn Fowler; Aff. of Pioneer Superintendent Mark Zirschky.) IDWR's recommendations in the SRBA for water rights 63-166B, 63-167B, and 63-179C all have the same point of diversion. (Lawrence Aff., Exs. A, B, C.) As admitted by both Franklin and Mason, this point of diversion is Pioneer's Highline Canal. (Lawrence Aff., Ex. D (Franklin admissions), Ex. E (Mason admissions).) Importantly, all three recommendations contain the following statement: "Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code." (Lawrence Aff., Exs. A, B, C.)

In its objections to all three water rights, Pioneer specifically objected to point of diversion. (Lawrence Aff., Exs. F, G, H.) However, Pioneer is not aware of any remand of these subcases back to IDWR, of any hearing conducted by IDWR to determine whether any injury or enlargement has occurred, or of any supplemental report issued by IDWR. (Campbell Aff., ¶ 2.) Nor is Pioneer aware of ever having been requested or having granted consent to any accomplished transfers. (Campbell Aff., ¶ 3.)

III. STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56; *see, e.g., City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 109, 157 P.3d 600, 603 (2007). Typically, the nonmoving party is entitled to the benefit of all inferences which might reasonably be drawn from the evidence. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Kline v. Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). However, the nonmoving party may not rest on mere allegations or denials of that party's pleadings to avoid summary judgment. *Theriault v. A.H. Robbins Co.*, 108 Idaho 303, 306 07, 698 P.2d 365, 368-69 (1985). The nonmoving party's case must not rest on mere speculation, because a "scintilla of evidence" is not enough to create a genuine issue of material fact. *G&M Farms, supra*; *Kline, supra*.

IV. LEGAL ARGUMENT

Idaho Code Section 42-1425 establishes mandatory requirements and procedures that must be followed when an objection is filed to a recommended accomplished transfer of a point of diversion:

(2) *Any change of . . . point of diversion . . . of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, . . . may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:*

(a) *If an objection is filed to a recommendation for accomplished change of . . . point of diversion . . . , the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.*

IDAHO CODE § 42-1425 (emphasis added).

Here, all three of the recommendations for 63-166B, 63-167B, and 63-179C contain the following statement: "Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code." (Lawrence Aff., Exs. A, B, C.) And, Pioneer objected to the recommended point of diversion for all three of those water rights. (Lawrence Aff., Exs. F, G, H.) However, Pioneer is not aware of any remand of these subcases back to

IDWR, of any hearing conducted by IDWR to determine whether any injury or enlargement has occurred, or of any supplemental report issued by IDWR, all of which are explicitly required by Section 42-1425 when an objection is filed to a recommended accomplished transfer. (Campbell Aff., ¶ 2.) The “Subcase Summary” sheet for each of these three subcases does not reflect that any such actions have been taken. (Lawrence Aff., Exs. I, J, K.)

In addition, Section 42-1425 specifically preserves and incorporates “the consent requirements of section 42-108, Idaho Code” for any accomplished transfer of point of diversion. This is a reference to the following language from Section 42-108:

The person entitled to the use of water or owning any land to which water has been made appurtenant . . . may change the point of diversion . . . , if the water rights of others are not injured by such change in point of diversion . . . , provided; . . . if such works or system is owned and/or managed by an irrigation district, *no change in the point of diversion . . . of such water shall be made or allowed without the consent of such . . . irrigation district.*

IDAHO CODE § 42-108 (emphasis added).

Here, the point of diversion for all three water rights 63-166B, 63-167B, and 63-179C is Pioneer’s Highline Canal. Both Franklin and Mason admitted this in response to requests for admission propounded by Pioneer. (Lawrence Aff., Ex. D (Franklin admissions), Ex. E (Mason admissions).) Therefore, an accomplished transfer involving the Highline Canal specifically requires Pioneer’s consent pursuant to Idaho Code Sections 42-108 and 42-1425. However, such consent was never requested or given. (Campbell Aff., ¶ 3.)

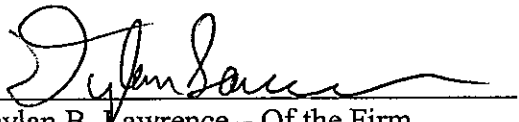
V. CONCLUSION

Based upon the foregoing, Pioneer respectfully requests a holding from this Court that the recommended points of diversion for water rights 63-166B, 63-167B, and 63-179C are invalid until the procedures of Idaho Code Section 42-1425 are followed and until Pioneer

provides the consent required by Idaho Code Section 42-108. Pioneer further requests that the Court remand this matter back to the Idaho Department of Water Resources pursuant to Idaho Code Section 42-1425.

DATED this 13th day of September, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Objector Pioneer
Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2010, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO REMAND to be served by the method indicated below, and addressed to the following:

Mason Creek Ditch Company

Represented by:

Albert P Barker

BARKER ROSHOLT & SIMPSON LLP

1010 W. Jefferson, STE 102

P.O. Box 2139

Boise, ID 83701-2139

☒ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile

Franklin Ditch Co.

Represented by:

Jon C. Gould

Daniel V. Steenson

RINGERT CLARK CHARTERED

P.O. Box 2773

Boise, ID 83701

☒ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile

Martin Galvin

P.O. Box 115

Middleton, ID 83644

☒ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile

John J. McEvoy

1703 N. KCID Road

Caldwell, ID 83605

☒ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile

Director

IDAHO DEPARTMENT OF WATER RESOURCES

322 E. Front Street, 6th Floor

P.O. Box 83720

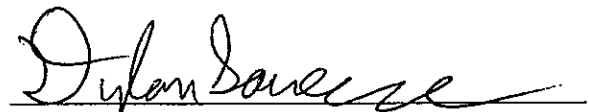
Boise, ID 83720

☒ U.S. Mail, Postage Prepaid

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☐ Overnight Mail

☐ Facsimile


Dylan B. Lawrence