

DEPARTMENT OF
WATER RESOURCES

Albert P. Barker, ISB #2867
Shelley M. Davis, ISB #6788
Sarah W. Higer, ISB #8012
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Mason Creek Ditch Company

**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,
and 63-32580

**MASON CREEK'S MEMORANDUM IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

COMES NOW Mason Creek Ditch Company (“Mason Creek”), by and through its attorneys of record Barker Rosholt & Simpson, LLP, and hereby submits the following *Memorandum in Support of Motion for Summary Judgment*.

I. INTRODUCTION

This dispute involves the ownership of water right claims 63-00179A (Pioneer’s claim) and 63-00179C (Mason Creek’s claim). Water right 63-00179C was decreed to Mason Creek by the “Stewart Decree,” issued by district court Judge George H. Stewart on January 18, 1906 and affirmed by the Supreme Court in *Farmers Cooperative Ditch Co. v. Riverside Irrigation Dist.*,

MASON CREEK'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

14 Idaho 450, 94 P. 761 (1908). Barker Affidavit Ex. A. Pioneer Irrigation District (“Pioneer”) was a party to the adjudication that resulted in the Stewart Decree. Now, more than one hundred years later and in a different forum, the Snake River Basin Adjudication (“SRBA”), Pioneer seeks to collaterally attack the water right decreed to Mason Creek in 1906 by filing a notice of claim for water right 63-00179A and an objection to Mason Creek’s claim for water right 63-00179C seeking to decree this right in the name of Pioneer.

Pioneer is bound by the Stewart Decree’s award of water right No. 63-179 to Mason Creek and cannot go behind that decree now to claim Mason Creek’s water right adjudicated in that decree. *Order of Recommitment to Special Master for Specific Findings* (Subcase No. 74-50A et al.) issued on January 12, 2009 (“*Carlson Order*”). Pioneer has even admitted that Mason Creek is the owner of this water as discussed more thoroughly below. Barker Affidavit, Ex. B. Mason Creek is therefore entitled to summary judgment confirming its ownership of water right 63-00179C. Mason Creek also requests dismissal of Pioneer’s claim to water right 63-00179A.

II. FACTS

Mason Creek and Pioneer were both parties in the *Farmers Cooperative Ditch Company v. Riverside Irrigation District, et al.* adjudication that resulted in the Stewart Decree. In that adjudication, Judge Stewart decreed to Mason Creek a water right for 1860 inches of water with a priority date of 1869. Pioneer did not object to that decree, and did not make any of the claims to ownership of the right that it is making now.

The source for water right no. 63-179C is natural flow from the Boise River. Water right no. 63-179C is diverted at the Caldwell Highline Canal. Barker Affidavit, Ex. C. This right was not claimed by Pioneer in the Stewart decree and Pioneer admits that water under right No. 63-179C is delivered to Mason Creek.

Interestingly, the Department has recommended total diversions of over 1212 cfs (60,600 inches) for 34,204.61 acres to Pioneer¹, not counting the additional Mason Creek and Franklin water rights Pioneer claims here. In addition, Pioneer holds over 60,000 acre-feet of storage rights in the Boise River reservoirs. *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Pioneer briefing). Why, when Pioneer is awash in water for its 34,204.61 acres, it has to demand ownership of its neighbor's water at the same time is a mystery.

Pioneer admits in its response to Mason Creek's Requests for Admission 1 that Mason Creek was decreed the water right in the Stewart Decree. *Barker Affidavit Ex. B* ("Please admit that the Mason Creek Ditch Company was decreed 1860 inches of water in the Stewart Decree..." to which Pioneer responded "Pioneer admits the allegation in Request for Admission No. 1..."). Pioneer admits in its response to Mason Creek's Requests for Admission 2 that the water Pioneer now seeks in water right 63-00179A is the same water decreed to Mason Creek in water right 63-00179C. *Id.* ("Please admit that Pioneer Irrigation District's claim to water right number 63-179A is for the same water right decreed to the Mason Creek Ditch Company in paragraph XLIII of the Stewart Decree." Pioneer responded "Pioneer admits the allegation in Request for Admission No. 2."). Pioneer also acknowledges, in its response to Mason Creek's Interrogatory No. 3, that the water right at issue is "diverted, conveyed, and delivered to the water users comprising the Mason Ditch Co. through Pioneer's Highline Canal." *Id.*

III. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the "pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P.

¹ 63-161BU, 63-224, 63-225, 63-294, 63-295, 63-371, 63-2275, 63-2276, 63-2294, 63-2529A, 63-2529B, 63-2891, 63-5199, 63-5200, 63-5219, 63-5237, 63-5255, 63-9109, 63-11622, 63-21731, 63-21739, 63-2114.

56(C); *In Re SRBA*, Case No. 39576, Subcase Nos. 63-02529, et al (“Tlucek”), at 7 (citing *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990)). All controverted facts are liberally construed in favor of the non-moving party. *Id.* (citing *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987)). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Id.* (citing *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969)). The moving party’s case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *Id.* (citing *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990)). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Id.* (citing *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986)).

The Director’s Report is prima facie evidence of the nature and extent of the water right. Idaho Code § 42-1411(4). It is up to the objector to rebut the Director’s Report with actual evidence. Idaho Code § 42-1411(5); *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997).

IV. ARGUMENT

This dispute involves the ownership of water right numbers 63-00179A and 63-00179C. Water right 63-00179C was decreed to Mason Creek by the “Stewart Decree,” issued by district court Judge George H. Stewart on January 18, 1906. Pioneer was a party to the adjudication that resulted in the Stewart Decree and did not object to Mason Creek’s water right in that proceeding. Barker Affidavit, Ex. B, ¶ LXXVI.

Whether the adjudication that resulted in the Stewart Decree was general or private is irrelevant. Pioneer is bound by that decree and prevented by the doctrine of *res judicata* from re-

litigating those claims in the SRBA. Idaho law defines “general adjudication” as “an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1420, Idaho Code, and for the administration of those rights.” I.C. § 42-1401A(5). It further defines “private adjudication” to mean “an action commenced in accordance with section 42-1404, Idaho Code, for the judicial determination of both the extent and priority of the rights of named persons to the use of water from any water system within the state of Idaho, for which a general adjudication has not been commenced or completed, that binds only those persons joined in the action and for the administration of such rights.” I.C. § 42-1401A(8). Whether general or private, an adjudication that has in common parties and cause of action is binding on those parties and they are barred by the doctrine of *res judicata* from attempting another bite at the apple. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 739, 947 P.2d 409, 412 (1997).

The Idaho Supreme Court has held that “a prior decree entered in a private adjudication is binding upon the parties (and their privies) to that decree.” *Order of Recommitment to Special Master for Specific Findings* (Subcase No. 74-50A et al.) January 12, 2009 (“*Carlson Order*”), at 2 (citing *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997)). The SRBA Court, in *Carlson*, also noted that “with limited exception, I.C. § 42-1420 states that a decree in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” *Carlson*, at 3 (internal quotations omitted). Judge Melanson continued “[t]herefore, in the SRBA, water rights decreed in a prior adjudication are binding upon the parties (and their successors-in-interest) to that decree. Parties bound by that earlier decree may not collaterally attack it in a later adjudication, such as the SRBA. The SRBA

cannot serve as a second opportunity for parties and their successors-in-interest to re-adjudicate their prior decreed water rights.” *Id.*

This Court reached the same result in *Order on Motion to Strike* (Subcase No. 63-00012, et al.) issued August 23, 2010, where it found:

In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that a prior decree entered in a private adjudication is binding only upon the parties (and their privies) to that decree. The converse of this principle is that in a general adjudication the decree entered therein is binding upon all existing users of water from the adjudicated water system, irrespective of whether such water user was made a party to the action or not. In other words, in a general adjudication, a water right that was not claimed in the adjudication is lost.

Order on Motion to Strike (Subcase No. 63-00012, et al.), at 13. (Footnote omitted).

This Court also found, in Subcase No. 63-03618, (“Lucky Peak Reservoir”), that licenses “are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies.” *Memorandum Decision and Order on Cross-Motions for Summary Judgment RE: Bureau of Reclamation Streamflow Maintenance Claim* (Subcase No. 63-03618, “Lucky Peak Reservoir”) issued September 23, 2008, at 16. In *Lucky Peak*, this Court quoted its earlier decision in *City of Pocatello* – *Federal Law Claims*:

If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license.... The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Id. (citing *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law (City of Pocatello – Federal Law Claims* (Subcase No. 29-11609 (Oct. 6, 2006) at 12-13) (emphasis added).

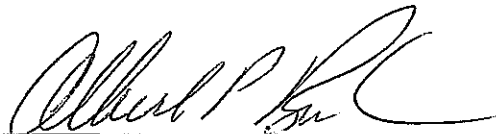
As noted above, Pioneer admits that Mason Creek was decreed water right 63-179C in the Stewart Decree. *Barker Affidavit, Ex. B.* Pioneer also acknowledges that the water right at issue is “diverted, conveyed, and delivered to the water users comprising the Mason Ditch Co. through Pioneer’s Highline Canal.” *Barker Affidavit, Ex. B.* Thus, on its own admission, Pioneer is claiming a water right that belongs to Mason Creek, as previously decreed in an adjudication to which Pioneer was party and did not object. Pioneer cannot reopen the ownership of this decreed water right in the SRBA as it is forbidden under the doctrine of *res judicata*. This Court should not countenance this collateral attack on a previously decreed water right and should grant Mason Creek’s Motion for Summary Judgment.

V. CONCLUSION

For the above stated reasons, Mason Creek respectfully requests that this Court grant its Motion for Summary Judgment, decree water right No. 63-179C in the name of Mason Creek and decree water right claim 63-179a as disallowed.

DATED this 17th day of September, 2010.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker

Sarah W. Higer

Attorneys for Mason Creek Ditch Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2010, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by the method indicated below, and addressed to each of the following:

Original hand delivered to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707
Fax No. 208-736-2121

Copy mailed to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

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

United States Department of Justice
Environment & Natural Resc Division
550 West Fort Street, MSC 033
Boise, ID 83724

Copy faxed to:

Jon C. Gould
Daniel V. Steenson
Ringert Law
P. O. Box 2773
Boise, ID 83701-2773
Attorneys for Franklin Ditch Company

Scott L. Campbell
Andrew J. Waldera
Moffatt Thomas, et al.
P. O. Box 829
Boise, ID 83701-0829
Attorneys for Pioneer Irrigation District



Albert P. Barker