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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

Case No. 39576

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

**PIONEER IRRIGATION DISTRICT'S
RESPONSE IN OPPOSITION TO FRANKLIN
DITCH COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

Pioneer Irrigation District (hereinafter "Pioneer"), through undersigned counsel of record, hereby files this response brief in opposition to the Motion for Summary Judgment filed by the Franklin Ditch Company (hereinafter "Franklin"). This response brief is supported by Affidavits of Scott King, Dylan Lawrence, Jennifer Stevens, and Mark Zirschky, filed

contemporaneously herewith (hereinafter “King Aff.,” “Lawrence Aff.,” “Stevens Aff.,” and “Zirschky Aff.,” respectively).

I. INTRODUCTION

Franklin’s motion for summary judgment only seeks confirmation of Franklin’s ownership of water rights 63-00166 and 63-00167. While Franklin’s motion purports to seek dismissal of “Pioneer’s notices of claims and objections,” Franklin offers no argument as to why Pioneer’s objections to other aspects of the recommendations for water rights 63-00166B and 63-00167B should be dismissed. Subsequent sections of this response brief will discuss why there are material issues of fact regarding quantity, point of diversion, and place of use that require resolution at trial, even if Franklin had included them in its motion. An objective reading of Franklin’s moving papers demonstrates that even Franklin concedes that those issues need to be resolved at trial.

II. STATEMENT OF FACTS

A. Facts Regarding The Agreements And Indentures Executed In 1883-1884 Between Franklin And Pioneer’s Predecessor

On October 2, 1883, the Idaho & Oregon Land Improvement Company, Pioneer’s predecessor-in-interest, and Franklin entered into an agreement. (Larson Aff. of 9/14/10, Ex. 1 (1883 agreement).) In that agreement, Franklin represented that it was “the claimant of and in possession of a certain Water Right and irrigating ditch taking water out of [the] Boise River or its Sloughs. . . .” (Larson Aff. of 9/14/10, Ex. 1, p. 1 (1883 agreement).)

Idaho & Oregon’s purpose in signing the 1883 agreement was “to acquire said Water right and ditch and to enlarge and extend the same for the irrigation of lands below those now covered by it.” (Larson Aff. of 9/14/10, Ex. 1, p. 1 (1883 agreement).) Therefore, in the

agreement, Franklin agreed “to convey to [Idaho & Oregon] all its said Water Right and ditches. . . .” (Larson Aff. of 9/14/10, Ex. 1, p. 1 (1883 agreement).) More specifically, Franklin agreed to convey to the Idaho & Oregon Land Improvement Company:

[O]ne thousand three hundred and fifty (1350) Statutory inches of Water, to be taken by [Franklin], or its said shareholders or the grantees from the ditch of the [Idaho & Oregon Land Improvement Company], or from any slough along the line of said ditch, at such point or points, as [Franklin] or said shareholders, or their grantees, may from time to time prefer, and [Idaho & Oregon] further covenants and agrees, to leave at all times at least three hundred and fifty (350) inches of water in what is know as the outside or South Slough, into which the ditch of [Franklin] now empties near the Bluff, and not less than Eight hundred (800) inches of water in what is known as the Back Slough that leaves the main slough about twenty feet above the head gate of [Franklin]

(Larson Aff. of 9/14/10, Ex. 1, p. 2 (1883 agreement).)

In exchange, Idaho & Oregon agreed to “enlarge said ditch” between the Boise River and Mason Creek by a date certain, and to convey “one thousand three hundred and fifty (1350) Statutory inches of Water” back to Franklin. (Larson Aff. of 9/14/10, Ex. 1, p. 2 (1883 agreement).)

On June 24 and 25, 1884, the parties executed the indentures necessary to effectuate the 1883 agreement. Specifically, on June 24, 1884, Franklin conveyed “all of the Water Rights, Sloughs and ditches known as the Franklin Ditch property” to Idaho & Oregon. (Larson Aff. of 9/14/10, Ex. 2 (indenture of June 24, 1884).) The next day, Idaho & Oregon conveyed “the first Thirteen Hundred and Fifty (1350) inches of Water of the Main Caldwell Canal” back to Franklin. (Larson Aff. of 9/14/10, Ex. 3 (indenture of June 25, 1884).) That indenture specifically limited the allowable place of use for that water to “the lands owned or claimed by” sixteen enumerated individuals. (*Id.*) As will be explained in more detail later in this brief and consistent with the 1883 agreement and 1884 indentures, Franklin representatives

repeatedly confirmed during the Stewart Decree proceedings that only 1,350 inches (27 cfs) of water were to be conveyed through the Caldwell Canal to Franklin water users. (See Gould Aff. of 9/14/10, Ex. 1, pp. 901:2930, 902:2933, 903:2937-38, 904:2940-41 (testimony of Franklin founding member Adam Schindler), 915:2975, 916:2979-917:2980, 917:2982-918:2984 (testimony of Franklin secretary H.E. Allen.))

Ultimately, the Stewart Decree decreed two water rights to Franklin: one right for 770 inches (15.4 cfs) of water (63-00166), and the other for 1,380 inches (27.6 cfs) of water (63-00167). (Gould Aff. of 9/14/10, Ex. 3, p. 462.) The point of diversion for both water rights was described broadly as “a point on the William Frost farm in section 18, township 4 north, range 1 west, Boise Meridian . . . ,” with no references whatsoever to the Caldwell Highline Canal. (Gould Aff. of 9/14/10, Ex. 3, p. 462.)

B. Facts Relevant To Forfeiture And The Capacity Of The Caldwell Highline Canal

IDWR’s recommendations in the SRBA for Franklin’s water rights 63-00166B and 63-00167B and Mason Creek Ditch Company’s water right 63-00179C all have the same point of diversion. (Lawrence Aff. of 9/14/10, Exs. A, B, C (SRBA recommendations).) As admitted by both Franklin and Mason, this point of diversion is Pioneer’s Caldwell Highline Canal. (Lawrence Aff. of 9/14/10, Ex. D (Franklin admissions), Ex. E (Mason admissions).) In fact, the Caldwell Highline Canal is the only recommended point of diversion for all three rights. (Lawrence Aff., of 9/14/10, Exs. A, B, C (SRBA recommendations).) When combined, these three water rights have a total recommended diversion rate of 79.2 cfs of water. *Id.*

Not far from its heading on the Boise River, there is a particular driveway bridge and culvert that has been constructed within Pioneer’s Caldwell Highline Canal. (Zirschky Aff., ¶ 3, Ex. A.) Due to the presence of this structure within the canal, Pioneer typically does not

divert more than 40-43 cfs of water into the canal. (Zirschky Aff., ¶ 4.) Diversion of more than this amount of water into the Highline would potentially risk flooding of adjacent properties and damage to the bridge/culvert and the canal itself. (Zirschky Aff., ¶ 4.) This bridge and culvert appears to be owned by William Clayton, (Zirschky Aff., ¶ 3.), a member of the Franklin Ditch Company. (Lawrence Aff., Ex. D (Franklin discovery responses).) While Pioneer is not yet aware of the precise date the bridge and culvert were originally constructed in the canal, it was likely originally constructed several years prior to 1992, the first year of Pioneer Superintendent Mark Zirschky's employment with Pioneer. (Zirschky Aff., ¶¶ 1, 3.)

Between Franklin's two water right recommendations and Mason Creek Ditch Company's recommendation for 63-00179C, IDWR has recommended these water rights with a total combined diversion rate of 79.2 cfs into the Caldwell Highline Canal. (Lawrence Aff. of 9/14/10, Exs. A, B, C (SRBA recommendations).) Franklin's right 63-00166B has the earliest priority date of the three (July 3, 1866) with a diversion rate of 15.4 cfs. (Lawrence Aff. of 9/14/10, Ex. A.) Mason's right 63-00179C has the next most senior priority date of June 1, 1869, with a diversion rate of 36.2 cfs. (Lawrence Aff. of 9/14/10, Ex. D.) Combined, those two rights have a total diversion rate of 51.6 cfs. This exceeds the 40-43 cfs that is typically diverted into the Caldwell Highline Canal. (See Zirschky Aff., ¶ 4.) This raises the issue that water right 63-00167B, with the most junior priority date of the three water rights (October 29, 1880) (Lawrence Aff. of 9/14/10, ¶ B), may have been partially forfeited over time.

C. Facts Relevant To IDWR's Recommendation Of Place Of Use For 63-00166B And 63-00167B

When IDWR prepared the recommendation for 63-00166B and 63-00167B, it based the place of use for those recommendations nearly exclusively upon information provided by Franklin representatives:

[Q.] [BY MR. LAWRENCE] With a ditch company, how are the actual boundaries determined of who the ditch company serves?

A. [BY IDWR 30(b)(6) REPRESENTATIVE JAN SHURTE] Quite frankly, the ditch company told us. Yeah, there was no other way for us to really know ourselves personally on that type of thing.

Q. And do you know what process the ditch company would go through or did go through for these recommendations to identify their boundaries?

A. They worked with one of our GIS personnel; I know that. But as far as within their own ditch company, I don't know what they did.

Q. And this might be a difficult question to answer, but would the place of use for a ditch company -- and so just talking about the boundary at this point as opposed to what's actually irrigated. Would the boundaries be determined by determining which lands can actually be served by the particular facilities through which water is conveyed or is there some other method for actually drawing the boundaries around a ditch company place of use?

A. Actually, it was just based on where the ditch company said their boundaries were.

(Lawrence Aff., Ex. B, 34:25-35:21 (30(b)(6) Dep. of IDWR).)

In other words, IDWR did not investigate existing information regarding the lands that were actually irrigated by these two water rights at the time of the Stewart Decree.

However, for both 63-00166 and 63-00167, the Stewart Decree defines the place of use as "the lands lying under [Franklin's] canal system." (Gould Aff., dated 9/14/2010, Ex. 3, p. 462:1534.)

Critical in this regard is the fact that the map that was apparently utilized in conjunction with the Stewart Decree proceedings specifically identifies which lands were irrigated from which irrigation facilities at the time of the Stewart Decree. (King Aff., ¶¶ 2, 3, Exs. B, C.) This information relates directly to which lands were "under [Franklin's] canal system" at the time of

the Stewart Decree, but was not utilized by IDWR in investigating and preparing the recommendations.

In addition, the indenture of June 25, 1884, in which Pioneer's predecessor conveyed 1,350 inches of water back to Franklin one day after Franklin had conveyed all of its water rights to Pioneer's predecessor, specifically states that such water was "to be appurtenant to, and used only on the lands owned or claimed by [sixteen enumerated individuals] on October 2nd 1883. . . ." (Larson Aff., dated 9/14/2010 Ex. 3, p. 1 (indenture of 6/25/1884).) This provides yet another source of information regarding the place of use for these rights that should have been investigated by IDWR as part of its recommendation of place of use.

III. STANDARD OF REVIEW

Pursuant to Idaho Rule of Civil Procedure 56(c), granting a summary judgment motion is appropriate when "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 a judgment as a matter of law."

This Court liberally construes all disputed facts in favor of the nonmoving party, and all reasonable inferences drawn from the record will be drawn in favor of the nonmoving party. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper.

Spencer v. Jameson, 147 Idaho 497, 501, 211 P.3d 106, 110 (2009) (citations omitted).

"The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment." *Van v. Portneuf Medical Center*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009) (citation omitted). In the SRBA,

Facts contained in the affidavits create triable issues to the extent they conflict with facts alleged in the Director's Report. Once the presumption [of the correctness of the Director's Report] is

rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant.

State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 746, 947 P.2d 409, 419 (1997).

IV. LEGAL ARGUMENT

A. Franklin's Motion Only Relates To Ownership Of Water Rights 63-00166 And 63-00167; It Does Not Seek Summary Judgment As To Other Water Right Elements

At the outset, it is important to clarify the scope of relief requested by Franklin's motion. Franklin requests "entry of summary judgment confirming its ownership of these water rights, and dismissing Pioneer's notices of claims *and objections*." (Franklin Mot. for Summ. J. of 9/14/10, p. 1 (emphasis added).) However, in its memorandum in support of its motion, Franklin only offers argument as to why "Pioneer is precluded from claiming ownership of Franklin's water rights." (Franklin Mem. in Supp. of 9/14/10, pp. 5-6.) Critically, Pioneer's objections to the recommendations of 63-00166B and 63-00167B do not relate only to ownership; they also object to many other water right elements. (Lawrence Aff. of 9/14/10, Exs. F, G (Pioneer objections).) Franklin offers no legal argument as to why those other aspects of Pioneer's objections should be "dismissed."

Therefore, the only issue raised by Franklin, and the only issue to be decided by this Court at this time, is whether Pioneer is precluded from claiming ownership of water rights 63-00166 and 63-00167. All other aspects of Pioneer's objections must now be decided at trial. To illustrate why this is necessary, the remainder of this brief discusses other aspects of the recommendations of 63-00166B and 63-00167B that would still require resolution at trial, even if Franklin had included them in its motion.

B. The 1883 Agreement And Franklin's Own Testimony During The Stewart Decree Proceedings Raise Material Issues Of Fact Regarding The Quantities And Points Of Diversion Which Require Resolution At Trial

The 1883 agreement between Franklin and Pioneer's predecessor and Franklin's own testimony during the Stewart Decree proceedings indicate that only 1,350 inches (27 cfs) of water was to be conveyed through the Caldwell Canal for Franklin water users. In the 1883 agreement, Franklin agreed to convey to the Idaho & Oregon Land Improvement Company:

[O]ne thousand three hundred and fifty (1350) Statutory inches of Water, to be taken by [Franklin], or its said shareholders or the grantees from the ditch of the [Idaho & Oregon Land Improvement Company], or from any slough along the line of said ditch, at such point or points, as [Franklin] or said shareholders, or their grantees, may from time to time prefer, and [Idaho & Oregon] further covenants and agrees, to leave at all times at least three hundred and fifty (350) inches of water in what is known as the outside or South Slough, into which the ditch of [Franklin] now empties near the Bluff, and not less than Eight hundred (800) inches of water in what is known as the Back Slough that leaves the main slough about twenty feet above the head gate of [Franklin]

(Larson Aff. of 9/14/10, Ex. 1, p. 2 (1883 agreement).)

Franklin representatives repeatedly confirmed during the Stewart Decree proceedings that 1,350 inches (27 cfs) of water were to be conveyed through the Caldwell Canal to Franklin water users. For example, Adam Schindler, one of the founders of the Franklin Ditch Company, testified as follows:

This ditch was operated as the Franklin ditch until we sold out to the Strahorn people. All of the original users continued to use out of the ditch until it was sold. At the time I sold out and entered into this agreement to sell to the Strahorn people we were to have 1,350 inches of water carried through the canal proper, and 800 inches delivered into a certain slough—that slough is the first slough from the river and is known as the “North Slough.” There was 350 inches to be delivered on the south part of my ranch right next to the hill where the Strahorn ditch takes out.

* * *

Eight hundred inches of water was delivered into the Strahorn slough as shown on the state engineer's map. Three hundred and fifty inches was to be delivered here—it is called the Waste slough on this map; 1,350 inches was to be delivered in the ditch down as far as Mason creek, out of the main canal, between the head of the main ditch and Mason creek.

(Gould Aff. of 9/14/10, Ex. 1, pp. 901:2930, 902:2933, 903:2937-38, 904:2940-41 (Schindler testimony).)

Similarly, H. E. Allen, Franklin's secretary at the time, testified as follows:

Under this agreement between the Franklin Ditch Company and the Idaho and Oregon Land and Improvement Company there is 800 inches to be delivered into the north slough, which is the slough next to the river—it is called the Strahorn slough. The 350 inches was to be delivered in the south slough or Waste slough. The 1,350 inches are delivered from the headgate of the Caldwell canal to Mason creek. As I understand it, 800 inches is turned into the Strahorn slough, 350 inches to the Waste slough and the other 1,350 inches goes from the different points on the Caldwell canal.

* * *

We don't consider that our rights are limited to that 1,350 inches in the Caldwell canal, besides that are the 800 inches which goes into the north slough parallel to the river and which goes into the slough before it goes into the headgate in the Caldwell canal; this irrigates quite a large portion of this country which it would be impossible to irrigate from the Caldwell canal. The Caldwell canal throws out this 800 inches for us. It goes above their canal, this ditch does, about 20 or 30 feet above the headgate. It flows parallel to the river nearly to the canyon. ***This water never goes into the Caldwell canal.*** The 350 inches is taken out of the south slough and it runs into the Caldwell canal about a half a mile, I should judge. This 800 inches is taken through sloughs ***without running into the Caldwell canal at all.*** According to our contract the Pioneer Irrigation District agreed to deliver this water; they put dams in the river so it will run into these canals. And then 1,700 inches are run through the Caldwell ditch. Our company has a deed for it from the Caldwell ditch.

By Mr. Wood: That deed calls for 1,350 inches.

(Gould Aff. of 9/14/10, Ex. 1, pp. 915:2975, 916:2979-917:2980, 917:2982-918:2984 (Allen testimony) (emphasis added).)

Ultimately, the Stewart Decree decreed two water rights to Franklin: one right for 770 inches (15.4 cfs) of water (63-00166), and the other for 1,380 inches (27.6 cfs) of water (63-00167).¹ (Gould Aff. of 9/14/10, Ex. 3, pp. 462.) The point of diversion for both water rights was described as “a point on the William Frost farm in section 18, township 4 north, range 1 west, Boise Meridian . . .” (Gould Aff. of 9/14/10, Ex. 3, p. 462.) However, this is obviously a very broad, general description; there could have been multiple diversions within such a broadly described area. This point becomes abundantly clear from images of the area, which show the Caldwell Canal and the Strahorn Slough very close together. (King Aff., Ex. B.) However, IDWR has recommended both of Franklin’s rights with the Caldwell Highline Canal as the point of diversion.

Based upon the unequivocal testimony of Franklin’s own representatives regarding the separate and distinct nature of the Caldwell Canal, the Strahorn/North Slough, and the South/Waste Slough, it is illogical to conclude that the point of diversion in the Stewart Decree was the Caldwell Canal for both rights. Instead, the only reasonable conclusion is that

¹ It does not appear that the 350-inch water use from the South/Waste slough referred to in the 1883 agreement and the Stewart Decree testimony was decreed to Franklin in the Stewart Decree. However, IDWR has recommended water right 63-5239 to Franklin. (Lawrence Aff., Ex. C.) That right has a source of “Back Slough,” tributary to the Boise River, a quantity of 9.8 cfs (490 inches), and a priority date of April 1, 1880. It appears that this “Back Slough” is the same source of water as the South/Waste Slough referred to in the 1883 agreement and the Stewart Decree testimony (though confusingly, the 1883 agreement appears to refer to the Strahorn/North Slough as the “Back Slough”). (King Aff., ¶ 2, Ex. B; Larson Aff. of 9/14/10, Ex. 1, p. 2.) Presumably, the reason this “Back Slough” right was not included in the Stewart Decree was that it was not diverted directly from the Boise River and was therefore not within the scope of the Stewart Decree proceedings. (Lawrence Aff., Ex. B, 23:4-9 (IDWR 30(b)(6) dep.).)

the point of diversion for the 1,380-inch right was the Caldwell Canal, and that the point of diversion for the 770-inch right was the nearby Strahorn Slough. Therefore, unless Franklin can produce some other mechanism such as an approved water right transfer with Pioneer's approval, the water rights recommended to Franklin for diversion into the Caldwell Highline Canal must necessarily be limited to 27.6 cfs (1,380 inches) of water.

C. Franklin's Water Right 63-00167B May Be Partially Forfeited Due To Restrictions On The Operational Capacity Of The Highline Canal

When combined, the recommendations for water rights 63-00166B, 63-00167B, and 63-00179C would authorize the diversion of up to 79.2 cfs of water into Pioneer's Caldwell Highline Canal at its headgates on the Boise River. However, according to Pioneer Superintendent Mark Zirschky, Pioneer typically does not allow the diversion of more than 43 cfs of water into the canal. (Zirschky Aff., ¶ 4.) This is because there is a particular bridge and culvert constructed within the Caldwell Highline Canal, and diversions in excess of 43 cfs would risk flooding and damage to the bridge and the canal. (Zirschky Aff., ¶ 4.) This bridge and culvert appears to be owned by William Clayton, (Zirschky Aff., ¶ 3.), a member of the Franklin Ditch Company. (Lawrence Aff., Ex. D (Franklin discovery responses).) While Pioneer has not yet been able to definitively determine the date of construction of the bridge in question, Mr. Zirschky knows it was already in-place when his employment with Pioneer began in 1992, and believes it was originally constructed several years before then. (Zirschky Aff., ¶ 3.)

Idaho Code Section 42-222 provides in pertinent part:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost

through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

IDAHO CODE § 42-222(2).

As the Idaho Supreme Court has held, “partial forfeiture is provided for by I.C. § 42-222(2).” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). In other words, to the extent a water right is not used in its entirety for five consecutive years, the unused portion of that right is forfeited. Therefore, if the bridge in question was constructed more than five years prior to the commencement of the SRBA, and if the operational capacity of the Caldwell Highline Canal is indeed significantly less than the total recommended quantity of 79.2 cfs, it is likely that at least a portion of Franklin’s water right 63-00167B has been partially forfeited. This is because 63-00167B is the most junior of the three Franklin and Mason rights that have been recommended with the Caldwell Highline Canal as the point of diversion.

Critically, both Idaho Supreme Court case law and IDWR’s own Claim Investigation Handbook strongly support the conclusion that these types of capacity limitations are proper bases for a finding of forfeiture. In *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 56-57, 231 P. 418, 420 (Idaho 1924), the Idaho Supreme Court specifically relied upon the limited capacity of a water conveyance facility as the basis for a finding of forfeiture. And, IDWR’s Claim Investigation Handbook provides:

There is a range within which different fact-finders could find forfeiture. At one end of the range would be two photographs, five years apart which show that water was not used in either of those years. *At the other end of the range would be physical evidence such as a parking lot or a diversion system with limited capacity that was in place for five or more years.*

* * *

The following examples provide guidance to the agent regarding situations in which it is appropriate to initially recommend forfeiture when considering evidence of non-use of water rights:
[1] *Permanent physical features preventing use, such as parking lots or homes, are constructed after the right is established.*

(Lawrence Aff., Ex. A (Claim Investigation Handbook) (emphasis added).)

As confirmed by IDWR, what the Handbook is saying is that these types of permanent physical restrictions provide strong evidence for a forfeiture finding:

Q. [BY MR. LAWRENCE] Again, that these sorts of permanent physical features, things that are really out there provide a strong evidence and a basis for a forfeiture finding; is that a fair crystallization of what that's [the quoted portion of the Claim Investigation Handbook] saying?

A. [BY MS. SHURTE] Yes, that's fair.

(Lawrence Aff., Ex. B, 70:12-16 (30(b)(6) Dep. of IDWR).)

This reasoning applies here, even though Franklin is a water delivery organization. More specifically, one of the statutory defenses to forfeiture provides:

No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to *nonuse* by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

IDAHO CODE § 42-223(7) (emphasis added).

Even assuming that Franklin qualifies for this defense as a general matter, this defense is inapplicable here. The basis of forfeiture is not simply "nonuse" by members of Franklin. Instead, the basis for forfeiture here is the operational capacity of the Highline Canal. Therefore, this presents another material issue of fact with respect to the quantity of 63-00167B that requires resolution at trial.

D. The Recommended Point of Diversion Is Invalid Until the Procedures Of Section 42-1425 Are Followed And Until Franklin Obtains Pioneer's Permission To Utilize The Caldwell Highline Canal

On September 3, 2010, Pioneer filed a combined motion for partial summary judgment and motion to remand subcases 63-00166B, 63-00167B, and 63-00179C back to IDWR. Essentially, that combined motion seeks confirmation of the applicability of the procedures and requirements of Idaho Code Sections 42-108 and 42-1425, based upon the fact that all three recommendations include an accomplished transfer remark for the point of diversion such that the rights are to be diverted into Pioneer's Caldwell Highline Canal, and that Pioneer objected to those recommendations. There is no need to repeat those arguments in their entirety here, though Pioneer specifically incorporates that combined motion and the supporting materials herein by reference. In short, it would be improper to grant summary judgment in favor of Franklin regarding the point of diversion for 63-00166B and 63-00167B prior to the supplemental report, hearing, and approval of Pioneer pursuant to Sections 42-1425 and 42-108.

And, with respect to this issue of whether Franklin has authority to utilize Pioneer's Caldwell Highline Canal for the conveyance of its water rights, it is notable that maps from the early 1900s reflect that the old Caldwell Canal followed a different course than Pioneer's current Caldwell Highline Canal for much of its length. (*See Stevens Aff., Exs. A, B.*) More specifically, the two maps from the Stevens affidavit show that starting in Township 4 North, Range 2 West, Section 22, NWSW, the old Caldwell Canal was located farther north than the proposed Caldwell Highline Canal at that time. And, Pioneer's current Caldwell Highline Canal matches up more closely with the proposed Highline Canal in the two maps than it does with the old Caldwell Canal. (*King Aff., ¶ 4.*) While in the 1883 agreement Pioneer's predecessor agreed that the 1,350 inches of water could "be taken by [Franklin] . . . from the ditch of [Idaho & Oregon]," such authority does not necessarily apply to an entirely different

facility. This provides further support for the conclusion that there are material issues of fact regarding the recommended point of diversion that must be resolved at trial.

E. There Are Material Issues Of Fact Regarding The Place Of Use For 63-00166B And 63-00167B Because IDWR Did Not Investigate The Lands Irrigated At The Time Of The Stewart Decree Or Consider The 1884 Indenture Specifying The Limits Of Franklin's Allowable Place Of Use

When IDWR prepared the recommendation for 63-00166B and 63-00167B, it based the place of use nearly exclusively upon information provided by Franklin:

Q. With a ditch company, how are the actual boundaries determined of who the ditch company serves?

A. Quite frankly, the ditch company told us. Yeah, there was no other way for us to really know ourselves personally on that type of thing.

Q. And do you know what process the ditch company would go through or did go through for these recommendations to identify their boundaries?

A. They worked with one of our GIS personnel; I know that. But as far as within their own ditch company, I don't know what they did.

Q. And this might be a difficult question to answer, but would the place of use for a ditch company -- and so just talking about the boundary at this point as opposed to what's actually irrigated. Would the boundaries be determined by determining which lands can actually be served by the particular facilities through which water is conveyed or is there some other method for actually drawing the boundaries around a ditch company place of use?

A. Actually, it was just based on where the ditch company said their boundaries were.

(Lawrence Aff., Ex. B, 34:25-35:21 (30(b)(6) Dep. of IDWR).)

In other words, IDWR did not investigate existing information regarding the lands that were actually irrigated by these two water rights at the time the Stewart Decree was issued. While it is generally true that Idaho Code Section 42-1427 provides IDWR with some flexibility

when recommending water right claims that are based upon previous licenses and decrees, that flexibility applies for elements “not defined by the prior license or decree”

For both 63-00166 and 63-00167, however, the Stewart Decree defines the place of use as “the lands lying under [Franklin’s] canal system.” (Gould Aff. of 9/14/10, Ex. 3, p. 462:1534.) IDWR characterizes this place of use designation in the Stewart Decree as follows:

A. [BY MS. SHURTE] No. I mean, I would think that [the place of use for 63-00166 and 63-00167 in the Stewart Decree] was a lot of information from an old decree, actually.

Q. [BY MR. LAWRENCE] Really?

A. Yeah. Sometimes they [old judicial decrees] don’t even say where the place of use is; and that’s an ambiguity to me. But “lying under its canal system,” it would have meant the canal system at the time of the Stewart Decree.

(Lawrence Aff., Ex. B, 52:16-22 (30(b)(6) Dep. of IDWR).)

According to IDWR, reference to more recent information about the place of use is necessary because of a lack of information regarding the place of use at the time of the Stewart Decree:

Q. [BY MR. LAWRENCE] So if we have a decree from 1906, I believe, that says that the place of use is lands lying under its canal system, but we use 1987 information to define the place of use – I mean, there has got to be some reason that we look at the later information rather than what was happening in 1906 [when recommending place of use in the SRBA].

A. [BY MS. SHURTE] Well, and the reason being is that we really don’t know all the lands and where they were located lying under its canal system in 1906.

(Lawrence Aff., Ex. B, 56:5-13 (30(b)(6) Dep. of IDWR).)

However, there are two sources of information that IDWR should have considered to determine which lands were “under [Franklin’s] canal system” at the time of the Stewart

Decree. First, the map that was apparently utilized in conjunction with the Stewart Decree proceedings specifically identifies which lands were irrigated from which irrigation facilities. (King Aff., ¶¶ 2, 3, Exs. B, C.) This information relates directly to which lands were “under [Franklin’s] canal system” at the time of the Stewart Decree and therefore should have been considered by IDWR.

Second, the indenture of June 25, 1884, in which Pioneer’s predecessor conveyed 1,350 inches of water back to Franklin one day after Franklin had conveyed all of its water rights to Pioneer’s predecessor, specifically states that such water was “to be appurtenant to, and used only on the lands owned or claimed by [sixteen enumerated individuals] on October 2nd 1883” (Larson Aff., Ex. 3, p. 1 (indenture of 6/25/1884).) While that particular document was not contemporaneous with the Stewart Decree proceedings, the restriction upon the allowable areas to be irrigated appears in a real property conveyance document which was duly recorded. (Larson Aff., Ex. 3, p. 2 (indenture).) Therefore, that restriction “runs with the land” pursuant to real property law. IDAHO CODE §§ 55-606, 55-811. However, IDWR did not consider this information either:

Q. [BY MR. LAWRENCE] Do you recall what you did with them [the 1884 indentures], how they were utilized in the process of recommending the Franklin water rights?

A. [BY MS. SHURTE] I didn’t do anything with them. I just put them in the file and read through them, thought it was a little strange, and went about my way.

Q. So they weren’t utilized?

A. No.

(Lawrence Aff., Ex. B, 46:6-13 (30(b)(6) Dep. of IDWR).)

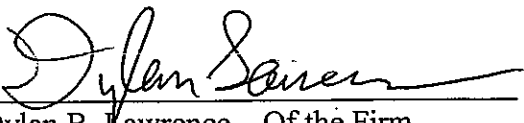
IDWR should have consulted that information in order to confirm that the recommended place of use does not exceed that restriction. Because it did not do so, there is a material issue of fact regarding place of use that requires resolution at trial.

V.
CONCLUSION

Based on the foregoing, Pioneer respectfully requests that Franklin's motion be denied as to all of the bases of Pioneer's objections other than ownership of the two water rights in question.

DATED this 28th day of September, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2010, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO FRANKLIN DITCH COMPANY'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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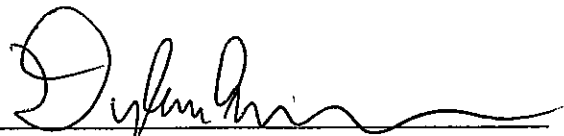
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