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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	
	)	SUBCASE NOS.: 63-00166A, 63-00166B,
	)	63-00167A, 63-00167B, 63-00179A,
Case No. 39576	)	63-00179C, and 63-32580
	)	
	)	MASON CREEK'S MEMORANDUM IN
	)	OPPOSITION TO PIONEER'S MOTION
	)	FOR PARTIAL SUMMARY JUDGMENT
	)	AND MOTION TO REMAND

Pioneer Irrigation District's Motion seeks an Order from this Court remanding the Director's Recommendation concerning the point of diversion of Mason Creek Ditch Company's water right No. 63-179C. Pioneer also seeks a similar Order with respect to Franklin Ditch Company's water rights Nos. 63-166B and 63-167B.

There is no dispute of fact that these rights have been diverted from the head of the Caldwell Highline Canal since early last century. The undisputed facts show that Pioneer has accepted this obligation to deliver Mason Creek and Franklin water through the Caldwell Highline Canal for a century. Now, Pioneer seeks not only to take the water rights belonging to

Mason Creek and Franklin by filing its own competing claims to the same water rights, but Pioneer also seeks to deny Mason Creek its historic point of diversion. This Court should not allow Pioneer to accomplish such an illegal and inequitable result by the sleight of hand suggested by its motion. There are two reasons for denying Pioneer's Motion: one procedural and one substantive.

PROCEDURALLY, PIONEER'S MOTION IS UNTIMELY

While denominated as a Motion for Partial Summary Judgment, in fact this motion is simply a procedural ploy to remand the case back to the Department of Water Resources for hearing on whether or not a transfer as provided by §§ 42-222 and 42-108 should be approved by the Department of Water Resources.

Water right No. 63-179C was recommended to Mason Creek in 2006. Pioneer's competing claim to the same water right was denied at the same time. In June of 2007, more than three years ago, Pioneer filed an objection to water right No. 63-179C. An initial hearing was held in June 2008; status conferences were held in October 2008, February 2009, and September 2009. A scheduling conference was held in February 2010. At the scheduling conference, a trial schedule was ordered setting another status conference and a supplemental scheduling conference. The supplemental scheduling conference was held and a trial scheduling order issued in May 2010 which set an actual trial date in December 2010. Throughout this process and until Pioneer's September 13, 2010 filing, Pioneer never made any mention of remanding the case back to the Department for further proceedings. Instead, Pioneer agreed that there would be a trial in this case on all issues in December 2010. If, as Pioneer requests, the matter is remanded back to the Department to conduct a hearing on the point of diversion then the trial date that Pioneer stipulated and agreed to cannot be met.

Pioneer had ample time in the three plus years since it filed its objection to water right No. 63-179C to ask this Court to remand to the Department of Water Resources for a hearing. Pioneer failed to do so. Instead, it agreed to a trial schedule at which the issues raised and their objections would be handled by the Special Master. Pioneer is bound by the Stipulation that they entered into and procedurally this Motion should be denied.

**PIONEER HAS LONG ACKNOWLEDGED THAT IT HAS A DUTY TO DELIVER
MASON CREEK WATER THROUGH THE CALDWELL HIGHLINE CANAL**

Pioneer has consistently admitted throughout the years that it has a duty to deliver water to Mason Creek lands through the Caldwell Highline Canal. For example, on July 3, 1928, the secretary of the Pioneer Irrigation District wrote to the Boise River Water Master stating as follows:

As you are also aware, this District is under contract to carry thru its Caldwell canal the water decreed to the Franklin Ditch Company under decrees No. 34 and 77, and to the Mason Creek Ditch Company under decree No. 46, amounting to 4,010 inches.

Ex. A to Aff. of Albert P. Barker (emphasis added).

Pioneer also admitted this obligation when it filed its objections. The 1938 document produced by Pioneer from its records and attached to its objections to the Mason Creek rights states:

In return for rights-of-way of Franklin Ditch Company and Mason Creek Ditch Company, P.I.D. agreed to carry their decreed water from the river through the Highline ditch which P.I.D. had enlarged and made no assessments against the lands of those two ditch companies. Turner thinks there is a contract covering this. The Highline probably had no water until P.I.D. made this trade with Franklin and Mason Creek companies."

Id. Ex. B (emphasis added).

In transfer No. 29 dated August 26, 1918, the Department of Water Resources recognized that Mason Creek's water right was at that time delivered into the Caldwell canal. *Id.* Ex. C. At that time, a portion of the lands previously delivered to Mason Creek became on the northside of the river because the river moved. Thus, no later than August of 1918, IDWR records show that the Mason Creek water right was diverted out of the Caldwell Highline Canal. *Id.* The transfer shows no record that Pioneer objected at that time. *Id.*

The reason for the diversion of the Mason Creek water into the Caldwell Highline Canal is disclosed in an opinion from the Idaho Supreme Court. *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 56 P.2d 1115 (1938). There, the Court stated:

It appears that since 1914, all of the natural flow of Boise River, during the low-water periods, has been used in the irrigation of lands up stream from the head of the Caldwell Highline Canal; and that it has been the practice, in recent years, to dam the river below the intake of that canal and divert, through the Caldwell Highline Canal, all the water of the stream that flows down that far. The irrigated lands below the head of said canal have been water from the return flow of the river which has been adequate for their irrigation.

57 Idaho at 407 (emphasis added).

Mason Creek's Stewart decree point of diversion is immediately below the Caldwell Highline on the Boise River and would then have been diverted into the Caldwell Highline. See also transfer No. 29 from 1918. *Id.* Ex. C. At about the same time, Pioneer was developing water rights in the Mason Creek drainage from return flows above Pioneer. Water developed in these drains were then diverted into the Caldwell Highline and comingled with the Mason Creek and Franklin water diverted into the head of the Caldwell Highline. See Application for Permit No. 63-2276. *Id.* Ex. D.

The records on file with the Boise River Water Master and the Department of Water Resources make it clear that the Mason Creek water has been continuously diverted into the Caldwell Highline Canal for approximately 100 years. Pioneer has acknowledged that it has a duty to deliver this water to Mason Creek. Under these circumstances, Pioneer is barred by the principles of laches and estoppel from objecting to the accomplished change in point of diversion regardless of the procedures set forth in § 42-1425.

In *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, *supra*, the Supreme Court faced exactly this type of claim. In that instance, the Hillcrest rights had been moved upstream from the Caldwell Highline Canal to the New York Canal. 57 Idaho at 407. There, Hillcrest had actually diverted or caused to be diverted water through the New York canal for more than 20 years with full knowledge of the objecting party, Nampa & Meridian. Here, Mason Creek has been diverting its water at the head of the Caldwell Highline Canal for approximately 100 years and with full knowledge of Pioneer.

Under those circumstances, the Supreme Court held that the parties objecting to the change of point of diversion of the Hillcrest water upstream to the New York Canal were barred by the doctrines of estoppel and laches from objecting to the change in point of diversion. The Court in so holding stated:

Courts of equity do not favor antiquated and stale demands and refuse to intervene where there has been gross laches in commencing the proper action or long acquiescence in the assertion of adverse rights.

Here, the change of point of diversion and use whether regular and legal or not, was actually accomplished and thereafter used and enjoyed adversely.

57 Idaho at 412 (internal quotes and citations omitted).

Idaho Code § 42-1425 upon which Pioneer exclusively relies in support of this Motion essentially creates a method to go through the transfer proceedings set out in Idaho Code §§ 42-108 and 42-222 when an objection has been made. Even assuming that Pioneer has not waived its right to raise Idaho Code § 42-1425 by sitting on its hands for the last three years during the course of the SRBA proceeding; nevertheless, Pioneer cannot prevail on its objection because of its long acquiescence and failure to assert the objection it now seeks to assert. The established precedent of the Idaho Supreme Court in transfer proceedings makes that outcome certain. *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, *supra*.

Finally, as the Department's counsel recognized years ago, the transfer statute did not require Department approval until 1969. *See* P. Rassier, 28 Idaho L. Rev. 509 (1991-92). The purpose of Idaho Code § 42-1425 was to permit users who had transferred "water rights without compliance with the statutory provisions of Idaho Code § 42-222 to have the transfer confirmed or the course of the general SRBA adjudication." *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996).

Since Mason Creek was not required to comply with the statutory provisions of Idaho Code § 42-222 when the transfer was accomplished, this transfer does not fall within the intended scope of Idaho Code § 42-1425, as explained by the Supreme Court in *Fremont-Madison*, *supra*.

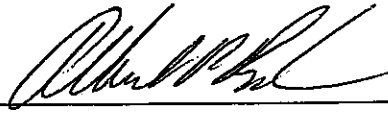
Accordingly, for all these reasons, Pioneer's Motion for Partial Summary Judgment and Motion for Remand should be denied and the point of diversion decreed as recommended.

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DATED this 28th day of September, 2010.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Albert P. Barker', written over a horizontal line.

Albert P. Barker

Attorneys for Mason Creek Ditch Company

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 28th day of September, 2010, I caused to be served a true and correct copy of the foregoing **MASON CREEK'S MEMORANDUM IN OPPOSITION TO PIONEER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO REMAND** 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
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Twin Falls, ID 83303-2707
Fax No. 208-736-2121

Copy mailed to:

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

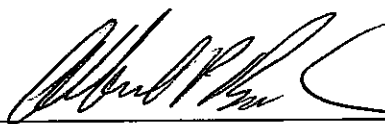
Chief, Natural Resources Division
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