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DEPARTMENT OF
WATER RESOURCES

DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Franklin Ditch Company, Inc.

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
)
) **FRANKLIN DITCH COMPANY'S**
) **RESPONSE TO PIONEER'S MOTION**
) **FOR PARTIAL SUMMARY JUDGMENT**
) **AND MOTION TO REMAND**
)

Franklin Ditch Company, Inc. (hereafter "Franklin"), by and through its counsel of record, Ringert Law Chartered, submits this *Response* to Pioneer Irrigation District's (hereafter "Pioneer") *Motion for Partial Summary Judgment and Motion to Remand*.

I. INTRODUCTION

Pioneer, through its motion for partial summary judgment, requests this Court to find that the recommended point of diversion ("POD") for water right nos. 63-166B and 63-167B is invalid until the procedures of Idaho Code Section 42-1425 are followed and until Pioneer provides consent required by Idaho Code Section 42-108. The basis for Pioneer's motion on the following sentence included by the Director in the Directors' Reports for these water rights: "Right includes

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accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.”

Pioneer’s motion should be denied for several reasons. First, the location of the POD for these water rights has not changed since the rights were previously decreed in *Farmers' Coop. Ditch Co. v. Riverside Irrigating Dist. et al.*, aff’d., 14 Idaho 450, 94 P. 761 (1908) (commonly referred to as the “Stewart Decree”). It appears that there was a clerical error in the Stewart Decree’s description of the location of the POD, which IDWR chose to correct in the Director’s Report through the mechanism of an “accomplished transfer.” Such a correction does not constitute an accomplished transfer under I.C. § 42-1425, and does not require Pioneer’s consent under I.C. § 42-108.

Second, even if the location of the POD had changed after the Stewart Decree was issued, Pioneer has owned and controlled the diversion works since 1884, and would therefore have made such a change. Franklin has not changed the POD. Accordingly, in this proceeding, potential injury to Pioneer could not be an issue, and Pioneer’s permission could not be a requirement.

Third, this Court has no authority to invalidate Franklin’s POD pending the procedures of I.C. § 42-1425, as asserted by Pioneer.

II. FACTS

Franklin incorporates herein its statement of facts contained in Franklin’s *Memorandum in Support of Motion for Summary Judgment* at pages 2-4, which was filed with the Court on September 15, 2010.

Water right nos. 34 and 77, currently denominated as nos. 63-166 and 63-167, were awarded to Franklin by the Stewart Decree. *Affidavit of Jon C. Gould in Support of Motion for Summary Judgment* (“*Gould Aff.*”), Ex. 3 at 462. The Stewart Decree states that water under these rights is

“diverted at a point on the William Frost farm in section 18, township 4 north, range 1 west for lands lying under its canal system.” *Id.* This identification of the location of the POD is not consistent with the evidence that existed at the time of and/or was presented at the trial. At trial, witnesses described the POD, and identified its location by reference to a map. *Id.*, Ex. 1 at 896-898, 901-908. A state engineer’s map was specifically referenced. *Id.* at 904. IDWR has a copy of the 1904 Boise River Survey Map from the Office of State Engineer, to which IDWR refers as the Stewart Decree map. The 1904 Office of State Engineer Map clearly shows the Caldwell Canal as originating in T4N, R2W, Section 24. *Second Affidavit of Jon Gould (hereafter “Second Gould Aff.”)*. The Map also shows the headgate and the Strahorn Slough. *Id.* Ex. 1.

The director’s report recognizes the POD for water nos. 63-166 and 63-167 as T4N, R2W, section 24, NE, NE. Both Pioneer and Franklin claimed that same POD in their respective claims to these water rights. Pioneer lists two additional PODs for the water rights however neither of the additional PODs are in Section 18, where the Stewart Decree listed the POD. The POD on the IDWR Digital Maps for water right nos 63-00166B and 63-00167B appears to be the same location as the headgate on the 1904 map. See IDWR maps. *Second Gould Aff.*, Ex. 2.

III. ARGUMENT

A. Franklin’s POD Has Not Changed

The Stewart Decree’s listing the POD for Franklin’s water rights as being T4N, R1W, Section 18 is likely a clerical error or mistake. The 1904 State Engineer’s Map or the “Stewart Decree” map clearly show the “headgate” used to divert water from the Boise River into the Highline Canal as being in the northeast quarter of the northeast quarter of Section 24, T4N, R2W. This map also shows the head of the Strathorn Slough as being adjacent to the headgate and sharing the same

POD. This POD (T4N, R2W, Sect. 24) is consistent with IDWR's recommendation, Franklin's claim and Pioneer's claim for the water rights in question. IDWR digital maps show the POD that is consistent with the location on the 1904 Office of State Engineer Map. This evidence suggests a clerical error or mistake accounts for the Stewart Decree POD as being in T4N, R1W, Section 18. Certainly, the location of the POD has not changed for over 100 years.

Similarly, the Stewart Decree describes the location of the POD for Pioneer's 1884 water right no 63-371 (identified as Right No. 90 in the Stewart Decree) as "a point on the farm known as the William Frost farm in section 18, township 4 north, range 1 west, Boise Meridian, through what is known as the Caldwell Canal" for lands lying under its canal system. *Id.*, Ex. 3 at 484. The currently identified location of this POD for Pioneer's water right is also T4N, R2W, Sect. 24.

B. I.C. §§ 42-1425 and 42-108 Are Not Applicable

Even if the POD for Franklin's water rights had changed since the Stewart Decree, I.C. §§ 42-1425 and 42-108 are inapplicable because any such change was made by Pioneer. Pioneer owns and operates the Caldwell Highline Canal, also known as the Caldwell Canal or the Highline Canal. *Memorandum in Support of Motion for Partial Summary Judgment and Motion to Remand* ("*Pioneer's Memorandum*") at p. 2. Pioneer or its predecessor has had sole ownership and control the canal and the POD since 1884. Since at least 1884, Franklin has not owned, operated, maintained or repaired the Highline Canal or the diversion infrastructure including the POD.

I.C. § 42-1425 applies to situations where **any person entitled to use of water or owning any land to which water has been made appurtenant** transfers the water right without complying with sections 42-108 and 42-222. Emphasis added. Here, Franklin owns the water rights and members of Franklin own the appurtenant land. However, Franklin has not had control or ownership

of the headgate at the POD since 1884. There is no evidence that Franklin changed the POD since conveying ownership of the POD and the diverting works. I.C. §42-1425 is not applicable and remand is not necessary.

Pioneer quotes and relies on the mandatory requirements and procedures established by I.C. Section 42-1425(2) to support its motion. Specifically, Pioneer quotes the first sentence of that code section:

Any change of . . . point of diversion . . . of a water right by 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, and prior to January 1, 2006, for the northern Idaho adjudications authorized by section 42-1406B, Idaho Code, 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.

Idaho Code Section 42-1425 (emphasis added).

Pioneer owned, maintained and operated the headgate used to divert the Franklin water rights at the time the Stewart Decree noted the location of the POD. Pioneer continues to own, maintain and operate the headgate used to divert the Franklin water rights. Only Pioneer could change this POD because the POD is in Pioneer's sole control.

Pioneer's Memorandum points out that under the pertinent portions of I.C. § 42-108 the POD cannot be changed without the consent of Pioneer. Pioneer's reliance on I.C. § 42-108 demonstrates the absurdity of its position. Under I.C. § 42-108, Pioneer, the party that controls the POD, must seek permission from itself for the change in the POD. Likewise, by seeking remand under 42-1425 to allow IDWR to conduct an injury analysis, Pioneer is seeking a determination of

whether a change in the POD by Pioneer, which never occurred, injured Pioneer.

C. **The Court has no Authority to “Invalidate” Franklin’s Points of Diversion Under I.C. §§ 42-1425 or 42-105**

Pioneer asks this Court to find that the POD for water rights 63-166 and 63-167 is invalid until (1) the procedural requirements listed in I.C. 42-1425 are followed and (2) Pioneer consents to an accomplished transfer that never occurred. Neither Idaho Code section 42-1425 nor 42-108 grant this Court with the authority to find that the POD for water right nos 63-166 and 63-167 is invalid.

IV. CONCLUSION

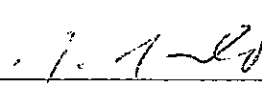
There was no change in the Franklin/Pioneer POD, and therefore there was no accomplished transfer. The available evidence indicates that there was a clerical error in the identification of the POD in the Stewart Decree, which can be corrected in this proceeding without an unnecessary remand to IDWR. Certainly, there was is no injury to Pioneer from the correction of this clerical error, and its permission to make the correction is not required. If there was a change in the POD since the Stewart Decree, it was made by Pioneer, not Franklin. Pioneer has controlled the POD since prior to the Stewart Decree so that any injury from transferring the POD would be self-inflicted.¹

Accordingly, this court should find that neither I.C. §§ 42-108 nor 42-1425 are applicable and should deny Pioneer’s motions for summary judgment and remand.

¹Franklin is unaware of this Court ever recognizing a self-inflicted injury resulting from a POD transfer.

DATED this 28th day of September, 2010.

RINGERT LAW CHARTERED

By: 
Jon C. Gould
Attorneys for Franklin Ditch Company

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2010, I served a true and correct copy of the foregoing document by U.S. mail, postage pre-paid to the following:

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

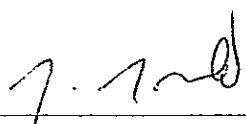
Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Pioneer Irrigation District
c/o Scott Campbell
P.O. Box 829
Boise, Idaho 83701-0829

Mason Creek Ditch Company
c/o Albert Barker
P.O. Box 2139
Boise, Idaho 83701-2139

Martin Galvin
P.O. Box 115
Middleton, Idaho 83644

John J. McEvoy
1703 N. KCID Road
Caldwell, Idaho 83605



Jon C. Gould