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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

**RESPONSE IN OPPOSITION TO MASON
CREEK 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 Mason Creek Ditch Company. This response brief is supported by the Affidavits of

Scott King, Dylan Lawrence, and Mark Zirschky, filed contemporaneously herewith (hereinafter, “King Aff.,” “Lawrence Aff.,” “and “Zirschky Aff.,” respectively).

I. INTRODUCTION

Mason’s motion for summary judgment only seeks confirmation of Mason’s ownership of water right 63-179. While the memorandum in support of Mason’s motion requests that the Court “decree water right No. 63-179C in the name of Mason Creek,” Mason offers no argument as to why such decree should be issued prior to resolution of Pioneer’s objections to other aspects of the recommendation for water right 63-179C. Therefore, it would be premature for this Court to “decree” water right 63-179C to Mason at this time. Subsequent sections of this response brief will discuss why there are material issues of fact regarding quantity, source, point of diversion, and place of use that require resolution at trial, even if Mason had included those issues in its motion. An objective reading of the arguments advanced in Mason’s moving papers, which focus only upon the ownership issue, demonstrates that even Mason concedes these issues need to be resolved at trial.

II. STATEMENT OF FACTS

A. Incorporation By Reference Of Prior Statement Of Facts

There is obviously significant overlap between the factual bases for Pioneer’s objection to Franklin’s rights 63-166B and 63-167B and Mason’s right 63-179C and, therefore, between this response brief and Pioneer’s response to Franklin’s motion for summary judgment. Rather than restate the Statement of Facts from Pioneer’s response to Franklin verbatim here, Pioneer specifically incorporates that Statement of Facts herein by reference. (*See* Pioneer’s

Resp. of 9/28/10, pp. 2-7.) A discussion of additional facts specifically relevant to Mason's motion for summary judgment follows.

B. Additional Facts Relevant To Quantity And Forfeiture

Expert witness Scott King, P.E., of SPF Water Engineering, LLC has analyzed Pioneer's water delivery records from the Caldwell Highline Canal, the operation and hydrography of the canal system, and discovery responses provided by both Franklin and Mason regarding their diversions from the canal. (King Aff., ¶ 3.) Based on this information, at this point in time, Mr. King can only identify delivery of water to 78 acres of land irrigated by Mason Creek Ditch Company water users. (King Aff., ¶ 4.) Deliveries of water to 1,849.9 acres are attributable to Franklin water users, while 144.6 acres-worth of water deliveries out of the canal could be delivered to some combination of Franklin and/or Mason water users. (King Aff., ¶ 4.) If one were to apply the standard "inch per acre" rule to such acreages, this would result in delivery of 37 cfs of water to Franklin water users and 1.56 cfs of water to Mason water users out of the Caldwell Highline Canal, while the destination of the 2.89 cfs associated with the 144.6 acres noted above is unclear at this time. (King Aff., ¶ 4.) In addition, by the time the Caldwell Highline Canal reaches the first Mason diversion from the canal, the Weymouth "100" Lateral, the water supply within the canal consists primarily of water from Fivemile Creek and various other waste and return flow ditches, rather than Boise River water. (King Aff., ¶ 5-7.)

Pioneer believes Mason's other claimed and recommended water rights in the SRBA further support the conclusion that Mason has historically used little, if any, water from the Boise River. As recommended by IDWR, 63-179C authorizes Mason to divert up to 36.2 cfs of water to irrigate 1,504.3 acres within a digital boundary place of use. (Lawrence Aff. of 9/14/10, Ex. C.) Mason also has a recommendation for water right 63-32580, which authorizes

the diversion of up to 17 cfs of water to irrigate 850 acres within the same 1,504.3 acres Mason's water users irrigate in a given irrigation season, with a priority date of March 1, 1922, though the priority date was originally claimed as June 1, 1869. (Lawrence Aff. Exs. A (SRBA recommendation), D (notice of claim).) In addition, Mason has now filed a claim to water right 63-33392 for an additional 17 cfs with a priority date of June 1, 1869, for irrigation within the same digital boundary as for 63-179C and 63-32580. (Lawrence Aff. Ex. B (notice of claim and order approving motion to file same).)

C. Additional Facts Relevant To Point Of Diversion And Accomplished Transfer

With respect to Pioneer's position that the accomplished transfer of the points of diversion for 63-166B, 63-167B, and 63-179C require remand, a hearing, and a supplemental report pursuant to Idaho Code Section 42-1425, additional facts regarding Mason's recommended point of diversion support this point. The Stewart Decree specifies the point of diversion for water right 63-179 as within Section 16 of Township 4 North, Range 2 West. (Barker Aff. of 9/17/10, Ex. A (Stewart Decree).) IDWR's recommendation specifies the point of diversion as within Section 24. (Lawrence Aff. of 9/14/10, Ex. C (SRBA recommendation).) At deposition, IDWR estimated that these two points of diversion are "three to four miles" apart. (Lawrence Aff. Ex. C, 80:2-9 (30(b)(6) dep. of IDWR).) Yet, IDWR was unaware of the circumstances of that change in point of diversion:

Q. [BY MR. LAWRENCE] Yes. Let's go down to the point of diversion a little bit. So we have the point of diversion. Do you agree that that point of diversion designated there is the Highline Canal?

A. [BY MS. JAN SHURTE, IDWR's 30(b)(6) REPRESENTATIVE] Yes, that is the Caldwell Highline Canal.

Q. And then, again, towards the bottom, we have the explanatory remark about there being an accomplished change in point of diversion; correct?

A. Right.

Q. Now, I know I asked this in the Franklin context, but do you have any knowledge about the circumstances of this change in point of diversion?

A. I do not.

Q. And just staying on the same topic there, we have basically the last remark on the recommendation, "This right in Caldwell Highline Canal Trans No. 29." Is it safe to assume that "Trans 29" refers to Transfer 29?

A. Yes. And I think that was a remark that was left over from the water right or from the claim, actually.

Q. Do you know anything about Transfer No. 29?

A. Yes. That's where one cfs was transferred to the Canyon County Canal Company, Canyon County Ditch Company, something like that.

Q. Yeah. That's my recollection as well. So we'd agree that that does not explain how --

A. No.

Q. -- how this point of diversion changed?

A. Exactly.

Q. And you're not aware of any other old transfer that deals with this issue?

A. No, I'm not.

(Lawrence Aff. Ex. C, 76:21 – 78:3 (30(b)(6) dep. of IDWR).)

D. Additional Facts Relevant To Place Of Use

In its response to Franklin's motion for summary judgment, Pioneer asserts that there are material issues of fact regarding the recommended place of use. Similar arguments

apply to the recommended place of use for Mason's right 63-179C. As with Franklin's rights, the place of use for 63-179 is described by the Stewart Decree as "the lands lying under its canal system." (Barker Aff. of 9/17/10, Ex. A.) And, IDWR's process for recommending the place of use for Mason's water right 63-179C was the same as that for Franklin's rights:

Q. [BY MR. LAWRENCE] And as far as the place of use goes -- I mean, I know we've covered this ground in terms of Franklin, but is it safe to assume that the general process that you discussed there also applies here, that sort of back and forth with the claimant and --

A. [BY MS. SHURTE] Yes, it was.

Q. So, again, with place of use, it's relying primarily on information provided by Mason Creek Ditch Company to help draw the boundaries and identify where irrigation occurs?

A. That's correct, yes.

(Lawrence Aff. Ex. C, 82:9-19 (30(b)(6) dep. of IDWR).)

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 Med. Ctr.*, 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. **Mason’s Motion Only Relates To Ownership Of 63-179; Therefore, The Other Aspects Of Pioneer’s Objections To That Recommendation Must Be Resolved At Trial**

At the outset, it is important to clarify the scope of relief requested by Mason’s motion. Mason 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.” (Mason’s Mem. in Supp. of 9/17/10, p. 7 (emphasis added).) However, in that memorandum, Mason only offers argument as to *res judicata* and the ownership issue. (Mason’s Mem. in Supp. of 9/17/10, pp. 4-7.) Critically, Pioneer’s objection to the recommendation of 63-179C does not relate only to ownership; it also objects to many other water right elements. (Lawrence Aff. of 9/14/10, Ex. H (Pioneer objection).) Mason offers no legal argument as to why the Court should “decree water right No. 63-179C” to Mason before Pioneer’s other objections are resolved.

Therefore, the only issue raised by Mason, and the only issue to be decided by this Court at this time, is whether Pioneer is precluded from claiming ownership of water right 63-179. All other aspects of Pioneer’s objection to the recommendation for 63-179C must

now be decided at trial. To illustrate why this is necessary, the remainder of this brief discusses other aspects of that recommendation that would still require resolution at trial, even if Mason had included them in its motion.

B. Mason's Water Right 63-179C Has Been Partially Forfeited Due To Restrictions On The Operational Capacity Of The Highline Canal, Which Is Confirmed By Water Delivery Records To Mason Water Users, Analysis Of The Flows Within The Highline Canal, And Other Claims Filed By Mason

In its response to the motion for summary judgment filed by the Franklin Ditch Company, Pioneer argues that there are material issues of fact as to the quantity element of Franklin's water right 63-167B, because of historic limitations on the operational capacity of the Caldwell Highline Canal and the doctrine of partial forfeiture, which Pioneer specifically incorporates herein by reference. (Pioneer's Resp. of 9/28/10, pp. 4-5, 12-14.) Simply put, the same concern also applies to Masons' water right 63-179C. Of the three Franklin and Mason rights recommended for diversion into the Highline Canal, Franklin's right 63-166B, which has a diversion rate of 15.4 cfs, is the most senior, followed by Mason's right 63-179C, which has a diversion rate of 36.2 cfs. (Lawrence Aff. of 9/14/10, Exs. A, B, C (SRBA recommendations).) Therefore, unless the historical operational capacity of the Caldwell Highline Canal equals or exceeds 51.6 cfs, water right 63-179C has been partially forfeited due to limitations on the canal's operational capacity.

Analysis of the water deliveries from, and flows within, the Caldwell Highline Canal conducted by expert witness Scott King of SPF Water Engineering, LLC, supports the conclusion that Mason has historically used only small quantities of Boise River water via the Caldwell Highline Canal, and also raises material issues of fact as to the source of Mason's

water.¹ Based upon an analysis of Pioneer water delivery records from the Caldwell Highline Canal, IDWR's recommendations for the Franklin and Mason water rights, and personal observation of the operation of the Caldwell Highline Canal, Mr. King has concluded that:

[T]he total acreage irrigated out of the Caldwell Highline Canal by Franklin water users is approximately 1,849.9 acres, and the total acreage irrigated out of the Caldwell Highline Canal by Mason water users is approximately 78 acres. In addition, there are 144.6 acres where it is not clear from the water delivery catalog, the discovery responses provided by Franklin and Mason, and/or headgate locations if the water users belong to either Franklin Ditch Company and/or Mason Creek Ditch Company. The sum total in the water delivery catalog of "Free Deliveries" provided to both Franklin and Mason water users is 2,072.5 acres.

(King Aff., ¶ 4.)

Therefore, if one were to apply the standard "inch per acre" rule to those deliveries:

[T]his would result in the delivery of 37 cfs of water out of the Caldwell Highline Canal to water users associated with the Franklin Ditch Company, 1.56 cfs of water out of the Caldwell Highline Canal to water users associated with the Mason Creek Ditch Company, and an additional 2.89 cfs of water out of the Caldwell Highline Canal that is presently unaccounted for, but

¹ In this regard, Pioneer has supplemented its discovery responses to Mason to clarify this position. In its summary judgment brief, Mason relies upon one of Pioneer's initial discovery responses which stated that water right 63-179C is "diverted, conveyed, and delivered to the water users comprising the Mason [Creek] Ditch Co. through Pioneer's Highline Canal." (Mason's Mem. in Supp. of 9/17/10, pp. 3, 7.) Of course, Mason relied upon this response only in the context of making arguments regarding ownership of water right 63-179, not the quantity or source elements of the recommendation for 63-179C. (Mason's Mem. in Supp. of 9/17/10, p. 7 ("[t]hus, on its own admission, Pioneer is claiming a water right that belongs to Mason Creek. . . . Pioneer cannot reopen the ownership of this decreed water right. . . .")) However, to avoid confusion, Pioneer has now supplemented that response pursuant to Idaho Rule of Civil Procedure 26(e) to more accurately characterize its position in light of additional investigation. (Lawrence Aff. Ex. E (supplemental discovery responses).)

which could be delivered to some combination of water users associated with Franklin Ditch Company and/or Mason Creek Ditch Company.

(King Aff., ¶ 4.)

Analysis of the hydrography of the Caldwell Highline Canal system supports the conclusion that Mason water users have historically used only small quantities of Boise River water from the canal:

[B]y the time the Caldwell Highline Canal reaches the Weymouth “100” lateral, the canal has already passed 12 of the 13 headgates associated with Franklin Ditch Company water users, and a turnout from the Weymouth “100” lateral constitutes the 13th headgate associated with Franklin Ditch Company. Based upon my personal observation of the operation of the Caldwell Highline Canal and Pioneer’s water delivery catalog, I believe the majority of the Boise River water diverted into the Caldwell Highline Canal at its heading on the river has already been diverted by these Franklin water users by the time the canal reaches the Weymouth “100” lateral.

Instead, by the time the Caldwell Highline Canal reaches the Weymouth “100” lateral, the majority of canal flows consist of water from sources other than the Boise River. The most significant source of this water is a feeder canal which diverts and conveys water from Fivemile Creek into the Caldwell Highline Canal. In addition, there are a number of waste ditches which empty into the Caldwell Highline Canal upstream of the Weymouth “100” lateral. These are the waste ditch associated with the 5.3 Lateral, two waste ditches associated with the 5.17 Lateral, and an unnamed waste ditch upstream of William Clayton’s bridge crossing the Caldwell Highline Canal.

Based upon this information, I believe water users associated with the Mason Creek Ditch Company have historically diverted and beneficially used only limited quantities of water from the Caldwell Highline Canal. And, to the extent Mason water users have diverted and beneficially used water from the Caldwell

Highline Canal, I believe a significant percentage of that water has consisted of Fivemile Creek water and waste water, rather than

water diverted from the Boise River at the heading of the Caldwell Highline Canal.

(King Aff., ¶ 5-7.)

Other water rights claimed by Mason provide further support for the conclusion that Mason has long since forfeited the majority of water right 63-179. As recommended by IDWR, 63-179C authorizes the diversion of up to 36.2 cfs of water to irrigate 1,504.3 acres within a digital boundary place of use. (Lawrence Aff. of 9/14/10, Ex. C.) Mason also has a recommendation for water right 63-32580, which authorizes the diversion of up to 17 cfs of water to irrigate 850 acres within the same 1,504.3 acres Mason's water users irrigate in a given irrigation season, with a priority date of March 1, 1922, though the priority date was originally claimed as June 1, 1869. (Lawrence Aff. Exs. A (SRBA recommendation), D (notice of claim).)

In addition, Mason has now filed a claim to water right 63-33392 for an additional 17 cfs with a priority date of June 1, 1869, for irrigation within the same digital boundary as for 63-179C and 63-32580. (Lawrence Aff. Ex. B (notice of claim and order approving motion to file same).) At a hypothetical application rate of an inch per acre, this would provide another 850-acres worth of irrigation.

Together, these three rights would provide a total diversion rate of 70.2 cfs. Assuming the same combined use limitation of 1,504.3 acres would be carried forward to the recommendation of 63-33392, Mason would have an overall duty of water of 0.0467 cfs per acre, or more than 2.5 inches per acre. According to Idaho Code Section 42-220:

When water is used for irrigation, no such license *or decree of the court* allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, *and to the court in making such decree*, that a greater amount is necessary. . . .

IDAHO CODE § 42-220 (emphasis added).

Therefore, unless the Court concludes that such a high duty of water is necessary pursuant to Section 42-220, the only reasonable assumption, particularly in light of the other evidence presented, is that Mason has been using Mason Creek and Fivemile Creek water in lieu of Boise River water for decades.

C. The Recommended Point Of Diversion For Water Right 63-179C Is Invalid Until The Procedures Of Section 42-1425 Are Followed And Mason Obtains Pioneer's Permission Pursuant To Section 42-108

On September 3, 2010, Pioneer filed a combined motion for partial summary judgment and motion to remand subcases 63-166B, 63-167B, and 63-179C 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 Mason regarding the point of diversion for 63-179C prior to the supplemental report, hearing, and approval of Pioneer pursuant to Sections 42-1425 and 42-108.

The recent 30(b)(6) deposition of IDWR supports Pioneer's argument on this issue. The Stewart Decree specifies the point of diversion for water right 63-179 as within Section 16 of Township 4 North, Range 2 West. (Barker Aff. of 9/17/10, Ex. A (Stewart Decree).) IDWR's recommendation specifies the point of diversion as within Section 24. (Lawrence Aff. of 9/14/10, Ex. C (SRBA recommendation).) At deposition, IDWR estimated that these two points of diversion are "three to four miles" apart. (Lawrence Aff. Ex. C, 80:2-9

(30(b)(6) dep. of IDWR).) Yet, IDWR was unaware of the circumstances of that change in point of diversion:

Q. [BY MR. LAWRENCE] Yes. Let's go down to the point of diversion a little bit. So we have the point of diversion. Do you agree that that point of diversion designated there is the Highline Canal?

A. [BY MS. SHURTE] Yes, that is the Caldwell Highline Canal.

Q. And then, again, towards the bottom, we have the explanatory remark about there being an accomplished change in point of diversion; correct?

A. Right.

Q. Now, I know I asked this in the Franklin context, but do you have any knowledge about the circumstances of this change in point of diversion?

A. I do not.

Q. And just staying on the same topic there, we have basically the last remark on the recommendation, "This right in Caldwell Highline Canal Trans No. 29." Is it safe to assume that "Trans 29" refers to Transfer 29?

A. Yes. And I think that was a remark that was left over from the water right or from the claim, actually.

Q. Do you know anything about Transfer No. 29?

A. Yes. That's where one cfs was transferred to the Canyon County Canal Company, Canyon County Ditch Company, something like that.

Q. Yeah. That's my recollection as well. So we'd agree that that does not explain how --

A. No.

Q. -- how this point of diversion changed?

A. Exactly.

Q. And you're not aware of any other old transfer that deals with this issue?

A. No, I'm not.

(Lawrence Aff. Ex. C, 76:21 – 78:3 (30(b)(6) dep. of IDWR).)

The fact that the circumstances of this change in point of diversion are still unknown by IDWR and the parties further supports the conclusion that a remand, hearing, and supplemental report as required by Section 42-1425 are warranted.

D. There Are Material Issues Of Fact Regarding The Recommended Place Of Use Because IDWR Did Not Investigate The Lands Under The Canal System At The Time Of The Stewart Decree

In its response to Franklin's motion for summary judgment, Pioneer argues that there are material issues of fact as to the recommended place of use for water rights 63-166B and 63-167B because IDWR simply relied upon information provided by Franklin regarding place of use and did not investigate previous agreements between Franklin and Pioneer's predecessor or information about the lands irrigated at the time the Stewart Decree was issued. (Pioneer's Resp. of 9/28/10, pp. 16-19.) To be clear, the portions of that discussion dealing with the prior agreements and indentures between Franklin and Pioneer's predecessor are not applicable here.

However, the portions of that discussion that relate to IDWR's procedures in recommending place of use and failure to consider information regarding the irrigation occurring at the time of the Stewart Decree are equally applicable to Mason's water right 63-179C and are specifically incorporated herein. As with Franklin, the place of use for 63-179 is described by the Stewart Decree as "the lands lying under its canal system." (Barker Aff. of 9/17/10, Ex. A.) And, IDWR's process for recommending the place of use for Mason's water right 63-179C was the same as that for Franklin's rights:

Q. [BY MR. LAWRENCE] And as far as the place of use goes -- I mean, I know we've covered this ground in terms of Franklin, but is it safe to assume that the general process that you discussed

there also applies here, that sort of back and forth with the claimant and --

A. [BY MS. SHURTE] Yes, it was.

Q. So, again, with place of use, it's relying primarily on information provided by Mason Creek Ditch Company to help draw the boundaries and identify where irrigation occurs?

A. That's correct, yes.

(Lawrence Aff. Ex. C, 82:9-19 (30(b)(6) dep. of IDWR).)

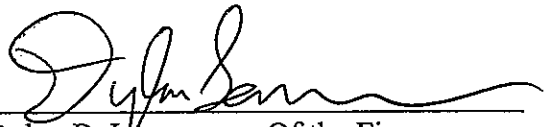
Therefore, as with Franklin's two water rights, Pioneer believes there are material issues of fact regarding place of use to be resolved at trial.

V. CONCLUSION

Based on the foregoing, Pioneer respectfully requests that Mason's motion be denied as to all of the bases of Pioneer's objection other than ownership of water right 63-179.

DATED this 1st day of October, 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 1st day of October, 2010, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MASON CREEK DITCH COMPANY'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Mason Creek Ditch Company

Represented by:

Albert P. Barker

Shelley M. Davis

BARKER RSHOLT & SIMPSON LLP

1010 W. Jefferson, Suite 102

P.O. Box 2139

Boise, ID 83701-2139

☐ U.S. Mail, Postage Prepaid

☒ Hand Delivered

☐ Overnight Mail

☐ Facsimile

Franklin Ditch Company

Represented by:

Daniel V. Steenson

Jon C. Gould

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

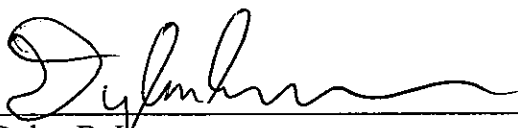
Boise, ID 83720

☒ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile


Dylan B. Lawrence