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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
	)	
	)	FRANKLIN DITCH COMPANY'S
	)	REPLY TO PIONEER'S RESPONSE
	)	IN OPPOSITION TO FRANKLIN'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	

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

ARGUMENT

Franklin moved this Court for entry of summary judgment confirming its ownership of water right nos. 63-166B and 63-167B ("Franklin's water rights") and dismissing Pioneer Irrigation District's (hereafter "Pioneer") notices of claims and objections to those same rights. Pioneer does not contest Franklin's ownership of the water rights in its response to Franklin's motion. Accordingly, the Court should confirm Franklin's ownership of water right nos. 63-166B and 63-

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167B and dismiss Pioneer's claims for these water rights.

Having conceded Franklin's ownership of water right nos. 63-166B and 63-167B in response to Franklin's *Motion for Summary Judgment*, Pioneer now asserts previously unidentified reasons to sustain its objections on summary judgment and justify an unnecessary trial. Pioneer asserts that: (1) testimony and evidence presented in the prior adjudication of Franklin's water rights raise material issues regarding the point of diversion and quantities of Franklin's water rights; (2) Franklin's water rights may have been partially forfeited due to Pioneer's installation of a culvert in Pioneer's Caldwell Highline Canal that restricts the flow of water through the canal; (3) the Court should remand the case to IDWR to determine whether Pioneer has been injured by a change in the point of diversion that never occurred or was made by Pioneer, and (4) IDWR did not sufficiently investigate Franklin's place of use in preparing the Director's Reports for Franklin's water rights.

Based on the pleadings and affidavits filed in this matter, the Court should reject these assertions, grant Franklin's *Motion for Summary Judgment*, and dismiss Pioneer's objections.

A. Pioneer Is Judicially Estopped from Asserting Alternative Reasons To Sustain Its Objections

Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Sword v. Sweet*, 140 Idaho 242, 252 (2004). Its application by a district court is entirely discretionary. *Id.*

Pioneer's Notices of Claims to Franklin's water rights (denominated by IDWR as 63-166A and 63-167A) claim the same quantities and priority dates as claimed by Franklin in its Notices of Claim, and as decreed to Franklin in the Stewart Decree. Each of Pioneer's claims states:

Claim to this water right is based upon an Agreement between the Franklin Ditch Company and the Idaho and Oregon Land Improvement Company, the predecessor in interest to Pioneer Irrigation District, as well as the historic use and practice which has existed since the date of that Agreement.

Pioneer's objections to the Director's Reports recommending denial of Pioneer's claims each states that water rights 63-166A and 63-167A "*should be recommended as claimed* based upon historic diversion, delivery, and use by the Pioneer Irrigation District through its system of canals and laterals." Pioneer's Objections to Water Right Nos. 63-166A and 63-167A; Section E. Reasons Supporting Objection(s) of the SF-1 - Objection form filed in this matter on June 19, 2007 (emphasis added).

In its Standard Form 1 Objections to the Director's Reports recommending issuance of decrees to Franklin for water right no. 63-166B and 63-167B, Pioneer checked the box next to each water right element (except the inapplicable box for "Instream Flow Description"), stating as the reason for its objection that: "This water right should be recommended as No. [63-00166A (or) 63-167A], as claimed by [Pioneer], based upon historic diversion, delivery, and use by [Pioneer] through its system of canals and laterals." Section E. Reasons Supporting Objection(s) of the SF-1 - Objection form filed in this matter on June 19, 2007 (emphasis added). No other reason for Pioneer's objection was identified.

Having claimed ownership of the full quantities of Franklin's water rights in this proceeding, Pioneer is judicially estopped from asserting that Franklin's water rights have been partially forfeited. Pioneer, having asserted ownership as the sole reason for its objections, Pioneer is also judicially estopped from asserting any other reason for objecting to Franklin's water rights at this late stage in this proceeding.

B. Res Judicata Precludes Pioneer From Challenging the Elements of Franklin's Water Rights Based on Stewart Decree Testimony and Evidence

Under the doctrine of *res judicata*, in an action between the same parties (and their successors-in-interest) upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 844 (2003). Regardless of Pioneer's interpretation of the 1883 Agreement or testimony from the Stewart Decree, Pioneer, a party to the Stewart Decree proceedings, is bound by the determinations in the Stewart Decree which recognize the water rights in question as claimed by Franklin.

As stated in Franklin's memorandum in support, in upholding the Stewart Decree, the Supreme Court reviewed and considered: (1) the October 2, 1883 Agreement between Franklin and Pioneer's predecessor, IOLIC; (2) the June 24, 1884 deed whereby Franklin conveyed its water rights and ditches to IOLIC; (3) the June 25, 1884 deed whereby IOLIC conveyed Franklin's water rights back to Franklin; and (4) testimony as to the use and practice at that time. Under the doctrine of *res judicata*, Pioneer is barred from litigating issues and claims that have been settled by a prior judicial decision. *See Sagewillow, Inc, supra*. Pioneer's objections and claims to water right nos. 63-116 and 63-117 should be dismissed.

C. Pioneer Has Failed to Rebut The Director's Recommendation as to the Nature and Extent of Water Right Nos. 63-00166B and 63-00167B

Water Right Nos. 63-00166B and 63-00167B were recommended in the SRBA by IDWR. The Director's recommendation is *prima facie* evidence of the nature and extent of the water rights. I.C. § 42-1411(4). As such, the Director's recommendation of water right nos. 63-00166B and 63-

00167B constitutes a rebuttable evidentiary presumption. *McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001). Pioneer has the burden of producing evidence that rebuts the Director's recommendation of water right nos. 63-00166B and 63-00167B. I.C. §42-1411(5), *McCray, supra*, at 514. The facts in the Director's Report are presumed correct until Pioneer produces sufficient evidence to rebut the presumption. *Id.* Because I.C. §42-1411 is silent as to the amount of proof necessary to rebut the Director's recommendation, Pioneer is required to produce "substantial evidence" of the nonexistence of water right nos. 63-00166B and 63-00167B. *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986). The substantial evidence so required is "more than a scintilla, but less than a preponderance." *Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 938 (1993). Pioneer, by conceding its claim of ownership to Franklin's water rights, has acquiesced to the Director's recommendation for water right nos. 63-00166B and 63-00167B.

D. No Controversy Regarding Quantity

There is no controversy for this Court to decide as to quantity for the water rights in question. Pioneer claims 15.4 cfs for water right no. 63-166A and 27.6 cfs for water right no. 63-167A. Franklin claims the same 15.4 cfs for water right no. 63-166B and 27.6 cfs for water right no. 63-167B. The Director's Report recommends 15.4 cfs for water right no. 63-166B and 27.6 cfs for water right no. 63-167B. Pioneer's claims, Franklin's claims and the Director's Report recommendations recognize the same quantity. Accordingly, Pioneer's argument re; quantity must be dismissed.

E. No Controversy Regarding Point of Diversion

There is no controversy for this Court to decide as to the point of diversion for the water rights in question. Franklin claims a point of diversion of T4N R2W Sect. 24 for both water rights. Pioneer claims a point of diversion of T4N R2W Sect. 24 for both water rights. The Director's

Report recommends a point of diversion of T4N R2W Sect. 24 for both water rights. Just as with quantity, Pioneer's claims, Franklin's claims and the Director's Report recommendations are all in agreement.¹

F. No Controversy Regarding Place of Use

The place of use claimed by Franklin and recommended in the Director's Report includes lands owned by members of Franklin and within the Franklin place of use. The place of use claimed by Pioneer includes lands within Pioneer's place of use but outside of Franklin's place of use. This best illustrates the absurdity of Pioneer's new position that while there may be no issue as to ownership, there are material issues of fact as to quantity, point of diversion and place of use. Clearly there is no logic or evidence to support a finding that Franklin is the owner of the water right but the place of use is within the Pioneer Irrigation District service area and on lands not owned by Franklin's members so that Franklin could not use its own water right.

G. IDWR Investigated Place of Use in Making Its Recommendation

Pioneer also alleges that IDWR did not adequately investigate existing information regarding the lands that were actually irrigated by the water rights in question at the time the Stewart Decree was issued. However, the actions of a state agency are afforded a strong presumption of validity. *Duncan v. State Bd. of Accountancy*, 232 P.3d 322, 324 (2010).

Jan Shurte (IDWR) stated that she did not prepare the recommendations for water right nos. 63-166 or 63-167. Affidavit of Jon C. Gould in Support of Franklin's Reply (hereafter *Gould Affin*

¹On Pioneer's claims, it simply added two other points of diversion. There is no evidence that the additional points of diversion claimed by Pioneer have ever been used to divert water under water right nos. 63-166 and 63-167 or that water diverted from these other points of diversion could be delivered to Franklin's the place of use.

Support”), Exh. 1, Shurte Deposition Testimony at 11:18-19. She does not know what information was used to prepare the recommendation for water rights nos. 63-166 or 63-167. 54:1. Also, when recommending the place of use, for both ditch companies like Franklin and irrigation districts like Pioneer, IDWR starts with its GIS personnel creating shapes of what appear to be the irrigated areas within the company’s place of use. *Gould Aff in Support*, Exh. 1 at 33:25, 34:1-4. IDWR then works with the companies to accurately define the boundaries. *Gould Aff in Support*, Exh. 1 at 35:8-9. IDWR is dependant on the ditch companies to inform it of the boundaries because there is no other way for IDWR to know this type of information. *Gould Aff in Support*, Exh. 1 at 35:2-4.

Pioneer alleges that IDWR failed to adequately investigate the place of use for these water rights because it did not use a certain map. Assuming the map referenced by Pioneer **apparently** utilized in conjunction with the Stewart Decree proceeding, adds value to the recommendation process, there is no evidence this map was not used by IDWR in making its recommendation. *Pioneer’s Response* at 18. IDWR had access to the map because it is housed at IDWR. There is no evidence the IDWR failed to appropriately follow its procedures and duties in making its place of use recommendation for the place of use for water right nos. 63-166 and 63-167.

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

Pioneer suggests that it would be improper to grant summary judgment in favor of Franklin regarding the point of diversion for 63-166B and 63-167B prior to following the procedures and requirements of I.C. § § 42-1425 and 42-108. These statutes provide for changes in various elements of a water right and require procedures to be followed for the changes to occur. These sections are not applicable to Franklin because Franklin has not changed the point of diversion for either water right and transfers prior to 1969 do not require IDWR approval.

Assuming there was an accomplished transfer, Pioneer has owned and controlled the point of diversion for water right nos. 63-166B and 63-167B. Any change in the point of diversion would have been under the control and authorization of Pioneer. Both I.C. § § 42-1425 and 42-108 are only applicable to Franklin when Franklin is the party changing the point of diversion. Here, not only is there no evidence that Franklin has changed the point of diversion for its water rights, the weight of the evidence demonstrates that point of diversion was never in T4N R1W, Sect. 18 as listed in the Stewart Decree.²

IDWR included the accomplished transfer comment in its recommendation because there was conflicting information as to the location of the point of diversion, a long period of time had passed, and it assumed there was no injury because there were no complaints for several years. *Gould Aff in Support*, Exh. 1 at 29:13-18. IDWR acknowledge that the description of the point of diversion in the Stewart Decree could be in error. *Gould Aff in Support*, Exh. 1 at 107:21-25, 108:1. However, when there is a discrepancy in a POD location, the accomplished transfer comment is included in the recommendation unless there is documentation in the file that there was actually an error in the decree. *Gould Aff in Support*, Exh. 1 at 108:22-25, 109:1.

Assuming, for arguments sake and contrary to the available maps of the point of diversion area and the fact that T4N, R1W, Sect 18 is north of the south channel of the Boise River, the transfer statute did not require IDWR 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

²Stevens Aff., Exs. A - March 1900 Map, B - May 1901 Map.; King Aff., Ex. B, 1904 Map apparently utilized in conjunction with the Stewart Decree proceedings; Gould Secon Aff., Exs 1-1904 Map, 2- IDWR Digital Maps.

compliance with the statutory provisions of Idaho Code §42-222 to have the transfer confirmed in the course of the general SRBA adjudication” *Fremont-Madison Irrigation Dist. V. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456 (1996).

I. No Forfeiture Has Occurred

Statutory forfeiture is based upon the legislative declaration in I.C. § 42-222(2) that water rights may be lost if they are not applied to a beneficial use for a period of five continuous years. *Id.* Forfeitures are not favored in the law, and clear and convincing proof is necessary to support a claim of forfeiture. *Id.* Furthermore, certain defenses to forfeiture have been recognized including the Resumption of Use Doctrine, *Id.* citing *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945); *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944), wrongful interference with a water right or failure to use the water because of circumstances over which the water right holder has no control, *Id.* citing *Alamo Water v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972); *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Welch v. Garrett*, 5 Idaho 639, 51 P. 405 (1897), and the Forfeiture Tolling Rule. *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B (May 9, 2002) (“*Wood v. Trout*”) at 19.

1. No Clear and Convincing Evidence of Forfeiture

The record contains no clear and convincing evidence that the water under water right no. 063-00167B was not applied to beneficial use for a continuous period of five years. The objectors provided the Affidavit of Mark Zirschky as the only evidence of partial non-use of water right no. 63-167B. Mr. Zirschky states that Pioneer typically does not allow the diversion of more than 43 cfs of water into the canal. Zirschky Aff. ¶4. Pioneer then deduces that because three water rights (63-166B,

63-167B, and 63-179C) share the same point of diversion and have a combined recommended diversion rate of 79.2 cfs of water into Pioneer's Caldwell Highline Canal at its headgates on the Boise River, the most junior of these water rights, 63-167B, may have been partially forfeited over time. This does not constitute clear and convincing evidence that Franklin water right 63-167B has not been used for a period of more than five years.

There are numerous other problems with Pioneer's theory of partial forfeiture. First Pioneer assumes that the full quantity of water under the most senior water rights is always diverted. Next, Pioneer assumes that the canal flows are between 40-43 cfs. The data shows that the maximum flows are consistently greater than 50 cfs. *Gould Reply Aff. Ex. 2*. In 1994, the Canal flow was measured at 72 cfs. *Gould Reply Aff. Ex. 2*. The inapplicability of Pioneer's partial forfeiture claim is further evidenced by the fact that Pioneer owns five water rights that are more junior than 63-0167 that share the same point of diversion.

2. Defenses To Forfeiture

The forfeiture tolling rule, the resumption of use doctrine and Pioneer's placement of a flow restricting culvert in the canal provide Franklin with defenses to forfeiture.

a. Forfeiture Tolling Rule Prevents Forfeiture

Under SRBA law of the case, the five-year statutory period of non-use required to establish forfeiture tolls upon the filing of a claim in the SRBA until a partial decree is entered. *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B (May 9, 2002) at 19. As to SRBA claim 63-167B, Franklin filed a notice of claim in February, 1990. At that time, under the forfeiture tolling rule, the time on any forfeiture action ceased to accrue. Therefore, there can be no forfeiture of water right no. 63-167B after February, 1990 while this action

is pending.

Pioneer is alleging partial forfeiture from 1992 to present. Because the time for establishing forfeiture has been tolled since prior to Pioneer's alleged non-use, there can be no partial forfeiture.

b. Pioneer Is the Cause of the Alleged Partial Forfeiture

Regardless of the existence of the Forfeiture Tolling Rule and the absence of evidence that water right no. 63-167B not been used in full, forfeiture of this water right can not have occurred because it is Pioneer, by installing a culvert that allegedly limits capacity of the canal to 43 cfs, that has prevented Franklin from using its water rights in full. Forfeiture does not occur when the party asserting the forfeiture prevented the right from being used during the period of alleged forfeiture. *Hodges v. Trail Creek Irrigation Company, Inc.*, 78 Idaho 10, 16, 297 P.2d 524 (1956). Pioneer has failed to deliver Franklin's full entitlement of water because Pioneer, the objector here, restricted capacity of the canal.

J. This Court Has Authority to Grant Summary Judgment on All Issues Raised

Franklin, through its summary judgment motion, seeks to confirm ownership of its water rights and dismiss Pioneer's notices of claims and objections. Pioneer objected to the elements claimed by Franklin. By seeking to dismiss Pioneer's claims and objections through this summary judgment motion, the issues as to the elements of the water rights objected to and claimed by Pioneer are before this court.

Because Pioneer filed its claims and objections based on ownership, a determination on the issue of ownership of water right nos. 63-166B and 63-167B in favor of Franklin will be dispositive. The elements of water right nos. 63-166A and 63-167A as claimed by Pioneer are the same as the elements of water right nos. 63-166B and 63-167B with the exception of ownership and place of use.

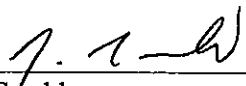
The Pioneer has addressed the issue of place of use in its briefing.

V. CONCLUSION

For the above stated reasons, Franklin respectfully requests that this Court grant its motion for summary judgment.

DATED this 5th day of October, 2010.

RINGERT LAW CHARTERED

By: 
Jon C. Gould
Attorney for Franklin Ditch Company

CERTIFICATE OF SERVICE

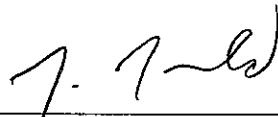
I hereby certify that on this 5th day of October, 2010, I served a true and correct copy of the foregoing document by U.S. mail, postage pre-paid to the following:

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