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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 REPLY
IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT AND MOTION TO
REMAND**

Pioneer Irrigation District, through undersigned counsel of record, hereby files
this reply in support of its Motion for Partial Summary Judgment and Motion to Remand, in

accordance with SRBA Rule of Procedure 1 and Idaho Rules of Civil Procedure 7(b)(3) and 56(c).

I. INTRODUCTION

Franklin and Mason both offer various explanations for why the procedures of Sections 42-1425 and 42-108 should not apply to their particular water rights. However, none of these arguments have any basis in the plain text of those statutes. The simple fact of the matter is that Section 42-1425 requires the Court to remand the matter back to IDWR when an objection has been filed to an accomplished transfer. That has not occurred. While Franklin and Mason both speculate as to the factual background surrounding the points of diversion and explain why, in their estimation, adherence to Section 42-1425 is unnecessary for their particular water rights, their arguments ultimately illustrate and support Pioneer's overall point—that, pursuant to Section 42-1425, it is IDWR's job to determine whether injury and enlargement have occurred. It is not Franklin's or Mason's job, nor is it Pioneer's. The procedures of Section 42-1425 serve a purpose, and Pioneer believes the Court should not disregard those procedures as urged by Franklin and Mason.

II. LEGAL ARGUMENT

A. Franklin And Mason Ignore The Importance Placed Upon Section 42-1425's Procedures By The Idaho Supreme Court And Pioneer's Obligations To Its Patrons

The Idaho Supreme Court ruled on the constitutionality of Section 42-1425 and the other "amnesty statutes" in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). In upholding the constitutionality of Section 42-1425, the court recognized:

Therefore, two limitations exist for an accomplished transfer: (1) there must be no injury to other water rights existing on the date of the change, and (2) the transfer cannot constitute an “enlargement” of the original right.

129 Idaho at 458, 926 P.2d at 1305.

The court concluded its discussion of the constitutionality of Section 42-1425 as follows:

The limitations in section 42-1425 protect other water users from injury to their rights resulting from a recognition of the transfers that are memorialized in the adjudication. Proceeding under section 42-1425 a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water rights existing on the date of the change. Section 42-1425 of the Idaho Code is constitutional as written.

Id.

In other words, the requirements and procedures in Section 42-1425 that protect against injury and enlargement were expressly relied upon by the Idaho Supreme Court in upholding the constitutionality of the statute. Given this factor, this Court should not dismiss the importance of these procedures in Section 42-1425, as Franklin and Mason urge in their response briefs.

In this regard, it may be helpful to remind the Court that in addition to Franklin and Mason, Pioneer uses the Caldwell Highline Canal to convey “water to approximately 7,443 acres of land within Pioneer’s own district boundaries.” (Zirschky Aff. of 9/28/10, ¶ 2.) Pioneer owns and operates the Caldwell Highline Canal “in trust” for those Pioneer patrons. IDAHO CODE § 43-316; *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 381 P.2d 440, 450-51 (1963); *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250, 252 (1923). While Franklin and Mason have repeatedly used their legal briefs to question Pioneer’s motives in pursuing its

objections in these subcases, Pioneer believes it has an obligation to its patrons utilizing the Caldwell Highline Canal, recognized in statute and in Idaho Supreme Court case law, to ensure that the water rights conveyed by others through the canal are accurately decreed in this Court. The mandatory procedures in Section 42-1425 are in-place to help ensure that that occurs.

B. Franklin And Mason Both Ignore The Plain Language Of Idaho Code Section 42-1425 And IDWR's Recommendations

Both parties argue that Section 42-1425 does not apply to IDWR's recommendations of 63-166B, 63-167B, and 63-179C. (Franklin's Resp., pp. 4-6; Mason's Resp., p. 6.) Before addressing these arguments more specifically, it is important to remind the Court that the recommendation for each of the three water rights at issue specifically states that it includes an accomplished transfer of the point of diversion. (Lawrence Aff. of 9/14/10, Exs. A, B, C.) In the SRBA, IDWR is the "independent expert and technical assistant" to the Court, so IDWR's conclusion that an accomplished transfer occurred should be accorded significant weight on the issue of whether Section 42-1425 requires a remand to IDWR. IDAHO CODE § 42-1401B(1).

Franklin further argues that Section 42-1425 does not apply because any change in point of diversion was made by Pioneer, not Franklin. (Franklin's Resp., pp. 4-6.) According to Franklin, "[t]here is no evidence that Franklin changed the POD since conveying ownership of the POD and the diverting works," and that such a change "never occurred." (Franklin's Resp., p. 5.) This argument is not persuasive for multiple reasons.

First, the record demonstrates that the points of diversion in the SRBA recommendations are different from those in the Stewart Decree for all three rights. (Lawrence Aff. of 9/14/10, Exs. A, B, C; Gould Aff. of 9/14/10, Ex. 3, p. 462; Barker Aff. of 9/17/10,

Ex. A.) Second, the more general point is that Section 42-1425 requires *IDWR*, as the “independent expert and technical assistant,” I.C. § 42-1401, to engage in this analysis, rather than Franklin, who is certainly not objective or otherwise “independent” on these issues.

Third, as Pioneer has established in prior briefing, the evidence in the record demonstrates that at the time of the Stewart Decree, water right 63-166B was never intended to be conveyed through Pioneer’s Caldwell Canal. (Pioneer’s Resp. of 9/28/10, pp. 9-12.) Instead, it had always been associated with the Strahorn Slough which, while located close to the old Caldwell Canal, was a completely separate facility. (*Id.*) Therefore, there certainly is evidence of a change in point of diversion associated with that water right.

Mason relies upon a law review article for the proposition that it “was not required to comply with the statutory provisions of Idaho Code § 42-222” prior to 1969 and, therefore, that Section 42-1425 does not apply. (Mason’s Resp., p. 6.) On this issue, this Court has previously held:

Pocatello asserts that prior to the enactment of I.C. § 42-222 in 1969, water users were not required to follow *any* procedures to transfer a point of diversion, and therefore, I.C. § 42-1425 does not apply to those pre-1969 rights. However, this is not a correct statement of law. The requirement to file an application for a change in point of diversion became mandatory in 1943. *See* 1943 Idaho Sess. Laws ch. 53, p. 101. *See also* SRBA Court’s ***Order on Challenge (A & B Irrigation District)*** Subcase Nos. 36-02080 *et. al.* (April 25, 2003) (Hon. R. Burdick) at 20, *aff’d sub nom. A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005).

* * *

Moreover, Pocatello’s argument that no mandatory transfer procedures existed prior to 1969 is not dispositive of the issue before this Court, because the “no-injury” rule was in place at the time the pre-1969 transfers allegedly took place. The common law prior to 1969 made clear that a water user may not change a point

of diversion, if such a change would injure other water rights. *See First Security Bank v. State*, 49 Idaho 740, 745, 291 P. 1064, 1066 (1930) (holding that in an action involving a change in place of diversion, the reasons why the change will or will not injure other appropriators may be considered). Idaho Code § 42-222 and its predecessors codified this “no-injury rule,” beginning in 1899 with the passage of House Bill 183, which stated in part that “[t]he person entitled to the use of water may change the place of diversion, if others are not injured by such change . . .” 1899 Idaho Sess. Laws § 11, p. 381. . . . At the time a claimant files a claim in the SRBA, the Director still maintains the authority to examine such transfers for injury to other water rights, especially since the “no injury” rule has been well-established for over 100 years.

In re SRBA, Order on Motion to Alter or Amend (City of Pocatello), pp. 9-10, Case No. 39576, Subcase Nos. 29-00271, *et al.* (5th Dist. April 12, 2010) (Melanson, P.J.).

Even if there were some merit to Mason’s argument, the plain language of Section 42-1425 still does not support Mason’s argument on this issue. That statute expressly applies to “any change” of point of diversion, “*even though* the [claimant] has not complied with sections 42-108 and 42-222. . . .” (Emphasis added.) The statute does not state that it only applies to changes occurring prior to 1969, nor does it even more generally state that it applies only to changes that required IDWR approval when made. Simply put, the specific year in which IDWR was supposedly first required to review and approve transfers as an administrative matter is irrelevant to Section 42-1425.

C. Franklin’s Uncertainty Regarding The Points Of Diversion Decreed In The Stewart Decree Illustrate That There Are Uncertainties That Must Be Resolved By IDWR Under Section 42-1425

Franklin states that it “appears” there was a clerical error in the Stewart Decree’s recommendation of point of diversion, that it is “likely” that the recommended point of diversion in the Stewart Decree was a clerical error or mistake, and that the evidence “suggests” that such an error or mistake occurred. (Franklin’s Resp., pp. 2, 3, 4.) Franklin’s choice of words

illustrates that there are uncertainties and ambiguities surrounding the Franklin points of diversion specified in both the Stewart Decree and in IDWR's SRBA recommendations. This acknowledgment by Franklin further supports Pioneer's overall point, that these issues need to be more fully explored in accordance with the procedures required by Section 42-1425.

D. Franklin Ignores That Water Right 63-166B Was Never Intended To Be Diverted Into The Caldwell Highline Canal

Franklin argues that the points of diversion for its two water rights have not changed since the Stewart Decree was issued. (Franklin's Resp., p. 2.) Franklin also asserts that the Strahorn Slough shared the same point of diversion as Pioneer's Caldwell Canal at the time of the Stewart Decree. (Franklin's Resp., pp. 3-4.) However, as Pioneer has explained in prior briefing, Franklin's assertions are not correct. (Pioneer's Resp. of 9/28/10, pp. 9-12.) At the time of the Stewart Decree, water right 63-166B was conveyed exclusively in the Strahorn Slough. *Id.* While the Strahorn Slough point of diversion was near the point of diversion for the old Caldwell Canal, they were two completely separate facilities. *Id.*

Franklin also notes that the Stewart Decree specifically describes the point of diversion for Pioneer's water right 63-371 (right number "90" in the Stewart Decree) as the "Caldwell Canal." Notably, in its recommendation of point of diversion for Franklin's two water rights, the Stewart Decree does *not* refer to the Caldwell Canal. (Gould Aff. of 9/14/10, Ex. 3, pp. 462, 484.) This critical difference in language within the Stewart Decree itself demonstrates that it is inappropriate to assume that the old Caldwell Canal was the point of diversion specified by the Stewart Decree for Franklin's water right 63-166B, and further supports the conclusion that adherence to the procedures required by Section 42-1425 is necessary to investigate these issues further.

E. Mason's Timeliness Arguments Ignore Both The Plain Language Of Section 42-1425 And The Practical Implications Of Mason's Own Late Claim To 63-33392

Mason argues that Pioneer's motion is untimely. (Mason's Resp., pp. 2-3.) More specifically, Mason argues that the Court should deny Pioneer's motion because Pioneer "failed" to raise this issue previously. (Mason's Resp., p. 3.) However, Mason's argument ignores the plain language of Section 42-1425, which states that, "[i]f an objection is filed to a claim for accomplished change . . . , the *district court* shall remand the water right to the director for further hearing. . . ." (Emphasis added.) Pioneer filed its combined Motion for Partial Summary Judgment and Motion to Remand on September 14, 2010, approximately three months prior to the December 14, 2010 trial date. Mason does not cite any legal authority which stands for the proposition that Pioneer should be prevented from seeking to ensure compliance with a statute that, by its terms, is mandatory and does not impose any rights, duties, or obligations upon Pioneer as the objector.

Mason's argument regarding the timing of Pioneer's motion also ignores the practical implications of the late notice of claim that Mason itself has recently filed. On September 21, 2010, the SRBA Presiding Judge granted Mason's motion to file a late notice of claim to water right 63-33392. (Lawrence Aff. of 10/1/10, Ex. B.) As Pioneer has demonstrated, there is substantial evidence that Mason has historically utilized very little Boise River water from the Caldwell Highline Canal under water right 63-179C, and that Mason has essentially replaced that water with water diverted from Mason Creek and Fivemile Creek and claimed as water rights 63-32580 and 63-33392, respectively. (Pioneer's Resp. of 10/1/10, pp. 8-12.) Therefore, all three of those rights are substantially related, and it would make little sense to have one trial on 63-179C and 63-32580 and a second follow-up trial on 63-33392. Pioneer suggests

that Mason's late claim to 63-33392 puts the practicality of proceeding with the December 14, 2010 trial in serious doubt. If that trial date is ultimately postponed to allow time for 63-33392 to be recommended on a late claim Director's Report, this would provide adequate time to accommodate the procedures required by Section 42-1425, rendering Mason's timeliness argument moot.

F. Mason's Assertion That Pioneer Has A Duty To Deliver Mason's Water Through The Caldwell Highline Canal Is Based Exclusively Upon An Alleged Contract That Neither Party Nor IDWR Has Been Able To Locate

Mason argues that Pioneer has "consistently admitted throughout the years that it has a duty to deliver water to Mason Creek lands through the Caldwell Highline Canal."

(Mason's Resp., p. 3.) For this proposition, Mason relies upon a letter from 1918 and a document from 1938, the authorship of which is not specified within the document itself.

(Mason's Resp., p. 3.)

The first problem with this argument is that it runs afoul of Idaho's "best evidence" rule, which is embodied both in state statute and in the rules of evidence. According to Idaho Code Section 9-411, "[t]here can be no evidence of the contents of a writing other than the writing itself, except in" certain situations specifically enumerated in the statute. Similarly, the applicable rule of evidence states that, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." I.R.E. 1002.

Idaho's statute of frauds requires "[a]n agreement that by its terms is not to be performed within a year from the making thereof" to be in writing to be enforceable. IDAHO CODE § 9-505. Therefore, an agreement requiring Pioneer to convey water in its system indefinitely must necessarily be in writing. However, at this time, no such written agreement has

surfaced. And, Mason has not established any exception to application of the “best evidence” rule. Until such a written agreement is produced, references to such an agreement such as those in the 1918 letter and the 1938 document are not sufficient to establish a contractual obligation or approval on the part of Pioneer to convey water through its system for Mason’s benefit.

G. The *Hillcrest* Case Relied Upon By Mason Is Distinguishable, And Mason Has Not Otherwise Established Application Of Estoppel Or Laches

Mason relies upon the case of *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 56 P.2d 1115 (1938), for the proposition that Pioneer is precluded from raising these issues in the SRBA. (Mason’s Resp., pp. 5-6.) However, that case is distinguishable for multiple reasons. First, and most obviously, *Hillcrest* did not involve Section 42-1425.

Second, part of the justification for application of “estoppe[l] by laches” in that case was that the party claiming estoppel/laches in that case had “incurred large indebtedness on the strength of its title. . . .” 57 Idaho at 409, 66 P.2d at 117. This is consistent with the rule that “[b]oth estoppel and waiver require that the party asserting the equitable doctrines have reasonably relied and altered his or her position *to his or her detriment*.” *Eastern Idaho Agricultural Credit Ass’n v. Neibaur*, 133 Idaho 402, 410, 987 P.2d 314, 322 (1999). Mason has not established the “detriment” that it has suffered that would justify application of estoppel. To the contrary, Mason’s arguments stand more logically for the proposition that Mason has benefitted from the use of Pioneer’s canal.

Mason emphasizes the length of time that some small portion of water right 63-179C has apparently been diverted into the Caldwell Highline Canal. However, length of time alone is largely irrelevant to the analysis:

In order for a claimant to establish that he has acquired a private prescriptive easement¹ by adverse use, he must submit 'reasonably clear and convincing' proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient tenement, for the prescriptive period. 'Under a claim of right' signifies use without recognition of the rights of the owner of the servient estate. Thus, a prescriptive right cannot be acquired if the use of the land is with the permission of its owner. *Absent estoppel, permission to use the land of another can be revoked at any time, no matter how long the permitted use has continued.*

West v. Smith, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (Idaho 1973) (emphasis added) (citations omitted).

Similarly, in the context of the doctrine of laches, the Idaho Supreme Court has stated that, "[t]he lapse of time alone is not controlling on whether laches applies." *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002). Instead, there are four particular elements that must be found in order to apply the doctrine of laches:

(1) [D]efendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Thomas, 137 Idaho at 359, 48 P.3d at 1248.

Mason has not even attempted to apply any facts to these required elements. Particularly difficult for Mason in this regard would be establishing the first required element—"invasion" of Mason's rights. First, and more generally, insisting upon following mandatory

¹ Mason has not claimed a prescriptive easement, and Pioneer does not concede that one exists. By including this discussion of prescriptive easement, Pioneer is simply providing context for the discussion leading up to the Idaho Supreme Court's statement that "permission to use the land of another can be revoked at any time, no matter how long the permitted use has continued."

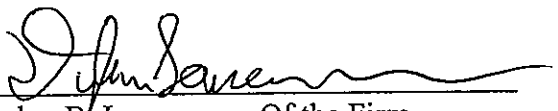
statutory procedures such as Sections 42-1425 and 42-108 can hardly be characterized as “invading” Mason’s rights. Second, until Mason, Pioneer, or IDWR is able to locate an existing, applicable written agreement entitling Mason to the use of the Caldwell Highline Canal, Mason would not be able to establish how Pioneer’s insistence upon authorization to utilize its canal pursuant to Section 42-108 would constitute an invasion of Mason’s rights.

III. CONCLUSION

For the foregoing reasons, Pioneer respectfully requests that its Motion for Partial Summary Judgment and Motion to Remand be granted, *i.e.*, that the Court confirm application of Sections 42-1425 and 42-108 to the change in point of diversion for water rights 63-166B, 63-167B, and 63-179C, and remand the matter back to IDWR in accordance with Section 42-1425.

DATED this 5th day of October, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
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Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2010, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO REMAND** to be served by the method indicated below, and addressed to the following:

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