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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 REPLY IN SUPPORT
	)	OF MASON CREEK DITCH COMPANY'S
	)	MOTION FOR SUMMARY JUDGMENT

COMES NOW Mason Creek Ditch Company ("Mason Creek"), by and through its attorneys of record Barker Rosholt & Simpson, LLP, and hereby submits the following *Reply in Support of its Motion for Summary Judgment*.

I. INTRODUCTION

In its *Response to Mason Creek's Motion for Summary Judgment*, Pioneer Irrigation District ("Pioneer") declines to address the argument raised by Mason Creek, which is that Pioneer is barred from asserting any claim to 63-00179A and objecting to 63-00179C under the legal doctrine of *res judicata*. Instead, Pioneer attacks various elements of Mason Creek's right,

attempting to create questions of fact where none exist. Pioneer endeavors to cast doubt on the point of diversion for 63-00179C, though it is the same point of diversion Pioneer itself claims for 63-00179A. Pioneer faults Mason Creek's *Memorandum in Support of Motion for Summary Judgment* for asserting "ownership" of water right 63-00179C and not addressing other aspects of Pioneer's objections to water right 63-00179C. In reality, there are no remaining elements of Mason Creek's water right 63-00179C to address. The Stewart Decree established water right 63-00179C's diversion rate. The Department has recommended the quantity, source, point of diversion and place of use for water right 63-00179C as claimed by Mason Creek, based on ample evidence of continuous use of the water right by Mason Creek, with Pioneer's full knowledge, for more than one hundred years. The Department's recommendations are prima facie evidence of the elements of water right 63-00179C. It is Pioneer's burden to prove otherwise.

Mason Creek does not concede Pioneer's assertion that there are individual elements of water right 63-00179C to be resolved at trial. *See Pioneer's Response* at 2. Mason Creek has diverted and applied water right 63-00179C to beneficial use for more than one hundred years. Water right 63-00179C was decreed to Mason Creek in the Stewart Decree, and the Department has recommended water right 63-00179C as claimed by Mason Creek. There are no remaining "issues" to be resolved at trial.

Pioneer's assertion that water right 63-00179C may have been partially forfeited is without basis in law and in fact. Pioneer has the burden of proving any partial forfeiture of water right 63-00179C, yet it has offered only evidence as to the amount of water delivered to the Caldwell Highline Canal, which is insufficient to prove partial forfeiture. Moreover, Pioneer has controlled delivery of water right 63-00179C since at least 1918, and directs the water master as

to when and how to divert this water right. Under the facts of this matter, there can be no partial forfeiture of Mason Creek's water right 63-00179C because Mason Creek does not control delivery of the water in the Caldwell Highline Canal. I.C. §42-223(6). *See also Jenkins v. State*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). (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)).

Pioneer has raised no genuine issues of material fact to preclude this Court granting Mason Creek's motion for summary judgment. Water right 63-00179C was decreed to Mason Creek in the 1906 Stewart Decree. Mason Creek has diverted and applied the right to beneficial use for more than one hundred years. Pioneer has delivered water right 63-00179C to Mason Creek since at least 1918, and without question had full knowledge of Mason Creek's ownership of water right 63-11079C. For these reasons, discussed in detail below, the Court should grant Mason Creek's Motion for Summary Judgment, decree recommended water right 63-00179C, and dismiss Pioneer's disallowed claim 63-00179A.

II. UNDISPUTED FACTS

1. Mason Creek's water right 63-00179C was decreed to Mason Creek in the Stewart Decree in 1906. *See* The Stewart Decree, paragraph XLIII, Exhibit A to *Affidavit of Albert P. Barker in Support of Mason Creek's Motion for Summary Judgment*.

2. Water right 63-00179C has been delivered in the Caldwell Highline Canal since at least 1918. *See* Idaho Department of Water Resources Transfer File No. 29, Exhibit C to *Affidavit of Albert P. Barker in Support of Mason Creek's Memorandum in Opposition to Pioneer's Motion for Partial Summary Judgment and Motion to Remand*.

3. Pioneer has acknowledged it has a duty to deliver water right 63-00179C to Mason Creek. *See Pioneer's Response to Mason Creek's Interrogatory No. 3 in Pioneer Irrigation District's Response to Mason Creek Ditch Company's First Set of Discovery Requests.*

4. There is no record of Pioneer ever objecting to Mason Creek's water right 63-00179C in the 90 years since the Stewart Decree.

5. Pioneer has complete control over the diversion works of the Highline Canal. *See Pioneer's Response to Mason Creek's Interrogatory No. 3 in Pioneer Irrigation District's Response to Mason Creek Ditch Company's First Set of Discovery Requests.*

6. The water master delivers water in the Highline Canal in accordance with Pioneer's instructions.

7. Pioneer diverts water from Mason Creek and Five Mile Creek into the Highline Canal and co-mingles that water with Boise River water.

8. Pioneer has natural flow rights and storage rights, with a corresponding duty of water for Pioneer's place of use, in excess of the amount held by Mason Creek on lands that are immediately adjacent to Mason Creek's place of use.

III. ARGUMENT

A. Pioneer does not address the binding effect of the Stewart Decree and instead unsuccessfully attempts to create issues of fact regarding the elements of a water right as a decoy.

Mason Creek reiterates its prior position in the *Memorandum in Support of Summary Judgment* that Pioneer is bound by the Stewart Decree and as such is barred under the legal doctrine of *res judicata* from arguing that the point of diversion for water right claim 63-00179C is invalid. Pioneer does not even attempt in its response to assert any defense to *res judicata*, despite its claim to ownership of water right claim 63-00179A.

Pioneer objects to the quantity, source, point of diversion and period of use for Mason Creek's water right 63-00179C. However, Pioneer was a party to *Farmers Cooperative Ditch Company v. Riverside Irrigation District, et al.* 14 Idaho 450, 94 P. 761 (1908), in which water right 63-00179C was decreed to Mason Creek. Pioneer did not object to that decree. Pioneer has delivered water right 63-0017C to Mason Creek since at least 1918, without raising any objection or question as to Mason Creek's ownership of that right. These objections are untimely and insupportable, and should therefore be dismissed.

Moreover, in addition to being bound by the Stewart Decree, Pioneer's argument should also be dismissed because its failure to raise this claim over a period of one hundred years is precluded by the doctrine of laches. As found by the Idaho Supreme Court, "Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim." *Hillcrest Irr. Dist. v. Nampa-Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115, at 118 (1937) (citing *Ryan v. Woodin*, 9 Idaho, 525, 75 P. 261; *Oylear v. Oylear*, 35 Idaho, 732, 208 P. 857; *Smith v. Faris-Kesl Const. Co., Ltd.*, 27 Idaho, 407, 426, 150 P. 25; *Just v. Idaho Canal, etc., Co., Ltd.*, 16 Idaho, 639, 653, 102 P. 381, 133 Am.St.Rep. 140). The *Hillcrest* Court also noted, "In *Ryan v. Woodin* the just and fair rule is stated as follows: 'Courts of equity do not favor antiquated or stale demands, and refuse to interfere where there has been gross laches in commencing the proper action, or long acquiescence in the assertion of adverse rights.'" *Id.*, (emphasis added).

Pioneer has not provided any evidence supporting its claim to water right 63-00179A. In the absence of any evidence to demonstrate Pioneer's alleged ownership, water right claim 63-00179A should be dismissed.

Pioneer's long acquiescence to and full knowledge of Mason Creek's ownership of water right no. 63-00179C precludes Pioneer from now claiming ownership of the right. The Stewart Decree confirmed Mason Creek's ownership of the right, and the Director's recommendation is prima facie evidence of the same. Pioneer has failed to provide any evidence that raises a genuine issue of material fact as to Mason Creek's confirmed ownership of the right. For this reason, Mason Creek requests that this Court grant its Motion for Summary Judgment.

B. Mason Creek has not forfeited any portion of water right 63-00179C.

Under the facts of this case, it is legally impossible for Mason Creek to have forfeited any portion of water right 63-00179C. Forfeiture of water rights is governed by Idaho Code § 42-222(2), which provides that water rights may be lost if they are not applied to the beneficial use for which the rights were appropriated for five continuous years. I.C. § 42-222(2). *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001). The Idaho Code provides, as a defense to forfeiture, "No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis." I.C. §42-223(6). Pioneer has controlled delivery of Mason Creek's water right 63-00179C since at least 1918.¹

The Idaho Supreme Court has "often repeated its position that forfeiture of water rights is not favored in Idaho." *Id.* (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999)). Indeed, the Idaho Supreme Court has called forfeiture of water rights "abhorrent" and thus requires that "all intendments are to be indulged against a forfeiture." *In*

¹ See Idaho Department of Water Resources Transfer File No. 29, Exhibit C to *Affidavit of Albert P. Barker in Support of Mason Creek's Memorandum in Opposition to Pioneer's Motion for Partial Summary Judgment and Motion to Remand*.

Re: Boyer, 73 Idaho 152, 160, 248 P.2d 540 (1952) (emphasis added). (Citing *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50; *Idaho Farms Co. v. Northside Canal Co.*, D.C., 24 F.Supp. 189). See also *W.M. Hodges v. Trail Creek Irrigation Company*, 78 Idaho 10, 297 P.2d 524 (1956).

(“Forfeiture or abandonment of water rights is not favored and is not to be presumed, and all intendments are to be indulged in against a forfeiture.”) Because forfeiture of water rights is strongly disfavored in Idaho law, Idaho courts require that such actions be proved by the heightened evidentiary standard of clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho at 515, 20 P.3d at 699.

In addition to the statutory defense provided by I.C. § 42-223(6), certain defenses to partial forfeiture have been recognized by Idaho courts, such as “wrongful interference with a water right or failure to use the water because of circumstances over which the water right holder has no control have been recognized as defenses.” *Jenkins v. State*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). (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)). In *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972), the Idaho Supreme Court noted that “Neither would interference by the water master in the exercise of a decreed right, by failure to fill that right in accord with the decreed priority, establish grounds for abandonment or forfeiture....” *Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972).

Water rights are not forfeited by a change in the point of diversion. *Joyce et al v. Rubin et al*, 23 Idaho 296, 130 P. 793 (1913). The Idaho Supreme Court, in *Joyce*, rejected the argument that water rights had been abandoned after a change in the point of diversion, writing:

This contention is without merit; for, under the law, they had a right to change their point of diversion, so long as it did not injure any other water user. Under the provisions of section 3247, Rev. Codes, a person entitled to the use of water may change the point of diversion, if others are not injured by such change; and if a change is made without proper application to the state engineer, as claimed in this case, that would not forfeit the right to the use of such water.

Id., at 797 (emphasis added).

Pioneer's competing claim to the water right at issue, 63-00179A, must also be dismissed as a matter of law. The Idaho Supreme Court has found that while "an appropriator may... forfeit his water right where he fails to make beneficial use of the same for the statutory period, title to such water right cannot be acquired by another, where such other claimant was the party at fault in preventing its use for the purpose for which the water was originally appropriated." *W.M. Hodges v. Trail Creek Irrigation Company*, 78 Idaho 10, 16, 297 P.2d 524, 527 (1956). In *Hodges*, the Court found that "If defendant is to prevail in this case, it must be on the strength of its own title. Title to the water in question was clearly established as owned by plaintiff, and has never been forfeited or abandoned, nor has defendant secured title by subsequent appropriation." *Id.* Water right 63-00179C was confirmed in Mason Creek's name in the Stewart Decree and Pioneer has never asserted ownership over this water.

Pioneer has delivered water right 63-00179C to Mason Creek since at least 1918 and has had sole control over the diversionary device since that time. It is therefore a legal impossibility for Pioneer to assert 1) that Mason Creek has partially forfeited water right 63-00179C, and 2) a right to that water in Pioneer claim 63-00179A. For these additional reasons, Pioneer has failed to allege any genuine issue of material fact that would preclude this Court granting Mason Creek's Motion for Summary Judgment. Mason Creek again respectfully requests that this Court grant its Motion for Summary Judgment.

C. Pioneer is barred from arguing that Mason Creek's point of diversion is invalid.

1. Pioneer is estopped from asserting the point of diversion is invalid because this point of diversion has been identified and used by Mason Creek for almost 100 years without objection from Pioneer.

Pioneer has not objected to Mason Creek's use of water right 63-00179C since it was decreed to Mason Creek in the Stewart Decree in 1906. Pioneer has also admitted that it has a duty to deliver water right 63-00179C to Mason Creek.² Pioneer has been delivering water right 63-00179C to Mason Creek since at least 1918.³ Pioneer is thus estopped from objecting to Mason Creek's ownership of water right 63-00179C.⁴ This situation was squarely addressed by the Idaho Supreme Court, which found:

It satisfactorily and conclusively appears that, even though appellant's title may have been originally questionable or uncertain, nevertheless respondents have stood by, with full knowledge of all the facts, and for more than twenty years have allowed appellant to proceed on the theory that it had valid title to these water rights and a legal right to have the water diverted from the New York Canal; and in the meanwhile has incurred large indebtedness on the strength of its title and right until now respondents are, and should be, estopped by laches from questioning appellant's title.

Hill Crest Irr. Dist v. Nampa-Meridian Irr. Dist., 57 Idaho 403, 66 P.2d 115 at 117 (1937)

(emphasis added). In the present matter, it is undisputed that Pioneer has acknowledged its duty to deliver Mason Creek's water right 63-00179C and that Pioneer has delivered that water to Mason Creek for more than one hundred years, far longer than the twenty years found sufficient by the Idaho Supreme Court in *Hillcrest* to estop the claim in that instance.

² See Pioneer's Response to Mason Creek's Interrogatory No. 3 in *Pioneer Irrigation District's Response to Mason Creek Ditch Company's First Set of Discovery Requests*.

³ See Idaho Department of Water Resources Transfer File No. 29, Exhibit C to *Affidavit of Albert P. Barker in Support of Mason Creek's Memorandum in Opposition to Pioneer's Motion for Partial Summary Judgment and Motion to Remand*.

⁴ Mason Creek has addressed this argument in detail in its *Response to Pioneer's Motion for Partial Summary Judgment and Motion to Remand*.

2. Pioneer's reliance on I.C. § 42-108 is in error.

Pioneer mistakenly argues that Mason Creek must get Pioneer's permission prior to the accomplished transfer of water right 63-00179C's point of diversion to the Caldwell Highline Canal. This position is flawed on two counts. First, I.C. § 42-108 requires the consent of shareholders of an irrigation entity prior to changing a point of diversion, which in this case would be Pioneer's own shareholders consenting to Pioneer's change in a point of diversion or Mason Creek's shareholders consenting to Mason Creek changing a point of diversion, not Pioneer consenting to Mason Creek's change in point of diversion.

Second, even if I.C. § 42-108 did require Pioneer's consent to Mason Creek's change in point of diversion, Mason Creek has been receiving water from this point of diversion since at least 1918, twenty-nine years before I.C. § 42-108 was enacted. I.C. § 42-108 is not retroactive and has no bearing on transfers completed prior to its enactment. This was addressed by the Idaho Supreme Court in *In Re: Boyer*, 73 Idaho 152, 248 P.2d 540 (1952), which found:

The amendment to Section 42-108, I.C., requiring consent by an irrigation district, became effective February 25, 1947. The application herein was filed September 16, 1946 and the District's protest, October 7, 1946, which did not contain this point.... Appellants contend the amendment, being procedural and remedial, may be given retroactive or retrospective effect. Conceding that it might be, on such *158 theory and not violative of the Constitution as contended by respondent, before a statute will be given retroactive and retrospective effect, the statute itself must contain words which indicate the Legislature intended it to have such retroactive and retrospective effect, and this amendment did not. *Peavy v. McCombs*, 26 Idaho 143 at page 151, 140 P. 965; *Bellevue State Bank v. Lilya*, 35 Idaho 270 at page 272, 205 P. 893. This amendment not being in effect when the application was initiated, does not apply thereto.

In Re: Boyer, 73 Idaho 152, 157-158, 248 P.2d 540, 543. Since water Right 63-00179C had been delivered to Mason Creek for almost thirty years prior to the enactment of I.C. § 42-108,⁵ and, according to *In Re: Boyer*, I.C. § 42-108 is not retroactive, it is therefore not applicable to the point of diversion for water right 63-00179C.

D. The place of use for water right 63-00179C is adequately identified.

Pioneer argues that there remain material issues of fact as to the place of use for water right 63-00179C because the Department relied on Mason Creek's description of the place of use in its recommendation. Pioneer alleges that the place of use given in the Stewart Decree and the place of use claimed in 63-00179C may be different. That allegation is immaterial, as found by the Idaho Supreme Court "it being well settled that a water right is a property right, and that one of its valuable incidents of which the owner cannot be deprived is the right to use it where he will, and to change its place of use, provided always that by such use or such change in the place of use the rights of others are not adversely affected." *In Re: Rice*, 50 Idaho 660, 666, 299 P. 664 (1931). Thus, under *In Re: Rice*, whether Mason Creek has changed the place of use over the last century is an irrelevant point of discussion; it has the right to do so as long as no other water rights are injured.

Alternatively, the Idaho Supreme Court has also offered this practical perspective:

This contention is answered by the fact that the description has for more than twenty years proven sufficient in practical application to enable the various watermasters to identify it and to make diversion from year to year, so that in practice there has been no controversy or dispute over the particular water rights or appropriations that were intended to be and, in fact, were transferred. Since the description given was sufficient to enable the parties, who had to deal with the property, to accurately identify and locate it, it must be held sufficient for all practical purposes.

⁵ See Idaho Department of Water Resources Transfer File No. 29, Exhibit C to *Affidavit of Albert P. Barker in Support of Mason Creek's Memorandum in Opposition to Pioneer's Motion for Partial Summary Judgment and Motion to Remand*.

Hillcrest Irr. Dist. v. Nampa-Meridian Irr. Dist., 57 Idaho 403, 66 P.2d 115, at 118 (1937) (emphasis added). (Citing *Hollister v. State*, 9 Idaho, 651, 659, 77 P. 339; 4 Thompson on Real Property, § 3073). In other words, the place of use must be sufficient if water has been delivered to it by the water master – in the case of Mason Creek - since 1918.

Finally, as with the other elements of Mason Creek's water right 63-00179C, Pioneer is estopped from objecting to Mason Creek's place of use by laches. As addressed by the Idaho Supreme Court in *Hill Crest*:

It satisfactorily and conclusively appears that, even though appellant's title may have been originally questionable or uncertain, nevertheless respondents have stood by, with full knowledge of all the facts, and for more than twenty years have allowed appellant to proceed on the theory that it had valid title to these water rights and a legal right to have the water diverted from the New York Canal; and in the meanwhile has incurred large indebtedness on the strength of its title and right until now respondents are, and should be, estopped by laches from questioning appellant's title.

Hill Crest Irr. Dist v. Nampa-Meridian Irr. Dist., 57 Idaho 403, 66 P.2d 115 at 117 (1937) (emphasis added). Mason Creek has applied water right 63-00179C to its place of use for more than one hundred years, with Pioneer's full knowledge. Since twenty years of acquiescence was sufficient for the Idaho Supreme Court in *Hill Crest*, Pioneer's objection to Mason Creek's place of use after more than one hundred years is estopped by laches.

E. Pioneer's duty of water argument is disingenuous because Pioneer has more water rights for its place of use than Mason Creek is claiming for the place of use associated with 63-00179C.

Pioneer's issue with Mason Creek's duty of water is puzzling for the following reasons. First, Pioneer's water rights have more water per acre, in addition to storage rights, than Mason Creek's water rights for a place of use that is immediately adjacent to Mason Creek's place of use. How can Pioneer claim an issue with Mason Creek's duty of water when its own duty of

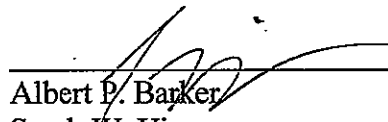
water exceeds that of Mason Creek? Second, Mason Creek's waste water claims are essentially back-up claims, similar to the waste water claims Pioneer has made. Third, Pioneer has done no conveyance loss calculations to determine an accurate duty of water for Mason Creek's place of use.

IV. CONCLUSION

For the above stated reasons, Mason Creek respectfully requests that this Court grant its Motion for Summary Judgment.

DATED this 5th day of October, 2010.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker

Sarah W. Higer

Attorneys for Mason Creek Ditch Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2010, I caused to be served a true and correct copy of the foregoing **MASON CREEK'S REPLY IN SUPPORT OF MASON CREEK DITCH COMPANY'S MOTION FOR SUMMARY JUDGMENT** 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
P.O. Box 2707
Twin Falls, ID 83303-2707
Fax No. 208-736-2121

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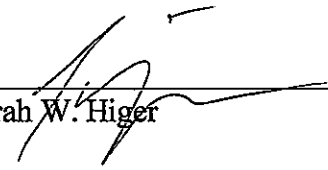
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