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DEPARTMENT OF  
WATER RESOURCES

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| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |           |
| OCT 22 2010                                                                               |           |
| By _____                                                                                  | Clk _____ |
| Facts, Chf. _____                                                                         |           |

**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**

) Subcases 63-00166A, 63-00166B,  
) 63-00167A, 63-00167B, 63-00179A,  
) 63-00179C, and 63-32580  
)  
) **MEMORANDUM DECISION AND**  
) **ORDER ON MOTIONS FOR SUMMARY**  
) **JUDGMENT**  
)  
) **ORDER REQUIRING PIONEER TO**  
) **FILE A STATEMENT REGARDING**  
) **INJURY AND/OR ENLARGEMENT**  
)  
) **ORDER SETTING STATUS**  
) **CONFERENCE**

**I. APPEARANCES**

Daniel V. Steenson and Jon C. Gould, Ringert Law Chartered, for Franklin Ditch Company, Inc. (hereinafter "Franklin").

Albert P. Barker, Barker Rosholt & Simpson LLP, for Mason Creek Ditch Company (hereinafter "Mason").

Dylan B. Lawrence, Moffat, Thomas, Barrett, Rock & Fields, Chartered, for Pioneer Irrigation District (hereinafter "Pioneer").

**II. PROCEDURAL AND FACTUAL BACKGROUND**

**A. Franklin's Claims 63-166B and 63-167B; Pioneer's Claims 63-166A and 63-166B.** Water right claims 63-166B and 63-167B (Franklin's claims) have the same claimed point of diversion located in T04N R02W S24 NENE. IDWR's recommendations in the SRBA for these two rights recommended the point of diversion as claimed, together with a remark stating: "Right includes accomplished change in point

of diversion pursuant to Section 42-1425, Idaho Code.” Water under these claimed rights is diverted from the Boise River into the Caldwell Highline Canal. The diversion structure and canal are owned and operated by the Pioneer Irrigation District.

Pioneer’s claims 63-166A and 63-167A essentially mirror Franklin’s claims, with the exception that the claimed place of use is lands within the boundaries of the Pioneer Irrigation District. Water right claims 63-166A and 63-167A were recommended to be disallowed by IDWR. Pioneer timely filed objections to the Director’s recommendation of disallowance.

On June 19, 2007, Pioneer filed objections to the *Director’s Reports* for Franklin’s claims. Pioneer checked all of the boxes on the Standard Form 1 Objections with the exception of the non-applicable “instream flow” box. The objections also state: “This water right should be recommended as No. 63-00166A [or B], as claimed by Pioneer Irrigation District, based upon historic diversion, delivery, and use by the Pioneer Irrigation District through its system of canals and laterals.”

On September 14, 2010, Pioneer filed a *Motion for Partial Summary Judgment and Motion to Remand*, seeking to have the water rights remanded back to IDWR for the purpose of complying with the procedures set forth in I.C. § 42-1425.

On September 15, 2010, Franklin filed *Franklin Ditch Company’s Motion for Summary Judgment*, seeking an order confirming Franklin’s ownership of water rights 63-166B and 63-167B, and dismissing Pioneer’s claims for 63-166A and 63-167A, and dismissing Pioneer’s objections.

**B. Mason’s Claim 63-179C; Pioneer’s Claim 63-179A.** Water right claim 63-179C (Mason’s claim) is also claimed to have the same point of diversion as Franklin’s claims, located in T04N R02W S24 NENE. IDWR’s recommendation in the SRBA for this right recommended the point of diversion as claimed, together with a remark stating: “Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.” Water under this claimed right is also diverted from the Boise River into the Caldwell Highline Canal.

Again Pioneer’s claim 63-179A essentially mirrors Mason’s claim, with the exception that the claimed place of use is lands within the boundaries of the Pioneer

Irrigation District. Water right claim 63-179A was recommended to be disallowed by IDWR. Pioneer timely filed an objection to the Director's recommendation of disallowance.

On June 19, 2007, Pioneer filed an objection to the *Director's Report* for Mason's claim. Again, Pioneer checked all of the boxes on the Standard Form 1 Objection with the exception of the non-applicable "instream flow" box. The objection also states: "This water right should be recommended as No. 63-00179A, as claimed by Pioneer Irrigation District, based upon historic diversion, delivery, and use by the Pioneer Irrigation District through its system of canals and laterals."

On September 14, 2010, Pioneer filed a *Motion for Partial Summary Judgment and Motion to Remand*, seeking to have the water right remanded back to IDWR for the purpose of complying with the procedures set forth in I.C. § 42-1425.

On September 16, 2010, Mason filed *Mason Creek Ditch Company's Motion for Summary Judgment*, seeking an order that Mason is the owner of water right 63-179C and dismissing Pioneer's claim for water right 63-179A.

### **III. ISSUES PRESENTED**

#### **A. Franklin's and Mason's Motion for Summary Judgment.**

Issue 1 – Should Pioneer's claims 63-166A and 63-167A be disallowed?

Issue 2 – Should Pioneer's claim 63-179A be disallowed?

Issue 3 – Should Pioneer's objections to 63-166B and 63-167B be dismissed?

Issue 4 – Should Pioneer's objection to 63-179C be dismissed?

#### **B. Pioneer's Motion for Summary Judgment.**

Issue 5 – Should water right claims 63-166B, 63-167B, and 63-179C be remanded to IDWR for purposes of compliance with I.C. § 42-1425?

### **IV. STANDARD OF REVIEW**

A motion for summary judgment shall be rendered if 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 judgment as a matter

of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

## V. ANALYSIS

### A. Franklin's and Mason's Motions for Summary Judgment.

#### Issue 1 – Disallowance of Pioneer's Claims 63-166A, 63-167A

Franklin's water right claims 63-166B and 63-167B are based upon the decree entered in *Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist. et al.*, aff'd., 14 Idaho 450, 94 P. 761 (1908) (hereinafter "*Stewart Decree*"). Therein, Franklin was decreed two water rights: one right for 770 miners inches (15.4 cfs) of water from the Boise River (63-166); and the other for 1,380 miners inches (27.6 cfs) of water from the Boise River (63-167). *Gould Aff. of 9/14/10*, Ex. 3, p. 462. The point of diversion for both water rights was described as "a point on the William Frost farm in section 18, township 4 north, range 1 west, Boise meridian . . ." *Id.*, Ex 3, p. 462.

Pioneer has not offered into the record any post-decree deed or instrument of conveyance that would have changed ownership of these rights from Franklin to Pioneer. Nor has Pioneer shown facts that would amount to a change in ownership through operation of law (e.g. adverse possession). Therefore, as to the issue of ownership of water rights 63-166 and 63-167, Franklin's motion for summary judgment is **granted**. It

is the intent of this Special Master to recommend that Pioneer's water right claims 63-166A and 63-167A be decreed as disallowed in the SRBA.

### **Issue 2 – Disallowance of Pioneer's Claim 63-179A.**

Mason's water right claim 63-179C is likewise based upon the *Stewart Decree*. *Barker Aff.* Ex. A. Therein, Mason was decreed 1,860 miners inches (37.2 cfs)<sup>1</sup> of water from the Boise River. The point of diversion is described as "a point on the south bank thereof near the center of the east line of Sec. 16, T. 4N. R. 2W. B.M." *Id.*

Again, Pioneer has not offered into the record any post-decree deed or instrument of conveyance that would have changed ownership of this right from Mason to Pioneer. Nor has Pioneer shown facts that would amount to a change in ownership through operation of law (e.g. adverse possession). Therefore, as to the issue of ownership of water right 63-179C, Mason's motion for summary judgment is **granted**. It is the intent of this Special Master to recommend that Pioneer's water right claim 63-179A be decreed as disallowed in the SRBA.

### **Issue 3 – Dismissal of Pioneer's Objections to Franklin's Claims.**

Pioneer asserts that there are genuine issues of material fact that preclude summary judgment with respect to Pioneer's objections to the various elements of Franklin's claims for water rights 63-166B and 63-167B. For the reasons set forth below, this Special Master agrees with Pioneer in this regard. Accordingly, Franklin's motion for summary judgment seeking dismissal of Pioneer's objections is **denied**.<sup>2</sup>

Franklin offers various arguments as to why Pioneer's objections to 63-166B and 63-167B should be dismissed. These arguments are addressed below.

**(i) Judicial Estoppel.** Franklin asserts that Pioneer is estopped to assert partial forfeiture of Franklin's claims. Franklin cites to *Sword v. Sweet*, 140 Idaho 242, 252

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<sup>1</sup> The *Director's Report* recommends a quantity of 36.2 cfs. It is the understanding of this Special Master that 1.0 cfs was transferred under Transfer No. 29.

(2004) for the proposition that a party is precluded from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. Franklin points out that the application of this doctrine is discretionary with the court.

Franklin reasons that Pioneer, in its claim for 63-179A, claimed the full quantity of water that would be available under the quantities decreed in the *Stewart Decree*. Pioneer also filed an objection to IDWR's recommendation of disallowance for 63-179A, stating: "This water right should be recommended as claimed . . ." Both the claim and the objection contain sworn statements that the statements contained therein are true and correct. Franklin asserts that Pioneer should be estopped to take the inconsistent positions of making these sworn statements on the one hand regarding its claim, and then asserting something different when it comes to Franklin's claims.

While this Special Master recognizes the merit in Franklin's estoppel argument, there is also a compelling reason to have the issues raised in Pioneer's objections decided on the merits. Therefore, recognizing the issue of one of discretion, this Special Master holds that Pioneer is not estopped to assert its objections to Franklin's claims despite the fact that it has taken an apparently inconsistent position with respect to its own claim for the same water rights.

(ii) *Res Judicata*. Franklin asserts that Pioneer is bound by *res judicata* and therefore cannot attack the elements of Franklin's water rights determined in the *Stewart Decree*. While this assertion is correct, Pioneer is not precluded from asserting issues with respect to changes that may have occurred to Franklin's water rights since the time the *Stewart Decree* was entered. Partial forfeiture and accomplished transfers are examples of such post-decree changes that may affect the elements of a water right. Additionally, Pioneer is not precluded from objecting to any element of the previously decreed water right that may have been undefined or imprecisely defined in the prior decree; but defined in the *Director's Report* pursuant to the authority set forth in I.C. § 42-1427. For example, the *Stewart Decree* states that the place of use for Franklin's water rights is "agricultural lands lying under their canal system." *Gould Aff.* of 9/14/10,

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<sup>2</sup> It should be noted, as pointed out by Pioneer, that Franklin's motion for summary judgment appears to focus on the issue of ownership. See *Pioneer's Response* of 10/28/10, p. 8.

Ex. 2., p. 354. This imprecisely defined place of use has been substituted in the *Director's Report* with a precisely defined place of use. Pioneer is not bound by *res judicata* from raising issues as to whether the *Director's Report* correctly determined Franklin's place of use.

#### **Issue 4 – Dismissal of Pioneer's Objections to Mason's Claim**

As stated above with respect to Franklin's claims, this Special Master agrees with Pioneer that there are material questions of fact that preclude deciding the issues raised in Pioneer's objections on summary judgment. Accordingly, Mason's motion for summary judgment seeking dismissal of Pioneer's objection is **denied**.

(i) *Res Judicata*. Mason also asserts that Pioneer is bound to the *Stewart Decree* under the doctrine of *res judicata*. As stated above, this Special Master agrees that Pioneer is precluded from "going behind" the *Stewart Decree* or arguing that the decree incorrectly described the elements of Mason's water right at the time the decree was entered. However, Pioneer is not precluded from asserting issues regarding post-decree changes to Mason's water right (e.g. partial forfeiture, accomplished transfer); nor is Pioneer precluded from raising issues regarding whether IDWR has correctly defined any elements that were imprecisely defined in the prior decree. Again, for example, the *Stewart Decree* defined the place of use as: "[F]or use upon the lands lying under its canal system . . ."

(ii) *Laches*. Mason asserts that Pioneer's objection should be dismissed based upon the doctrine of laches. Mason recites the statement by the Idaho Supreme Court that: "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).

Assuming *arguendo* that the doctrine of laches applies to Pioneer in this instance, there would still be issues of material fact as to the extent of Pioneer's acquiescence. For example, the *Affidavit of Scott King, P.E.* of SPF Water Engineering, LLC, states that based upon his review of the water delivery records from the Caldwell Highline Canal, the operation and hydrography of the canal system, and the discovery responses provided by both Franklin and Mason regarding their diversions from the canal, Mr. King could only identify delivery of water to irrigate 78 acres of land through the Caldwell Highline Canal to Mason Creek Ditch Company water users. In other words, even if Pioneer has acquiesced to water deliveries through its Caldwell Highline Canal to Mason Creek Ditch Company water users, the extent of such acquiescence may not be coextensive with the full amount of Mason's water right 63-179C. As such there are material issues of fact to be resolved at trial.

#### **B. Pioneer's Motion for Summary Judgment.**

##### **Issue 5 – Should water right claims 63-166B, 63-167B, and 63-179C be remanded to IDWR for purposes of compliance with I.C. § 42-1425?**

Pioneer asserts that Idaho Code § 42-1425 requires that water rights 63-166B, 63-167B, and 63-179C be remanded to IDWR for a hearing on the issue of whether the change in point of diversion caused injury to Pioneer or constituted an enlargement. For the reasons set forth below, Pioneer's motion is **conditionally granted**; the condition being that Pioneer file with the Court and IDWR a more definite statement as to the exact nature of the injury or enlargement alleged to have occurred, and also a statement as to how said injury or enlargement arises from the change in point of diversion for these rights. This more definite statement shall be filed by **Friday, October 29, 2010**.

For the purposes of reviewing the sufficiency of Pioneer's statement, and to discuss the procedures and timeline upon remand to IDWR, a status conference will be held on **Monday, November 1, 2010, at 2:00 PM** at the Snake River Basin Adjudication Courthouse, 253 3<sup>rd</sup> Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 215-446-0193 and when prompted entering the code 675342.

Idaho Code § 42-1425(2) states:

Any change of . . . point of diversion . . . of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant . . . by decree of the court . . . prior to November 19, 1987, the date of commencement of the Snake River basin adjudication . . . may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, **provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.** Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

- (a) If an objection is filed to a claim for accomplished change of . . . point of diversion . . . the district court shall remand the water right to the director for further hearing **to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.** After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.
- (b) This section is not applicable to any claim based upon an enlargement of use.

I.C. § 42-1425 (emphasis added). Pioneer asserts that the procedures set forth in I.C. § 42-1425 are to be automatically implemented by the SRBA District Court whenever an objection is filed to a water right recommendation that is based upon an accomplished transfer. Pioneer's argument overlooks that in these particular subcases the Court's file lacked sufficient information to determine whether these subcases should be remanded to IDWR for a hearing pursuant to I.C. § 42-1425. Prior to Pioneer filing its *Motion for Partial Summary Judgment and Motion for Remand* on September 14, 2010, the Court's file contained two pieces of information relative to the point of diversion for Franklin's and Mason's water right claims: (1) the *Director's Report* which states that the point of diversion is based upon an accomplished transfer; and (2) an objection by Pioneer wherein the "Point of Diversion" box is checked. Pioneer's objection does not specify the nature of its objection to the claimed point of diversion. Pioneer did not fill

out the line on the objection form where it asks what Pioneer assert the point of diversion “Should be.” In other words, the objection filed by Pioneer’s gives no indication that the reason it is objecting to Franklin’s and Mason’s claimed point of diversion is injury or enlargement occasioned by an unauthorized change; as opposed to perhaps an allegation that the point of diversion was simply described in the wrong quarter quarter.

Under I.C. § 42-1425, the purposes for which a water right claim is to be remanded to IDWR for further proceeding are very limited – to determine whether the change resulted in injury or enlargement. Prior to Pioneer’s request for remand, the Court could not have simply guessed or presupposed that Pioneer was asserting that an unauthorized change in point of diversion has resulted in injury or enlargement.

The initial hearing in these subcases was held on June 20, 2008. At that time, a simple and non-specific allegation by Pioneer that it was asserting injury or enlargement would have sufficed for purposes of triggering the remand provisions of I.C. § 42-1425.<sup>3</sup> However, at this late stage of the proceedings, it is incumbent upon Pioneer to state with particularity the exact nature of the injury or enlargement that it wishes to be examined upon remand to IDWR. Pioneer has engaged in extensive discovery and investigation into the facts of these subcases, and therefore Pioneer should be able to state the exact nature of its assertion. It would be an idle exercise and a waste of time and resources to expect the IDWR hearing officer to examine the issues of injury or enlargement without the benefit of pinpoint allegations by Pioneer. Accordingly, as set forth above, the granting of Pioneer’s motion is conditioned upon the filing of such a statement.

Franklin and Mason offer various reasons why Pioneer’s motion for remand should be denied, including an argument that Pioneer’s motion is untimely. Although this “untimeliness” argument is compelling, this Special Master is concerned that Pioneer

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<sup>3</sup> Even if it were made clear at the time of the initial hearing that an objection was directed toward injury or enlargement resulting from an accomplished transfer, this Special Master would not automatically remand the claim back to IDWR without first discussing the matter with the parties. In most circumstances, it is likely that the parties would waive the opportunity for a hearing before IDWR for the following reasons: First, in the process of recommending water rights IDWR reviews issues of injury or enlargement. Secondly, many objectors would likely opt for a more informal process of discussing issues of injury or enlargement with IDWR as opposed to the formal and likely more costly route of holding a hearing pursuant to I.C. § 42-1425. Third, the end result of the hearing under I.C. § 42-1425 is the filing of supplemental director’s report setting forth the Department’s findings and conclusions. It is the experience of this Special Master that IDWR is typically willing to create such a report upon request by the parties or the Court.

will seek to raise issues of injury or enlargement at trial; and it may be error to try those issues without first having gone through the procedures set forth in I.C. § 42-1425. Furthermore, this Special Master is not convinced that the hearing process and the filing of a supplemental director's report by IDWR will necessitate losing the previously scheduled trial date of December 14, 2010.

## VI. ORDER

In accordance with the foregoing the following are hereby ordered:

(1) Franklin's *Motion for Summary Judgment* seeking dismissal of Pioneer's water right claims 63-166A and 63-167A is **granted**.

(2) Franklin's *Motion for Summary Judgment* seeking dismissal of Pioneer's objections to the *Director's Report* for 63-166B and 63-167B is **denied**.

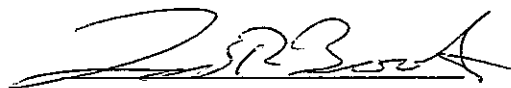
(3) Mason's *Motion for Summary Judgment* seeking dismissal of Pioneer's water right claim 63-179A is **granted**.

(4) Mason's *Motion for Summary Judgment* seeking dismissal of Pioneer's objection to the *Director's Report* for 63-179C is **denied**.

(5) Pioneer's *Motion for Partial Summary Judgment and Motion for Remand* is **conditionally granted** subject to the filing of a more definite statement as to how injury or enlargement arises from the change in point of diversion for water rights 63-166B, 63-167B, and 63-179C, on or before Friday, October 29, 2010.

(6) A status conference will be held on **Monday, November 1, 2010, at 2:00 PM** at the Snake River Basin Adjudication Courthouse, 253 3<sup>rd</sup> Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 215-446-0193 and when prompted entering the code 675342.

Dated Oct. 22 2010



THEODORE R. BOOTH  
Special Master  
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION & ORDER ON SUMMARY JUDGMENT; ORDER REQUIRING STATEMENT was mailed on October 22, 2010, with sufficient first-class postage to the following:

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