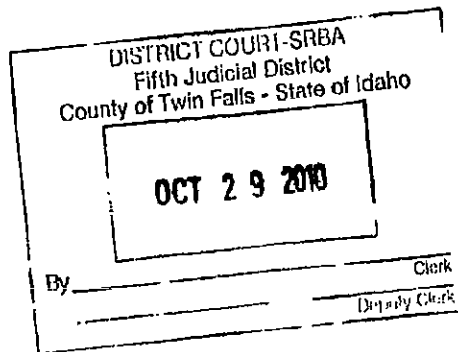


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos. 63-00166A 63-00166B
63-00167A 63-00167B
63-00179A 63-00179C
63-32580

STATEMENT REGARDING INJURY
AND ENLARGEMENT

Pioneer Irrigation District, through undersigned counsel of record, hereby files this Statement Regarding Injury and Enlargement, pursuant to this Court's order of October 22, 2010, in the above-referenced subcases. In that order, the Court requires Pioneer "to state with particularity the exact nature of the injury or enlargement that it wishes to be examined upon remand to IDWR." (Order, p. 10.) The Court established a deadline of October 29, 2010

STATEMENT REGARDING INJURY AND ENLARGEMENT - 1

as the deadline for the more definite statement, with a follow-up status conference scheduled for November 1, 2010, at 2:00 p.m. (Order, p. 11.)

**I.
GENERAL DISCUSSION OF THE “INJURY” AND
“ENLARGEMENT” CONCEPTS IN THE CONTEXT OF WATER RIGHTS**

Pioneer is not aware of one definitive statement of what constitutes an “injury” or an “enlargement” in the water rights context. Instead, those concepts have been developed over the years through statutory enactments, case law, IDWR administrative proceedings and rules, and IDWR-issued guidance documents. Therefore, Pioneer believes it will be helpful to begin this Statement by briefly discussing those concepts as a general matter, as they have been developed and described by the legislature, the courts, and IDWR.

A. Discussion Of Injury

In the context of a new water right application, injury to an existing water right occurs if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right...or;
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

Water Appropriation Rule 45.01(a).

According to the Idaho Supreme Court, “[p]riority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.” *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

According to IDWR, “[c]onsideration of this [injury] factor may require an analysis of the timing and location of return flows both before and after a proposed change to determine if the change will reduce the supply *available* to other rights.” IDWR, ADMINISTRATOR’S MEMORANDUM: TRANSFER PROCESSING POLICIES & PROCEDURES, p. 24 (Transfer Processing No. 24, Dec. 21, 2009) (“TRANSFER MEMO”) (emphasis added).

In addressing a depletion of flows by 0.03 cfs, IDWR has stated:

While the [0.03 cfs] depletion in flow is small, it is still real and determinable.[FN2] Moreover, simply because the injury to a water source is small, doesn’t mean the injury should not be mitigated for.

* * *

[FN2] This is consistent with the Department’s previous statements on this issue. See Final Order, In the Matter of Application for Transfer No. 5174 in the name of Dennis M. Baker and No. 5175 in the name of Huf-N-Puf Trust, at 1 (“Even if the maximum instantaneous depletion would not exceed 0.02 cfs and could not be measured using conventional methods, the hearing officer correctly concluded that such depletion would be ‘real’”).

In the Matter of Transfer for Application No. 73969 in the Name of Robert Rohe, Final Order and Order Denying Exceptions, p. 6, n. 2 (Idaho Dept. of Water Resources, May 12, 2010) (Spackman, Interim Dir.).

And, as will be noted in the next section, the concepts of injury and enlargement are related, in that an enlargement results in a *per se* injury to junior water rights.

B. Discussion Of Enlargement

According to the Idaho Supreme Court, “[a]n enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.” *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). The concept of enlargement also includes

“[a]n increase in the volume of water diverted.” *Id.* In addition, an enlargement occurs when the “transfer would result in the use of water at a time when it was historically unavailable.” *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001). This is consistent with IDWR’s position that:

An application for transfer, which proposes to change a point of diversion from a surface water source to a new location where the water available is greater or more reliable, such as moving from the tributary of a stream downstream to the mainstem of the stream, is presumed to enlarge the water right, unless the proposed change is subject to conditions limiting diversion of water at the proposed new point of diversion to times when water is available and in priority at the original point of diversion.

IDWR, TRANSFER MEMO, p. 31.

Pursuant to Idaho Code Section 42-222(1), in the administrative transfer context, IDWR “may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.” Generally speaking, “consumptive use” is “that portion of the annual volume of water diverted under a water right that...otherwise does not return to the waters of the state.” IDAHO CODE § 42-202B(1). So, while consumptive use “is not an element of a water right,” and while “[c]hanges in consumptive use” alone “do not require a transfer pursuant to section 42-222,” *id.*, consumptive use is relevant to whether a change in point of diversion or other water right element would result in an enlargement of that water right.

It is also notable that, according to the Idaho Supreme Court, the concept of enlargement is directly related to that of injury:

This Court has made it clear that there are few instances in which an enlarged use will not cause injury to junior appropriators, consequently requiring subordination in the case of a new enlargement. *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. *Fremont-Madison* held that, “[i]t is difficult, if not impossible, to perceive of a situation in which an enlargement

would not injure an appropriator who had an established right if the enlargement receives priority.” *Id.* (emphasis added).

A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist., 141 Idaho 746, 752, 118 P.3d 78, 84 (2005).

The Idaho Supreme Court’s A & B decision quoted above ultimately affirmed this Court’s rulings in the related district court proceedings. *A & B*, 141 Idaho at 754, 118 P.3d at 86. In its rulings, this Court explained:

At the time an enlargement occurs the affect on other appropriators may not be physically apparent or apparent because there may be sufficient enough water supply at the time to satisfy all rights on the system as well as the enlargement.¹ However, the relative priority dates on a system only become significant when there is not enough water to supply all water rights on the system. Hence, the essence and value of a water right in a prior appropriation system is the priority date. To the extent a claimant is entitled to retroactively receive a valid water right with a priority date senior to other appropriators on the same source the juniors are per se injured irrespective of the extent of the water supply.

In re SRBA (A & B Irr. Dist.), Order on Challenge, p. 25, Case No. 39576, Subcase Nos. 36-02080, *et al.* (5th Dist., April 25, 2003) (Burdick, P.J.).

In other words, to the extent the transfer of a water right results in the enlargement of that right, the enlarged portion should be considered a separate water right with a priority date as of the enlargement. *See* IDAHO CODE § 42-1426(2).

¹ This reasoning further supports the Court’s rejection of the estoppel arguments advanced by Mason, as does the Legislature’s finding in Section 42-1425 “that many of these changes [in place of use, point of diversion, nature/purpose of use, and period of use] occurred with the knowledge of other water users and that the water has been distributed to the right as changed.”

II.
DISCUSSION OF INJURY AND ENLARGEMENT
ISSUES FOR IDWR TO EXAMINE UPON REMAND

As previously noted, the Court's order requires Pioneer "to state with particularity the exact nature of the injury or enlargement that it wishes to be examined upon remand to IDWR." (Order, p. 10.) Therefore, the issues that Pioneer wishes IDWR to examine upon remand are as follows:

A. Did Transferring All Or A Portion Of Water Right 63-166 From The Strahorn Slough Into The Caldwell Highline Canal Allow Franklin To Expand Its Irrigation Under That Right?

As Pioneer has established in its prior briefing and affidavits, the evidence in the record establishes that Franklin's water right 63-166 was diverted into the Strahorn Slough at the time of the Stewart Decree, and not into the Caldwell Highline Canal. (Pioneer's Resp. in Opp. to Franklin's MSJ, 9/28/10, pp. 9-12.) Pioneer understands that Franklin water users still use some water from a ditch which diverts water from the Boise River very close to the heading of the Caldwell Highline Canal and which may be a remnant of the Strahorn Slough, though there is only one point of diversion listed on the recommendation for this right, rather than two.

IDWR takes the position that a transfer is required "when a point of diversion is proposed to be added for a water right, even when the existing authorized point of diversion is recorded as a 10-acre legal subdivision and the additional diversion would be within the same 10-acre legal subdivision. IDWR, TRANSFER MEMO, p. 2. And, when a point of diversion is proposed to be moved to a location within the same legal public land survey subdivision, IDWR takes the position that a transfer is not required, but only if "the change will not enlarge the right or injure other rights." IDWR, TRANSFER MEMO, p. 5.

A review of the maps prepared at the time of the Stewart Decree demonstrates that the Strahorn Slough and the old Caldwell Canal followed different courses, and while the

Strahorn Slough fed back into the Boise River after approximately two miles, the old Caldwell Canal continued on. (*See King Aff. of 9/28/10, Ex. B.*) Pioneer believes that moving water from the Strahorn Slough into the canal provided Franklin water users with access to many more acres of irrigation, because the canal was higher and farther from the river than the Strahorn Slough. This would mean that the transfer of water right 63-166 resulted in the enlargement of that right. Therefore, Pioneer would request that IDWR examine this issue upon remand, as required by Section 42-1425.

B. Did Transferring Water Right 63-166 From The Strahorn Slough Into The Caldwell Highline Canal Injure Other Water Rights By Diluting Their Priority And Making Less Water Available Under Those Rights?

The Stewart Decree decreed two water rights for diversion into the Caldwell Highline Canal with a total combined diversion rate of 80.1 cfs: Franklin's right 63-167 (Stewart Decree right no. 77) (1,380 inches or 27.6 cfs with a priority date of October 29, 1880), and Pioneer's right 63-371 (Stewart Decree right no. 90) (2,655 inches or 53.1 cfs with a priority date of June 1, 1884). (*Gould Aff. of 9/14/10, Ex. 3, pp. 462, 484.*) The three SRBA recommendations for Franklin's rights 63-166 and 63-167 and Mason's right 63-179 have a total combined diversion rate of 79.2 cfs. (*See Lawrence Aff. of 9/14/10, Exs. A, B, C.*) Testimony of Pioneer Superintendent Mark Zirschky supports the conclusion that due to the presence of a particular bridge culvert within the Caldwell Highline Canal, Pioneer has for many years not intentionally diverted more than 43 cfs into the canal. (*Zirschky Aff. of 9/28/10, ¶¶ 3, 4.*) Regardless of what the particular maximum operational capacity of the canal is ultimately determined to be, there is no question that the capacity of the Caldwell Highline Canal has a finite, upper limit that cannot be exceeded.

Due to the finite capacity of the Caldwell Highline Canal, the transfer of all or a portion of Franklin's water right 63-166 from the Strahorn Slough into the canal raises the

possibility that such transfer injured other junior water rights also conveyed into the canal. As previously mentioned, the Stewart Decree specifically established that Pioneer's water right 63-371 (Stewart Decree right no. 90), which is junior to 63-166 (priority date of July 3, 1866), was diverted into and conveyed through the Caldwell Highline Canal.² In addition, this Court has issued several partial decrees to Pioneer with the Caldwell Highline Canal as the point of diversion and with priority dates going back as far as September 1, 1890, but which are still junior to 63-166's priority date of July 3, 1866, confirming that Pioneer has historically conveyed water to its own patrons through the Caldwell Highline Canal. (*See Partial Decrees in Subcase Nos. 63-224, 63-225, 63-294, 63-295, 63-371.*)³

Moreover, Mason's right 63-179, with a priority date of June 1, 1869, is also junior to 63-166. If 63-179 was transferred into the Caldwell Highline Canal prior to the transfer of 63-166 into the canal, this also raises the possibility that the transfer of 63-166 into the canal injured water right 63-179. Given these circumstances, upon remand, Pioneer would request that IDWR examine whether the transfer of all or a portion of water right 63-166 into the Caldwell Highline Canal injured other water rights existing at that time, as required by Section 42-1425.

² There are suggestions in the record that water right 63-371 was at some point transferred from the Caldwell Highline Canal into Pioneer's Phyllis Canal. (Barker Aff. of 9/28/10, Ex. B.) Pioneer and (to Pioneer's knowledge) IDWR have thus far been unable to locate documentation of an approved transfer to that effect. Regardless, the Caldwell Highline Canal is an authorized point of diversion for that right.

³ This Court has also issued a partial decree to Pioneer for water right 63-161BU with the Caldwell Highline Canal as an authorized point of diversion and a priority date of May 1, 1866, senior to 63-166.

C. Did Transferring Water Right 63-179 Into The Caldwell Highline Canal From A Point Three To Four Miles Downstream On The Boise River Allow Mason To Expand Its Irrigation Under That Right?

The record establishes that at the time of the Stewart Decree, Mason's water right 63-179 was not conveyed into the Caldwell Highline Canal. (Pioneer's Resp. in Opp. to Mason's MSJ, 10/1/10, pp. 12-14.) Instead, that right was diverted from the Boise River approximately three to four miles downstream of the heading of the Caldwell Highline Canal. (*Id.*; see also King Aff. of 9/28/10, Ex. B.) Again, as with the transfer of Franklin's right 63-166 into the canal, it is highly likely that the transfer of Mason's right 63-179 into the canal allowed Mason water users to access many more acres of irrigation when compared to its irrigation practices prior to the transfer. (See generally King Aff. of 9/28/10, Ex. B; King Aff. of 10/1/10, Ex. A.) This would constitute an enlargement of that right. Therefore, Pioneer would request that IDWR examine this issue upon remand, as required by Section 42-1425.

D. Did Transferring Water Right 63-179 Into The Caldwell Highline Canal From A Point Three To Four Miles Downstream On The Boise River Injure Other Water Rights By Diluting Their Priority And Making Less Water Available Under Those Rights?

The analysis here is similar to that under Section II.B of this Statement. Again, given that the Caldwell Highline Canal has a finite capacity, the transfer of water right 63-179 into the canal could have injured junior water rights existing at the time of the transfer, including the Pioneer rights previously discussed in Section II.B. In addition, Franklin's water right 63-167, with a priority date of October 29, 1880, is junior to 63-179 and therefore could have also been injured by the transfer of 63-179 into the Caldwell Highline Canal. Therefore, upon remand, Pioneer would request that IDWR examine whether the transfer of water right 63-179 into the Caldwell Highline Canal injured other water rights existing at that time.

E. Did the Change in Mason's Point of Diversion Result in Water Right 63-179 Being Available More Often?

In its prior briefing, Mason has relied upon the case of *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115 (1937), as providing a potential explanation for why Mason would have wanted to transfer its water right into the Caldwell Highline Canal. (Mason's Mem. in Opp., 9/28/10, p. 4.) Because that opinion does not specifically mention Mason, and because neither of the parties nor IDWR have yet located documentation of that transfer, the extent to which the factual background described in *Hillcrest* explains the transfer of 63-179 into the Caldwell Highline Canal remains unclear.

However, there is language in the *Hillcrest* opinion which suggests that the transfer of 63-179 into the Caldwell Highline Canal, whenever it occurred, resulted in an enlargement. Specifically, as Mason has noted, *Hillcrest* states:

It appears that since 1914 all the natural flow of Boise river, during the low water periods, has been used in the irrigation of lands upstream from the head of the Caldwell Highline Canal; and that it has been the practice, in recent years, to dam the river below the intake of that canal and divert, through the Caldwell Highline Canal, all the water of the stream that flows down that far. The irrigated lands below the head of said canal have been watered from the return flow of the river, which has been adequate for their irrigation.⁴

Hillcrest, 57 Idaho at 407, 66 P.2d at 116.

What this passage seems to suggest is that prior to the damming of the Boise River at the heading of the Caldwell Highline Canal, downstream water users (presumably including Mason) were not receiving any water "during low water periods," because "all the natural flow of [the] Boise [R]iver . . . [had] been used in the irrigation of lands upstream from

⁴ This explanation also supports Pioneer's position that Mason has historically utilized very small quantities of water from the Boise River.

the head of the Caldwell Highline Canal. . . .” *Id.* If that is the case, then the change in point of diversion may have resulted in Mason’s diversion and use of water at a time of the year when it previously had been unavailable or available in smaller quantities. In fact, in light of the factual background provided in *Hillcrest*, one would assume that Mason would not have pursued a transfer of 63-179 unless it realized some benefit in the form of water availability. Under the *Barron* case previously cited, this would be an enlargement. Therefore, Pioneer would request that IDWR examine this issue upon remand, as required by Section 42-1425.

F. Did The Transfer Of Water Rights 63-166 And 63-179 Into The Caldwell Highline Canal Result In Reduction Of Conveyance Losses?

Prior to their transfer into the Caldwell Highline Canal, water rights 63-166 and 63-179 were diverted and conveyed through facilities located in areas close to the Boise River, regarded in the Stewart Decree proceedings as the river “bottom” lands. (*See King Aff. of 9/28/10, Ex. B.*) Because these “bottom” lands tend to be more porous than the upgradient lands, it is likely that the transfer of these two rights into the Caldwell Highline Canal resulted in lower conveyance losses, increasing the availability of water to the Franklin and Mason water users. If this increased availability of water resulted in the irrigation of additional acres, this would constitute an enlargement of those two rights. *See, e.g.,* IDAHO CODE § 42-1426(1)(a) (referring to water right enlargements “through water conservation and other means”). Therefore, Pioneer would request that IDWR examine this issue upon remand, as required by Section 42-1425.

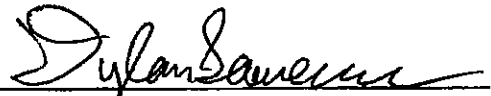
**III.
CONCLUSION**

Based upon the foregoing and the arguments advanced by Pioneer in support of its Motion for Partial Summary Judgment and Motion to Remand of 9/14/10, Pioneer respectfully requests that the Court remand this matter to IDWR for further proceedings in accordance with Idaho Code Section 42-1425.

DATED this 29th day of October, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By

A handwritten signature in black ink, appearing to read "Dylan Lawrence", written over a horizontal line.

Dylan B. Lawrence – Of the Firm
Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2010, I caused a true and correct copy of the foregoing **STATEMENT REGARDING INJURY AND ENLARGEMENT** to be served by the method indicated below, and addressed to the following:

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