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DEPARTMENT OF
WATER RESOURCES

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Pioneer Irrigation District

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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

AFFIDAVIT OF SCOTT L. CAMPBELL IN
SUPPORT OF MOTION IN LIMINE

STATE OF IDAHO)
) ss.
County of Ada)

Scott L. Campbell, having been duly sworn upon oath, deposes and states as
follows:

1. I am licensed to practice law in the state of Idaho. I am one of the attorneys of record for Pioneer Irrigation District ("Pioneer") in the above-captioned matter and have access to the files that are pertinent to this matter. I make this affidavit based upon my own personal knowledge.

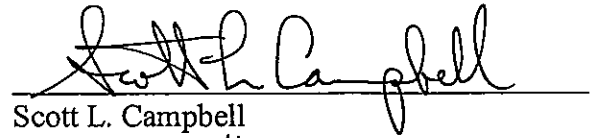
2. Attached hereto as Exhibit A are true and correct copies of selections from the Rule 30(b)(6) Deposition of the Idaho Department of Water Resources, dated September 17, 2010.

3. On or about November 11, 2010, I contacted Dr. Tuthill to discuss the fact that he had prepared the Idaho Department of Water Resources' recommendations for water right numbers 63-00166, 63-00167, and 63-00179 and to determine whether he would make himself available as a witness regarding the same. Dr. Tuthill responded that he had agreed to serve as an expert witness for Franklin Ditch Company.

4. On November 11, 2010, I advised Mr. Steenson, counsel for Franklin Ditch Company, of my conversation with Dr. Tuthill and requested confirmation regarding Dr. Tuthill's status as a retained expert for Franklin Ditch Company. Attached hereto as Exhibit B is a true and correct copy of my e-mail correspondence to counsel for Franklin Ditch Company, dated November 11, 2010.

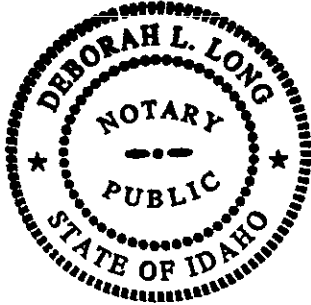
5. On November 11, 2010, Mr. Steenson responded to my e-mail. He indicated that he had asked Dr. Tuthill whether he would assist Franklin Ditch Company in an evaluation of issues raised by Pioneer on summary judgment. He stated that no decision had been made regarding Dr. Tuthill's participation as an expert witness at trial because he had not conducted the evaluation or issued any reports yet. Attached hereto as Exhibit C is a true and correct copy of Mr. Steenson's e-mail response, dated November 11, 2010.

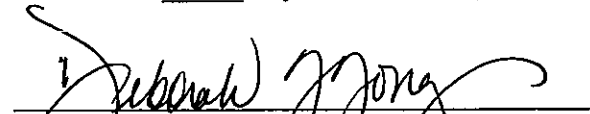
Further your affiant sayeth naught.



Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 19th day of November, 2010.





NOTARY PUBLIC FOR IDAHO
Residing at Bose, Idaho
My Commission Expires 10/10/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF SCOTT L. CAMPBELL IN SUPPORT OF MOTION IN LIMINE** to be served by the method indicated below, and addressed to the following:

Mason Creek Ditch Company

Represented by:

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Shelley M. Davis

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Dylan B. Lawrence

EXHIBIT A

TO THE AFFIDAVIT OF SCOTT L. CAMPBELL

In Re SRBA Case No. 39576

Subcase Numbers 63-00166A, 63-00166B, 63-00167A,
63-00167B, 63-00179A, 63-00179C, and 63-32580

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
Case No. 39576	) 63-00167A, 63-00167B
	) 63-00179A, 63-00179C
	) 63-32580
	)

RULE 30(b)(6) DEPOSITION OF JAN SHURTE

Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho

Friday, September 17, 2010
Beginning at 9:00 o'clock a.m.

QnA COURT REPORTING, LLC
Jeana Reiner, CSR, RPR
Idaho Certificate No. 711
776 East Riverside Drive, Suite 200
Eagle, Idaho 83616
Web: www.qnacourtreporting.com
E-mail: realtimeqna@msn.com
(ELECTRONIC COPY) Telephone: (208) 484-6309
30(b)(6) DEPOSITION OF JAN SHURTE (TAKEN 09.17.10)

1 separate ditch that diverts off of Mason Creek?
2 A. I'm not aware of the Mason Creek Ditch.
3 Q. And how about Mason Creek Slough? I've seen
4 references to Mason Creek Slough. Do you know if that's
5 Mason Creek or a separate feature or facility?
6 A. I don't know.
7 Q. Well, again, this is something I think we might
8 be able to turn back to at some point and use as a
9 resource throughout this thing to refer to.
10 A. Okay.
11 Q. I think that would be helpful, but we can put
12 it aside for the time being.
13 So I'd like to start by talking about the
14 recommendations for the Franklin Ditch Company. And
15 before we get into those, can you just summarize your
16 understanding of what type of organization the Franklin
17 Ditch Company is and how it works? Well, my understanding
18 is it's just a regular ditch company that has people
19 that have shares in it and are responsible to deliver
20 the shares to those people; and that's about it.
21 Q. Do you have any knowledge if they have any, you
22 know, centralized functions? I mean, like with an
23 irrigation district, you usually have an office and
24 ditch riders and staff. Did the Franklin Ditch Company
25 have anything like that to your knowledge?

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1 A. I don't know. I have not discussed that with
2 them.
3 Q. And do you have knowledge as far as how water
4 is delivered within the Franklin Ditch Company? I mean,
5 we know that the Franklin Ditch Company has
6 recommendations in its name, but do you have any idea as
7 far as how they allocate water among their users?
8 A. No. No, we wouldn't.
9 MR. LAWRENCE: Why don't we go ahead and take a
10 look at recommendations here.
11 (Exhibit No. 3 was marked for identification.)
12 BY MR. LAWRENCE:
13 Q. So I've given you what's been marked as Exhibit
14 3. Can you explain to me what the document is.
15 A. Yes. This is the recommendation for the
16 Franklin Ditch Company. It's No. 63-166B. And it's the
17 recommendation for the Boise River decreed water right
18 15.4 cfs covering their place of use.
19 Q. Before we get into the details of it, can you
20 just summarize the Department's process in investigating
21 and preparing the recommendation?
22 A. Yes. At the time -- Dave Tuthill did this
23 recommendation, just so you know. And it's my
24 understanding in talking to him and also in hearing
25 about it, is that these were duplicate claims that came

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1 in.
2 So he had a lot of claimant contact with the
3 people. They had to verify the acres and also to verify
4 their boundaries that they were using the water at. And
5 he would have -- well, I can't say exactly what he did.
6 So I guess that's where I kind of end up at.
7 Q. Well, why don't we take a look at some of the
8 individual elements here.
9 A. Okay.
10 Q. So the first one we've got name and address.
11 And I think you referenced this before, but the
12 Department was aware that Pioneer Irrigation District
13 filed what we call a competing claim to this water
14 right; correct?
15 A. Yes. They were at this time, uh-huh, at the
16 time of recommendation.
17 Q. When that occurs, does the Department have a
18 particular procedure it follows for resolving competing
19 claims and who they are ultimately going to recommend
20 the water right to?
21 A. Yes, we do actually. Well, the procedure is a
22 lot of claimant contact or water user contact to
23 determine, you know, what has happened in the past; why
24 they filed duplicate claims; what each person thinks the
25 reason is that they have the water right. And then to

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1 study the documents that you have at hand with the
2 Department, anything that's submitted to you also. And
3 then make a determination as to who actually has the
4 water right. That's a general description.
5 Q. So as far as resolving the competing claim for
6 this water right 63-166, do you have any knowledge or
7 can you summarize what the process was actually in these
8 two particular subcases?
9 A. I believe I can. In talking to Dave, the way
10 that it worked is that he had several meetings with the
11 Franklin Ditch Company and Pioneer Irrigation District.
12 There were many discussions concerning the agreements
13 and the decree.
14 And I don't know whether or not Mason Creek
15 attended those meetings for sure. But anyway -- and in
16 the final determination, it was basically determined
17 that the decree subordinated everything; and that
18 because it was decreed to the Franklin Ditch Company and
19 to the Mason Creek Ditch Company, that that's who should
20 have the water right.
21 Q. So it was primarily reliance upon the Stewart
22 Decree itself?
23 A. The Stewart Decree, yes.
24 Q. So you say the Department relied primarily on
25 the Stewart Decree. Do you know if the Department took

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1 a look at some of the testimony that was in the record 2 on which the Stewart Decree was based? So the testimony 3 from the proceedings back in the early 1900s that 4 resulted in the Stewart Decree? 5 A. I don't know whether Dave did or not. I did 6 not. 7 Q. But generally speaking, when we're talking 8 about judicial decree, this might be a helpful place to 9 just discuss this as a general matter and not 10 necessarily specific to this water right. 11 But what is the Department's position on -- let 12 me ask it this way: What is the Department's position, 13 first of all, on whether the Stewart Decree and those 14 proceedings were a general adjudication or a private 15 adjudication? 16 A. We believe it was a general adjudication. 17 Q. Oh, that was a general adjudication? 18 A. On the Boise River as a single source. 19 Q. Now, in the SRBA, does the Department treat 20 prior judicial decrees differently based on those two 21 categories, whether it considers it a private 22 adjudication or a general adjudication? 23 A. I believe that, in my experience, the reason 24 that we make those determinations is more to -- we don't 25 treat them any differently. It's more to decide whether Page 21	1 water right. And if they didn't, then they didn't have 2 a water right after that, I mean, as of that date of the 3 decree. 4 Q. And did the Stewart Decree deal with the Boise 5 River only or did it include any tributaries? 6 A. No. As far as we could tell, it was just the 7 Boise River Proper. 8 Q. Just the Boise River itself? 9 A. Yes. 10 Q. So the fact that tributaries weren't included 11 doesn't affect whether it's a general or a private 12 adjudication? 13 A. I don't know that. 14 (Exhibit No. 4 was marked for identification.) 15 BY MR. LAWRENCE: 16 Q. Does this document look familiar? It's a 17 document I've just handed you that we've labeled as 18 Exhibit 4; is that correct? 19 A. Yes, it does look familiar. 20 Q. Can you tell me what you know about this and 21 the context in which it was prepared? 22 A. I believe that it was meeting notes for a 23 meeting that they had with the Franklin Ditch Company in 24 2005. Somebody typed it up from that meeting. 25 Q. Now, down under the "Actions" heading, and then Page 23
1 or not it included just the Boise River in this case or 2 any kind of tributaries to the Boise River and in -- no. 3 Okay. 4 Basically, in a general adjudication, it should 5 have been everything that was -- not tributary to the 6 Boise, but the Boise River Proper. And in a private 7 adjudication it can be just a couple of people that are 8 fighting over just a few sources or one source, and it 9 doesn't necessarily mean that it's the entire group of 10 people that use that water source. It's just between 11 these two private individuals. 12 So it means that other people can date back 13 into the decree if they have water rights on that 14 source. So in the case of the Boise River being a 15 general adjudication, everybody should have claimed it 16 at that time and filed on it, and it should have been 17 objected to if there was a problem. And we don't date 18 things back into the decree from that same source. 19 Q. So let me ask the question I may have sort of 20 asked at the beginning. So what makes the Stewart 21 Decree proceedings a general adjudication as opposed to 22 a private adjudication? 23 A. Well, my understanding of a general 24 adjudication is where everybody that used water out of 25 that source was notified, and they should have filed a Page 22	1 you'll see there is -- you know, we have these little 2 items denoted with bullet points. So can you read for 3 me, not the very last one, but the next to the last 4 bullet under "Actions"? 5 A. It states, "Maximum flow rate for the Back 6 Slough and Highline Canal are needed. Helen will see if 7 there is any information in the paperwork. If not, 8 follow-up may be necessary." 9 Q. Do you know what the result of that 10 investigation was as far as the maximum flow rate for 11 the Back Slough and the Highline Canal? 12 A. Not on the Back Slough. On the Highline Canal, 13 I know there was a graph in the file that showed the 14 last 50 years of from about -- I think it was -- I'd 15 have to look at it, but I think it was a 50-year period. 16 I'll just say that. Of the flow and the Highline 17 Canal. 18 Q. And I recall the document you are referring to. 19 And actually we can go ahead and track that down as 20 well. 21 A. But other than that, I do not know what the 22 results of that were. 23 (Exhibit No. 5 was marked for identification.) 24 BY MR. LAWRENCE: 25 Q. So I've handed you a document that we've marked Page 24

1 Q. And can you explain the background behind the
2 accomplished transfer. So we have the point of
3 diversion. And then down in explanatory material there
4 is just a general notation that it's an accomplished
5 change in point of diversion. Do you know the
6 background of that remark?

7 A. Yes. In the decree, the point of diversion was
8 listed as just in Section 18, 04 North 1 West, I believe
9 it was. Yeah, 04 North 01 West. And when Dave
10 recommended this, the point of diversion listed on this,
11 and Mason Creek and on Pioneer's for Caldwell Highline,
12 was in Section 24.

13 When that happens, we put the accomplished
14 transfer condition on there for a change of point of
15 diversion. And when it's been a long period of time,
16 like this has been, it's assumed there is no injury,
17 because nobody has complained about it for several
18 years. I mean, that's kind of some of the basics of
19 that analysis.

20 Q. Right.

21 A. And that is why that's put on there; so that
22 people know that it was an accomplished change.

23 Q. Do you know or have any idea why the point of
24 diversion was different between the Stewart Decree and
25 what was recommended in the SRBA, what accounted for the

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1 change?

2 A. From looking at the file, it appears that the
3 information submitted stated that it was the northeast
4 northeast of Section 24 for the Caldwell Highline Canal.
5 And that's all I can tell as to why they changed it.

6 I don't know personally why Dave changed it. I
7 don't know. Or where he got that information from. It
8 looks like Pioneer submitted it to him. It was just a
9 commonly known thing.

10 Q. So we're talking about now where the actual,
11 the headgates of the Highline Canal are on the Boise
12 River; correct?

13 A. Yes. Oh, well --

14 Q. Let me --

15 A. I'm not sure what you are asking me.

16 Q. Let me get something here that may help us.

17 A. I don't want to dance around it too much.
(Exhibit No. 6 was marked for identification.)

18 BY MR. LAWRENCE:

19 Q. This may help me ask the question better.
20 Do you recognize what we've marked as
21 Exhibit 6?

22 A. Yes, I do.

23 Q. What is this?

24 A. It is copied from the Stewart Decree of water

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1 rights number -- well, including water right Nos. 63-166
2 and 167 for the Franklin Ditch Company.

3 Q. And so how does it designate the point of
4 diversion for the Franklin Ditch Company?

5 A. It says, "Diverted at a point on the William
6 Frost farm in Section 18, Township 04 North, Range 01
7 West, Boise, Meridian."

8 Q. And then the point of diversion recommended in
9 the SRBA is --

10 A. Is the northeast northeast of Section 24,
11 Township 04 North, Range 02 West.

12 Q. So it's not just a matter of identifying the
13 point of diversion with more specificity, correct,
14 because we have actual different township, range,
15 section information?

16 A. Exactly, yeah.

17 Q. So the question I'm trying to ask is, do you
18 know any information about the history of this change
19 going from Section 18 in the Stewart Decree to Section
20 24 in the SRBA?

21 A. I honestly do not. Well, let me rephrase that.
22 I have read the agreements. So I know that there was
23 something going on about changing to the Caldwell
24 Highline.

25 So, you know, I just wanted to make that a

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1 little bit -- but I don't know when it happened, and I
2 don't know, you know, what happened after those
3 agreements -- after that one agreement.

4 Q. And can you describe in more detail the
5 agreement you are referring to?

6 A. It would be the agreement that talked about
7 basically how much water that they were going to start
8 diverting through Pioneer Irrigation District system in
9 order to deliver it to Franklin and Mason Creek, the
10 1,350 inches. I'd have to see the agreement to kind of
11 talk about it.

12 MR. LAWRENCE: Well, I think I can accommodate
13 you on that.

14 THE WITNESS: I bet. Thank you.
(Exhibit No. 7 was marked for identification.)

15 BY MR. LAWRENCE:

16 Q. We'll take a couple cracks at this.

17 Is this the agreement you are referring to,
18 what we've marked as Exhibit 7?

19 A. Yes, it is.

20 Q. And what is the date on the agreement? It
21 should be there, one of the first lines, I believe.

22 A. Second day of October 1883.

23 Q. So it pre-dated the Stewart Decree proceedings;
24 correct?

25

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1 place of use like that where they are separated out?
2 A. Yeah.
3 Q. Even for a water distribution entity?
4 A. Right. I've seen it, anyway.
5 Q. And does it also look accurate to you that
6 there is some overlap between the Franklin Ditch Company
7 and the Mason Creek Ditch Company places of use?
8 A. Yes, it does. From reading the files, it
9 appears that there are people who use both.
10 Q. Is that common, uncommon?
11 A. That's very common.
12 Q. Very common for two water distribution entities
13 to overlap?
14 A. Yes.
15 Q. Now, when the Department recommends overlapping
16 water rights like that, does it typically undertake any,
17 you know, kind of duty of water analysis to make sure
18 that the overlap isn't excessive or anything like that?
19 A. Yes. Yes, it does usually.
20 Q. Do you know if that was done for these
21 particular water rights? And when I say "these
22 particular," I'm talking now about Franklin and Mason,
23 not just the Franklin.
24 A. Not just the Franklin. I don't know. I really
25 don't. It -- I did not see anything to that effect in

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1 the file. And I did not ask Dave that question.
2 Q. And also, I mean, just in my own personal
3 observations working in the SRBA, it's not uncommon when
4 you have overlapping irrigation rights to see them tied
5 together with a combined use limitation, or something
6 like that; that's fairly common, correct?
7 A. That's fairly common, yes.
8 Q. And indeed, I think the two sets of Franklin
9 rights and the two sets of Mason rights, those are tied
10 together with some combined --
11 A. Correct, yeah.
12 Q. Is there a particular reason why the
13 overlapping rights between Franklin and Mason wouldn't
14 be tied together with some sort of a combined use
15 limitation?
16 A. Personally, I doubt that I would have either in
17 this case, because with this kind of an overlap, you
18 don't really know. Maybe the person had less shares
19 from Mason Creek, and so they picked up a few extra from
20 Franklin, and it's that type of thing. You don't --
21 it's not -- I don't know quite how to explain it
22 accurately. It would be very hard to determine, you
23 know, if it was a total overlap in which lands were
24 totally overlapping, I should say.
25 So when you get these large entities like this,

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1 it's very hard -- except for within themselves. But
2 when you get overlaps like this, you don't know why they
3 are overlapping. You know that it's because they are
4 getting shares from both, probably because they didn't
5 have enough from each to fulfill what they needed.
6 Q. Correct me if I'm wrong, with this issue of the
7 shares, and focusing on who has shares, isn't shares,
8 isn't that something that can change over time as far as
9 whether there are shares located in particular areas
10 within a place of use?
11 A. Yes, it can change. People buy and sell shares
12 within ditch companies.
13 Q. So why would it make sense, then, to not put a
14 combined use limitation because of, well, there may not
15 be enough shares in a particular location? I mean, it
16 seems like for something like the SRBA that, you know,
17 it's supposed to be like a partial decree that has some
18 permanence. Why would it make sense to look at who has
19 shares where at a particular point in time? Does that
20 question make sense?
21 MS. COURTNEY: I'm sorry. Can you repeat that
22 one?
23 THE WITNESS: Yeah, that was a little bit tough
24 one.
25 BY MR. LAWRENCE:

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1 Q. So we agree that shares are something that can
2 change over time within a water distribution entity,
3 like a ditch company; correct?
4 A. That's correct.
5 Q. If that's the case -- and correct me if I'm
6 wrong -- it sounded like what you were saying was that
7 the Department probably, to a certain extent, based its
8 recommendations in these subcases on where shares were
9 located.
10 A. Well, they didn't know where the shares were
11 located. I mean, you can assume they are located, you
12 know, on the place of use, of course, but those shares
13 can change. And that's what the whole idea of the
14 boundary of the water right is, so that the shares can
15 be moved around.
16 So you could go to places that, you know,
17 perhaps may not have been irrigated before, and they can
18 do that in a ditch company. I think it would be really
19 hard to put a combined use limitation on two ditch
20 companies. And I think that's probably why it wasn't
21 done.
22 Q. Fair enough.
23 Well, I think we're technically still down in
24 the place of use field here in the recommendation for
25 166B. Sorry. I'm switching gears on you. Back to

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1 Exhibit 3.
2 A. That's okay.
3 Q. Now, can you read the last comment before the
4 other provisions necessary section?
5 A. Yes. It says, "This right, when combined with
6 right Nos. 63-167B and 63-5239, can be used to irrigate
7 up to 2,056 present and future acres within the boundary
8 of the Franklin Ditch Company."
9 Q. A couple of quick questions about that comment.
10 First one, I personally haven't observed many references
11 to present and future acres. So what is that supposed
12 to encompass?
13 A. Quite frankly, I hadn't noticed that in that
14 remark. It's not familiar to me. So I hesitate to say
15 what Dave meant by that. I mean, it's pretty obvious
16 when you are reading it what it probably meant, but I
17 don't know. That's kind of a different remark.
18 Q. Yeah. So what would the obvious explanation be
19 even if you are not sure of the exact explanation?
20 A. Well, it says, "can be used to irrigate up to
21 2,056 present and future acres." It can be looked at in
22 a couple of different ways, actually. He could say that
23 there was -- well, he is saying there is 2,056 at the
24 present. And in the future, I guess, maybe he was
25 indicating there could be 2,056 acres and they might be

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1 different ones. I don't know. That's a different
2 remark.
3 Q. Well, just to explore that a little bit more,
4 we have the place of use, the actual number of areas
5 that can be irrigated with this right as 2,056; is that
6 correct?
7 A. Yes. That would be the place of use. The
8 boundary can be larger. It doesn't mean that you can
9 irrigate more acres within that boundary. It's just you
10 can switch them around within that boundary.
11 Q. And then we have the reference to 2,056 present
12 and future acres.
13 A. So he could have meant that, you know -- I
14 don't know. I don't know what he meant. You'd have to
15 ask him.
16 Q. And then the second thing in this comment we
17 see -- we talked about it a little bit, when we see a
18 reference to this water right 63-5239.
19 A. Yes.
20 Q. And I think we've discussed it a little bit
21 already, but what is your recollection of that water
22 right?
23 A. I just barely glanced at it when I was looking
24 at overlapping water rights, and in reference to it in
25 that Exhibit 4. And I just noticed that it was from the

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1 Back Slough, and that's about all I noticed. And that
2 it was Franklin. I didn't review it.
3 Q. Now, do you know if the Department analyzed --
4 and this is not necessarily limited to this particular
5 water right. So also just for general purpose here,
6 include 167 as well. Do you know if the Department
7 evaluated whether Franklin Ditch Company uses all of
8 these Boise River rights, so the Stewart Decree rights
9 166 and 167, and then in addition to those, also
10 utilizes this Back Slough right, the 5239?
11 A. Repeat the first part of that.
12 Q. Do you know if the Department evaluated -- so
13 basically we have three total water rights for Franklin
14 that we're dealing with here.
15 A. Right.
16 Q. We have the two Stewart Decree rights and then
17 this Back Slough right, the 5239. Did the Department
18 ever determine that, yes, Franklin has historically
19 fully utilized the two Stewart Decree Boise River rights
20 and also fully utilizes the right from the Back Slough,
21 the 5239 right?
22 MS. COURTNEY: I'm going to object that it's
23 beyond the scope of this depo, because 5239 wasn't
24 noticed, but to the extent that it was part of the
25 review for these --

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1 MR. LAWRENCE: I recognize that is a
2 complicating factor, and if it's that you just don't
3 know, I think that's reasonable, because this subcase
4 wasn't noticed up, but it is also on the recommendation.
5 So I think I do have a little bit of latitude.
6 MS. COURTNEY: Right. Which is why we have
7 gone to pieces of it.
8 BY MR. LAWRENCE:
9 Q. Let me ask the question a different way.
10 Regardless of the details of the specific
11 recommendation, we do know that we have this other Back
12 Slough water right out there for Franklin Ditch Company;
13 right?
14 A. Yes, we do.
15 Q. Do you know if the Department ever evaluated,
16 when it was preparing the recommendations for 166 and
17 167, whether that 5239 really was a separate water right
18 or an accomplished transfer of the Stewart Decree
19 rights?
20 A. I don't know.
21 Q. At this point I think those are my questions on
22 166B. Do you have anything you want to add or anything
23 that we missed or you want to go back and something that
24 came up after I asked a particular question?
25 A. I don't believe so at this point.

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1 Q. And we talked a little bit about the
2 recommendation of place of use before; correct?
3 A. Yes.
4 Q. I believe you said it was kind of an iterative
5 process between the Department and the claimant where
6 you have exchanges of --
7 A. That's correct.
8 Q. -- shape files, maps for boundaries, and that
9 sort of thing?
10 A. Yes.
11 Q. And I believe you clarified this before, but
12 that would have all been as of 1987?
13 A. Correct.
14 Q. So inherently there is an assumption there that
15 what was in place in 1997 was the same as it was when
16 the Stewart Decree was issued?
17 A. No.
18 Q. No?
19 A. Let me just clarify that.
20 Q. Okay. Go ahead.
21 A. Basically, what we were trying to do was to,
22 you know, to say what was there in 1987. I don't
23 believe we know what was there in 1906 necessarily under
24 the canal system. I mean -- I don't know. I don't know
25 what Dave was -- I mean, I know what I would have done

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1 in this situation, but I don't know what Dave did.
2 Q. So what would you have done in the situation?
3 A. I knew you were going to ask that question.
4 Actually, the way that the Department treated these is
5 that -- because, I guess -- okay. Because in the
6 decree, it doesn't say how many acres. There was no
7 duty of water in the Stewart Decree.
8 So I would have gone with the 1987 map and what
9 the ditch company showed and what we could digitize that
10 was being irrigated at the time of the ditch company
11 system.
12 Q. If the general rule is that we, you know, in
13 the SRBA, if there is an old decree, we're recommending
14 what was in the old decree --
15 A. Uh-huh.
16 Q. -- why would we look to the 1987 information as
17 opposed to trying to go back to the time of the Stewart
18 Decree to figure out what was decreed at that time?
19 A. Because the Snake River Basin Adjudication was
20 supposed to be a snapshot in time and that was supposed
21 to be as of 1987.
22 There are times when we've looked back, if we
23 had the materials to do so, at decrees, if we had some
24 way to look back to see. In this case -- I guess you
25 could say that is an ambiguity, then, because it didn't

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1 say how many acres. It didn't say where the canal
2 system was.
3 Q. Right.
4 A. So that's what we did in using the 1987 map,
5 the same as what we did for Pioneer also.
6 Q. Correct me if I'm wrong -- I'm about to put
7 words in your mouth and draw some inferences, but is it
8 basically the Department's position or what you are
9 saying is that lands under the canal system in 1906, the
10 Department's not able to recreate that at this time, so
11 we utilize 1987 information kind of assuming that they
12 are one and the same or close enough to be the basis of
13 a recommendation?
14 Do you want me to try again?
15 A. Yeah, please.
16 Q. Well, again, I'm starting with the assumption
17 that if you have an old decree that identifies an
18 element of the water right -- and I think this ties back
19 a little bit to what we were talking about before, that
20 that's the term of the water right and that generally
21 that's what's recommended in the SRBA; that if you've
22 got an old decree that says something that defines place
23 of use, then unless you can show an accomplished
24 transfer or some sort of an intervening change, that
25 that's usually carried forward to the recommendation in

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1 the SRBA; is that a fair --
2 A. That's a fair --
3 Q. -- general statement?
4 A. That's a fair statement, yes.
5 Q. So if we have a decree from 1906, I believe,
6 that says that the place of use is lands lying under its
7 canal system, but we use 1987 information to define the
8 place of use -- I mean, there has got to be some reason
9 that we look at the later information rather than what
10 was happening in 1906.
11 A. Well, and the reason being is that we really
12 don't know all the lands and where they were located
13 lying under its canal system in 1906.
14 Q. I understand that. Is it a matter of just it
15 being impossible or it's just impractical, because it
16 would be a lot of work and we're assuming 1987 is close
17 enough?
18 A. I think actually -- well, I have not actually
19 gone through and looked at everything that went into the
20 Stewart Decree, because there are boxes and boxes and
21 boxes on that.
22 So I don't know if somewhere in there -- yeah,
23 there might be something about where their canal was
24 located or the lands under their canal. And so we do
25 not undertake that type of -- because there is the

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1 decree that says it's under the canal system, our rules
2 were to go as of 1987, the beginning. And that was to
3 the best of your knowledge in 1987. They don't even
4 have photos that go back that early, so there would be
5 no way to tell.
6 Q. Let me ask a follow-up question that I didn't
7 even think to ask you. Where are these boxes about the
8 Stewart Decree?
9 A. Actually, I guess they are in the legal section
10 somewhere. I don't know. The boxes were at the
11 Attorney General's Office at one point. I mean, not the
12 actual, but some scanned documents.
13 Q. So would these be scanned documents from the
14 district court proceedings?
15 A. I think they were the documents that -- yes.
16 Yes, exactly. That's where they got them from.
17 Q. Interesting. Okay.
18 A. Yeah. Great, huh?
19 Q. More papers to look at. I'm so excited.
20 A. But you can also get them from the county, you
21 know, from the district court, too. That's where they
22 are at.
23 Q. The actual district court records?
24 A. Well, I believe they were in -- it seems to be
25 like they were in -- I'm not sure, but they were in

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1 Canyon County, I'm thinking.
2 MR. LAWRENCE: So why don't we turn to 167B
3 now. I don't think you have anything yet on that.
4 (Exhibit No. 10 was marked for identification.)
5 BY MR. LAWRENCE:
6 Q. So we've probably covered a lot of ground that
7 relates to this one as well, but I do want to walk
8 through some of the elements here.
9 So, again, we have name and address. We talked
10 a little bit about ownership and procedures when there's
11 a competing claim.
12 A. Uh-huh.
13 Q. And, again, is your recollection that Pioneer
14 filed a competing claim to this particular water
15 right?
16 A. Yes.
17 Q. And would the procedures have been the same as
18 far as resolving the competing claims to ownership for
19 this one as it was to 166B?
20 A. Yes.
21 Q. And I know we covered it, but can you summarize
22 again for me what those are?
23 A. The procedures on a duplicate or a competing
24 claim as it was, is that there is a -- you begin with
25 mainly water user contact to find out why one water user

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1 feels that they have the water right, and that type of
2 thing.
3 Q. So once that contact has been made, then,
4 within the Department, what is the process for resolving
5 ownership? I mean, who weighs in on it? And the reason
6 I ask is, because just to give you a little bit of
7 context, is that when you look at a water right
8 recommendation, most of the elements that are being
9 recommended are something where, you know, water right
10 expertise is valuable. Ownership is one of those things
11 that seems to be different. It's more kind of a legal
12 issue.
13 So how is that, you know, when you have
14 somebody like -- did Dave Tuthill prepare this
15 recommendation as well?
16 A. Yes, he did.
17 Q. So obviously someone very experienced with
18 on-the-ground water right issues, but perhaps, perhaps
19 not, qualified or experienced in dealing with resolving
20 ownership ambiguities or disputes.
21 So is there a process within the Department for
22 when there are issues over ownership, is that treated
23 differently than elements such as quantity or place of
24 use? Or is that still up to the discretion of who is
25 preparing the recommendation?

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1 A. I think that -- and I know that in this
2 situation, that Dave, you know, he would have delved
3 into that. The decree was overwhelming, I mean, because
4 it was in the name -- and Dave actually told me that
5 because the decree was in the name of the Franklin Ditch
6 Company, and the decree was in the name of the Mason
7 Creek Ditch Company, that anything prior to that, any
8 kind of agreements, it didn't matter; that it was
9 decreed in court; that they could have objected to it,
10 Pioneer could have objected to it if they needed to at
11 the time, and that they didn't. And so that is why he
12 recommended it this way.
13 Q. Now, do you happen to know -- and without
14 asking you to actually give the contents of what they
15 are, but do you know if Dr. Tuthill would have asked one
16 of the staff attorneys with IDWR for assistance on
17 resolving an ownership issue?
18 A. I don't know whether he did or not.
19 Q. Is that something that's commonly done or is
20 that rare? Or have you ever heard of that being done?
21 A. Oh, yeah, we've done that.
22 Q. Let's go back to Exhibit 5. So what we have in
23 front of us now is a line graph that at the top says,
24 "The maximum monthly diversion for the years 1950
25 through 2000 for the Caldwell Highline Canal." Is that

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1 whether what they are talking about is that other water
2 right, that Back Slough water right that we discussed
3 previously?
4 A. I don't know. I don't know what they -- I
5 don't know why Carter was -- I just don't know.
6 Q. Again, I'm not trying to get you to make
7 anything up. I just want to know what you know.
8 A. Yeah. And I don't want to do that, so --
9 Q. Aside from maybe some cleanup items towards the
10 end, I think I'm ready to move from Franklin to Mason,
11 if that's all right with you.
12 Since we're at a logical breaking point, do you
13 want to take another break or do you want to keep
14 plowing through?
15 A. No. I'm fine, as long as everybody else is.
16 Q. Everyone looks like they are having a great
17 time.
18 A. Yeah, they do.
19 Q. So Mason Creek Ditch Company -- and you know,
20 when we started with Franklin, I asked you a little bit
21 about just the type of organization. Is it your
22 understanding that Mason Creek Ditch Company is,
23 generally speaking, the same type of organization as
24 Franklin? Any differences between them, anything like
25 that?

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1 A. You know, I don't know their bylaw and so I
2 don't know that there is any differences. I don't know
3 about either one of them and their bylaws.
4 MR. LAWRENCE: Why don't we just go ahead and
5 pull out the recommendation.
6 (Exhibit No. 12 was marked for identification.)
7 BY MR. LAWRENCE:
8 Q. So do you recognize the document what we've
9 just marked as Exhibit 12?
10 A. Yes, I do.
11 Q. And is it just the SRBA recommendation for
12 water right 63-179C?
13 A. Yes, it is.
14 Q. And am I correct in remembering that Pioneer
15 also filed a competing claim to this water right; is
16 that your recollection?
17 A. Yes, that's true.
18 Q. So as far as, again, resolving and competing
19 claims and who owns the water right, was it the same
20 process for this one that you described in the context
21 of the Franklin recommendations?
22 A. Yes, it was.
23 Q. And just backing up a little bit, is this a
24 recommendation that was also prepared by David
25 Tuthill?

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1 A. Yes, it was.
2 Q. Did you have any role in preparing this
3 recommendation at all?
4 A. No.
5 Q. Well, staying up there towards the top of the
6 recommendation, we have the source as Boise River and
7 the quantity as 36.2 cfs; correct?
8 A. Correct.
9 Q. So by making this recommendation, is it the
10 Department's position that 36.2 cfs of Boise River water
11 have historically been delivered to and used by the
12 Mason Creek Ditch Company?
13 A. It was what was decreed in the Boise River. I
14 would have to look at reports to -- you know,
15 historically delivered -- you know, I can't say for sure
16 that I know it was historically delivered every year.
17 So that's why I'm having a hard time answering that
18 question.
19 Q. That's fair enough. But by making the
20 recommendation, though, is it fair to say that it's
21 implicit that at least the Department believes that at
22 some point in time, particularly given the very early
23 priority date on this water right --
24 A. Yes.
25 Q. -- that 36.2 cfs has made it to and been used

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1 by the Mason Creek Ditch Company?
2 A. I think that's a fair statement.
3 Q. Just overall. I'm not asking you to focus on a
4 particular year or anything.
5 A. Yes.
6 Q. So why don't we actually turn back to Exhibit
7 2, the map.
8 A. Okay.
9 Q. Do you have an understanding of how -- and
10 maybe you can walk me through on the map. If water is
11 diverted from the Boise River into the Highline,
12 theoretically, how does it make it to the Mason Creek
13 Ditch Company land?
14 A. And that I do not have an understanding of,
15 because we are only responsible for where it comes out
16 at the point of diversion.
17 Q. So once it's in the Highline, then that's it?
18 A. Yeah, that's it. That's the way it is with
19 everything. I mean, everything dealing with the point
20 of diversion.
21 Q. Yes. Let's go down to the point of diversion a
22 little bit. So we have the point of diversion. Do you
23 agree that that point of diversion designated there is
24 the Highline Canal?
25 A. Yes, that is the Caldwell Highline Canal.

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1 through the Highline. And I think that with -- now, I
2 don't know, because Dave had the meetings, but in
3 looking at the files, I would have gathered that right
4 away.
5 Q. Yeah. Now, I know like in the context now,
6 these days of applying for a new water right, that it's
7 always a big deal if you are the applicant but you don't
8 own the point of diversion, submitting proof that you
9 have the authority to divert the water. Does the
10 Department do anything like that in the SRBA, or has it
11 historically; that if someone is claiming a point of
12 diversion that's not owned or operated by them, that
13 they do produce some sort of documentation to show that
14 that's appropriate?
15 A. It depends. It depends on if it appears to be
16 a problem when you are reviewing that claim.
17 Q. Has the Department determined that?
18 A. In the past we have, yes. I have actually seen
19 water rights that we have determined that -- yes, I have
20 seen those.
21 Q. But did you think in this context it was
22 probably -- when David Tuthill prepared this, he
23 probably was just -- and, you know, recognizing I'm
24 asking you to speculate to a certain extent here, but
25 probably what he did was just, you know, look at water
Page 81

1 master records that show this being diverted into the
2 Highline and probably assumed, "Well, this is okay.
3 We'll just recommend this."
4 A. I definitely think that's what he looked at,
5 because in the water distribution book it does have
6 these water rights as coming out of the Caldwell
7 Highline Canal. And plus, there was other documents in
8 there.
9 Q. And as far as the place of use goes -- I mean,
10 I know we've covered this ground in terms of Franklin,
11 but is it safe to assume that the general process that
12 you discussed there also applies here, that sort of back
13 and forth with the claimant and --
14 A. Yes, it was.
15 Q. So, again, with place of use, it's relying
16 primarily on information provided by Mason Creek Ditch
17 Company to help draw the boundaries and identify where
18 irrigation occurs?
19 A. That's correct, yes.
20 Q. I don't really have any other questions at this
21 point on this particular recommendation. Is there
22 anything through the course of our discussion that
23 something else comes to mind or one of your answers has
24 changed or anything like that?
25 A. Not at this point.
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1 (Exhibit No. 15 was marked for identification.)
2 BY MR. LAWRENCE:
3 Q. That is Exhibit 15 that we just handed you; is
4 that correct?
5 A. Yes, it is.
6 Q. Can you describe for me what this document is?
7 A. Yes. This is the Department's recommendation
8 for 63-32580 to Mason Creek Ditch Company for water out
9 of the Mason Creek.
10 Q. Now, if I remember correctly, this is one you
11 prepared; is that right?
12 A. Yes, that's correct.
13 Q. Can you, before we get into the details and the
14 particular elements, just summarize for me what the
15 process was in preparing this recommendation?
16 A. When I prepared this recommendation, I made
17 claimant contact. Well, I call it claimant. It's water
18 user contact with Mason Creek and the ditch company. I
19 believe I spoke to Dorothy Bicandi and Richard both.
20 And I also studied maps, had them submit maps to me,
21 showing where the points of diversion were, had them
22 submit information to me concerning the sizes of the
23 ditches and the diversion ditches and submit affidavits
24 to me concerning the priority date. And then submit
25 information to me concerning the number of acres
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1 irrigated from this actual diversion point rather than
2 all of Mason Creek Ditch Company.
3 That's it in a little nutshell.
4 Q. Were you the only person who worked on it at
5 the Department or did anybody else work on it with
6 you?
7 A. No. I was the only person that worked on this
8 one.
9 Q. Did you visit the diversion on Mason Creek --
10 or there are actually two points of diversion. So did
11 you conduct any sort of a field exam? Or was it all
12 photos and information from the claimant?
13 A. It was all photos and information from the
14 claimant. I did not do a field exam.
15 Q. Now this is a beneficial use claim; correct?
16 A. That's correct.
17 Q. Is it customary or common for the Department,
18 for a beneficial use claim specifically, to not perform
19 a field exam at some point?
20 A. It is more common now than it used to be. And
21 the reason for that is because there is a lot fewer of
22 us. And a lot of the time we don't have time to conduct
23 field exams. And so, if we can get enough information
24 from the water user, and if we can see it on the map,
25 and using that type of information, we don't conduct a
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EXHIBIT B

TO THE AFFIDAVIT OF SCOTT L. CAMPBELL

In Re SRBA Case No. 39576

Subcase Numbers 63-00166A, 63-00166B, 63-00167A,
63-00167B, 63-00179A, 63-00179C, and 63-32580

Lela Pena

From: Scott Campbell
Sent: Thursday, November 11, 2010 9:09 AM
To: Dan Steenson
Cc: Dylan Lawrence
Subject: Re: David Tuthill, Jr./Franklin Ditch Co.
Importance: High

Dan:

I contacted David Tuthill, Jr. yesterday to determine his view of his availability to serve as an expert witness in the Pioneer/Franklin Ditch Co./Mason Creek Ditch Co. dispute. I told him that I doubted that he would be able to serve as an expert for Pioneer in view of his role as the Director and his personal involvement in the review of the applicable water right claims. I also stated that I would like to interview or depose him as a fact witness. He advised me that he would not consider serving as an expert for Pioneer because he had already agreed to serve as an expert for Franklin Ditch Co. I advised him that his participation for Franklin would need to be resolved by the SRBA Court. I assume Dave correctly represented his status as a retained testifying expert for Franklin Ditch Company in these sub- cases. If that is not correct, please respond immediately. We are in the process of preparing a Motion in Limine on the issue and I do not want to incorrectly represent Franklin's actions to the Court. Since Franklin has not designated David Tuthill, Jr. as an expert in its discovery responses to Pioneer, my telephone conversation with David was the first notice we have had of this development. We will assume that Franklin will immediately supplement its discovery responses to properly designate David as Franklin's expert. When can we expect to receive that supplementation?

Scott L. Campbell
Moffatt Thomas
www.moffatt.com
slc@moffatt.com
(208) 345-2000

11/16/2010

EXHIBIT C

TO THE AFFIDAVIT OF SCOTT L. CAMPBELL

In Re SRBA Case No. 39576

Subcase Numbers 63-00166A, 63-00166B, 63-00167A,
63-00167B, 63-00179A, 63-00179C, and 63-32580

Lela Pena

From: Dan Steenson [dvs@ringertlaw.com]
Sent: Thursday, November 11, 2010 10:41 AM
To: Scott Campbell
Cc: Dylan Lawrence
Subject: RE: David Tuthill, Jr./Franklin Ditch Co.

That's interesting. I received a voice message from Dave that you called him and asked if he could serve as an expert witness for Pioneer. Dave said that he told you that he could not because we had contacted him. You then told him that Pioneer would oppose his participation in the case.

I contacted Dave a little more than a week ago to discuss his recollection of the reason for the accomplished transfer remark that is the basis for Pioneer's summary judgment motion and the SRBA Court's remand. Pioneer deposed Jan Shurte regarding the remark, and she referred to Dave as potentially having better information regarding the remark. In this sense, Dave is a fact witness, as Jan was.

I also asked Dave whether he would assist Franklin in evaluating the other issues raised by Pioneer on summary judgment. He agreed. He has not had an opportunity to conduct an evaluation or report any opinions. Accordingly, we have not determined whether Franklin will call him as an expert witness at trial in the SRBA subcase that has been vacated and is not likely to be rescheduled until April of next year, at the earliest.

Franklin will certainly supplement its response to Pioneer's interrogatory which asks Franklin to identify expert witnesses it intends to call at trial if and when it is appropriate to do so.

From: Scott Campbell [mailto:SLC@moffatt.com]
Sent: Thursday, November 11, 2010 9:09 AM
To: Dan Steenson
Cc: Dylan Lawrence
Subject: Re: David Tuthill, Jr./Franklin Ditch Co.
Importance: High

Dan:

I contacted David Tuthill, Jr. yesterday to determine his view of his availability to serve as an expert witness in the Pioneer/Franklin Ditch Co./Mason Creek Ditch Co. dispute. I told him that I doubted that he would be able to serve as an expert for Pioneer in view of his role as the Director and his personal involvement in the review of the applicable water right claims. I also stated that I would like to interview or depose him as a fact witness. He advised me that he would not consider serving as an expert for Pioneer because he had already agreed to serve as an expert for Franklin Ditch Co. I advised him that his participation for Franklin would need to be resolved by the SRBA Court. I assume Dave correctly represented his status as a retained testifying expert for Franklin Ditch Company in these sub-cases. If that is not correct, please respond immediately. We are in the process of preparing a Motion in Limine on the issue and I do not want to incorrectly represent Franklin's actions to the Court. Since Franklin has not designated David Tuthill, Jr. as an expert in its discovery responses to Pioneer, my telephone conversation with David was the first notice we have had of this development. We will assume that Franklin will immediately supplement its discovery responses to properly designate David as Franklin's expert. When can we expect to receive that supplementation?

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11/16/2010

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