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DEPARTMENT OF
WATER RESOURCES

**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, and 63-32580
)
) **MASON CREEK'S RESPONSE TO**
) **PIONEER'S OBJECTION TO I.C. § 42-**
) **1425 FACT-FINDING HEARING**

COMES NOW Mason Creek Ditch Company ("Mason Creek"), by and through its attorneys of record Barker Rosholt & Simpson, LLP, and hereby submits the following *Response to Pioneer's Objection to I.C. § 42-1425 Fact-Finding Hearing*. For the following reasons, Mason Creek Ditch Company responds and objects to Pioneer's procedural objections to the Director's Order and hereby requests that this Court deny the relief requested by Pioneer.

ARGUMENT

1. The Director Properly Limited the Manner in Which Testimony and Evidence will be Admitted for Hearing in the Department's Pre-Hearing Order Setting I.C. § 42-1425 Fact-

**MASON CREEK'S RESPONSE TO PIONEER'S OBJECTION TO I.C. § 42-1425
FACT-FINDING HEARING**

Finding Hearing, Did Not Improperly Limit the Scope of the Parties' Method of Appeal, and
Mason Creek Requests that the Hearing Date Remain December 14, 2010:

Pursuant to Idaho Code § 67-5242(3)(b) the hearing officer, even in a formal proceeding as such is defined by the Department's rules, "shall afford all parties the opportunity to respond and present evidence and argument on all issues involved, except as restricted by a limited grant of intervention or by a prehearing order." I.C. § 67-5242(3)(b), emphasis added. In this instance, Director Spackman has prescribed the manner of presentation of evidence and arguments during the fact-finding hearing pursuant to his prehearing order, the Notice of I.C. § 42-1425 Fact-Finding Hearing issued on November 9, 2010. The District Court remanded this action for the very limited purpose of determining whether injury or enlargement occurred when the accomplished transfer was determined to have taken place approximately a century ago. No living witnesses could possibly be called in the matter, and it is perfectly acceptable and understandable under these circumstances that the Director would require testimony and other evidence to be submitted in writing prior to the hearing, as is allowed by the Administrative Procedure Act, and the Department's rules governing formal hearings.

The Director stated that the parties shall file all testimony in a written form on or before December 6, 2010. Notice of I.C. § 42-1425 Fact-Finding Hearing. He also provided that the parties at the hearing, shall be offered an opportunity to present argument regarding the submitted testimony and evidence, and may provide the court with written rebuttals at that time. *Id.* The only restriction prevents the parties from calling witnesses to give live testimony. This is, a distinction without a difference as none of the IDAPA rules, nor the Department's rules, require that a formal or informal hearing provide the parties an opportunity to call witnesses for live testimony during the hearing. Further, on the limited question of whether injury was

suffered by Pioneer nearly a century ago, no such living witnesses could be called to testify. Any evidence to be submitted on this limited question certainly can be made in writing prior to the hearing.

Pioneer argues that the Department's rules 558, 559, 600 and 606 contemplate that witnesses may be called, testimony given, and exhibits introduced. Indeed the Department's rules do anticipate that those things may occur during the course of the Department's formal hearing process, but it does not state that the testimony of witness and exhibits offered cannot be required to be submitted through the pre-filing of that information. In fact, the Department's procedural rule 600 states in pertinent part

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order.

IDAPA 37.01.01.600. Further, the Department's rule 605, titled 'Prepared Testimony' expressly provides that "[t]he presiding officer may order a witness's prepared testimony previously distributed to all parties to be included in the record of hearing as if read." IDAPA 37.01.01.605.

Limiting the manner in which testimony is provided and exhibits offered, additionally does not transform these proceedings into informal proceedings, as those proceedings are defined by the Department's rules 100 through 103. Informal proceedings are defined as those proceedings "without a record to be preserved for later agency or judicial review, without the necessity or representation according to rule 230, without formal designation of parties, without the necessity of hearing examiners or other presiding officers, or without other formal procedures required by these rule for formal proceedings." IDAPA 37.01.01.100. The I.C. § 42-1425 Fact-Finding Hearing is not contemplated to be an informal proceeding, as the record of written testimony and evidence will be preserved for the District Court on appeal, as well as a transcript

prepared of the arguments at the hearing. The Director's pre-hearing order limiting the manner in which testimony and evidence may be provided, in conformance with Department rule 605, does not transform this proceeding into an informal proceeding.

Limiting the procedure for the hearing to pre-filed testimony and written rebuttal also serves the best interests of the parties in that it limits the expense of the hearing before the Department. If Pioneer's requested relief is granted, the parties will essentially be required to hold duplicate trials in this action, first before the Department and then before the district court on appeal from the Supplemental 706 Report.

Furthermore, the Director's statement that the trial to be held in this matter is the party's sole remedy is similarly inoffensive. The Director did nothing improper when he stated that the parties' remedy after issuance of the Supplemental 706 Report, is to appeal the matter in the proceedings already pending before the special master in the District Court. I.C. § 42-1425 provides that after submission of the supplemental 706 Report, if any party is aggrieved by that determination "they may seek review before the district court." Whether the judicial review will be had by the Special Master in the SRBA action presently before this district court, or in some other proceeding before a different district court is irrelevant. Whether the Directors' statement that the sole remedy shall be the trial to be had in this matter is a legally correct statement and within the discretion of the Department to make, is not necessary for this Court to decide at this stage in the proceedings.¹ A proper record of the proceedings before the Department will be maintained in accordance with the Department's rules governing such formal proceedings, and in

¹ In accordance with the Supreme Court's Administrative Order dated December 9, 2009, which holds that all administrative appeals from orders of the Idaho Department of Water Resources shall be assigned the SRBA District Court, any appeal from the hearing limited to the issue of injury or enlargement in this action will be reassigned to the SRBA District Court.

conformance with the Idaho Administrative Procedure Act, and Pioneer or any other aggrieved party will be entitled to an appeal of the Department's Administrative determination.

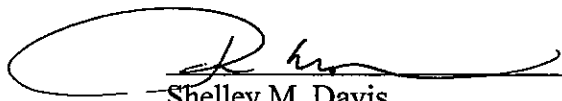
Finally, Pioneer's representation the Director's Order limiting the manner in which testimony and exhibits may be presented in some manner requires that the hearing be delayed is insupportable. Nothing about the Director's Order prejudices the parties in their preparation for the hearing and Mason Creek Ditch Company respectfully requests that the Director leave the hearing scheduled on December 14, 2010.

CONCLUSION

THEREFORE, for the foregoing reasons, Mason Creek Ditch Company respectfully requests that this Special Master deny the relief requested by Pioneer Irrigation District in its' Objection to IDWR's Notice of I.C. § 42-1425 Fact-Finding Hearing.

DATED this 24th day of November, 2010.

BARKER ROSHOLT & SIMPSON LLP


Shelley M. Davis
Attorneys for Mason Creek Ditch Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, I caused to be served a true and correct copy of the foregoing **MASON CREEK'S RESPONSE TO PIONEER'S OBJECTION TO I.C. § 42-1425 FACT-FINDING HEARING** by the method indicated below, and addressed to each of the following:

Original served via US Mail to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707
Fax No. 208-736-2121

Copies served via US mail to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

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