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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

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

**MEMORANDUM IN SUPPORT OF MOTION
TO DETERMINE ENFORCEABILITY OF
SETTLEMENT AGREEMENT WITH MASON
CREEK DITCH COMPANY**

Pioneer Irrigation District, through undersigned counsel of record, hereby files
this memorandum in support of its motion to determine the enforceability of a settlement
agreement between itself and the Mason Creek Ditch Company in the above-referenced
subcases.

**MEMORANDUM IN SUPPORT OF MOTION TO DETERMINE ENFORCEABILITY
OF SETTLEMENT AGREEMENT WITH MASON CREEK DITCH COMPANY - 1**

Client:1926151.3

I. INTRODUCTION

On December 14, 2010, Pioneer and the Mason Creek Ditch Company signed a Settlement Agreement purporting to resolve Pioneer's objections in subcases 63-179C and 63-32580. Pioneer signed this agreement without having consulted its attorney first. Now, Pioneer is concerned that the Settlement Agreement violates public policy and Idaho law regarding the trust relationship between an irrigation district and its patrons. Rather than operating under this uncertainty and deferring potential disputes over the Settlement Agreement into the future, Pioneer feels it is best for both parties to address this issue now.

Pioneer and Mason have been negotiating alternative language to address Pioneer's concerns. However, the parties have thus far not come to an agreement. Therefore, Pioneer seeks a ruling from this Court regarding the enforceability of the Settlement Agreement. "The illegality of a contract can be raised at any stage in litigation." *Farrell v. Whiteman*, 146 Idaho 604, 608, 200 P.3d 1153, 1157 (2009).

II. STATEMENT OF FACTS

Pioneer Irrigation District is an irrigation district duly formed pursuant to Idaho law. *See generally Pioneer Irr. Dist. v. Bradbury*, 8 Idaho 310, 68 P. 295 (1902). Pioneer is the owner and operator of the Caldwell Highline Canal. (Fowler aff. of 9/14/10, Ex. A; *see also* Zirschky aff. of 9/14/10, ¶ 2.) The Caldwell Highline Canal is the point of diversion for water rights that have been recommended to the Franklin Ditch Company (63-166B, 63-167B) and the Mason Creek Ditch Company (63-179C). (*See* Lawrence aff. of 9/14/10, Exs. A-E.) In addition to deliveries to Franklin Ditch Company and Mason Creek Ditch Company, the Caldwell

Highline Canal also supplies water to approximately 7,443 acres of land owned by Pioneer's own patrons. (Zirschky aff. of 9/28/10, ¶ 2.)

Pioneer filed objections to the Franklin and Mason rights in June 2007. (Lawrence aff. of 9/14/10, Exs. F-H.) The summary judgment hearing on Pioneer's objections occurred on October 12, 2010. While the Court dismissed Pioneer's competing claims, the Court found material issues of fact as to the elements of the Franklin and Mason recommendations, and therefore denied the Franklin and Mason summary judgment motions seeking dismissal of Pioneer's objections to those recommendations, and conditionally granted Pioneer's motion for summary judgment and motion to remand the subcases to IDWR for an injury/enlargement hearing.¹ (Mem. Dec. & Order on Mot. for SJ of 10/22/10, p. 11.)

Settlement discussions among the three parties had been occurring periodically since 2007. (Newbill aff., ¶ 4.) As the legal costs began to mount, the three parties engaged in more serious settlement discussions over the course of the fall 2010. (*Id.*, ¶ 5.) These efforts culminated in a particularly contentious meeting among the parties on November 29, 2010. (*Id.*, ¶¶ 6, 7.) After that meeting, the parties exchanged draft settlement agreements. (*Id.*, ¶ 8.)

Given the hostility of the Franklin and Mason representatives at the November 29 meeting, and based upon Pioneer's ongoing involvement in litigation over urban storm water discharges into its irrigation system, the Pioneer Board members simply wanted to resolve this matter quickly, and they signed what they thought at the time to be reasonable settlement agreements with Franklin and Mason. (*Id.*, ¶ 9.) While it is not normally Pioneer's practice to

¹ Pioneer filed the injury/enlargement statement required by the Court's order on October 29, 2010. The Court fully granted Pioneer's motion for summary judgment and motion to remand during the telephonic hearing on November 1, 2010.

do so, Pioneer signed the final versions of the Settlement Agreements without seeking the advice of counsel. (*Id.*)

After Pioneer signed the Settlement Agreements, the Board members became concerned that the agreements did not comply with Idaho law. (*Id.*, ¶ 10.) Pioneer and Franklin have agreed to alternative language that adequately addresses Pioneer's concerns. The addendum to the Settlement Agreement has been finalized and executed, and Pioneer is filing a Notice of Withdrawal of its objections to the Franklin rights concurrently with this memorandum.

However, at this time, Pioneer and Mason have not yet agreed on alternative language. Rather than continuing to operate under the uncertainty regarding the enforceability of that Settlement Agreement and deferring a potential dispute over the agreement into the future, Pioneer believes it is best for both Pioneer and Mason to have the Court address the issue now. (*Id.*) That is the purpose of Pioneer's motion.

III. STANDARD OF REVIEW

"Compromise and settlement agreements are subject to the same rules of construction as contracts generally." *Ernst v. Hemenway & Moser, Co., Inc.*, 120 Idaho 941, 949, 821 P.2d 996, 1004 (App. 1991). "Whether a contract is against public policy is a question of law for the court to determine from all the facts and circumstances of each case." *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997).

IV. LEGAL ARGUMENT

A. **Contracts By Irrigation Districts Which Favor Non-Patrons Over Patrons Are Unenforceable**

Under Idaho law, irrigation districts hold their property, including their water rights, “in trust” for their patrons. IDAHO CODE § 43-316. The Idaho Supreme Court has relied upon this trust relationship in a decision as recently as 2007. *See generally U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 114, 115, 157 P.3d 600, 608, 609 (2007); *see also Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 162, 219 P.3d 804, 809 (2009).

A contract that violates this principle is “ultra vires and void.” *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141, 269 P.2d 755, 760 (1954). It is such an important principle that the equitable doctrine of estoppel cannot be used to enforce a contract which violates it. *Jensen*, 75 Idaho at 141-42, 269 P.2d at 760. “Otherwise, the will and purpose of the legislature, and the public policy established by its dedication of such water to the lands within the district, could be defeated by ill-advised contracts of the directors.” *Jensen*, 75 Idaho at 142, 269 P.2d at 760.

The reason such contracts are ultra vires is that irrigation districts are created by statute and therefore cannot take actions which exceed their statutory authority:

[T]he primary purpose of an irrigation district is limited to the conducting of its business for the private benefit of the *landowners within the district* by the acquisition of water rights and the irrigation of lands within its boundaries Its primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of *landowners within the district*, such property being held in trust for them in a proprietary capacity

Lewiston Orchards Irr. Dist. v. Gilmore, 53 Idaho 377, 381-82, 23 P.2d 720, 722 (1933)

(emphasis added).

In *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 308, 216 P. 250, 252 (1923), the Idaho Supreme Court specifically addressed this trust relationship in the context of the respective rights of landowners within an irrigation district and landowners outside of the district:

An irrigation district acquiring a system which had theretofore furnished water to settlers outside of the district, who had a vested right thereto, is compelled to continue to deliver such water. But an irrigation district acquiring a system which only furnished water to settlers within the district *cannot be compelled thereafter to furnish water to settlers outside of the district.*

* * *

Under the provisions of C.S. § 4350 [the statutory predecessor to Section 43-316], the legal title to all property acquired by the district by operation of law vests immediately in the district and is held in trust for, dedicated to, and set apart to the use and purposes provided by law. Under the provisions of C.S. §§ 4346 and 4355, the power of the directors or other officers of an irrigation district is limited, and any act done in excess of the express or implied provisions of the statute by such directors or other officers is ultra vires.

* * *

The appropriation and diversion of waters by the district, through its officers, or the purchase of a system constructed in whole or in part by its funds, becomes the property of the district, and is held in trust for the landowners within it, and no burden can be imposed upon it for the delivery of water beyond the boundaries of the district, and *no contract made by the directors of a district to deliver water beyond its boundaries is a liability for which the district can be held.* The ultimate purpose of a district's organization, under provisions of the statutes of this state, is the improvement, by irrigation, of lands within the district. The purpose of its organization is not rental, sale, or distribution of water. It is authorized to acquire the right to the use of water for the purpose of delivery *to settlers within the district.* To bond the lands of the settlers within the district to acquire the rights to the use of water, and then to deprive them of such right in order that it may be furnished to lands without the district would clearly be taking property of the landowners within the district without due process of law.

* * *

The delivery of water by the directors or officers of an irrigation district to exterior lands would simply be an act ultra vires, except in such cases where the district acquired the system burdened with the duty to deliver water without its boundaries, or in case of surplus water.

Yaden, 37 Idaho at 308-10, 216 P. at 252-53 (emphasis added) (citations omitted); *see also Jones v. Big Lost River Irr. Dist.*, 93 Idaho 227, 229, 459 P.2d 1009, 1011 (1969) (“The [irrigation district] had no duty or obligation to deliver storage water outside the boundaries of the district. In fact under the holdings of this court it could not have done so.”).

B. The Settlement Agreement Violates Idaho Law And Is Therefore Unenforceable

Paragraph 7 of the Settlement Agreement between Pioneer and Mason provides:

Pioneer agrees to convey water diverted under Mason Creek’s water rights into the Highline Canal, at no cost to Mason Creek, to delivery headgates on the Highline Canal for use on lands owned by Mason Creek shareholders. Mason Creek’s water rights have delivery priority over Pioneer’s. Pioneer’s water rights may be diverted into the Highline Canal when and to the extent that the capacity of the canal is not required to deliver Mason Creek’s water rights. Pioneer agrees to operate, maintain and repair the Highline Canal in order to deliver Mason Creek’s water rights.

(Newbill aff., Ex. A, p. 2, ¶ 7.)

1. Requiring Pioneer To Deliver Mason’s Non-Boise River Water Rights Would Deprive Pioneer’s Downstream Patrons Of Water To Which They Are Entitled

One significant problem with Paragraph 7 is that it speaks generally in terms of the relative rights and responsibilities as to Mason’s “water rights,” which are defined as water rights 63-179C and 63-32580. (Newbill aff., Ex. A, p. 1, ¶ 1.) However, 63-179C is the only Mason water right with the Caldwell Highline Canal as the point of diversion. Mason’s other water right recommendation (63-32580) is based upon a beneficial use claim for diversions from

Mason Creek. (Lawrence aff. of 10/1/10, Ex. A (SRBA recommendation).) As recognized in the Settlement Agreement, (*id.*), Mason has also filed a late beneficial use claim (63-33392) to diversions from Fivemile Creek. (*Id.*, Ex. B (SRBA Notice of Claim).)

With respect to these Mason Creek and Fivemile Creek claims, Mason has argued that, “Pioneer is supposed to divert water from [the] Caldwell Highline Canal into Mason Creek and Five Mile for delivery to the Mason Creek Ditch Company place of use.” (Lawrence aff., Ex. A.) This is consistent with Mason’s previous characterization that there are “diversion structures and delivery systems from the Caldwell Highline Canal to Mason Creek [and] Five Mile” (Lawrence aff., Ex. B.)

However, there is no basis for the proposition that Pioneer is obligated to divert water out of the Caldwell Highline Canal into Mason Creek and Fivemile Creek in order to satisfy Mason’s diversions from those sources. Mason has adduced no contracts which require Pioneer to “deliver” water through these structures, nor has it adduced any evidence it has occurred historically.

To the contrary, the “diversion structures and delivery systems” described by Mason are check structures used to manage flows in the Caldwell Highline Canal. (Zirschky aff., ¶ 3.) When the canal is running high, Pioneer releases water through those structures so that the canal does not overtop. (*Id.*) However, that is the only reason water is released by Pioneer from the Caldwell Highline Canal into Mason Creek or Fivemile Creek. (*Id.*)

Based upon both its trust responsibilities and its duties under Idaho Code Section 42-1201 (Ditches to Be Kept Full), Pioneer must keep the canal full for its own patrons, and only release water when doing so is necessary for safety purposes. *See also* IDAHO CODE § 42-1203 (“the owner or owners of any irrigating ditch, canal or conduit . . . shall not at any

time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain . . .”). Therefore, Paragraph 7 is unenforceable to the extent it grants rights to Mason or imposes responsibilities upon Pioneer as to the diversion and conveyance of 63-32580 and 63-33392 through or from the Caldwell Highline Canal.

2. Requiring Pioneer To Deliver The Entirety Of 63-179C Would Deprive Pioneer Patrons Of Capacity Within The Caldwell Highline Canal

With respect to Mason’s Boise River water right (63-179C), Mason has not produced an agreement or other document establishing its legal right to convey that water through Pioneer’s canal. Pursuant to Idaho’s Statute of Frauds, Idaho Code Section 9-505, an agreement that cannot be completed within one year must be in writing to be enforceable. IDAHO CODE § 9-505(1). Pursuant to Idaho’s “best evidence” rule, “[t]here can be no evidence of the contents of a writing other than the writing itself,” except in certain specifically enumerated situations. IDAHO CODE § 9-411. In addition, “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” I.R.E. 1002.

While Mason has argued that laches prevents Pioneer from challenging Mason’s right to convey water through the canal, (*see* Mason’s Reply in Supp. of MSJ of 10/5/10, pp. 5, 9), laches is an equitable doctrine. *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004). As previously explained, in *Jensen*, the Idaho Supreme Court held that estoppel, another equitable doctrine, could not be used to enforce a contract which violates Section 43-316.

Jensen, 75 Idaho at 141-42, 269 P.2d at 760. Such reasoning applies equally to the equitable doctrine of laches.²

And, even if laches were applicable here, as the Court held, the quantitative extent of laches has yet to be determined. (Court's Mem. Decision & Order on MSJ of 10/22/10, p. 8.) As the Court noted, the affidavit of Pioneer expert witness Scott King, P.E., indicates that Mason water users irrigate only 78 acres of land out of the Caldwell Highline Canal. (*Id.*; *see also* King aff. of 10/1/10, p. 3, ¶ 4.) Applying Pioneer's standard practice of delivering an inch of water per acre, this would result in delivery of 1.56 cfs to Mason water users. (*See* King aff. of 10/1/10, p. 3, ¶ 4.) This un-rebutted evidence is in stark contrast to the recommended diversion rate of 36.2 cfs into the Caldwell Highline Canal for water right 63-179C. (*See* Lawrence aff. of 9/14/10, Ex. C.)

3. Requiring Pioneer To Deliver Water "At No Cost To Mason Creek" Results In The Subsidizing Of Mason's Deliveries By Pioneer Patrons

Even if Mason can establish the right to convey water right 63-179C through Pioneer's canal, there is no basis to conclude that doing so should be "at no cost to Mason Creek" While the Franklin Ditch Company produced an agreement with Pioneer's predecessor specifically providing for deliveries of water "free and clear of all expenses costs and charges for the construction, repair, and maintenance of said ditch forever," (Larson aff. of 9/14/10, Ex. 1, p. 3), Mason has produced no such agreement. Under these circumstances, Pioneer cannot contractually bind its patrons to subsidize water deliveries to Mason water users for time immemorial. Doing so would violate Section 43-316 as applied in *Yaden*. The fact that

² In fact, the case relied upon by Mason refers to the doctrine as "estoppe[l] by laches." *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 409, 66 P.2d 115, 117 (1937).

Mason has received free deliveries in the past does not mean it is entitled to them in the future, even if it is entitled to the deliveries themselves.

Certainly the railroad company cannot complain if the [irrigation] district failed to assess its property for the years 1902, 1903, and 1904. Such failure did not in any way injure the railway company but was *clearly to its benefit*; and it *cannot be allowed to complain* of future legal assessments because of such failure.

Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 603, 102 P. 904, 913 (1909)

(emphasis added).

4. Subordinating all of Pioneer's water rights to all of Mason's water rights would deprive Pioneer's downstream patrons of water to which they are entitled

Paragraph 7 provides that "Mason Creek's water rights have delivery priority over Pioneer's," and that, "Pioneer's water rights may be diverted into the Highline Canal when and to the extent that the capacity of the canal is not required to deliver Mason Creek's water rights." Pioneer owns several decreed water rights (63-161BU, 63-224, 63-225, 63-294, 63-295, 63-371) with the Caldwell Highline Canal as an authorized point of diversion that are senior to either 63-179C or 63-32580. (Lawrence aff., Ex. C (SRBA partial decrees).) Pioneer also owns two water rights (63-2276 and 63-2294) diverted from Mason Creek or Fivemile Creek into the Caldwell Highline Canal which are senior to Mason's right 63-32580.³ (Zirschky aff., ¶ 4; Lawrence aff., Ex. C (SRBA partial decrees).) A recommendation for Mason's late claim to Fivemile Creek water (63-33392) has not yet been issued.

The prior appropriation doctrine is well established in Idaho, as it is grounded in the state constitution, which provides that, "[p]riority of appropriation shall give the better right

³ Pioneer also owns water rights 63-32514 and 63-32515 which are diverted from Fivemile Creek and Mason Creek, respectively, into the Caldwell Highline Canal. (Zirschky aff., ¶ 4; Lawrence aff., Ex. C.) These rights are junior to 63-32580.

as between those using the water” IDAHO CONST. art. XV, § 3; *see also* IDAHO CODE § 42-106 (“[a]s between appropriators, the first in time is first in right”). Subordinating all of Pioneer’s rights to all of Mason’s rights, even though Pioneer owns several senior rights, violates Section 42-316 and *Yaden*.

5. Pioneer’s Primary Obligation In Operating The Caldwell Highline Canal Is To Serve Its Own Patrons

Under Section 43-316 and *Yaden*, Pioneer’s primary purpose and obligation in everything it does, including the operation of the Caldwell Highline Canal, must be to serve the interests of its patrons. The last sentence of Paragraph 7 states that, “Pioneer agrees to operate, maintain and repair the Highline Canal *in order to deliver Mason Creek’s water rights*.” (Emphasis added.) This implies that the interests of Mason are to be elevated above those of Pioneer’s own patrons in Pioneer’s operation of the Caldwell Highline Canal. That language therefore violates 43-316 and *Yaden* and is unenforceable.

C. Void Contracts Are Unenforceable

“A contract prohibited by law is illegal and hence unenforceable.” *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). “In most cases, the court will leave the parties to an illegal contract as it finds them.” *Farrell v. Whiteman*, 146 Idaho 604, 609, 200 P.3d 1153, 1158 (2009). Therefore, if the Settlement Agreement with Mason is unenforceable, the proceedings before the Special Master must resume from where they left off when the litigation was stayed to accommodate settlement discussions.

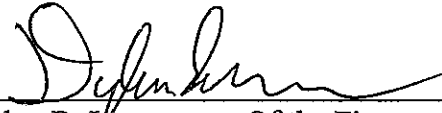
**V.
CONCLUSION**

For the foregoing reasons, Pioneer respectfully requests that the Court (1) determine whether the Settlement Agreement is enforceable or unenforceable, and (2) if the

Settlement Agreement is unenforceable, set a status conference to discuss the resumption of the judicial proceedings.

DATED this 8th day of February, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February, 2011, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DETERMINE ENFORCEABILITY OF SETTLEMENT AGREEMENT WITH MASON CREEK DITCH COMPANY** to be served by the method indicated below, and addressed to the following:

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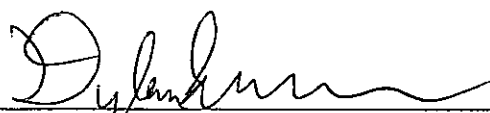
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