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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, and 63-32580 **MASON CREEK'S RESPONSE TO PIONEER IRRIGATION DISTRICT'S MOTION TO DETERMINE ENFORCEABILITY OF SETTLEMENT AGREEMENT WITH MASON CREEK DITCH COMPANY**

COMES NOW Mason Creek Ditch Company ("Mason Creek"), by and through its attorneys of record Barker Rosholt & Simpson, LLC, and pursuant to SRBA Administrative Order 1 and Rule 7(b)(3)(E) of the Idaho Rules of Civil Procedure, hereby submits the following *Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek.*

I. INTRODUCTION

Mason Creek owns water right 63-179C. This is right #46 decreed in the Stewart decree for 37.2 cfs with an 1868 priority date. This right has been diverted from the Boise River into the Caldwell Highline on a continuous basis since at least 1918 to the present. Mason Creek also owns a waste water right diverted from Mason Creek, 63-32580 with a priority date of 1922, and has filed a late claim 63-33392 for waste water diverted from Five Mile Creek. Pioneer objected to 63-179C and 63-32580, and filed a competing claim (63-179A) to Mason Creek's Boise River right.

After discovery and cross motions for summary judgment were heard and decided by this Court, and after the Court found issues of fact related to Pioneer's objections, the parties entered into a settlement agreement resolving all of Pioneer's objections to all of Mason Creek's rights. At Pioneer's insistence, this settlement agreement was recorded. The settlement agreement requires Pioneer to dismiss its objections to the Mason Creek right within 10 days of recording and to refrain from objecting to Mason Creek's right 63-33392, as long as the priority date is not before 1922.

The settlement agreement provides that Mason Creek will continue to divert its right from the Boise River into the Highline Canal at no cost to Mason Creek, as historically was the case. Pioneer can deliver its own water rights into the Highline as long as these deliveries do not interfere with Mason Creek deliveries.

In exchange, Pioneer received important benefits. Mason Creek acknowledges Pioneer's ownership and control of the Highline Canal's operations, maintenance and repair. Pioneer is permitted to use Mason Creek's water rights diverted into the Highline free of charge. Mason

Creek is not permitted to lease any of its water diverted into the Highline if Pioneer needs that water to meet the needs of Pioneer's landowners who take water from the Highline.

Now Pioneer asserts (after consulting with its attorneys) that the settlement agreement it freely and voluntarily entered into is illegal. Pioneer does not contend that there was any fraud or coercion. Ultimately, Pioneer's lawyers do not like the deal their client agreed to and have filed this motion to set aside the deal.

Yet at the same time, Pioneer has agreed with Franklin Ditch Company to certain modifications to one paragraph of an identical agreement and has now dismissed its objections to Franklin's rights to use the same canal, with the same essential provisions. Pioneer advised the Court of this development on the Franklin right, but failed to tell the Court that Pioneer rejected the very same changes to the identical Mason Creek agreement.

The only clue to this discrepancy between how Pioneer is treating Franklin and Mason Creek is its claim that Mason Creek "has not produced a document" and Franklin did. *Pioneer's Brief pp. 9-10.* In other words, Pioneer is trying to use this motion to litigate the underlying dispute over the scope and extent of Mason Creek's pre-existing rights. As we show herein, Pioneer is legally precluded from relitigating this issue which was resolved in the settlement agreement, and there is ample evidence from Pioneer's own records admitting that Mason Creek had a right to use the Highline long before the settlement agreement.

This Court should not so freely cast aside this very carefully considered and mutually beneficial agreement on the flimsy grounds offered by Pioneer.

II. STATEMENT OF UNDISPUTED FACTS

1. "Mason's water right claim 63-179C is likewise based upon the *Stewart Decree. Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company,* Ex. A. Therein, Mason was decreed 1,860 miners inches (37.2 cfs) of water from the Boise River. The point of diversion is described as 'a point on the south bank thereof near the center of the east line of Sec. 16, T.4N. R. 2W B.M.'" *Court's Order*, at 5. (citing Stewart decree ¶ XLIII.)

2. "Again, Pioneer has not offered into the record any post-decree deed or instrument of conveyance that would have changed ownership of this right from Mason to Pioneer." *Id.*

3. Water right 63-179C has been delivered in the Caldwell Highline Canal since at least 1915 or 1918 as evidenced by a 1918 transfer of a small portion of Mason Creek's right No. 46 in the Stewart decree to a POD on the north side of the Boise River from the Highline. Idaho Department of Water Resources Transfer File No. 29, Exhibit A to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.*

4. Water right 63-179C "is diverted, conveyed, and delivered to the water users comprising the Mason Creek Ditch Co. through Pioneer's Highline Canal." Pioneer's Response to Mason Creek's Interrogatory Nos. 2&3 in *Pioneer Irrigation District's Response to Mason Creek Ditch Company's First Set of Discovery Requests,* Exhibit B to *Affidavit of Albert P.*

Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.

5. Pioneer's records show the following:

a. In 1915 noted Caldwell water lawyer Walter Griffith wrote to Pioneer confirming that Mason Creek and Franklin rights were diverted into the Highline, and complaining that Right No. 90 had been moved to the Phyllis Canal. PID000074, Exhibit C to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.*

b. In 1928, Fred Evans, Secretary of Pioneer, wrote to the water master, Williams Welch, stating: "As you are also aware this District is under contract to carry through its Caldwell Canal the water decreed to the Franklin Ditch Co. under decrees nos. 34 and 77, and to the Mason Creek Ditch Co. under decree No. 46, amounting to 40010 inches." Exhibit D to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.*

c. In 1938 PID records reveal:

> "Years ago when Pioneer Irrigation District took over the Mason Creek Ditch Company and Franklin Ditch Company it enlarged the ditch those companies had been using and called it the Caldwell highline. In return for rights-of-way of Franklin Ditch Company and Mason Creek Ditch Company, P.I.D. agreed to carry their decreed water from the river through the Highline ditch which P.I.D. had enlarged and make no assessments against the lands of those two ditch companies. Turner thinks there is a contract covering this. The

> Highline probably had no water until P.I.D. made this trade with the Franklin and Mason Creek Companies."
>
> * * *
>
> As to Highline water, P.I.D. has nothing decreed in its name. Its Highline water is decreed as follows:
>
> To Franklin Ditch Company (Rights Nos. 34 and 77).
> To Mason Creek Ditch Company (Right No. 46).

PID000097 (emphasis added). Exhibit E to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.*

d. In 1940, Turner (a PID Board member) and Welsh (the water master) reported to Pioneer that when Pioneer's right No. 90 was transferred from the Highline to the Phyllis and there was a hearing on that transfer. PID00127. No records have been located of that hearing, but as of 1937 right No. 90 was not delivered to the Highline and has not been delivered there since. Exhibit F to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company*; see also *Sisco and Barrie Affidavits*.

e. As late as 2007, Pioneer records show that the Pioneer Board and/or its counsel advised Mason Creek that putting water in the water bank may violate "the contract they currently have with Mason Creek Ditch Company..." PID000316. Exhibit G to *Affidavit of Albert P. Barker in Support of Mason*

Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.

6. From at least 1937 to the present, the water master reports for District 63 identify Franklin and Mason Creek water rights as the only rights delivered to the Highline. See *Sisco and Barrie Affidavits* filed concurrently herewith.

7. Actual deliveries of water to the Highline by the District 63 water master have been limited to Franklin and Mason Creek rights (Stewart decree rights 34, 46 and 77). *Id.*

8. No Pioneer Stewart decree rights have been delivered to the Highline since at least 1937. *Id.*

9. Pioneer claimed water right 63-179A with the same amount of water and same POD as Mason Creek's right 63-179C. Upon summary judgment, this Court found no basis for Pioneer's claim to this right and granted Mason Creek's motion that this right be disallowed. *Court's Order p. 5.*

10. Upon motion for summary judgment brought by Mason Creek seeking to dismiss Pioneer's objections to Mason Creek rights, this Court held that there were "material questions of fact" on the issues raised by Pioneer concerning its objections to Mason Creek's rights including relating to the diversions into the Highline. *Court's Order p. 7.* In other words, this Court ruled there was a dispute between Pioneer and Mason Creek over the facts that prevented resolution on summary judgment.

11. Faced with expensive litigation in this and other forums and the realization that its actions had engendered ill will, Pioneer decided to settle with both Mason Creek and Franklin on

essentially the same terms, in what Pioneer deemed to be a "reasonable settlement." *Newbill Affidavit*, p. 3, ¶ 9.

III. ARGUMENT

A. The Settlement Agreement When Construed as a Whole is Enforceable

1. Pioneer's Board of Directors had Authority to Settle

Idaho Code § 43-304 outlines the general powers of an irrigation district board of directors. Those powers include "the power to manage and conduct the business and affairs of the district, make and execute all necessary contracts, ..." Pioneer admits that a settlement agreement is construed as a contract, *Pioneer's Brief at 4*, and thus within Pioneer's power to enter. Moreover, Idaho Code § 43-304 provides that the Board "may enter into contracts for a water supply to be delivered to the canals and works of the district...". This settlement agreement specifically provides that Mason Creek water is delivered to Pioneer's Highline Canal and that this water is available for use by Pioneer when not needed by Mason Creek. Settlement Agreement ¶¶ 4-5.

2. Public Policy Favors Settlement

Idaho has a strong public policy favoring settlement. Idaho law "favors the avoidance or settlement of litigation, and compromises in good faith for such purposes will be sustained as based upon a sufficient consideration, * * *." *Aguirre v. Hamlin*, 80 Idaho 176, 181, 327 P.2d 349, 351 (1958) (quoting *Nelson v. Krigbaum*, 38 Idaho 716, 226 P. 169, 170 (1924). Indeed, the compromise of a claim is sufficient consideration to sustain a settlement agreement. *Wilson v. Bogert*, 81 Idaho 535, 543, 347 P.2d 341, 345-346 (1959). Because "(t)here is an obvious public policy favoring the amicable settlement of litigation, . . . agreements accomplishing this

result will be disregarded only for the strongest of reasons." *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.* 99 Idaho 539, 542, 585 P.2d 949, 952 (1978) (citing *Service Oil Co. v. Coleman Oil Co.*, 470 F.2d 925, 929 (1st Cir. 1972)). The burden is on the party who moves to set aside a settlement agreement to provide sufficient grounds, and "such reasons must be shown by clear, satisfactory and convincing evidence." *Id.*, (citing *Ranta v. Rake*, 91 Idaho 376, 421 P.2d 747 (1966)).

Wilson v. Bogert, a leading Idaho case on the law of settlement agreements, thoroughly explains the operation and effect of a settlement agreement:

> Where the parties to a legal controversy, in good faith enter into a contract compromising and settling their adverse claims, such agreement is binding upon the parties, and, in the absence of fraud, duress or undue influence, is enforceable either at law or in equity according to the nature of the case. Such a contract stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally. An agreement of compromise and settlement is a merger and bar of all pre-existing claims which the parties intended to settle thereby. Such prior claims are thereby superseded and extinguished. The compromise agreement becomes the sole source and measure of the rights of the parties involved in the previously existing controversy. The existence of a valid agreement of compromise and settlement is a complete defense to an action based upon the original claim.

Wilson v. Bogert, 81 Idaho 535, 542, 347 P.2d 341, 345 (1959) (internal citations omitted).

Pioneer's motion simply ignores this strong public policy.

3. Pioneer May Not go Behind the Settlement Agreement to Litigate the Disputed Issues of Fact Concerning Mason Creek's Prior Rights

Essentially Pioneer asks this Court to accept its legal arguments that Mason Creek had no pre-existing right to have water delivered to the Highline, because Mason Creek has not "produced a document." *Pioneer's Brief pp. 9-10.* Pioneer would have this Court ignore the nearly 100 years of uninterrupted delivery of Mason Creek water to the Highline, and Pioneer's

own records which repeatedly admit that there was a pre-existing agreement with Mason Creek. Instead, Pioneer asserts that Mason Creek could not prove its right in litigation; litigation which is now settled by Pioneer's agreement.

The Idaho Supreme Court in *Wilson v. Bogert* held:

> In an action brought to enforce an agreement of compromise and settlement, made in good faith, the court will not inquire into the merits or validity of the original claim.

81 Idaho at 542. This holding was recently affirmed by the Court in *Goodman v. Lothrop*, 143 Idaho 622, 625, 151 P.3d 818, 821 (2007). There the Court stated that the appellant's strenuous arguments about the strength of their underlying case was irrelevant and "not the issue before this Court." *Id.*

Thus, Pioneer cannot argue here that Mason Creek's rights to use the Highline are weaker than Franklin's because there is no "document" or that Mason Creek had no actual right to use the Highline Canal. It is enough that Mason Creek's "claim honestly and in good faith asserted, concerning which the parties may *bona fide* and upon reasonable grounds disagree." *Wilson v. Bogert*, 81 Idaho at 543, quoting *Health v. Potlach Lumber Co.*, 18 Idaho 42, 49, 108 P.343, 345 (1910). This Court has found material issues of fact regarding Pioneer's objections to Mason Creek's rights, including the POD at the Highline canal, thus establishing as a matter of law there is at the very least a *bona fide* dispute. Moreover, Pioneer makes no claim that the agreement is unenforceable for fraud, duress, or coercion.[1]

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[1] In Idaho, an agreement to compromise and settle is binding in the absence of fraud, duress or undue influence. *Saint Alphonsus Reg'l Med. Ctr., Inc. v. Krueger*, 124 Idaho 501, 506-07, 861 P.2d 71, 76-77 (Idaho Ct. App. 1992). Pioneer describes the settlement discussions as "contentious," *Pioneer's Brief* at 3, and Alan Newbill mentions in his affidavit that a Franklin board member yelled at him. *Newbill Affidavit* at 2, ¶6. Even though Pioneer does not claim fraud, duress or undue influence as factors that the Court should consider regarding the enforceability of the settlement agreement, any claim of fraud, duress or undue influence by Pioneer would nonetheless fail because Pioneer cannot assert those claims under Idaho law. (*See Lomas & Nettleton Co. v. Tiger Enterprises*, 99 Idaho 539,

4. The Settlement Agreement Benefits Pioneer and its Landowners

Pioneer's counsel has focused on only one clause in the settlement agreement and ignores the significant benefits the agreement provides to Pioneer and its landowners. The settlement agreement gives Pioneer the right to receive Mason Creek's water which is needed by Pioneer's landowners in the event Mason Creek wishes to lease its water delivered to the Caldwell Highline. *Settlement Agreement*, § 4. Mason Creek also agreed not to charge Pioneer for use of its tail water diverted in the Highline under Mason Creek's water right. *Settlement Agreement*, § 5.

Additionally, compromise of a claim asserted by one party and challenged by the other is sufficient consideration to support a settlement agreement. The Idaho Supreme Court explained this principle in *Wilson v. Bogert*:

> Whether the plaintiff in fact could have maintained such action is not the test in determining whether there was a consideration for the compromise agreement. If the plaintiff made his claim in good faith and the defendant company denied its liability, and to avoid a lawsuit agreed to pay the plaintiff his wages as a consideration for the plaintiff's not bringing such suit, then there was sufficient consideration to support such compromise agreement. In such cases it is sufficient if the plaintiff in good faith makes a claim, and the defendant disputes such claim, and in consideration of the plaintiff's forbearance to sue in respect to such claim promises to pay plaintiff a certain sum of money. In such cases there is a consideration for such promise, and the same may be enforced in an action at law.

542, 585 P.2d 949, 952-53 (1978) "Duress must result from the opposing party's wrongful and oppressive conduct and not from the claimant's necessities. It cannot result merely from the opposing party's insistence on a legal right and the other party's yielding to the insistence."; *Saint Alphonsus Reg'l Med. Ctr., Inc. v. Krueger*, 124 Idaho at 508, 861 P.2d at 78 "Fraud involves (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the other party and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the truth of the statement; (8) the hearer's right to rely on the statement; and (9) injury."; and *Liebelt v. Liebelt*, 118 Idaho 845, 848, 801 P.2d 52, 55 (Idaho Ct. App. 1990) "Undue influence is proven by showing that a person who has mental capacity to understand, and does understand, what he is doing, and is compelled by artifice, force or fear to do, what he does not want to do, and what he would not otherwise do but for such influence." Importantly, a party's "failure to read the contract or otherwise inform himself as to the nature, terms and conditions of the contract constitutes nothing more than gross negligence on the part of that party and is an insufficient ground upon which to set the contract aside." *Id.*, at 118 Idaho 848-849, 801 P.2d at 55-56.

Wilson v. Bogert, 81 Idaho 535, 543, 347 P.2d 341, 345-346 (quoting *Heath v. Potlatch Lumber Co.*, 18 Idaho 42, at 50-51, 108 P. 343, at page 346 (emphasis added).

Indeed, Pioneer's Board recognizes that settlement of its objections provided Pioneer with the benefit of ending costly litigation and avoided creating further ill will with its co-users of the canal. Thus, this agreement provides substantial benefits to Pioneer's irrigation system and its coffers.

5. Whether the Prior Agreement Can be Located is Irrelevant

Pioneer argues that the settlement agreement is unenforceable because Mason Creek has not "produced a document" establishing its legal rights. *Pioneer's Brief pp. 9-10.* Pioneer argues that the statute of frauds and the best evidence rule preclude Mason Creek from making this showing presumably as a matter of law. As the Court is aware, the parties addressed these very same arguments in the motion for summary judgment. The Court held that there are material questions of fact concerning the existence of the contract and its enforceability. In construing the settlement agreement, Pioneer would have the Court rule as a matter of law that Mason Creek cannot establish the terms of a prior agreement with Pioneer based on these legal doctrines even though this Court previously determined that there were material issues of fact concerning that agreement when the Court denied Mason Creek's summary judgment motion.

As the Court is aware from the prior summary judgment hearing and as set forth in the statement of facts herein, there is significant evidence that there was an agreement and that Pioneer admitted to this agreement. Thus, for example, since at least 1915 water rights of Mason Creek have been delivered into the Highline Canal without protest by Pioneer. Pioneer admitted that there was a contract with Mason Creek under which it acquired the right to use rights of way

from Mason Creek and Franklin in exchange for placing the Mason Creek and Franklin rights into the Highline. Indeed, the Idaho Supreme Court in *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 66 P.2d 115 (1937) has held that an irrigation district can be estopped from asserting that rights were not properly transferred into a canal merely by 20 years of uninterrupted and unobjected to use. Here, the uninterrupted and unobjected to use is on the order of 90+ years. Moreover, as the affidavits of the water master of District 63 demonstrate, only Mason Creek and Franklin rights have been diverted to the Highline and none of Pioneer river flow rights have been diverted into the Highline.

6. The Mutual "No-Cost" Provisions in the Settlement Agreement do not Render the Contract Unenforceable

This settlement agreement provides that Pioneer can use Mason Creek's water that is not used by Mason Creek at no cost to Pioneer. Indeed, Pioneer's reliance on Mr. King's affidavits suggest that Mason Creek's water diverted into the Highline is a significant benefit to Pioneer. The settlement agreement provides that in return for free use of its water, Mason Creek is not required to pay for the cost of operation and maintenance of the canal. Indeed, the settlement agreement confirms that operation and maintenance of the canal is entirely under the control of Pioneer.

Next, Pioneer admits that at no time in the past has Mason Creek ever been charged by Pioneer for use of the water. Accordingly, based upon the Pioneer documents admitting that the original agreement with Mason Creek, exchanging rights of way for a provision that there would

be no assessments against Franklin and Mason Creek, is clearly part of the original agreement and justifies the parties carrying over that prior agreement into this settlement agreement.[2]

7. Pioneer Has Misconstrued ¶ 7 in a Misguided Attempt to Find it Unenforceable

Mason Creek believes that the challenged provisions of ¶ 7 of the settlement agreement are clear and unambiguous. Pioneer agrees to convey water which is diverted under Mason Creek's water rights into the Highline at no cost to Mason Creek. The water rights that are delivered to Mason Creek are represented by right no. 63-197C. Mason Creek's right 63-32580 is diverted from Mason Creek. Mason Creek's late claim for water right 63-33392 is diverted from Five Mile Creek. Both of these latter rights are waste water rights. Neither are diverted from the Boise River and neither are diverted into or from the Highline Canal. Pioneer's attempt to create confusion by alleging that the agreement somehow subordinates its Boise River rights to these waste water rights is absurd. The agreement says no such thing. The agreement continues the status quo as outlined in the Affidavits of Lee Sisco and Rex Barrie. Franklin and Mason Creek rights 63-166, 63-167, and 63-179C are the primary rights diverted into the Highline. If Pioneer wishes to divert any of its other rights into the Highline it is free to do so by enlarging the capacity of the Highline.

Pioneer's arguments about the priority doctrine are equally absurd. What Pioneer does not tell the Court in its motion is that all of its Boise River rights have a point of diversion at the Phyllis Canal. Pioneer does not mention that the Phyllis Canal has a capacity many times the size of the Highline or that the Phyllis Canal is higher up on its system and therefore able to provide more water to more land in the Pioneer district. The settlement agreement does not

[2] Notably, the enforceable settlement agreement between Pioneer and Franklin contains these same terms that Pioneer asserts are unenforceable.

provide that Pioneer cannot divert its early prior water rights at all or subordinate its rights to any of the Mason Creek rights. The settlement agreement merely provides that unless Pioneer enlarges the Highline to provide sufficient capacity then its early priority rights will have to be delivered in the Phyllis Canal as they have historically been delivered.

Pioneer argues that it has "several decreed water rights" that are senior to 63-179C or 63-32580. Yet, what Pioneer does not tell the Court is that only one of these rights has an earlier priority date than Mason Creek's right 63-179C. That is right 63-161BU, with an 1866 priority. Pioneer does not tell the Court that 63-161BU was a Stewart decree right (No. 30) that Pioneer acquired from Consumers Water Corporation in 1964 and that right was originally decreed not to be delivered into either the Phyllis or the Highline, but to the Walling ditch in Boise. See IDWR Transfer Records - #1038. Exhibit H to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company.* In other words, water right 63-161BU is the result of a very late transfer from the location decreed in the Stewart decree for that right. As such, it is subject to all prior uses of that point of diversion. Idaho Code § 42-222. As a matter of law, that right cannot be diverted into the Highline in a way that would interfere with the previously established diversions of Franklin and Mason Creek including any junior rights ("provided that no other water rights will be injured." *Id.*)

The remainder of Pioneer's Boise River rights are junior to the Mason Creek Boise River right, but even then those rights have never been delivered to the Highline Canal. *Sisco and Barrie Affidavits*. Accordingly, this settlement agreement does not injure any of Pioneer's Boise River rights or any of its waste water rights. Thus, it is no surprise that Pioneer cites to the Court

no case law asserting that where it changes its point of diversion through an accomplished transfer, that it has the right to move out a junior right. Of course it cannot because the accomplished transfer statutes also prohibit injury even to a junior right. Idaho Code § 42-1425. Moreover, Pioneer's claim to an accomplished transfer for any of its Boise River rights is dubious at best since the District 63 water master records establish that none of these rights have been delivered to the Highline Canal at least since 1937. Indeed, it is likely that right No. 90, which was the only Pioneer right decreed to the Highline, has not been delivered there and that right is junior to Mason Creek's right No. 63-179C.[3]

8. The Settlement Agreement Does Not Violate Pioneer's Responsibility to its Landowners

Finally, Pioneer challenges the enforceability of the settlement agreement arguing that "contracts by irrigation districts which favor non-patrons over patrons are unenforceable." *Pioneer's Brief* at 5. Pioneer places exclusive reliance for this proposition on *Yaden v. Gem Irrigation Dist.*, 37 Idaho 300, 216 P.250 (1923).

In *Yaden* the Court recognizes that "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 furnishes water to settlers within the district cannot be compelled thereafter to furnish water to settlers outside of the district." *Yaden v. Gem Irr. Dist.*, 37 Idaho at 308, 216 P. 252. (emphasis added.) In its brief, Pioneer emphasizes the last sentence which is inapplicable to this litigation. *Pioneer's Brief at 6.*

[3] If the Court opens up this settlement agreement, Mason Creek will ask the Court to reopen the partial decrees on these Pioneer rights which assert a POD on the Highline which has never been exercised or decreed.

Pioneer's own records demonstrate just such a pre-existing obligation:

> Years ago when Pioneer Irrigation District took over the Mason Creek Ditch Company and the Franklin Ditch Company it enlarged the ditch those companies had been using and called it the Caldwell Highline. In return for rights-of-way of Franklin Ditch Company and Mason Creek Ditch Company, P.I.D. agreed to carry their decreed water from the river through the Highline ditch which P.I.D. enlarged and make no assessments against the lands of those two ditch companies.

Exhibit B to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company* (emphasis added). Thus, as Pioneer's own records unambiguously memorialize, Pioneer acquired "a system which had theretofore furnished water to settlers outside of the district, who had a vested right thereto..." *Yaden*, 37 Idaho at 308. Pioneer is therefore "compelled to continue to deliver such water." *Id.*

Pioneer has acknowledged over the years its pre-existing duty to deliver Mason Creek's water to Mason Creek. See Exhibit D to *Affidavit of Albert P. Barker in Support of Mason Creek's Response to Pioneer Irrigation District's Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company* ("this District is under contract to carry thru its Caldwell Canal the water decreed to the Franklin Ditch Co under decrees Nos 34 and 77, and to the Mason Creek Ditch Co under decree No 46, amounting to 4010 inches.") and Exhibit E ("In return for rights-of-way of Franklin Ditch Company and Mason Creek Ditch Company, P.I.D. agreed to carry their decreed water from the river through the Highline ditch which P.I.D. had enlarged and make no assessments against the lands of those two ditch companies.... As to Highline water, P.I.D. has nothing decreed in its name. Its Highline water is

decreed as follows: To Franklin Ditch Company (Rights Nos. 34 and 77). To Mason Creek Ditch Company Right No. 46.)"

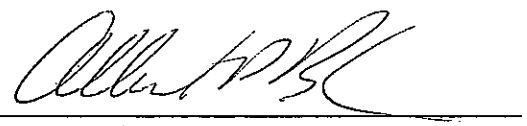
Jones v. Big Lost Irr. Dist., 93 Idaho 227, 459 P.2d 1009 (1969), and *Jensen v. Boise-Kuna Irrigation District,* 75 Idaho 133, 269 P.2d 755 (1954) are of no help to Pioneer either. These cases stand for the proposition that the district cannot transfer its own water rights to persons outside the district if the water is needed within the district. Nothing of the sort occurred here. It is Mason Creek's water that is delivered to Mason Creek landowners. Pioneer benefits from this delivery because Pioneer can take any water not used by Franklin and Mason Creek and deliver those entities water to Pioneer patrons. This agreement is a net benefit in water to Pioneer patrons.

IV. CONCLUSION

Pioneer should not be permitted to litigate the merits of the underlying case under the guise that the "reasonable" settlement agreement which involved give and take between the parties is unenforceable. This settlement agreement benefits Pioneer, Mason Creek, their landowners, and the Court's scarce judicial resources, and must be upheld.

DATED this 15th day of February, 2011.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
Attorneys for Mason Creek Ditch Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2011, I caused to be served a true and correct copy of the foregoing **MASON CREEK'S RESPONSE TO PIONEER IRRIGATION DISTRICT'S MOTION TO DETERMINE ENFORCEABILITY OF SETTLEMENT AGREEMENT WITH MASON CREEK DITCH COMPANY** by the method indicated below, and addressed to each of the following:

Filed via Hand Delivery:

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

Served via U.S. Mail:

IDWR Document Depository
P.O. Box 83720
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United States Department of Justice
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