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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

**OBJECTION AND REPLY IN
SUPPORT OF PIONEER'S MOTION TO
DETERMINE ENFORCEABILITY**

Pioneer Irrigation District, through undersigned counsel of record, hereby files this objection to certain evidence adduced by Mason Creek Ditch Company and reply in support of Pioneer's motion to determine the enforceability of the Settlement Agreement between Pioneer and Mason. Due to the Presidents' Day holiday, pursuant to Idaho Rules of Civil Procedure 6(a) and 7(b)(3)(E), this reply was technically due on Thursday, February 17, 2011.

**OBJECTION AND REPLY IN SUPPORT OF
PIONEER'S MOTION TO DETERMINE ENFORCEABILITY - 1**

Client:1944135.1

Pioneer received Mason's response brief the afternoon of Tuesday, February 15, allowing only two days to generate a reply. Counsel for Mason has agreed to extend the deadline for Pioneer's reply until Friday, February 18. Pioneer hopes the Court finds this one-day extension acceptable.

I. INTRODUCTION

In its motion and opening memorandum, Pioneer discussed the trust relationship between an irrigation district and its patrons, as established by Idaho Code Section 43-316 and decisions of the Idaho Supreme Court. (Pioneer's Mem. in Supp. of 2/8/11, pp. 5-7.) Pioneer then went on to explain its concerns regarding whether the various provisions within Paragraph 7 of the Settlement Agreement violate the trust responsibility. These are:

1. Imposing responsibilities upon Pioneer to deliver Mason's Mason Creek water right (63-32580) through or from the Caldwell Highline Canal, when there is no legal basis to do so and when releases from the canal to Mason Creek are for flow management purposes (*id.*, pp. 7-9);
2. Requiring Pioneer to deliver the entirety of Mason's Boise River right (63-179C), when the evidence shows Mason has historically diverted and beneficially used little, if any, Boise River water (*id.*, pp. 9-10);
3. Providing Mason with free water deliveries, when there is no pre-existing legal obligation to do so (*id.*, pp. 10-11);
4. Subordination of all of Pioneer's water rights to both Mason rights, where Pioneer has senior rights and the evidence shows that Mason has historically beneficially used little, if any, Boise River water (*id.*, pp. 11-12); and
5. Elevation of Mason over Pioneer's own patrons in Pioneer's operation of the Caldwell Highline Canal. (*Id.*, p. 12.)

II. OBJECTION TO EVIDENCE ADDUCED BY MASON

Before proceeding with its legal argument, Pioneer lodges the following objections to evidence adduced by Mason:

1. Stale and irrelevant discovery response. Mason relies upon a discovery response from Pioneer dated September 9, 2010. (Mason Resp. p. 4; Barker Aff. Ex. B.) Pioneer subsequently supplemented that particular response in accordance with Idaho Rule of Civil Procedure 26(e), on October 1, 2010. (Lawrence Aff. Ex. A.) In addition, the stale response relied upon by Mason was in response to a request regarding the basis for Pioneer's competing claim to 63-179A, not Pioneer's objection to 63-179C. Therefore, the discovery response adduced by Mason should not be considered because it is irrelevant pursuant to Idaho Rules of Evidence 401 and 402.
2. Sisco and Barrie affidavits. The relevance of the Sisco and Barrie affidavits is extremely limited. It is well known that the watermaster's duties end at the headgate from the Boise River. Nothing in either of those affidavits reflects personal knowledge of water delivery and use downstream of the headgate of the Caldwell Highline Canal. Therefore, Mr. Sisco and Mr. Barrie do not have personal knowledge as to whether and how much water has historically been actually diverted and used by the Mason Creek Ditch Company. Pioneer objects on relevance and personal knowledge grounds under Idaho Rules of Evidence 401, 402, and 602, to the extent the Sisco and Barrie affidavits are utilized for any purpose other than to establish that previous Water District 63 annual reports have associated Mason's Boise River right with the Caldwell Highline Canal.
3. Walter Griffiths' letter of June 17, 1915. Mason relies upon this letter to support its argument that there is a contract which entitles Mason to convey its water right

63-179C through the Caldwell Highline Canal. (Mason Resp. p. 5; Barker Aff. Ex. C.) The copy of that letter Pioneer received from Mason is virtually illegible, so Pioneer is providing a copy as Exhibit B to the Lawrence Aff. The context of that letter appears to be that it was a demand letter sent to Pioneer by an opposing attorney. This is not a reliable source of factual information as to whether Pioneer was contractually obligated to convey water right 63-179C through the Caldwell Highline Canal and should therefore be disregarded on relevance grounds under Idaho Rules of Evidence 401 and 402.

4. Anonymous document dated May 9, 1938. Mason relies upon this document to support its argument that there is a contract which entitles Mason to convey its water right 63-179C through the Caldwell Highline Canal. (Mason Resp. pp. 6, 17; Barker Aff. Ex. E.) The copy of that letter Pioneer received from Mason is virtually illegible, so Pioneer is providing a copy as Exhibit C to the Lawrence Aff. The author of that document simply states that, “Turner *thinks* there is a contract” governing the relationship between Pioneer and Mason. (Emphasis added.) Therefore, Pioneer objects to reliance upon this document on relevance grounds under Idaho Rules of Evidence 401 and 402.

III. LEGAL ARGUMENT

A. Mason’s Caustic Tone Belies The Context In Which Pioneer Filed Its Motion And The Differences Between Mason And The Franklin Ditch Company

Mason’s response takes an unnecessarily caustic tone, referring to Pioneer’s concerns as, among other things, “flimsy” and “absurd.” (Mason Resp. pp. 3, 14.) This type of approach is easily taken by those who are not subject to the trust responsibility that is the basis for Pioneer’s motion. The culmination of Mason’s acrimony is an accusation that, “Pioneer’s lawyers do not like the deal their client agreed to and have filed this motion to set aside the deal,”

(Mason Resp. p. 3), the apparent implication of which is that counsel for Pioneer did not have authority from Pioneer itself to file the motion in the first place. Mason's speculation is unfounded and false. Acting on behalf of a client without the client's authorization would be an obvious breach of the rules of professional conduct.

Given that Mason has now devolved into the realm of asserting ethical violations, Pioneer feels it is important to remind the Court of the context in which the Settlement Agreement was signed, and in which Pioneer now brings its motion. Pioneer prevailed on both its own motion for partial summary judgment and on the portion of Mason's motion for summary judgment which sought dismissal of Pioneer's objections to the specific elements of 63-179C. No motions for summary judgment were filed as to 63-32580. Accordingly, prior to Pioneer's agreement to enter into settlement discussions, the parties were on track for preparing and participating in an injury/enlargement hearing before IDWR on 63-179C, and a separate trial before this Court on both 63-179C and 63-32580. While Mason would prefer that Pioneer not have filed its motion, it should recall that this motion ultimately arises out of Pioneer's good faith efforts to resolve this matter in order to avoid the hearing and trial for both parties.

Neither Pioneer nor its attorneys enjoy taking the position that Pioneer may have breached its trust responsibility. At best, this is awkward for both Pioneer and its counsel. However, once Pioneer became aware of the issue, it determined that acting promptly was the preferable approach. Pioneer cannot ask any court for an advisory opinion. Therefore, the other options were to wait for the SRBA to conclude and file a declaratory judgment action or to operate under this uncertainty until a dispute with Mason arose, or an *ultra vires* action was filed by a Pioneer patron. In any of these scenarios, substantial education of a district judge would be required. Instead, Pioneer determined that filing a motion with a Court with expertise in water

issues generally, and that has already become familiar with these particular water rights through the summary judgment proceedings, to be the preferable approach for everyone involved.

Pioneer has already settled this issue with the Franklin Ditch Company, and sincerely hopes this dispute with Mason will ultimately settle as well. Pioneer has extended what it believes to be reasonable settlement offers to Mason, which Mason has thus far not accepted. In this regard, Mason refers on multiple occasions to the fact that Pioneer has not agreed to settle with Mason on the identical terms that it agreed to settle with Franklin. (Mason Resp. pp. 3, 14, n.2.) Perhaps this is an attempt to imply that Pioneer is acting inconsistently in its dealings with the two ditch companies. However, this is not a valid comparison. As the Court will recall, there is an agreement from 1883 and two indentures from 1884 which specifically obligate Pioneer to convey Franklin water through the Caldwell Highline Canal. (Larson Aff. of 9/14/10, Exs. 1-3.) Mason has produced no such agreement. In addition, in the course of responding to Mason's summary judgment motion, Pioneer became aware that Mason has historically diverted very little Boise River water from the canal; instead, the evidence reflects that virtually all of the water diverted into the canal has historically been diverted and used by Franklin water users. (See King Aff. of 10/1/10.) Given these two fundamental differences, it is not valid to compare Pioneer's dealings with Mason to its dealings with Franklin.

B. Mason Largely Ignores The Trust Relationship Under Section 43-316 And Yaden, Which Is Also A Public Policy Goal

Mason places significant reliance upon the public policy of promoting settlement of disputes. (Mason Resp. pp. 8-9.) Pioneer does not dispute that such a public policy exists. However, Pioneer's motion is based on the trust responsibilities under Section 43-316,¹ which

¹ Mason asserts that Pioneer places "exclusive reliance" upon *Yaden*. (Mason Resp., p. 16.) A more accurate way to characterize Pioneer's concerns is that they are based upon Idaho

the Idaho Supreme Court has also characterized as “public policy.” *See Jensen v. Boise Kuna Irr. Dist.*, 75 Idaho 133, 142, 269 P.2d 755, 760 (1954). The cases relied upon by Mason do not address how to resolve a situation in which these two public policies are in conflict. Therefore, Mason’s implication that Pioneer’s motion is based solely upon the strength of Pioneer’s underlying case (Mason Resp. p. 10), is not true. Instead, Pioneer’s motion is based upon Section 43-316 as applied to uncontroverted facts regarding the historic operation of the Caldwell Highline Canal and use of water by Mason.

In this regard, it is notable that Mason relegates a discussion of the trust relationship to the last substantive section of its response brief. (Mason Resp. pp. 16-18.) This represents either a fundamental misunderstanding of Pioneer’s motion, or an attempt to minimize the concern due to its persuasive value. Either way, Section 43-316 underlies all five of the issues raised in Pioneer’s motion. This is why Pioneer began its legal memorandum with a detailed discussion of Section 43-316 and the Idaho Supreme Court’s application of it. (Pioneer Mem. in Supp. of 2/8/11, pp. 5-7.)

And, in its brief discussion of the trust responsibility, Mason misapplies *Yaden* in two ways. (Mason Resp. p. 16.) First, Mason seeks to avail itself of language which only applies to water users outside the district who have a “vested right” to the conveyance of water through Pioneer’s system. That language only applies to the Franklin Ditch Company, since Mason has not produced an agreement. Even if laches or estoppel were to apply, these doctrines are equitable bars that would apply to Pioneer; they are not “vested rights” owned by Mason.²

Code Section 43-316, as that statute has been interpreted by the Idaho Supreme Court in *Yaden* and other cases.

² Moreover, Mason states that its diversions into the Caldwell Highline Canal have been continuous since 1915 or 1918. (Mason Resp., pp. 4.) And, as the Court will recall, the 1906

Second, Mason's attempts to distinguish *Yaden* on the facts is unpersuasive. Mason's ability to articulate some factual distinctions between *Yaden* and this case does not render *Yaden* inapplicable. To the contrary, *Yaden* specifically addresses the relative rights of water users within an irrigation district and those outside the district, and its holding can be summarized by the simple statement that irrigation districts cannot enter into agreements which favor those outside the district to the detriment of those within the district, unless there is a pre-existing "vested right."

C. Regarding Issue Nos. 1 And 4, Mason's Concession Regarding Delivery Of 63-32580 Practically Mandates Setting The Settlement Agreement Aside

Mason asserts that, "[n]either [63-32580 or 63-33392] are diverted from the Boise River *and neither are diverted into or from the Highline Canal.*" (Mason's Resp. p. 14.) This concession by Mason practically mandates that the Settlement Agreement be set aside. As Pioneer's opening memorandum and supporting affidavits explain, there is no legal or historical basis for imposing any responsibilities or duties upon Pioneer as to the diversion, conveyance, or delivery of 63-32580. (Pioneer Mem. in Supp. of 2/8/11, pp. 7-9.) Despite Mason's assertion that Pioneer's concerns on this issue are an "attempt to create confusion" (Mason's Resp. p. 14), the fact remains that this concern is based upon the plain language of the Settlement Agreement and previous assertions by Mason in discovery. (See Pioneer Mem. in Supp. of 2/8/11, pp. 7-9.)

Mason's arguments regarding interference and injury (Mason's Resp. pp. 15-16), are not applicable because they presume Mason has the legal right to convey its water through

Stewart Decree put Mason's point of diversion 3 to 4 miles downstream of the Caldwell Highline Canal. (See Pioneer Resp. of 10/1/10, pp. 12-14; Pioneer Statement of 10/29/10, p. 9.) Since Pioneer's formation was confirmed in 1902, *Pioneer Irr. Dist. v. Bradbury*, 8 Idaho 310, 68 P. 295 (1902), and Pioneer acquired the Caldwell Canal system that same year, (Fowler aff. of 9/14/10, Ex. A), it could not possibly have acquired that system already subject to Mason's conveyance of water through it.

the Caldwell Highline Canal in the first place. As Pioneer's opening memorandum and other sections of this reply explain, no such right has been established. And, because Mason has historically diverted little, if any, water from the Boise River, there would be no injury or interference.

D. Regarding Issue No. 2, Mason Still Fails To Establish A Contractual Right To Convey 63-179C Through The Caldwell Highline Canal Free Of Charge

Despite all of Mason's reliance upon isolated references to an alleged contract that entitles Mason to the use of the Caldwell Highline Canal, the fact remains that Mason has advanced no legal argument which rebuts Pioneer's arguments under the Statute of Frauds and the Best Evidence Rule, which require production of the actual written agreement. Mason states that, "[t]he Court held that there are material questions of fact concerning the existence of the contract and its enforceability," but does not provide a citation to that particular holding. (Mason's Resp. p. 12.) Pioneer has been unable to locate that holding, but does recall the Court's statement in its "laches" section that, "[a]ssuming *arguendo* that the doctrine of laches applies to Pioneer in this instance, there would still be issues of material fact as to the extent of Pioneer's acquiescence." (Order of 10/22/10, p. 8.) Obviously, this says nothing about an issue of fact as to the existence of a contract between Pioneer and Mason.

The isolated references relied upon by Mason suffer from many defects. The 1915 letter attached as Exhibit C to the Barker affidavit was written by Walter Griffiths, whom Mason characterizes as a "noted Caldwell water lawyer." (Mason Resp. p. 5.) The clear context of that letter is that it was a demand letter by an attorney on behalf of a client, presumably Franklin and/or Mason. Representations contained within a demand letter written by an attorney on behalf of a client are not necessarily true facts. Ironically, that letter also specifically complains that Right No. 90 has been moved to the Phyllis Canal and specifically demands that

Pioneer resume diverting that right through the Caldwell Highline Canal. Right No. 90 was decreed to Pioneer for diversion into the Caldwell Highline Canal (*see* Gould Aff. of 9/14/10, Ex. 3, p. 484), and was later renumbered as water right 63-371. This is one of the water rights that, according to Mason, “have never been delivered to the Highline Canal.” (Mason Resp. p. 15.)

Mason again attempts to have it both ways with Exhibit E (Mason Resp. pp. 6, 17),³ which does not specify its author, and which states that, “Turner *thinks* there is a contract covering” distribution of water to Franklin Ditch Company and Mason Creek Ditch Company. (Emphasis added.) That document then states that, “[t]hese Franklin and Mason Creek rights comprise about 750 to 800 acres.”⁴ In the SRBA, Mason’s recommended place of use for its Boise River right is 1,504.3 acres, and Franklin’s recommended place of use is 2,056 acres. (Lawrence Aff. of 9/14/10, Exs. A-C.)

Mason also overstates what the Barrie and Sisco affidavits actually say about historic diversions of water into the Caldwell Highline Canal. (Mason Resp. p. 7.) According to Mr. Barrie, “[d]uring my tenure as the watermaster for the Boise River, water diverted from the Boise River into the Caldwell High Line Canal *is limited to* water delivered under the Stewart Decree water right nos. 34, 46, and 77.” (Barrie Aff. ¶ 5 (emphasis added).) He does not testify as to the extent of delivery of Mason’s right. Similarly, Mr. Sisco states that the annual Water

³ Page 17 of Mason’s response includes a block quote, which is cited as Exhibit B to the Barker affidavit. Pioneer believes that is a quote from Exhibit E to that affidavit.

⁴ It is also notable that the first paragraph of that document describes the 1883 exchange involving the old Caldwell Canal as one transaction, *i.e.*, “this trade.” This provides further support for the proposition that the 1883 agreement and 1884 indentures between Pioneer’s predecessor and Franklin is the only set of agreements that exist regarding historical obligations to convey water through Pioneer’s canal.

District 63 reports only identify rights 34, 46, and 77 as “authorized to be diverted” into the Caldwell Highline Canal. (Sisco Aff. ¶¶ 7, 8.) This does not establish that Mason’s right is in fact authorized to be diverted into the Caldwell Highline Canal as a legal matter, nor does Mr. Sisco offer testimony as to the actual amount of water actually delivered to Mason.

Given that Pioneer, Mason, and IDWR have not found a contract, when the contracts between Pioneer’s predecessor and Franklin from the 1880s are readily available, the more plausible conclusion is that no such contract exists and that the existence of a contract was a fallacy everyone accepted as true until the parties examined these issues in detail in the summer and fall of 2010, as this litigation progressed. This is precisely why the Statute of Frauds and the Best Evidence Rule exist.

E. Regarding Issue No. 3, Mason’s Arguments Ignore The Effect Of Public Policy Considerations On The Enforceability Of Contracts

The fact that the Idaho Supreme Court has held Section 43-316 to embody public policy vitiates Mason’s contractual arguments. According to the Idaho Supreme Court, “the general rule is that no relief will be granted to either party to an unlawful contract.” *Ingle v. Perkins*, 95 Idaho 416, 417, 510 P.2d 480, 481 (1973). The exception to that general rule is where there are “severable” agreements “supported by distinct consideration.” *Id.* The Idaho Supreme Court has applied the following articulation of how to determine if an agreement is severable:

In determining whether the questioned instrument shall be considered as constituting but one entire contract, or as constituting two or more separate and independent contracts, courts and text book writers have laid down several rules to guide us. It is said-primarily, the question of whether a contract is entire or severable is one of intention, to be determined from the language which the parties have used, and also the subject matter of the agreement. Another inquiry is, whether the parties reached an agreement regarding the various items as a whole or whether the agreement

was reached by regarding each item as a unit. 2 Williston on Contracts, § 863. Another important factor in the determination of the question is whether the consideration is stated to be given for each part as a separate unit or whether there is a single consideration covering the various parts. In *Thompson v. Fesler*, 1929, 74 Ind.App. 80, 123 N.E. 188, 191, the court said: 'The test chiefly relied upon is whether the parties have apportioned the consideration on the one side to the different covenants on the other. If the consideration is apportioned, so that for each covenant there is a corresponding consideration, the contract is severable. If, on the other hand, the consideration is not apportioned, and the same consideration supports all the covenants and agreements, the contract is entire. 3 Page on Contracts, § 1484. A contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment.'

Durant v. Snyder, 65 Idaho 678, 693-94, 151 P.2d 776, 782 -783 (1944) (quoting *Armstrong v. Illinois Bankers Life Ass'n*, 217 Ind. 601, 29 N.E.2d 415, 420, 953, 131 A.L.R. 769).

The plain language of the Settlement Agreement does not indicate any intention that it is severable, or that any of its considerations are capable of apportionment. To the contrary, the Settlement Agreement specifically refers to its provisions as “*mutual* promises, agreements, and understandings.” (Newbill aff. of 2/8/11, Ex. B, p. 1.) Therefore, Mason’s attempts to salvage the Settlement Agreement by reference to other provisions (Mason’s Resp. pp. 11-12, 13-14), have no legal basis.

F. Mason Does Not Rebut Pioneer’s Arguments On Issue No. 5

While Mason offers general legal argument regarding the trust responsibility under *Yaden*, it does not appear that Mason has specifically rebutted Pioneer’s arguments on Issue No. 5, regarding the fact that the last sentence of Paragraph 7 requires Pioneer to “operate, maintain and repair the Highline Canal *in order to deliver Mason Creek’s water rights*.” (Newbill aff. of 2/8/11, Ex. B, p. 2 (emphasis added).) Again, under *Yaden*, Pioneer cannot

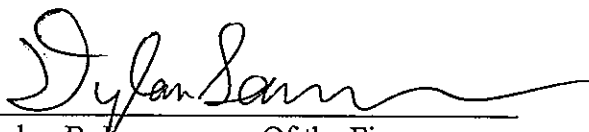
contractually agree to elevate the concerns of landowners outside of district boundaries over those of landowners within district boundaries.

**IV.
CONCLUSION**

Based on the foregoing and on Pioneer's opening motion, memorandum, and affidavits, Pioneer respectfully requests that the Court determine the enforceability of the Settlement Agreement. If the Settlement Agreement is unenforceable, then Pioneer further requests the Court to resume proceedings in subcases 63-179C and 63-32580.

DATED this 18th day of February, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
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By 
Dylan B. Lawrence – Of the Firm
Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2011, I caused a true and correct copy of the foregoing **OBJECTION AND REPLY IN SUPPORT OF PIONEER'S MOTION TO DETERMINE ENFORCEABILITY** to be served by the method indicated below, and addressed to the following:

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