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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 25 2011	
By _____	Clerk
Deputy Clerk	

**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. 63-00179C and 63-32580
	)
Case No. 39576	) ORDER ON PIONEER'S MOTION TO
	) DETERMINE ENFORCEABILITY OF
	) SETTLEMENT AGREEMENT
	)
	) ORDER ON MASON CREEK'S MOTION
	) TO DISMISS PIONEER'S OBJECTIONS
	) TO WATER RIGHTS 63-00179C AND 63-
	) 32580
	)
	) ORDER SETTING SCHEDULING
	) CONFERENCE

Holding: The Settlement Agreement is void for the reason that it commits the use of non-surplus property of the Pioneer Irrigation District to the use of landowners outside the District.

I. PROCEDURAL AND FACTUAL BACKGROUND

Succinctly stated, the dispute in subcase 63-00179C is whether the claimant of the right, Mason Creek Ditch Company (hereinafter "Mason Creek"), has a right to have water delivered via the Caldwell Highline Canal. In other words, the cause of action in the subcase appears to primarily be an action for quiet title as to the right to use the water delivery infrastructure known as the Caldwell Highline Canal. If it is found that Mason Creek does not have a right to have water right 63-00179C delivered through the Caldwell Highline Canal, the corollary issue is how to describe the point of diversion for the right.

The *Director's Report* for water right claim 63-00179C recommended the right for 36.20 cfs of water from the Boise River with a point of diversion located in T04N

R02W S24 NENENE. This is the location of the diversion works where water is diverted from the Boise River into the Caldwell Highline Canal. Water right claim 63-00179C is based upon the decree entered in *Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist. et al.*, aff'd., 14 Idaho 450, 94 P. 761 (1908) (hereinafter "*Stewart Decree*"). In the *Stewart Decree* (January 18, 1906), the point of diversion for Mason Creek's water right 63-00179C is described as "a point on the south bank [of the Boise River] near the center of the east line of Sec. 16, T. 4N. R. 2W. B.M." In other words, at the time of the *Stewart Decree*, Mason Creek's water right with a source of the Boise River was diverted at a different location than is now recommended in the *Director's Report*. The *Director's Report* states: "Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code" and "This right in Caldwell High Line Canal. Trans #29."

It is not disputed that the Pioneer Irrigation District (hereinafter "Pioneer") is the owner and operator of the Caldwell Highline Canal. *Zirschky Aff.* of 9/14/10, ¶ 2. The record contains a copy of an indenture dated June 21, 1902, conveying the "Caldwell Canal" from the Caldwell Land Company Limited to Pioneer. *Fowler Aff.* dated 9/14/10, Ex. A.

Pioneer filed an objection to the *Director's Report* for water right claim 63-00179C. On September 14, 2010, Pioneer filed a *Motion for Partial Summary Judgment and Motion to Remand*, seeking an order remanding the subcase to the Department for a hearing pursuant to I.C. § 42-1425 as to whether the accomplished change in point of diversion resulted in injury or enlargement. Mason Creek also filed a *Motion for Summary Judgment* seeking dismissal of Pioneer's objections to the *Director's Report* for water right 63-00179C. Pioneer's *Motion* seeking remand to the department was granted, the trial was vacated, and a hearing before the department was set to occur on December 14, 2010. Mason Creek's *Motion* seeking dismissal of Pioneer's objection was denied.

Prior to the scheduled hearing before the Department, on November 29, 2010, the parties met for settlement negotiations at Pioneer's office. *Newbill Aff.*, ¶ 6. The respective attorneys of the parties were not present at the meeting. *Id.* Subsequent to this meeting, the parties exchanged written settlement agreements. *Id.* ¶ 8. Pioneer and Mason Creek ultimately executed a settlement agreement. *Id.* A copy of the Settlement

Agreement (hereafter "Settlement Agreement") is attached as Exhibit B to the *Affidavit of Alan Newbill* dated 2/8/11.

On February 8, 2011, Pioneer filed a *Motion to Determine Enforceability of Settlement Agreement with Mason Creek Ditch Company*. The basis of Pioneer's motion is the assertion that certain provisions in the Settlement Agreement violate the trust relationship that exists between an irrigation district and its patrons. Therefore, argues Pioneer, the Settlement Agreement is *ultra vires* and void.

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

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.

II. ANALYSIS

A. Analysis of Property Interests.

In this subcase it is important to describe the various property rights at issue with particularity. As to Mason Creek, it asserts through its claim in the SRBA that it has the usufructory right to divert the waters of the Boise River for use on the lands of Mason Creek shareholders. Mason Creek claims a right to divert this water at a point of diversion that corresponds with the location of the Caldwell Highline Canal. This usufructory right to the use of water is between Mason Creek Ditch Company and the state of Idaho, who is the owner of the water. I.C. § 42-101.

Mason Creek also asserts a separate right to have water conveyed through the Caldwell Highline Canal. This claimed right is not an element of the usufructory water right, but rather it is a right claimed by Mason Creek as against the owner of the Caldwell

Highline Canal (Pioneer) and/or against the underlying fee owners of the land upon which the Canal is built.

Mason Creek asserts that water from the Boise River has been diverted into the Caldwell Highline Canal on a continuous basis since at least 1918 to the present. *Mason Creek's Response Brief*, p. 4, citing 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*. Mason Creek asserts that its water has heretofore been diverted into the Caldwell Highline Canal pursuant to a contract with Pioneer. Mason Creek has put in the record documents which refer to such a contract, but a written contract itself, if such exists, has not been found by either party. *See e.g. Barker Aff.*, Ex. D.

As to the right of Mason Creek to continue to have its water right diverted into and conveyed via the Caldwell Highline Canal, Mason Creek asserts that the Settlement Agreement is binding, not *ultra vires* and not void. In the event that the Settlement Agreement is found to be *ultra vires* and void, Mason Creek would necessarily have to assert some other basis for the continued right to have water diverted under 63-00179C delivered via the Caldwell Highline Canal.

Looking prospectively, the right to convey water through the Caldwell Highline Canal is neither created nor memorialized by simply decreeing a particular point of diversion. For example, if Mason Creek's past deliveries were made pursuant to a license agreement with Pioneer, such a license could be revoked by the grantee at any time. Such revocation could take place during the pendency of the adjudication of the right, or even after a partial decree is issued. The partial decree could not transform a license into something it is not. The delivery of water in years past at a particular point of diversion and through the conveyance infrastructure of another pursuant to a license agreement may well be sufficient for purposes of demonstrating the continued beneficial use of a water right so as to defeat a claim of forfeiture or abandonment, and hence such a right could be recognized via a partial decree in the SRBA. As between the right holder and the state of Idaho, the right holder would have the right to continue to divert water in the future. However, as between the right holder and the licensor, the partial decree in no

way would ensure the right of the licensee for future deliveries across the land or through the conveyance system of such licensor.

A partial decree setting forth the point of diversion and place of use of a water right is not an adjudication of an independent property right necessary for the future conveyance of the water through a ditch across the lands of another. A partial decree as to the point of diversion of a water right is simply an adjudication that the right holder has the right to the use of the water (from a particular source diverted at a particular location) vis-à-vis the owner of the water, the state of Idaho.

As to Pioneer's property rights relevant in these subcases, Pioneer claims to be the owner of the Caldwell Highline Canal. This assertion is not disputed. This ownership interest can be further broken down into two components. First, Pioneer's property interest would be in the nature of an easement for a canal vis-à-vis the owners of the servient estate(s), i.e. the landowners of the lands upon which the canal traverses. An easement for a canal could have been acquired either through a grant, through eminent domain proceedings pursuant to Article I § 14 of the Idaho Constitution, and Idaho Code § 42-1102, or pursuant to federal law such as 43 U.S.C.A. § 661.

The second component of Pioneer's property interest can be described as the ditch itself, together with the diversion structures and headgates. In his treatise, Kinney states:

The works constructed for the means of use of water, consisting of ditches, canals, flumes, or reservoirs, are not in themselves easements, but are land. Where these works are constructed upon the lands of the appropriator, the portion whereon they are located is held by no different title from the rest of the land. The same is also true where they are constructed over lands owned by others than the appropriator. They are still land, although the fee to the same may belong to a person other than the appropriator. What the appropriator acquires in this instance is not a ditch or canal as an easement, but an easement *for* a ditch or canal or other works, as the case may be. The very definition of the word easement precludes the idea that a ditch or canal in and of itself is an easement. It is simply a privilege or private way, 'in which a particular man may have an interest or right, though another be the owner of the soil.' It is an incorporeal hereditament. Or, again, 'an easement is a liberty, privilege, or advantage without profit

which the owner of one parcel of land may have in the lands of another They are incorporeal.’

Upon the other hand, the ditch or canal is land; and, being visible and tangible, is corporeal. Because a ditch or canal is dug on land in no way changes its character as land. It is still land, although the bed of the same may be sunk below the surface of the land adjoining it. It has the bed and sides still consisting of the same character of soil or rock as that of the adjoining land, and it is as much a part of this land as though the ditch or canal had never been dug.

Clesson S. Kinney, Kinney on Irrigation and Water Rights, 2nd Ed., Section 833, pp. 1460-1461 (1912) (internal citations omitted). In this subcase, there is no dispute that Pioneer is the owner/operator of the easements and infrastructure that make up what is known as the Caldwell Highline Canal. Generally speaking, if Mason Creek has heretofore acquired a right to have water diverted under water right 63-00179C conveyed through this canal, such a right would have to have been acquired through grant, contract, license, adverse user, or eminent domain. Similarly, if Mason Creek’s prior deliveries of water through the Caldwell Highline Canal were simply pursuant to a revocable license, then upon revocation of the license future deliveries would have to be secured through grant, contract, license, or eminent domain.¹

B. Applicable Law.

Irrigation districts are quasi public or municipal corporations created by statute, and “as such have only such power as is given to them by statute, or such as is necessarily implied.” *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 308, 216 P. 250, 252 (1923). The express terms of Idaho Code § 43-304 confer upon an irrigation district board “the power to manage and conduct the business and affairs of the district,” and “make and execute all necessary contracts.” Thus, as a general matter an irrigation district board is authorized participate in litigation and enter into agreements settling litigation on behalf of the district.

¹ For an example of an irrigation entity using eminent domain proceedings to secure the right to enlarge and deliver water through an existing canal, see *Portneuf Irrigating Company, Ltd., v. Budge*, 16 Idaho 116, 100 P 1046 (1909). See Also Kinney, Section 1085, pp. 1946-1947.

Idaho law makes equally clear, however, that a trust relationship exists between an irrigation district and its constituents. Idaho Code § 43-316 provides that legal title to all property acquired by the irrigation district “shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title.” This trust relationship places certain limitations on an irrigation district board’s powers with respect to the disposition and use of district property. In *Yaden v. Gem Irr. Dist.*, the Idaho Supreme Court evaluated such a limitation.

In *Yaden*, a landowner outside the boundaries of the subject irrigation district brought action against the district to compel it to deliver water to her land.² One of the issues addressed in the case was whether the board of the irrigation district had the authority to deliver district water through district infrastructure to a landowner located outside of the district. The Court noted that the applicable Idaho law on the issue turned on whether or not the system was already burdened with delivering water to the outside landowner when the district acquired it:

[W]henever an irrigation district, organized under the provisions of the statute acquires an irrigation system through which waters have theretofore been delivered and applied to a beneficial use on lands outside or within the boundaries of the district, it is burdened with the obligation to continue such delivery.

* * *

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.

* * *

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

² Although the majority of the landowner’s land was located outside of the subject irrigation district, the Idaho Supreme Court noted that the landowner had 10 acres within the district’s boundaries. With respect to those 10 acres, the district conceded the landowner was entitled to receive district water.

no burden can be imposed upon it for the delivery or maintenance of canals or laterals 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 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 of water.

Id. at 307-310, 216 P. at 252-253. Since no obligation to the landowner existed on the system prior to the acquisition of the same by the irrigation district, the Court denied the landowner's request to compel the irrigation district to deliver water to her land.

In *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969), the Court again addressed the issue of whether the board of the irrigation district had the authority to deliver district water through district infrastructure to a landowner located outside of the district. The Court re-affirmed the principles set forth in *Yaden*:

The respondent 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. In the case of *Yaden v. Gem Irrigation District*, 37 Idaho 300, 216 P. 250 (1923), this court held that the waters owned by an irrigation district must be used within the irrigation district itself and cannot be used outside the district

Id. at 229, 459 P.2d at 1011.

Likewise, the SRBA Court has previously applied and affirmed the principles set forth in *Yaden*. See e.g., *Memorandum Decision and Order on Challenge*, Subcase Nos. 34-00012, *et al.*, (April 27, 1999); *Memorandum Decision and Order on Motions for Reconsideration*, Subcase Nos. 34-00012, *et al.*, (Dec. 16, 1999). In those subcases, the SRBA District Court identified the primary issue as follows "the heart of these disputes is the propriety of the delivery of dedicated, non-surplus storage waters of [The Big Lost River Irrigation District] to lands outside of the district boundaries. *Memorandum Decision*, p.2.

In those subcases, certain of the parties entered into a Water Rights Agreement in resolution of certain of the objections filed in the SRBA which provided that the Big Lost

Irrigation River District (“BLRID”) shall “continue permanently the delivery of water” to certain landowners outside the district. The SRBA Court, relying upon the above-mentioned cases, among others, held:

[T]his Court holds that to the extent the Water Rights Agreement entered into between Walker and BLRID relates to or covers non-surplus irrigation water belonging to BLRID, held in trust for lands within the district, is to be granted to Walker, or delivered to Walker (or others), for use on lands outside the district, it is *ultra vires*, and void.

Memorandum Decision, pp.19–20.

C. Is the Settlement Agreement Ultra Vires and Void?

In the present subcases, Pioneer has made 5 separate assertions that the Settlement Agreement violates the trust relationship between Pioneer and its patrons. All of these assertions relate to paragraph 7 of the Settlement Agreement, which states:

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.

i. Ultra Vires Issue No. 1 – Delivery of Mason Creek’s Non-Boise River Water Rights Through the Caldwell Highline Canal. Pioneer argues that paragraph 7 of the Settlement Agreement is unenforceable to the extent it requires the delivery of Mason Creek’s non-Boise River water rights³ through the Caldwell Highline Canal. This Special Master agrees that the Settlement Agreement is unenforceable to the extent that the parties have attempted to agree to something prohibited under Idaho law, i.e. the

diversion of water in a manner that is inconsistent with the elements of the water rights. The parties cannot agree to divert water from the Boise River under a water right with a source of Mason Creek.

That being said, to the extent the parties have attempted to agree to something they cannot do within the parameters of the water rights, the unenforceability of such an agreement would not be due to the principles set forth in *Yaden*. The legal principles in *Yaden* prevent an irrigation district from using its property for the benefit of landowners outside the district, subject to the two exceptions of pre-existing obligation and surplus property. Accordingly, although the Settlement Agreement may well be unenforceable if it indeed requires diversion of water outside the parameters of the right, the Settlement Agreement is not void by reason of an *ultra vires* act on the part of Pioneer Irrigation District due to such unenforceability.

ii. Ultra Vires Issue No. 2 – Delivery of Mason Creek’s Boise River Water through the Caldwell Highline Canal. Pioneer argues that the delivery of the full amount of Mason Creek’s water right 63-00179C (36.2 cfs) would deprive Pioneer of canal capacity it needs for water deliveries to its own patrons, and therefore a contract to allocate this canal capacity to Mason Creek is *ultra vires* and void. This Special Master agrees.

In the two Idaho Supreme Court cases discussed above (i.e. *Yaden* and *Jones*), and in the SRBA subcases concerning the Big Lost River Irrigation District, the property of the irrigation districts at issue was the right to the use of water. In the instant subcase, the property of Pioneer at issue is the Caldwell Highline Canal, which as discussed above consists of the easement(s) for the Canal and the improvements that comprise the Canal itself. As a preliminary matter, it should be noted that there is no reason that property consisting of a canal should be treated differently than property consisting of water rights.

During the course of proceedings in this subcase, there has been no factual determination made as to the capacity of the Caldwell Highline Canal. However, the *Affidavit of Mark Zirschky* (9-28-2010) states that there is a driveway bridge and culvert

³ Mason Creek Ditch Company is the claimant of water right 63-32580 which has a recommended source of Mason Creek.

in the canal which limits total diversions at the headgates to the 40-43 cfs range.

Zirschky Aff. ¶ 4. Water rights have been decreed to the Pioneer with alternative points of diversion which include the Caldwell Highline Canal in the total amount of 692.215 cfs.⁴

In addition, the two Franklin Ditch Company water rights that are diverted into the Caldwell Highline Canal have a combined allowable diversion rate of 43 cfs.⁵ Whatever the capacity of the Caldwell Highline Canal may be, the potential demand for that capacity by Pioneer could exceed the supply.

The Settlement Agreement states: “Mason Creek’s water rights have delivery priority over Pioneer’s. Pioneer’s water rights may be delivered 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.” In other words, under the Settlement Agreement, the capacity of the canal is first allocated to delivering Mason Creek’s water rights, and if there is any capacity left over, such may be used by Pioneer. This term of the Settlement Agreement is in violation of the principle in *Yaden* which allows irrigation district property to be used for the benefit of landowners outside the boundaries of the district under the conditions that such district property is surplus. Under the terms of the Settlement Agreement this concept has been reversed, with Mason Creek being the primary beneficiary of the District property, and Pioneer being allowed to use the “surplus” if any.

This term of the Settlement Agreement on its face provides for the use of non-surplus District property for the benefit of landowners outside the District. Accordingly, there is no need to make a factual finding as to the capacity of the Caldwell Highline Canal, because under the express terms of the Agreement Pioneer can only use the property after Mason Creek’s use of the property is satisfied. By definition Mason Creek would be using non-surplus property. The board of director’s of the Pioneer Irrigation District is not authorized to commit the use of such non-surplus property to non-patrons of the District. Accordingly, the Settlement Agreement is *ultra vires* and void.

⁴ The following water rights have been decreed in the SRBA in the name of the Pioneer Irrigation District with alternative points of diversion which include the Caldwell Highline Canal: 63-00161BU, 63-00224, 63-00225, 63-00294, 63-00295, and 63-00371.

⁵ The Franklin Ditch Company water rights are 63-00166B and 63-00167B.

iii. Ultra Vires Issue No. 3 – Cost of Water Deliveries. The Settlement Agreement requires Pioneer to convey water to Mason Creek’s delivery headgates “at no cost to Mason Creek.” *Newbill Aff.* Ex. B, ¶ 7. Pioneer asserts that such an arrangement is in violation of its trust obligations to its patrons. For the reason that the Settlement Agreement is herein found to be void on other grounds, this Special Master declines to offer an opinion on this issue.

iv. Ultra Vires Issue No. 4 – Subordination of Pioneer’s Water Rights to Mason Creek’s Rights. The Settlement Agreement states: “Mason Creek’s water rights have delivery priority over Pioneer’s.” *Newbill Aff.* Ex. B, ¶ 7. Pioneer asserts that this clause of the Settlement Agreement requires Pioneer to subordinate its senior water right to Mason Creek’s water rights is in violation of its trust obligations to its patrons. For the reason that the Settlement Agreement is herein found to be void on other grounds, this Special Master declines to offer an opinion on this issue.

v. Ultra Vires Issue No. 5 – Elevation of Mason Creek’s Interests Over Pioneer’s. The Settlement Agreement states: Pioneer agrees to operate, maintain and repair the Highline Canal in order to deliver Mason Creek’s water rights.” *Newbill Aff.* Ex. B, ¶ 7. Pioneer asserts that this implies that the interests of Mason Creek are to be elevated above those of Pioneer’s patrons. Pioneer argues that this is in violation of its trust obligations to its patrons. Again, for the reason that the Settlement Agreement is herein found to be void on other grounds, this Special Master declines to offer an opinion on this issue.

C. Mason Creek’s Motion to Dismiss Pioneer’s Objections

For the reason that the Settlement Agreement is void, the term of the Settlement Agreement requiring Pioneer to withdraw its objections to Mason Creek’s water right claims is of no effect. Accordingly, Mason Creek’s motion is **denied**.

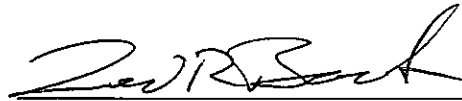
III. ORDER

In accordance with the foregoing, the following are hereby ordered:

(1) At such time when a special master's report and recommendation is made to the SRBA Presiding Judge for water right claims 63-00179C and 63-32580, it is the intent of this Special Master that included in such recommendation will be a recommendation that the SRBA District Court contemporaneously issue a judgment declaring that the subject settlement agreement is void by reason of *ultra vires* act on the part of Pioneer Irrigation District.

(2) A scheduling conference will be held on **April 26, 2011 at 3:30 PM** Mountain Time at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing **215-446-0193** and when prompted entering the code **675342**.

Dated March 25, 2011



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication