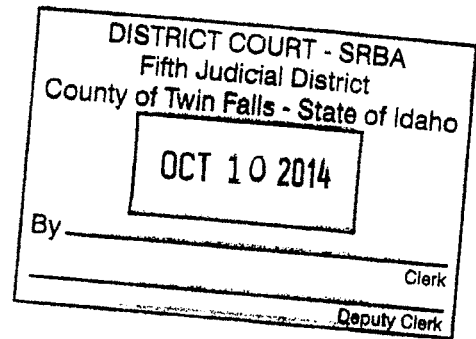


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

)
) Subcase Nos. 63-33732 & 63-33737
) (Arrowrock); 63-33733 & 63-33738 (Anderson
) Ranch); 01-10622 & 01-10617 (Lake Walcott);
) 01-10620, 01-10616 & 01-10618 (American
) Falls); 01-10621 & 10615 (Palisades); and
) 01-10623 & 01-10614 (Jackson Lake)
)

) **STATE OF IDAHO'S MOTION FOR**
) **SUMMARY JUDGMENT**
)

MOTION FOR SUMMARY JUDGMENT

The State of Idaho, by and through its counsel of record and pursuant to the Idaho Rules of Civil Procedure, moves for summary judgment in these subcases that the claims of the Boise Project Board of Control ("Board of Control") to storage water rights for

Arrowrock and Anderson Ranch reservoirs (subcase nos. 63-33737 and 63-33738), which are federally owned and operated facilities; and the claims of the “Surface Water Coalition”¹ to storage water rights for Lake Walcott, American Falls, Palisades, and Jackson Lake reservoirs (subcase nos. 01-10614, 01-10615, 01-10616, 01-10617 and 01-10618), which are also federally owned and operated facilities, are void and must be dismissed as a matter of law under *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007).

This motion addresses only the subcases listed in this Court’s *Order Re: Scheduling Proposals* (Sep. 10, 2014) that implicate competing federal and private claims to irrigation storage water rights in the same federal reservoirs. The grounds for this motion are discussed below. The State requests oral argument on this motion.

FACTS

These subcases arise from late claims to storage water rights for a number of different storage reservoirs, in several different basins: Lake Walcott, American Falls, Palisades, and Jackson Lake reservoirs in Basin 1 (Snake River above Milner Dam); Island Park reservoir in Basin 21 (Henry’s Fork); Lucky Peak, Arrowrock, and Anderson Ranch reservoirs in Basin 63 (Boise River); Cascade and Deadwood reservoirs in Basin 65 (Payette River); and the Little Wood River reservoir in Basin 37.

¹ In this proceeding the “Surface Water Coalition” (or “Coalition”) consists of A&B Irrigation District, American Falls Reservoir District No. 1, American Falls Reservoir District No. 2, Burley Irrigation District, Falls Irrigation District, Hillsdale Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. *Memorandum In Support Of Motion To File Late Notices Of Claims, Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618 and 01-10619* (Jan. 11, 2013).

All of the reservoirs and their dams are federally owned and operated facilities, and the United States filed late claims for all of them.² Various irrigation organizations also filed late claims for some of the same federal reservoirs: Arrowrock, Anderson Ranch, Lake Walcott, American Falls, Palisades, and Jackson Lake. It is these reservoirs and the competing claims of ownership of irrigation storage water rights in them that are the subject of this motion.³

All of the federal and private claims to these federal reservoirs are “beneficial use” claims⁴—i.e., claims based on “the constitutional method of appropriation.” *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). Further, the elements of the competing federal and private claims are virtually identical. All of the claims assert “irrigation storage” and “irrigation from storage” as primary purposes of use.⁵ Each of the claims also asserts that the “point of diversion” is the location of a

² Subcase Nos. 65-23531, 65-23532, 63-33734, 63-33732, 63-33733, 37-22806, 01-10622, 01-10620, 01-10621, 01-10623, and 21-13161.

³ The United States’ claims for Lake Walcott, American Falls, Palisades, Jackson Lake, Lucky Peak, Arrowrock, and Anderson Ranch are, in order: Subcase nos. 01-10622, 01-10620, 01-10623, 63-33734, 63-33732 and 63-33733. The Coalition has filed competing claims for Lake Walcott (01-10617), American Falls (01-10616 and 01-10618); Palisades (01-10615), and Jackson Lake (01-10614). The Board of Control has filed competing claims for Arrowrock (63-33737) and Anderson Ranch (63-33738). The following table summarizes the competing federal and private claims:

Reservoir	United States Claims	Board of Control Claims	Coalition Claims
Arrowrock	63-33732	63-33737	
Anderson Ranch	63-33733	63-33738	
Lake Walcott	01-10622		01-10617
American Falls	01-10620		01-10615, 01-10618
Palisades	01-10621		01-10615
Jackson Lake	01-10623		01-10614

⁴ “Beneficial Use” was asserted as the “Basis of Claim” for each late claim referenced in this Court’s *Order Re: Scheduling Proposals* of September 10, 2014. See *Notice of Claim To A Water Right Acquired Under State Law* in each of the following: Subcase Nos. 65-23531, 65-23532, 63-33732, 63-33733, 63-33734, 63-33737, 63-33738, 37-22806, 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, and 21-13161. The *Notices of Claim* were appended to the claimants’ *Motions To File Late Notice Of Claim* (Jan. 31, 2013).

⁵ *Notices Of Claim* filed in Subcase Nos. 63-33732, 63-33733, 63-33737, 63-33738, 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, and 01-10623. The Board of Control’s claims assert “irrigation from storage” in “remarks” section rather than in the “purposes” section.

federally owned and operated dam, that the federal dam is the “diverting works” or “diversion works,” and that the federal reservoir is the “place of use for storage.”⁶

The claimed places of irrigation use also are essentially identical in the federal and private claims. The United States and the Coalition both claimed Minidoka and Cassia counties as “places of irrigation use” in their Lake Walcott claims.⁷ The United States claimed Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, and Elmore counties as “places of irrigation use” in its American Falls, Palisades, and Jackson Lake claims.⁸ Most of these same counties were claimed as the “place of use” in the Coalition’s claims for American Falls, Palisades, and Jackson.⁹

The “place of use” identified in the United States’ claims for Arrowrock and Anderson Ranch is the area “within the Boise Federal Reclamation Project within Ada, Canyon, Boise, Elmore counties, Idaho, and Malheur County, Oregon (Big Bend Irrigation District).”¹⁰ While the Board of Control did not expressly claim a “place of use,” the Board of Control’s claims were filed on behalf of irrigation districts that operate

⁶ *Id.* The *Notices of Claim* filed by the Coalition, and those filed by the United States for Lake Walcott, American Falls, Palisades, and Jackson Lake, expressly claim federal reservoirs as the “place of use for storage.” The Boise Project Board of Control’s *Notice of Claim* asserted in “remarks” that “[t]his claim is for irrigation from storage at Arrowrock [Anderson Ranch] Reservoir.” While the United States’ claims for Arrowrock and Anderson Ranch do not expressly claim those reservoirs as the place of storage, it is clear they are the intended places of storage.

⁷ *Notices of Claim, Subcase Nos. 01-10622, 01-10617.*

⁸ *Notices of Claim, Subcase Nos. 01-10620, 01-10621, 01-10623.*

⁹ *Notices of Claim, Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618.* The Coalition’s claims did not include some of the counties identified in the United States’ claims: Fremont, Madison, Jefferson, Bonneville, and Bannock counties. Presumably storage from the federal reservoirs is delivered to irrigators in these counties by non-Coalition irrigation organizations.

¹⁰ *Notices of Claim, Subcase Nos. 63-33732, 63-33733.*

within the Boise Federal Reclamation Project and receive storage water from Boise Project reservoirs.¹¹

The quantities and priority dates claimed by the United States and the Coalition are also the same. The United States in its motion to file late claims asserted that the quantities of water claimed were “the amount of th[e] inflow” to each reservoir in “the year in which the largest inflow to the reservoir occurred prior to 1971.”¹² The priority date the United States claimed for each reservoir was September 30 of the year (prior to 1971) in which the largest inflow occurred.¹³ The Coalition in its motion also asserted that the quantities of water claimed were also based on “the year with the highest inflow” to each reservoir prior to 1971,¹⁴ and the priority date the Coalition claimed for each reservoir also was September 30 of the year (prior to 1971) in which the largest inflow occurred.¹⁵ Further, both the United States and the Coalition asserted that their claims were justified by water right accounting arguments the State made in the proceedings on Basin-Wide Issue 17.¹⁶

The nature of the claims filed by the United States, the Coalition, and the Board of Control water are the same in that they all seek supplemental storage rights that are dependent on the licensed and decreed storage water rights for the same reservoirs. The

¹¹ See *Notices of Claim, Subcase Nos. 63-33737, 63-33738* (“Irrigation Districts include: Boise-Kuna Irrigation District; Nampa-Meridian Irrigation District; Wilder Irrigation District; New York Irrigation District; and Big Bend Irrigation District”); *Affidavits of Tim Page, Subcase Nos. 63-33737, 63-33738*, at 1 (referring to “storage allocated to those Districts [that] has been claimed”).

¹² *The United States Memorandum In Support Of SF4 Motions To File Late Claims, Subcase Nos. 01-10620, 01-10621, 01-10622, 01-10623, 21-13161, 37-22806, 63-33732, 63-33733, 63-33734, 65-23531, and 65-23532* (Jan. 31, 2013) (“U.S. Brief”), at 4.

¹³ *Id.*; *Notices of Claim, Subcase Nos. 01-10620, 01-10621, 01-10622, 01-10623, 63-33732, 63-33733*.

¹⁴ *Memorandum In Support Of Motion To File Late Notices Of Claims, Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618 and 01-10619* (Jan. 31, 2013) (“Coalition Brief”), at 4-5.

¹⁵ *Id.*; *Notices of Claim, Subcase Nos. 01-10614, 01-10615, 01-10616, and 01-10617*. The Coalition claimed a different priority date and quantity under Subcase no. 01-10618, on the basis of “refill” and “administration of prior licensed and decreed water rights.” *Coalition Brief* at 2 n. 2.

¹⁶ *U.S. Brief* at 3; *SWC Brief* at 3-5 & n.4. These assertions mischaracterized the State’s arguments in the Basin-Wide Issue 17 proceedings.

United States asserted that its claims were for “supplemental” water rights to be administered “in conjunction with” the licensed and decreed storage water rights for the same reservoirs.¹⁷ The United States also included remarks in its claims limiting them, “in combination with” the licensed and decreed rights for the reservoir in question, to the “irrigation from storage” volume of the licensed and decreed rights.¹⁸ The Coalition’s claims included a virtually identical remark that limited the combined irrigation from storage volume to the total of the Coalition entities’ contractual storage allocations for each of the reservoirs in question.¹⁹ The Board of Control’s claims would result in the same type of administration, as they claimed quantities equivalent to total of the original contractual storage allocations of the Board of Control entities, and relied upon beneficial use made under the contracts and the licensed and decreed storage water rights.²⁰

ARGUMENT

I. Summary Judgment Standard.

Under Rule 56(c) of the Idaho Rules of Civil Procedure, summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 158 Idaho 586, 591, 329 P.3d 368, 373 (2014). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Id.* Disputed facts are construed in favor of the non-moving party and inferences that can reasonably be made from the record are made in favor of the non-moving party. *Id.*

¹⁷ *U.S. Brief* at 2.

¹⁸ *Notices of Claim, Subcase Nos. 01-10620, 01-10621, 01-10622, 01-10623, 63-33732, and 63-33733.*

¹⁹ *Notices of Claim, Subcase Nos. 01-10614, 01-10615, 01-10616, and 01-10617.*

²⁰ *Affidavits of Time Page, Subcase Nos. 63-33737 & 63-33738* (Jan. 31, 2013), at 2-3 & Exhibit 1.

However, the non-moving party may not rest on a mere scintilla of evidence. *Id.* If the record raises neither a question of witness credibility nor requires weighing the evidence, then summary judgment should be granted. *Id.* The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Id.*

II. The Competing Claims Of The United States, The Coalition, And The Board of Control To Irrigation Storage Water Rights In The Same Federal Reservoirs Raise A Threshold Question Of Law.

The United States and the irrigation organizations have filed virtually identical claims for "beneficial use" based storage water rights for the federal reservoirs at Arrowrock, Anderson Ranch, Lake Walcott, American Falls, Palisades and Jackson Lake. The claims assert ownership of irrigation storage water rights at the same reservoirs for the same water, for use in the same places by the same irrigators, and that are based on the same or substantially similar theories. They are explicitly or implicitly claimed as supplemental to the licensed and decreed storage water rights for the federal reservoirs, as having been administered in conjunction with the licensed and decreed storage water rights, to ensure the reservoirs have physically filled or refilled, regardless of flood control operations. The federal and private claims are, both in form and substance, competing claims for the same irrigation storage water rights.

This fact raises a threshold question of law under *Pioneer*, which also involved competing claims to the same storage water rights for the same federal reservoirs. The Court need not reach the merits of any of the claims to decide the *Pioneer* question.²¹ The State's motion for summary judgment, rather, seeks a ruling that claims filed by the Coalition and the Board of Control are void as a matter of law under *Pioneer* and must be

²¹ The State expressly reserves all arguments regarding the merits of all of the late claims.

decreed disallowed. In light of the reasoning and holdings of *Pioneer*, allowing the competing claims of the Coalition and the Board of Control to proceed would result in unnecessary confusion and delay. Addressing and resolving the State's motion will prevent duplicative proceedings, promote judicial economy, and clarify the issues moving forward.

III. Under *Pioneer*, The Competing Claims Of The Coalition And The Board Of Control Must Be Decreed Disallowed.

In *Pioneer*, the United States filed SRBA claims to storage water rights for the federal reservoirs at Lucky Peak, Arrowrock, and Anderson Ranch. *Pioneer*, 144 Idaho at 108, 157 P. 3d at 602. As in these subcases, various irrigation entities, including the Board of Control, "filed separate claims to the same water rights." *Id.* This raised the question of the water right ownership interests of the United States and the irrigation organizations. *Id.*

As in these subcases, there was no dispute that the United States "manages and operates the storage facilities," *id.* at 110, 157 P.3d at 604, storing the water in the federal reservoirs and subsequently releasing it for irrigation use by "the beneficial users that are served by the irrigation districts." *Id.* at 109, 157 P.3d 603 (bold and capitalization omitted). The Idaho Supreme Court therefore held that based on Idaho constitutional and statutory law, the storage water rights should be decreed with the United States identified as the legal title holder, and with the now-familiar *Pioneer* remark, which states that the "title to the use of the water is held by the consumers or users of the water," and that the irrigation organizations "act on behalf of the consumers or users to administer the use of the water for landowners." *Id.* at 115, 157 P.3d at 609. This Court subsequently entered

an order disallowing the competing claims of the irrigation organization in the *Pioneer* proceedings:

The Supreme Court held that the water rights should be decreed in the name of the United States with the inclusion of a remark on the face of the partial decree defining the interest in the right held by the beneficial or end users of the right. Therefore, the above captioned separate individual claims filed by the irrigation organizations must be decreed disallowed.

Order Disallowing With Prejudice All Claims Filed By Irrigation Entities Under Consolidated Subcase No. 91-63, Subcase Nos. 63-303A [etc.] (Jun. 29, 2007), at 1 (emphasis added).

The parallels between these proceedings and *Pioneer* are plain. As in *Pioneer*, these proceedings involve claims filed by irrigation organizations to irrigation storage water rights in federal reservoirs for which the United States has also filed substantially identical claims. The basis of the private claims in these subcases is the same as that asserted in *Pioneer*: that the storage water rights were perfected by actual beneficial use of storage water for irrigation purposes, which was accomplished by the irrigators, not the United States. *See Pioneer*, 144 Idaho at 110, 157 P.3d at 604 (“There is no dispute that the BOR does not beneficially use the water for irrigation”). Also as in *Pioneer*, the private claims in these subcases are for storage water rights, and the storage of water and its subsequent release for use by irrigators is accomplished by the United States, not the irrigation organizations. *See id.* (stating that the United States “manages and operates the storage facilities”).

In short, *Pioneer* recognized that under Idaho law, irrigation storage water rights for federal reservoirs can be perfected only through cooperative action by the United States, the irrigation organizations, and the irrigators. The United States manages and

operates the storage facilities, the irrigation organizations contract for storage space on behalf of the irrigators and distribute stored water to them, and the irrigators “make beneficial use of the water for irrigation purposes.” *Id.* All three play necessary roles in perfecting an irrigation storage water right for a federal reservoir under Idaho law.

Pioneer means that when the United States and irrigation entities have filed competing claims for rights to the same water at a federal storage reservoir, there can be but one valid irrigation storage water right decreed by this Court. The different interests and roles of the United States, the irrigation organizations, and the irrigators are reflected by identifying the United States as the legal title holder and including the *Pioneer* remark rather than by decreeing separate water rights.

In these subcases the Coalition and the Board of Control have filed separate, competing claims asserting full and undivided ownership of the same irrigation storage water rights to federal reservoirs that have been claimed by the United States. Under *Pioneer*, the claims filed by the Coalition and the Board of Control in these subcases must be decreed disallowed as a matter of law. *See Order Disallowing With Prejudice All Claims Filed By Irrigation Entities Under Consolidated Subcase No. 91-63, Subcase Nos. 63-303A [etc.] at 1* (holding that under *Pioneer* the competing claims of the irrigation organizations “must be decreed disallowed”). The interests of the irrigation organizations and the irrigators they serve must be reflected through a *Pioneer* remark in any storage water rights decreed to the United States.²²

Indeed, under *Pioneer*, “irrigation organizations” such as the Coalition and the Board of Control do not hold an ownership interest in the irrigation storage water rights to federal reservoirs. They are, rather, distribution intermediaries between the legal title

²² The United States’ claims in these subcases include *Pioneer* remarks.

holder (the United States) and the “consumers or users,” who directly hold “title to the use” of the stored water. The plain language of the *Pioneer* remark confirms this conclusion:

[A]s a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations.

Id. at 115, 157 P.3d at 609. This provision replaced language in the remark originally adopted by this Court, which stated that “[b]eneficial or equitable title to this water right is held in trust by the irrigation organizations.” *Id.* at 109, 157 P.3d at 603. The Idaho Supreme Court came to a different conclusion, and remanded with instructions “to substitute” the remark it had approved, “[t]o reflect this Court’s analysis.” *Id.*

These conclusions are not altered by the fact that *Pioneer* involved claims involving licenses and decrees rather than the “constitutional method of appropriation.” The irrigation organizations in *Pioneer* did not assert legal ownership of the pre-existing licenses or that they had been identified as legal owners of the storage water rights in pre-existing decrees. Rather they relied on the fact that the water rights had been perfected by their irrigators’ actual application of storage to irrigation use. The same is true in these subcases: the Coalition and the Board of Control rely on the same assertions they made in *Pioneer* that actual “beneficial use” was made by the irrigators they serve. Indeed, the Coalition and Board of Control claims are expressly “beneficial use” claims.

Further, in *Pioneer* the Idaho Supreme Court left no doubt that its analysis applied with equal force to both the constitutional and the statutory methods of appropriation.

See id. at 110, 157 P.3d at 604 (“Under either the constitutional or statutory method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho”); *id.* at 113, 157 P.3d at 607 (“In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation.”).

CONCLUSION

The competing claims of the Coalition and the Board of Control to irrigation storage water rights to the same federal reservoirs for which the United States has filed substantially identical claims are void as a matter of law under *Pioneer*, and must be decreed disallowed. *Pioneer* requires that the interests of the Coalition, the Board of Control, and the irrigators they represent in valid storage water rights to federal reservoirs be reflected through a *Pioneer* remark in storage water right decrees identifying the United States as legal title holder. The State therefore requests that this Court decree as disallowed the claims of the Coalition and the Board of Control, to narrow and clarify the issues, reduce duplication and confusion, and to promote judicial economy.

Respectfully submitted this 10th day of October 2014.

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