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DEPARTMENT OF
WATER RESOURCES

**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.: Attachment A**
)
) **SURFACE WATER COALITION'S**
) **MEMORANDUM IN OPPOSITION**
) **TO THE STATE OF IDAHO'S**
) **MOTION FOR SUMMARY**
) **JUDGMENT / NOTICE OF**
) **JOINDER**
)

COME NOW, American Falls Reservoir District #1, American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Hillsdale Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively "Surface Water Coalition" or "Coalition"), by and through their undersigned attorneys of record, and hereby submit this *Memorandum in Opposition* to the State of Idaho's motion for summary judgment filed on October 10, 2014. The Coalition further joins in and adopts the arguments set forth in the *Memorandum in Opposition* filed by the Boise Project Board of Control in this matter.

INTRODUCTION

The State of Idaho claims that the Coalition's beneficial use claims are void and must be dismissed as a matter of law under its interpretation of *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007). The State's misinterpretation of *Pioneer* should be rejected and the Court should deny the present motion.

The question of ownership of beneficial use claims to store water in the Basin 01 reservoirs after releases for flood control and other purposes was not at issue in *Pioneer*. Furthermore, if the State objects to the ownership of the Coalition's beneficial use claims it has the ability to present its objections and supporting evidence at trial. Just because the State disagrees with the "name" on the water right claim doesn't mean the claims are "void" and must be dismissed on summary judgment.

Furthermore, contrary to the State's misleading assertions, the beneficial use claims filed by the Coalition and Reclamation are not the same. The Coalition has identified specific differences below which create genuine issues of material fact. Moreover, the State forgets that the Coalition has a separate beneficial use claim (#01-10618) that does not overlap with any claim filed by the U.S. Bureau of Reclamation. Accordingly, the Coalition has a right to prove its claims and have its case heard on the merits. As set forth below, since the State cannot meet the summary judgment standard and erroneously relies upon a misreading of *Pioneer*, its motion should be denied.

FACTS

The State's so-called statement of "facts" is misleading and inaccurate. The attorney general's motion does not meet the civil rules' standard that requires a showing of "no genuine issue as to any material fact." I.R.C.P. 56(c). Although the State correctly notes that the

Coalition and the U.S. Bureau of Reclamation each filed beneficial use claims to store water at Lake Walcott, American Falls, Palisades, and Jackson Lake Reservoirs, the State wrongly asserts the claims are “virtually” or “essentially identical.”¹ *See State Motion* at 3-4.

A basic reading and comparison of the claims reveals distinct differences that the State consciously attempts to “hide” from the Court:

Jackson Lake Reservoir

	SWC Claim #01-10614	Reclamation Claim #01-10623
Quantity		
Irrigation from Storage	608,282 af	847,000 af
Place of Use	(9 counties)	(14 counties)

Palisades Reservoir

	SWC Claim #01-10615	Reclamation Claim #01-10621
Purpose		
Irrigation from Storage	367,000 af	1,200,000 af
Power Storage	N/A	5,935,975 af
Power from Storage	N/A	1,200,000 af
Place of Use	(9 counties)	(14 counties)

American Falls Reservoir

	SWC Claim #01-10616	Reclamation Claim #01-10620
Purpose		
Irrigation from Storage	1,348,393 af	1,655,000 af
Power Storage	N/A	6,986,887 af
Power from Storage	N/A	45,000 af
Place of Use	(9 counties)	(14 counties)

	SWC Claim #01-10618	Reclamation Claim # N/A
Purpose		
Irrigation from Storage	193,000 af	N/A

¹ The State’s description is telling, claims that are “virtually” or “essentially identical” are admittedly not the same. Claiming something is the same when it is not does not satisfy the criteria set up by the State for purposes of its own motion. The Court should reject the State’s misleading representation of the claims that were filed in these subcases.

Importantly, Reclamation does not even have a competing claim to the Coalition's separate beneficial use claim at American Falls (#01-10618). Whereas that claim represents early irrigation use and refill unique to the Coalition members, the State cannot even show a competing claim filed by Reclamation. As such the State's entire premise for its motion fails. The only thing undisputed in this case is the fact the claims filed by the Coalition and Reclamation are different.

Furthermore, the facts in *Pioneer* concerned reservoirs and storage water rights in Basin 63, not Basin 01. As recognized by this Court, that difference is significant and therefore precludes summary judgment: "the issue of when a storage water right is filled does not lend itself to a basin-wide proceeding, and is not before the Court here. As an initial matter, addressing the issue of fill may require factual inquiries, investigation and record development specific to a given reservoir and the water right or rights associated with the reservoir." *See e.g. Memorandum Decision* at 11 (Basin Wide Issue 17, March 20, 2013). The same reasoning applies to the beneficial use claims at issue here.

Accordingly, based upon the above differences, it is obvious the two sets of claims filed by the Coalition and Reclamation are not "identical." Since the State has failed to demonstrate there are "no genuine issues of material fact," its motion fails the Rule 56 standard.

STANDARD OF REVIEW

Summary judgment is appropriate if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). The Supreme Court has advised that "summary judgment motions should be granted with caution" and that if "the record contains conflicting inferences or reasonable minds

might reach different conclusions, a summary judgment must be denied.” *Bonz v. Sudweeks*, 119 Idaho 539, 541 (1991); *see also*, *American Falls Res. Dist. #2 v. IDWR*, 143 Idaho 862, 869 (2007).

ARGUMENT

I. The Coalition’s Beneficial Use Claims are Not the Same as Reclamation’s.

The State’s entire theory underlying its motion is that the Coalition has filed “competing claims for the same irrigation storage water rights.” *State Motion* at 7. According to the State, if there are “essentially identical” competing water right claims at a reservoir then the Court must dismiss the non-government claims. *Id.* at 10. To the contrary, the claims at issue in these subcases are not the same. As demonstrated above, the Coalition has claimed a different quantity for its irrigation from storage purpose of use, has not claimed power storage or power from storage, and the place of use is different. Moreover, the Coalition has filed a senior claim (#01-10618) unique to American Falls Reservoir that does not overlap or compete with any claim filed by Reclamation.

Given these obvious differences, there are genuine issues of material fact that preclude summary judgment. The Court should reject the State’s misrepresentation of the facts as set forth in the water right claims filed with this Court.

II. The Coalition Can Appropriate a Storage Water Right at a Federal Reservoir.

Assuming for argument’s sake that the Coalition’s claims do “compete” with Reclamation’s in some regard that does not mean the Coalition’s separate claims are “void” as a matter of law. Indeed, the Idaho Supreme Court has expressly recognized a private individual’s right to appropriate water on federal land. *See Joyce Livestock Co. v. United States*, 144 Idaho 1, 508 (2007) (“Idaho has long recognized that an appropriator can obtain a water right in waters

located on federal land”). By analogy, a private entity or individual can also appropriate a water right under a beneficial use or constitutional theory at a federal facility (i.e. federal reservoir).

The Court in *Joyce Livestock Co.* explained:

The prior appropriation doctrine recognizes that two or more parties can obtain a right to use water from the same source. “[T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other.” *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475, 480-81 (1943) (quoting from *St. Onge v. Blakely*, 76 Mont. 1, 245 P. 532, 536 (1926)). Thus, an appropriator need not have exclusive access to federal lands in order to obtain a water right in waters situated on those lands.

144 Idaho at 508.

Accordingly, contrary to the State’s theory, the Coalition can appropriate a right to refill empty storage space in federal reservoirs pursuant to Idaho law. Whether the Coalition’s and/or Reclamation’s claims can be decreed is a question of fact, not a question for summary judgment. As such, the Court should deny the State of Idaho’s motion.

III. The Court Should Reject the State’s Misinterpretation of *Pioneer*.

The State of Idaho wrongly contends 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.” *State Motion* at 10. This theory is not supported by Idaho law (see above Part II). Further, the State wrongly claims that the *Pioneer* analysis applies “with equal force to both the constitutional and statutory methods of appropriation.” *Id.* at 11. The Supreme Court said no such thing in *Pioneer*. The issue in *Pioneer* involved multiple claims to the same licensed storage water rights. That is distinguishable from the present beneficial use claims. The State’s argument fails to recognize this critical distinction.

Moreover, contrary to the State's claim, the *Pioneer* Court held:

Based upon the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right. The irrigation entities in this case act on behalf of those who have applied the water to beneficial use and repaid the United States for the costs of the facilities. The irrigation districts hold an interest on behalf of the water users pursuant to state law, consistent with the Reclamation Act and U.S. Supreme Court cases that were properly recognized by the SRBA Court.

144 Idaho at 114.

While the Supreme Court addressed the proper ownership remark to include on previously licensed base storage water right claims in Basin 63, the above holding does not preclude the Coalition's beneficial use claims in Basin 01 as a matter of law. The State simply reads *Pioneer* to stand for something that is not stated in the court's opinion. Moreover, the SRBA Court's decision disallowing competing claims to previously licensed storage water rights at issue in *Pioneer* is no more dispositive. *See Memorandum Decision and Order on Cross-Motions for Summary Judgment* at 30 (Consolidated Subcase No. 91-63; Sept. 2, 2004) ("Conversely, to the extent the Irrigation Entities seek to obtain full title (on behalf of their members) to the subject water rights – that is inconsistent with existing law and would be a collateral attack on the prior decree or license."); *see also, Order Disallowing with Prejudice All Claims Filed by Irrigation Entities Under Consolidated Subcase 91-63* at 1 (Subcase Nos. 63-303A et al.; June 23, 2007) (Both . . . Reclamation and the irrigation organizations that use the water, filed claims to the same project water." (emphasis added).

Contrary to what Reclamation and the Irrigation Entities requested in the *Pioneer* litigation, the Coalition is not asserting sole ownership of the beneficial use claims in Basin 01. In addition, the claims are not for the "same project water." Further, the Coalition is not collaterally attacking prior decrees or licenses. Here the Coalition is not claiming "full

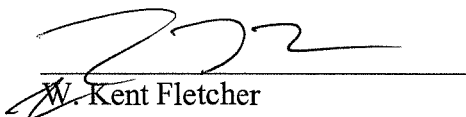
ownership” of the beneficial use claims for storage space in Lake Walcott, American Falls, Palisades, and Jackson Lake Reservoirs. Notably, the Coalition included the standard *Pioneer* remark in its water right claims. Whereas that claim could be amended to identify the respective irrigation entity rather than Reclamation as “nominal legal title” owner, that is an issue that remains to be resolved in these subcases. Indeed, the Court noted that it would set a status conference in each individual subcase following a decision on the State’s motion. At that time, a deadline to amend claims can be established by the Court. Since these water right claims have not been previously licensed or adjudicated, the Coalition has a right to present its case on the merits. The State’s misinterpretation of *Pioneer* should be rejected.

CONCLUSION

The State’s motion relies upon a misrepresentation of the facts and a flawed reading of *Pioneer*. At its core the State cannot meet the civil rules’ standard which requires a showing of “no genuine issue as to any material fact.” I.R.C.P. 56(c). Just because the State disputes the proper ownership element of the Coalition’s claims does not mean those claims are “void” or must be dismissed as a matter of law. Since the Coalition has the right under Idaho law to file beneficial use claims at the respective reservoirs, the State’s motion should be denied.

DATED this 3rd day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2014, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT / NOTICE OF JOINDER** on the person(s) listed below by the method indicated:

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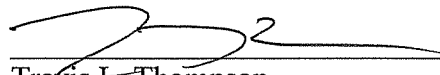
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ATTACHMENT A

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