



Perkins Coie LLP
1111 West Jefferson Street
Suite 500
Boise, ID 83702-5391

T. +1.208.343.3434
F. +1.208.343.3232
perkinscoie.com

RECEIVED
Sep 18, 2025
DEPARTMENT OF
WATER RESOURCES

September 18, 2025

Erika E. Malmen
EMalmen@perkinscoie.com
D. +1.208.343.3434
F. +1.208.343.3232

Via Email

Mathew Weaver
Director
Idaho Department of Water Resources
322 E. Front Street
Boise, ID 83702
Email: mathew.weaver@idwr.idaho.gov

**Re: Bear River Basin Adjudication
Competing Claims to Water Rights 11-248, 11-249, 11-250, and 11-251**

Dear Director Weaver:

This firm represents PacifiCorp with regard to its water rights within the Bear River Basin Adjudication, particularly Water Right Nos. 11-248, 11-249, 11-250, and 11-251.

Cub River Irrigation Company, West Cache Irrigation Company, Last Chance Canal Company, Matt and Leanne Curry, and Justin and Sarah Curry (collectively the “Irrigators”) have all filed competing claims to these water rights on the basis that they hold some legal interest under the reasoning set forth in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (“*Pioneer*”). However, the *Pioneer* case does not apply.

The Idaho Supreme Court’s decision in *Pioneer* is expressly limited to the context of federal Bureau of Reclamation projects and does not extend to private operators such as PacifiCorp’s Bear River Project. In *Pioneer*, the Idaho Supreme Court’s holding was grounded in the unique legal and historical framework of the federal Reclamation Act, which was designed to facilitate federal financing and construction of water storage and distribution projects for the benefit of irrigators.¹ The Court emphasized that the Bureau of Reclamation acts as a conduit, with water rights ultimately intended to benefit irrigators, and that the “title to the use of water” is held by the consumers or users, not the Bureau itself.² This framework is specific to federal reclamation law and does not apply to private or commercial water providers.³

The *Pioneer* decision itself, as well as subsequent case law, clarifies that the *Pioneer* holding should not be applied outside the context of federal reclamation projects. For example,

¹ See *Pioneer*, 144 Idaho at 115, 157 P.3d at 609; Bureau of Reclamation, About Us, (May 8, 2025), <https://www.usbr.gov/main/about/fact.html#:~:text=Manages%2C%20develops%2C%20and%20protects%20water, and%20support%20about%20450%2C700%20jobs>.

² *Pioneer*, 144 Idaho at 114, 157 P.3d at 608.

³ See *id.* at 115, 609.

SCANNED

SEP 22 2025

the Court acknowledged and left intact prior precedents holding that commercial water companies and other non-federal entities retain full title to their water rights, subject only to constitutional guarantees of continued service and fair dealing for their customers.⁴ This distinction is reinforced by the fact that the Court did not overturn these earlier cases. Additionally, a post-*Pioneer* decision, *Eagle Creek Irrigation Co., Inc. v. A.C. & C.E. Invs., Inc.*, 165 Idaho 467, 447 P.3d 915 (2019) (“*Eagle Creek*”), further supports the conclusion that the unique treatment of title in *Pioneer* is not applicable to private or commercial operators (Landowners served by irrigation districts do not hold individual water rights.).⁵

In this context, PacifiCorp is more akin to a municipal or commercial water provider than to a federal reclamation entity. Under *Pioneer*, the mere fact that PacifiCorp provides water to others does not mean that title to the water rights passes to those end users. Instead, PacifiCorp retains ownership of its water rights, and its customers have, at most, a right to continued service as provided by contract or other law. The special “title to the use of water” recognized in *Pioneer* is a product of federal reclamation law and does not alter the longstanding rule that private and municipal providers retain title to their water rights, even as they deliver water to others.⁶

Even if *Pioneer* were arguably applicable outside the context of federal Bureau of Reclamation projects, both the case itself and Idaho law explicitly note that those interests are limited, based on relevant contractual provisions, and informed by other reasonable considerations which notably include payment for that delivery.⁷ The Court emphasized that failure to pay the requisite fees results in forfeiture of the limited right.⁸ Because there is no payment associated with PacifiCorp’s delivery, any beneficial right the Irrigators may claim under *Pioneer* would need to be based on a separate contractual agreement with PacifiCorp. However, nothing in the applicable agreements provide the Irrigators with a legal interest in the water PacifiCorp delivers.

Finally, no authority allows for this limited interest to be denoted on the face of the “paper” right. This would be impracticable, given the “right” itself is subject to change based on factors

⁴ See, generally, *Pioneer*, 144 Idaho 106, 157 P.3d 600.

⁵ *Eagle Creek Irrigation Co., Inc. v. A.C. & C.E. Invs., Inc.*, 165 Idaho 467, 480 447 P.3d 915, 928 (2019).

⁶ See *Pioneer*, 144 Idaho at 114, 157 P.3d at 608.

⁷ Idaho Code § 42–220.

⁸ *Id.* at 113, 607; see also Idaho Const. art. XV § 4. The Idaho Constitution provides that when a person appropriates water or uses it for agriculture purposes, that person “shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.” Idaho Const. art. XV § 4.

Further, relevant provisions of Idaho code similarly state that “[t]he right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure . . . to pay the ordinary charges or assessments . . .”

such as nonpayment.⁹ In fact, the issue of whether beneficial users must be included on the face of a paper right was specifically addressed and dismissed in *Pioneer*. There, the Court explicitly rejected the irrigators' request that the "identity" of those holding "beneficial title" be included in the paper right (in that case, a partial decree), because doing so was not necessary: "The Boise Project water rights have been administered successfully without the specificity requested by the cross-appellants." *Pioneer*, 144 Idaho at 116, 157 P.3d at 610 (emphasis added).¹⁰ Accordingly, the Irrigator's interests, if any exist, have no place on the paper right.

Accordingly, PacifiCorp requests that these claims be rejected. However, should you need additional information to do so, we would ask that you exercise your discretion under Idaho Code § 42-1410 to conduct a fact-finding hearing prior to the issuance of the Director's Report.

Please contact me if you have any questions.

Sincerely,



Erika E. Malmen

cc: Lacey Rammell-O'Brien (via email – lacey.rammell@idwr.idaho.gov)
James Cefalo (via email – james.cefalo@idwr.idaho.gov)
IDWR Preston Field Office (via email – prestoninfo@idwr.idaho.gov)
John Hutchings, PacifiCorp

EEM/SAH:kh

⁹ The question posed by irrigators as part of Basin Wide Issue 17 posed a slightly different question, whether Idaho law requires a remark authorizing storage rights to refill, under priority, space vacated for flood control. Even there, the Idaho Supreme Court declined to address the issue, stating it "was not a question anyone appears to have wanted answered." *A&B Irrigation Dist. v. State* ("BW-17"), 157 Idaho 385, 336 P.3d 792 (2014).

¹⁰ "The Boise Project water rights have been administered successfully without the specificity requested by the cross-appellants." *Pioneer*, 144 Idaho at 116, 157 P.3d at 610 (emphasis added). Notably, the Idaho Supreme Court upheld the SRBA court's ruling below, but dismissed District Court Judge Melanson's "remark" and replaced it with its own interpretation. Judge Melanson had explicitly described the concept of divided title, where the United States retained bare legal title while the irrigators possessed beneficial or equitable title. *Pioneer*, 144 Idaho at 109, 157 P.3d at 603. Chief Justice Schroeder, however, avoided using the divided title terminology. He stated only that the irrigators held "title to the use of the water" without clarifying the nature of that title. It remains uncertain whether this is different from, or identical to "equitable" title.