

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF THE A&B IRRIGATION )	
DISTRICT'S 2009 MITIGATION PLAN TO )	<b>CM-MP-2009-002</b>
COMPENSATE BLUE LAKES TROUT )	
FARM, INC. )	<b>ORDER DENYING UNIT A</b>
)	<b>ASSOCIATION'S MOTION</b>
(Water Right Nos. 36-02356a, 36-07210, )	<b>TO STRIKE AND/OR MOTION</b>
and 36-07427) )	<b>IN LIMINE RE: TESTIMONY</b>
)	<b>OF DR. CHARLES BROCKWAY</b>
)	
_____ )	

On January 11, 2010, the A&B Irrigation District ("A&B") submitted pre-filed direct testimony of Dr. Charles E. Brockway in support of its mitigation plan for the benefit of Blue Lakes Trout Farm, Inc. On February 1, 2010, the Unit A Association ("Association") filed a motion and memorandum to strike or limit certain testimony of Dr. Brockway ("Motion"). The Motion sought to exclude the following pre-filed statement from Dr. Brockway:

Q: IN YOUR OPINION, DOES THE A&B MITIGATION PLAN SATISFY THE RULE 43 FACTORS TO BE CONSIDERED BY THE DIRECTOR?

A. Yes. In my opinion A&B's conversion of the approximately 1,378 acres to surface water supply will prevent injury to Blue Lakes' senior water rights caused by pumping under the junior rights subject to the call. Based upon the analysis provided in the attachments to my testimony, along with the model simulations performed by Dr. Wylie, it is my opinion that the plan meets the applicable criteria of Conjunctive Management Rule 43.

The basis for the Motion is that the testimony lacks foundation and that the opinion invades the province of the trier of fact by offering a legal conclusion. On February 9, 2010,

A&B filed a response to the Motion in which it asked the Director to deny the Association's request.

As discussed at the February 10, 2010 status conference, a concern of the Association in this proceeding is whether A&B has the authority to provide surface water from Unit A to conversion acres within Unit B. The Association believes that Dr. Brockway's testimony could be broadly construed, so as to offer an opinion on A&B's authority to allow Unit A surface water to be used on Unit B conversion acres.

While the Director will not strike Dr. Brockway's testimony, the Director will weigh Dr. Brockway's testimony in light of his expertise. As stated in his January 11, 2010, pre-filed direct testimony, Dr. Brockway holds a Ph.D. in water resources engineering and is a licensed engineer in the state of Idaho.

#### ORDER

Based upon the foregoing, the Association's Motion to strike the above-cited testimony of Dr. Brockway is DENIED.

Dated this 23<sup>rd</sup> day of February, 2010.

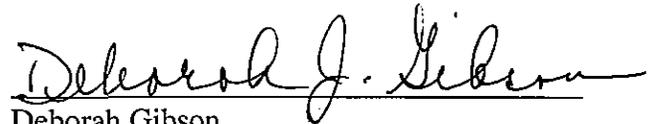
  
\_\_\_\_\_  
GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of February 2010, the above and foregoing document was served to the following by U.S. Mail, postage prepaid, and electronic mail:

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