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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS' 2009 JOINT MITIGATION PLAN FOR 2009 (Blue Lakes)	**Docket Nos. CM-MP-2009-002**
IN THE MATTER OF A&B IRRIGATION DISTRICT'S RULE 43 MITIGATION PLAN (Water Right Nos. 36-02356A, 36-07210, and 36-07427)	**MEMORANDUM IN SUPPORT OF UNIT A ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT**

Protestant Unit A Association ("Unit A") by and through its counsel of record, Perkins Coie LLP, hereby submits the following Memorandum in Support of Unit A Association's Motion for Summary Judgment. This memorandum is supported by the Affidavit of Erika E. Malmen in Support of Unit A Association's Motion for Summary Judgment filed concurrently herewith and all other Unit A Association filings of record.

I. INTRODUCTION

Protestant Unit A brings this motion for summary judgment in opposition to and for denial of the Rule 43 Mitigation Plan submitted by A&B Irrigation District ("A&B") on or about August 18, 2009 ("Mitigation Plan") in accordance with applicable Scheduling Orders and IDAPA 37.01.01 Rules 260 & 565. Summary judgment in favor of Unit A is appropriate

because there are no genuine issues of material fact to be decided in this case. There is no dispute that A&B is proposing to take water that Unit A landowner irrigator members have a legal right to use, and allocate it for use on Unit B lands. There is also no question that A&B does not have the consent required to do so. Idaho Department of Water Resources ("IDWR") approval of the Mitigation Plan would be in direct contravention of the holding in *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963) (hereinafter referred to as "*Bradshaw*") and Idaho law. IDWR can not approve the Mitigation Plan because the Mitigation Plan is not in compliance with Idaho law for the reasons set forth below.[1]

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Similar to a motion for summary judgment made pursuant to Rule 56 of the Idaho Rules of Civil Procedure, IDWR must review the pleadings, depositions and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.

The moving party bears the burden of proving absence of material facts. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Once the moving party has met this burden, the nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P.

[1] In addition to the reasons more fully set forth in this memorandum, a final order by IDWR approving the Mitigation Plan is actionable under due process provisions of the United States' and Idaho Constitutions as well as 42 U.S.C. § 1983 because it would deprive Unit A landowner irrigators of a legally protected property interest. "A water right is tantamount to a real property right, and is legally protected as such." *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). "The Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Article I, Section 13 of the Idaho Constitution guarantees that "[n]o person shall be ... deprived of life, liberty or property without due process of law."" *Boise Tower Associates, LLC v. Hogland*, 215 P.3d 494, 502-503 (2009).

56(e). In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Baxter*, 135 Idaho at 170, 16 P.3d at 267.

"Summary judgment is appropriate if there are no genuine issues of material fact and the case can be decided as a matter of law." *In Re: SRBA Case No. 39576 (Subcase 91-63) Re: Ownership of Water Rights,* 144 Idaho 106, 109, 157 P.3d 600, 603 (2007) (quoting *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 205-06, 108 P.3d 349, 352-53 (2005)).

III. STATEMENT OF UNDISPUTED FACTS

1. In an effort to mitigate for alleged injury to water rights held by Blue Lakes Trout Farm ("Blue Lakes") caused by groundwater withdrawals, A&B submitted a Rule 43 Mitigation Plan on or about August 18, 2009 . Affidavit of Erika E. Malmen in Support of Unit A Association's Motion for Summary Judgment (hereinafter "Malmen Aff.") Ex. A.

2. The Mitigation Plan seeks IDWR approval to convert acres within Unit B from a groundwater source to a surface water source ("conversion"). Malmen Aff. Ex. B at 10, Request for Admission No. 3.

3. The surface water proposed for use in conversion in the Mitigation Plan may be identified as a portion of water rights numbers 01-2064 and 01-2068 ("Unit A surface water rights"). Malmen Aff. Ex. A at 2.

4. Legal title to Unit A surface water rights is held by the United States, acting through the Bureau of Reclamation ("BOR"). Malmen Aff. Ex. C.

5. A&B holds equitable title to Unit A surface water rights. Malmen Aff. Ex. D at 2-3, ¶4.

6. Members of Unit A hold beneficial title to Unit A surface water rights, as owners and irrigators of land in which the rights are appurtenant. Malmen Aff. Ex. E at 4:13-19, Feb. 1, 2010.

7. A&B does not own the land to which water rights numbers 01-2064 and 01-2068 are appurtenant. Malmen Aff. Ex. B at 11, Request for Admission No. 9.

8. No portion of Unit A surface water rights are appurtenant to Unit B lands. Malmen Aff. Ex. E at 2:21-23, 3:1-17.

9. The source of water rights appurtenant to Unit B lands is groundwater. Malmen Aff. Ex. F[2] at 1:17-22, Feb. 1, 2010.

10. Unit B's use of the surface water rights decreases the quantity of water available for use by Unit A landowner irrigators. Malmen Aff. Ex. E at 4:21-23, 5:1; Ex. F at 4:1-18.

11. This decrease in quantity has and will continue to cause injury to Unit A landowners. Malmen Aff. Ex. E at 4:15-19.

12. A&B did not seek the consent of Unit A landowner members for the use of the surface water rights at issue in this matter. Malmen Aff. Ex. E at 3:21-23, 4:1-4.

13. A&B does not have the consent of Unit A landowners to use Unit A surface water rights to irrigate Unit B lands. *Id.*

14. Unit A filed a Protest to the Mitigation Plan on or about September 25, 2009. Malmen Aff. Ex. E at 4:12.

15. IDWR approval of the Mitigation Plan will cause and condone injury to Unit A landowner irrigators by allowing Unit B landowner irrigators use of Unit A landowners' surface water rights without the required consent. Malmen Aff. Ex. E at 4:15-23, 5:1-3; Ex. F at 4:1-18.

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[2] Also referred to as "Temple Reply."

IV. JURISDICTION

"The IDWR has the power to issue "rules and regulations as may be necessary for the conduct of its business." Idaho Code § 14-1734 (19)." *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). "Additionally, the IDWR's Director is in charge of distributing water from all natural water resources or supervising the distribution. Idaho Code § 42-602." *Id.*

In this action, A&B seeks an IDWR order approving the Mitigation Plan pursuant to Rule 43; one of the administrative rules commonly referred to as the Conjunctive Management of Surface and Ground Water Resources ("CMRs"). *See* IDAPA 37.03.11 *et seq.* On the contrary, Unit A respectfully requests that IDWR issue a final order denying approval of the Mitigation Plan as violative of Rule 43 because, *inter alia,* it proposes actions that are not in accordance with Idaho law.[3]

Statutory authority for Rule 43 and other CMRs may be found at Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Idaho Code §§ 42-603 & 42-1805. Indeed, the CMRs have been tested in court and survived a constitutional challenge to their facial validity, as the Idaho Supreme Court has upheld the authority of IDWR to promulgate and administer the CMRs. *See American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007).

As a precursor to seeking judicial review in the event that IDWR issues an order adverse to Unit A, Unit A must generally first seek and exhaust administrative remedies as provided by the Idaho Administrative Procedure Act and the CMRs. "Where an administrative remedy is provided by statute, relief must be sought from the administrative

[3] In filing its Motion and Memorandum in Support of Summary Judgment, Unit A does not waive the right to make additional legal arguments or present additional facts in support of the arguments made herein at the scheduled hearing in this matter. Unit A only raises the arguments that are ripe for summary judgment. However, a ruling in favor of Unit A would obviate the need for a hearing in regard to the A&B Mitigation Plan should IDWR issue an order denying approval of the Mitigation Plan based on the argument(s) set forth herein.

body and this remedy exhausted before the courts will act." *Dep't of Agric. v. Curry Bean*, 139 Idaho 789, 792, 86 P.3d 503, 506 (2004).

V. APPLICABLE LAW

A. Factors to Consider under Rule 43

Pursuant to Rule 43, factors that IDWR should consider when evaluating whether a proposed mitigation plan will *prevent injury* to senior rights[4] are summarized as follows: (1) whether delivery, storage, and *use of the water* pursuant to the mitigation plan is *in compliance with Idaho law*; (2) whether the mitigation plan will provide replacement water at the appropriate time and place; (3) whether the mitigation plan will provide replacement water in times of shortage; (4) whether the mitigation plan proposes artificial recharge; (5) whether defensible science has been used in calculations/assumptions relating to aquifer characteristics; (6) whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics; (7) whether the mitigation plan reasonably calculates consumptive use; (8) reliability of replacement water; (9) whether the mitigation plan proposes enlargement; (10) whether the mitigation plan is consistent with conservation, public interest, *injures other water rights*, or exceeds recharge; (11) whether the mitigation plan provides for monitoring and adjustment; (12) whether the mitigation plan mitigates for effects of pumping of existing and new wells; (13) whether the mitigation plan provides for future participation of other water users; (14) division of appurtenant land into zones for purposes of consideration of impacts; and (15) whether the mitigation plan has been agreed to by the source of the delivery call.

[4] "Senior-Priority" is defined as "[a] water right priority date earlier in time than the priority dates of other water rights being considered." IDAPA 37.03.11.010.21. Here, A&B seeks the continued use of its "Enlargement Rights" which are junior in priority to the Unit A surface water rights at issue.

B. Burden of Proof under Rule 43

Rule 43 is not explicit as to the applicable burden of proof. However, the language of Rule 43, Idaho case law governing approval of transfers, and Idaho Code § 42-222 (applicable to mitigation plans filed pursuant to Rule 43)[5] indicate that the burden is on the proponent of the Mitigation Plan; in this case A&B. As discussed above, Rule 43 lists a number of factors for IDWR to consider when evaluating a Mitigation Plan. Rule 43 states that "[f]actors that may be considered by the Director in determining whether a proposed mitigation plan will *prevent injury* to senior rights include . . . ." This language indicates that the burden is on the proponent to show that injury will be *prevented.* Accordingly, the burden is on A&B to show the absence of injury; Unit A is not required to prove that injury will necessarily flow from the approval of the Mitigation Plan. The requirement that A&B show an absence of injury to senior water rights is further supported by the following:

> As the district court noted, however, the IDWR's director is statutorily required to examine all the available evidence and information when deciding whether to approve a proposed transfer. Although the difficulty of showing the absence of injury has prompted criticism by some courts, *see Tanner v. Humphreys,* 87 Utah 164, 172-75, 48 P.2d 484, 488-89 (1935), our statute requires Barron to present sufficient evidence to the Department so that the director can make an informed determination as to Barron's transfer application. Accordingly, the question of whether the Department's decision was in derogation of statutory provisions can alternatively be stated as whether Barron produced sufficient evidence to enable the director to approve his proposed transfer. Merely requiring Barron to present this evidence does not amount to imposing an inconsistent burden of proof. In fact, Barron's presentment of evidence of non-injury, non-enlargement, and favorable public interest is what enables the director to discharge his obligation under the statute. As noted above, Barron on several occasions failed to provide the Department with the requested information, instead relying on imprecise facts and assertions. Without a satisfactory demonstration by Barron, the director cannot, under the statutory guidelines, approve the transfer. Thus, the Department's actions in this case do not amount to the imposition of an inconsistent burden of proof, but instead demonstrate the director's compliance with his statutory responsibility under I.C. § 42-222(1).
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> *Barron v. Idaho Dept. of Water Resources,* 135 Idaho 414, 420-421, 18 P.3d 219, 225-226 (2001) (internal page references omitted).

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[5] Rule 43 indicates that mitigation plans are to be considered according to the procedural requirements of Idaho Code § 42-222, which governs IDWR consideration of applications for transfer.

C. Idaho Constitution

Article XV, Section 4 of the Idaho Constitution provides:

> Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, 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.

Article XV, Section 5 of the Idaho Constitution provides:

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

VI. ARGUMENT

A. Unit A Landowner Irrigators Hold Beneficial Title to the Surface Water Rights at Issue

Under the instant facts the United States, through the BOR, holds legal title, A&B holds equitable title, and Unit A landowner irrigators hold beneficial title. *In re SRBA Case No. 39576 (Subcase 91-63) re: Ownership of Water Rights,* 144 Idaho 106, 157 P.3d 600 (2007). *See also* Malmen Aff. Ex. C.

It is well-settled, as a matter of law, that State law determines beneficial use. *See* Idaho Code §§ 42-201(1), 42-217; *Nevada v. United States,* 463 U.S. 110, 126, 103 S.Ct. 2906, 2916 (1983) (Nevada law controls perfecting of a water right), *California v. United States,* 438 U.S. 645, 653-54, 98 S.Ct. 2985, 2990 (1978) (deference to local law in the

determination of water rights). There is no dispute in this case that irrigation is a beneficial use and that Unit A landowner irrigators have put the surface water rights at issue to beneficial use.

B. Beneficial Use Defines the Basis, Measure, and Limit of the Surface Water Rights at Issue

It is not legal or equitable title or provisions in a repayment contract that are dispositive for recognizing a continued right to the use of water; *beneficial use defines the basis, measure, and limit of any water right.* The concept that beneficial use is the basis, measure and limit of an appropriated right is widely recognized on both the state and federal level. Since state law (beneficial use) governs water rights in Idaho, repayment contracts between A&B and the BOR are not dispositive of the right to the use of water. *In re SRBA Case No. 39576 (Subcase 91-63) re: Ownership of Water Rights,* 144 Idaho 106, 157 P.3d 600 (2007).

As explained above, once put to beneficial use, title to the use of the water is held by the landowner irrigator. Accordingly, since A&B is not the beneficial user of the surface water rights at issue, A&B has no legal authority to take or interfere with delivery of the surface water rights beneficially used by Unit A landowners, without their consent.

C. Unit A Landowner Irrigators Have a Continuing Constitutional Right to the Beneficial Use of the Surface Water at Issue and A&B May Not Interfere with this Right Absent Consent

Regardless of the label one places on an ownership interest, the Idaho Constitution protects the rights of irrigators to continued beneficial use of water for irrigation purposes. "The framers of Idaho's Constitution clearly intended that whenever water is once appropriated by any person or corporation for agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes."

Mellen v. Great W. Beet Sugar Co., 21 Idaho 353, 359, 122 P. 30, 31 (1912).

Irrigation districts such as A&B are not immune from the Constitutional provisions governing and guaranteeing water rights and priority of appropriation. *Bradshaw*, 85 Idaho at 545, 381 at 449. In fact, irrigation districts must deliver water according to priority and are bound by the Constitution:

> These constitutional provisions apply to irrigation districts. The defendant district, having acquired by purchase the rights of the original appropriator and having itself made subsequent appropriations and purchases of water, stands in the position of appropriator for distribution to the landowners within the district, within the meaning of Const., Art. 15, § 1. The district holds title to the water rights in trust for the landowners. The landowners, to whose lands the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§ 4 and 5. Nampa & Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557.

Id.

Unit A landowners have acquired valuable water rights through application of the surface water at issue to beneficial use, and these water rights are appurtenant to and dedicated to Unit A landowner irrigators' lands. The Unit B conversion acres currently have appurtenant groundwater rights – the mere fact that they face challenges in obtaining their appurtenant supply of groundwater is not a legal basis for arguing that they are now entitled to surface water that is appurtenant and dedicated to Unit A lands. If A&B wishes to convert Unit B lands from groundwater to surface water irrigation, A&B must have the consent of the legal owners of the surface water.

In *Bradshaw*, the Idaho Supreme Court stated "[t]he owners of the old lands, through and by means of the irrigation district, acquired, and for many years applied to the irrigation of their lands, valuable water rights, which had become appurtenant and dedicated to their lands, and which were held in trust by the district for their use. They could not thereafter, without their consent, be deprived of the use of that water when needed to irrigate their lands." *Id.* at 546, 450.

Although it is unclear whether the Unit B conversion acres are original district, annexed lands, or otherwise, such fact is of no consequence here - it is undisputed that water rights appurtenant to the Unit B conversion acres are groundwater rights. Malmen Aff. Ex. F at 1:17-22. Accordingly, the Unit B conversion acres are directly analogous to the new or annexed lands at issue in *Bradshaw* because they seek the use of water rights that are not appurtenant to, nor dedicated to, Unit B land. A&B does not dispute the fact that water rights appurtenant to Unit A and Unit B have separate sources and varying priority dates. Malmen Aff. Ex. A 1-2. Idaho law unquestionably prohibits A&B from delivering or administering Unit A and Unit B water rights as if they have the same source and same priority.[6]

D. A&B Has Not Met Its Burden to Shown that the Mitigation Plan Will Prevent Injury to Unit A Landowner Irrigators

A&B concedes injury in this case and has not met their burden to show that injury *will be prevented*, as is required by Rule 43, Idaho Code § 42-222 and supporting case law. Although Unit A landowner irrigators allege past and future material injury resulting from conversion, Unit A is not required to allege, let alone prove, injury. In the Temple Reply, A&B implies that Unit A landowner irrigators' ability to purchase additional water somehow mitigates for the injury A&B will cause through conversion. Malmen Aff. Ex. F at 4:20-23. This argument by A&B entirely misses the point – the law in Idaho is that A&B is not entitled to take water that Unit A landowner irrigators put to beneficial use without their consent, period.

Although claiming that no injury has or will occur to Unit A from conversion, A&B proceeds to document injury to Unit A irrigators by providing a numerical estimate of losses in the Temple Reply. Malmen Aff. Ex. F at 4:1-3, 5-18. If conversion of Unit B acres was

[6] Unit B conversion acres' groundwater rights are junior to Unit A surface water rights; Unit B use of which results in water delivered out of priority. "Priority of appropriation shall give the better right as between those using the water. Constitution, Art. 15, § 3." *Bradshaw*, at 449, 544.

indeed occurring in 2004 and 2005 as alleged by A&B, then there is absolutely no basis for A&B's argument that no injury has or will occur.[7] It is a simple matter of mathematics that an increase in irrigable acres using a finite supply of surface water would decrease the pro rata share of those acres using that finite supply. This alone provides a basis for the Director to reject the Mitigation Plan. Approval of the Mitigation Plan is contrary to the public interest, as it would legally sanction, among other things, injury, water delivered out of priority, and the ability of irrigation districts to ignore beneficial use, appurtenancy and priority in delivery of water rights. The public has a concrete interest in consistency in interpretation and administration of the law.

VII. CONCLUSION

A&B proposes to do *exactly* what is prohibited by *Bradshaw* and other relevant Idaho law. Under Idaho law, A&B simply can not seek to avoid alleged injury to Blue Lakes by allocating appurtenant surface water away from Unit A landowner irrigators and delivering it to Unit B lands. A&B does not hold beneficial title to the water at issue, Unit A landowner irrigators have a legally protected right to the continued use of the surface water at issue, and therefore A&B must have the consent of Unit A landowners in order for IDWR to approve the Mitigation Plan. Nothing in a repayment contract or Mitigation Plan can alter Idaho law that protects Unit A landowners' beneficial use of their water rights. For the reasons set forth herein, IDWR must deny approval of the A&B Mitigation Plan.

[7] In 2004 and 2005, A&B alleges that injury to Unit A landowner irrigators was caused by a failure to fill at American Falls and Palisades reservoirs. Under A&B's apparent theory of "shared" district water rights, Unit A landowners should have received Unit B groundwater in 2004 and 2005, but they did not. A&B has historically treated the "sharing" of water as a one-way street.

DATED: February 19, 2010

PERKINS COIE LLP

By: _____

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I, the undersigned, certify that on February 19, 2010, I caused a true and correct copy of the within named document to be forwarded with all required charges prepaid and properly addressed, by the method(s) indicated below, in accordance with IDAPA 37.01.01.303, to all of the parties of record in this proceeding, as follows:

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