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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 No. 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)	**REPLY TO A&B IRRIGATION DISTRICT'S RESPONSE TO UNIT A'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 Reply to A&B Irrigation District's Response to Unit A Association's Motion for Summary Judgment ("Reply"). For all the reasons stated below, Unit A submits that the Idaho Department of Water Resources must grant Unit A Association's Motion for Summary Judgment, because there are no *material* facts in dispute and Unit A is entitled to summary judgment as a matter of law.

I. INTRODUCTION

The Idaho Department of Water Resources ("IDWR") can not bless the actions proposed by A&B Irrigation District ("A&B" or "District") in the Mitigation Plan - actions

which are summarily characterized as robbing Peter to pay Paul. IDWR approval of the Mitigation Plan would authorize A&B to deliver water in clear violation of Idaho law governing delivery according to appurtenancy, source and priority.

A&B has historically taken the legal position that landowners have a beneficial and protectable interest in water used for irrigation. A&B's assertion that District landowners do not have a protectable interest independent of the District is disingenuous. A&B confuses the general place of use descriptions authorized by Idaho Code with the doctrine of appurtenancy. As articulated by the court in *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528, 381 P.2d 440 (1963)(hereinafter "*Bradshaw*"), A&B's legal status as an irrigation district does not authorize A&B to disregard source and priority. Idaho statutes require the *just and proper* distribution of water, not equality amongst all landowners within an irrigation district. Idaho Code § 43-304. Source, appurtenancy, priority and beneficial use matter - even within an irrigation district.

Unit A is not asking the Director to interfere in the internal affairs of A&B. Unit A is asking the Director to reject the specific Mitigation Plan that A&B *voluntarily* submitted to IDWR for IDWR approval. A&B's arguments are based on the false premise that a landowner water user does not have standing to challenge an irrigation district's practices because they do not have a protectable property interest separate from the district. This is simply not true in Idaho.

II. UNIT A's STATEMENT OF FACTS DISPUTED BY A&B

Although A&B takes issue with some of the facts asserted by Unit A, this is of no consequence, because there are no material facts in dispute.

Unit A's undisputed fact no. 6 is the first fact that A&B takes issue with.[1] A&B argues that landowner irrigators within the District do not hold beneficial title to water, even though this is *stated as fact in A&B's own 2005 Mitigation Plan*, attached as Exhibit D to the *Affidavit of Erika E. Malmen in Support of Unit A's Motion for Summary Judgment*. This dispute about whether A&B holds beneficial title or whether the landowner irrigators hold beneficial title is not material to a summary judgment decision in this case. Regardless of how the ownership interest is characterized, the Idaho Constitution protects an irrigator's right to the continued use of water. Accordingly, any dispute about the ownership label attached to the irrigator is not material as it is clear that Unit A irrigators have a protectable property interest at stake in this case.

Unit A's undisputed fact no. 8 is the next fact that A&B disputes. A&B treats the recommendations in the SRBA as dispositive, even though these recommendations are currently contested, and even though these recommendations include Jerome and Minidoka Counties as the authorized place of use – not A&B. In its Response, A&B appears to mislead us about the true "place of use" descriptions contained in the licenses and in the SRBA recommendations. The license for water right no. 1-2068 indicates Unit A as the place of use, not A&B.[2] Yet, A&B repeatedly argues that the water rights, on their face, authorize A&B to provide irrigation to Unit B acres. As discussed later in this brief, the "place of use" attached to any SRBA recommendation or license is not material, because beneficial use defines water rights in Idaho and Unit B lands have never beneficially used the surface water rights at issue. For well over 30 years, from the time the repayment contract

[1] A&B counsel now has the names and addresses of Unit A Association members. The Association currently represents about thirty Unit A landowner irrigators. Since A&B delayed propounding discovery upon Unit A, Unit A's responses were not due to A&B until after A&B's Response was due. Unit A and A&B voluntarily agreed to engage in discovery.
[2] The license for water right no. 1-2064 is in the name of BOR, and does not reference "A&B" in the ownership or place of use descriptions.

was executed between A&B and the BOR in 1962 up until at least the mid 1990's, A&B delivered surface water to Unit A lands and groundwater to Unit B lands. A&B's assertion that surface water is appurtenant to Unit B acres is a new revelation, a revelation which A&B has chosen not to openly discuss or share with District water users.

Unit A's undisputed fact no. 9 states simply that the source of water rights appurtenant to Unit B lands is groundwater. The surface water rights that are the subject of the Mitigation Plan are not appurtenant to Unit B lands because there can be no appurtenance without beneficial use. Unit B lands have never put surface water to beneficial use.[3] A&B is mistaken when it asserts that surface water rights are appurtenant to Unit B lands because the place of use recommended in the SRBA for the surface water rights includes the entire District. A&B Irrigation District is not named in the "place of use" descriptions in the licenses. Even if A&B was described as the place of use, such description alone would not authorize A&B to disregard all other elements of the water right as long as it was delivered to the appropriate place of use. As further explained below, BOR contracts can not provide authority for A&B's appurtenance argument either. There is no *genuine* issue of material fact in dispute here.

Unit A's undisputed fact no. 10 concerns reduced quantity delivered to Unit A as a result of delivery to Unit B conversion acres. A&B disputes this fact by relying on the testimony of Dan Temple. Dan Temple simply states that if Unit A landowners want a larger quantity of water, they can get it, *if* they pay more for it. This does not dispute injury. Unit A landowner irrigators are entitled to their full amount and full delivery rate without having to pay extra for it. There is only a finite amount of storage space, and dividing up that finite

[3] The one apparent exception is the Unit B conversion acres. These conversion acres should not be considered to have appurtenant surface water rights due to intermittent and illegal surface water use. A&B does not contest the fact that these conversion acres have appurtenant groundwater rights.

amount between more acres will necessarily reduce the quantity available per acre, whether that reduction is manifest in the instant irrigation season or affects the quantity of available carryover storage for use in the following irrigation season. Unit A does not need to provide an expert to explain this concept – it is simple math.

A&B is well aware that the rate of delivery in the peak season (usually the first part of July) is extremely important for gravity irrigation purposes. *See Unit A Association's Responses to A&B Irrigation District's First Discovery Requests, Response to Interrogatory No. 5.* A&B's pump can only put out a certain rate of delivery (cfs) and the delivery system can only handle a certain amount of water. When water traveling at a certain delivery rate is suddenly diverted into a number of additional laterals, the rate of delivery to any given farm using that water will decrease. The decreased rate of delivery and volume available to Unit A acres caused by delivery of surface water to Unit B conversion acres has and will continue to injure Unit A landowner irrigators. *Id.*

It is true that the reduction in 2004 and 2005 appears to be related *mostly* to the water exchange agreements. Since A&B has not been completely forthcoming about surface water used on conversion acres, it is impossible to confirm exactly how and when Unit A has been injured in the past.[4] Unit A raises 2004 and 2005 as examples of how reduced storage can injure irrigators, and thus how the Mitigation Plan will injure Unit A irrigators if approved. Reduced storage is reduced storage, whether that storage is reduced by methods of accounting or whether that storage is reduced by irrigation of Unit B conversion acres.

In any event, Unit A's undisputed fact no. 10 relates to injury, and Unit A is not seeking summary judgment based on a finding of injury. Unit A seeks summary judgment

[4] Unit A remains unable to confirm delivery of surface water to Unit B conversion acres for the years A&B claims it has done so. Exhibit A to the Reply Testimony of Dan Temple includes information relating to A&B delivery of surface water to Unit B conversion acres from 2000-2009. However, there is no information prior to 2000, and Exhibit A is not explicit about which Unit B acres received the surface water.

confirming that IDWR will not approve A&B delivery of the surface water rights at issue to Unit B, contrary to Unit A landowner rights under Idaho law. All landowners within Unit A have a property interest in the surface water that may not be infringed without their consent. Accordingly, any dispute about specific injury to the water rights held by Unit A due to the delivery of storage water to Unit B is not material to the legal question at issue in summary judgment. A&B has not met their burden to prove a lack of injury as required by Rule 43, and A&B acknowledges that it has the burden. *See A&B Response* at pp. 39. Unit A can address injury at hearing, should a hearing occur.

Similar to Unit A's undisputed fact no. 10, Unit A's undisputed fact no. 11 alleges injury due to surface water delivery to Unit B conversions acres. Unit A disputes Mr. Temple's testimony alleging non-injury, but this dispute is not material for purposes of summary judgment. If this matter goes to hearing, Unit A will address the misstatements made in Mr. Temple's Reply Testimony.[5] For present purposes, Unit A hereby incorporates its discussion concerning Unit A's undisputed fact no. 10 by reference.

Unit A's undisputed fact no. 12 concerns required consent. On page 4 of A&B's Response, A&B indicates that they do not dispute Unit A's fact no. 12, yet A&B proceeds to attempt to do so on page 6, where A&B states "individuals do not 'own' the water rights without regard to the other landowners of the District." If all landowners within A&B shared the same water right, with the same source and priority, this might be accurate. But these are not the facts here.

Unit A's undisputed fact no. 13 concerns whether surface water is appurtenant to Unit B. As explained above in the discussion of Unit A undisputed fact no. 9, A&B is confusing the place of use indicated on a Bureau of Reclamation ("BOR") license with

[5] Unit A has not had the opportunity to rebut Mr. Temple's Reply testimony.

appurtenancy. Unit A hereby incorporates its discussion of Unit A's undisputed fact no. 9 above by reference.

Unit A's undisputed fact no. 15 relates to injury from IDWR approval of a Mitigation Plan that authorizes take without consent. A&B asserts that IDWR does not have jurisdiction because the injury alleged is intra-irrigation district and that Dr. Brockway indicates that no injury will occur. A&B concedes IDWR jurisdiction by voluntarily submitting the Mitigation Plan to IDWR for approval. Further, A&B has not challenged jurisdictional arguments asserted by Unit A in its Motion for Summary Judgment. Unit A is already on the record about the weight that should be afforded to Dr. Brockway's legal conclusions.

III. A&B's STATEMENT OF FACTS DISPUTED BY UNIT A

For purposes of summary judgment and argument only, Unit A accepts A&B's statement of undisputed facts[6] numbered 1, 2, 8, 10, 12, 14-16, 18, 20, 21, and 23-28.

Unit A disputes the factual allegations contained in A&B's undisputed fact nos. 3 and 4. However, past delivery volumes are not directly relevant to the legal question presented for decision on summary judgment.

Unit A disputes A&B's undisputed fact nos. 5 and 6, as the license for water right number 1-2068 does not appear to include Unit B lands in the place of use description. Water right 1-2064 does not contain a reference to A&B in the place of use description. In any event, the place of use description is not at issue in this case.

Unit A disputes A&B's characterization of Idaho Code § 43-304 in undisputed fact no. 7, which A&B uses to support their argument that A&B must deliver the same amount of water to all landowners within the District. This code section indicates that the A&B Irrigation District Board ("Board") should provide for "just and proper distribution." *Id.* The

[6] Some of the "facts" are Idaho Code definitions. Unit A does indeed dispute some of the facts it accepts for purposes of summary judgment, and reserves the right to present evidence to dispute these facts at the hearing in this matter.

just and proper distribution in this case would limit storage water delivery to Unit A lands and limit groundwater delivery to Unit B lands. *Bradshaw* confirms that different irrigators may have different entitlements within a district, and that irrigation districts must deliver water in accordance with those entitlements, including state law principles of source and priority.

Unit A disputes A&B's undisputed fact no. 11 to the extent that it suggests that A&B can deliver water to any member of the District in contravention of the appurtenant land water rights of Unit A landowner irrigators.

Unit A disputes that A&B was "forced" to do anything as asserted in undisputed fact no. 9. A&B could have rented or purchased water for use on Unit B lands or asked for Unit A landowners for their permission to deliver surface water to Unit B lands.

Unit A can not confirm A&B's undisputed fact no. 13 and it does not make sense. If more carryover storage had been available to Unit A in 2004/2005, then Unit A may not have had to go on allotment in those years. Unit A continues to suspect that delivery of surface storage to the converted acres reduced the quantity of storage water available to Unit A. Again, this is a factual dispute, but it is not material to a decision on summary judgment.

Unit A disputes A&B's undisputed fact no. 17 to the extent it implies that the District's interest in water is superior to that of the landowner irrigator on whose behalf the District manages the water right. Unit A agrees that the District's very reason for existence is to operate and maintain the delivery systems and ensure just and proper delivery of water to all District landowners.

Unit A disputes A&B's undisputed fact no. 19 because the first sentence is unclear as to for what the repayment contract is alleged to be the authority. It asserts that the "repayment contract is the authority," but it is not clear what argument A&B is asserting that the repayment contract is "the authority."

Unit A disputes A&B's undisputed fact no. 22, because the place of use for water right 1-14 is not the same as for rights 1-2064 and 1-2068 and is not relevant. The Mitigation Plan concerns only 1-2064 and 1-2068.

IV. ARGUMENT

A. Unit A Member Landowner Irrigators Have Rights to Water and a Protectable Property Interest that Can Not be Taken by A&B For Use on Unit B Lands Without Unit A's Consent

A&B attempts to gloss over the fact that Unit A landowners have water rights by repeating that the Association does not hold any rights and therefore there can be no property deprivation. A&B should not be taken seriously when A&B asserts that individual irrigators that put water to beneficial use do not have a protectable property interest or "water right."[7] Regardless of the ownership label one prefers, Unit A landowners have a protectable property interest in water appurtenant to their land and this interest does not become subordinate to anyone or anything simply because the specific land to which the water is appurtenant is located within an irrigation district.

A&B perhaps sums it up best in a brief submitted by the Committee of Nine on behalf of A&B in the *Pioneer*[8] litigation: "The United States' position obliterates the protection of the water users guaranteed by the Constitution and the law. Idaho's statutes, § 43-316, and Constitution, art. XV, § 4, recognize a right in *water users and landowners* that is *independent* and *superior* to any *contract*." 2005 WL 3334412 at *27 (Nov. 3, 2005)(emphasis added).

Accordingly, A&B can cite all they want to BOR contract provisions, recommended place of use descriptions contained in water right 1-14, A&B's digital boundary, the ability

[7] This argument constitutes a significant departure from previous legal positions of A&B and should not be entertained by IDWR. In a brief filed by the Committee of Nine (of which A&B is a member) in the *Pioneer* case, several arguments are advanced that support the conclusion that Unit A landowners have a protectable property interest in their water.
[8] *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106 (2007)(hereinafter "*Pioneer*").

of the District to use a general description of the place of use, etc., but at the end of the day none of this is determinative. Beneficial use remains the basis, measure, and limit of a water right and the Idaho Constitution is unequivocal in its protection of the right to continued use of water appurtenant to land used for irrigation. *See Memorandum in Support of Unit A Association's Motion for Summary Judgment* at pp. 8-11.

B. A&B was Formed to Share Development and Infrastructure Costs, Not Water Rights

A&B is a unique irrigation district for a number of reasons, a couple of which are directly relevant here. First, to our knowledge, A&B is the only irrigation district in Idaho comprised of two original separate and distinct units. A&B is comprised of lands classified as "Unit B lands" and lands classified as "Unit A lands." Second, A&B is apparently the only operating irrigation district in Idaho that was originally developed to deliver water from both groundwater and surface water sources, with separate and distinct priority dates. In relation to other irrigation districts in Idaho, A&B is the exception, not the rule.

The delivery system designed and constructed to serve the entirety of A&B was never intended for or designed to deliver surface water to Unit B lands. For well *over 30 years* A&B delivered groundwater to Unit B lands and surface water to Unit A lands. *A&B Response* at pp. 25. Further, the Board continues to publish newsletters and other communications containing language that strongly supports Unit A's position that Unit A and Unit B have separate sources and separate water rights. "For Unit A, the District holds storage space rights in both American Falls and Palisades reservoirs . . ." The letter goes on for several more sentences on the topic of Unit A surface water supply, then the letter continues with a new paragraph "Unit B is unique in its own way that its water is also held in a reservoir in the Snake Plain Aquifer, whose supply volume cannot be defined . . ." The letter goes on for several sentences about Unit B groundwater supply, then concludes "[a]s

soon as we receive confirmed storage numbers for Unit A or notice any Unit B pump discharge declines that alarms us, we will notify you with this information." May 19, 2004 Letter from Dan Temple to A&B water users, attached as Exhibit A to the *Affidavit of Erika E. Malmen in Reply to A&B Irrigation District's Response to Unit A Association's Motion for Summary Judgment*, ("Malmen Aff.") filed concurrently herewith.

Other communications from A&B to water users are similar in nature. In newsletters sent to District members, "water supply" is a heading and underneath the heading, supply information is divided according to Unit. *See* Malmen Aff. Exhibit B and Exhibit C. If A&B has a clear right to use storage water for Unit B lands, and has held this right since contracts with the BOR were signed as they argue, why separate the units and discuss their sources separately, referencing only storage rights in Unit A supply information and only groundwater rights in Unit B supply information? If surface and groundwater rights were intended to benefit the whole of the District, why wasn't the delivery system constructed to deliver water to all lands within the District from both sources? Why hasn't A&B ever come out and publicly stated, before this case, that surface water is appurtenant to Unit B lands?

In its Response, A&B states that since Unit B landowners pay assessments that benefit storage, they must get to use storage water. What A&B fails to mention is that Unit A landowners pay for wells and other infrastructure that only benefit Unit B lands. This reciprocal sharing of costs is not a basis for moving water from Unit A lands to which it is appurtenant to Unit B lands, without the landowner's consent.

C. Storage Contracts with BOR and General Place of Use Descriptions Do Not Provide Authority for A&B's Argument that Surface Water is Appurtenant to Unit B Lands

There is no credible evidence that the storage contract between A&B and the BOR authorizes the use of storage water on Unit B lands. Even if the contract did expressly authorize Unit B's use, which it does not, Unit B has never beneficially used the surface

water and can not now claim a right to it. Further, thanks to *Pioneer*, we know that a *BOR contract does not by itself define a water right in Idaho. See Pioneer Irrigation Dist.*, 144 Idaho 106 (2007). The law is well settled that an irrigation district may contract for water that is appurtenant only to certain lands within the district. *See Bradshaw.*

A general description of place of use does not by operation of law authorize the use of any particular water right at any given place within the general description. *See* Idaho Code § 42-219. The place of use descriptions are intended for ease of administration, and to allow *willing* landowners the privilege of swapping or moving water around to enhance farming practices without having to endure the more formal transfer process. This privilege to move water around within an irrigation district, however, is not unfettered. It should be noted that change in place of use, even within an irrigation district, requires notice and will not be allowed if it will cause injury or constitute an enlargement. Idaho Code § 42-219(7).

D. The "Water Rights" Do Not Authorize Delivery to Unit B Lands

A&B claims that their ability to use surface water on Unit B acres is clear from the "water rights."[9] As discussed in an earlier section of this brief, this is flat wrong. A&B's name does not appear on either of the two licenses for the water rights (1-2064 & 1-2068) at issue. A&B's rights under these licenses and any water rights it controls are held in trust for the landowners within the district. *See Pioneer Irrigation Dist.*, 144 Idaho 106 (2007). The relevant place of use for 1-2068 is described as Unit A, and the place of use for 1-2064 does not name A&B anywhere. *See Affidavit of Erika E. Malmen in Support of Unit Association's*

[9] It's unclear what "water rights" A&B is referring to, and whether they are referencing the recommendation for water rights in the SRBA or the licenses issued to the BOR. Since the SRBA recommendations are currently contested and in adjudication, Unit A relies on the licenses, issued to BOR, to define the elements of 1-2064 and 1-2068. A&B's repeated references to water right 1-14 and the associated recommended place of use is not relevant. Further, it appears that the SRBA recommendations for 1-2064 and 1-2068 do not specifically reference A&B either, but instead appear to describe place of use by county boundaries.

Motion for Summary Judgment, Exhibit C. It is not evident at all from the face of these water rights or the BOR contracts that A&B is authorized to deliver water to Unit B.

E. The Fact that Blue Lakes Has Conditionally Approved the Mitigation Plan is Not Dispositive

A&B argues that the Mitigation Plan complies with State law because Blue Lakes has conditionally signed off on it and because the District is obligated to supply all the landowners within the District with an equal amount of water. A&B even goes so far as to suggest that the Director may approve a Mitigation Plan, based solely on such agreement, even if the Mitigation Plan does not comply with the law. *See A&B Response* at pp. 38. But it is not legitimately disputed that Blue Lakes' conditional agreement to the actions proposed in the Mitigation Plan is only one factor that the Director should consider under Rule 43. There are many other factors the Director should consider when evaluating a Mitigation Plan under Rule 43, such as compliance with law, ability of others to participate, injury, etc. *See Memorandum in Support of Unit A's Motion for Summary Judgment* at pp. 6-7, 11-12.

F. A&B Is Not Legally Obligated to Deliver Equal Amounts of Water to All Lands Within the District

A&B cites to Idaho Code § 43-304 as authority for their argument that they must deliver equal amounts of water to all landowners within the District, apparently at any cost. A&B mischaracterizes the law applicable to irrigation districts. Idaho Code § 43-304 allows irrigation districts to take "any and every *lawful act* necessary to be done that sufficient water may be furnished to each landowner in said district for irrigation purposes...." (emphasis added). A&B apparently reads out the word "lawful" in that statute. *Bradshaw,* however, holds that irrigation districts must deliver water according to the law. A&B delivery of surface water to Unit B conversion acres without the consent of Unit A landowners is not lawful. Further, A&B had other options - A&B could have secured water through an

exchange agreement, or delivered water from other groundwater wells to the conversion acres, or *they could have asked Unit A irrigators for their consent to deliver surface water.*

Contrary to the assertions made by A&B in undisputed fact no. 7, irrigation districts are not required to "do everything in its power to distribute water equally to all of its landowners." This is a *gross* mischaracterization of Idaho Code § 43-304 that is directly contradicted by *Bradshaw*. Irrigation districts are obligated to "secure the just and proper distribution" of water within the district. Idaho Code § 43-304. A&B acts contrary to this statute when it delivers water to Unit B conversion acres without Unit A landowners' consent. *Bradshaw* reiterates the principle that irrigation districts may include landowners with different entitlements or rights and that the irrigation districts are required to deliver water according to source, priority and other relevant considerations under Idaho law.

V. CONCLUSION

Whether one chooses to frame Unit A landowner irrigators' interest in water as an "individual water right" or a constitutionally protected interest in the right to continued beneficial use of water for irrigation is of no consequence here. A&B's own filings in *Pioneer* confirm that these landowners have rights "superior" and "independent" from any irrigation contract.

Unit A is not seeking to control A&B operation "for all landowners" as A&B repeatedly asserts throughout their Response. Unit A is seeking IDWR disapproval of a specific Mitigation Plan that A&B voluntarily submitted to IDWR.

There is no factual dispute that A&B is proposing to deliver surface water to Unit B conversion acres. Unit A should prevail on summary judgment based solely on the legal conclusion that A&B lacks legal authority to deliver surface water to Unit B conversion acres. For purposes of summary judgment, Unit A does not need to prove injury.

Accordingly, IDWR should not hesitate to reject the Mitigation Plan by granting Unit A Association's Motion for Summary Judgment.

DATED: March 12, 2010

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I, the undersigned, certify that on March 12, 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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