

**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>
)	<b>FOR SUMMARY JUDGMENT</b>
(Water Right Nos. 36-02356a, 36-07210, )	
and 36-07427) )	
_____ )	

On February 19, 2010, protestant Unit A Association ("Unit A") filed a motion and supporting memorandum for summary judgment to A&B Irrigation District's ("A&B") mitigation plan with the Idaho Department of Water Resources ("Department" or "IDWR"). This order addresses the motion for summary judgment.

The following are facts not disputed by the parties. Some of these facts are restated from the Unit A's memorandum in support of the motion for summary judgment.

Certain ground water diversions within A&B are subject to a delivery call filed by Blue Lakes Trout Farm ("Blue Lakes"). A&B submitted a proposed mitigation plan to mitigate for alleged injury asserted by Blue Lakes.

The mitigation plan proposes the conversion of acres previously irrigated with ground water to irrigation with surface water. The surface water proposed for irrigation of acres that were previously irrigated by ground water is water diverted under water right numbers 01-2064

and 01-2068. Legal title to water right numbers 01-2064 and 01-2068 is held by the United States, acting through the Bureau of Reclamation (“BOR”).

Water diverted under water right numbers 01-2064 and 01-2068 is applied to and irrigates lands owned by the Unit A members. The place of use described by water rights 01-2064 and 01-2068 generally describes the boundaries of irrigated lands within A&B. The place of use does not individually describe the precise acres irrigated with surface water.

Unit A argues that use of water authorized by 01-2064 and 01-2068 to irrigate A&B lands once irrigated with ground water will deprive the Unit A members of surface water historically delivered to the Unit A members’ lands.

The primary issues are:

1. Do the individual water users within an irrigation district own beneficial title to the water rights authorizing the delivery of water to their lands?
2. Does an irrigation district hold both equitable and beneficial title to water rights used within the district?

In Rule 43 of IDWR’s Conjunctive Management Rules, IDWR should determine whether a mitigation plan will injure other water rights. IDWR should also determine whether the use of water pursuant to the mitigation plan is in compliance with Idaho law.

Article XV, § 4 of the Idaho Constitution states that “any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of 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... .” A narrow reading of the constitutional provision would always establish the right to use of water in the person making

beneficial use of the water for irrigation.

In contrast, through the application, permit, and licensing process described by statute, IDWR has issued water rights to applicants that develop large irrigation projects, expend the money therefore, and own the delivery systems. Consequently, the water rights 01-2064 and 01-2068 were issued to the United States of America, Bureau of Reclamation.<sup>1</sup>

In the Snake River Basin Adjudication (“SRBA”), the question of ownership of storage rights held by the United States of America, Bureau of Reclamation, was questioned in *United States v. Pioneer Irrigation District*, 144 Idaho 106 (2007). In the *Pioneer* case, the Idaho Supreme Court determined the ownership of storage water rights held by the United States of America when the storage water is used by patrons within an irrigation district. In the SRBA, the district court ordered the following remark placed on the subject water rights held by the United States:

Although the name of the United States of America acting through the Bureau of Reclamation appears in the name and address section of this partial decree, the ownership of this water right is divided. The United States Bureau of Reclamation holds nominal legal title. Beneficial or equitable title to this water right is held in trust by the irrigation organizations, in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations, for the benefit of the land owners entitled to receive distribution of this water from the respective irrigation organizations pursuant to Idaho law. As a matter of law, this interest is appurtenant to the lands within the boundaries of or served by such irrigation organization. The ownership of this water right is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

*Pioneer* at 109.

On appeal, the Court made clear that “irrigation districts act as *trustees* for the landowners managing the water right, and standing in place of the landowners in cases involving

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<sup>1</sup> “The United States Bureau of Reclamation constructed the A&B Project . . . . In 1966 the Bureau turned over operation and maintenance of the District to the water users to operate under the 1962 repayment contract with the District.” *A&B Response to Unit A Motion for Summary Judgment* at 9.

the appropriation of water. I.C. § 43-316 . . . . Further, I.C. § 43-1829 provides that the districts hold the water rights *in trust* for the landowners.” *Id.* at 114 (emphasis added). “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.” *Id.* at 115 (emphasis added). To reflect its own analysis, the Court remanded the case to the SRBA court to insert the following remark on the subject water rights:

The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

*Id.* at 115.

In other words, *Pioneer* recognized that the paper water right is held by the United States of America, but established an underlying right in the irrigation district, based upon its trust relationship with the patrons of the district that put the water to beneficial use.

Unit A attempts to distinguish the holding in *Pioneer* by making a compelling argument that while the irrigation district holds equitable title, the ultimate beneficial title contemplated by the Idaho Constitution is held by those individuals who put the water to beneficial use.

*Memorandum in Support of Unit A Association’s Motion for Summary Judgment* at 8.

The trust relationship discussed in *Pioneer* establishes the irrigation district as the trustee and the water user within the irrigation district as the beneficiary. A trustee holds title to property in trust for the benefit of the beneficiary. A fiduciary duty is created in the trustee to act for the benefit of the beneficiary at all times within the confines of the law. Should the trustee not perform his or her fiduciary duties, the beneficiary, who is ultimately entitled to the benefits of the property, may have a cause of action against the trustee.

In addition to the language establishing the trust relationship of the irrigation district in the *Pioneer* case, the following examples establish consistency in water law of the irrigation district's equitable ownership and the trustee-beneficiary relationship:

Idaho law allows the Department to generally describe places of use within irrigation districts. *See* Idaho Code § 42-219. These generally described places of use identify a fixed number of irrigated acres that may be irrigated within a larger described boundary. Water right records do not establish which individual patrons within the irrigation district are entitled to benefits, the quantity of the benefits, or the owners of the irrigated lands therein.

Contracts for storage water with the Bureau of Reclamation describe the relationship between the irrigation district and the United States. The relationship between the irrigation district and its individual water users are described by district documents. These relationships are not described by Department water right documents.

Storage water can be transferred in the State of Idaho and the place of use expanded without it being deemed an enlargement of use. Storage water has always been viewed as a source of water that can flexibly be applied within an irrigation district's boundaries.

Idaho law does not require an irrigation district file a transfer when adding more acreage within the place of use boundary.

In other Department processes, particularly in applications for transfer, IDWR does not review the impacts of an application for transfer on individual patrons within an irrigation district. If it were required to do so, IDWR would often receive a myriad of protests from individual water users within a district who would not agree with a district's allocation of water within its boundaries.

If an individual patron of an irrigation district believes he or she is not receiving the correct entitlement of water, the patron may have a cause of action against the irrigation district for breach of its fiduciary duty. It is not the responsibility of IDWR to determine, within the boundaries of an irrigation district, whether the patrons are receiving their individual entitlements.

**ORDER**

IT IS HEREBY ORDERED that Unit A's motion for summary judgment is **Denied**. Furthermore, the Director holds that IDWR is not authorized to determine whether an individual patron within an irrigation district is receiving the patron's entitlement under the trust relationship with the irrigation district. This question raises legal and factual issues solely between the irrigation district and the individual patron seeking a breach of fiduciary duty.

Dated this 31<sup>st</sup> day of March, 2010.


  
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GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1<sup>st</sup> day of ~~March~~ <sup>April</sup>, 2010, the above and foregoing document was served to the following by electronic mail:

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