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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07247 **(Blue Lakes Delivery Call)**	)))))))))	**CM-MP-2009-02** **A&B IRRIGATION DISTRICT'S RESPONSE TO UNIT A'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, A&B IRRIGATION DISTRICT ("A&B" or "District"), by and through its counsel of record, BARKER ROSHOLT & SIMPSON LLP, and hereby submits this *Response to Unit A's Motion for Summary Judgment* ("Unit A" shall hereafter be referred to as "the Association"). A&B's response is supported by the *Affidavit of Travis L. Thompson* ("*Thompson Aff.*") submitted together herewith.

For the reasons stated below, the Director should: 1) deny the Association's motion; 2) find that A&B is authorized under state law to implement its Mitigation Plan; 3) grant summary judgment in favor of A&B; and 4) approve A&B's proposed mitigation plan pursuant to the terms of the *Stipulation and Joint Motion for Approval of A&B Irrigation District's Rule 43 Mitigation Plan* filed on February 1, 2010.

INTRODUCTION

The Association's entire motion is based on the faulty premise that a few individual landowners own and can dictate the use of all of the District's water on the A&B irrigation project. The Association also claims that the A&B Irrigation District must obtain the consent of individual landowners before it decides how to distribute water to all landowners within the project. Finally, the Association asserts that its members hold individual water rights that stand to be injured by the approval of A&B's Mitigation Plan.

All of these claims fail as a matter of law and amount to nothing more than a few landowners' personal disagreement with the management and operation of the irrigation district, as approved by the A&B's Board of Directors, and that has been in place for over 15 years. These "disagreements", however, do not constitute a legal basis to deny A&B's Mitigation Plan thereby forcing the curtailment of nearly 3,500 acres of productive farm land within the project. In essence, a protest to a Mitigation Plan is not the proper forum to challenge the internal management decisions of the A&B Irrigation District. Indeed, the Idaho Department of Water Resources does not control the internal management and distribution of water within irrigation projects in Idaho and should not superimpose itself into the shoes of district management to determine how the District distributes its available water to its landowners.

Finally, since A&B's Mitigation Plan complies with Idaho law and completely mitigates the injury to Blue Lakes' senior surface water right, the Director should deny the Association's motion and approve A&B's Mitigation Plan pursuant to the terms of the *Stipulation and Joint Motion* filed on February 1, 2010.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995). The court shall liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party. *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 200, 899 P.2d 411, 413 (1995). Moreover, the Director is free to grant summary judgment to the non-moving party, in this case, the A&B Irrigation District. See *Spencer-Steed v. Spencer*, 115 Idaho 338, 345, 766 P.2d 1219, 1226 (1988) ("David was entitled to summary judgment as a matter of law on this issue, even though he had not moved for summary judgment."); *Juker v. American Livestock Ins. Co.*, 102 Idaho 644, 645, 637 P.2d 792, 793 (1981) ("Although appellant made no motion for summary judgment, where one party moves for summary judgment and the other is entitled to it, the court may grant summary judgment in favor of the non-moving party."). In such an instance, the Director liberally construes the record in favor of the party against whom summary judgment was entered. *Allen v. Blaine County* 131 Idaho 138, 141, 953 P.2d 578, 581 (Idaho, 1998).

STATEMENT OF FACTS

I. The Unit A Association's Statement of Facts

The Association lists 15 separate "facts" that it claims are "undisputed" in this matter. To the contrary, the Association has not established there are no genuine issues of material fact necessary to sustain its motion. However, although the Association has not met its burden for purposes of its motion, summary judgment can be granted in A&B's favor since the facts and the law provides that A&B is authorized to implement its Mitigation Plan as filed. A&B agrees with

the Association's statement of undisputed facts numbered 1-5, 7, 12 and 14. A&B disputes the Association's remaining statement of facts, and the legal conclusions drawn from those facts, as follows:

Statement of Fact #6

A&B does not have knowledge of the exact membership of the Association and has no means of discovering that information without disclosure by the Association. A&B served discovery requests upon counsel for the Association on February 5, 2010 requesting The Association to identify its members. *See Thompson Aff.* at ¶ 3. To date, the Association has not responded to this discovery request. *Id.* Accordingly, A&B cannot verify what "The Unit A surface water rights" are referred to in this statement of fact or the claim alleged in the referenced section of the *Direct Testimony of Gary Ottman* (at 4:13-19). However, no water rights or SRBA claims appear in IDWR's water right database in the name of the "Unit A Association". *See Thompson Aff.* at ¶ 3, Ex. B.

Regardless, assuming members of the Association are only delivered water through the water rights of the A&B Irrigation District, members of the Association do not hold beneficial title to Unit A surface water rights as owners and irrigators of land within the District and the water rights of A&B are not solely appurtenant to the Association's members' lands. A&B holds beneficial title to all the water rights for use on the A&B project. Finally, even assuming the *Ottman Testimony* is true, which A&B disputes, the Association's members only comprise 30% of the landowners that receive surface water within the A&B Irrigation District. Therefore, the Association's members do not own all the land within the District to which the water rights are appurtenant.

Statement of Fact #8

A&B disputes this alleged statement of fact. As described in the water right recommendations attached to the *Reply Testimony of Dan Temple* (Exhibits F and G), the place of use for water rights 01-2064 and 01-2068 includes all lands within the A&B Irrigation District in Jerome and Minidoka Counties.

Statement of Fact #9

A&B disputes this alleged statement of fact as implying the only source of water appurtenant to Unit B lands within the District is groundwater. As described in the recommendations for water rights 01-14, 01-2064, and 01-2068, the District's surface water rights are also appurtenant to all "Unit B lands". *See Temple Reply*, Exs. E, F, and G.

Statement of Fact #10

A&B disputes this alleged statement of fact. The use of surface water from A&B's storage rights on the converted lands does not decrease the quantity of water available for Unit A landowners. *See Temple Direct* at 3: 3-9; *Temple Reply* at 4: 1-18, 5: 1-23, 6: 12-14. Moreover, the Association's own witness admits that "in 2004 and 2005, Unit A received significantly less water than usual, ***primarily as a result of surface water lease/exchange agreements*** made by the A&B Board preceding years." *See Ottman Testimony* at 4:21-23, 5:1 (emphasis added). Mr. Temple's *Reply Testimony* confirms that the reduced storage allocations in 2004 and 2005 resulted from IDWR's decisions related to prior exchange agreements and the reduced fill of the reservoirs in those years, not delivery of storage water to the converted lands. *See Temple Reply* at 4. Accordingly, the Association has provided no support for its alleged statement of fact.

Statement of Fact #11

A&B disputes this alleged statement of fact. A&B has delivered surface water to the converted lands within the District for over 15 years. *Temple Direct* at 3: 12-14; *Temple Reply* at 8:6-7. In all years except 2004, all landowners have received at least 3 acre-feet per acre, the standard allocation per acre set by the A&B Board of Directors. *See Thompson Aff.*, Ex. A at 5. In 2004, A&B set an allocation of 2.6 acre-feet per acre as a result of IDWR's treatment of prior exchanges, as admitted by the Association's own witness, and reduced fill in American Falls and Palisades Reservoirs, not because water was delivered to the converted lands. *Temple Reply* at 4:1-18, 5: 8-11; *Ottman Direct* at 4:21-23. Finally, a reduced allocation for landowners in a particular year as set by the District's Board of Directors is an internal water management decision. *See Thompson Aff.*, Ex. A; *Temple Reply*, Ex. D at 21 ("***The amount of water in acre-feet per acre which is to be delivered each year for the minimum annual charge shall be determined by the District's board of directors***, but it may not be in excess of 3 acre-feet until the District assumes operation and maintenance under article 13") (emphasis added). Such a decision due to the available water supply does not constitute an "injury" to another "water right" in the context of what is contemplated by the Department's CM Rules.

Statement of Fact #12

A&B disputes the implication in this statement that "consent" of individual landowners is required for purposes of operation and distribution of water within the A&B Irrigation District. A&B admits that it does not "seek the consent" of individual landowners for purposes of operating the District and delivering water to all landowners. Moreover, consent of individual landowners to implement the District's Mitigation Plan and deliver water to all landowners with the project is not required. *See generally*, Title 43, Idaho Code; *see also*, *Nelson v. Big Lost*

Irrigation District, 148 Idaho 157, 219 P.3d 804 (2009). It was the intent of the Idaho legislature that irrigation districts would be run in a cooperative manner, indeed they are formed so that people work together to distribute water. The A&B project is not operated for an individual only. Moreover, individuals do not "own" the water rights without regard to the other landowners of the District.

Statement of Fact #13

A&B disputes this alleged statement. The Association does not represent all or even a majority of the landowners that receive surface water within the A&B Irrigation District. Accordingly, Mr. Ottman has provided no testimony as to whether other landowners within the District object to or consent to A&B's delivery of water as set forth in the Mitigation Plan. In addition, the statement does not define "Unit A surface water rights". With respect to A&B Irrigation District's water rights there are no "Unit A surface water rights" as alleged. In addition, the Association holds no separate water rights. *See Thompson Aff.*; ¶ 3; Ex. B. A&B's surface water rights are appurtenant to all lands within the District, including both Unit A and Unit B lands. *See Temple Reply* 9:8-17; Exs. E-H.

Statement of Fact #15

A&B disputes this alleged statement of fact. How A&B distributes water within the District does not come under the purview of IDWR for purposes of any injury analysis as to other existing water rights under the CM Rules. Moreover, approval of the Mitigation Plan will not cause injury to other existing water rights. *See Brockway Testimony* 6: 13-18. Finally, the injured senior water right holder, Blue Lakes Trout Farm, Inc., has accepted A&B's proposed mitigation. *See Stipulation and Joint Motion for Approval of A&B Irrigation District's Rule 43 Mitigation Plan* at 2, 5 (filed February 1, 2010).

II. A&B Irrigation District's Statement of Undisputed Facts

1. A&B has delivered storage water to the identified lands within the District as set forth in the mitigation plan for over the past 15 years. *Temple Direct* at 3: 12-14; *Temple Reply* at 8:6-7.

2. Although A&B does not have knowledge of the exact membership of the Association, the Association does not represent all or even a majority of landowners that receive surface water within the A&B Irrigation District. *Ottman Testimony* 1: 21, 2: 7-9.

3. The Association members and other A&B landowners have received the standard 3 acre-feet per year every year the conversions have taken place with the exception of 2004. *Temple Reply* 4: 1-4. The reduced allocation to 2.6 acre-feet per acre in 2004 was a result of reduced reservoir fill and IDWR's treatment of prior exchange agreements, not due to the converted lands receiving a share of the available storage water that year. *Temple Reply* 4: 4-18; Ex. B (*see* 2004 Annual Report Water District 1 at 2: "The 2004 storage allocation represented only 59.4% of the system capacity"; at 72 "2004 Palisades Allocable Storage = 67,207 acre-feet" – out of 845,840 acre-feet of space in the 1939 Palisades storage right, or 7%).

4. In the 52 years of operation, all A&B landowners that receive surface water, including the Association members, have been entitled to receive at least 3 acre-feet per year, and upon additional payment per acre foot have been able to receive "excess" water as requested, in every year except 2004 and 2005. *Temple Reply* 4:20-23, 5:1-11.

5. All of the land within the boundaries of the A&B Irrigation District is included in the designated place of use for the surface water rights held by A&B. *Temple Reply* 9:8-11, Exs. E-H.

6. The acreage identified in A&B's proposed mitigation plan is not "new", "additional", or "annexed" acreage within the District. *See Temple Reply*, Ex. D. The lands have always been included as original lands within the District and are included in the place of use for A&B's surface water rights. *Temple Reply* 9:1-11, Ex. D at 4, 54-55, Exs. E-H.

7. Idaho law requires that an irrigation district do everything in its power to distribute water equally to all of its landowners. I.C. § 43-304.

8. A&B has temporarily converted 1,377.8 acres within Unit B that were formerly delivered ground water by water right 36-2080 and 36-15127A to a surface water supply using A&B's storage water rights in American Falls and Palisades Reservoirs under water rights 1-2064 and 1-2068. *Temple Direct*, 3:4-7. The water is delivered from the Snake River through A&B's canal system to these acres that used to receive groundwater under A&B's ground water rights. *Temple Direct*, 3.

9. A&B was forced to change the water source for those lands in 1993, 1995, and 1996 because of the unavailability of ground water in wells serving those lands. In response, A&B filed its ground water delivery call in 1994 to protect water right 36-2080 from injury. *Temple Direct*, 3; *Temple Reply*, 2-3.

10. The United States Bureau of Reclamation constructed the A&B Project with two divisions, Unit A and Unit B. 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. *Temple Reply*, 1.

11. All District landowners with lands that qualify for water deliveries are entitled to 3 acre-feet of water per irrigable acre for the payment of their assessment. *Temple Reply* 3:9-10, *Thompson Aff.*, Ex. A at 5-6. However, there is no annual volume limit as long as the District

has water available. Water users can use as much as they can put to beneficial use, even if that exceeds the first 3 acre-feet. The historical average volume delivered has held right at the 3 acre-feet per acre. *Temple Reply*, 3:9-10, 4:22-23, 5:1-2.

12. There have only been two years in the District's 52 years of operation, 2004 and 2005, when landowners that receive surface water were placed on a restricted per acre water allocation for the year. In 2004 that was a 2.6 acre-feet per acre allocation and in 2005 that was a 3 acre-feet per acre allocation. *Temple Reply*, 4:1-4.

13. The reduced allocations in 2004 and 2005 did not occur due to Unit B's converted lands receiving a share of the available surface water. *Temple Reply*, 4:4-18.

14. A landowner can pay for "excess" water with an increasing charge for each acre-foot over 3 that is used within an irrigation season. *Temple Reply*, 4:20-21; *Thompson Aff.*, Ex. A at 5-6.

15. Every year, in both Units A & B, there are individual water users that use more than their first 3 acre-feet entitlement under the 0 & M assessment and go into "excess" water usage. The exception to this would be in 2004 and 2005 for Unit A and for several years in Unit B for certain deep well systems that don't have the pumping discharge capacity because of aquifer water table declines. *Temple Reply*, 5:1-5.

16. All rates of delivery are based on total water volumes available for delivery to entitled lands in the project. If the water users demand exceeds the District's supply capacity, the water users are placed "on allotment" which is an equally prorated volume based on the water users qualifying irrigable lands, water availability, and the District's delivery system capacity. *Temple Reply*, 5:13-17.

17. The delivery of water each year is first governed by the District's water rights, the repayment contract with the U.S. Bureau of Reclamation, District By-Laws, and the Board of Directors' decisions. The District's very reason for existence is to operate and maintain the delivery systems and try and ensure a fair and equitable delivery of water to all landowners. *Temple Reply*, 6:17-23, 7:1-4, Exs. D-H; *Thompson Aff.*, Ex. A.

18. Exhibit E to Mr. Ottman's testimony is a prior interim contract between Reclamation and an individual landowner on the project. *Temple Reply*, 7:16-17.

19. The repayment contract is the authority and supersedes all interim contracts that were required to be signed by the individual landowners and the USBR prior to full completion of the project. *Temple Reply,* Ex. D at 55-56. The repayment contract was authorized by a vote of all District landowners. *Temple Reply*, 7:22-23, 8:1-2.

20. All qualified landowners of the District paid for the District's storage space in Palisades and American Falls reservoirs. *Temple Reply*, 8:10-11.

21. All qualified landowners of the District pay the annual reservoir Operating and Maintenance charges assessed to the District by USBR. *Temple Reply*, 8:15-16.

22. The storage water rights' place of use for irrigation includes Jerome and Minidoka counties. The District's digital boundary, or service area boundary for water right 1-14, is located within these counties and includes the converted lands. *Temple Reply*, 9:8-10, Exs. E-H.

23. Under the Idaho Code, "digital boundary" means "the boundary encompassing and defining an area consisting of or incorporating the place of use or permissible place of use for a water right prepared and maintained by the department of water resources using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard." I.C. § 42-202B(2).

24. The Idaho Code further provides "a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under section 42-219, Idaho Code. I.C. § 42-1411(2)(h).

25. A&B Irrigation District covers an area of more than 78,000 acres as depicted in the digital boundary identified in the recommendation for water right 1-14. *Temple Reply* 9:4-11, Ex. D at 4, Ex. E.

26. For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho, the license issued shall be issued to the persons, association, company, corporation or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project. It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. The water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not. I.C. § 42-219(5).

27. For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder.

For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights. I.C. § 42-219(6).

28. Idaho's adjudication code incorporates the place of use description procedure provided in I.C. § 42-219. I.C. § 42-1411(2)(h).

ARGUMENT

The Association's entire motion is premised on the claim that its members hold "individual" water rights that must be protected in the consideration of A&B's Mitigation Plan. In addition, they wrongly assert that A&B somehow proposes to "take" those rights away from its members by delivering storage water to the lands identified in the plan. The Association's theories are flawed, both factually and as a matter of law.

Although the Association's members are presumably landowners within the A&B Irrigation District, they not control or dictate the operation and management of the District <u>for all landowners</u>. Moreover, those members do not individually determine how A&B uses its water rights in order to deliver water to all landowners. As described below, A&B is authorized to deliver water to the lands identified in the Mitigation Plan pursuant to Idaho law and the express elements of the storage water rights. In addition, A&B's Repayment Contract with Reclamation provides additional support for the District's authority to deliver storage water to these lands. In sum, there is no factual or legal support for the Association's claim and the Director should deny its motion as a matter of law.

I. The Association Does Not Hold Individual Water Rights For Purposes of an Injury Analysis Under the CM Rules.

Under the CM Rules, the Hearing Officer is charged to determine whether or not the approval and implementation of a mitigation plan will "injure other water rights." Rule 43.03.j. The CM Rules define a "water right" as follows:

> The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional right or a right based on federal law.

CM Rule 10.25 (emphasis added).

Neither the Association nor its members hold any individual "water rights" as defined the CM Rules. *See Thompson Aff.*, ¶ 3; Ex. B. The Association has not identified any decree, permit, license, beneficial use right, or federal water right in its name or its' members' names. Although the Association members may receive water through the A&B Irrigation District, by reason of their qualification as an assessed "landowner" within the District, they do not hold individual "water rights" within the meaning of that definition. Indeed, the use of water under the District's rights arises from an individual's status as a benefitted landowner that is assessed and delivered water by the irrigation district. Idaho Code §§ 42-701, 704. For purposes of surface water delivery, the A&B Irrigation District owns and operates the pumping plant on the Snake River and the canal system used to deliver water to its landowners. In addition, the surface water rights are in the name of the A&B Irrigation District and the U.S. Bureau of Reclamation, not the "Association" or its individual members. *See Temple Reply* , Exs. E-G.

Accordingly, under a plain reading of the CM Rules, the Association does not hold any "water rights" that stand to be injured by the approval and implementation of A&B's Mitigation Plan. Therefore, the implementation of the Mitigation Plan will not "injure" any "water rights"

held by the Association or its members as alleged. The Director should deny the Association's motion for summary judgment accordingly.

II. A&B's Mitigation Plan Complies with State Law.

In addition to failing to identify any "water rights" that would fall under a proper review of the District's Mitigation Plan pursuant to the CM Rules, the Association provides no meritorious position that the plan somehow violates Idaho state law. Contrary to the Association's claim, A&B's Mitigation Plan complies with state law and the Director should it approve it consistent with the *Stipulation and Joint Motion* filed by A&B and Blue Lakes on February 1, 2010.

The A&B Irrigation District was organized as a single irrigation district under Idaho law in the 1960 to provide for irrigation of lands in Jerome and Minidoka Counties. *Temple Reply*, 1:17-22; *Thompson Aff.*, Ex. A at 1; I.C. § 43-101. The District supplies water to its landowners through both surface and ground water rights. *Temple Reply*, 1:20-22.

Idaho Code § 43-304 grants the District the authority to perform "any and every lawful act <u>necessary to be done</u> that sufficient water may be furnished <u>to each landowner in said district</u> for irrigation purposes." (emphasis added). When A&B ran out of water in its wells that served the lands identified in the Mitigation Plan, the District undertook necessary action to supply those lands water for irrigation purposes, in this case part of the District's storage supplies. *Temple Direct*, 3:12-14; *Temple Reply*, 3:1-5. The District did not have the option to refuse water delivery to those landowners. *Thompson Aff.*, Ex. A, *Temple Reply*, Ex. D. Since the District's storage water could be used on those lands, and the District had available capacity to deliver surface water to that area, the choice was made to serve those lands with part of the

District's storage water rights. *Temple Direct*, 3:12-14. The water has been delivered to these lands for over 15 years. *Id.*

Under Idaho law, the description of a place of use for an irrigation district that covers more than 25,000 acres and how the water right relates to the district's place of use is defined as follows:

> (5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho, the license issued shall be issued to the persons, association, company, corporation, or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project. It shall not be necessary to give a description of the land by legal subdivision but a general description of the entire area under the canal system shall be sufficient. The water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not.

Idaho Code § 42-219 (emphasis added).

This provision is incorporated into the adjudication code as well, allowing IDWR to recommend a place of use for qualifying irrigation districts in the same manner. I.C. § 42-1411(2)(h). Since A&B is an irrigation district organized pursuant to Idaho law, it qualifies for the water right descriptions described above. *See Temple Reply*, Ex. D.

A. The Water Rights Authorize the Use of A&B's Storage on the Mitigation Plan Lands.

In the SRBA, IDWR recommended that the storage water rights in the name of the U.S. Bureau of Reclamation. *Temple Reply*, Exs. F, G. Water right 1-2064 is for storage at American Falls Reservoir and water right 1-2068 is for storage at Palisades reservoir. *Id.* A&B's Repayment Contract with Reclamation identifies the respective amounts of storage that the District is entitled to receive, and is further referenced in the water right recommendations. *Temple Reply*, Exs. D, F, G.

The water rights do not contain a specific or limited "place of use" within the boundary of the A&B Irrigation District, instead a remark is included that states: "Place of use for irrigation from storage is within the following counties: . . . Minidoka, . . . Jerome." *Temple Reply*, Exs. F, G. A&B's natural flow water rights further identify the project by digital boundary and identify a place of use that includes all 82,610.1 acres. *See Temple Reply*, Exs. E, H. The storage water right recommendations further clarify the ownership issue that was decided by the Idaho Supreme Court in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007):

> 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 landowners entitled to receive distribution of this water from the respective irrigation organizations pursuant to Idaho law.

See Temple Reply, Exs. F, G (emphasis added).

The recommendations reflect the language required by the Idaho Supreme Court in *Pioneer*. As to stored water, the storage of the water is an identified beneficial use which supports the water right and the irrigation of District lands within Minidoka and Jerome Counties. The Association incorrectly argues that the storage water rights are appurtenant only to the lands in Unit A of the District. To the contrary, the water right recommendations make clear that the right is appurtenant to all lands within the District:

> 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 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 organizations.

See Temple Reply, Exs. F, G (emphasis added). This remark is consistent with the general place of use description provided for irrigation districts such as A&B. *See* I.C. §§ 42-1411(2)(h); 42-219. The water rights therefore do not limit the use of A&B's storage water to particular lands within the District, including only those lands owned by the Association's members.

Instead, A&B holds beneficial title to the water rights "in trust" for all landowners and the interest is appurtenant to the "lands within the boundaries of or served by such irrigation organizations." A&B delivers water to all lands assessed within its boundaries, including all lands in both Units A and B. All landowners, not just those in Unit A or those that are part of the Association, have paid and continue to pay for the storage through the Repayment Contract with Reclamation. *Temple Reply*, 8:9-11, Ex. D. Furthermore, all landowners within A&B continue to pay Reclamation's annual O&M assessments for that storage water as well. *Id.*, 8:12-16. In other words, <u>all landowners</u> within the District have contributed to the payment of the storage water rights that have been acquired. This is consistent with the place of use identified by the storage water rights.

By their plain terms the water rights authorize the use of storage water on lands identified in the Mitigation Plan and which have received that water for over the past 15 years. *Temple Direct*, 3:12-14; *Temple Reply*, Exs. F, G. This fact alone should end any inquiry on the part of the Director as to whether A&B's proposed plan complies with state law. Stated simply, the storage water rights expressly authorize A&B to deliver storage water to the lands identified in the Mitigation Plan, not just certain lands owned by the Association's members. Since A&B is authorized to deliver water to those lands pursuant to the water right, there is nothing more for the Director to analyze on this issue. Moreover, the internal decision of how A&B delivers water

to the lands within the district's boundaries is not a factor for the Director to consider on whether or not to approve the proposed mitigation plan.

In summary, pursuant to the plain terms of A&B's storage water rights, it is obvious that A&B's Mitigation Plan complies with Idaho law. Therefore, the Association's motion should be denied and the Director should find that A&B is authorized to use the storage on the lands identified in the Mitigation Plan.

B. A&B Holds Beneficial Title to the Surface Water Rights at Issue.

Apart from the plain terms of the storage water rights, the Association's motion fails based upon a plain reading of Idaho law. First, the Association incorrectly asserts that its members alone hold individual beneficial title to the storage water rights separate and apart from the rest of the landowners within the District. Just the opposite, Idaho law has long held that irrigation districts hold that title:

> The consumers possess no water right which they can assert as against any other appropriator; their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises.

Nampa-Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 47 P.2d 916, 919 (1935) (citing *Yaden v. Gem Irr. Dist.*, 37 Idaho, 300, 216 P. 250 (1923) (emphasis added).

In support of its motion the Association misreads the Idaho Supreme Court's decision in *Pioneer*. *See Assn. Br.* at 8-9. The *Pioneer* Court wrote:

> in order to obtain a licensed water right in Idaho one must prove that the water has been applied to a beneficial use. I.C. § 42-217. The districts act on behalf of the landowners within the districts to put the water to beneficial use. It is that beneficial use that determines water right ownership."

Id., at 607 (emphasis added). The *Pioneer* Court went on to note "I.C. § 42-219(5) discusses beneficial use. That section applies to irrigation projects where the canals constructed cover an

area of twenty-five thousand (25,000) acres or more, or irrigation districts like A&B, and provides:

> [T]he license issued shall be issued to the persons, association, company, corporation or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project. It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. The water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not.

Id. (Citing I.C. § 42-219(5)) (emphasis added).

Similar to the facts in *Pioneer*, the A&B Irrigation District is an irrigation district organized under Idaho law located in Jerome and Minidoka Counties. *See Temple Reply,* Exs. D, E, F, G. In addition, *Pioneer* further holds:

> ... it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right. 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. (emphasis added).

Although *Pioneer* acknowledges that the landowners who put the water to beneficial use have an interest in continuing to receive water delivered to their property, the case holds that the water rights held by irrigation districts must be treated as a whole. In other words, the water rights held by irrigation districts are for all landowners, nor just a certain few, and the place of use of those water rights is the entire project and there are no individual places of use in those water rights for only certain landowners in the project. Indeed, a landowner that chooses not to have water delivered or used on his particular land cannot forfeit the District's water right. *See*

Idaho Code § 42-223(7); *see also, Aberdeen-Springfield Canal Company v. Peiper*, 133 Idaho 82, 86-87 (1999).

In support of its motion the Association mistakenly argues that the individual landowner's application of water to a beneficial use creates an "independent" water right separate and apart from the District's water right that is used to deliver water to all landowners. This is not the law in Idaho, as stated in *Pioneer*. Moreover, the Court previously held in *Jensen v. Boise-Kuna Irr. Dist.* that "[u]nder the provisions of C.S. § 4350 [§ 43-316, I.C.], the legal title to all property acquired by the district by operation of law vests immediately in the district and is held in trust for, dedicated to, and set apart to the use and purposes provided by law." *Jensen v. Boise –Kuna Irr. Dist.*, 75 Idaho 133, 139 (1954) (Citing *Yaden*...).

Idaho Code section 43-316 provides just that:

> The legal title to all property acquired under the provisions of this title [Irrigation Districts] shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided.

I.C. § 43-316 (emphasis added). The *Jensen* Court also found the "appropriation and diversion of waters by the district, through its officers, or the purchase of a system constructed in whole or in part by its funds, becomes the property of the district, and is held in trust for the landowners within it...." *Jensen*, 75 Idaho 133, 139 (1954) (citing *Yaden*).

Recently, in *Nelson v. Big Lost Irrigation District*, the Idaho Supreme Court further confirmed that "[t]he various water users in the District are not appropriators of the storage water. The District is the appropriator of that water." 148 Idaho 157, 219 P.3d 804, 810 (2009) (internal citations omitted) (emphasis added); *see e.g.*, *Aberdeen-Springfield Canal Co.*, 133

Idaho at 86 ("ASCC, as a Carey Act operating company, holds title to the canal system and is the appropriator of the water rights involved in this case.").

As the appropriator of the water rights, A&B is entity solely authorized to control the delivery of water pursuant to those rights and oversee the management and operation of the District for the benefit of all landowners, not just a select few. The Association's members do not own "individual" water rights separate and apart from the rest of the Districts' landowners. Consequently, they do not hold the individual "beneficial title" to the water rights as claimed. While the District holds title to the water rights and operates the project to deliver water to all landowners, the Association's members do not hold any individual water rights that would dictate a different result. Therefore, there is no basis to deny A&B's Mitigation Plan on this theory. As a result, the Association's motion fails.

C. A&B's Repayment Contract with Reclamation Authorizes the Use of A&B's Storage Water on the Mitigation Lands.

A&B's storage water rights are appurtenant to all of the land that lies within the boundaries of the District. As discussed in the previous section, the place of use identified on the water rights includes all of the lands in A&B Irrigation District (in Jerome and Minidoka Counties), not just particular lands or those solely owned by the Association's members.

The District initially acquired rights to storage water at American Falls and Palisades Reservoirs through its 1962 Repayment Contract with the U.S. Bureau of Reclamation. *Temple Reply*, Ex. D. The Contract contains several provisions that indicate the District is one entity and operates for the benefit of all landowners on the project, irrespective of the source of water delivered:

> 4. (b) "Project" shall mean the entire North Side Pumping Division of the Minidoka Project constructed and being constructed by the United States under the Federal Reclamation Laws.

Ex. D at 2.

> 5. (b) To the extent funds are and may be made available therefor, the United States, within the limitations of this contract, will undertake to complete construction of the facilities of the irrigation system to serve the lands within the jurisdiction of the District, including these works:
>
> > Unit A pumping plant, intake structures, discharge line, surge tank, switch gear and transformers;
> >
> > wells and ground water pumping installations; and
> >
> > a distribution system to serve the lands of the District,
>
> together with the appurtenant auxiliary structures and other works related thereto which are determined by the Secretary to be necessary for the irrigation of approximately 78,000 acres of land within the District, with the lateral system to provide a single point of delivery to each farm unit determined by the Secretary to be economically irrigable.

Id. at 4.

> 12. Beginning with the close of the development period for each block, the District shall assess against those lands in the District an amount necessary to cover the cost of the operation and maintenance. Except as to the procedure established in article 16, the assessments to be made hereunder shall be uniform for all such lands in the District.

Id. at 14.

> 15. (a) The District, during the period of operation and maintenance of the reserved works by the United States, shall pay to the United States the share of costs of operation and maintenance thereof, including whatever costs may be incurred in the delivery of water therefrom, which is apportionable to the irrigation storage rights therein and which is allocable to the District's rights defined in article 17.

Id. at 18.

> 16. (a) The provisions of this article are made with the objective, among other things, of encouraging the economical use of water and of distributing the operation and maintenance charges equitably among the lands of the District. . . .

> (b) . . . The amount of water in acre-feet per acre which is to be delivered for the minimum annual charge shall be determined by the District's board of directors, but it may not be set in excess of 3 acre-feet until the District assumes operation and maintenance under article 13.

Id. at 20-21.

> 17. (a) The water supply to be available under this contract comprises water accruing to capacity in Palisades Reservoir and in American Falls Reservoir, natural flow rights and ground water rights held for the District, as more fully defined herein.

Id. at 22.

Nothing in the above provisions indicates that the District would be operated only for a select few individuals depending upon the source of the water delivered by the District. Instead the District entered into the contract to operate the entire "Project" for all landowners. Moreover, with respect to "Lands for Which Water is Furnished; Limitations on Area", the Contract provides as follows:

> 41. (a) The water delivered under the terms of this contract shall be used solely for distribution by the District to water users for irrigation and domestic uses incidental thereto.
>
> (b) ***The District*** (and the United States while it is operating and maintaining the transferred works) ***will operate the irrigation system to the end of making available to each irrigable acre of land in the District, during the irrigation season, that quantity of water to which it is entitled.***

Ex. D at 54 (emphasis added).

Consistent with the water rights' defined place of use, the District's contract with Reclamation provides further support in opposition to the Association's motion. Nothing in the Contract limits the place of use for the District's storage water rights in the manner suggested by the Association. Moreover, contrary to the testimony of Mr. Ottman and its accompanying exhibits, there are no existing "individual" contracts between Reclamation and individual landowners that survived the execution of the Repayment Contract with the A&B Irrigation

District. *See Malmen Aff.*, Ex. D at 4-5; Ex. E, ¶¶ 7(d), 10(g), 17. The contracts cited in the *Ottman Testimony* are prior individual contracts between Reclamation and certain individual landowners executed before the District was organized. Those contracts were then superseded by the District's Repayment Contract of 1962, which was authorized and ratified by the qualified electors of the District and therefore is binding upon all members of the Association.

Similar to the water rights, A&B's Repayment Contract does not limit the place of use for storage within the District's boundary. Moreover, consistent with the above-quoted provisions, A&B strives to deliver water fairly and equitably to all landowners within the District, irrespective of whether they receive surface or ground water. *Temple Reply*, 6:15-23, 7:1-4. When ground water wells that served the lands in the Mitigation Plan no longer produced sufficient water in the mid 1990s, the District was forced to provide water from another source. *Temple Direct*, 3:12-14. The District made the decision at that time to deliver storage water to these lands, which has continued to present day. *Id.*

In summary, the terms of the Repayment Contract confirm A&B's right to implement the Mitigation Plan and deliver storage water to the identified lands. Since the delivery of A&B's storage water is consistent with the water rights and the terms of the repayment contract, the Association's motion fails as a matter of law.

D. Case Law Confirms A&B's Right to Deliver Storage Water to the Mitigation Plan Lands.

Under *United States v. Pioneer*, A&B holds title to and has sole discretion in the delivery of water to all landowners within the project, which is treated as a single irrigation project. In *Nelson v. Big Lost Irrigation District*, the Idaho Supreme Court quoted from its 1913 decision *Colburn v. Wilson*, noting:

> [I]t was the intention of the Legislature that all lands within an irrigation district available for and subject to irrigation, under the system constructed, must be considered as a whole, and that the assessment shall be spread upon all the lands of the district which are or may be supplied with water by such district, under said system.

Nelson v. Big Lost Irr. Dist., 148 Idaho 157, 219 P.3d 804, 811(2009) (citing *Colburn v. Wilson*, 24 Idaho 94, (1913) (internal citations omitted)) (emphasis added). The *Nelson* court, continuing its reliance on *Colburn*, cited legislative intent:

> The benefit of the water supplied to the owners of land within the district, as provided by sec. 2407, means such benefits as contribute to promote the prosperity of the district, and add value to the property of the respective owners of the entire district, and such improvement of land in any portion of the district adds to and increases the value of the lands of the entire district as the water is applied and devoted to a beneficial use by the owners through said system.
> 24 Idaho at 103, 132 P. at 581-82 (emphases in original [check – different emphasis in court's citation]).

Id.

In *Board of Directors of Wilder Irr. Dist. v. Jorgensen*, the Court again noted legislative intent, writing:

> The dominant purpose of our irrigation district law is to facilitate the economical and permanent reclamation of our arid lands, and it must be the constant aim of judicial construction to effectuate that purpose so far as consistent with the whole body of our law. The continued existence of an irrigation district depends upon its ability to furnish water to land owners within the district. *** In the absence of *** the right to furnish an adequate water supply ***, the very purpose and object of the district would be thwarted, and the growth and development of the state retarded to its serious detriment."

64 Idaho at 538 (1943) (emphasis added).

By protesting A&B's Mitigation Plan, the Association would have the very purpose of the District defeated by seeking to prevent the delivery of water to certain acres in the project for their own personal gain. If the plan is denied, A&B stands to have nearly 3,500 acres of assessed land curtailed within the project. Losing those acres would in turn increase the assessments on

the acres of all remaining landowners within the project, including the Association's members.[1] For example, in 2010, if those acres did not receive water and no assessments were paid, the District would lose approximately $280,000 for purposes of operating and maintaining the entire project. Certainly such an action would not benefit the entire District and would defeat the purpose the purpose as to why the irrigation district was set up in the first place.

The *Nelson* Court, in addressing whether landowners in an irrigation district whose lands were cheaper to supply water to could be assessed at lower rates than landowners further away from the point of diversion and thus more expensive to deliver water to, wrote:

> This Court concluded by stating that "the lands irrigable under the system within the district should be considered as a whole, and such lands must be assessed, for the maintenance and operation of the water system, at the same rate, where the benefits, that is, the water needed and received, are the same."

Nelson, 219 P.3d at 811 (citing *Gedney v. Snake River Irr. Dist.*, 61 Idaho 605, 611 (1940).

The *Nelson* Court further held: "<u>The Directors have the power "to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land [within the District], as may be necessary and just to secure the just and proper distribution of the same</u>." I.C. § 43-304. *See* 148 Idaho 157, 219 P.3d at 812 (2009) (Internal citations omitted) (emphasis added).[2]

---

[1] This assumes that the District could not find an alternate water supply for these acres.

[2] *See also*, *Colburn v. Wilson*, 24 Idaho 94, 132 P. 579 (1913), where the Court reasoned as follows:

> [I]t was the intention of the Legislature that all lands within an irrigation district available for and subject to irrigation, under the system constructed, must be considered as a whole, and that the assessment shall be spread upon all the lands of the district which are or may be supplied with water by such district, under said system.
>
> It is apparent from the creation of the district and the construction of the system and the maintenance of such system, that there can be no benefit to the land from the maintaining and operating of such irrigation system, other than the benefit arising from the supplying of the needed water. *The supplying of the water is the benefit sought by the provision of the act and the whole benefit is the water supplied, and the incident of such supply of water is the expenditure.*
>
> The benefit of the water supplied to the owners of land within the district, as provided by sec. 2407, means *such benefits as contribute to promote the prosperity of the district*, and add value to the property of the respective owners of the *entire district*, and such improvement of land in any portion of the district adds to

Accordingly, A&B's Board is vested with the authority to operate and maintain the District for all landowners. A&B's Board previously adopted By-Laws for the District which provide the following with respect to the operation of the District and delivery of water to all landowners:

> Section 1. The Board of Directors is the governing body of the irrigation district, and as such, responsible for policy making, administration of the affairs, and the proper conduct of the business of the District, as prescribed by law.
>
> * * *
>
> Section 6. Eligibility for delivery of water shall be contingent upon payments of all delinquent assessments and charges plus accrued penalty and interest, and the current year's advance payment of toll, minimum O&M, or minimum water charge.
>
> ARTICLE NINE – WATER ALLOTMENT AND DELIVERY:
>
> Section 1. Article 16 (b) of the Contract of February 9, 1062, states: "The District shall, except as to lands in a development period status, levy a minimum annual operation and maintenance charge against each irrigable acre of land within the District, and the payment of such minimum charge shall be required whether or not water is used. The amount of water in acre-feet per acre which is to be delivered each year for the minimum annual charge shall be determined by the District's Board of Directors, but it may not be set in excess of three (3) acre feet. For water to be delivered each year in excess of the minimum amounts, the landowners or waterusers involved shall pay the District an excess charge as follows: (The wording following has been condensed from the Contract wording.)
>
> (1) First acre foot per acre - 100% of the minimum rate.
> (2) Second acre foot per acre – 160% of the minimum rate.
> (3) Third acre foot per acre, and all additional acre feet per acre, 200% of minimum rate.
>
> When the District assumed operation and maintenance under Article 13, the Board of Directors were empowered to adjust the charges to be made for excess water so as to increase or decrease such charges as it determines to be necessary for the efficient operation of the project.

> and increases the value of the lands of the *entire district* as the water is applied and devoted to a beneficial use by the owners through said system.

24 Idaho at 103 (emphases in original). *Nelson*, 219 P.3d at 811.

> (c) To carry out the provisions of this article, the District, or the United States, whichever is operating the irrigation works, shall measure the water delivered to each farm turnout and shall keep individual farm turnout delivery records." (end of quote from Contract)
>
> Section 2. In addition to the contractual provisions in Section 1, above, no change shall be made in the three (3) acre foot allotment of water under the minimum charge unless said charge shall first be approved by a majority favorable vote in the election for deciding such question by the waterusers of the District; said election shall be held only in conjunction with the regular election for director. (See Minutes of the Board of Directors, January 22, 1962, page 159 of Minute Book No. One.)

Thompson Aff., Ex. A at 1, 5-6.

The Association's members are subject to the Repayment Contract and the above By-Laws. Since the A&B Board of Directors is authorized to establish these rules for water distribution as well as "[t]he amount of water in acre-feet per acre which is to be delivered each year", the Association's members have no valid complaint to present in this matter. In short, there is no injury to any water rights held by the Association's members and their disagreement with the operation and management of the District, as determined by A&B's Board, fails as a matter of law.

III. There Can Be No Constitutional Violation of the Association's Water Rights Because It Does Not Own Any Water Rights.

The Association seeks to apply certain provisions of the Idaho Constitution (Art. XV, §§ 4, 5) in support of its argument but fails to explain how these provisions are relevant to the Director's consideration of A&B's Mitigation Plan. *Assn. Br.* at 9-10. Instead, the Association cites to and replies upon two cases that do not apply to the issues in this proceeding. As explained below, both of those cases concerned separate classes of water users or newly annexed lands within irrigation projects that had different water rights. Unlike A&B, which has both surface and ground water rights appurtenant to all lands within its project, there are no separate

"classes" of landowners within the District entitled to different priority water rights. Moreover, through implementation of the Mitigation Plan A&B does not propose to divest any landowner of the right to receive water through the District. Therefore, the Association's constitutional claim fails.

First, the Association appears to rely upon *Mellen v. Great Western Beet Sugar Co.*, 21 Idaho 353 (1913), to assert that its members have a constitutional right to "continued beneficial use of water for irrigation purposes." A&B agrees with that position, however nothing in the Mitigation Plan proposes to deny the Association's members of the right to use water delivered under the District's water rights. Moreover, *Mellen* concerned an action to determine the respective rights of the parties to the use of water from a reservoir system in Elmore county, which involved "two classes of claimants to the use of water from the irrigation system,", including water users that had settled land and used water prior to the construction of the reservoir system. 21 Idaho at 356. The facts of *Mellen* are inapplicable here where all A&B landowners are treated equally, and are not distributed water based upon "priority" of settlement and improvement of lands on the project. *See Temple Reply*, Ex. D at 20-21, 54; *Thompson Aff.*, Ex. A at 5-6.

The Association cites *Bradshaw v. Milner Low Lift Irrigation District*, 85 Idaho 528, 381 P.2d 440 (1963) for its theory that certain landowners within A&B have a "junior" or inferior status to the Association members and that Article XV, § 5 applies to prevent A&B from delivering the District's storage water to other lands. However, the Association's reliance is misplaced as *Bradshaw* is distinguishable and does not apply to the facts here. *Bradshaw* involved an irrigation district that annexed 4,000 acres of <u>new land</u> to its original boundaries and entered into a new contract with Reclamation for delivery of water to that annexed land.

Bradshaw, in other words, involved two different surface water rights that were acquired at different times for different lands.

The *Bradshaw* litigation was commenced by owners of "new lands"[3] against the irrigation district and the owners of the "old lands", to have the claimed right of the owners of "new lands" share in all water rights owned by the district equally with all other landowners within the district, regardless of the date of their annexation to the district, or the date of the water rights. *Bradshaw*, 85 Idaho at 539, 381 P.2d at 445. The irrigators of the "new lands" petitioned for annexation approximately 32 years after the initial formation of the Milner Low Lift Irrigation District. Milner Low Lift had incorporated other lands into its boundaries prior to the petitioned annexation of the 4,000 acres, however, Milner Low Lift did not have enough water to adequately supply the proposed additional acres.

During this period of time, the United States began construction of Palisades Reservoir. The Palisades project was intended to be a supplemental source of water for <u>existing</u> irrigation systems. In order to be eligible for Palisades water, the "new lands" used annexation to the existing Milner Low Lift Irrigation District as a means to obtain the additional water, as noted by the Court:

> The promoters of the proposed annexation understood that the Palisades project was planned and was to be developed as a source of water supplemental to the water available to existing irrigation systems, and was not intended primarily for the development of new projects. Hence, <u>annexation to an existing district would facilitate the acquisition of additional water</u> from the Palisades storage for the irrigation of the lands to be annexed.

Id., at 85 Idaho at 534, 381 P.2d at 442 (emphasis added).

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[3] The *Bradshaw* Court noted "The lands in the district as it existed prior to the annexation of 1952 are referred to as the 'old lands', and the lands annexed in 1952 are referred to as 'new lands'." *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho at 535, 381 P.2d at 442.

The owners of the "new lands" filed a petition for annexation with the owners of the "old lands." The Court's opinion found "It was understood by all concerned that the existing water rights owned by the district were insufficient for the irrigation of more than a fraction of the proposed additional land. This is apparent from the terms of the petition for annexation." *Id.*, at 534, 442 (emphasis added). The petition explicitly stated "This petition is presented with the expressed understanding and agreement that water is not now available for more than the following described real estate...." *Id.*, at 536, 443 (emphasis added). Further, the "board of directors advised the owners of new lands that their right to receive water, after payment of the annexation fee, was subject, and inferior, to the rights of the owners of the old lands." *Id.*, at 539, 445.

The Idaho Supreme Court agreed with the district court's holding that "The water rights owned by the District, except Palisades Reservoir waters, are appurtenant to the lands within the District as it existed prior to October, 1952, and the District holds title to such waters in trust for the owners of old land" and "if and when water is made available from Palisades Reservoir such water shall be appurtenant to the lands annexed to the District in 1952." *Id.*, at 543, 448 (emphasis added). The Court found that:

> ... the owners of the new lands, by the terms of their petition for admission to the district, specifically disavowed any purpose to claim, or infringe, the existing water rights of owners of the old lands, and that same limitation was carried forward into the order changing the boundaries of the district, and became a condition of that order.

Id., at 546, 450 (internal citations omitted) (emphasis added).

The Court further held, "We agree with the conclusion of the trial court that the water acquired or to be acquired from Palisades reservoir storage should be treated as appurtenant to the new lands. It was and is a new right initiated expressly for the benefit of such lands." *Id.*, at

547, 450 (emphasis added). *Bradshaw's* holding that water is appurtenant to the lands for which it was acquired does not support the Association's argument that A&B's surface water is appurtenant only to Unit A land. *Bradshaw* holds that A&B's surface water right is appurtenant to the lands within the District for which it was acquired, including Unit B.

Bradshaw concludes with the observation that "irrigation district law regards the irrigation district as a unit, and as a legal entity, holding title to its property and water rights in trust for the uses and purposes set forth in that law. I.C. §§ 43-101, 43-316; *Gedney v. Snake River Irr. Dist.*, 61 Idaho 605, 104 P.2d 909; *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250;*Colburn v. Wilson*, 24 Idaho 94, 132 P. 579. *Id.*, at 547, 450-451 (emphasis added). The Court offered this final clarification:

> What is said here is not in conflict with *Colburn v. Wilson*, 24 Idaho 94, 132 P. 579, nor with *Gedney v. Snake River Irr. Dist.*, 61 Idaho 605, 104 P.2d 909. In those cases the water rights of the respective owners were of the same origin and of equal priority. No classification of lands was made in the organization of the districts nor in the assessment of benefits, based upon any difference in the cost of construction or of maintenance and operation. Nor was there any enlargement or extension of either district after the original landowners' rights had become fixed.

Id., at 548, 451 (emphasis added). The Unit B land that the Association attempts to paint as "new" or "annexed" is in fact "of the same origin and of equal priority" as the Unit A lands, similar to the lands in *Colburn* and *Gedney*. *Bradshaw's* treatment of the annexed lands is inapplicable to Unit B lands.

A comparison of the two repayment contracts underscores this distinction. The Repayment Contract between Reclamation and Milner Low Lift providing for the additional water in Palisades contains provisions for the different treatment of the "new lands". "New lands" is included in the definitions sections as follows:

> "New lands" shall mean those lands within the jurisdiction of the District which were not irrigated prior to the 1953 irrigation season, excluding any of such lands

> as, at the beginning of that season, were within the outer boundaries of an ownership then entitled to water through the District's canal system or had by transfer or otherwise an independent right to water from the Snake River.

Thompson Aff., Ex. C *Milner Repayment Contract*, at 3 (emphasis added). The "Limitation on Service to New Lands" section states:

> The total irrigable area of new lands to be provided irrigation service under this contract exceeding 1,500 acres, no part of the additional stored water made available to the District under this contract shall be delivered to or for any new lands except those new lands whose owners, for themselves, their heirs, successors and assigns have, within the time hereinafter provided, executed and delivered recordable contracts in the form approved by the Secretary accepting the terms and conditions of this article.

Id., at 43.

Finally, the amendatory contract entered into in 1966 leaves no doubt about the water supply intended for the "new lands" as opposed to the "old lands":

> For purposes of the internal administration of the District, the water available to the District from this additional capacity, as well as the Palisades capacity initially provided under the storage contract, is confined to the new lands of the District, these being the lands within the District which first received water deliveries from the District after the year 1952.

Thompson Aff., Ex. C *1966 Amendatory Contract* at 10.

The *A&B Repayment Contract*, in contrast, has no similar provisions because there were no annexed or "new lands" to account for when the District entered into the contract. There is no reference in the *A&B Repayment Contract* to "new lands" and the descriptions of project and place of use repeatedly refer to the "lands of the district". The lands identified in the Mitigation Plan that the Association claims were annexed were in fact "lands of the district" included in the original boundaries, included in the original contract, and lands of the A&B Irrigation District from its inception.

In contrast to Milner Low Lift's provision for "new lands", the *A&B Repayment Contract* defines "Project" to mean "the entire North Side Pumping Division of the Minidoka Project constructed and being constructed by the United States under the Federal Reclamation Laws." And "Transferred Works" as "all of the irrigation works built and to be built to serve the lands within the District..." *Temple Reply*, Ex. D at 2 (emphasis added). In the "Description of Cost of Project Works" the contract contemplates "the irrigation of approximately 78,000 acres of land within the District, with the lateral system to provide a single point of deliver to each farm unit determined by the Secretary to be economically irrigable." *Id.*, at 4 (emphasis added). The section "Project Irrigable Acreage" explains "The lands of the District have been classified as to each irrigable acre of land within the jurisdiction of the District. *Id.*, at 12 (emphasis added). Under "Allotment of Water; Excess Water Charges", the contract provides:

> 16 (a) The provisions of this article are made with the objective, among other things, of encouraging the economical use of water and of distributing the operation and maintenance charges equitably among the lands of the District.
>
> (b) The District shall, except as to lands in a development period status, levy a minimum annual operation and maintenance charge against each irrigable acre of land within the District, and the payment of such minimum charge shall be required whether or not water is used. The amount of water in acre-feet per acre which is to be delivered each year for the minimum annual charge shall be determined by the District's board of directors, but it may not be set in excess of 3 acre-feet until the District assumes operation and maintenance under article 13...

Id., at 20. "General Obligations; Levies Therefor" makes "The respective obligations of the lands for charges coming due under this contract shall be a general obligations of all District Lands."*Id.*, at 51 (emphasis added). And "Lands for Which Water is Furnished; Limitations on Area" is given as:

> 41. (a) The water delivered under the terms of this contract shall be used solely for distribution by the District to water users for irrigation and domestic uses incidental thereto.

> (b) The District (and the United States while it is operating and maintaining the transferred works) will operate the irrigation system to the end of making available to <u>each irrigable acre of land in the District</u>, during each irrigation season, that quantity of water to which it is entitled.

Id., at 54 (emphasis added).

The lands in the Mitigation Plan are clearly not analogous to the "new lands" in *Bradshaw*. These lands are not "new lands" or "annexed lands" or "expanded lands" as incorrectly asserted in the Association's motion. The land in Unit B was included in A&B's district boundaries from its inception. All original lands A&B are assessed and treated equally for purposes of operating and maintain the District. A&B owns its storage water rights for the entire District, and that storage is not divided between any original lands and "new" annexed lands as was the case in *Bradshaw*. Moreover, nothing in the storage water rights or A&B's contract with Reclamation limits the use of storage water to particular lands as was the case in *Bradshaw*. No consent of individual landowners is necessary for A&B to deliver water under its water rights to any particular lands within the District. In summary, *Bradshaw* does not apply and should be disregarded.

Moreover, there is no allocation of stored water that will reduce the water used on the Association's members' lands within the project. The storage rights clearly show that the place of use in within the boundary of the entire A&B Irrigation District and is not restricted to certain lands based upon "priority" of settlement or any other reason.

The select landowners that comprise the Association have a right to receive stored water from A&B that the District is entitled to receive from the storage allocated to it by Reclamation from the storage facility owned and operated by Reclamation, as shown by the storage water rights and the repayment contract. However, neither the Association nor its members has a separate "water right" for the irrigation of lands within the irrigation district, and therefore they

cannot show an injury to a particular water right, or any constitutional rights for that matter. The District owns "equitable title" to the water stored in the American Falls Reservoir and Palisades Reservoir and the right to store said water, which water and right is appurtenant to all lands within the district.

In addition, the Association members continue to receive the amount of water they are allowed to receive by reason of diversion and delivery of water under A&B's water rights. *Temple Reply,* 3-5. The District has not "taken" any water away from the Association's members and they have suffered no injury in correlation with the implementation of the actions under the Mitigation Plan for the past 15 years. *Temple Reply*, 4-5. Since all Association members continue to have a right to receive at least 3 acre-feet per acre, and more, if they pay for "excess" water, they cannot validly claim that their constitutional rights have been or will be violated by the Director's approval of the Mitigation Plan. Stated another way, the Association members have not been denied any right to the "annual use" of water contemplated in Article XV, § 4. The Idaho Supreme Court, when confronted with this misstatement of the law, wrote:

> The issue with which we are here confronted is founded on an erroneous theory which has been advanced from time to time by counsel for some of the ditch and irrigation companies and water users, to the effect that a water user who has acquired his right through "sale, rental or distribution" from a ditch or canal company or an irrigation or drainage district, acquires the rights of an appropriator of the water and is entitled to the same consideration in all litigation involving the original appropriation to which the canal or ditch company or irrigation or drainage district is entitled. Such is not the law and it has never been so held or recognized in this state.

Nampa-Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 47 P.2d 916, 918 (1935) (emphasis added).

> The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the use of such water, after having 'once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes,' becomes a perpetual right, subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the

> conditions of the use. Section 4, art. 15 of the Constitution; *Bardsly v. Boise Irr. & Land Co.*, 8 Idaho, 155, 67 P. 428;*Wilterding v. Green*, 4 Idaho, 773, 45 P. 134. A decree in favor of a water user from such ditch could not relieve him from any constitutional or statutory requirements; nor could it put him in any better position or condition than he already finds himself. His presence in the action is in no respect essential to the adjudication of the rights of the several appropriators from the stream itself. Any controversy he may have is with the ditch company from which he receives water, or with other consumers under the ditch over the question of priority of use."

Barclay, 47 P.2d at 918-19 (emphasis added).

The Association's members do not own individual water rights that are distributed by the District. The District holds the rights for all landowners and delivers water in accordance with the water rights, the District's By-Laws, the Board's decisions, and state law. There is no evidence that the Association's members' lands have been denied the water that each acre is entitled to receive and beneficially use as a result of the irrigation of the lands identified in the Mitigation Plan. *See Temple Reply*, 4-5. As previously noted, the one year that A&B restricted surface water use, 2004, was as admitted by the Associations' witness, due to IDWR's treatment of prior exchange agreements, and due to the fact the reservoirs did not fill that year. *Ottman Direct* 4:22-23, 5:1; *Temple Reply*, 4-5. The reduced allocation was not a result of the District delivering storage water to the lands identified in the Mitigation Plan. *Temple Reply*, 4. Moreover, this reduced allocation was not a "taking" of any constitutional rights held by the Association's members, they still received an "annual use" of water equal to all other District landowners that received surface water that year. *Id.*

In sum, this is an internal water distribution question for A&B, not a constitutional question. Based upon the reasons set forth above, the Association has failed to show any injury to any constitutional right held by its members. The Director should deny the Association's motion accordingly.

IV. A&B has met its Burden on the Mitigation Plan, Blue Lakes has Agreed to the Mitigation Plan, Therefore the Director Should Approve the Plan.

A&B has in fact met its burden to show the proposed mitigation plan will prevent injury to existing water right holders. As explained above, neither the Association nor its members hold any "water rights" that stand to be injured as that term is defined in the CM Rules. Moreover, how A&B delivers water to its landowners is not a matter to be considered by the Director in this proceeding. Since A&B is authorized to deliver the water to the lands identified in the Mitigation Plan, the Association's motion fails as a matter of law.

Importantly, Blue Lakes, the injured senior water right holder, has approved the mitigation plan. *See Stipulation and Joint Motion.* The Association has provided no evidence that the Mitigation Plan will not satisfy the injured senior water right. For over 15 years A&B has implemented the action contemplated in the Mitigation Plan, <u>without injury</u> to the Association or its members. Moreover, the facts plainly show that all A&B landowners received at least 3 acre-feet per year in all years but one in the 52-year history of the District. *Temple Reply*, 4. In 2004, slightly reduced delivery amounts were directly attributable to reduced reservoir fill and IDWR's treatment of prior exchange agreements, as agreed to by the Association's own witness. *Ottman Direct* at 4, 5. There is simply no injury that will result from the approval and implementation of A&B's Mitigation Plan.

Irrespective of the Association's claims, the Director has the authority to approve a mitigation plan even though it does not comply with all Rule 43 provisions <u>provided</u> the injured senior water right holder <u>agrees</u> to the plan. *See* Rule 43.03.o. Accordingly, even if the Director determines that A&B's plan does not comply with all of the applicable Rule 43 criteria, the Director can still approve the mitigation plan. Based upon the facts and law as described above, the Director should approve the plan consistent with the *Stipulation and Joint Motion* since A&B

is authorized to deliver the storage water under the Mitigation Plan and no injury will result to any senior water right holder or any of the Association's members.

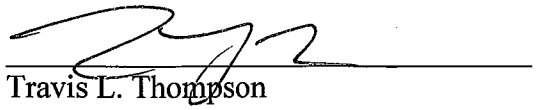
CONCLUSION

A&B's proposed Mitigation Plan is in accordance with state law. The place of use for the storage water rights authorize A&B to deliver storage to the lands within its project identified in the Mitigation Plan. In addition, A&B, and not the individual landowners of the District, holds equitable and beneficial title to the water rights and is required by law to do everything in its power to distribute those rights equally and ratably to each irrigable acre within district boundaries. The Board of Directors is authorized by contract and its By-Laws to annually determine the acre-feet per acre allocated to each District landowner. In every year except one in the 52-history of the project the Association's members have received the standard 3 acre-feet per acre. The Association's mistaken belief that the mitigation plan is a constitutional violation of its members' water rights is a non sequitur – neither the Association nor its members has a separate water right apart from the District's rights for all landowners and as such cannot suffer an injury to that which it does not have.

Finally, A&B has met its required burden regarding the mitigation plan, as is dispositive by Blue Lakes agreement to the plan, under CM Rule 43, the Director may consider that a factor and should approve the plan. For these reasons, and the reasons stated above, the Director should deny Unit A's Motion for Summary Judgment, find that A&B is authorized to implement the Mitigation Plan, and approve the plan pursuant to the terms of the *Stipulation and Joint Motion* filed by A&B and Blue Lakes.

DATED this 5th day of March, 2010.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2010, the above and foregoing **A&B IRRIGATION DISTRICT'S RESPONSE** was sent to the following by e-mail at the listed e-mail addresses:

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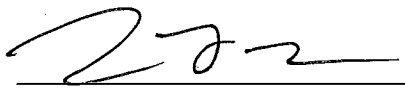

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