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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. ACE BLACK RANCHES, LLP, Defendant.	Case No.: 1:24-cv-00113-DCN **ACE BLACK RANCHES, LLP'S REPLY IN SUPPORT OF MOTION TO DISMISS [DKT. 7]**

Ace Black Ranches, LLP (ABR), by and through its undersigned counsel of record, respectfully submits this reply in support of its motion (Mot. to Dismiss, Dkt. 7) seeking dismissal of the plaintiff's claims regarding "adjacent wetlands."

A. The plaintiff gets the pleading standard backward.

A court can dismiss a plaintiff's claims when the plaintiff "fails to state a claim" by not alleging "sufficient facts . . . under a cognizable legal theory." Fed. R. Civ. P. 12(b)(6); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted); *Dreyer v. Idaho Dep't of Health & Welfare*, 558 F. Supp. 3d 917, 924–25 (D. Idaho 2021).

What is "sufficient"? The complaint "does not need detailed factual allegations," but it must set forth "more than labels and conclusions, and a formulaic recitation of the elements." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007). If the so-called "facts" alleged are "merely consistent with" a defendant's liability, or if there is an "obvious alternative explanation" that would not result in liability, then the complaint has not stated a claim for relief that is plausible on its face—the plaintiff has not alleged sufficient *facts* to support its legal theory. *Id.* at 557, 567.

"Sufficiency" of the fact allegations is critical early in a case. At the pleading stage, when a plaintiff actually does allege the facts that would support the plaintiff's legal theory and demand for a remedy, the "court must accept" those allegations "as true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Put another way, a court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

Twombly gives a useful example of the plaintiff's burden. In that case, the plaintiffs' "fact" allegation, which mirrored a statute, was that the defendants "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." 550 U.S. at 551. But how? When did the defendants talk? Where was the agreement? What was the "factual context suggesting agreement"? *Id.* at 549. What were the facts that, should the plaintiffs prove them after pleading them, would have supported the legal theory and demand for a remedy? What *facts* would the plaintiffs later show a fact-finder to prove that "an agreement was made"? *Id.* at 556. And could the plaintiffs allege facts that would turn lawful behavior into unlawful behavior? The plaintiffs did not say.

The plaintiffs only alleged a legal *conclusion*—anti-competitive conspiracy!—devoid of "factual context" allegations that the plaintiff would have to prove. The Supreme Court explained that such conclusory pleading was insufficient to justify letting a case get past the pleading stage. *Id.* at 556–57. Dismissal of such conclusory allegations and unsupported claims was proper.

That is exactly what is happening in this case about so-called "adjacent wetlands." In its Complaint (Dkt. 1), the plaintiff repeatedly alleges that ABR discharged into or otherwise disturbed "adjacent wetlands." *See* Mem. in Supp. of Mot. to Dismiss (Dkt. 7-1) 5–6 n.3 (collecting paragraphs in the Complaint). The plaintiff doubles-down on this approach in its Opposition to the Motion to Dismiss (Dkt. 11 at 7–8). But the assertion that a piece of ground—dry or wet—is an "adjacent wetland" is a *legal* conclusion. *See generally Sackett v. EPA*, 598 U.S. 651 (2023) (addressing what an "adjacent wetland" is as a matter of law); *Rapanos v. United States*, 547 U.S. 715 (2006) (same); *see also N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 998 (9th Cir. 2007) (explaining, in a case that predated *Sackett*, "The [Supreme] Court held [in *Riverside Bayview Homes*] that 'the relationship between waters and their adjacent wetlands provides an adequate basis *for a legal judgment* that adjacent wetlands may be defined as waters under the Act.'" (emphasis added)).

Having made the conclusory allegation that ABR did something to an "adjacent wetland," the plaintiff still must allege the "factual context" that would make the conclusory allegation true. *See Twombly*, 550 U.S. at 551. It is not enough for the plaintiff to say, "adjacent wetland," and then invite *the Court* to make up the allegations that would make the legal conclusion true. Where is the ground? How is it connected to the Bruneau River? Is it close to the river? Did it have a continuous surface-water connection with the river within the relevant time? The federal investigators were at the ranch for seven days over two different visits, was the ground wet?

The plaintiff does not say. Instead, in the Opposition (Dkt. 11 at 7–8), the plaintiff leans into the conclusory legal allegation that whatever happened, it must have happened in "adjacent wetlands." That is not enough to meet the plaintiff's pleading burden.

This is how it works in practice: at the pleading stage, the plaintiff is supposed to give the Court a reason *to believe* that the plaintiff's legal conclusion is correct and "unlock the doors of discovery." *See Iqbal*, 556 U.S. at 678. Here, the plaintiff does not agree with the practice, arguing instead in the Opposition (at 1, 7–8, 12–13) that *because* the plaintiff asserts a conclusion—that ABR did something to "adjacent wetlands"—thus the Court should *invent* a set of facts that would make the allegation true. *Ipse dixit*. But the plaintiff—not the Court (nor ABR)—must come up with and allege the facts that will support its legal theory later in the case. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 554–55. The plaintiff has the burden of showing why litigation over so-called "adjacent wetlands" is necessary at all. That is neither the Court's nor ABR's burden.

Going a step further, the plaintiff would excuse (Opposition, Dkt. 11 at 13–16) its insufficient pleading because "whether a continuous surface connection exists is a fact-intensive inquiry." In that respect, the plaintiff might be right. So what are the supposed facts? The plaintiff had federal investigators onsite at the ranch for seven days over two different visits; what are the facts that the investigators witnessed that would give the Court (and ABR) a reason to think that there was a continuous surface-water connection between the Bruneau River and any piece of ground where ABR allegedly did something? Maybe the plaintiff does not know, in which case the plaintiff should not have sued ABR for discharges or other disturbances in so-called "adjacent wetlands." If, on the other hand, the plaintiff has *facts* that support its legal conclusions, then the plaintiff should have no problem pleading those facts so that the Court knows what they are and ABR can test them in litigation.

Because the plaintiff here does not plausibly allege facts supporting its legal conclusion that ABR discharged into or otherwise disturbed "adjacent wetlands" the plaintiff has jurisdiction to enforce, the Court must dismiss the plaintiff's claims regarding those "adjacent wetlands" (wherever they are).

B. ABR agrees that *Sackett* did not create a new pleading standard, it only explained what the plaintiff must plausibly allege and ultimately prove to get a Clean Water Act claim past the pleadings stage.

The plaintiff makes much in its Opposition (Dkt. 11 at 8–12) of an argument that the plaintiff invents from whole cloth, insisting that "*Sackett* did not create a new pleading standard." ABR agrees completely with this statement, and that's the point.

Under *Twombly* and *Iqbal*, the plaintiff must plausibly plead its claims, including allegations that give "factual context" to the conclusory allegation that ABR did something to "adjacent wetlands." *See Twombly*, 550 U.S. at 549. The Supreme Court explained that in doing so when it comes to "adjacent wetlands"—*Element 4* of the plaintiff's burden according to the plaintiff (Opposition, Dkt. 11 at 7)—the plaintiff has to actually explain how "the wetland has a continuous surface connection" with the Bruneau River such that it, "mak[es] it difficult to determine where the water ends and the wetland begins." *See Sackett*, 598 U.S. at 678–79.

In the Opposition (generally, and at 8–12 specifically), the plaintiff is arguing that it does not have to meet the *Twombly*/*Iqbal* pleading standard on a necessary element of its claims—*Element 4*. But why? The plaintiff does not explain and is wrong. At most, the whole argument is a "straw man" intended to draw the Court away from the plaintiff's failure to adequately plead its claims about "adjacent wetlands."

C. The plaintiff's argument about "indistinguishable" wetlands is irrelevant and wrong.

Similarly, the plaintiff in its Opposition (Dkt. 11 at 9–11) seems to say that it is not bound by the *Sackett* opinion, and so the plaintiff does not have to plausibly allege that whatever supposed

ground that ABR allegedly discharged into or disturbed had "a continuous surface connection" with the Bruneau River, "making it difficult to determine where the water ends and the wetland begins." *Sackett*, 598 U.S. at 678–79. The plaintiff says (at 9–10) that these are mere "descriptive phrases" from the Supreme Court, so the plaintiff does not have to care about them.

But that is not what the Supreme Court seemed to think. The Court presented them as necessary parts of a necessary element that the plaintiff would have to plead and prove whenever it sought a civil remedy against an Idaho property owner like ABR. In this case, the plaintiff did not plead and does not think it has to prove that any given piece of ABR's property—dry or wet—"has a continuous surface connection with" the Bruneau River "making it difficult to determine where the 'water' ends and the 'wetland' begins." *See Sackett*, 598 U.S. at 678–79. The plaintiff also did not plead and does think it has to prove that any given piece of ABR's property—dry or wet—is "indistinguishably part" of the Bruneau River. *See id.*

The plaintiff is wrong. ABR has not contended that the plaintiff must use the magic word "indistinguishable"—the opposite is true. *See* Mem. in Supp. of Mot. to Dismiss (Dkt. 7-1) 8 ("Nor is Plaintiff's failure to state a claim due to merely failing to say any magic words."). And the district court's explanation in *White v. EPA*, 2024 WL 3049581 (E.D.N.C. June 18, 2024), which the plaintiff provided the Court (Dkt. 12-1, filed June 20, 2024) explains why. Whether the plaintiff and the Court couch the jurisdictional trigger as wetlands with "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands," *Sackett*, 598 U.S. at 678, or as "wetlands that are 'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the 'water' ends and the 'wetland' begins,'" *id.*, is a distinction without a difference. As the district court explained in *White*, "indistinguishability occurs when

wetlands have a continuous surface connection to bodies that are waters of the United States in the own right, so that there is no clear demarcation between waters and wetlands." 2024 WL 3049581, at *9 (quoting *Sackett* and *Rapanos*). "[W]hether using the phrasing from either *Rapanos* or *Sackett*, the Court has stated in no uncertain terms that the consequence of a 'continuous surface connection' with a covered water is indistinguishability with that water." *Id.* at *10. The plaintiff's hang-up on the semantics of the word "indistinguishable" and the words "continuous surface connection" or "difficult to determine where the water ends and the wetland begins" is irrelevant—these requirements "meld[] into one." *Id.* at *9.

The plaintiff's argument on this score (Opposition, Dkt. 11 at 9–11) is not only irrelevant but also wrong. The plaintiff still must *plausibly allege* that the wetlands ABR allegedly discharged into or disturbed had a sufficient surface-water connection with the Bruneau River that they were indistinguishable from the river—that is, it was difficult to figure out where the river ended and the supposed wetlands began. *See Sackett*, 598 U.S. at 678–79. Of course, it would not suffice for the plaintiff to merely use the magic word "indistinguishable," the plaintiff must plausibly plead the "factual context" supporting allegations that any piece of ground that ABR allegedly discharged into or disturbed is "indistinguishably part" of the Bruneau River, so that it is "difficult to determine" where Bruneau River ends and that given piece of non-river on ABR's ranch begins. *See Twombly*, 550 U.S. at 549; *see also Sackett*, 598 U.S. at 678–79.

D. The plaintiff cannot enforce alleged violations occurring beyond the limitations period.

The plaintiff's supposed "saving grace" is its suggestion (Opposition, Dkt. 11 at 10–11) that ABR's actions *outside* the limitations period cutoff the continuous surface-water connection between the Bruneau River and the ground where ABR supposedly violated the Clean Water Act. *See also* Compl. ¶ 54, Dkt. 1. ABR addressed this mistaken argument already. *See* Mem. in Supp.

of Mot. to Dismiss (Dkt. 7-1) 6–7 (addressing ¶ 54 of the Complaint). But trying to rescue its allegation, the plaintiff cites footnote 16 of the majority opinion in *Sackett* (Opposition, Dkt. 11 at 11). According to *the plaintiff*, the *Sackett* majority noted "that an unlawfully constructed barrier separating a wetland from a water of the United States does not defeat Clean Water Act coverage of the wetland." But the plaintiff leaves out a crucial condition in the footnote; the plaintiff's reading of the footnote is only correct in those situations where the plaintiff has authority to enforce the Clean Water Act:

> Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. ***Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act***, see 33 U.S.C. §§ 1319(a)–(b), that unlawful barrier poses no bar to its jurisdiction.

Sackett, 598 U.S. at 678 n.16 (emphasis added). But what if the EPA cannot exercise its statutory authority to order a barrier's removal?

Under 28 U.S.C. § 2462, the EPA—that is, the plaintiff here—can only file a lawsuit or proceeding "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, . . . within five years from the date when the claim first accrued." *See Sackett*, 598 U.S. at 660 ("due to the Act's 5-year statute of limitations, 28 U.S.C. § 2462, and expansive interpretations of the term 'violation,' these civil penalties can be nearly as crushing as their criminal counterparts").

At most, the plaintiff makes the unexplained allegation that "*prior* to Defendant's violations of the Clean Water Act, wetlands on the Site had a continuous surface connection to the Bruneau River." Compl. ¶ 54, Dkt. 1. There are several problems with this allegation, which ABR addressed in detail. *See* Mem. in Supp. of Mot. to Dismiss (Dkt. 7-1) 6–7. In addition, the allegation is arguably tautological or at least lacking sufficient specificity to suggest that ABR did

something wrong—it does not say that *but for* ABR's alleged action, the ground that ABR allegedly disturbed had a continuous surface-water connection with the Bruneau River; it just says that at some time, there were wetlands at the ranch that *did* have a continuous surface-water connection with the Bruneau River. So what?

More to the point, though, in addressing *Sackett* footnote 16, if the Court were to read into the vague allegation that it was *ABR* who did something to sever the continuous surface-water connection between ground ABR allegedly disturbed and the Bruneau River, then the plaintiff nevertheless may have no recourse in this Circuit—whether legal or equitable—if that alleged activity took place outside the five-year limitations period. *See* 28 U.S.C. § 2462; *Sackett*, 598 U.S. at 660, 678 n.16; *cf. Cope v. Anderson*, 331 U.S. 461, 464 (1947) (generally, equitable remedies are time-barred when a statute of limitations bars legal remedies); *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (applying the "concurrent remedy" rule to time-barred claims for equitable relief by a federal agency per 28 U.S.C. § 2462).

When did ABR supposedly cut off the continuous surface-water connection? The plaintiff does not say. If that alleged activity occurred beyond the five-year statutory period, then the plaintiff would not have "statutory authority" to order ABR to *re-connect* the Bruneau River with the grounds that ABR allegedly disturbed. *See Sackett*, 598 U.S. at 678 n.16. And if the plaintiff has no authority to re-connect the Bruneau River with the ground on various parts of ABR's ranch, then the plaintiff has no "statutory authority" to enforce alleged Clean Water Act violations on parts of the ranch where there is no alleged continuous surface-water connection with the Bruneau River. *See id.* at 678–79, 678 n.16. The plaintiff's conclusory allegation that ABR must of have done something at some point in the past that cut off the surface-water connection between parts of the ranch and the Bruneau River does not save the plaintiff's "adjacent wetlands" claims.

E. The Court should dismiss the plaintiff's "adjacent wetlands" claims with leave for the plaintiff to amend those claims if the plaintiff can make plausible fact-allegations.

ABR understands that in this Circuit, dismissal of a complaint without leave to amend is inappropriate unless it is beyond doubt that the complaint could not be saved by an amendment. *See Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009). In this case, the plaintiff had federal investigators onsite at ABR's ranch for seven days over two different visits. If in that time, the plaintiff witnessed *facts* that would give the Court (and ABR) a reason to think that there was a continuous surface-water connection between the Bruneau River and any piece of ground where ABR allegedly did something, then the plaintiff should explain that in allegations in an amended complaint. At that point, the Court would know what the Court is supposed to believe, and ABR would know what *facts* it will need to test in litigation. If the plaintiff does not know whether there was a continuous surface-water connection between the Bruneau River and any piece of ground where ABR allegedly did something and is just guessing, then the plaintiff should not have sued ABR for discharges or other disturbances in so-called "adjacent wetlands."

For the reasons described in its motion (Dkt. 7) and memorandum in support of the motion (Dkt. 7-1) and further explained in this reply supporting the motion, ABR respectfully asks the Court to dismiss the plaintiff's claims alleging an entitlement to relief for "discharges of pollutants in violation of Section 301(a)" into "adjacent wetlands" for a failure to state a claim upon which relief can be granted.

DATED this 21st day of June, 2024.

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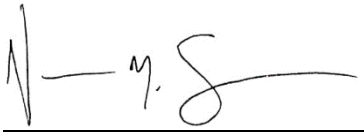

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MOUNTAIN STATES LEGAL FOUNDATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of June, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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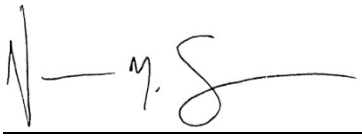

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