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Attorneys for North Snake and Magic Valley Ground Water Districts

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE MITIGATION
PLAN OF THE NORTH SNAKE AND MAGIC
VALLEY GROUND WATER DISTRICTS
IMPLEMENTED BY APPLICATIONS FOR
PERMIT NOS. 02-10405 AND 36-16645 AND
APPLICATION FOR TRANSFER NO. 74904
TO PROVIDE REPLACEMENT WATER FOR
CLEAR SPRINGS SNAKE RIVER FARM

(Water District Nos. 130 and 140)

**GROUND WATER DISTRICTS'
MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
RECONSIDERATION OF
NOVEMBER 26, 2008, ORDER**

COME NOW North Snake Ground Water District and Magic Valley Ground Water District (collectively the Ground Water Districts), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby submit the Ground Water Districts' Memorandum in Support of its Motion For Partial Reconsideration of the Director's November 26, 2008, Order.

I. BACKGROUND

On June 13, 2008, the Ground Water Districts submitted the *Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District* under IDAPA 37.03.11.043 (Conjunctive Management Rule 43), to the Director to provide Clear Spring with a replacement water supply of suitable water quality. On September 5, 2008, the Ground Water Districts filed an Amended Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District (“Amended Mitigation Plan”) that changed the order of consideration of the mitigation options contained within the original mitigation plan. As part of its Amended Mitigation Plan, the Ground Water Districts set forth a pump back/recycle alternative, as well as other mitigation methods.

On September 25, 2008, Director Tuthill issued a Scheduling Order which set a hearing on the pump-back/recycle option for January 20, 2009, and hearing on the remaining issues for February 3, 2009. The Scheduling Order also allowed the parties to engage in written discovery. Thereafter, on October 2, 2008, the Ground Water Districts served written interrogatories and a request for production of documents upon Clear Springs. In response, Clear Springs filed a Motion to Dismiss and/or Motion for Protective Order on October 24, 2008.

In its Motion to Dismiss, Clear Springs argued that as a matter of law the principles of *res judicata* barred the Ground Water Districts’ pump back/recycle mitigation option because it had already been ruled upon by the Director in his July 11, 2008, Final Order. Clear Springs did not seek dismissal on any factual issues and did not support its Motion with affidavits.

On November 18, 2008, in light of Clear Springs' objection to providing information concerning the pump back/recycle option, the Ground Water Districts filed a Motion to Compel and a Motion to Extend Deadlines and to Consolidate Hearings.

On November 26, 2008, the Director issued his Order on Prehearing Motions and Amending Schedule. As part of its November 26, 2008, Order, the Director ruled that *res judicata* does not bar the Ground Water Districts' pump-back recycle option. The Director then dismissed the Ground Water Districts' pump-back alternative, without prejudice, finding that there are many existing issues and concerns relating to the use of a pump back alternative and that it is "impractical to expect that these numerous issues and concerns could be adequately explored and addressed to allow for an approvable mitigation plan to be in place within the desired time frame for the 2009 irrigation season." The Director further found that dismissal of the pump back/recycle option made the Ground Water Districts' Motion to Compel moot.

The Ground Water Districts now seek reconsideration of the portion of the November 26, 2008, Order that dismissed the pump back/recycle option because (1) the Order violated the Ground Water Districts' due process rights and (2) the pump back/recycle option is a viable mitigation plan.

II. GROUND WATER DISTRICTS HAS BEEN DENIED DUE PROCESS

In this case, the Director has entered an Order dismissing a portion of the proposed mitigation option before any evidence was presented by either party regarding the pump back/recycle mitigation option. In its Motion to Dismiss, Clear Springs sought dismissal as a matter of law on the ground of *res judicata*, and did not present any evidence concerning the pump back/recycle option. Accordingly, in response to the

Motion to Dismiss, the Ground Water Districts did not present any evidence about the feasibility of a pump back/recycle option. Clear Springs did not seek dismissal on any other ground. The Director correctly ruled that *res judicata* did not apply, but went on to dismiss the pump back/recycle option on other grounds not presented by any of the parties. The *sua sponte* ruling violated the Ground Water Districts' due process rights because the Ground Water Districts were not given an opportunity to argue against dismissal on the grounds the Director found for dismissal.

Furthermore, in the Dismissal Order, the Director made factual findings. Specifically, the Director found that there are many existing issues and concerns relating to the use of a pump back alternative and that it is "impractical to expect that these numerous issues and concerns could be adequately explored and addressed to allow for an approvable mitigation plan to be in place within the desired time frame for the 2009 irrigation season."

The Director's factual findings are not supported by the record because no facts regarding the pump back/recycle option have ever been presented. Accordingly, the Director's Order, in part, violates the Ground Water Districts' due process rights and is reversible error. *See* I.C. § 67-5279 (allowing court to set aside agency action if it is a violation of constitutional provisions, arbitrary or capricious or not supported by substantial evidence). In this matter, the Director's order is not supported by any evidence and is entirely speculative.

III. THE GROUND WATER DISTRICTS ARE PREJUDICED BY THE DIRECTOR'S ORDER

In preparation for the Hearings, the Ground Water Districts have retained numerous experts to examine the feasibility of a pump back/recycle option. The Ground

Water Districts' experts and its counsel have expended a great deal of effort to analyze the pump back/recycle option. The Ground Water Districts have incurred great expenses in having its counsel and experts explore the pump back/recycle option. The Ground Water Districts are greatly prejudiced by not be allowed to go forward with its evidence of a pump back/recycle mitigation option.

IV. THE EVIDENCE SUPPORTS A PUMP BACK/RECYCLE OPTION

The Ground Water Districts retained various experts, including Ray Eldridge, to opine that a pump back/recycle option (*See* Ground Water Districts' expert witness disclosures and testimony filed contemporaneously herewith). Mr. Eldridge holds a bachelors and master's degree in civil engineering and has over 25 years of experience in this field of hydraulic engineering, fish facilities, water supply, treatment and construction management (*See* direct testimony of Ray Eldridge filed contemporaneously herewith). Mr. Eldridge is a founding partner at ESC Engineering Science Construction, P.C., and has prepared a report regarding the pump/back recycle option. *Id.*

In his report, Ray Eldridge concludes that:

1. The SRF is an oxygen limited operation and that limitation is overcome by aeration within the serial reuse system.
2. Un-ionized ammonia is not a limiting factor at an annual production rate of 3,700,000 lbs/yr and a water flow rate of 91.5 cfs. Production could be increased by approximately 10% or water flow decreased by 10% before un-ionized ammonia becomes a limiting factor.
3. Carbon dioxide is not a limiting factor at an annual production rate of 3,700,000 lbs/yr and a water flow rate of 91.5 cfs. Production could be increased by approximately 20% or water flow decreased by 20% before carbon dioxide becomes a limiting factor.
4. Disease problems at the facility do not appear to be a significant operational issue, as evidenced by the on-going reuse operation. (*See* page 5 of Eldridge Report attached to direct testimony of Eldridge).

Furthermore, Mr. Eldridge ultimately concludes that, “While the proposed flow schematic for this option is far more complex than the aeration option, it is simple when compared to most recirculating aquaculture systems, and can be expected to be operated with few problems.” (See page 7 of Eldridge Report attached as Exhibit 4201 to direct testimony of Eldridge). Mr. Eldridge also opines the recycle option will cost approximately \$730,000 to implement. (See direct testimony of Ray Eldridge).

In addition to Mr. Eldridge, the Ground Water Districts retained Terry Scanlan as an expert. Mr. Scanlan holds a Masters of Science in Geological Engineering from the University of Idaho and a Bachelor of Science in Geological Engineering from the University of Idaho. (See direct testimony of Terry Scanlan filed contemporaneously herewith). Mr. Scanlan is a licensed professional engineer, a licensed professional geologist, and a certified water rights examiner who has expertise in hydrogeology, well engineering, and water systems engineering. *Id.*

Mr. Scanlan has been primarily investigating the viability of drilling wells as part of the Ground Water Districts’ mitigation plan (See Scanlan Direct Testimony). Mr. Scanlan has concluded that the well option could cost upward of \$750,000 to \$1,000,000 upon completion assuming the testing comes back positive. (See affidavit of Terry Scanlan). Mr. Scanlan has also read Mr. Eldridge’s report and has consulted with Mr. Eldridge regarding his report. *Id.* Mr. Scanlan has opined that Mr. Eldridge’s recycle solution is a more feasible and more favorable mitigation option than the well option. *Id.*

Accordingly, based on the expert opinions of Mr. Eldridge and Mr. Scanlan, the recycle option is not “impractical to expect that these numerous issues and concerns

could be adequately explored and addressed to allow for an approvable mitigation plan to be in place within the desired time frame for the 2009 irrigation season.”

Moreover, the portion of the hearing dealing with a pump back/recycle option should involve less complexity than the portion of the hearing dealing with a well mitigation option. The only party with standing to contest the pump back/recycle option is Clear Springs because the pump back/recycle option will not affect any other protesters. Whereas the well option, or other possible mitigation options, may arguably affect other protesters, or at the very least, there will be standing for other protestors to raise concerns at the hearing.

V. CONCLUSION

Thus, the Ground Water Districts request Director Tuthill to reconsider his November 26, 2008, Order, as it relates to the dismissal of the Ground Water Districts’ pump back/recycle option and the Ground Water Districts’ Motion to Compel. The Ground Water Districts request that the pump back/recycle option be reinstated and that their Motion to Compel be granted.

DATED this 5th day of December, 2008.

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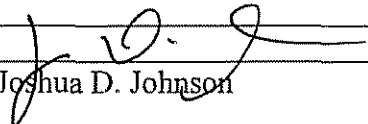
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CERTIFICATE OF MAILING

I hereby certify that on this 5th day of December, 2008, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

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