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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 DISTRIBUTION OF
WATER TO WATER RIGHT NOS.
36-0413A, 36-04013B AND 36-7148

(Snake River Farm)

**SECOND MITIGATION PLAN OF
NORTH SNAKE GROUND WATER
DISTRICT AND MAGIC VALLEY
GROUND WATER DISTRICT
PROVIDING FOR MONETARY
COMPENSATION**

COME NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively “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 this Second Mitigation Plan Providing for monetary compensation to Snake River Farm (“Second Mitigation Plan”) pursuant to Conjunctive Management Rule 43, IDAPA 37.03.11.043.03.c which specifically authorizes approval of a mitigation plan providing “other appropriate compensation,” as an alternative to replacement water supplies , sufficient to offset injury to the senior-priority Water Right Nos. 3604913B and 36-07148 of Snake River Farm (collectively “the Snake River Farm Water Rights”).

I. INTRODUCTION

This Mitigation Plan is provided in response to the Idaho Department of Water Resources (IDWR or Department) Director's July 8, 2005, Order in the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm); and subsequent Orders relating thereto. These orders are referred to herein collectively as the Director's Orders.

The Director's *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls dated July 11, 2008* ("Final Order") requires that the Ground Water Districts provide mitigation in order to avoid involuntary curtailment of ground water rights located in Water District 130. Further, the *Final Order Regarding the Surface Water Coalition Delivery Call* dated September 5, 2008 on page 3 states that the Idaho Ground Water Appropriators (on behalf of its members) should file a Rule 42 Mitigation Plan after a record has been developed, but acknowledges that replacement water plans serve a necessary role in the interim period after a delivery call is filed. In accordance with the Director's latest direction, the Ground Water Districts are submitting this Second Mitigation Plan under Rule 43.

As described below, this Second Mitigation Plan does not provide physical replacement water supplies, but rather "other appropriate compensation" pursuant to CM Rule 43.03b in the form of an annual cash payment in an amount equal to the actual lost net profit (defined as gross revenue less expenses) incurred by Snake River Farm resulting from the lost trout production associated with 2.0 cfs of reduced flow to Snake River Farm from the Final Order, Finding of Fact 9, p.3.

II. RESERVATION OF DEFENSES

By submitting this Mitigation Plan, the Ground Water Districts do not waive and expressly reserve any and all objections and defenses they have made to the Director's Orders. This Second Mitigation Plan, is submitted as a new, stand alone plan to be considered on its own merits. The Ground Water Districts acknowledge that they also have an Amended Mitigation Plan pending before IDWR.

III. 2005, 2006 AND 2007 REPLACEMENT WATER PLANS

The Ground Water Districts previously submitted Replacement Water Plans for 2005, 2006 and 2007. Orders were entered approving the 2005 and 2007 Replacement Water Plans. Because of litigation and appeal relating to the constitutionality of the Conjunctive Management Rules, in *American Falls Reservoir Dist. No 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), the Director did not issue any order approving or disapproving the Ground Water Districts' 2006 Replacement Water Plan.

IV. MITIGATION PLAN

(1) Submission of Mitigation Plan

This proposed Second Mitigation Plan is submitted to the Director pursuant to CM Rule 43.03.c to provide other appropriate compensation to the Snake River Farm water rights in the form of an annual cash payment equal to the lost net profit (defined as sale revenue less cost of production) associated with a reduced water supply of 2.0 cfs along with the expected benefits to the Buhl to Thousand Springs Reach from past conversion efforts and ongoing Conservation Reserve Enhancement Program ("CREP") acreage.

The following information is provided:

(a) The names and mailing addresses of the Ground Water Districts submitting the plan are:

North Snake Ground Water District
1092 South 2500 East
Hazelton, Idaho 83335

Magic Valley Ground Water District
P.O. Box 430
Paul, Idaho 83347

(b) The water rights that benefit from the Second Mitigation Plan are: 36-04013B, 36-07148 (“Snake River Farm Water Rights”).

(2) Mitigation Requirement

Based on simulations using the Department’s Ground Water Model for the ESPA, the 2009 delivery requirement to Snake River Farms is 2.6 cfs.^{1,2}

The Department calculated that 2008 CREP lands and conversions are anticipated to provide 9.7 cfs to the Buhl to Thousand Springs reach as described in the Director’s May 13, 2008 letter on page 2 as follows:

“The 2008 Conservation Reserve Enhancement Program (CREP) lands and conversions are anticipated to provide 9.7 cfs to the Buhl to Thousand Springs reach, if the conversions remain the same as in past years. The Order indicates that Snake River Farm is computed to receive 7 percent of the flow in the Buhl to Thousand Springs reach. Taking into account 9.7 cfs of benefit to the Buhl to Thousand Springs reach, which reduces the Ground Water Districts’ Replacement Plan obligation for 2008 from 31 cfs in 2008 to 21.3 cfs, and from 38 cfs to 28.3 cfs for 2009, the computed shortfall of direct replacement water owed to Snake

¹ Finding of Fact 9 at page 3 of the Final Order Regarding Blue Lakes and Clear Springs Delivery Calls dated July 11, 2008.

² The 2009 reach gain requirement for the Buhl to Thousand Springs Reach of 38 cfs multiplied by 6.9% equals 2.6 cfs.

River Farm in 2008 is 1.5 cfs (21.3 times .07) and 2 cfs (28.3 cfs times .07) in 2009.”

Based upon the foregoing calculations of the Department and assuming the same CREP and conversions benefit of 9.7 cfs to the Buhl to Thousand Springs reach, the Ground Water Districts’ remaining mitigation requirement to Snake River Farm for 2009 is 2.0 cfs. The method used by the Department, although subject to dispute by the Ground Water Districts, meets the requirements of CM Rule 43.03.d. e. f. and g.

(3) Monetary Compensation

This Second Mitigation Plan is made pursuant to Rule 43.03.c, which states, *inter alia*,

Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

(c) Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed” Rule 43.03.c (emphasis added).

Although not specifically defined in the Idaho Administrative Code, Black’s Law Dictionary defines “compensation” as:

1. Remuneration and other benefits received in return for services rendered; esp., salary or wages. . . . 2. Payment of damage, or any other act that a court orders to be done by a person who has caused injury to another and must therefore make the other whole. BLACK’S LAW DICTIONARY 277 (7th ed. 1999) (emphasis added).

In his January 11, 2008, decision, Hearing Officer Schroeder found that,

6. The use of water by the Spring Users is a beneficial use. The propagation of trout is a substantial business that competes in a global market. Blue Springs (sic) markets nationally. Clear Springs markets internationally. Water they receive pursuant to their water rights enables them to engage in an enterprise that benefits the owners and employees and the State of Idaho through tax revenues and employment. Each is capable of utilizing the total amount of water decreed in their various rights to produce trout. The more water available under the rights the more fish they can produce.

Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation (Blue Lakes and Clear Springs Delivery Call) at 5-6. (emphasis added).

Because there has been a finding that the beneficial use Clear Springs receives from their water rights is additional trout, and they are capable of utilizing the total amount of water decreed, then “other appropriate compensation” for mitigation would be the amount of net profit Clear Springs would earn from producing trout with an additional 2.0 cfs of water.

Based upon the assertion that “more water equals more fish,”³ the only issue presented is to determine the additional quantity of fish Clear Springs would be able to produce at its Snake River Farm facility by an additional 2.0 cfs of water and the net profit associated with that quantity of fish. The exact fish production per cfs and net profit per pound of fish can be easily calculated using actual records and standard accounting procedures. For example, lost net profit per cfs amount can be determined as follows:

- a. The amount of incremental fish production mitigated is that proportion of production foregone by the directed mitigation flow per cfs. That proportion is then 1.0 cfs divided by the existing flow of 91 cfs⁴ or 1.1%.
- b. Assuming current peak fish production is 3 million pounds per year,⁵ the forgone production would be 3 million multiplied by 1.1% or about 33,000 pounds per cfs per year.
- c. The current wholesale price of trout is approximately \$1.43 per pound. Assuming a 10% cost of sales for freight, marketing, and processing, a high estimate of the pond side market value is approximately \$1.29/lb in net sales revenue.

³ The Ground Water Districts dispute that there is substantial competent evidence in the record to support this finding of fact and is an issue raised and pending on appeal.

⁴ The flow of 91.5 cfs is the average of monthly flow to the Snake River Farm facility between December 2000 and December 2007 as reported to the Idaho Department of Environmental Quality (“DEQ”) by Clear Springs Snake River Farm.

⁵ Fish production estimate obtained from Discharge Monitoring Reports submitted by Clear Springs Snake River Farm to DEQ.

- d. The direct production cost associated with trout consists of feed, labor and labor related costs, energy, maintenance, supplies, and depreciation. In very efficient operations, feed is often 50% of production cost. Estimates of current trout production costs range from about \$0.75 to \$1.00 per pound.
- e. Assuming revenue of net sales revenue of \$1.29 and production cost of \$0.75, the gross profit margin is then \$0.54 per pound. The incremental total gross profit offered for mitigation is then 33,000 pounds multiplied by \$0.54/pound or \$17,820 per cfs per year.

In addition to fully compensating Clear Springs for its financial losses, this Second Mitigation Plan avoids water quality and other concerns expressed by Clear Springs' vice president and aquaculturist, Dr. John R. MacMillan. According to Dr. MacMillan's testimony filed in support of Clear Springs' objection to the Ground Water District's Amended Mitigation Plan, any recycling of water could expose all of the farmed trout to dangerous pathogens and providing well or spring water from any source would be of a different temperature and may contain unhealthy chemicals that would harm fish. If one were to agree with Dr. MacMillan's testimony just for argument's sake, then it does not appear, that there is any type of replacement water the Ground Water Districts could provide to Clear Springs that would satisfy Clear Springs' concerns. Accordingly, monetary compensation may be the only mitigation alternative since it completely eliminates all risk of contaminating the fish farm and alternative compensation is specifically authorized and contemplated by CM Rule 43, presumably for just this purpose.

(4) Advantages of Monetary Compensation

Clear Springs has sought curtailment of junior priority ground water pumping and has claimed injury that focuses on the loss of fish production to its Snake River Farm facility which translates into lost revenue.

Clear Springs' complaints are demonstrated by its vice president, Dr. MacMillan who asserts in his Expert Report dated December 3, 2008 filed *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)* that:

- Stress shifts the bioenergetic flow of feed resources (energy and protein) away from somatic growth toward maintenance of homeostasis thus negatively impacting fish production (p. 4 of Dr. MacMillan December 3, 2008 Expert Report);
- Recirculation of effluent water will increase fish stress, will diminish carrying capacity, will increase disease prevalence, severity and fish loss, and will create food safety problems (Id.);
- Pumping water from other springs, from a well or from effluent will decrease water delivery certainty, increase physiologic stress when delivery fails, create food safety issues and would diminish utility of existing water rights (Id.);
- The basis of the opinions expressed in this report arise directly from the rainbow trout, it's biology, it's farming under intensive flowing water commercial conditions, it's response to water quality diminishment, bioenergetics, and various food safety and quality issues. These factors significantly impact the profitability of commercial operations and the competitive position of Clear Springs Foods (Id.);
- The primary aims of fish farming are to maximize fish survival and growth at minimal cost. Unfortunately, all of the mitigation proposals from the Ground Water Districts will decrease fish survival, decrease growth and production capacity, and increase production costs (Id. at 18);
- Much of this report identifies factors or processes that injure the production capacity of the Snake River Farm. The mitigation efforts proposed by the Ground Water Districts each, or collectively, will cause decreased fish production capacity (Id. at 21);
- For the trout farmer, all challenges to homeostasis are important because they impact fish performance and ultimately profitability. Adaptation is an energy demanding process that diminishes feed conversion efficiency and reduces overall production capacity. Sublethal injury further diminishes fish performance and profitability. Management efforts by the fish farmer to prevent mortality of compromised fish, including use of drugs, can be very costly. Prematurely dead trout (i.e. death no occurring at the processing plant) reduces overall profitability and may ultimately

result in loss of customers dependent on reliable supply. The closer to optimum the farmer can manage the production environment, the closer to maximum profitability. (Id. at 25-26);

The Ground Water Districts submit that the foregoing Second Mitigation Plan offers substantial and obvious advantages to Clear Springs Snake River Farm, the Ground Water Districts and the State of Idaho. These advantages are summarized below:

a. Advantages to Clear Springs, Snake River Farm:

- Direct and immediate compensation will be paid annually to Clear Springs to fully compensate it for lost net profits associated with the 2.0 cfs of water.
- The amount of lost net profits can be readily determined based upon the actual records of Clear Springs Snake River Farm.
- Monetary Compensation renders irrelevant and moot all of Clear Springs' unwavering and repeated objections to all replacement water plans previously presented.
- The monetary payment is certain.
- The monetary payment can be readily adjusted annually to account for changes in mitigation requirements, fish production, sales revenue and production expenses.
- The monetary payment as so calculated can immediately be adjusted to compensate fully for any future changes in the amount of replacement water resulting from future Orders of the Court or the Director.
- Clear Springs will still benefit from increase reach gains from past conversion and ongoing CREP acreage.

b. Advantages to the Ground Water Districts:

- Monetary compensation is likely to be most cost effective way to address Clear Springs' injury to its water rights from junior-priority pumping.
- Monetary compensation can be implemented immediately with no investment in costly infrastructure and with no regulatory impediments (e.g. transfer applications, right of way agreements, third party agreements etc.)
- Monetary compensation can be easily adapted to changed conditions (e.g. if CAMP results in recovery of spring discharges it can simply be

terminated off with no waste of expensive physical infrastructure investment.)

c. Advantages to the State of Idaho:

- Monetary compensation is appropriate and consistent with the statutory mandate of full economic development and optimal use of the state's under ground water resources as provided under the Ground Water Act, I.C. 42-226.
- Monetary compensation more accurately balances the economic costs of curtailment and the economic benefits of fish production.

REQUESTED ACTION

Based on the foregoing the Ground Water Districts request the following:

A. That this Mitigation Plan be set for hearing with notice given to the parties as deemed necessary pursuant to CM Rule 43.02. It is submitted that notice need not be published and need only be given to Clear Springs for the reason that no water rights and no other parties are affected.

B. That the Director order that Clear Springs produce to the Department and the Ground Water Districts information relevant to this Mitigation Plan, including but not limited to present and historic Clear Springs fish production records, fish production costs and fish market purchase and market sale revenues relating to Clear Springs' Snake River Farms facility.

C. That an Order to be entered authorizing the parties to conduct discovery in the form of interrogatories, requests for production, requests for admissions and depositions.

D. That an Order be entered approving this Second Mitigation Plan and establish the methods for determining appropriate compensation to Clear Springs.

Submitted this 18th day of December, 2008.

RACINE OLSON NYE BUDGE &
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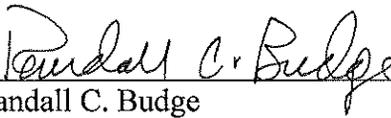
By: Randall C. Budge
Randall C. Budge

*Attorneys for North Snake Ground Water
District and Magic Valley Ground Water
District*

CERTIFICATE OF MAILING

I hereby certify that on this 18th 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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