

**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))) _____)	ORDER ON PREHEARING MOTIONS) AND AMENDING SCHEDULE)
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On September 25, 2008, the Director of the Department of Water Resources (“Director” or “Department”) issued a *Scheduling Order* in this proceeding on objections to the mitigation plan filed by North Snake Ground Water District and Magic Valley Ground Water District (“Ground Water Districts”) to provide replacement water for the Snake River Farm fish propagation facility owned by Clear Springs Foods, Inc. (“Clear Springs”). The *Scheduling Order* set prehearing deadlines and two hearing dates of January 20, 2009 (hearing on issues related to the pump-back proposal alternative), and February 3, 2009 (hearing on all remaining issues). The *Scheduling Order* set a deadline of November 21, 2008 for pre-filed direct testimony of expert witnesses.

On October 24, 2008, Clear Springs filed *Clear Springs’ Motion to Dismiss and/or For Protective Order* (“Motion”). The *Motion* requests that the Director issue an order dismissing those portions of the *Amended Mitigation Plan of North Snake Ground Water District & Magic Valley Ground Water District* (“Amended Plan”) filed by the Ground Water Districts proposing a “direct pump-back of water from the end of Snake River Farm’s raceway to the head of Snake River Farm’s raceway” (the “pump-back proposal”). Alternatively, Clear Springs requested a protective order that discovery not be had on information and documents related to the pump-back proposal.

In response to the *Motion*, the Ground Water Districts filed *Ground Water Districts’ Objection to Motion to Dismiss* (“Objection”) on November 7, 2008. Clear Springs filed *Clear Springs Foods, Inc.’s Reply in Support of Motion to Dismiss and/or for Protective Order* (“Reply”) on November 18, 2008. In addition, on November 18, 2008, the Ground Water Districts filed *Ground Water Districts’ Motion to Compel Discovery Responses; Ground Water*

Districts' Motion to Extend Deadlines and Consolidate Hearings; and Ground Water Districts' Motion to Shorten Time Required for Notice of Hearing.

The Director granted the *Motion to Shorten Time* and held a hearing November 20, 2008 on *Ground Water Districts' Motion to Extend Deadlines and Consolidate Hearings*. Clear Springs filed *Clear Springs Foods, Inc.'s Response to Ground Water Districts' Motion to Compel Discovery Responses & Motion to Extend Deadlines and Consolidate Hearings* on November 20, 2008, requesting that the motions be denied. Clear Springs also requested that a decision be made on its pending *Motion to Dismiss and/or for Protective Order*. At the conclusion of the hearing, the Director stated that the deadline for pre-filed expert direct testimony would be extended from November 21 to November 28, 2008, and that an order would be issued addressing the pending motions. On November 24, 2008, the Director notified counsel for the parties that the deadline for pre-filed expert direct testimony would be extended to December 5, 2008.

Clear Springs' Motion to Dismiss

Clear Springs' *Motion to Dismiss* seeks dismissal of the portion of the Ground Water Districts' *Amended Plan* that proposes a "direct pump-back of water from the end of Snake River Farm's raceway to the head of Snake River Farm's raceway." In the alternative, Clear Springs requests a protective order that discovery not be had on information and documents related to the pump-back proposal.

Under the *Amended Plan*, "it is assumed that water would be diverted from the lake on the southeast shore and pumped to the inlet of the SRF raceway." *Amended Plan*, Ex. 1 at 2. Water is discharged into the lake from the SRF raceways. *See id.* Clear Springs asserts that the pump-back proposal must be dismissed because it has already been rejected by the Director in the Spring Users Case.¹ In the Spring Users Case, the IDWR Hearing Officer recognized that: "The temperature, purity and oxygen content of the water from the springs makes it desirable for trout farming." *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation (January 11, 2008) ("Recommended Order")* at 5. The IDWR Hearing Officer concluded:

The Spring Users are not obligated to pursue repumping of water beyond the current practices. IGWA maintains that the Spring Users should be required to institute systems for reuse of the water they receive before calling for the curtailment of junior rights. At the present time water is reused in the trout farms as it moves from one set of raceways in a pond to a lower set of raceways. The process works by gravity and utilizes a settling system between the ponds. IGWA maintains that this process can be replicated by repumping the water through the raceways. This is a theory. The burden of proof is upon IGWA to show that it is a realistic method.

Id. at 12.

¹ *In the Matter of Distribution of Water to Water Rights Nos. 36-02356A et al (Blue Lakes Delivery Call) and In the Matter of Distribution of Water to Water Rights Nos. 36-04013A et al (Clear Springs Delivery Call) (IDWR final order issued July 11, 2008).*

The Hearing Officer in the Spring Users Case also recognized that the failure to consider the quality of the water being supplied for mitigation could defeat the very purpose of the spring users' water rights:

The quality of water is not an element of a water right but may be considered. IGWA maintains correctly that quality of water is not one of the elements of a water right. However, the quality of water may be considered in alternative proposals to curtailment. The Spring Users businesses are dependent upon a certain quality of water in order to operate their business. The purpose of the water rights enumerated in their partial decrees is fish propagation. If something happens in nature that prevents the quality of water necessary for fish propagation from coming to them from the springs they are out of luck and most likely out of business. There are no guarantees against natural processes that might alter either the quantity or quality of the water they receive. However, in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered. They are adjudicated to have water rights for the purpose of fish propagation. If their rights are met through curtailment they will receive the quality of water that nature provides and that will most likely be suitable for fish propagation. Any alternative to curtailment must accomplish the same result as curtailment. Otherwise the purpose of the water right is defeated.

Id. at 22. The Director's *Final Order* of July 11, 2008 in the Spring Users Case did not alter these recommended findings of the Hearing Officer relating to the importance of water quality in fish propagation water use. *See Final Order* at 2 ¶ 6-7 (stating that, unless specifically addressed in the *Final Order*, the "Findings of Fact entered previously by the Director and recommendations of the hearing officer govern").

Finally, Clear Springs cites to one of the initial orders issued in the Spring Users Case in which former Director Dreher determined: "Unless a replacement water supply of suitable water quality for use by Blue Lakes Trout is provided by the holders of junior priority ground water rights causing material injury ... the Director should order the curtailment of such rights" *Order in the Matter of Distribution of Water to Water rights Nos. 36-02356A, 36-07210 & 36-07427* (Blue Lakes Order, May 19, 2005) at 27.

Clear Springs argues that according to the plain terms of these prior orders, the Ground Water Districts' pump-back proposal cannot be accepted because the Ground Water Districts, as parties to the Spring Users Case, are bound by these decisions and are barred, by *res judicata*, from raising the issue here. In response, the Ground Water Districts argue that *res judicata* does not apply in this instance because the *Final Order* of the Director in the Spring Users Case specifically provided that, "The ground water districts may submit a plan or plans to the Director to provide Clear Springs for its Snake River Farm, with a replacement water supply of suitable water" *Final Order* at 3-4. The Ground Water Districts also emphasize a distinction between the determination in the *Final Order* that the Spring Users were not obligated to pursue a pump back method, and the issue presently before the Director as to whether the Ground Water Districts may proceed with a pump-back proposal to provide required replacement or mitigation water for the Clear Springs Snake River Farm facility.

January 21, 2009 Deadline for filing rebuttal testimony (required for experts;
optional for lay witnesses);

January 21, 2009 Discovery cutoff (all written discovery and depositions must be
completed 30 days before hearing);

January 26, 2009 Exchange exhibit lists;

February 3, 2009 Commence hearing on all remaining issues.

Dated this 26th day of November, 2008.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of November 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>RANDY BUDGE CANDICE M. MCHUGH RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail</p>
<p>JOHN SIMPSON TRAVIS L. THOMPSON PAUL L. ARRINGTON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail</p>
<p>DANIEL V. STEENSON CHARLES L. HONSINGER S. BRYCE FARRIS RINGERT CLARK PO BOX 2773 BOISE ID 83701-2773 dvs@ringertclark.com clh@ringertclark.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail</p>
<p>Tracy Harr, President CLEAR LAKE COUNTRY CLUB 403 CLEAR LAKE LANE BUHL, ID 83316</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Stephen P. Kaatz, Vice President CLEAR LAKE HOMEOWNERS ASSOC 223 CLEAR LAKE LANE BUHL, ID 83316</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

ALLEN MERRITT
CINDY YENTER
WATERMASTER - WD 130
IDWR – SOUTHERN REGION
1341 FILLMORE STREET SUITE 200
TWIN FALLS ID 83301-3380
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources