

RECEIVED

JUN 11 2009

DEPARTMENT OF
WATER RESOURCES

Randall C. Budge (ISB # 1949)
Candice M. McHugh (ISB #5908)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
PO Box 1391
Pocatello, ID 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109

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-
04103A, 36-04013B AND 36-7148

(Snake River Farm)

**GROUND WATER DISTRICTS'
REQUEST FOR STATUS CONFERENCE
AND RESPONSE TO CLEAR SPRINGS
FOODS, INC.'S NOTICE OF AVAILABLE
DATES FOR HEARING**

COME NOW, North Snake Ground Water District and Magic Valley Ground Water District ("Ground Water Districts") by and through their attorneys of record and files this *Request for Status Conference and Response to Clear Springs Foods, Inc.'s Notice of Available Dates for Hearing.*

BACKGROUND

On March 12, 2009, the Ground Water Districts filed the *2009 Replacement Water Plan and Third Mitigation Plan (Over-The-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* ("Third Mitigation Plan") in response to the Director's March 5, 2009 Curtailment Order. On March 26, 2009, the Director of the Department of Water Resources ("Director" or "Department") issued his *Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("Replacement Plan Order"). The Director published notice

of the Ground Water Districts' Third Mitigation Plan on April 2 and April 9, 2009, and protests to the Third Mitigation Plan were due April 20, 2009. Clear Springs was the only entity to file a timely protest to the Third Mitigation Plan.

On April 27, 2009, Clear Springs Foods, Inc. ("Clear Springs") filed *Clear Springs Foods, Inc.'s Motion for Partial Stay of Implementation of Director's March 26, 2009 Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("Partial Stay Motion"). Clear Springs specifically requested that the conversion portion of the Third Mitigation Plan be completed but wanted construction of the over-the-rim portion of the Third Mitigation Plan halted. On May 15, 2009, the Director issued an *Order Granting Partial Stay of Ground Water Districts' Replacement Water Plan for 2009* ("Order Granting Partial Stay"). The Order Granting Partial Stay indicates that the conversion of acres irrigated from ground water to surface water should be completed and that this effort and level of mitigation will be deemed sufficient for the 2009 and 2010 calendar years, pursuant to the parties' agreement. Order Granting Partial Stay at 2. Concurrent with the Ordering Granting Partial Stay, the Director issued an *Order Appointing Hearing Officer; Granting Petition to Intervene; and Consolidating Matters for Hearing*, ("Order Appointing Hearing Officer") appointing Gerald F. Schroeder as hearing officer and granting the Idaho Dairymen Association's intervention. The Order Granting Partial Stay did not specifically grant or deny Clear Springs' request for a hearing on the Third Mitigation Plan as such, the scope or timing of any hearing was not addressed.¹

¹ The Order Appointing Hearing Officer did consolidate the hearing on Clear Spring's request for a "post-audit" hearing on the Ground Water Districts' prior mitigation efforts with any hearing set in the matter involving the Ground Water Districts' Third Mitigation Plan.

DISCUSSION

The Ground Water Districts' request a status conference on this matter.. A status conference is necessary because the Ground Water Districts' believe *Clear Springs' Notice of Available Dates for Hearing* is premature and presumes that there is a need for a hearing in 2009, which the Ground Water Districts dispute. A hearing in 2009 is premature, may be unnecessary and would result in a waste of the time and resources of the parties, the Hearing Officer and the Department for the reasons set forth below.

First, a hearing in this matter of the expanded scope sought by Clear Springs is *res-judicata* with respect to any attempt to re-determine the Ground Water Districts' mitigation obligation as established in the prior administrative proceeding. Further, a hearing now would result in duplication of efforts that may be rendered moot by reason of the pending appeal of the Final Order to the District Court and the expected appeal thereof to the Supreme Court. Clear Springs requests a hearing on all matters, including the extent of material injury to Clear Springs, the amount of mitigation owed, and whether the 10% trim line should be used. Below is a short summary of some of the items that Clear Springs expects to cover at the hearing in this matter, all of which have already been litigated in the delivery call hearing before this Hearing Officer and all of which are issues currently pending on appeal:

- Whether, a “replacement water plan is without support in rule or law.” March 17, 2009 Letter at 2.²
- Whether, “[u]se of a ‘trim line’ on the ESPA effectively creates a de-facto futile call line beyond which no ground water pumper is deemed to be causing injury to the spring flow subject to the water call. This use is technically unjustified.” March 17, 2009 Letter at 2.
- Whether, “[t]he use by the Director of a fixed percentage contribution (6.9%) of SRF springs to the Snake River reach gain from the Buhl Gage to Thousand Springs for

² Clear Springs specifically incorporated all of the items in its March 17, 2009 letter in its *Protest to 2009 Replacement Water Plan and Third Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District* (“Clear Springs’ Protest”). Clear Springs’ Protest at 2 ¶ 1.

determination of required mitigation discharge is not justified.” March 17, 2009 Letter at 3.

- Whether, “[t]he ESPAM calibration for the Clear Lakes Springs is in error because the discharge of SRF springs was not included in the total calibration discharge.” Id.
- Whether “[s]easonal impact of ground water pumping to a spring water supply used for fish propagations should be considered injury.” Id.
- Whether “[t]he determination of injury to senior spring rights should incorporate the evaluation of temporal effects on the historically available flow....” Clear Springs’ Protest at 4. And, arguing that “[t]he impact of junior groundwater pumping also has a temporal pattern. The time pattern of impact of junior ground water pumping when superimposed on the hydrograph of historical spring flow can have significantly different net effects than is depicted by steady state analysis of impact.” Id.

Because these matters were part of the hearing on the Springs Users’ Delivery Call they are barred from being re-litigated in this matter under the principle of *res-judicata*. These identical issues are currently pending on appeal before the Honorable John Melanson. Oral arguments on the appeal were presented on April 26, 2009, a decision is expected soon and further appeal to the Supreme Court certain. The final decision resulting from these appeals could confirm or reverse in full or in part the Final Order on the very issues Clear Springs now seeks to re-litigate, presumably on alleged “new evidence.”

Second, a hearing addressing these issues is rendered moot and premature at this time, because, at Clear Springs’ request, a stay has been issued and there will be no water delivered “over-the-rim” pursuant to the Ground Water Districts approved Third Amended Plan for a period of two years. Since no water will be delivered to Clear Springs during this stay it does not matter during this time whether the mitigation obligation is right or wrong. Accordingly, any hearing can and should be delayed until the fall of 2010 which would permit the issues to be fully and finally resolved through the court appeal process. If then a hearing was still necessary on the “over-the-rim” delivery portion of the Third Amended Plan, it could be timely completed

before the 2011 irrigation season, the earliest possible date the Ground Water Districts would have any obligation to provide water directly to Clear Springs under their “over-the-rim” delivery plan. As a practical matter this delay will have no adverse impact on Clear Springs who apparently simply desires more “process and procedure” in this already convoluted and complicated case.

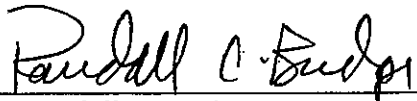
Third, holding a hearing in 2009 would be impractical and would interrupt the parties’ present good faith dialogue and ongoing attempts at exploring long-term solutions with Clear Springs and other spring users. As set forth in the Order Granting Partial Stay, the parties have agreed to forestall any further construction on the over-the-rim portion of the Ground Water Districts’ Third Mitigation Plan. The above the rim conversion projects are nearly completed and an examination by the Watermaster for Water District 120, Cindy Yenter, has been completed. The parties are continuing to discuss other settlement options and embroiling them in contentious litigation would stifle these settlement efforts. Because only the additional conversion acres have been completed and implemented under the Third Mitigation Plan and the parties are working on options, other than over-the-rim delivery, holding a hearing on the Third Mitigation Plan would be ineffective and unnecessarily disruptive.

CONCLUSION

For the reasons set forth above, the Ground Water Districts’ request a status conference, that Clear Springs’ request for a hearing in 2009 be denied and that the scheduling of any further hearing be delayed until the late fall 2010 after the pending court appeals have been concluded and the identical issues raised by Clear Springs on appeal have been finally determined.

DATED this 8th day of June, 2009.

RACINE OLSON NYE BUDGE &
BAILEY CHARTERED

By: 
Randall C. Budge
Candice M. McHugh
Attorneys for North Snake and
Magic Valley Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of June, 2009, 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:

Mr. David R. Tuthill, Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-009
victoria.wigle@idwr.idaho.gov
phil.rassier@idwr.idaho.gov

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Gerald Schroeder
Home Address

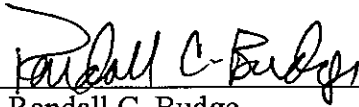
U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Michael C. Creamer,
GIVENS PURSLEY LLP
601 W. Bannock St.
Post Office Box 2720
Boise, Idaho 8370 I-2720
mcc@givenspursley.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery



Randall C. Budge