

Attachment 1

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS)
NOS. 36-04013A, 36-04013B, AND)
36-07148)
(SNAKE RIVER FARM))
(Water District Nos. 130 and 140))
Third Mitigation Plan)
_____)

COPY

) Docket No.
) CM-MP-2009-004

DEPOSITION OF TIMOTHY JAMES LUKE

NOVEMBER 16, 2009

REPORTED BY:

JEFF LAMAR, C.S.R. No. 640

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A. Yes.

Q. And in your view, would that transfer and the approval of that transfer be necessary in order to determine the validity of their mitigation plan?

A. Well, mitigation plan? There's a separate hearing process, of course, for the mitigation plan. So if the question is -- I don't think the transfer on itself would dictate the validity of the mitigation plan.

Q. So if the transfer injures other water rights which are not mitigated through either the transfer or the mitigation plan, would the mitigation plan be approvable?

MR. BROMLEY: Calls for a legal conclusion.

Q. (BY MR. SIMPSON): Answer if you can.

A. Well, I think that would be an issue, yes.

Q. And, Mr. Luke, are you familiar with the conjunctive management rules, generally?

A. Yes.

Q. Okay. I'm going to hand you a copy of Rule 43 and draw your attention to 43.03, which identifies the factors to be considered in approval of a mitigation plan and give you an

opportunity to look at that rule, if you would.

A. (Reviews.)

Okay.

Q. And do you see in Rule 43.03, and any of the subparts thereof, the requirement that the mitigation plan and whether or not it injures other water rights?

A. Yes, some of the criteria or factors are consistent with the same criteria we look at on a transfer.

Q. Okay. And so there is a requirement for the approval of a mitigation plan that it can't injure other existing water rights?

A. I think that's fair to say.

Q. Okay. And would it be fair to say that that would include other water rights, other spring rights or rights in the aquifer?

A. Yeah, correct.

Q. Hence your acknowledgment, then, that the mitigation plan, there would be some question whether a mitigation plan could be approved if it injured other water rights?

A. Yes, I think that's a question.

Q. And, Mr. Luke, was that the basis or the foundation for why you communicated with

1 ground water counsel and suggested that they file
2 a water right transfer application sooner rather
3 than later?

4 A. Yeah, I think it makes sense to view
5 the transfer with the mitigation plan.

6 Q. That both the transfer and the
7 mitigation plan be considered at the same time?

8 A. Yeah, that -- I mean there's a timing
9 issue there. I think the transfer -- when they
10 filed the original over-the-rim plan, they
11 indicated a transfer would be filed. And of
12 course, the two-year stay came, so that likely put
13 a perhaps -- put that in the background, I guess,
14 at best.

15 So -- but we had expected a transfer
16 to be filed all along. So the question had come
17 up, I think sometime in September, had we received
18 the transfer. And we hadn't, so we reminded them
19 of the need to do that.

20 But I think there's a lot of reasons,
21 you know, for further delay. It is another
22 process that has to be done, but it makes sense to
23 look at them together.

24 Alternatively, they could -- and I
25 think this is something they probably ought to do

1 as well, is make application to at least those
2 rights to the water supply bank, and perhaps rent
3 them out just as a plan B or a precaution. That
4 was identified, I believe, in Director Tuthill's
5 approval of the original plan, at least as a
6 replacement plan before a hearing would be held.

7 Q. Has the Department completed an
8 analysis of the injury question as to the injury
9 that would result from the transfer?

10 A. No.

11 Q. So the Department hasn't looked or ran
12 the model or did any type of an analysis which
13 would consider the effects of the movement of
14 water and the change in the nature of use, period
15 of use as to either the Snake River Farms water
16 rights or any other water rights in that reach?

17 A. Not that I'm aware of.

18 Q. Okay. Mr. Luke, could the mitigation
19 plan be constructed without an approvable plan?

20 A. No, I don't -- I guess it could be,
21 but it would be foolish.

22 Q. Okay. Could water be delivered
23 pursuant to the plan without an approved transfer?

24 A. I think it could be, but there would
25 have to at least be an approved water supply bank,

1 lease and rental.

2 Q. And that lease and rental, would it
3 not also include whether or not there was injury
4 to other water rights?

5 A. That would be something we'd look at
6 in that process, yes.

7 Q. So it would be a similar process in
8 terms of the approval of that plan in considering
9 whether other rights were injured as a result of
10 that lease?

11 A. Right.

12 Q. Similar or identical criteria to the
13 approval of a transfer?

14 A. Correct.

15 Q. Mr. Luke, are you familiar with then
16 Director Dreher's statement that mitigation had to
17 be in time, in kind, in place?

18 A. Yes, I think I've heard that.

19 Q. In terms of mitigation being provided
20 in time, what does that mean to you?

21 A. I think that means in a timely fashion
22 and in a -- in a time known.

23 Q. In a time when it otherwise would have
24 been received, the water would have been received
25 and put to beneficial use?

1 nature that would replace the amount of water that
2 was determined that needed to be replaced from the
3 injury analysis.

4 Q. And would "in place," as you have an
5 understanding, mean the same type of diversion
6 that the mitigated water right had been originally
7 appropriated in water?

8 A. Oh, I think it just means to the same
9 reach or spring complex or to the facility or
10 party that's being injured under those rights that
11 they called on.

12 Q. So with respect to "in place," if we
13 were looking at an irrigation diversion out of the
14 river, "in place" would mean available at that
15 diversion structure out at the Snake River;
16 correct?

17 A. I don't think it would have to be
18 limited to that.

19 Q. With respect to that irrigation
20 facility, what other source were you thinking
21 about, or what other location?

22 A. If we're talking about an irrigation
23 right?

24 Q. Right.

25 A. A tributary source, storage from

1 A. Been received by?

2 Q. By the right being mitigated.

3 A. Injured, yes.

4 Q. And, Mr. Luke, what does "in kind"
5 mean to you?

6 A. I think an equivalent amount or an
7 amount that's equivalent with the injury or
8 determined injury.

9 Q. Of like quality?

10 A. Yes, I think that would be a
11 consideration.

12 Q. Okay. Of like quality that otherwise
13 would have been the source of water for the --

14 A. Right.

15 Q. -- mitigated water right?

16 A. Yes.

17 Q. And so if a water right holder was
18 receiving spring water, would "in kind" mean that
19 they should continue to receive spring water from
20 any form of mitigation?

21 MR. BROMLEY: Calls for a legal conclusion.

22 Q. (BY MR. SIMPSON): In your view,
23 Mr. Luke.

24 A. Well, I don't know that it has to be
25 spring water. But water of a similar quality,

1 somewhere within the system. I don't know. It
2 depends on the system and what we're looking at.
3 But I don't think it's intended to be limited to
4 just the same, exact point of diversion. I think
5 there's other options that could be proposed and
6 considered.

7 Q. Okay. Mr. Luke, do you recall that in
8 2001/2002 time frame you filed an affidavit in the
9 SRBA describing the basis for interim
10 administration?

11 A. Yes.

12 Q. And that was the foundation for the
13 Department requesting or the State requesting the
14 creation of water districts?

15 A. Yes.

16 Q. Okay. And authorizing those water
17 districts to commence administration within those
18 water districts?

19 A. Yes.

20 Q. And in that affidavit did you
21 generally describe that there was a need for
22 administration because senior water rights weren't
23 being satisfied?

24 A. Yes.

25 Q. And do you have a general