

INTRODUCTION

The Districts spend much of their *Post-Hearing Brief* (“*GWD Post Br.*”) alleging that the OTR Plan is a result of Clear Springs forcing the Districts to this point, that the OTR Plan is their only option, and that evidence supporting Clear Springs’ protest to the plan should be excluded. The Districts’ arguments belie the standards under Idaho law, including the CM Rules, and the very reason the parties are in this position before the Hearing Officer.

First, the use of junior priority ground water rights by the Districts’ members injures Clear Springs’ senior water rights. Clear Springs didn’t choose to be injured by junior ground water pumping. In a prior appropriation state like Idaho, the burden falls on the junior to prove no-injury by reason of his diversion, or in the case of providing mitigation, prove that a plan meets the requirements of IDWR’s CM Rules. In conjunctive water right administration, junior rights causing injury must either be curtailed or allowed to divert under an approved and “effectively operating” Rule 43 mitigation plan. *See* Rule 40.01, 05.

In this case the Districts and IDWR created the problem of violating Idaho law by engaging in the submission and approval of “replacement water plans” for the last five years (2005-2009). Although the Districts avoided curtailment, the “replacement water plans” did not fully mitigate Clear Springs’ injury, and were approved without providing any due process or following the procedures under the CM Rules. Consequently, the Districts enjoyed the benefit of out-of-priority diversions without having to follow the law or provide adequate mitigation. Recognizing the flaws in their unlawful procedure the Districts finally filed a Rule 43 Mitigation Plan in 2008. The Districts also filed companion applications for permit and transfer of water rights at the same time. Protests were filed by Clear Springs and other water right holders and a comprehensive case covering all applications proceeded to a hearing scheduled in March 2009.

Instead of pursuing approval of their *First Amended Plan*, the Districts voluntarily withdrew the plan on the eve of hearing and chose instead to rely upon their *Second Amended Plan* that proposed to provide “money” or “fish”, not water, to mitigate Clear Springs’ injuries. The Director denied this plan on March 5, 2009.¹

Although the Districts had a Rule 43 Mitigation Plan scheduled to be heard before the 2009 irrigation season, they made the conscious decision to withdraw the plan well aware of the risks that posed for administration of their junior rights. Instead of following the law, the Districts and IDWR returned to their old ways of filing and approving a “replacement water plan” for 2009. Rather than force the parties to rush to unlawful judgment and implementation of a plan without hearing and process, Clear Springs filed a motion to stay construction of the OTR pipeline for purposes of efficiency. Clear Springs’ motion proved timely as Judge Melanson declared IDWR’s “replacement water plan” strategy to be unlawful in his June 19, 2009 Order. Although the Districts rushed to construct the OTR pipeline under the guise of an approved “replacement water plan”, this procedure would have violated the law. Instead, the Director granted the stay motions, which the Districts did not oppose. When the Districts failed to comply with the terms of the Director’s May 15, 2009 Stay Order, curtailment was ordered in July. Curtailment was ordered because the Districts and their members made the conscious choice not to implement their surface water conversions for 2009, choosing to pump their ground water wells instead. Notwithstanding the stay and curtailment, Clear Springs’ senior rights continued to suffer injury throughout 2009.

The above background leads us to this proceeding where the Districts seek approval of a Rule 43 Mitigation Plan in order to divert their water rights out-of-priority. Again, the burden rests on the junior users and the applicants seeking IDWR’s approval. The Districts cannot

¹ Judge Melanson recently affirmed the denial of this plan on December 4, 2009.

simply propose a concept, without complete analysis and details, and have the plan approved without meeting the requirements under Rule 43. Such a process would equate to “pre-approval” of a plan to be determined later, similar to an unlawful “replacement water plan”. Fortunately for injured seniors and the integrity of Idaho’s law of prior appropriation, that is not the standard under the CM Rules.

Admittedly, the Districts have failed to carry their burden to prove an acceptable and workable mitigation plan in this case. First, the Districts have no source of water for the OTR Plan as no transfer has been filed and approved. Second, the Districts’ proposed design for the OTR Plan is only 50% complete, and no governmental permissions have been obtained to route the pipeline, including the new proposed route north of the old Clear Lakes Grade road. Third, the Districts have failed to provide mitigation that is “in kind, in time, and in place.” Instead, the Districts propose to deliver pumped ground water that is not of “equal utility” to the natural spring water that Clear Springs has historically relied upon for use under its senior water rights. Finally, the Districts have proposed no mitigation to satisfy the injury to Clear Springs’ and other senior water rights in the area caused by year-round pumping under the plan.

In sum, the OTR Plan fails to meet the Rule 43 requirements and the Districts have failed to carry their burden to prove an acceptable plan. The Hearing Officer should therefore recommend that the plan be denied.

I. The “Source” of Water Proposed Under the OTR Plan and its Impacts on Clear Springs’ Use of its Senior Water Rights is Relevant.

The Districts wrongly discount the issues relating to the “source” of water proposed for delivery by the OTR Plan. Whereas Clear Springs appropriated senior rights to the spring source and has relied upon that source to develop its aquaculture operations and business over time, the Districts propose to strip Clear Springs of the right to use “spring” water by substituting pumped

ground water instead. Although the difference between spring and ground water may not matter to the Districts' farmers for irrigation use, the utility of spring water is clearly important and unique to Clear Springs' aquaculture water use. Indeed, that is the very reason Clear Springs supports effective conservation projects and recharge on the ESPA that are aimed at reducing depletions from the aquifer and improving spring flows. Therefore, evidence regarding the importance of spring water to Clear Springs' use of its senior water rights is relevant for purposes of ruling on the acceptability of the OTR Plan and should be considered by the Hearing Officer.

A. IDWR's CM Rules and Mitigation Policy Require Inquiry into a Plan's Proposed "Source" of Water.

In urging the Hearing Officer to ignore evidence related to the importance of spring water to Clear Springs' operations and use of its senior surface water rights, the Districts refuse to acknowledge the Rule 43 factors and IDWR's policy that requires mitigation to be provided "in kind, in time, and in place." In seeking to minimize Clear Springs' protest, the Districts overlook the criteria IDWR uses in evaluating the acceptability of the OTR Plan. As described below, the evaluation of the OTR Plan's "source" of water, including its impact on Clear Springs' use of its senior water rights and its operations is relevant, required by the CM Rules, and therefore should be considered.

At the outset it is important to recognize that Clear Springs has appropriated water rights to a unique source of water in the Thousand Springs reach. The spring water resources are globally unique and Clear Springs has relied upon the resource for its operations, marketing, and reputation. The evidence submitted on this point is undisputed. Clear Springs' reliance upon spring water is no different than a company relying upon a spring source for a bottled water operation, or a water user that relies upon the unique aspects of geothermal water for heating.

While interfering juniors could physically replace the quantity of water from a canal or cold water well, the purpose of the appropriations would be defeated if the injury to the “source” was not fully mitigated. Stated another way, providing canal water to a bottled water company or cold water to a geothermal user would not constitute mitigation that is “in kind, in time, and in place”. The injury to the water right would not be made “whole” from the different source of water. The same principle applies in this case. The evidence Clear Springs has submitted on the value of the spring resource to its operations, particularly for its Idaho grown rainbow trout, and the use of its senior water rights is relevant to its protest to the OTR Plan.

Ignoring the facts regarding Clear Springs’ water use and the importance of the spring source, the Districts claim that evidence related to Clear Springs’ brand, image, and marketing strategy should not be considered because it “opens the door to any number of far-flung objections that have little if anything to do with the actual use of water”. *GWD Post Br.* at 8. The facts show just the opposite in this case. Here, the evidence regarding the foundation of Clear Springs’ business, the appropriation of spring water under its senior rights, has everything to do with Clear Springs’ “actual use of the water”.² Clear Springs has created a brand and reputation in the industry that is built upon the use of spring water, not pumped ground water. The importance of the source of Clear Springs’ decreed water supply is a defined point and was thoroughly explained by Clear Springs’ witnesses through testimony. *See Larry W. Cope Testimony* at 3-5; *Expert Report of John R. MacMillan* at 10-11, 13-15; *Cope and MacMillan Supplemental Testimony* at 2-3. The Districts’ argument that considering this evidence would somehow “open the floodgate” to any and all objections allowing seniors to control the mitigation process is not well-founded and is certainly not applicable to the facts in this case.

² The Districts’ argument contradicts its own witnesses’ testimony. *See Schuur Depo. Tr.*, pl. 82, ln. 23 – p. 83, ln. 2 (“Q. [BY MR. SIMPSON]: Okay. So then would it be fair to say that success in the aquaculture industry is determined by location and water supply and efficiency? A. [BY MR. SCHUUR]: No question, yes.”).

In addition, the importance of a water “source” is relevant in other contexts and for other uses of water. For example, the City of Twin Falls was required to transfer its surface municipal water rights to a “groundwater” supply in order to comply with the federal Safe Drinking Water Act. *See* IDWR File for Water Right #36-2603A, and Transfer No. 4066 (on file with IDWR). Although the City previously used spring water for its municipal water supply (Blue Lakes Springs), federal law required the City to use a “groundwater” supply. In that context the “source” of water is critical in terms of compliance with law and costs to the water user. Supplying “surface” water would not adequately mitigate injury to the City’s water rights and the source where groundwater is required for its municipal needs. In other words, just replacing the physical quantity of water would not make the water right “whole”, and would not provide water “in kind”, given the City’s need to use “groundwater” for its municipal water supply. Accordingly, this example provides further support to Clear Springs’ protest and demonstrates that the “source” of water is relevant for purposes of evaluating water use and the acceptability of mitigation plans. The “source” of water is clearly relevant to Clear Springs and other water users, and is not a “far flung” objection as claimed by the Districts.

The CM Rules and IDWR policy require inquiry into a mitigation plan’s proposed “source” of water.³ Rule 43.01 requires an applicant to describe the “water supplies” proposed to be used for mitigation and any “circumstances or limitations on the availability of such supplies.” Rule 43.03 provides a list of criteria for the Director to consider in determining whether a plan “will prevent injury to senior rights”. These criteria include, but are not limited to questions as to whether water will be provided at the “time and place required by the senior-

³ The Districts’ reliance upon statutes and cases from other jurisdiction is not relevant in this proceeding. Moreover, contrary to the Districts’ argument, the Idaho constitution and water distribution statutes do not require IDWR to approve mitigation plans that injure senior appropriators. The Districts’ OTR Plan does not prevent injury to Clear Springs or make its senior water rights “whole”.

priority right” (43.03.b), whether the plan “provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage” (43.03.c), the “reliability of the source of replacement water over the term in which it is proposed to be used” (43.03.h), and whether the plan “is consistent with the conservation of water resources, the public interest or injures other water rights” (43.03.j). Each of these criteria implicates a plan’s proposed “source” of water and whether or not the plan will prevent injury to the senior water right. By proposing to provide pumped ground water instead of spring water, the Districts’ OTR Plan fails the above criteria and continues the injury to Clear Springs’ water rights.

First, the OTR Plan will not “prevent injury” to Clear Springs’ senior water rights. The OTR Plan’s pumped ground water supply is not “in kind” or of “equal utility” to Clear Springs based upon the historic use of spring water under its senior water rights. Moreover, providing pumped ground water as a “replacement” water supply does not adequately replace the spring water depleted by out-of-priority pumping. Therefore, water will not be provided “in place” as historically used by Clear Springs under its senior surface water rights.

Second, the plan is not consistent with the “conservation of water resources” or the “public interest” as it proposes to continue to deplete hydraulically-connected springs and pump ground water year-round to the detriment of Clear Springs’ and other senior surface water rights in the area. Dr. Brockway explained the injury resulting from the operation and provided further testimony on the “conservation of water resources” criteria that was not rebutted by any of the Districts’ witnesses. *See Brockway Rebuttal* at 12-13, 17-18. Rather than mitigate the impacts on the ground water levels and the spring source that Clear Springs’ relies upon, the Districts would prefer to continue to overtax the aquifer and even introduce new seasonal impacts that

have never been experienced. Injuring Clear Springs' and senior rights at other area springs is not in the "public interest" and is inconsistent with the "conservation" of the aquifer and spring water resources.

Finally, the Districts confuse the "reasonable means of diversion" with the "source" of water at issue in this case. The Districts wrongly assert that the springs themselves constitute a "means of diversion" and that the difference between ground water and spring water is "simply the mechanism of delivery". *GWD Post Br.* at 7, 9. Contrary to the Districts' claim, the springs are a natural water resource, not a physical or man-made "means of diversion". Clear Springs collection facilities constitute the point of diversion and the "means of diversion" used to appropriate and deliver spring water. IDWR previously found that Clear Springs' employs a "reasonable means of diversion" for collecting and using spring water at its Snake River Farm facility. Pumped ground water is not "spring" water and the different source is significant for purposes of analyzing the Districts' mitigation plan. Therefore, the Districts' attempt to confuse the issue and disregard the different sources and the importance of spring water to Clear Springs should be rejected.

Contrary to the Districts' argument, the CM Rules and IDWR's mitigation policy require an evaluation of a plan's proposed "source" of water supply. The spring source is a critical element of Clear Springs' senior water rights and replacing the spring water supply with pumped ground water is not adequate mitigation and does not make Clear Springs' "whole" from the injuries caused by junior ground water pumping.

B. The Districts' Reliance upon *Wilder* is Misplaced and Not Applicable.

The Districts erroneously rely upon *In the Matter of Petition of the Board of Directors of Wilder Irrigation District*, 64 Idaho 538 (1943), for the proposition that a senior does not have an

entitlement to a particular source of water. *GWD Post Br.* at 7. Specifically, the case is distinguishable for two reasons: 1) the issue concerned confirmation of a contract between an irrigation district and the U.S. Bureau of Reclamation; and 2) the agreed upon exchange provision concerned two surface water sources for irrigation purposes.⁴ The Court was not presented with the question of whether a junior priority ground water user can force an exchange of a pumped ground water supply for a senior's natural spring water supply in the context of a Rule 43 Mitigation Plan and aquaculture water rights. Accordingly, the Districts misread the case and wrongly assert that the Court "addressed the question of whether a senior appropriator is entitled to demand water from a particular source". *GWD Post Br.* at 7.

The issue before the Court for that confirmation proceeding was: Did the irrigation district have the "power to enter into a contract with the United States whereby the United State may, at some future time, substitute an equal amount of Payette and Salmon River water for District Boise River water?" 64 Idaho at 546. Certain landowners appealed the confirmation of the contract and contended the District did not have the power to voluntarily enter into the future exchange. The Court disagreed and held that the District did have the authority, and explained "that the proposed contract will not have the effect of reducing the amount of water to which any landowner within the district is entitled; that no landowner is compelled to surrender any right whatsoever, that in the event an exchange of water is later made . . . a landowner within the district . . . would receive a like amount of the waters of the Payette and Salmon Rivers . . . which would not, under the circumstances above stated, operate to the detriment of any landowner." *Id.* at 549-50 (emphasis added).

⁴ Idaho's exchange statute requires an agreement by the water right holders. See I.C. § 42-240(1) ("If the application proposes an exchange with water under another water right, the application shall be accompanied by an agreement in writing subscribed by the person proposing the exchange and each person or organization owning rights to water with whom the exchange is proposed to be made.").

In other words, the District had the power to enter into the contract for the exchange of water since it would not operate as a “detriment” to any landowner.⁵ The fact that an irrigation district would voluntarily enter into an agreement with the U.S. Bureau of Reclamation for an exchange of different surface water supplies which would not “operate to the detriment of any landowner” is not applicable to the facts in this case where junior ground water users are seeking approval of a CM Rule 43 Mitigation Plan that would substitute pumped ground water for a natural spring water supply to the detriment of Clear Springs. In his concurrence Justice Ailshie affirmed the irrigation district’s right to contract for an exchange and found that it was “intended to preserve and protect the rights of the locators and appropriators of water rather than to impair them.”⁶ *Id.* at 552 (emphasis added).

Unlike the agreed upon exchange of irrigation surface water supplies in *Wilder*, here the Districts propose to substitute pumped ground water for natural spring water that would “impair” Clear Springs’ use of its senior aquaculture water rights. Moreover, the OTR Plan does not “preserve and protect” Clear Springs’ senior rights, or its use of spring water that it has historically relied upon. Therefore, the case did not address the question posed by the Districts and does not support approval of the OTR Plan.⁷

⁵ In his concurrence Justice Budge also found that “[n]o additional burdens are to be placed upon the landowners and waterusers by reason of the exchange or substitution of water.” 64 Idaho at 554. That is not the case here, where the OTR Plan would force Clear Springs to accept additional burdens of a pumped ground water supply rather than receive spring water under its senior water rights.

⁶ The language quoted by the Districts is also found in Justice Ailshie’s concurring opinion. Justice Ailshie assumed that conditions of the exchange, if it was ever to occur, would not “impair” or be “detrimental” to the rights of senior appropriators. 64 Idaho at 551. These facts are distinguishable from the OTR Plan which would “impair” and be “detrimental” to Clear Springs’ senior water rights.

⁷ The cases cited by the Districts from other jurisdictions are also inapplicable and distinguishable from the law and facts concerning approval of the OTR Plan. In *Deseret Livestock Co.*, the Utah Supreme Court found that “salts” were minerals owned by the state and that an appropriator of water first had to submit a contract to pay the state royalties before appropriating a water right to extract the salt. *See* 110 Utah at 244. Contrary to the Districts’ claim, the “salt” in the water was a compensable interest to be covered by a contract to pay royalties. In *A-B Cattle Company*, the Colorado Supreme Court held that water users did not have a right to receive “silt laden” water as opposed to “clear water” for irrigation use resulting from the construction of the Pueblo Dam on the Arkansas River. *See* 589 P.2d at 61. The Court found that the irrigation company had failed to line its ditches and that it did not have

C. Clear Springs Complied with the Scheduling Order as to the Evidence and Testimony in Support of its Protest.

The Districts continue to argue that evidence related to Clear Springs' protests to the OTR Plan should be excluded on the basis that the evidence was not timely presented in the case. *GWD Post Br.* at 10-11. Relying upon I.R.C.P. 26(e), the Districts wrongly claim the evidence should be excluded because Clear Springs did not disclose its testimony and expert reports through supplemental discovery responses. Contrary to the Districts' claim, Clear Springs followed the schedule and timely disclosed its testimony and expert reports in support of its protests to the OTR Plan.

First, the Hearing Officer's August 28, 2009 *Scheduling Order* set the schedule for filing testimony and expert reports in the case. Clear Springs complied with the order and filed its testimony and expert reports on October 30, 2009. Clear Springs even provided additional documents and supplemental testimony on November 20, 2009 in response to the Districts' motion to compel. Whereas the Districts argued in their motion to compel before the Hearing Officer that they could not respond to Clear Springs' protest without additional information, Clear Springs' complied with the request and supplied the documents and explanatory testimony.

Therefore, Clear Springs had no reason to formally supplement its prior discovery responses since the Districts were provided all the information prior to hearing consistent with the case schedule. The Districts' insistence to receive the same information in the form of supplemental discovery responses is irrelevant and moot. The Districts can complain of no prejudice since they insisted upon the shortened schedule for hearing and still were able to

a right to the silt content of the water to do so. Had the opposite question been presented about the quality of the water being provided, i.e. substitution of "silt laden" water for "clear water", Colorado law would have likely prevented the result. *See id.* at 59 (citing section 37-80-120, C.R.S. 1973 "Any substituted water shall be of a quality and continuity to the meet the requirements of use to which the senior appropriation has normally been put.").

depose all of Clear Springs' witnesses prior to hearing. Although they previously argued they could not respond, the Districts prepared and filed rebuttal testimony on November 25, 2009. Finally, the Districts had the opportunity to cross-examine all of Clear Springs' witnesses at hearing.

Since Clear Springs complied with the deadlines in the *Scheduling Order* and the Districts had the opportunity to depose and cross-examine all of Clear Springs' witnesses and were able to present rebuttal testimony, the Districts had a "full and fair opportunity" to rebut the evidence submitted. The fact the Districts acknowledge that their testimony is not persuasive is not a reason to exclude the evidence submitted by Clear Springs. There is no violation of the letter and spirit of the discovery rules and evidence submitted by Clear Springs in support of its protest should be considered.

D. Clear Springs' Evidence and Testimony in Support of its Protest is Relevant and Demonstrates the OTR Plan Fails to Provide Adequate Mitigation.

The Districts have offered no reasonable evidence to refute Clear Springs' testimony regarding the importance of spring water to its brand, reputation, and operations. Without a credible response, the Districts mischaracterize Clear Springs' testimony, and even go so far to allege that it is "exaggerated" or "disingenuous". Admitting they have no reasoned response, the Districts turn to their only defense and continue to press the Hearing Officer to exclude the evidence from the record. These arguments are not well-founded and should be rejected.

Clear Springs has a legitimate interest in continuing to receive spring water under its senior water rights. The source of Clear Springs' water rights is the cornerstone of the company's brand image and reputation in the industry. *See Clear Springs' Post-Hearing Memo* at 22-27. Clear Springs has invested considerable time and resources in its brand name and the fact that its Idaho rainbow trout are grown in spring water. The Districts have not addressed

Clear Springs' objections to receiving pumped ground water and the impact that action stands to have on Clear Springs' reputation and its legal obligations regarding the marketing of its product.

Instead, the Districts continue to distort the facts and mischaracterize Clear Springs' testimony and its operations. First, the Districts claim that since "Box Canyon Creek flows for some distance before it is used by Clear Springs", that the water then transforms into something other than spring water. This is factually untrue. Box Canyon Spring, the eleventh largest spring in North America, is the only water supplying Clear Springs' Box Canyon facility. Similar to the spring complex at Snake River Farm, spring water at Box Canyon arises in different locations before it is collected for use. This was confirmed by Larry Cope who has personal knowledge of the water source.⁸ *See* Deposition of Larry Cope, Tr. p. 90, lns. 7-11; p. 92 ("the origin is the water upwells in the bottom of Box Canyon . . . And it upwells pretty much all the way down the canyon, it appears to me. You see water upwelling."). Atch. A to *CS Response* filed 12/04/09.

The Districts also mischaracterize Clear Springs' marketing of other products apart from its Idaho grown rainbow trout. *See GWD Post Br.* at 12. Their claims regarding Clear Springs' products from other countries are false.⁹ Mr. Cope explained that Clear Springs does not market its products grown in other countries as grown in spring water:

Q. [BY MR. BUDGE]: And under those products that you sell under the Splash or Seafood Perfections name, that would include the trout that is imported from Chile or Argentina?

A. [BY MR. COPE]: *And we do not represent under Seafood Perfections the new brand, or under Splash, that that comes from natural, pristine spring water.*

Tr. Vol. II, p. 354, lns. 9-15 (emphasis added).

⁸ Unlike the Districts' witness, Mr. Schuur, who has never visited Box Canyon and was unaware of the partial decree exhibit attached to his own rebuttal testimony, which apparently he did not rely upon. *See* Tr. Vol. I, pp. 187-190.

⁹ Contrary to the Districts' claim, Exhibit 4 refers to Clear Springs' Clear Cut rainbow trout fillets, grown in Idaho, not its "Splash!" branded product from South America.

Q. [BY MR. SIMPSON]: Okay. Is that mahi mahi branded and marketed as grown in pristine spring water?

A. [BY MR. COPE]: No, it is not. *The only products that are branded and marketed as raised in natural, pristine spring water is our Idaho-produced rainbow trout.*

Tr. Vol. II, p. 375, ln. 25 – p. 376, lns. 1-5 (emphasis added).

That Clear Springs relies upon spring water for its Idaho grown rainbow trout and its brand name and marketing image as to this product is undisputed. Therefore, the importance of the spring source is critical in reviewing the OTR Plan and the consequences pumped ground water would have on the use of Clear Springs' senior water rights. The evidence is clearly relevant for consideration and demonstrates that the OTR Plan does not provide a source of water of "equal utility" and will not make Clear Springs' "whole" from the injury it suffers due to pumping by junior ground water rights. Finally, the evidence meets the standard under IDWR's procedural rules, and there is no basis to strike or exclude it from the record in this proceeding. *See* IDAPA 37.01.01.600; *see also*, *Clear Springs' Response to GWD Motion to Strike and Motion in Limine* at 12-17.

The Hearing Officer should deny the Districts' motion to exclude the evidence accordingly.

II. The OTR Plan is Not the Only Mitigation Alternative Available to the Districts.

The Districts continue to portray the "end-game" scenario of water right administration that unless the OTR Plan is approved, "massive, devastating, and permanent" destruction will follow since the Districts have no other mitigation options. The Districts further claim that this is Clear Springs' fault since the company has filed protests to the Districts' other mitigation plans, including plans previously withdrawn. The Districts' arguments fail to recognize that it is

Clear Springs' senior water rights that are injured, and that under Idaho law juniors have the obligation to prove an acceptable mitigation plan.

Although the Districts repeatedly raise the claim of pending "mass destruction" from any curtailment, the facts in 2009 demonstrate otherwise. When the Districts failed to comply with their proposal to convert approximately 9,300 acres to a surface water supply in 2009, Interim Director Spackman ordered curtailment of water rights junior to January 8, 1981. Watermaster Cindy Yenter compiled information on the curtailment enforcement last summer and concluded the following in her August 20, 2009 memo:

Some individual followup is ongoing, but as of the date of this memo, less than 100 of the critical 1100 acre remain out of compliance with the August 7 Order.

Ex. 27 at 1.

At her deposition Ms. Yenter confirmed the above statement and the fact that ground water users had obtained alternative water supplies or taken other actions in response to the Director's curtailment order. *See Yenter Depo. Tr.* p. 14, lns. 7-13. Ms. Yenter further testified that she was not aware of any failing farms or businesses as a result of the order. *Id.*, p. 16-17.

At hearing, Lynn Carlquist, a director for the North Snake Ground Water District, also testified that he was not aware of any junior ground water users that had gone out of business or failed as a result of the curtailment. *Tr. Vol. I*, p. 40, lns. 7-19. Although IDWR ordered curtailment in 2009 it is clear that actions were taken to obtain alternative water supplies, or ground water users complied with the order and did not suffer the "mass destruction" as claimed.

Similar to their claims about the results of administration, the Districts continue to wrongly assert that the OTR Plan and the use of pumped ground water is their only option to mitigate injury to Clear Springs' senior water rights. At hearing, Lynn Carlquist testified that other mitigation options exist, but that the Districts have not explored or pursued all of those

alternatives:

Q. [BY MR. SIMPSON]: Okay. And has the district --- excuse me, have the districts ever looked at instituting a voluntary curtailment program whereby the districts pay users within the district not to irrigate?

A. [BY MR. CARLQUIST]: We have not.

* * *

Q. But if you were able to target a fallowing program above the springs that are subject of this curtailment order, that possibly would be an alternative mechanism to satisfying the order; correct?

A. Possibly, yes.

Tr. Vol. I, p. 35, lns. 6-11, 24-25; p. 36, lns. 1-4.

Q. Mr. Carlquist, has the district – have the districts explored the possibility of conversions within the American Falls Reservoir District No. 2 boundaries?

A. We are looking at that this year. . . .

* * *

Q. And so that if those acres were available for conversions, that would enlarge the amount of conversions that would be possible through a mitigation plan?

A. It would.

Q. And have you explored, then, building your own facilities within these canal companies or the – either within North Side Canal Company or American Falls Reservoir District No. 2 that would allow you to obtain water or retain water, provide an alternative source of water for conversions?

A. No. We have not really looked at that. . . .

Id., p. 48, lns. 16-20; p. 49, lns. 17-25; p. 50, lns. 1-5.

In addition to this testimony, Dr. Brockway also provided an example of another mitigation option that the Districts have failed to analyze or pursue which would be consistent with the “conservation of water resources” requirement IDWR must consider under the CM Rules. *See Brockway Report* at 12-13. Instead of pumping ground water over-the-rim and

reducing spring flows, the Districts could turn off the wells and pump surface water from Clear Lake back above the rim and onto the plain for irrigation use.

Although the Districts object to taking actions on the ESPA to improve ground water levels and spring flows in the OTR Plan, they have admittedly participated in programs to recharge the aquifer and convert ground water acres to a surface water supply over the past 5 years. The fact the Districts have failed to pursue additional conversions or target voluntary curtailment of acres near the springs does not mean the OTR Plan is the only mitigation option. Moreover, that the Districts have offered to lease an adjacent spring water right from IDFG is further evidence that other alternatives exist. *See* Districts' 3rd Mitigation Plan at 9-10 (filed 3/12/09). Finally, the Districts have failed to explore obtaining other spring water rights in the area of Snake River Farms as possible replacement water sources as well. Whereas replacing spring water with other spring water stands to provide replacement water of "equal utility" to Clear Springs, the Districts apparently refuse to take the necessary steps to provide that type of mitigation.

In summary, the OTR Plan is not the "end all" mitigation plan for purposes of providing water to satisfy Clear Springs' senior water rights. Moreover, the fact the Districts refuse to pursue mitigation alternatives that would prevent injury to Clear Springs and comply with the law is not a reason to approve the OTR Plan. As evidenced above, other options exist to prevent injury to Clear Springs' water rights and submit a plan that complies with the CM Rules and IDWR's mitigation requirements.

III. The Districts Seek Unlawful "Pre-Approval" of the OTR Plan Without Meeting the Burden They Carry in this Proceeding.

Since the Districts have failed to carry their burden to prove an acceptable and workable mitigation plan under Rule 43, they instead seek an "advisory opinion" from the Hearing Officer.

Incredibly the Districts believe the OTR Plan should be approved with “no obligation to pursue further administrative proceedings” until Clear Springs confirms it will accept the water. *GWD Post Br.* at 5. In other words, even if the transfer is denied, which they have yet to file with IDWR, the Districts believe the OTR Plan can be approved as a Rule 43 Mitigation Plan. This is not the standard under Idaho law.

As correctly acknowledged by the Hearing Officer, the Districts, as the applicant and junior water right holders causing injury, carry the burden to meet the requirements under Rule 43 to prove an acceptable and workable mitigation plan. *See* Tr. Vol. II, pp. 396-97. Since the Districts currently have no “source” of water to supply under their plan, they have failed to meet that burden. Now, the Districts apparently seek approval without even demonstrating that a transfer could be approved! Alternatively, the Districts ask that an approved transfer simply be made a condition of approval of the OTR Plan. *GWD Post Br.* at 14-15. The Districts claim there is no need to pursue a transfer before approving a mitigation plan, yet they ignore the CM Rules and the requirements related to a demonstrating an available water supply. *See* Rules 43.01, 43.03.b,c, h, i, and j. Although the Districts admit that the evaluation of a Rule 43 plan “may overlap to a degree with an analysis under a transfer”, they fail to meet their burden to show that the OTR Plan will not injure other water rights and that they will have an available water supply. In essence, the Districts seek an “advisory opinion” on their plan without having to meet the burden they carry in this proceeding. The Hearing Officer should reject their arguments accordingly.

Similar to their argument on the transfer application, the Districts further claim they have no responsibility to obtain final design, permits, or easements for the OTR Plan. *GWD Post Br.* at 16-18. Again, such an argument flies in the face of Rule 43 and the requirement to prove an

acceptable mitigation plan. Since the Districts have failed to obtain the necessary permits and permissions for the pipeline and have not completed a design, they have admittedly not met their burden to prove an acceptable mitigation plan. Although the Districts claim the final design should be worked out with Clear Springs, they have failed to obtain the governmental approvals for road crossings and use of county right-of-ways for their proposed route. *See Clear Springs Post-Hearing Memo.* at 8-10. This is not simply a matter of a “condition” for an approved plan, it is a burden the Districts carry at the threshold, which they have failed to meet in this proceeding. After all, if any of the permits or permissions is denied, the Districts’ plan is not approvable as filed.

In addition, the Districts have failed to present a final well location and pumping plan for review in this case. The uncertainty associated with a proposed well location and pumping operation is fatal to the plan since there is no way to evaluate the OTR Plan and its effects on spring flows and other water rights. Rule 43 requires specific analysis of water rights the Districts propose to change and whether that change will injure other water rights. Rule 43.03.i, j. No specific analysis as to these elements was provided since no final well location or pumping plan was identified. Instead, the Districts provided two options analyzed by Mr. Scanlan, which are not applicable given the removal of Wells #2 and #4. *See Ex. 2000*, pp. 6-7, 12-15.

Regardless, Dr. Brockway testified that the change in pumping from an irrigation season to a year-round operation will decrease wintertime spring flows in the area. *Brockway Rebuttal Report* at 17. The OTR Plan does not mitigate for these new injuries and therefore fails the standard the Districts must meet under Rule 43. Accordingly, the Hearing Officer cannot defer the issue as a “condition” on the Plan, rather it is central to whether the plan can be approved in the first place.

In summary, the Districts misread the applicable burden in this proceeding by seeking to defer all the “unknown” and unproven factors about their plan as “conditions” of approval. With only a 50% design, a lack of required permits and county permissions, and no final well location or pumping regime to analyze, IDWR is not in a position to approve the OTR Plan. Although the Districts complain of the costs to perform this analysis and prove an acceptable mitigation plan, that is the consequence of injuring senior water rights and the burden they carry in order to obtain approval of a Rule 43 mitigation plan in order to avoid curtailment.

IV. Water Quality Concerns Have Not Been Adequately Addressed.

Although the Districts have eliminated Wells #2 and #4 from the OTR Plan, concerns over water quality are not resolved given the lack of data in water quality sampling. The Districts do not have any long term trends in data for the wells in the OTR Plan. The Districts own witness Mr. Schuur testified that water quality is important and that he would not design or construct a facility based upon such limited data:

Q. [BY MR. SIMPSON]: Okay. And in designing and constructing those facilities, did you look at the water supply and water quality available for that particular aquaculture facility you were to build?

A. [BY MR. SCHUUR]: Yes.

Q. Did you look at the water-quality aspects of that water source?

A. Absolutely.

Q. Okay. And based upon that experience you have, given this amount of data available to you, two points in time for which water sampling was taken, would you construct a facility based upon two data points for water-quality sampling.

A. I’ve – probably not.

Schuur Depo Tr. p. 76, ln. 14 – p. 77, ln. 3.

Clear Springs has witnessed elevated nitrate levels in one spring in recent years and there is no way to compare whether the wells in the OTR Plan have witnessed a similar increase. *See* Tr. Vol. II, 272-73. Moreover, Clear Springs and DEQ are investigating the source of elevated nitrate levels and Clear Springs expressed concern in not receiving water with increased nitrate. *See MacMillan Report* at 26-32. The fact that increase nitrate levels could affect Clear Springs' operations is a risk that should not shift to the injured senior water right holder in this proceeding. As Mr. Cope explained at hearing, increased nitrate levels are not acceptable to Clear Springs or DEQ:

A. [BY MR. COPE]: We have a great concern about that water that we are receiving. And that's been brought forth to the State Department, DEQ. And we're engaged with them on that to determine what that source is, because either that will need to be corrected or we will have to make a determination on how we can do something different to divert that water.

Tr. Vol. II, p. 358, Ins. 14-21.

In summary, increased nitrate levels are a concern, and the lack of data on the OTR Plan wells demonstrates that the water quality issue is not completely resolved, even with the elimination of Wells #2 and #4. Under no circumstances should Clear Springs have to accept water with increased nitrate levels that stands to harm its operations. In sum, the Districts' limited sampling and failure to designate a final well location and pumping plan does not resolve the issues surrounding water quality in the OTR Plan wells.

V. The Districts Have Not Met the Requirements of Rule 43.

Acknowledging the flaws in the OTR Plan, the Districts seek to minimize the Rule 43 factors by emphasizing the rule contains "a list of factors the Director *may* consider in determining whether to approve a proposed mitigation plan." *GWD Post Br.* at 22. Evaluation

of the various factors depends upon the actions proposed in a particular mitigation plan.¹⁰

Accordingly, the Rule's reference to "may consider" must be read in context with the particular plan under review.

The Districts have no basis to interpret that language as a means to avoid having the Hearing Officer evaluate the OTR Plan under the Rule 43 factors. Specifically, Judge Melanson held the following with respect to IDWR's duty to follow the Rules in conjunctive administration:

Therefore, the Director should adhere to the CMR when responding to a conjunctive management delivery call . . . CMR 043 sets out the procedures for responding to the submission of a mitigation plan.

Order on Petitions for Judicial Review at 50 (Clear Springs, et al. v. Tuthill, et al., Gooding County Dist. Court, Fifth Jud. Dist., Case No. CV-08-444, June 19, 2009).

Contrary to the Districts' claim, the OTR Plan does not meet the Rule 43 requirements. First, the OTR Plan does not provide an adequate replacement water supply "in place". Rule 43.03.b. The proposal to pump ground water and take it away from the natural spring source is not mitigation "in kind" or "in place". The Districts' own expert admits that but for the pumping under the junior water rights included in the plan, Clear Springs would receive more spring water for use under its senior water rights. *See Clear Springs Post-Hearing Memo* at 21-22. In addition, without an approved transfer the Districts have no available water supply, therefore the reliability of the water is clearly at issue at this point.¹¹ Rule 43.01c, 43.03.h.

Next, the OTR Plan does not satisfy subparts (e), (h), and (j). The Districts admit that the OTR Plan results in new wintertime depletions in spring flows both to Clear Springs and other in

¹⁰ For example, the Director has no reason to consider subpart (d) if the plan does not propose recharge. In addition, the Director has no reason to consider subpart (o) if the parties have not entered into an agreement.

¹¹ The fact that half of the water rights are junior to November 16, 1972 is also an issue given the water rights have been subject to curtailment and may be curtailed in the future pursuant to a water delivery call. *See Brockway Rebuttal* at 15-16.

other parts of the reach, yet they identify no mitigation measures to prevent that injury. Instead, the Districts only compare the new depletion to the total spring flow in the reach, as if the comparison excuses injury to specific water rights in the reach. *GWD Post Br.* at 23. The admission of injury resulting from the OTR Plan plainly violates Rule 43.03.j.

Finally, the Districts wrongly assert that the OTR Plan will not result in an “enlargement” of the ground water rights and is consistent with the “conservation of water resources”. *GWD Post Br.* at 23. Changing the season of use of the ground water rights from a 6-month irrigation season to a year-round pumping regime in this case results in an “enlargement” of the water rights. As filed the plan does not mitigate for this enlargement. Dr. Brockway provided analysis and testimony on these criteria and concluded the following:

The transfer will decrease wintertime SRF spring flow below the historic wintertime flows. . . . Simulation of the changes in seasonal timing and location of pumping based on the over-the-rim plan, shows that there will be additional wintertime impact to all reaches of the Snake River from Milner downstream. There will be decreased wintertime reach gains in the Buhl to Thousand Springs reach and decreases in SRF spring flows compared to historical. The provision of 3 cfs of replacement water proposed in the over-the-rim plan does not totally eliminate the decreases in SRF spring flow in the wintertime.

Brockway Rebuttal at 17.

By not including any actions to adequately address injury to Clear Springs’ rights and other water rights in the reach, the OTR Plan fails the criteria set forth in Rule 43 related to enlargement and “injury” to other water rights. In addition, the plan is not consistent with the “conservation of water resources” as it proposes continued pumping of junior rights to the ESPA, which will not benefit aquifer levels or spring flows. *See Brockway Rebuttal* at 12-13, 17-18. In sum, the OTR Plan does not satisfy the criteria set forth in Rule 43. Although the Districts seek to defer all of the required analysis for another day, that is not the standard under the Rules and as filed the plan is unapprovable.

VI. Conclusion / Required Conditions to Address OTR Plan's Deficiencies.

As explained above, the Districts' OTR Plan does not satisfy the CM Rules and IDWR's mitigation requirements for purposes of providing replacement water to Snake River Farms and preventing injury to Clear Springs' senior water rights. The OTR Plan does not provide water of "equal utility" to Clear Springs for use under its senior water rights. Moreover, the lack of a proposed final well location and pumping regime, including a detailed analysis about that operation and the injury to Clear Springs' and other senior water rights is fatal to the Plan. The Districts carry the burden to prove an acceptable and workable mitigation plan up front, and questions concerning injury to other water rights cannot be deferred until later.

Although the Hearing Officer requested conditions that would need to be included in order to approve the Plan, Clear Springs suggests that the number and substantive issues related to those conditions demonstrate why the OTR Plan is not approvable in the first place. For example:

1) Plan Design / Well Locations / Pumping Operation

The Districts should be required to prepare a complete project design, including identifying a final well location and pumping operation for evaluation. As the evidence stands now, the Districts have failed to complete the design.

2) Reliable Water Supply / Transfer Approval

The Districts should be required to identify a reliable water supply. The Districts have identified "water bank leases" and "transfer applications" but have not filed any of the required applications with IDWR. At a minimum the Districts have to show a reliable water supply through an approved transfer.

3) Construction Requirements / Methods

The Districts should be required to identify a final pipeline alignment and the ability to construct the system in a manner that does not interfere with Clear Springs' operations or affect the integrity of the spring sources. To date the Districts have conducted no such studies or analyses to show the pipeline could be safely installed without affecting Clear Springs or the spring source. The Districts have failed to provide any analysis regarding the new route north of the old Clear Lakes Grade road, including permission to use the county road right-of-way. At a minimum, a final pipeline alignment must be studied and construction methods identified to not affect the integrity of Clear Springs' operations or the spring source.

4) Security Plan

The Districts should be required to complete a biosecurity plan to show how all of the facilities will be protected. This plan has yet to be prepared.

5) No Injury to Other Water Rights

The Districts have failed to show that they can mitigate the injury caused by pumping under the OTR Plan on other area water rights. Indeed, none of the Districts' witnesses provided any opinions about the injury resulting from the OTR Plan. *See Clear Springs' Post-Hearing Memo* at 16. The plan should be conditioned so that no injury to other water rights occurs.

Since the Districts have not provided the evidence and analysis required to demonstrate an approvable and workable mitigation plan at this point, the OTR Plan is not approvable as filed. The CM Rules and IDWR's requirements for acceptable mitigation plans cannot be qualified by endless "conditions".

Although the Districts seek approval of a Rule 43 mitigation plan in order to continue their out-of-priority diversions, they have admittedly not carried their burden in this proceeding. Therefore, the Hearing Officer should recommend the OTR Plan be denied.

DATED this 8th day of January, 2010.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF MAILING

I hereby certify that on January 8th, 2010, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email:

Hon. Gerald F. Schroeder
c/o Victoria Wigle
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov
fcjschroeder@gmail.com

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

Randy Budge
Candice M. McHugh
T.J. Budge
RACINE OLSON
P.O. Box 1391
Pocatello, Idaho 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

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

Mike Creamer
Jeff Fereday
GIVENS PURSLEY
P.O. Box 2720
Boise, Idaho 83701-2720
mcc@givenspurlsey.com

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


Travis L. Thompson