

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER)	CM-MP-2009-004
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,)	
AND 36-07148)	OPINION AND
(SNAKE RIVER FARM))	RECOMMENDATION
_____)	CONCERNING THE OVER-
)	THE-RIM MITIGATION PLAN
IN THE MATTER OF THE THIRD MITIGATION)	
PLAN (OVER-THE-RIM) OF THE NORTH SNAKE)	
AND MAGIC VALLEY GROUND WATER)	
DISTRICTS TO PROVIDE REPLACEMENT)	
WATER FOR CLEAR SPRINGS SNAKE RIVER)	
FARM)	
(WATER DISTRICT NOS. 130 AND 140))	
_____)	

PROCEDURAL HISTORY

Clear Springs Foods, Inc. is a corporation which holds water rights that are utilized for the propagation of trout for sale in commercial markets. Prior proceedings determined that water rights numbers 36-04013A, 36-04013B, and 36-07148 held by Clear Springs and utilized at its Snake River Farm facilities had been and are being injured as a result of junior ground water pumping above the rim of the canyon from which springs emerge which supply Snake River Farm water. As a consequence curtailment is required of ground water pumping causing the injury if an acceptable mitigation plan cannot be developed. The "Over-the-Rim" plan under consideration is intended to provide the final amount of water necessary to make up past deficiencies and ongoing deficiencies not met by other mitigation efforts.

The North Snake Ground Water District and Magic Valley Ground Water District (Ground Water Districts) represent ground water district members and non-member participants in the Ground Water Districts efforts to develop mitigation plans to avoid curtailment.

Various efforts to develop acceptable mitigation plans have been undertaken prior to the Over-the-Rim plan presently under consideration. However, on March 5, 2009, the Director entered a **Final Order Accepting Ground Water District's Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; And Notice of Curtailment:**

Notice of Curtailment is hereby given to holders of ground water rights that are junior to November 16, 1972. The resulting curtailment will impact approximately 860 ground water rights located in Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls counties. The curtailment will impact approximately 41,000 acres of land irrigated by ground water. If no further actions are taken by March 12, 2009, the Director will order curtailment on March 16, 2009. The watermaster for water district nos. 130 and 140 is directed to notify holders of certain junior-priority ground water rights located in water district nos. 130 and 140, listed in the attachment to this order, and bearing priority dates junior to November 16, 1972, that their rights are subject to curtailment in accordance with the terms of this order. The notices shall apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights use for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code Sec. 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set for in Idaho Code Sec. 42-1401A (12). Pursuant to IDAPA 37.03.11.020.11. Members of IDA participating in its mitigation plan shall not be subject to curtailment.

On March 12, 2009, the Ground Water Districts submitted their **2009 Replacement Water Plan and Third Mitigation Plan (Over-The-Rim) of North Snake Ground Water District and Magic Valley Ground Water District.** "This Plan provides for the "Over-the-Rim" direct delivery of ground water from existing wells to Snake River Farm's intake. This proposal will convert up to 2,000 acres from ground water irrigation to surface water irrigation irrigated farmland of certain existing member of North Snake Ground water District farming near the canyon rim above Snake River Farm. Surface water leased from the Upper Snake reservoir system will be delivered through the North Side Canal Company ("NSCC") "S Coulee" to replace the ground water irrigation." An alternative and/or supplemental mitigation plan through the direct delivery of Idaho Fish and Game water right no. 36-4076 was included in the Ground Water District's filing.

The Director conducted a status conference in response to the Ground Water District's March 12 proposal on March 13, 2009, and indicated the plan could be approvable but identified four core concerns that were not fully addressed in the Plan – water quality, temperature, reliability and timing to implement the system. Attorneys for Clear Springs and other interested

parties raised additional concerns. The Director established the format for a technical review working group and solicited written responses from the parties.

On March 16, 2009, the Director responded further to the Ground Water Districts' March 12 proposal with an **Order on Scheduling and Holding Notice of Curtailment in Abeyance**, providing that, "[b]ecause further actions were taken by the Ground Water Districts by the March 12, 2009 deadline established in the Notice of Curtailment, curtailment will not be ordered to begin on March 16, 2009." The Order set forth a format for further proceedings and provided, that "[t]he Director will review the information presented by the working group on the 2009 Plan and issue an order on the Plan no later than Thursday, March 26, 2009. If the Plan is not acceptable, curtailment will be ordered. The Notice of Curtailment shall therefore be held in abeyance until the Director issues his order on the 2009 Plan."

On March 17, 2009, counsel for Clear Springs submitted a letter to the Director outlining objections to the Ground Water District's replacement water plan, asserting (1) that a replacement water plan is without support in rule or law, and that the proceedings have violated due process; (2) the replacement water plan does not adequately mitigate for the injury caused to Clear Springs, asserting failures to update the injuries to Clear Springs, the inappropriate use of the "trim line" on the ESPA, the use of a fixed percentage (6.9%) for determination of required mitigation discharge, errors in the ESPAM calibration, failure to recalibrate or reconfigure the ESPAM calibration in light of recent ground water level changes and water use on the ESPA, failure to account for seasonal impact of ground water pumping on the spring water supply and failure to account for impacts on the September 15, 1955, water rights; (3) the replacement water plan fails to address previous failures to meet mitigation; (4) the replacement plan fails to specify the alleged benefits from conversions or CREP; (5) the ground water rights to be utilized for replacement are irrigation water rights with a specific period of use, necessitating transfers to change the place of use and the nature of use; (6) the replacement plan lacks adequate detail; (7) the replacement plan fails to analyze the impact of the proposed changes on the ESPA and connected water sources; (8) the replacement plan fails to adequately consider water quality; (9) the replacement plan fails to address bio-security; (10-13) the replacement plan fails to address on-going operation and maintenance, where the conversion water will be acquired, the necessary easements and the level of engineering design and safety to the facilities below the Snake River

Canyon. Additionally, Clear Springs reiterated its objections to the procedures being followed and reserved any rights it might have to challenge the procedures judicially.

Clear Springs followed the March 17 letter on March 19, 2009, with two filings – (1) a **Protest of the 2009 Replacement Water Plan and Third Mitigation Plan of North Snake Groundwater District and Magic Valley Groundwater District** and (2) a **Petition for Reconsideration and Request for Hearing on the Director’s March 5, 2009 Final Order**, seeking consolidation of the issues raised in the Petition with any hearing to be held on the Ground Water District’s Third Mitigation Plan. The Petition objected to the Director’s post-audit procedures and analysis of the Ground Water District’s prior mitigation actions. Further, the Petition maintains that the Director does not have the authority to approve a mitigation plan over the objection of the holder of the senior water right, asserting that, “If an approved “mitigation plan” is not in place *prior to the time a junior water right holder diverts*, the Director does not have authority to “approve a mitigation plan over the objection of a senior.” And, “the Director does not have the authority to approve a plan that allegedly mitigates for depletions, irrespective of what it is called, without providing due process and an opportunity for a hearing.” Also, Clear Springs asserted the First Mitigation Plan should be dismissed with prejudice and Clear Springs claimed a right to costs and attorney fees in its protest.

The Protest of the 2009 Replacement Water Plan and Third Mitigation Plan reiterated and refined some of the objections identified in the March 17 letter and reserved the right to amend the protest. Recently Clear Springs has expanded its protest to the Over-the-Rim Plan to include an assertion that its business image has been built upon the propagation of trout from pure spring water and that substituting and intermingling water pumped from wells will damage that business image.

On March 19, 2009, the Ground Water District members filed an **Augmentation to 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District**. The filing updated information supporting the Over-the-Rim Plan.

On March 26, 2009, the Director filed an **Order Approving Ground Water District’s Replacement Water Plan for 2009**, approving the Over-the-Rim Plan as a Replacement Water

Plan subject to a number of conditions and without prejudice of the 2009 Plan as a Conjunctive Management Rule 43 Mitigation Plan. Further, “the Notice of Curtailment will continue to be held in abeyance pending satisfactory completion of the over-the-rim project and resolution of the Ground Water Districts’ CM Rule 43 Mitigation Plan.”

On April 9, 2009, the Director entered an Order Denying Clear Springs’ Foods, Inc.’s March 19, 2009, Petition for Reconsideration; and Granting Request for Hearing:

Based upon the foregoing, IT IS HEREBY ORDERED that Clear Springs’ petition for reconsideration is DENIED and Clear Springs’ request for hearing is GRANTED. The requested hearing on the Department’s “post-audit” of the Ground Water Districts prior mitigation actions shall be consolidated with any hearing to be held on the Ground Water District’s Third Mitigation Plan.

On May 15, 2009, the Director entered an **Order Granting Partial Stay of Ground Water Districts Replacement Water Plan for 2009 and an Order Appointing Hearing Officer; Granting Petition of the Idaho Dairymen’s Association to Intervene; and Consolidating Matters for Hearing.** The Order consolidated Clear Springs’ requested hearing on the Department’s “post-audit” of the Ground Water Districts’ prior mitigation actions with consideration of the Over-the-Rim proceedings.

On August 28, 2009, a **Scheduling Order** was entered setting a hearing, staging the proceedings to first determine whether the proposal for Over-the-Rim delivery is an acceptable method to mitigate the obligations of the junior ground water users. If not, the remaining issues may be moot. If the Over-the Rim plan is an acceptable method of mitigating the injury caused by ground water pumping, and can be implemented, the remaining issues raised by the objections may be addressed as and if they become relevant to a final determination.

The parties pre-filed testimony and exhibits. A hearing was held December 7 and 8, 2009, at which additional evidence was submitted, including the cross-examination of witnesses whose testimony had been pre-filed. This opinion constitutes the findings of fact and conclusions of law arising from the evidence and legal arguments submitted.

I

CONSIDERATION OF A MITIGATION PLAN.

Idaho Code section 42-602 sets forth broad powers of the Director of the Department of Water Resources to supervise the distribution of water within water districts. This power is supplemented by Idaho Code section 42-603 which authorizes the Director to adopt rules and regulations for the distribution of water. IDAPA 37.03.11 contains the Rules concerning the Conjunctive Management of Surface and Ground Water Resources. Rule 43 of the Conjunctive Management Rules sets forth the process and considerations that may be taken into account when a mitigation plan is proposed. Beyond the factors enumerated that may be considered, Rule 43.03 provides that the Director is not limited to considering those factors. The option of considering factors other than those set forth is important in this case. The majority of the substantive objections that have been raised by Clear Springs fall within the enumerated considerations. However, Clear Springs maintains that the Over-the-Rim plan should be rejected because it would taint the extensive reputation of Clear Springs at its Snake River Farm facility of producing trout only from pristine spring water flowing by gravity into the canyon. Protection of a business reputation is not explicitly within the factors enumerated that may be considered. The Ground Water Districts object to the evidence presented by Clear Springs on this issue and have moved to strike that evidence on the bases that the assertion is untimely, that it is outside the scope of this hearing, and that it is speculative and not a proper factor to be considered in a mitigation proceeding.

II

IF IMPLEMENTED THE OVER-THE-RIM PLAN WOULD RELIABLY DELIVER WATER UNDER SECURE CONDITIONS OF COMPARABLE QUALITY AND TEMPERATURE AS THE WATER EMERGING FROM SPRINGS THAT IS UTILIZED AT THE SNAKE RIVER FARM FACILITY.

1. The temperature of the water delivered through pumping would be the same as that utilized at the Snake River Farm facility. This element of water quality has been resolved, and there remains no arguable dispute on this issue.

2. The Over-the-Rim system would meet the necessary standard of reliability.

Redundancy systems are available and designed into the system to provide backup to deliver the water in the event of power or mechanical failure or failure of a well. There are different configurations that can be utilized. All include the required redundancy. The system will be engineered to the level of reliability for a municipal water system.

3. The water quality will be at least equal to the water that flows from the springs that supply the Snake River Farm. The wells to be utilized draw from the same body of water that ultimately supplies the water emerging in the canyon from springs. As such it is logical that it would have the same or very similar characteristics to the spring water. Testing from the wells confirms that conclusion. In making this determination wells 2 and 4 must be excluded from use. They tested nitrogen levels in excess of the water from the springs and would not be suitable to provide mitigation water. The remaining wells do not have the same problems, and any configuration of those wells will meet the necessary quality standards. If a well falls below the quality standard of the water from spring flows to the Snake River Farm that well should be withdrawn from use. This is an objective standard of water quality with no value attached to the manner in which the water arrives at the Snake River Farm.

4. Issues of biosecurity have been adequately addressed. The question of potential pollution of the water provided from the wells is serious. While the water provided from the wells constitutes a small percentage of the water utilized at the Snake River Farm, any intentional or unintentional pollution of that water could have catastrophic effects. Consequently the security of the system is essential. The planning provides for locked enclosures for the wells. Thereafter the water is transported through an enclosed pipeline that will be buried at the points where access would otherwise be easy. Nothing can guarantee against an intentional attack on the system. The same is applicable to the water emerging from the springs. But as proposed, the pipeline would provide a high level of security comparable to that of the spring flows.

5. A precise plan for maintenance of the system by the Ground Water Districts and for an immediate response in the event of a problem in the system must be outlined. It is the obligation of the Ground Water Districts to maintain the system in good working order at the Ground Water Districts' expense and to respond expeditiously in the event of a problem. This requires a detailed outline of the persons to contact and the timetable for a response. Immediate

notice of any problem in the system must be given to representatives designated by Clear Springs, and access to the Over-the-Rim facilities must be available to representatives of Clear Springs. If Clear Springs must take maintenance action on the Over-the-Rim facilities to protect its stock, the cost of that action shall be reimbursed by the Ground Water Districts.

III

THE CLAIM OF POTENTIAL DAMAGE TO THE MARKETING IMAGE OF CLEAR SPRINGS FROM COMMINGLING WATER PUMPED OVER-THE-RIM FROM WELLS WITH WATER THAT ENTERS THE SNAKE RIVER FARM FACILITY FROM SPRINGS EMERGING FROM THE CANYON WALLS SHOULD NOT PREVENT APPROVAL OF THE MITIGATION PLAN.

1. The objection to using ground water to mitigate for a loss of surface water derived from springs will be addressed in this proceeding. The Ground Water Districts object to the consideration of this issue on both procedural and substantive grounds. Procedurally they maintain that the issue is not timely. Substantively they maintain that it is not a proper consideration under the Conjunctive Management Rules.

a. The procedural objections is basically that the issue was not presented to the Director to consider prior to entry of the order approving the Ground Water Districts' replacement water plan and at the outset was not specifically designated as an issue to be determined in this hearing. Nonetheless the claim has been made and must be addressed at some time in view of the fact that Clear Springs reserved the right to amend its protest, and this hearing anticipated consideration of whether the Over-the-Rim project is an acceptable method of mitigation.

b. Substantively the question is whether Clear Springs' objection that substituting pumped water for water emerging from springs falls outside the factors that can or should be considered in a conjunctive management determination. The water offered in mitigation would be pumped from the ground utilizing electricity and delivered through engineered facilities, unlike the water that flows naturally through the aquifer to the springs. Additionally, there is a taint to the "green" image of the Snake River Farm as an energy friendly facility. Clear Springs maintains that the Over-the-Rim plan will not provide water "in kind, in time, and in

place,” asserting that the delivery of pumped ground water would not provide water from a source that is of equal utility to Clear Springs. The language of “in kind, in time, and in place” derives from testimony by former Director Dreher in earlier proceedings and is not found in statute or the Conjunctive Management Rules. Nonetheless, it is a convenient summary of factors to be considered. In arguing this point Clear Springs relies on the District Court’s ruling concerning the Second Amended Mitigation Plan, *Clear Springs Foods, Inc. v. Spackman, Order on Petition for Judicial Review* (Gooding County District Court , Fifth Judicial District, Consolidated Case Nos. 09-241 and 09-270), at 16-17: that “[a]ny interpretation authorizing the Director to compel the acceptance of monetary compensation or other compensation in lieu of water, except for purposes of providing access to water, replacement water or by agreement, would not only result in the Director exceeding his authority but would also result in an unconstitutional application of the CMR.” (emphasis added). While instructive, the District Court ruling is not directly on point and is not controlling on the issue in this proceeding. The Over-the-Rim plan does not propose something other than water as mitigation for lost water. It proposes the replacement of water with water of the same quality, differing only in the method of delivery. The instructive part of the opinion to this case is the question of is whether there might be a constitutional violation if a form of mitigation is authorized which diminishes rather than restores the utility of a water right.

2. The water that would be delivered under the proposed Over-the-Rim Plan would be from the same body of water that provides the spring water to the Snake River Farm facility. The best evidence is that the wells that would be utilized in the Over-the-Rim Plan would pump from the source of water that would otherwise pass by gravity into the canyon springs, including those that provide the water for the Clear Springs facilities at the Snake River Farm. While particular molecules of water cannot be identified, the pool is the same and some of the water that would be transported by pumping would go to the Snake River Farm if the wells were not utilized. Apparently surface water will be brought in to irrigate land that would otherwise be irrigated by pumping. Some portion of that water would likely enter the aquifer. Whether this new water would alter the chemistry of the source is unknown but too speculative to bar consideration of the Over-the-Rim Plan.

3. The marketing strategy of Clear Springs falls outside the factors that should be considered in evaluating the proposed mitigation plan. The intent of this mitigation plan is to provide the required amount of water of proper quality in a timely and reliable manner so the Snake River Farm can raise fish to the level it could if ground water pumping did not injure its senior water rights. That goal is met by the Over-the Rim plan. Under some circumstances the claim of damage to a business reputation most likely could preclude a mitigation plan. But the nature of the claim of damaged business image in this case is too conjectural to cause rejection of the mitigation plan.

a. In making this determination only the Snake River Farm facility is considered, not the entirety of the Clear Springs operations domestically and internationally.

b. Reality already undercuts the Clear Springs marketing strategy. Clear Springs utilizes a compelling video (A Postcard From Idaho) and other promotional material to promote the reputation of producing trout from pristine spring water emanating from the snows of the Pioneer Mountains to the north. In fact the majority of the water that pours from the springs comes from points east, and much of it has entered the aquifer after being spread on the ground by surface water irrigation on crops treated with fertilizer and pesticides, entering the aquifer as incidental recharge water. Clear Springs has built a reputation and perception which is arguably a little askew from scientific reality. This proceeding is not the one to test the reality of that perception. Certainly it is not the role of this proceeding to stamp the seal of approval by the State of Idaho upon that perception. Marketing policy is best left beyond the scope of this process in this case.

4. Despite extended efforts over a period of years to develop a satisfactory mitigation plan, that has not occurred. The Ground Water Districts objected to the presentation of evidence by Clear Springs of prior mitigation plans that are no longer under consideration and moved to strike testimony and reports placed in the record by Clear Springs that addressed those plans. The Ground Water Districts are correct that these prior proposals are not relevant to the question of whether the Over-the-Rim plan will provide an acceptable amount of water of proper quality day in and day out. However, those reports are instructive on the nature of the problems confronted in providing mitigation in lieu of the extended curtailment otherwise necessary and are considered in that light.

5. Clear Springs asserts that there are other alternatives to curtailment but there are no viable alternatives in this record. The burden is upon the Ground Water Districts to develop a satisfactory alternative to curtailment. They have offered various plans and have withdrawn those proposals after objections were made by Clear Springs, justifiably it appears. Efforts through the use of conversions are limited by the capacity of the canal system to deliver water for additional conversions. There have also been difficulties in delivering sufficient water to the springs through voluntary curtailments, partly because many of the Ground Water District members are senior to the date in the curtailment order. Additionally, there was a suggestion of a pump-up plan made by Clear Springs. Doubtless this should be explored for practicality if it would eliminate the conflict between the parties, but for now it is a concept without technical analysis to support it.

6. Beyond conjectural solutions, within this record the Over-the-Rim plan is the only alternative to curtailment to provide the final amount of water necessary to meet the Ground Water Districts' mitigation requirement. This does not preclude any party from developing a better alternative, but for purposes of this hearing the choices presented are curtailment of pumping for up to 41,000 acres or the Over-the-Rim plan.

IV

TRANSFERS OF THE WATER RIGHTS PROPOSED TO BE USED FOR MITIGATION
MUST BE OBTAINED BEFORE THERE CAN BE APPROVAL OF THE OVER-THE-RIM
PLAN.

1. Transfers to effectuate the Over-the-Rim plan are not in place. Clear Springs moved to dismiss the proposed mitigation plan on the basis that the Ground Water Districts have not shown transfers of the water rights from the wells that are necessary to provide water to the Snake River Farm facility. The motion was denied, but it is clear that in order to secure water from the wells identified in the proposal transfers are necessary. The period of use – year round – is different, as is the place of use and the actual use of the water. The transfer proceedings would test whether the Over-the-Rim proposal would injure other water users, including Clear Springs and others who are not parties to this proceeding. A determination in this proceeding that the Over-the-Rim plan can provide the proper quality of water in the required amounts at the

times necessary does not prejudice the legitimacy of transfers or preclude objections to the transfers.

2. The necessary transfer proceedings can be conducted separate from the issues addressed in this hearing. Valid transfers are precedent to the implementation of the proposed mitigation plan, but the issues presented in transfer applications can be addressed in separate proceedings. Regardless of the efficacy of the Over-the-Rim plan it cannot be approved without those transfers.

3. Obtaining transfers of the ground water rights proposed for the Over-the-Rim plan is a condition of approval of the Ground Water Districts' mitigation plan. If the transfer applications fail to obtain approval, the Over-the-Rim plan cannot receive approval.

V

THE FAILURE TO PROVIDE ANALYSIS REGARDING POSSIBLE INJURY TO EXISTING WATER RIGHTS CAUSED BY THE OVER-THE-RIM PLAN MAY BE ADDRESSED IN TRANSFER PROCEEDINGS THAT ARE NECESSARY AS A CONDITION OF FINAL APPROVAL OF THE MITIGATION PLAN.

1. Conjunctive Management Rule 43.03 provides possible injury to other water rights or the public interest as factors for the Director's consideration in reviewing a mitigation plan:

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

This record does not contain answers to some of the questions to be addressed in CM Rule 43.03. The problem is akin to the failure to have approved transfers in place to be considered at this time.

2. This issue must be determined before a final plan may be approved, but that analysis is deferred, to be considered at the same time and in conjunction with the transfer applications.

VI

A COMPLETE ENGINEERING PLAN IS A NECESSARY CONDITION FOR FINAL APPROVAL OF THE OVER-THE-RIM MITIGATION PLAN.

1. At this time the Ground Water Districts have engineering plans that are approximately 50% complete. The effort to proceed to implementation of the Over-the-Rim plan was stopped because of the stay order that was issued that stopped the construction of the pipeline portion of the plan. Further, since the initial Over-the-Rim plan was proposed there have been significant changes in the plan. There have been changes in the selection of wells, and a final determination of the configuration of the wells has not been made. There have been changes in the proposed route of the pipeline which require the acquisition of easements or permits not presently in place, e.g., permission to cross the county road and permission to place the pipeline within the county road property. A pre-approval process would clarify if the contractor could obtain the necessary permits.

2. Clear Springs relies upon language in the recent decision by Judge Melanson, *Order on Petition for Judicial Review at 18-19* (emphasis in the original), Gooding County District Court, Case No. 08-551; July 24, 2009:

However, the provision goes on to provide: *'The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water sources become unavailable.'* Id. (emphasis added). This language is unambiguous.... In this regard, although the Director adopted a 'wait and see' approach, the Director did not require any protection to assure senior water right holders that junior ground water users could secure replacement water.

Clear Springs maintains that the uncertainties in the Over-the-Rim plan preclude approval of the plan, lacking the certainty necessary for consideration and lacking protection "to assure senior water right holders that junior ground water users could secure replacement water" if the plan were approved. In this case the water for mitigation is present in the aquifer and there is reasonable assurance that the rights to that water will be honored in the face of curtailment

otherwise. The redundancies in the construction of the system give assurance of the ability to deliver the water.

3. The Ground Water Districts have revised the plans in response to Clear Springs objections. Clear Springs objected to construction on its property that would disrupt its operation and limit future use of the property. This is a valid objection, and revisions of the route and placement of facilities were undertaken to avoid these consequences. Clear Springs objected to the use of water from wells identified as two and four because of water quality concerns. Again, this is a valid objection, and the Ground Water Districts responded by developing plans which could eliminate wells two and four from the system while adding well eight which does not have the same nitrogen level problems as two and four. The remaining wells can be configured to provide an adequate amount of water of appropriate quality to meet the mitigation requirement.

4. The presentation of final plans which meet legitimate concerns of Clear Springs is a condition for approval of the over-the-rim plan. The Over-the-Rim plan has been revised to avoid intrusion upon Clear Springs' property. There is a likelihood, but not a certainty, that the necessary easements and permits can be obtained to allow passage of the pipeline to the Clear Springs property. There may be other engineering issues of concern to Clear Springs. The interests of Clear Springs are such that its concerns must be addressed. However, those concerns must be reasonable and within the ambit of proper considerations in this proceeding. This does not pass a veto power to Clear Springs, as noted by Judge Melanson in *Clear Springs Foods, Inc. v. Spackman*, Case No. 2009-247 and 2009-270 (Gooding County, consolidated cases), pages 18-19:

A related issue raised by the Ground Water Users is whether the Director can order mitigation over the objections of the senior suffering the material injury. This Court does not read that condition in the CMR. Clearly the Director can approve and order mitigation over the objection of the senior...

The same principle is applicable in the adjustment of engineering plans to meet concerns of Clear Springs. All reasonable accommodations to meet Clear Springs' concerns should be made, but final approval does not encompass the need to satisfy desires beyond the engineering of a reliable system that will deliver the necessary quality and quantity of water without intruding

upon the real property rights of Clear Springs or disrupt its operation to the detriment of the raising and maturing of the trout.

VII

THE CONSEQUENCES OF CLEAR SPRINGS' ANTICIPATED REFUSAL TO ACCEPT WATER FROM OVER-THE-RIM.

1. The Chief Operating Officer of Clear Springs indicates that it will not accept water pumped from Over-the-Rim for use at the Snake River Farm. This position is subject to determination by the Board of Directors, but it appears to be a strong likelihood that Clear Springs will not use water pumped to the Snake River Farm. Clear Springs cannot be compelled to accept the water.

2. To meet their mitigation obligation the Ground Water Districts must produce a final engineered plan and obtain the necessary permissions and easements to install the Over-the-Rim system. The time and expense of the effort may be fruitless in terms of ultimately delivering water, but the burden is upon the Ground Water Districts to provide mitigation. That requires that at a minimum there be a final plan that can be constructed and would reliably deliver the proper quality of water at the proper temperature in the amounts required for mitigation at the Snake River Farm.

3. When, and if, a final plan is developed with pre-approval of all necessary permits and easements the Ground Water Districts should be excused from constructing the facilities if Clear Springs determines that it will not accept the water.

4. If Clear Springs determines that it will not accept the water, the Ground Water Districts should cease use of all wells included in its Over-the-Rim plan that are junior to the curtailment date, including wells two and four, and allow the water that otherwise would be pumped to pass into the aquifer as part of the Ground Water Districts' obligation for mitigation. The remaining obligation for mitigation that would be satisfied by implementation of the Over-the-Rim plan should be suspended. This does not permanently eliminate the Ground Water Districts' obligation to mitigate. There must be ongoing efforts to find acceptable mitigation, and hopefully the parties can cooperate to discover if there are

mutually reasonable and beneficial alternatives. But the provision of a viable Over-the-Rim plan as mitigation should suspend the obligation to curtail

5. If Clear Springs determines it will accept the water from Over-the-Rim, the Ground Water Districts must complete construction expeditiously.

RECOMMENDATION

This opinion constitutes the findings of fact and conclusions of law arising from the hearing conducted December 7 and 8, 2009. Various findings and recommendations have been made in this opinion and are incorporated in this summary recommendation if not otherwise if not set forth in detail.

1. The Over-the-Rim plan is an acceptable mitigation plan to the extent that it would reliably produce with adequate biosecurity and maintenance the necessary amount of water of sufficient quality and temperature to meet the Ground Water Districts' remaining obligation of mitigation. Consideration of the Over-the-Rim plan was staged to first determine if it would meet these objectives. If the Over-the-Rim plan could not be engineered to meet those goals, other objections would be moot because it would not be an acceptable mitigation plan. The evidence establishes that those goals will be met if the system is completed.

2. The argument that Over-the-Rim is not an acceptable mitigation plan because it would damage the Clear Springs marketing image of producing premium quality trout in pristine spring water should be rejected. The water that would be provided will be of the same quality as the water flowing from the springs. The mitigation plan provides for the replacement of water that would otherwise be delivered by the springs with water of equal quality delivered to the site where it could be utilized. The water would be delivered "in time, in kind and in place." In this case the State should not engage in validating or rejecting the Clear Springs marketing strategy. The State should stop at assuring that Clear Springs receives the amount and quality of water it would otherwise receive through curtailment.

3. Additional conditions must be met before the Over-the-Rim plan can be approved.

a. There must be approved transfers of the water rights that will be utilized.

b. There must be pre-approval from the appropriate entities for easements and permits necessary for construction of the pipeline.

c. A detailed plan of maintenance and response to emergencies must be in place at the expense of the Ground Water Districts.

d. Wells two and four must be removed from the configuration of wells to be utilized. The remaining wells may be utilized in whatever configuration meets the requirements of reliability.

e. The construction plan must not intrude upon Clear Springs' right to use or market its real property in the future which eliminates construction or the placement of facilities on Clear Springs property.

f. There must be no blasting in the vicinity of the Snake River Farm facilities during construction.

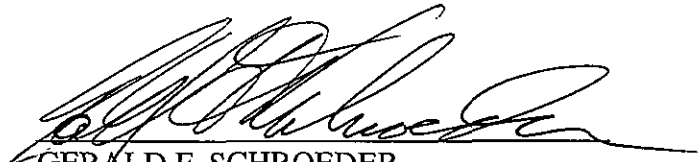
g. Clear Springs must be given an opportunity to review construction plans in the vicinity of the Snake River Farm facilities to assure that there will not be disruption of the facility.

4. At the time engineering of the system has been completed and all conditions for implementation of the Over-the-Rim plan have been met Clear Springs should be given the opportunity to determine if it would accept water pumped over the rim. If so, construction must begin expeditiously.

5. If Clear Springs determines that it will not accept water from the Over-the-Rim pumping, the Ground Water Districts' obligation to mitigate should be suspended with a requirement of further exploration of alternatives to be reported to the Director periodically. Those wells in the Over-the-Rim configuration that have rights junior to the curtailment date previously established should be removed from pumping.

6. There remain objections by Clear Springs. A post-hearing conference should be conducted to determine which issues remain and the manner of proceeding to address them.

Dated this 9th day of February, 2010.



GERALD F. SCHROEDER
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE
CANDICE M. MCHUGH
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

JOHN SIMPSON
BARKER ROSHOLT
PO BOX 2139
BOISE ID 83701-2139
(208) 344-6034
jks@idahowaters.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

TRAVIS THOMPSON
PAUL ARRINGTON
BARKER ROSHOLT
113 MAIN AVE WEST STE 303
TWIN FALLS ID 83301-6167
tlt@idahowaters.com
pla@idahowaters.com

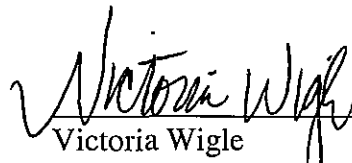
(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

MIKE CREAMER
JEFF FEREDAY
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720
(208) 388-1300
mcc@givenspursley.com
jefffereday@givenspursley.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
WATERMASTER - WD 130 and 140
IDWR – SOUTHERN REGION
1341 FILLMORE STREET SUITE 200
TWIN FALLS ID 83301-3380
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail


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