

**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)	FINAL ORDER CONCERNING
(SNAKE RIVER FARM))	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))	
_____)	

Interim Director of the Idaho Department of Water Resources Gary Spackman (“Director”) finds, concludes, and orders as follows:

FINDINGS OF FACT

I. Procedural Background

1. On March 5, 2009, the then-Director of the Department of Water Resources, David R. Tuthill, Jr. (“Director Tuthill”) issued a *Final Order Accepting Ground Water Districts’ 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”). The Notice of Curtailment stated that because there was no longer an acceptable mitigation plan before the Director, it would be necessary to order curtailment of junior ground water rights, starting on March 16, 2009, unless a plan to replace depletions to Clear Springs Foods, Inc. (“Clear Springs”) was received by March 12, 2009. Notice of Curtailment at 14.

2. On March 12, 2009, Director Tuthill received the Magic Valley Ground Water District and the North Snake Ground Water Districts’ (collectively referred to herein as “Ground Water Districts”) *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“Over-the-Rim plan”).

3. The Over-the-Rim plan was developed by the Ground Water Districts to offset the depletive effects of junior-priority ground water withdrawals on Clear Springs' water rights by way of two proposals.

4. The Over-the-Rim plan proposed to provide ground water to Clear Springs from the conversion of irrigation wells that are situated directly above Clear Springs' facility. The plan proposed the construction of a piping system that would integrate numerous irrigation wells and pipe the water down the canyon wall to Clear Springs. The Ground Water Districts proposed to provide Clear Springs a maximum of 3.0 cfs.

5. The second proposal, to convey water right no. 36-4076 directly to Clear Springs, would be implemented if the over-the-rim proposal "is rejected or conditioned, or ... inadequate" Over-the-Rim plan at 9. Water right no. 36-4076 is a partially decreed spring right held by the Idaho Department of Fish and Game with a year-round use in the amount of 3.59 cfs with a priority date of January 1, 1893, which is senior to Clear Springs' water rights. Measurements by Watermaster Cindy Yenter indicate that the flows available from the springs supplying this right sometimes are less than the decreed quantity but there is consistently about 1.1 cfs of water.

6. On March 19, 2009, the Department received *Clear Springs Foods, Inc.'s Protest of the 2009 Replacement Water Plan and Third Mitigation Plan of North Snake Groundwater District and Magic Valley Groundwater District* ("Clear Springs Protest") and a *Petition for Reconsideration and Request for Hearing on the Director's March 5, 2009 Final Order*.

7. On March 24, 2009, the Ground Water Districts 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*.

8. On April 9, 2009, Director Tuthill entered an *Order Denying Clear Springs Foods, Inc.'s March 19, 2009, Petition for Reconsideration; and Granting Request for Hearing*.

9. A hearing on the Over-the-Rim plan was held December 7 and 8, 2009. Former Idaho Supreme Court Justice Gerald F. Schroeder acted as hearing officer.

10. On February 9, 2010, the hearing officer issued his *Opinion and Recommendation Concerning the Over-the-Rim Mitigation Plan* ("Recommended Order"). The Recommended Order was issued as a recommended order pursuant to Idaho Code § 67-5243. The hearing officer recommended that the Over-the-Rim plan be conditionally approved.

11. On February 23, 2010, the Ground Water Districts filed *Ground Water Districts' Motion for Clarification and Exceptions to the Opinion and Recommendation Concerning the Over-the-Rim Mitigation Plan* ("Motion for Clarification and Exceptions").

12. On February 25, 2010, Clear Springs filed its *Petition for Reconsideration* (“Petition for Reconsideration”).¹

13. On June 1, 2010, the Ground Water Districts and Clear Springs filed a *Request for Stay*. The parties requested a stay of the Over-the-Rim plan until November 15, 2010.

II. The Hearing Officer’s Recommended Order

14. The hearing officer concluded that the Over-the-Rim plan is an acceptable mitigation plan. Recommended Order at 6, 16.

15. The hearing officer found that the temperature of the water delivered through pumping would be the same as that utilized at the Clear Springs facility. Recommended Order at 6.

16. The hearing officer found that the plan would also 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.” Recommended Order at 7.

17. The hearing officer found that water quality will be at least equal to the water that flows from the springs that supply the Clear Springs facility: “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.” Recommended Order at 7. If a well falls below the quality standard of the water from spring flows, that well should be withdrawn from use. *Id.*

18. The hearing officer found that issues of biosecurity have been adequately addressed: “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. ... [t]he pipeline would provide a high level of security comparable to that of the spring flows.” Recommended Order at 7.

19. The hearing officer rejected Clear Springs’ argument that the Over-the-Rim plan is not an acceptable mitigation plan because it would damage Clear Springs’ marketing image. Recommended Order at 8, 16. The hearing officer specifically held that the marketing strategy of Clear Springs falls outside the factors that should be considered in evaluating the proposed mitigation plan. “[T]he 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.” Recommended Order at 16.

¹ For purposes of this order, Clear Springs’ Petition for Reconsideration will be treated as a brief in support of exceptions pursuant to IDAPA 37.01.01.720.02.c.

20. The hearing officer concluded that the following additional conditions must be satisfied before the Over-the-Rim plan is finally approved:

- 1) The proposed transfer of water rights must be approved;
- 2) The Ground Water Districts must have approval from the appropriate entities for easements and permits necessary for construction of the pipeline;
- 3) A detailed plan of maintenance and response to emergencies must be in place at the expense of the Ground Water Districts; and
- 4) The presentation of the final plans which meet legitimate concerns of Clear Springs.

Recommended Order at 16-17.

21. The hearing officer also imposed limits on the plan and its implementation:

- 1) The construction plan must not intrude on Clear Springs' right to use or market² its real property in the future which eliminates construction or the placement of facilities on Clear Springs property; and
- 2) There must be no blasting in the vicinity of the Clear Springs facilities during construction.

Recommended Order at 17.

22. The hearing officer concluded that 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. *Id.* 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. *Id.*

III. Exceptions Filed By Parties

23. In the Motion for Clarification and Exceptions, the Ground Water Districts raise several issues regarding the hearing officer's recommended order. The Ground Water Districts seek to clarify the number of acres the Over-the-Rim plan anticipates converting. The hearing officer, referencing the Ground Water Districts' plan, stated that the Ground Water Districts propose converting 2,000 acres. Recommended Order at 2. The Ground Water Districts state that this was a typographical error in their plan, and that a little less than 1,000 acres will be converted. This clarification is acknowledged by the Director.

² The use of the term "market" by the hearing officer here does not include the marketing image of Clear Springs' product but instead references a possible sale of the property.

24. The Ground Water Districts also take exception with the timing of the steps described in the Recommended Order. As outlined above, the hearing officer recommended that before the mitigation plan is finally approved, a number of conditions must be satisfied:

- 1) The proposed transfer of water rights must be approved;
- 2) The Ground Water Districts must have approval from the appropriate entities for easements and permits necessary for construction of the pipeline;
- 3) A detailed plan of maintenance and response to emergencies must be in place at the expense of the Ground Water Districts; and
- 4) The presentation of the final plans which meet legitimate concerns of Clear Springs.

The hearing officer recommended that once these actions are completed, Clear Springs should then be given the opportunity to determine if it would accept water pumped over the rim. The Ground Water Districts argue that this order should be reversed and Clear Springs should first be required to make a decision whether it would accept water pumped over the rim. "Without first requiring Clear Springs' advance commitment to accept the water, requiring the Ground Water Districts to actually meet all of the conditions is entirely unnecessary and would be unduly burdensome, inefficient and a waste of resources." Motion for Clarification and Exceptions at 3. They argue that this is especially important because the CEO of Clear Springs, Larry Cope, already testified there is a strong likelihood that Clear Springs will not accept the water. Recommended Order at 15.

25. The Ground Water Districts also take exception with the conditions that "eliminates construction or placement of facilities on Clear Springs' property" and provide Clear Springs the opportunity to review and comment on construction plans. The Ground Water Districts argue these conditions would impede the Director's authority under the conjunctive management rules and Idaho Code.

26. In its Petition for Reconsideration, Clear Springs challenges the following conclusions made by the hearing officer:

- 1) Harm to Clear Springs' business image is "conjectural" and "should not prevent approval of the mitigation plan";
- 2) Proposed replacement water is different only in the method of delivery;
- 3) Consideration of the impacts of the well location and pumping operation can be investigated in the transfer proceeding; and
- 4) The Over-the-Rim plan is the only plan properly before the hearing officer.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994, (“CM Rules”). CM Rule 0. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

3. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director.

4. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights.

5. The Director concurs with the hearing officer’s conclusion that the Over-the-Rim plan meets the necessary standard of temperature, reliability, water quality, and biosecurity. The Director concurs with the hearing officer’s conclusion that the claim of potential damage to the marketing image of Clear Springs should not prevent approval of the mitigation plan.

6. The Director concurs with the hearing officer’s conclusion that the Over-the-Rim plan, with conditions, is an acceptable mitigation plan under the CM Rules. However, the Director herein modifies the order of implementation recommended by the hearing officer.

7. The plan adequately describes the actions that will be taken by the Ground Water Districts to mitigate material injury to Clear Springs by pumping ground water over-the-rim for the beneficial purpose of fish propagation. As will be described below, the approval of the plan is conditional. Nevertheless, the plan, if implemented, will provide water, of sufficient quality,

to Clear Springs “at the time and place required by the senior-priority water right” CM Rule 43.03.b.

8. The determination that the Over-the-Rim plan can provide the proper quality of water in the requested amounts at the times necessary does not prejudice the legitimacy of the transfers or preclude objections to the transfers. However, given Clear Springs’ previous statements about the refusal to accept water under the proposed mitigation plan, the Ground Water Districts are entitled to know whether Clear Springs will in fact refuse the replacement water prior to incurring the time and expense of a transfer proceeding.

9. As a condition of approval, however, the Ground Water Districts must still present a plan to Clear Springs which allows Clear Springs to fully evaluate the proposal. At the time of the hearing, the construction plans were not fully developed. The Ground Water Districts shall prepare a full conceptual plan for review by Clear Springs consistent with the Idaho Public Works Construction Standards. The conceptual plan should locate sources of water and the placement of pipe in both plan and profile views. The conceptual plan should describe the proposed modification of existing ground water wells and pumping systems and should specify the quantity of water proposed to be delivered, the pipe size, and pipe type. The conceptual plan should contain computations showing the amount of water proposed for delivery can physically be delivered by the conceptual delivery system. Finally, the conceptual plan should describe the methods of construction and security to minimize risk to Clear Springs of water contamination. The plan must include a detailed plan of maintenance and response to emergencies. This plan shall be prepared and submitted to the Department and Clear Springs by April 8, 2011.

10. Following submittal of the conceptual plan, Clear Springs must state, in writing, whether it will accept the water delivered through the over-the-rim pipeline before the Ground Water Districts need to take any further action (i.e., file transfers, seek easements, finish plans). Clear Springs must submit its written acceptance/rejection to the Department and the Ground Water Districts on or before April 22, 2011. The written acceptance/rejection must state whether Clear Springs will accept the piped ground water and whether Clear Springs will allow construction on its land related to placement of the delivery pipe. Rejection of the water by Clear Springs or Clear Springs’ refusal to allow construction in accordance with an approved plan suspends the Ground Water Districts’ mitigation obligations for the quantity of water that can physically be delivered to Clear Springs by the over-the-rim pipeline. The Director may require resubmission of the plan by the Ground Water Districts to address any reasonable design and construction concerns raised by Clear Springs. If the plan is accepted by Clear Springs, the Ground Water Districts must immediately file and pursue appropriate transfer applications and finalize all necessary approvals.

11. In its petition for reconsideration, Clear Springs argues that the hearing officer erred in finding that potential harm to Clear Springs’ business reputation was conjectural. The Director agrees with and adopts the hearing officer’s conclusion that the harm to Clear Springs’ business reputation is conjectural. However, the hearing officer made potentially conflicting statements about the extent the Director should delve into an analysis of business reputation. These potentially conflicting statements should be addressed. The hearing officer recommended:

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.

Recommended Order at 16.

The Director agrees with the above statement. Elsewhere in the recommended order, however, the hearing officer seemingly backs away from the statement by saying that “under some circumstances, the claim of damage to a business reputation could preclude a mitigation plan.” Recommended Order at 10. The Director disagrees with the suggestion that business reputation could preclude a mitigation plan. The responsibility of the Director is to determine whether the replacement water provided under the mitigation plan allows the senior user to meet the beneficial use of the senior water right. CM Rule 43.03. Here, Clear Springs’ senior water rights are for fish propagation. The Director must evaluate whether the plan will provide Clear Springs with the amount and quality of water it is authorized to be able to raise fish. CM Rule 43.03.b. Issues of business models and business reputation are outside the appropriate scope of the Director’s evaluation because they extend beyond whether the replacement water is adequate for its intended purpose. Business reputation is outside of the appropriate scope of the Director’s evaluation and is not something the Director should consider.

12. It its petition for reconsideration, Clear Spring also claims the hearing officer erred by concluding the replacement water is different only in the method of delivery. Clear Springs argues that the source of its water rights is “springs” not ground water. Petition for Reconsideration at 10. Clear Springs suggests that this means that replacement water cannot have a source different from the water right it replaces. There is no support for this argument in the CM Rules or Idaho Code. As discussed above, the focus in this proceeding is whether the replacement water is adequate for its intended purpose. The fact that Clear Springs’ water rights have been decreed with a source of springs does not preclude use of ground water for mitigation.

13. The hearing officer held that issues related to injury to existing water rights caused by the transfer of the ground water rights did not need to be addressed in this proceeding but could be addressed in the transfer proceeding. Recommended Order at 11-12. Clear Springs argues that the hearing officer does not have the discretion to “pre-approve” a mitigation plan. Petition for Reconsideration at 12. Contrary to Clear Springs’ suggestion, the hearing officer did not “pre-approve” the plan but recommended that it be approved upon conditions. CM Rule 43.02 provides that the Director is to consider the mitigation plan under the procedural provisions of Idaho Code § 42-222. Idaho Code § 42-222 provides that approval may be granted “in whole, or in part, or upon conditions” provided no other water rights are injured. Here, the Director views the hearing officer recommendation as recommending that the Director approve the mitigation plan contingent upon certain conditions. The Director agrees with this approach.

14. Clear Springs also argues that the hearing officer erred by not considering other alternative mitigation methods that were discussed in the proceeding. Petition for Reconsideration at 12. At the hearing, Clear Springs presented evidence of prior mitigation plans that were no longer under consideration. The hearing officer correctly identified 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.” Recommended Order at 10. The hearing officer was correct that there might be other alternatives to curtailment but there are no viable alternatives in this record.

15. The Hearing Officer recommended that if Clear Springs determines that it will not accept water from the Over-the-Rim plan, 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. Recommended Order at 17. The Director does not adopt the hearing officer’s recommendation in its entirety. The Director agrees with the hearing officer that if Clear Springs does not accept water from the Over-the-Rim plan, the Ground Water Districts’ obligation to mitigate should be suspended. However, there will be no requirement of further exploration of alternatives to be reported to the Director periodically. The suggestion by the hearing officer to have continued exploration of alternatives is too vague and will only lead to future litigation. Clear Springs will be able to decide whether or not to accept the water from the Over-the-Rim project, but will not be allowed to reject it, and then demand some other solution at some indeterminate time.

ORDER

Based upon and consistent with the foregoing, the Director hereby orders as follows:

IT IS ORDERED that the Over-the-Rim plan is conditionally approved. The Over-the-Rim plan is an acceptable mitigation plan as it provides replacement water of sufficient quality and temperature and in the time needed by Clear Springs. The argument that the plan is not an acceptable mitigation plan because it would damage Clear Springs’ marketing image is rejected. Certain conditions need to be met by the Ground Water Districts. The Ground Water Districts shall provide additional design details to Clear Springs as outlined in this order. Clear Springs shall provide a response as outlined in this order. If the plan is accepted by Clear Springs, the Ground Water Districts must immediately file and pursue appropriate transfer applications and finalize all necessary approvals. If the plan is rejected by Clear Springs, the Ground Water Districts’ mitigation obligation will be reduced by the amount of water the over-the-rim pipeline could physically deliver to Clear Springs. The Director will issue a separate “as applied” order shortly, which will address the effect of the conditionally approved mitigation plan with relation to the 2011 irrigation season.

IT IS FURTHER ORDERED that all other requests for relief by the Ground Water Districts and Clear Springs, unless specifically discussed herein, are hereby denied.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 18th day of March, 2011.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

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