

immediate hearing on the 2008 Plan before the Director pursuant to Idaho Code § 42-1701A(3) prior to the Director's decision on that plan.

INTRODUCTION

On May 2, 2005, Clear Springs requested water rights administration in Water District No. 130 pursuant to Idaho Code § 42-607, in order to satisfy its senior surface water rights at the Snake River Farm facility. The Director responded by issuing an order, on July 8, 2005 ("July 8 Order"), which, among other things, implemented a five-year phased curtailment plan. This plan calls for "involuntary or substitute curtailment ... in 2005, 2006, 2007, 2008 and 2009, such that ... phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach." July 8 Order at 37. Such "involuntary or substitute curtailment" was required to result in an increase of "steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively." *Id.*

According to the 2005 Order, groundwater users, who were found to be depleting the aquifer by their out-of-priority diversions to the injury of certain Clear Springs' water rights (only 1964 and junior), could avoid mandatory curtailment by providing a "replacement water plan", which would result in "cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach." Nothing in the conjunctive management rules provides for "replacement water plans" or the unilateral approval by the Director of the same without any process provided for injured senior water right holders. While the Department and junior priority ground water right holders have used the term "replacement water plan" and "mitigation plan" interchangeably, the plans filed by the Ground Water Districts are not Rule 43 Mitigation Plans, and no process has been followed pursuant to that rule to date. Consequently, the "replacement water plan" process, something created *sua sponte* by the Director in 2005, just

provides for the Director's approval or disapproval of a plan, with no due process provided to the injured senior water right holder.

In 2005, 2006, and 2007, the Ground Water Districts filed "replacement water plans" and avoided mandatory curtailment. An untimely hearing on the 2005 plan was then held a year after-the-fact, on June 5, 2006, after junior ground water right holders had been authorized to pump unabated for the entire 2005 irrigation season. Several questions and issues were raised at that hearing regarding the efficacy of the 2005 plan. However, no decision was ever issued by the Department after that hearing despite multiple requests by Clear Springs and Blue Lakes Trout Farm, Inc. Accordingly, without a final decision regarding the issues addressed at the hearing, there is no way to determine whether or not the actions taken in 2005 actually met the curtailment goals prescribed in the July 8 Order.

Next, although the Ground Water Districts filed another plan in 2006, no Department accounting has taken place to determine which actions promised were ever actually implemented. The Ground Water Districts now appear to claim that since the conjunctive management rules were under legal challenge during that year they had no obligation to mitigate for their out-of-priority depletions in 2006. Contrary to the Districts' arguments being offered now, the litigation over the Department's rules did not constitute a "free pass" to water right administration for 2006. Indeed, the Department used the rules through the better part of the irrigation season to justify not curtailing out-of-priority junior ground water rights, yet there has been no decision to determine the level of mitigation by those juniors that was actually provided during that year. Without an accounting of 2006 actions, which was repeatedly requested by Clear Springs and Blue Lakes in 2007, the Department and Director failed to identify the proper

mitigation goals for 2007 (i.e. the carryover of the 2006 shortfalls added to the 2007 requirements).

Despite the lack of mitigation actions and accounting from 2006, the Ground Water Districts then filed a replacement water plan for 2007, which on its face did not meet the third year requirements from the July 8 Order. This plan failed to provide the required 23 cfs as stated in the Director's July 5, 2007 Order, which found the plan to be deficient by 10.7 cfs. *See Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans* at 5, ¶ 11. Consequently, Clear Springs' Vice-President John R. MacMillan sent the Director a letter on March 28, 2008 requesting an accounting of the actions taken under the prior "replacement water plans" so that proper mitigation or administration could occur in 2008. The Director responded with a letter on March 31, 2008 and required the Ground Water Districts to file an "acceptable mitigation or a replacement plan" by April 7, 2008, but the letter did not identify the prior years' shortfalls or the required amount of mitigation for 2008.

Nonetheless, on April 1, 2008, the Ground Water Districts filed yet another "replacement water plan" for 2008. Tiering to their prior plans and analyses, the Ground Water Districts identified certain actions and proposed to supply Clear Springs' Snake River Farm facility with pumped water from a new water right owned by the State of Idaho Department of Fish & Game (#36-7046).¹ As explained below, the Ground Water Districts' 2008 Plan, which relies heavily upon the use of water from the State of Idaho Department of Fish & Game's water right, fails to lawfully mitigate for the injury being continually suffered by Clear Springs' senior surface water rights. As such, the 2008 Plan should be denied.

¹ The 2008 Plan is completely devoid of any specific data or modeled analysis of the proposed actions to be taken by the Ground Water Districts. The reference to prior plans and submissions is insufficient and confusing. At a minimum, the Ground Water Districts should be required to submit all supporting data and information with any proposed "plan" to avoid curtailment.

RESPONSE

I. The 2008 Plan Fails to Address and Cover the 2005-2007 Mitigation Shortfalls

Initially, Clear Springs notes that the Director issued orders on previous replacement plans without input from any party, including the party being injured and the subject to receive the proposed mitigation. The Hearing Officer addressed this unilateral action through discussion of due process in the recommended order. *See January 11, 2008 Opinion* at p. 27. The Hearing Officer's Order further provided guidance on a number of issues raised in the 2008 Plan. First, the 2008 Plan fails to address shortfalls in previous years' plans and their lack of implementation. At hearing, Department employees testified that the 2007 plan did not meet the phased-in curtailment obligations, which the Director's July 5, 2007 had previously confirmed. The Hearing Officer was specific as to this circumstance:

2. Replacement plans must meet the targeted goals of curtailment. Replacement plans are an alternative to curtailment. To be valid they must meet the goals of curtailment within the time frames of curtailment. A failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years. The cap on phased in curtailment is five years. That period of time should apply also to any approved mitigation plan, unless an agreement is reached with the Spring Users that extends the period or provides a different alternative. That appears unlikely. Consequently, if the targeted goals are not met in the five year phase in period, curtailment to meet the initial goals is required.

3. The Director's approval of a mitigation plan does not eliminate the need to meet the goals to be achieved by curtailment. The fact that the Director approves a replacement water plan for a particular year does not eliminate the ultimate goal of providing the amount of water to the Spring Users set forth in the Orders. The value of the approval is that the rights of IGWA and the Spring Users are settled for that year and they may plan accordingly. But the ultimate obligation that would be met by curtailment remains and is carried over. This is relevant in this case, since it appears that the last approved mitigation plan falls short of the targeted goal.

January 11, 2008 Opinion at 27.

Clearly, the 2008 Plan is deficient in addressing the previous years' shortfalls. The 2007 Plan failed to incorporate the fact that the 2006 plan was not fully implemented. Likewise, the 2008 Plan further fails to address the 2007 Plan shortfalls, and the cumulative deficiencies from the prior years. Mitigation must be timely and real. "Close enough" is not the standard. As the Hearing Officer stated: "To be valid they must meet the goals of curtailment within the time frames of curtailment." *January 11, 2008 Opinion* at 27. The 2008 Plan fails in both regards, it does not meet the "goal", and it is not "timely", hence it should be denied.

II. Proposed Conversion Acres / Rental of 35,000 acre-feet of Storage Water

Next, the 2008 Plan apparently relies upon the same conversion acres in the North Snake Ground Water District, and the use of 35,000 acre-feet of storage water from the Upper Snake River reservoirs above Milner Dam to supply water to those acres. The 2008 Plan proposes to receive credit for the lack of ground water pumped on those conversion acres, any associated loss of surface water on those acres, and the 30% loss charged by the North Side Canal Company for surface water delivery to those acres. The Ground Water Districts' proposal for this action is insufficient since it:

- 1) Fails to provide written documentation and proof of rental of 35,000 acre-feet of storage in 2008.
- 2) Fails to provide written documentation and agreement that the surface water will be delivered through North Side Canal Company's system in 2008.
- 3) Fails to identify which acres will apparently receive surface water in 2008, which acres have received that water in the past, and documented proof that ground water has not and will not be pumped to those acres.
- 4) Fails to identify the expected modeled benefits.
- 5) Fails to provide any analysis or justification for the claimed 30% "incidental recharge" from the delivery of surface water to those conversion acres.

The Ground Water Districts have known about the pending curtailment requirements for months. Actions could have been taken on acquiring the necessary written documentation and proof to avoid the same controversies that have plagued previous years' filings. Additional

issues may be identified if and when the Ground Water Districts supply information related to the above deficiencies.

III. Pump Project Using Water Under State Fish & Game Water Right No. 36-7046

The Ground Water Districts propose to directly supply Clear Springs' Snake River Farm facility with water (allegedly 2 cfs) under the Idaho Department of Fish & Game's water right no. 36-7046. The Ground Water Districts apparently propose to construct a pump on Clear Springs' private property to collect this water and divert it to the Snake River Farm raceways.

Representatives from the Ground Water Districts met with Clear Springs' executives on Friday April 4, 2008 to discuss this proposed project. Unfortunately, no specific details about the project, beyond those stated in the 2008 Plan, were provided. Without specific details to support the project, it is impossible for Clear Springs to completely evaluate the proposal as suggested in the 2008 Plan. However, as identified in the plan, the proposed project is insufficient for the following reasons:

- 1) The 2008 Plan does not identify how or when the water would be conveyed to Snake River Farms, except by indicating that the water would be pumped. Apparently, the project is completely dependant upon pumping water from another source to the Snake River Farm head canal. Systems reliant on pumping to deliver a continuous supply of water are subject to sudden failure. As previously explained by Clear Springs at the recent hearing and in other forums, "pumping water" to Clear Springs' facilities significantly increases risk to its operations, specifically the health and survival of the rainbow trout. Rainbow trout are keenly sensitive to sudden diminishment of water flow regardless of the cause. Water contains dissolved oxygen which when deprived first causes significant physiological imbalance, stress and if prolonged acute death. Elevated stress alone causes chronic disease, delayed death and poor fish growth. As such, the risk of pump failure is unacceptable to the operations of Clear Springs' facilities.
- 2) The spring located at the periphery of the Snake River Farm that is proposed to be the source of the water to be pumped under the Department of Fish Game Water Right 36-7046 has insufficient water to satisfy the 2 cfs alleged in the plan. Neither the 2008 Plan nor the Department have provided any historic measurements or flow data of the spring water diverted under water right 36-7046. However, an on-site field examination (conducted by several Clear Springs' employees on April 3rd and April

4th, 2008) indicates that no more than 0.5 cfs is present. Presumably this flow would fluctuate over time and would be diminished with the onset of ground water pumping throughout the 2008 irrigation season.

- 3) The 2008 Plan does not provide any information related to the water quality in this spring to demonstrate that it would be compatible with rainbow trout propagation. While the spring emanates from an area similar to where Snake River Farm obtains its current water supply, spring water quality can vary. Of great concern to Clear Springs is whether the water contains contaminants that would be toxic to rainbow trout or would adulterate their flesh making them unwholesome for human consumption. Introducing new water to Clear Springs' facilities without ensuring the proper quality could be disastrous for its operations.
- 4) The Ground Water Districts indicate they have received verbal agreement with the Idaho Department of Fish & Game to utilize this spring water, yet the authority providing such verbal agreement is not identified nor is there an apparent written agreement to do so making it impossible to confirm such a commitment.
- 5) The 2008 Plan does not provide any written assignment of the State Department of Fish & Game water right no. 36-7046 or the filing of transfer documentation as would be required under Idaho law.
- 6) The 2008 Plan fails to explain how what is currently a non-existent project with inadequate water (approximately 0.5 cfs) at this point will provide "timely" mitigation to Clear Springs's senior surface water rights this year.

Additional issues may arise if and when specific details are actually provided by the Ground Water Districts relative to this proposed project.

Regardless of the lack of detail, as to the issue of pumping water for mitigation use, the Hearing Officer's opinion expressly identified the pitfalls and risks associated with relying upon pumped water through an aquaculture facility:

THE PROPOSAL FOR REUSE OF WATER BY THE SPRING USERS

1. The Spring Users are not obligated to pursue repumping of water beyond the current practices. IGWA maintains that the Spring Users should be required to institute systems for reuse of the water they receive before calling for the curtailment of junior rights. At the present time water is reused in the trout farms as it moves from one set of raceways in a pond to a lower set of raceways. The process works by gravity and utilizes a settling system between the ponds. IGWA maintains that this process can be replicated by repumping the water through the raceways. This is a theory. The burden of proof is upon IGWA to show that it is a realistic method.

Several problems prevent acceptance of this alternative: a) There is no showing that it is financially feasible to run pumps twenty-four hours a day, three hundred sixty-five days a year. b) There is evidence that there would be risks that make this process unacceptable. Any breakdown for even a brief time could be catastrophic to fish deprived of water containing adequate oxygen. c) While water is presently reused in a process of settling waste that works, there is no evidence that a similar quality of water could be maintained with repumping.

January 11, 2008 Opinion at 12.

The same risks are present with relying upon pumped water as a part of a “replacement water plan”. The 2008 Plan on its face proposes an insufficient project since it lacks any specific details that would support its implementation. In particular, the amount of water the Ground Water Districts allege could be provided (2 cfs) does not match up with what the spring source is actually producing (about 0.5 cfs) at this time. If the Ground Water Districts cannot identify alternative actions that would supply the required water, it is obvious the proposed project fails.

Setting aside the shortfalls in the 2008 Plan, the Hearing Officer determined based upon the testimony of Department staff that Snake River Farms’ 1955 water right (#36-04013A) was being materially injured by out-of-priority ground water diversions. Hence, any subsequent mitigation plan must address mitigation of injury to this water right, not just the 1964 water right (#36-04013B). Such would be the case with any on-going administration of water rights on a

year-to-year basis where available water supply fluctuates. Since the 2008 Plan does not address injury to Clear Springs' 1955 water right, it fails and must be denied.

CONCLUSION

For the foregoing reasons, Clear Springs requests that the Director deny the Ground Water Districts' 2008 Plan. In the event the Department and Director do not consider the 2008 Plan as a "Mitigation Plan" filed pursuant to Rule 43 and the procedures provided therein, or do not provide any process to satisfy Clear Springs' constitutional rights, Clear Springs would request an immediate hearing on the plan before the Director pursuant to Idaho Code section 42-1701A(3) prior to the Director's action the plan.

DATED this 7th day of April, 2008.



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

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2008, I served a true and correct copy of the foregoing **CLEAR SPRINGS FOODS, INC.'S RESPONSE TO GROUND WATER DISTRICTS' JOINT REPLACEMENT WATER PLAN FOR 2008** by delivering it to the following individuals by the method indicated below, addressed as stated.

Director David K. Tuthill, Jr.
c/o Victoria Wigle
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
victoria.wigle@idwr.idaho.gov

U.S. Mail
 Facsimile
 Overnight Mail
 Hand Delivery
 E-Mail

Randy Budge
Candice M. McHugh
RACINE OLSON
P.O. Box 1391
Pocatello, Idaho 83204-1391

US Mail, Postage Prepaid
 Facsimile
 E-mail

Daniel V. Steenson
Charles L. Honsinger
RINGERT CLARK
P.O. Box 2773
Boise, Idaho 83701-2773

US Mail, Postage Prepaid
 Facsimile
 E-mail

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

US Mail, Postage Prepaid
 Facsimile
 E-mail

Michael S. Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

US Mail, Postage Prepaid
 Facsimile
 E-mail

Frank Erwin
Watermaster
Water District 36
2628 South 975 East
Hagerman, Idaho 83332

US Mail, Postage Prepaid
 Facsimile
 E-mail

Bob Shaffer
Watermaster
Water District 34
P.O. Box 53
Mackay, Idaho 83251

US Mail, Postage Prepaid
 Facsimile
 E-mail

Allen Merritt
Cindy Yenter
Watermaster - Water District 130
IDWR – Southern Region
1341 Fillmore St., Ste 200
Twin Falls, Idaho 83301-3380

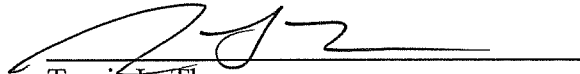
US Mail, Postage Prepaid
 Facsimile
 E-mail

Justin May
May Sudweeks & Browning LLP
1419 W. Washington
Boise, Idaho 83702

US Mail, Postage Prepaid
 Facsimile
 E-mail

Robert E. Williams
Fredericksen Williams Meservy
P.O. Box 168
Jerome, Idaho 83338-0168

US Mail, Postage Prepaid
 Facsimile
 E-mail


Travis L. Thompson