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Attorneys for North Snake and Magic Valley Ground Water Districts

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

IN THE MATTER OF THE MITIGATION  
PLAN OF THE NORTH SNAKE AND MAGIC  
VALLEY GROUND WATER DISTRICTS  
IMPLEMENTED BY APPLICATIONS FOR  
PERMIT NOS. 02-10405 AND 36-16645 AND  
APPLICATION FOR TRANSFER NO. 74904  
TO PROVIDE REPLACEMENT WATER FOR  
CLEAR SPRINGS SNAKE RIVER FARM

(Water District Nos. 130 and 140)

**AMENDED MITIGATION PLAN OF  
NORTH SNAKE GROUND WATER  
DISTRICT AND MAGIC VALLEY  
GROUND WATER DISTRICT**

COMES NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively “Ground Water Districts”), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts’ mitigation activities, and hereby submit this Amended Mitigation Plan pursuant to Conjunctive Management Rule 43, IDAPA 37.03.11.043. This Amended Mitigation Plan is intended to replace the *Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water* dated June 13, 2008 (“original Mitigation Plan”). The

Ground Water Districts are submitting this Amended Mitigation Plan in response to the objections and protests filed to the original Mitigation Plan and its accompanying Applications for Transfer and Permit. This Amended Mitigation Plan does not substantively change the proposals set forth in the original Mitigation Plan rather, it submits for consideration as the first option, a direct pump-back of water from the end of Snake River Farm's raceway to the head of Snake River Farm's raceway. The Ground Water Districts request that the direct pump-back proposal be considered and heard first and separate from the alternative proposals involving the use of Fish and Game Water Right No. 36-4076 and the new Application for Transfer and Applications for Permits. The Protestants objections to the Transfer and Permit Applications alleging injury to their respective water rights are rendered irrelevant for purposes of the direct pump-back. Accordingly, the alternatives and the objections pertaining thereto need only be addressed if the pump-back proposal is rejected.

## **I. RESERVATION OF DEFENSES**

By submitting this Amended Mitigation Plan, the Ground Water Districts do not waive and expressly reserve any and all objections and defenses they have made to the Director's Orders.

## **II. INTRODUCTION**

The Director's July 8, 2005 and subsequent Orders (collectively referred to herein as the Director's Orders) require that the Ground Water Districts provide mitigation in lieu of involuntary curtailment of ground water rights located in Water District 130. The Director's Orders provided for an accelerated schedule of curtailment or mitigation over a five year period.<sup>1</sup> The Director's

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<sup>1</sup> The July 8, 2005 Order at page 37 provided that "involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008 and 2009, such that based on simulations using the Department's Ground Water Model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of

Orders further provide that Snake River Farm gets 6.9 percent of the Buhl Gauge to Thousand Springs reach gain.<sup>2</sup> Accordingly, the 2008 delivery requirement to Snake River Farm to comply with the Director's Orders is 2.14 cfs.<sup>3</sup>

On or about June 13, 2008, the Ground Water Districts filed the original Mitigation Plan along with exhibit nos. 1-7. On July 2, 2008, the Ground Water Districts filed Applications for Permit Nos. 02-10405 and 36-16645 and Application for Transfer No. 74904 (collectively referred to herein as "Applications") in support of and accordance with the Mitigation Plan. The Idaho Department of Water Resources ("IDWR" or "Department") published notice on July 17 and 24, 2008 of the original Mitigation Plan together with notice of Applications. Protests to the original Mitigation Plan and/or the Applications were timely filed by Clear Springs Foods, Inc. and Clear Lakes Trout Company, Inc. on August 4, 2008. A late protest to Application for Permit no. 36-16645 from Clear Lake Country Club was treated as a motion to intervene by the Department and Clear Lake Country Club was granted intervention. See *Notice of Hearing and Order Granting Intervention* dated August 13, 2008 at 1. The Protestants alleged injury to their respective water rights or source of supply in connection with the proposed Applications.

On August 14, 2008, Clear Springs Food, Inc. filed a *Motion to Authorize Discovery, Motion to Vacate Hearing and Request for Prehearing Conference*. In response to that motion, on August 21, 2008, IDWR issued an *Order Vacating Hearing Date and Consolidating Proceedings and Notice of Prehearing Conference* setting a prehearing conference on September 8, 2008.

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springs in the Buhl Gauge to Thousand Springs Reach . . . for the water rights held by Clear Springs for Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively."

<sup>2</sup> Finding of Fact 9 at page 3 of the Final Order Regarding Blue Lakes and Clear Springs Delivery Calls dated July 11, 2008.

<sup>3</sup> The 2008 reach gain requirement for the Buhl to Thousand Springs Reach of 31 cfs multiplied by 6.9% equals 2.14 cfs.

In light of the protests filed to the original Mitigation Plan and Applications and in order to narrow and limit the issues presented and reduce the necessary parties to include only Clear Springs Food's Snake River Farms, the Ground Water Districts submit this Amended Mitigation Plan to provide as the first option, the direct pump back of water as set forth more fully on the attached **Exhibit 1**. As part of this Amended Mitigation Plan, the Ground Water Districts request that IDWR consider the pump back proposal first and separate from the alternative proposals involving Water Right No. 36-4076 and that the Transfer and Permit Applications should be placed on hold. The alternative proposals would be considered separately and at a later date in the event the pump-back proposal is rejected.

### **III. 2005, 2006 AND 2007 REPLACEMENT WATER PLANS**

The Ground Water Districts previously submitted Replacement Water Plans for 2005, 2006 and 2007. Orders were entered approving the 2005 and 2007 Replacement Water Plans. Because of litigation and appeal relating to the constitutionality of the Conjunctive Management Rules, in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), the Director did not issue any order approving or disapproving the Ground Water Districts' 2006 Replacement Water Plan. The Ground Water Districts nevertheless continued to implement portions of their proposed 2006 Replacement Water Plan.<sup>4</sup>

The Ground Water Districts' 2005 and 2007 Replacement Water Plans were fully implemented. The Ground Water Districts have provided delivery and diversion data regarding

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<sup>4</sup> The entire proposal in the Ground Water Districts' 2006 Replacement Water Plan, specifically, late-season recharge, was not implemented because the Department could not guarantee any mitigation credit for that effort in light of the pending appeal to the Supreme Court. Therefore, the Ground Water Districts could not afford to pursue that program that fall. This also resulted in no early-season recharge program in 2007.

their Replacement Water Plan efforts in each of these previous years to the Department and Ms. Cindy Yenter, watermaster for Water District 130.

#### **IV. AMENDED MITIGATION PLAN**

This proposed Amended Mitigation Plan is submitted to the Director pursuant to CM Rule 43 to provide replacement water to the Snake River Farm water rights sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source, with consideration to be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when these rights historically have not received the full supply. The following information is provided:

(a) The names and mailing addresses of the Ground Water Districts submitting the plan are:

North Snake Ground Water District  
1092 South 2500 East  
Hazelton, Idaho 83335

Magic Valley Ground Water District  
P.O. Box 430  
Paul, Idaho 83347

(b) The water rights benefiting from the Amended Mitigation Plan are: 36-04013B, 36-07148 (“Snake River Farm Water Rights”).

(c) Mitigation under the Amended Mitigation Plan will consist of water delivery to conversion acres, CREP acreage and direct replacement water to Snake River Farms.

##### **A. Mitigation Requirement**

Based on simulations using the Department’s Ground Water Model for the ESPA, the July 8, 2005 Order at page 37 required simulated cumulative increases to the average discharge of springs to the Buhl Gauge to Thousand Springs Reach for steady-state conditions of 31 cfs for 2008

and 38 cfs for 2009 and thereafter. The Director's Orders provided for an accelerated schedule of curtailment or mitigation over a five year period.<sup>5</sup> The Director's Orders further provide that Snake River Farm gets 6.9 percent of the Buhl Gauge to Thousand Springs reach gain.<sup>6</sup> Accordingly, the 2008 delivery requirement to Snake River Farms to comply with the Director's Orders is 2.14 cfs.<sup>7</sup>

The Department calculated that 2008 CREP lands and conversions are anticipated to provide 9.7 cfs to the Buhl to Thousand Springs reach as described in the Director's May 13, 2008 letter on page 2 as follows:

"The 2008 Conservation Reserve Enhancement Program (CREP) lands and conversions are anticipated to provide 9.7 cfs to the Buhl to Thousand Springs reach, if the conversions remain the same as in past years. The Order indicates that Snake River Farm is computed to receive 7 percent of the flow in the Buhl to Thousand Springs reach. Taking into account 9.7 cfs of benefit to the Buhl to Thousand Springs reach, which reduces the Ground Water Districts' Replacement Plan obligation for 2008 from 31 cfs in 2008 to 21.3 cfs, and from 38 cfs to 28.3 cfs for 2009, the computed shortfall of direct replacement water owed to Snake River Farm in 2008 is 1.5 cfs (21.3 times .07) and 2 cfs (28.3 cfs times .07) in 2009."

Based upon the foregoing calculations of the Department and assuming the same CREP and conversions benefit of 9.7 cfs to the Buhl to Thousand Springs reach, the Ground Water Districts' remaining mitigation requirement to Snake River Farm for 2008 is 1.5 cfs. The method used by the Department, although subject to dispute by the Ground Water Districts, meets the requirements of CM Rule 43.03.d. e. f. and g.

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<sup>5</sup> The July 8, 2005 Order at page 37 provided that "involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008 and 2009, such that based on simulations using the Department's Ground Water Model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gauge to Thousand Springs Reach . . . for the water rights held by Clear Springs for Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively."

<sup>6</sup> Finding of Fact 9 at page 3 of the Final Order Regarding Blue Lakes and Clear Springs Delivery Calls dated July 11, 2008.

<sup>7</sup> The 2008 reach gain requirement for the Buhl to Thousand Springs Reach of 31 cfs multiplied by 6.9% equals 2.14 cfs.

## **B. CREP and Conversion Deliveries**

Flows to the Buhl to Thousand Springs reach will be also be increased by the Conservation Reserve Enhancement Program (CREP) and by the delivery of water to acres that have been converted from ground water irrigation to surface water irrigation within the North Snake Ground Water District (“conversion deliveries”). Reach gains resulting from CREP may vary annually based upon increases or decreases in CREP acreage. Reach gains resulting from conversion acres may increase or decrease annually depending on the amount of water delivered annually to conversion acres.

Approximately 9,300 acres within the North Snake Ground Water District have been converted from ground water irrigation to surface water irrigation to increase incidental recharge to the aquifer. Projected deliveries for 2008 are 35,000 AF at the North Side Canal Company’s (“NSCC”) point of diversion at Milner Dam, with conveyance losses of approximately 10,000 AF and head gate delivery to converted acres of approximately 25,000 AF. For purposes of the Department’s analysis, the pattern of deliveries in 2008 should be assumed to be the same as actual deliveries in 2006 and 2007. All water delivered to the conversion acres should also be assumed to offset the consumption of ground water, with any excess water percolating to the aquifer at the location of the converted acres. In addition, NSCC conveyance charges should be assumed to percolate to the aquifer beneath the pertinent portions of the main canal and laterals used to make the conversion deliveries.

Attached as **Exhibit 2** is a copy of the Water Conveyance Agreement entered into on April 23, 2008, between the Ground Water Districts and NSCC for the delivery of 35,000 AF of storage water to be delivered through conversion acres through the NSCC system. This Agreement is for

the 2008 irrigation season only. While it is similar to the Water Conveyance Agreements entered into between the Ground Water Districts and NSCC in prior years, the delivery cost has increased substantially to \$8 per AF. Due to the increased costs and what appears to be a growing resistance and reluctance of NSCC to enter into Conveyance Agreements with the Ground Water Districts for conversions as well as late season recharge the plan is to phase out conversion deliveries and instead provide for direct delivery of water to Snake River Farm. The Ground Water Districts have several water leases which are ongoing that have supplied ample mitigation water to meet all Mitigation Plan requirements in Water Districts 120 and 130 since 2005. The amounts committed by these Lessors for 2008 far exceed the 35,000 AF required under this Mitigation Plan. The Lessors include the following:

- Aberdeen-Springfield Canal Company
- New Sweden Irrigation District
- People's Canal and Irrigation Company
- Snake River Valley Irrigation District
- City of Pocatello
- Enterprise Canal Company
- Idaho Irrigation District

**C. Direct Pump Back.**

Upon approval of the Amended Mitigation Plan, construction of a direct pump back system will be immediately undertaken to the extent necessary to secure sufficient flow to meet the mitigation requirement as set forth in the Director's Orders to the Snake River Farms water rights by direct delivery to the Snake River Farms' facility. The Ground Water Districts' Amended Mitigation Plan meets the phased in mitigation requirement allowed under CM Rule 20.04. Set forth below is a more detailed description of the Amended Mitigation Plan.

As described more fully in **Exhibit 1** the direct pump-back of water to the head of Snake River Farms Raceway will provide 1.5 cfs directly to Snake River Farm eliminating any shortage or

material injury to its water rights. If the direct pump-back proposal is rejected the Ground Water Districts propose and request a separate hearing on the mitigation alternatives, described below.

**D. First Back Up Alternative - Use of Water Right No. 36-4076**

In the event the pump-back mitigation proposal set forth above is rejected, the following first alternative mitigation proposal is presented. The water right proposed to be used for mitigation consist of up to 3.59 cfs of water available under Decreed Water Right No. 36-4076 with a priority date of January 1, 1893, which will be delivered directly to the head of the Snake River Farm raceway. **Exhibit 3** is a copy of the Lease Agreement entered into on May 28, 2008, between the Ground Water Districts and the Idaho Department of Fish and Game (“IDFG”) pursuant to which the Ground Water Districts have leased up to 3.59 cfs of water available under Decreed Right No. 36-4076 with a priority date of January 1, 1893. The Lease Agreement was entered into for the specific purpose of providing mitigation and replacement water to Snake River Farms (§ 1); provides the Ground Water Districts access to the IDFG property as may be necessary to provide mitigation or replacement water to Snake River Farms (§ 4); authorizes the Ground Water Districts to divert and utilize the entire right non-consumptively to provide replacement water to Snake River Farms’ raceway (§ 5); authorizes the Ground Water Districts to construct and maintain all pumps, pipes, diversion and delivery facilities and other improvements in order to utilize the water right for mitigation and replacement water purposes to the head of the Snake River Farm’s raceway, including any changes or improvements to the point of diversion or other elements of the water right (§ 5a); and, authorizes the Ground Water Districts to amend any elements of the water rights as may be required by the Department to accomplish the contemplated use (§ 5c). As a condition of the lease, the Ground Water Districts agree to provide replacement water to the IDFG wetlands in an amount equal to the amount of water provided to Snake River Farm (§ 6).

Water Right 36-4076 exists by way of a Partial Decree entered August 27, 2001, with a year-round use in the amount of 3.59 cfs with a priority date of January 1, 1893, which is earlier than all Snake River Farm water rights and all other known rights in the vicinity and is therefore more than adequate to meet the mitigation requirements under the Mitigation Plan. However, because recent spot measurements by Watermaster Cindy Yenter indicate that the flows available from the springs supplying this right sometimes are less than the decreed quantity and may not be adequate on a continuous basis to meet the full mitigation requirement described above, the Ground Water Districts would immediately proceed to improve the points of diversion as necessary to secure the full mitigation requirement. Attached as **Exhibit 4** is the proposed application for a well drilling permit that will be filed. Improvements will be performed by Eaton Drilling and Pump Service (**Exhibit 5** attached) or other licensed well driller to commence by improving the point of diversion of Spring 1 adjacent to the east of the Snake River Farm's raceway, near the Clear Lake Country Club spring pump station. Such improvements will not result in an enlargement of the water right and will simply secure the amount of water that is authorized under the water right and that has historically been used and developed under the water right as required under CM Rule 43.03.i.

Larry Nielson, the President of Eaton Drilling and Pump Service, believes that it is likely sufficient supply will be secured at Spring 1 at a depth of 100 feet or less, even though the proposal is to drill to 200 feet. **Exhibit 6** contains well logs for wells in the vicinity of the proposed spring improvements. Static water levels in these wells range from 36 ft. to 105 ft., indicating that the proposed well depth of 200 feet will likely be more than adequate to develop the necessary water supplies.

The Ground Water Districts filed an Application for Transfer No. 74904 to change any elements of Water Right No. 36-4076 as may be necessary pursuant to the Mitigation Plan and Lease in order to add mitigation and/or fish propagation as an additional authorized use and also to add an additional point of diversion on the Snake River for purposes of the pump-back to the IDFG wetlands and also perhaps at the site of the Spring 1 diversion improvements among other things. The Application for Transfer is attached as **Exhibit 7**. In addition, the Ground Water Districts filed an Applications for Permit Nos. 02-10405 and 36-16645 in support of this alternative and the second alternatives discussed below. See **Exhibits 8 and 9**.

**E. Second Backup Alternative**

If sufficient water is not secured at Spring 1 pursuant to the first backup alternative described above, this second backup alternative is presented. Pursuant to this alternative, further efforts will be taken to improve collection of discharges from Spring 2 and/or Spring 3 on the property of IDFG as described in **Exhibit 1**. Exhibit 1 presents a Conceptual Site Plan for development and conveyance of mitigation water using other alternatives in the event that the pump-back option is not approved.

For the proposed Amended Mitigation Plan, the Ground Water Districts will need authorization from Clear Springs-Snake River Farm to go upon its property for the purposes of completing design and for constructing the diversion improvements and pumps, motors, pipes and related facilities and equipment to deliver the required replacement water to the Snake River Farm raceway.

**F. Ground Water Districts' Accounting and Monitoring.**

The Ground Water Districts will continue to maintain measurement, documentation and accounting of its Mitigation Plan activities on an ongoing basis and will report its water deliveries

to the Department and the Water District 130 Watermaster so that they may verify and monitor ongoing compliance with this Mitigation Plan.

Any shortfalls in direct delivery, including any shortfalls in 2008 resulting from delays in securing Mitigation Plan approval and completing construction, will be made up by a combination of conversion deliveries and late season recharge in a manner similar to what the Ground Water Districts supplied in their Replacement Water Plans in previous years.

## **V. CONCLUSION AND REQUEST FOR BIFURCATION**

This proposed Amended Mitigation Plan is submitted to the Director to request first and separate consideration of the direct pump-back proposal to Snake River Farm. The amount of water to be supplied will be sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source, with consideration to be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when these rights historically have not received the full supply.

Consideration of the direct pump back option, first and separate from the alternatives contained in this Amended Mitigation Plan, will narrow the issues to Clear Springs objections, and render premature, irrelevant and unnecessary to decide the allegations of the Protestants that their respective water rights would be injured. This provides for a more focused and expedited resolution of the proposed mitigation. Therefore, the Ground Water Districts request that the hearing set in this matter, first only consider approval of the direct pump back option. The other alternatives including the Transfer and Permit Applications should be placed on hold and separately considered at a later date only if the pump-back proposal is rejected.

DATED this 5<sup>th</sup> DAY of SEPTEMBER, 2008.

RACINE OLSON NYE BUDGE & BAILEY  
CHARTERED

By: *Randall C. Budge*  
Randall C. Budge  
Attorneys for  
North Snake and Magic Valley Ground  
Water Districts

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of Sept, 2008, the above and foregoing document was served in the following manner:

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