

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- ) ORDER ON RECONSIDERATION;  
10405 AND 36-16645 AND APPLICATION ) SECOND MITIGATION PLAN;  
FOR TRANSFER NO. 74904 TO PROVIDE ) ALTERNATE DISPUTE RESOLUTION;  
REPLACEMENT WATER FOR CLEAR ) and VACATING HEARING DATE  
SPRINGS SNAKE RIVER FARM )  
)  
(Water District Nos. 130 and 140) )  
)  
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Motion for Partial Reconsideration

On December 5, 2008, the North Snake Ground Water District and Magic Valley Ground Water District (“Ground Water Districts”) filed *Ground Water Districts’ Motion for Partial Reconsideration of November 26, 2008 Order* (“Motion for Reconsideration”) with a supporting memorandum. The Director’s order, entitled *Order on Prehearing Motions and Amending Schedule* (“November 26 Order”), dismissed without prejudice those portions of the *Amended Mitigation Plan of North Snake Ground Water District & Magic Valley Ground Water District* (“Amended Plan”) filed to provide replacement water for the Snake River Farm fish propagation facility owned by Clear Springs Foods, Inc. (“Clear Springs”). The Amended Plan proposed a “direct pump-back of water from the end of Snake River Farm’s raceway to the head of Snake River Farm’s raceway.” *Amended Plan* at 2.

The Director’s rationale for dismissing the “direct pump-back proposal” from the Amended Plan was as follows:

Given the many existing issues and concerns relating to the use of the pump-back alternative as presently proposed by the Ground Water Districts, the Director finds it impractical to expect that these numerous issues and concerns could be adequately explored and addressed to allow for an approvable mitigation plan to be in place within the desired time frame for the 2009 irrigation season. The Director will therefore grant Clear Springs’ motion to dismiss those portions of the Amended Plan proposing a direct pump-back of water from the end of the Snake River Farm’s raceway to the head of Snake River Farm’s raceway.

*November 26 Order* at 4.

In *Ground Water Districts' Memorandum in Support of Motion for Partial Reconsideration of November 26, 2008 Order* ("Mem. in Support"), it is asserted that the November 26 Order violated the Ground Water Districts' due process rights because the Districts "were not given an opportunity to argue against dismissal on the grounds the Director found for dismissal," and because "[t]he Director's factual findings are not supported by the record because no facts regarding the pump back/recycle option have ever been presented." *Mem. in Support* at 4. The Director based the dismissal without prejudice upon the factual description of the direct pump-back proposal contained in the Ground Water Districts' Amended Plan and the record of this proceeding.

The Director now has also reviewed the direct testimony of Terry Scanlan, Ray Eldridge, and Chuck Brendecke together with the exhibits to direct testimony and the affidavit of Terry Scanlan in support of the Motion for Reconsideration. In addition, the Director has considered *Clear Springs Foods, Inc.'s Response in Opposition to Motion for Partial Reconsideration of November 26, 2008 Order*, filed December 23, 2008. Based upon a review and consideration of the foregoing, the Director will deny the Ground Water Districts' Motion for Partial Reconsideration.

## SECOND MITIGATION PLAN

On December 18, 2008, the Ground Water Districts filed *Second Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District Providing for Monetary Compensation* ("Second Mitigation Plan"). If approved, the Second Mitigation Plan would provide monetary compensation to Clear Springs as an alternative to replacement water supplies to offset injury to the senior-priority water rights for the Snake River Farm facility. The Ground Water Districts assert that the Second Mitigation Plan is filed "pursuant to Conjunctive Management Rule 43, IDAPA 37.03.11.043.03.c which specifically authorizes approval of a mitigation plan providing 'other appropriate compensation,' as an alternative to replacement water supplies." *Second Mitigation Plan* at 1. The Second Mitigation Plan was submitted "as a new, stand alone plan to be considered on its own merits." *Id.* at 3.

The Second Mitigation Plan proposes to provide compensation to Snake River Farm "in the form of an annual cash payment equal to the lost net profit (defined as sale revenue less cost of production) associated with a reduced water supply of 2.0 cfs along with the expected benefits to the Buhl to Thousand Springs reach of the Snake River from past conversion efforts and ongoing Conservation Reserve Enhancement Program ("CREP") acreage." *Id.* The portion of Conjunctive Management Rule 43 relied upon by the Ground Water Districts provides: "Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed ... ." IDAPA 37.03.11.043.03.c (emphasis added).

The Ground Water Districts request that the Second Mitigation Plan be set for hearing with notice given to the parties as deemed necessary pursuant to Conjunctive Management Rule 43.02. *Second Mitigation Plan* at 10. Rule 43.02 provides: "Upon receipt of a proposed

mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.” IDAPA 37.03.11.043.02.

Although the Ground Water Districts submit that notice need not be published and need only be given to Clear Springs because no water rights and no other parties are affected, the Director views published notice to be a more appropriate course under Rule 43.02.

### ALTERNATIVE DISPUTE RESOLUTION

On December 17, 2008, the Ground Water Districts filed *Motion for Order Compelling Alternative Dispute Resolution* (“Motion for ADR”). The motion requests an order from the Director mandating that the Ground Water Districts and Clear Springs meet informally to conduct settlement negotiations and or mediation,” pursuant to Department Rules of Procedure 500 and 610, IDAPA 37.01.01. The motion contains proposed terms and conditions to govern the requested alternative dispute resolution. On December 29, 2008, Clear Springs filed *Clear Springs Foods, Inc.’s Response in Opposition to Motion for Order Compelling Alternative Dispute Resolution* (“Response to Motion for ADR”), asking that the Ground Water Districts’ request for an order requiring ADR be denied.

Department Rule of Procedure 500 provides for the use of ADR as follows:

The Idaho Legislature encourages informal means of alternative dispute resolution (ADR). For contested cases, the means of ADR include, but are not limited to, settlement negotiations, mediation, fact finding, minitrials, and arbitration, or any combination of them. These alternatives can frequently lead to more creative, efficient and sensible outcomes than may be attained under formal contested case procedures. *An agency may use ADR for the resolution of issues in controversy in a contested case if the agency finds that such a proceeding is appropriate. An agency may, for example, find that using ADR is not appropriate if it determines that an authoritative resolution of the matter is needed for precedential value, that formal resolution of the matter is of special importance to avoid variation in individual decisions, that the matter significantly affects persons who are not parties to the proceeding, or that a formal proceeding is in the public interest.*

IDAPA 37.01.01.500 (emphasis added).

Department Rule of Procedure 610 provides that settlement negotiations among the parties to a contested case proceeding may be kept confidential:

Settlement negotiations in a contested case are confidential, unless all participants to the negotiation agree to the contrary in writing. Facts disclosed, offers made and all other aspects of negotiation (except agreements reached) in settlement negotiations in a contested case are not part of the record.

IDAPA 37.01.01.610.

Citing to the last sentence of Rule 500, Clear Springs argues that the Motion for ADR should be denied because (1) mediation is not mandatory and Clear Springs should not be forced into negotiations; (2) “formal resolution” to these proceedings is in the “public interest;” and (3) the issues presented in these proceedings stand to “affect persons who are not parties to the proceedings.” *Response to Motion for ADR* at 3-4.

Having weighed the potential benefits of utilizing ADR in this matter, the Director has determined that the Ground Water Districts’ motion to compel ADR should be granted because the parties may reasonably arrive at a “more creative, efficient and sensible outcome[] than may be attained under formal contested case procedures.” IDAPA 37.01.01.500. The Director is encouraged in this respect by the representation that the proposed mediator is Gerald F. Schroeder who, due to his past experience, has unique knowledge of the issues and the circumstances of the parties.

#### MOTION TO VACATE HEARING DATE

On January 21, 2009, Clear Springs filed *Clear Springs Foods, Inc.’s Motion to Vacate Hearing* requesting that the hearing in this matter presently set to commence on February 3, 2009 be vacated and reset for March 10, 2009. The motion to vacate is based upon the unavailability of one of Clear Springs expert witnesses due to serious health problems. The motion states that counsel for the Ground Water Districts do not oppose the motion and that the parties will separately agree to the other deadlines associated with the schedule and inform the Director. Good cause exists to vacate and reset the hearing date and therefore Clear Springs’ motion will be granted.

### ORDER

#### **IT IS HEREBY ORDERED:**

**Motion for Reconsideration:** That the Ground Water Districts’ Motion for Partial Reconsideration of the Director’s November 26, 2008 Order dismissing without prejudice those portions of the *Amended Mitigation Plan* proposing a “direct pump-back of water from the end of Snake River Farm’s raceway to the head of Snake River Farm’s raceway” is DENIED.

**Second Mitigation Plan:** That the Director shall cause notice of the Ground Water Districts’ December 18, 2008 Second Mitigation Plan proposing to provide monetary compensation be published in accordance with Rule 43 of the Department’s Conjunctive Management Rules.

**Motion for ADR:** That the Ground Water Districts’ Motion for Order Compelling Alternative Dispute Resolution pursuant to Department Rules of Procedure 500 and 610 is GRANTED as follows:

1. That the parties meet for the purpose of mediation and or settlement negotiations during January or February 2009, at such date, time and place to be mutually agreed upon, to make a good faith effort to settle or narrow some or all of the issues relating to the Ground Water Districts' requirement to provide mitigation to Clear Springs.
2. That the parties appear for ADR with one or more representatives with authority to enter into a binding settlement agreement.
3. That Gerald F. Schroeder be the designated Mediator.
4. That the parties report to the Director the results of the Mediation.
5. That pursuant to Department Rule of Procedure 610, the ADR negotiations shall be confidential, unless all participants to the negotiation agree to the contrary in writing. Facts disclosed, offers made and all other aspects of negotiation (except agreements reached) shall not be part of the contested case record.

**Motion to Vacate Hearing:** That Clear Springs' Motion to vacate the hearing set for February 3, 2009 and reset the hearing for March 10, 2009 is GRANTED. A new scheduling order shall be issued. The parties shall inform the Director regarding their agreement on the other deadlines associated with the hearing within seven (7) days from the date of this order.

Dated this 23<sup>rd</sup> day of January, 2009.

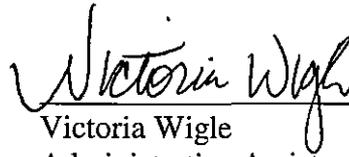
  
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DAVID R. TUTHILL, JR.  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of January 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

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