

The Districts and the legal owners of the water rights have failed to file applications for transfer with the Idaho Department of Water Resources (“IDWR”) necessary to implement the OTR Plan. Consequently, the OTR is not approvable as filed, is facially deficient, and should be dismissed.

INTRODUCTION

The Districts have filed a mitigation plan that is wholly predicated upon changing the nature and period of use of certain irrigation ground water rights in Basin 36. However, the Districts, and more importantly, the actual owners of those water rights, have failed to file the necessary applications for transfer required by Idaho law. *See* I.C. § 42-222(1). Accordingly, if the transfers, which are yet to be filed, are denied, the OTR Plan cannot be implemented as proposed. Since there is no water supply available to implement the OTR Plan in its present form, it is facially defective and should be dismissed as a matter of law.

FACTS

The facts relative to this motion are straightforward. The Districts filed the OTR Plan on March 12, 2009. As part of the plan the Districts proposed to covert approximately 1,060 ground water irrigated acres to a surface water supply and pump and deliver ground water “over the rim” to Clear Springs. *See* OTR Plan at 6-9. The Districts stated their intent to “lease the water rights of the members converted to surface water and utilize their existing wells, pumps and motors” to “deliver pumped ground water directly from the wells to Snake River Farm.” *Id.* at 7. The Districts further indicated that they “will file Transfer Applications with IDWR for each of the leased water rights as may be required by IDWR to change the place of use, period of use and nature of use for year-round mitigation and fish propagation at Snake River Farm.” *Id.* at 8.

The Districts have failed to file any applications for transfer with IDWR. Instead, the Districts filed the testimony of Charles Brendecke and attached unsigned transfer applications as Exhibits 2402 and 2403. Dr. Brendecke states that one of the purposes of his testimony is to offer “analyses of effects on reach gains of transferring the proposed wells from their historical to proposed locations and manners of use”. *See Brendecke Testimony* at 4, Ins. 19-20. At the end of Exhibits 2402 and 2403 the Districts further indicate that the “required attachments to the transfer applications will be completed and submitted to IDWR upon approval of the over-the-rim mitigation plan”. *See Exs. 2402, 2403*. Accordingly, even the “draft” applications attached as exhibits to the Brendecke Testimony are admittedly incomplete.

Since no transfer applications have been filed with or approved by IDWR, the Districts have no available water supply to implement their OTR Plan. Without a water supply available to use for mitigation purposes, the Districts can deliver no water even if the OTR Plan is approved.

STANDARD OF REVIEW

IDWR’s Rules of Procedure provide for prehearing motions. IDAPA 37.01.01.260 and 565. Idaho’s civil rules provide for dismissal for failure to state a claim at or before trial. I.R.C.P. 12(b)(6); 12(g)(2). The standard of review for a motion to dismiss is the same as that for a motion for summary judgment. *See Garcia v. Pinkham*, 144 Idaho 898, 174 P.3d 868, 870 (2007). “After viewing all facts and inferences from the record in favor of the non-moving party, we will ask whether a claim for relief has been stated.” *Id.* Here, Clear Springs’ motion to dismiss the District’s OTR Plan is analogous to a motion filed pursuant to I.R.C.P. 12(b)(6).

Even viewing the facts in favor of the Districts, the non-moving parties, dismissal is appropriate. As explained below, since the Districts have failed to file and obtain approval of the

proposed changes for the water rights to be used to supply water for the OTR Plan, the plan can deliver no water and hence it is facially deficient.

ARGUMENT

I. The OTR Plan is Facially Deficient and Should be Dismissed.

a. The Plan Violates Rule 43

CM Rule 43 requires an applicant to submit, among other things, the following information relative to the water supplies to be used for mitigation:

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.

Rule 43.01.c.

Although the OTR Plan identifies “ground water” as the water supply proposed to be used for mitigation, the Plan is deficient since the water rights to be used are for “irrigation” purposes and no transfers have been filed or approved to change the nature and period of use for those water rights. Clear Springs identified this flaw in the OTR Plan in its protest filed on April 20, 2009. *See Protest* at 3-4, ¶ 5. The lack of an approved transfer authorizing the use of the water rights for aquaculture purposes is a “circumstance or limitation” on the availability of the water that is fatal to the plan as filed. Moreover, a further review of the lease agreements and “draft” transfer applications reveals additional legal defects that warrant dismissal of the OTR Plan as well.

First, the Districts state that they “will lease the water rights of the members converted to surface water”. *See OTR Plan*. Exhibits 2502, 2503, and 2504 are the *Water Rights Lease and Conversion Agreements* executed with the various landowners. The Districts have provided no legal authority to demonstrate that a water right “lessor”, who does not hold a permanent interest

in the water right, has the ability to permanently change or transfer a water right owned by someone else. Idaho Code section 42-222(1) requires “any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to beneficial use as filed under the provisions of this chapter, or by decree of the court . . .” The Districts, although lessors of the water rights, do not hold “licenses”, “claims”, or “decrees”. Accordingly, they are prohibited by statute from filing the transfer applications in the first place since only the water right owners are authorized to file the transfers required to implement the OTR Plan.

Second, even the “draft” transfer applications (Exs. 2402 and 2403) are incomplete at this time. At the end of the exhibits is a single page stating the “required attachments to the transfer applications will be completed and submitted to IDWR upon approval of the over-the-rim mitigation plan”. In other words, the Districts apparently view any approval of a mitigation plan as having the concurrent effect to authorize the change in the nature and period of use of the irrigation ground water rights upon which the plan relies. To the contrary, approving a mitigation plan does not constitute an approved transfer of the water rights pursuant to I.C. § 42-222(1).

Accordingly, without an available water supply, the OTR Plan violates Rule 43 and should be dismissed as a matter of law.

b. The OTR Plan Cannot be Implemented as Filed Since it Relies Upon Transfer Applications That Have Not Been Filed or Approved by IDWR.

Second, the proposed transfer applications have yet to even be filed with IDWR. Accordingly, whether the transfers will actually be approved and provide water for the OTR Plan is speculative at this point. The foundation of the OTR project is to pump ground water and pipe

it to Clear Springs. However, the Districts have no legal right to pump and deliver any water at this time for aquaculture purposes on a year-round basis. The water right owners must follow the statutory procedures in order to effect a legal change in the water rights. *See* Idaho Code § 42-222(1); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417 (2001) (“Water transfers in Idaho are governed by Idaho Code section 42-222. This section provides that any person who desires to change the point of diversion or the place, period, or nature of use of the water must apply to the IDWR for approval. *See* I.C. § 42-222(1).”) (emphasis added).

As indicated in *Barron*, water right owners must follow the statutory procedures set out in section 42-222 in order to effect a legal change to their water rights. As referenced above, no transfer applications have been filed with IDWR in this case. At this point the plan literally holds “no water”. Without an available water supply to actually implement the project, the OTR Plan fails on its face.

The errors in the OTR Plan are further highlighted by the fact that the Districts are aware of the legal requirements in filing mitigation plans that rely upon additional applications, like a transfer. For example, when the Districts filed their *First Mitigation Plan* in June 2008 they filed companion applications for permit and transfer on July 2, 2008. *See* Exhibit A (notices of applications). Since the Districts relied upon additional applications “for the purpose of implementing the proposed Mitigation plan”, those applications for permit and transfer were filed and processed simultaneously with their mitigation plan. Since the mitigation plan and the applications had been separately protested by different parties, the Director then consolidated the cases on the mitigation plan and the various applications. *See* Exhibit B (August 21, 2008 *Order Vacating Hearing Date and Consolidating Proceedings; and Notice of Prehearing Conference*).

This procedure ensured that IDWR did not “pre-approve” a mitigation plan that did not have an available water supply. Moreover, it provided a procedure to review the applications simultaneously to ensure any decision on the mitigation plan would not influence the outcome of the decisions on the transfer and permit applications. Finally, the consolidation ensured that IDWR would properly analyze the plan and transfer application together to ensure that the proposed change in the water right would not injure other existing water rights. *See* I.C. § 42-222(1); CM Rule 43.03(j).

This is particularly important in this proceeding where the Districts have offered testimony about the proposed transfers even though the transfers have not been filed and are not pending before IDWR at this time. Clearly, IDWR cannot “approve” a mitigation plan that relies upon a change in a water right that may ultimately be denied in a separate transfer proceeding. Moreover, IDWR cannot “pre-judge” a yet to be filed transfer application that may result in a contested case with additional water right holders or protestants. Although the Districts are evidently seeking that type of decision here, given the testimony and exhibits filed by Charles Brendecke, IDWR is not in a position to rule on the validity of any transfer applications at this time. Since the OTR Plan cannot be implemented as filed, the plan is facially defective and should be dismissed.

CONCLUSION

The Districts’ OTR Plan is facially deficient since it relies upon a “water supply” that is not available to implement the plan. No transfer applications have been filed or approved by IDWR to provide water to supply to Clear Springs, leaving the Districts without the ability to implement the plan as filed. Since the Districts have failed to meet the standard required by Rule 43 and the plan should be dismissed as a matter of law.

DATED this 25th day of November, 2009.

BARKER ROSHOLT & SIMPSON LLP



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

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF MAILING

I hereby certify that on November 25, 2009, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email:

Hon. Gerald F. Schroeder
c/o Victoria Wigle
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov
fcjschroeder@gmail.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

Randy Budge
Candice M. McHugh
T.J. Budge
RACINE OLSON
P.O. Box 1391
Pocatello, Idaho 83204-1391
rbc@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

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

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail


Travis L. Thompson

Exhibit
A

NOTICE OF APPLICATION FOR APPROVAL OF SNAKE RIVER FARM MITIGATION PLAN

Notice is hereby given that on June 13, 2008, North Snake Ground Water District and Magic Valley Ground Water District (collectively referred to as "the districts"), c/o Randall C. Budge, Racine Olson Nye Budge & Bailey, PO Box 1391, Pocatello ID 83204-1391, submitted a Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District (plan or mitigation plan) to the Department of Water Resources (Department). The Department will process this plan pursuant to the Department's Conjunctive Management Rules (IDAPA 37, Title 03, Chapter 11).

The members of the districts hold ground water rights for domestic, stockwater, municipal, commercial and industrial uses, and for irrigation of approximately 220,000 acres located mostly north of the Snake River within Gooding, Jerome, Lincoln, Minidoka, Blaine and Cassia Counties. Certain of these ground water rights have priority dates junior to the priority dates of certain water rights from spring sources that discharge to the Buhl to Thousand Springs reach of the Snake River. The ground water and the springs are interconnected sources of water. The districts have proposed the mitigation plan to mitigate injury to earlier priority surface water rights that may result from depletions under later priority ground water rights.

The surface water rights which the mitigation plan proposes to benefit are: 36-4013B and 36-7148, both held by Clear Springs Foods for use at their Snake River Farm hatchery facility. The water right proposed to be used for mitigation is 36-4076, held by the Idaho Department of Fish and Game and diverted from nearby springs to supply flows to a wetlands area just east of Clear Lake Grade. The plan contemplates improvement to one or more of the points of diversion of 36-4076, including the drilling of a deep well, to supply replacement water directly to Snake River Farm raceways. **Water right Application Nos. 36-16645 and 02-10405, and Water Right Transfer No. 74904** seek to authorize the improvements necessary to implement this portion of the plan. The plan also proposes reductions in ground water withdrawals during 2008 through ongoing irrigation conversion projects, which partially offset depletions to the aquifer and increase spring discharges in the Buhl to Thousand Springs reach of the Snake River.

The Department has not determined the adequacy of the proposed plan. A complete copy of the proposed plan is available for review at either the Department's State Office in Boise, the Department's Regional Office in Twin Falls, or may be viewed online at the following website: www.idwr.idaho.gov, under the heading "Thousand Springs Area Water Call Related Documents". Any protest against approval of the plan must be filed with the Department of Water Resources, together with a protest fee of \$25 on or before August 4, 2008. The protest must include a certificate of service showing that a copy of the protest has been mailed to or served on the districts.

DAVID R. TUTHILL JR, Director

Published in the Gooding County Leader on 7/17 & 7/24/08.

NOTICE OF APPLICATIONS

The following applications have been filed by the North Snake Ground Water District and Magic Valley Ground Water District ("Districts") for the purpose of implementing the proposed Mitigation Plan filed by the Districts to offset depletions of spring discharges at Clear Springs Foods Snake River Farm hatchery. The applicants are North Snake Ground Water District, 152 E Main St; Jerome ID 83338 and Magic Valley Ground Water District, PO Box 430; Paul ID 83347.

Application for Permit No. 02-10405

Points of Diversion: NENESE & NWNESE, S01, T09S, R14E

County: Gooding

Source: Snake River Tributary To Columbia River

Uses: 01/01 To 12/31

WILDLIFE (3.59 CFS)

RECREATION (3.59 CFS)

AESTHETIC (3.59 CFS)

Total Diversion: 3.59 CFS

Date Filed: 07/02/2008

Place Of Use: Aesthetic, recreation, and wildlife uses associated with wetland ponds along Clear Lakes Grade located approximately 7.0 miles south and 2.5 to 3.0 miles west of the center of Wendell. The application proposes creating two diversions from the Snake River to be located approximately 7.0 miles south and 2.5 to 3.0 miles west of the center of Wendell.

Application for Permit No. 36-16645

Point of Diversion: SESWNW, S01, T09S, R14E

County: Gooding

Source: GROUND WATER

Uses: 01/01 To 12/31

FISH PROPAGATION (3 CFS)

MITIGATION (3 CFS)

Total Diversion: 3 CFS

Date Filed: 07/02/2008

Place Of Use: Fish propagation and mitigation uses associated with the Snake River Farm facilities, near the Clear Lakes Grade located approximately 7.0 miles south and 3.3 miles west of the center of Wendell. The proposed well is to be located approximately 7.0 miles south and 3.25 miles west of the center of Wendell. Permits will be subject to all prior water rights. Protests may be submitted based on the criteria of Sec 42-203A, Idaho Code.

Application for Transfer No. 74904 has been filed for changes to water rights within Gooding County:

Transfer application proposes modifying an existing right, 36-4076, that currently allows for the diversion of 3.59 cfs and 826 afa of water from springs for aesthetic, aesthetic storage, recreation, recreation storage, wildlife, and wildlife storage uses associated with wetland ponds along Clear Lakes Grade located approximately 7.0 miles south and 2.5 to 3.0 miles west of the center of Wendell. The transfer proposes adding a new groundwater point of diversion to be located approximately 7.0 miles south and 3.25 miles west of the center of Wendell, and adding two re-diversions of spring flow from the Snake River to be located approximately 7.0 miles south and 2.5 to 3.0 miles west of the center of Wendell. The transfer also proposes adding mitigation and fish propagation as additional authorized uses for the right and adding the fish raceways at the Snake River Farm facility located approximately 7.0 miles south and 3.30 miles west of the center of Wendell as an authorized place of use for the right. Protests may be submitted based on the criteria of Sec 42-222, Idaho Code.

For specific details regarding an application, please contact IDWR Southern Regional Office at 208-736-3033 or visit the website for the Department at <http://www.idwr.idaho.gov/apps/ExtSearch/WRFiling.asp> Protests against approval of any application must be filed with IDWR, Southern Region, 1341 Fillmore St.- Suite 200; Twin Falls, ID 83301 with a protest fee of \$25.00 for each application on or before August 4, 2008. The protestant must also send a copy of the protest to the applicant, c/o Randall C. Budge, Racine Olson Nye Budge & Bailey Law Firm, PO Box 1391, Pocatello ID 83204-1391.
DAVID R. TUTHILL, JR., Director

Published in the Gooding County Leader on 7/17 & 7/24/08.

Exhibit
B

**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))) _____)	ORDER VACATING HEARING DATE AND CONSOLIDATING PROCEEDINGS; and NOTICE OF PREHEARING CONFERENCE
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On August 13, 2008, the Director of the Department of Water Resources (“Director” or “Department”) issued *Notice of Hearing and Order Granting Intervention* (“Notice”) in the above-captioned proceeding. The *Notice* set the matter for hearing on September 3 and 5, 2008.

On August 14, 2008, Clear Springs Foods, Inc. (“Clear Springs”) filed four sets of *Clear Springs Foods’ Motion to Authorize Discovery / Motion to Vacate Hearing Dates / Request for Pre-Hearing Conference* (“Motion”) under separate captions for the mitigation plan, the two applications for permit, and the application for transfer combined in the above caption. On August 15, 2008, Clear Lakes Trout Company, Inc. (“Clear Lakes”) filed three sets of *Joinder in Clear Springs Foods’ Motion to Authorize Discovery / Motion to Vacate Hearing Dates / Request for Pre-Hearing Conference* under separate captions for the two applications for permit and the application for transfer.

Clear Springs explained in its *Motion* that it filed multiple sets of the pleading because the Department had not yet ordered the mitigation plan and associated applications consolidated. To clarify this concern, the Director shall order the mitigation plan and three applications consolidated for hearing before the Department because they present issues that are related and the rights of the parties will not be prejudiced by consolidation. *See IDAPA 37.01.01.556* (Department Rule of Procedure 556).

Clear Springs’ *Motion* asserts that more time than provided for under the Director’s August 13 *Notice* is required to prepare for hearing in this consolidated matter and therefore requests that the hearing scheduled for September 3 and 5, 2008 be vacated. Clear Springs also seeks authorization to conduct discovery as part of its preparation for hearing in accordance with Rule 520 of the Department’s Rules of Procedure. Finally, Clear Springs requests that a

prehearing conference be set in this matter as provided for in Department Rules of Procedure 510 - 513.

In consideration of the foregoing and good cause appearing therefor, the Director enters the following order in response to Clear Springs' *Motion*:

ORDER

IT IS HEREBY ORDERED that

1. The hearing previously scheduled for September 3 and 5, 2008 in this matter is vacated.
2. The mitigation plan, the two applications for permit, and the application for transfer included in the caption for this order are consolidated for hearing before the Department.
3. A prehearing conference in the consolidated matter is scheduled for September 8, 2008, as noticed below for the purposes cited in Department Procedural Rule 510.
4. The request to authorize discovery in this matter shall be addressed following the prehearing conference.

NOTICE OF PREHEARING CONFERENCE

PLEASE TAKE NOTICE that a prehearing conference is scheduled for **September 8, 2008, beginning at 10:00 a.m. (MDT)** at the office of the **Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho**. Parties provided with notice must be represented at the conference in person or by telephone. If participating by telephone, please dial 713-577-1201 and provide participant code 260503. The conference will be recorded.

The prehearing conference will be conducted in accordance with the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within five (5) days prior to the conference. Inquires about scheduling, hearing facilities, etc., should be directed to Victoria Wigle, Administrative Assistant to the Director, Idaho Department of Water Resources, 322 East Front Street, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4803, fax: (208) 287-6700.

Dated this 21st day of August, 2008.



DAVID R. TUTHILL, JR.
Director