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ATTORNEYS FOR THE GROUND WATER DISTRICTS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF
DISTRIBUTION OF WATER TO
WATER RIGHT NOS. 36-4013A, 36-
4013B and 36-7148 (Snake River
Farm)

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)

Docket No. CM-MP-2009-004

**PRE-HEARING BRIEF OF
GROUND WATER DISTRICTS AND
RESPONSE TO MOTION TO DISMISS
(Over-the-Rim Mitigation Plan)**

COME NOW, the North Snake Ground Water District, Magic Valley Ground Water District, for and on behalf of their respective ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities (collectively "Ground Water Districts"), through counsel, and submit this *Pre-Hearing Brief and*

Response to Motion to Dismiss for purposes of the hearing scheduled to commence December 7, 2009 before Gerald F. Schroeder, Hearing Officer, on the *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“OTR Plan”).

INTRODUCTION

In response to a delivery call by Clear Springs Foods, Inc. (“Clear Springs”) and a finding of material injury by the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) to Clear Springs’ Snake River Farm facility, the Ground Water Users filed their OTR Plan on March 12, 2009. The Ground Water Districts’ OTR Plan was approved as a Replacement Water Plan for the 2009 irrigation season in accordance with the Rule for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 et al (“CM Rules”) pursuant to *Order Approving Ground Water Districts’ Replacement Water Plan for 2009* issued March 26, 2009, by Director David R. Tuthill, Jr. (“March 26, 2009 Order”). The Ground Water Districts augmented their OTR Plan on March 19, 2009 to address water quality, temperature, reliability, and timing objections raised by Clear Springs. The OTR Plan was approved in order to provide the required 28.87 cfs to the Buhl to Thousand Springs spring reach, or 1.99 cfs directly to Clear Springs at its Snake River Farm facility (6.9% of 28.87 cfs) and avoid curtailment of groundwater rights junior to November 16, 1972, which would impact approximately 860 ground water rights including approximately 41,000 acres of land irrigated by groundwater. March 26, 2009 Order at FF 2. The OTR Plan proposes to construct piping system that would integrate numerous irrigation wells and pipe water down the canyon wall to

Clear Springs at its Snake River Farm facility. The project was designed to provide Clear Springs between 1.99 cfs and 3.0 cfs with the larger amount to make up for any previous years' shortfalls and in recognition of the fact that some delay in delivering the replacement water would be incurred until the necessary construction of the facilities is completed. March 26, 2009 Order at FF 4, OTR Plan at 8. The OTR Plan also provides for the conversion of approximately 1,000 acres from groundwater to surface water irrigation and continuing support of the federal government's Conservation Reserve Enhancement Program ("CREP"). By reason of conversion and CREP credits, the resulting shortfall to Clear Springs to be made up by the delivery of well water over the rim to Clear Springs is 1.83 cfs. March 26, 2009 Order at FF 17.

Construction of the OTR Project was required to be completed by June 1, 2009, with a \$10,000 penalty imposed for day of delay. *Id.* at FF 39, CL 5. Additionally, various conditions were imposed, including well monitoring and delivering direct replacement water with nitrate levels similar to levels that Clear Springs receives from its springs source (*Id.* at FF 28, CL 7) constructing locked cages to well houses to ensure that the well heads are secure and that contamination at the wells will not occur (*Id.* at FF 29); insulating the pipeline and burying it to a depth of three feet to maintain a constant temperature similar to the spring water (*Id.* at FF 32); measuring the diversions from each well and the total amount delivered to Clear Springs (*Id.* at FF 39); utilizing the Water Supply Bank operated by the Idaho Water Resource Board pursuant to §§42-1761 through 42-1766, Idaho Code, as a means of authorizing the necessary change in use of the water rights on an interim basis and as a substitute for the transfer proceeding requirements of §42-222, Idaho Code (*Id.* at FF 34, 35); the use of backup generators to ensure

water delivery in the event of a power failure (Id. at FF 36, CL 6); and posting a bond equal to the cost of construction of the project of approximately \$500,000 (Id. at FF 38).

Additionally, the Ground Water Districts were required to deliver 3 cfs until March 12, 2010 in order to make up previous shortfalls. Id. at CL 8. Upon approval of the OTR Plan the Ground Water Districts immediately proceeded to design and construct the project. Lease and Conversion Agreements were entered into with landowners, pursuant to which their water rights and pumping equipment were leased and construction was commenced to complete the conversion of the land from groundwater to surface water irrigation through the North Side Canal Company system as described in the Joint Direct Testimony of R. Lynn Carlquist and Orlo H. Maughan, (“Joint Direct Testimony”) at 8-9; see also Exhibits 2402, 2403 and 2404. The conversions were timely completed by the June 1, 2009 deadline at a cost of \$423,883.83. Joint Direct Testimony, at 12-14. The preliminary design and engineering of the over the rim pipeline facilities was nearly completed but construction did not commence on the pipeline because of the *Order Granting Partial Stay* entered by the Director on May 15, 2009 (“Partial Stay Order”). The Partial Stay Order stayed the construction of the over the rim pipeline for a period of two years. The two-year stay was issued in response to Clear Springs’ *Motion for Partial Stay of Implementation of Director’s March 26, 2009 Order Approving the Ground Water Districts’ Replacement Water Plan for 2009*. Joint Direct Testimony at 13.

The Director assigned the matter to Hearing Officer Gerald F. Schroeder for the purpose of conducting a hearing on Clear Springs’ objections to water quality, temperature, reliability, and approval of the OTR Plan as a permanent mitigation plan under CM Rule 43. The Hearing

Officer's Scheduling Order dated August 28, 2009, limited the scope of the hearing and objections to "determining first whether the proposal for over the rim delivery is an acceptable method to mitigate the obligations of the junior ground water users."

The Ground Water Districts and Clear Springs have pre-filed expert and lay witness testimony. Clear Springs recently filed a *Motion to Dismiss* and the Ground Water Districts filed a *Motion to Strike and Motion in Limine*, each of which will be addressed below.

COURSE OF PROCEEDINGS

In the spring of 2005, Clear Springs sent a letter to the Director of the Department requesting that junior priority water rights be administered to supply their senior surface water rights. On July 8, 2005, the Director issued Orders finding that the senior surface water rights held by Clear Springs at its Snake River Farm facility had been injured by junior ground water users. This Order is referred to as the "2005 Order". The 2005 Order established a five-year phased-in period of curtailment to achieve a steady state reach gain to the Buhl Gage to Thousand Springs Reach, of which 6.9% was estimated to arrive at Clear Springs' discrete point of diversion. For 2009, the final year of the five-year phase-in period, the required reach gain to the Buhl to Thousand Springs reach was 38 cfs, with 2.6 cfs (6.9% of 38 cfs) arriving at Clear Springs.

Clear Springs and the Ground Water Districts objected to the 2005 Orders and requested a hearing; a joint hearing¹ was held before appointed Hearing Officer Gerald F. Schroeder over a

¹ A joint hearing was held and included the delivery calls by both Clear Springs and Blue Lakes Trout Farm, Inc. ("Blue Lakes"). The OTR Plan was filed to address the material injury found to Clear Springs at its Snake River Farm facility only. A separate mitigation plan has been filed to deliver water directly to Blue Lakes and a separate administrative proceeding is ongoing regarding the mitigation plans filed in response to the Blue Lakes

course of approximately 12 days commencing November 28, 2007; January 11, 2008, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (“Recommended Order”). On July 11, 2008, the Director entered his *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* (“Final Order”) adopting most of the Findings and Conclusions of the 2005 Orders and the Recommended Order. An appeal of the Final Order to the Gooding County District Court followed, wherein District Judge John Melanson entered an *Order on Petition for Judicial Review* on June 19, 2009 (“June 2009 Order”), in Gooding County Case No. 2008-444. While the District Court’s June 2009 Order affirmed most of the Findings and Conclusions in the Director’s Final Order, the Court found fault with the process and procedure followed by the Director in conducting hearings on the 2005 Order and his approval of the Ground Water Districts’ Replacement Water Plans, stating as follows:

In this case, the Director did not provide a hearing before issuing Orders of Curtailment. In addition, he did not hold a hearing on the 2005 Orders of Curtailment until 2007. Taking into consideration the interests of the senior and junior water users, along with the Director’s interest in efficiently administering water rights, this Court finds that providing the parties with a hearing after the initial Curtailment Orders were issued would have been consistent with due process. A hearing is not required before the Curtailment Orders are issued because, as mentioned above, the Director is required by the CMR to make an initial material injury determination and must put both the senior and junior water users on notice of his decision. However, after the initial Order is issued and pursuant to the Constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before the junior rights are curtailed and before the senior rights are injured further.

June 2009 Order at 39, emphasis added.

delivery call and a scheduling order is being negotiated with a hearing to commence sometime in early March, 2010.

* * *

Because the Director waited one year to hold a hearing on Mitigation Plans that were submitted to him soon after issuing his Curtailment Orders, he abused his discretion. The delay in holding a hearing as required by the CMR was unreasonable, in light of the “emergency” nature of all delivery calls. Under the CMR, a more appropriate course of action for the Director to follow would have been to issue the initial Curtailment Order, provide the junior ground water users time to submit a mitigation plan before making that Order final, and then hold a hearing on the Order of Curtailment and Material Injury (as discussed in a previous section) and the Mitigation Plan at the same time.

Id. at 51, emphasis added.

Judge Melanson went on to conclude at page 58:

While the Court has ruled that the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing and failing to order curtailment after finding the Mitigation Plans inadequate, there is no practical remedy at this point in these proceedings.

Additionally, based on the June 2009 Order, the Director made the following statement:

Based on Judge Melanson’s Decision, the Director should not have approved the Ground Water Districts’ 2009 Plan as a Replacement Water Plan. The 2009 Plan was published as a Mitigation Plan in accordance with CM Rule 43. Based on guidance from Judge Melanson, the Ground Water Districts may not construct the pipeline to satisfy the mitigation obligations to Clear Springs until it has been approved as a CM Rule 43 Mitigation Plan. If the 2009 Plan is approved as a CM Rule 43 Mitigation Plan, the mitigation obligation of the Ground Water Districts would then be satisfied and the curtailment order rescinded.

Order Regarding Ground Water Districts’ Plan of Action dated July 29, 2009.

Petitions for Rehearing were granted, have been briefed and argued, with the matter pending before Judge Melanson. A final order on the petitions is expected any time to conclude the District Court Appeal, after which it is anticipated the parties will appeal to the Supreme

Court.

From 2005 up to 2009 when the Ground Water Districts' mitigation obligations under the 2005 Order became fully phased in, the Ground Water Districts undertook a number of above-the-rim measures to either reduce groundwater withdrawals or add to groundwater storage. These activities included voluntary curtailment under the CREP Program, conversions and managed recharge. Direct Testimony of Charles M. Brendecke ("Brendecke Direct") at 5-8. The Ground Water Districts submitted Replacement Water Plans in 2005, 2006 and 2007 to satisfy the schedule of replacement water to comply with the Director's 2005 Order. However, due to physical limitations through the North Side Canal Company, the mitigation efforts relied upon in 2005, 2006 and 2007 were not adequate to meet the increased mitigation obligations in 2008, 2009 and thereafter, thus subjecting hundreds of junior groundwater users to curtailment unless other mitigation tools are approved and implemented. Joint Direct Testimony at 8-9.²

Because the District Court's June 2009 Order placed a cloud of doubt upon the Replacement Water Plans the Ground Water Users had relied on in previous years, they filed several applications to secure permanent approval of mitigation plans under CM Rule 43. These include a permanent mitigation plan to satisfy Blue Lakes, a mitigation plan to secure permanent approval of above-the-rim mitigation efforts including voluntary curtailments under CREP and other such programs, conversions and recharge; a permanent mitigation plan to satisfy the

² To meet the Blue Lakes' mitigation obligation the Ground Water Districts purchased 10 cfs of Pristine Springs Water Right No. 36-2603C at a cost of \$11,000,000, financed pursuant to a 10-year loan from the Idaho Water Resource Board; and, since April of 2008 the 10 cfs has been delivered directly to Blue Lakes in full satisfaction of the Ground Water Districts' mitigation obligation. Joint Direct Testimony at 9; Charles M. Brendecke Direct Testimony, pp. 8-9. The 10 cfs of mitigation water is piped directly from Alpheus Creek to Blue Lakes' raceways and has been used to raise trout without any known difficulty since the spring of 2008.

Surface Water Coalition delivery call; and, the OTR Plan to permanently satisfy the Clear Springs' delivery call.

The Ground Water Districts have exhausted all known practical means of satisfying the Clear Springs' delivery call, making it imperative to secure approval of the OTR Plan to be in a position to avoid devastating curtailment. Credit for ongoing CREP and conversions will reduce the 2.67 cfs mitigation obligation to Clear Springs to approximately 1.99 cfs based on the ESPA groundwater model. March 26, 2009 Order at FF 14. The OTR Plan is the only remaining means of meeting that shortfall. Every other effort has been objected to by Clear Springs and/or rejected by the Director.

In June 2008, the Ground Water Districts attempted to meet the additional obligation by providing replacement water directly to Clear Springs from an adjacent spring leased from the Idaho Department of Fish and Game and supplemented if necessary by an adjacent well. As the result of objections and opposition by Clear Springs, the Ground Water Districts withdrew their June 2008 mitigation plan and filed a Second Mitigation Plan in December of 2008 which proposed to provide monetary compensation in an amount equal to the lost profits from any diminished fish production attributable to the water shortage based on Clear Springs' records; or, in the alternative, the direct delivery of fish consisting of rainbow trout of the same type, size and timing as could be produced by Clear Springs' Snake River Farm to replace the lost fish production associated with the 1.99 cfs of reduced flow. However, by Order dated March 5, 2009, the Director summarily dismissed the Second Mitigation Plan to provide monetary compensation or replacement fish and ordered curtailment before the beginning of the 2009

irrigation season.³ It was in response to this March 5, 2009 Order that the Ground Water Districts filed their OTR Plan Joint Testimony at 9-11.

ISSUES PRESENTED

The following issue is presented to the Hearing Officer for decision in this proceeding scheduled to commence December 7, 2009: should the Ground Water Districts' OTR Plan be approved as a mitigation plan to Clear Springs under CM Rule 43? However, before answering that question, the Hearing Officer must first decide *Clear Springs' Motion to Dismiss* ("Motion to Dismiss) and the *Ground Water Districts' Motion to Strike Testimony and Evidence and Motion in Limine* ("Motion to Strike"). The issues involved in those motions can be summarized as follows:

1. Is there any basis under CM Rule 43 to grant Clear Springs' Motion to Dismiss the OTR Plan simply because the Transfer Application to change the well water rights has not been filed?
2. Should the Ground Water Districts' Motion to Strike be granted to strike or limit the testimony, reports and exhibits submitted by Clear Springs' witnesses that is irrelevant or outside of the defined scope of this proceeding under the Scheduling Order as identified in the Motion?

ARGUMENT

1. CLEAR SPRINGS' MOTION TO DISMISS SHOULD BE DENIED AS UNTIMELY AND WITHOUT LEGAL BASIS.

Despite the fact that the Ground Water Districts' OTR Plan has been pending since March 2009, Clear Springs waited until the eve of the hearing to file its Motion to Dismiss on

³ The Director's March 5, 2009 Order dismissing the Districts' Second Mitigation Plan proposal to provide monetary compensation or replacement fish is pending on appeal to the Gooding County District Court, Case No. CV-2009-00241 & 00270 which has been briefed and argued to Judge John Melanson with a decision expected any day.

November 25, 2009. The stated basis for the Motion to Dismiss is that the Districts “have failed to file Applications for Transfer with IDWR necessary to implement the OTR Plan.” Motion to Dismiss at 2. The Motion to Dismiss is entirely without any legal basis and should be summarily dismissed on any one of four grounds. First, the Motion to Dismiss is untimely, having been filed too late to comply with the procedural requirements under IRCP Rule 56. Second, Clear Springs’ objection has already been addressed and rejected by the Director which concluded that on an interim basis the Water Supply Bank operated by the Idaho Water Resource Board provides the means of authorizing the necessary change in use of the water rights as a substitute for the transfer proceeding requirements. Third, CM Rule 43 does not require that a Transfer Application be filed prior to an approval of a proposed mitigation plan. Fourth, there is no practical reason to file a Transfer Application in advance of approval of the OTR Plan, any more than it would make sense to complete the final design and construct the pipeline facilities until the approval is given and the associated terms and conditions are known.

Clear Springs admits that the standard of review for a Motion to Dismiss is the same as that for a Motion for Summary Judgment. Motion to Dismiss at 3. IRCP Rule 12(b)(6) specifically requires that “the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Rule 56(c) provides in pertinent part: “The Motion, affidavits and supporting briefs shall be served at least 28 days before the time fixed for the hearing.” Clear Springs provided with its Motion to Dismiss no affidavits and no supporting brief, set no hearing date, and it was served a mere 12 days before the hearing

commences. As the requirements of Rule 56(c) have not been met, the Motion to Dismiss must be denied.

The Director's March 26, 2009 Order recognized that the Ground Water Districts had prepared a draft Transfer Application which had not yet been filed. Filing the Transfer Application before the OTR Plan was approved was recognized by the Director as unnecessary, to-wit:

On an interim basis, the Water Supply Bank, operated by Idaho Water Resource Board, pursuant to §§42-1761 through 42-1766, Idaho Code, provides a means of authorizing the necessary change in use of the water rights intended to be used for mitigation purposes. Idaho Code §42-1764 provides that, 'the approval of a rental of water from the Water Supply Bank may be a substitute for the transfer proceeding requirements of §42-222, Idaho Code.

March 26, 2009 Order at FF 35. Further, in the recent scheduling conference before Director Gary Spackman in the mitigation plans filed in response to the Blue Lakes' Delivery Call, the current Director also acknowledged that filing transfer applications was not necessary before proceeding with a hearing on the proposed mitigation plans. Audio of Blue Lakes Scheduling Conference in Docket No. CM-MP-2009-01 at 40:33 – Director Spackman states: "Candice, I would not expect a mitigation plan hearing would include or would bring in with it separate applications for transfer it seems to me that those would be separate, separately considered by the Department and I don't know if any of those would be pending." See Exhibit 2028 attached to the Affidavit of Candice M. McHugh. Director Spackman continued saying that he doesn't know if there are any transfer applications pending relating to the Blue Lakes' mitigation plans but that they would be considered independent of the mitigation hearing proceeding and he would not bring along with the mitigation hearing the transfer application process. Clear

Springs' argument that the OTR Plan requires the pre-filing of a Transfer Application is simply wrong.

CM Rule 43 governs approval of the OTR Plan. Clear Springs cites no legal authority whatsoever to support its argument that the Transfer Application must be filed before the plan is approved. Neither Rule 43.01 which describes the information that must be contained upon submission of a Mitigation Plan, nor Rule 43.03 which enumerates 15 different factors that may be considered by the Director in determining whether a proposed Mitigation Plan will prevent injury to senior rights make any mention whatsoever of the requirement to file a Transfer Application. Further, IDWR employees, Tim Luke and Cindy Yenter, both testified that while the filing of a Transfer Application would have been nice, it was not necessary and use of the water supply bank could occur in the interim. T. Luke Deposition, p. 21, L. 2-10; p. 23, L. 20- p. 24, L. 6; p. 40, L. 17-23; C. Yenter Deposition, p. 35, L. 15 – p. 3, L. 3.

As indicated in the Ground Water Districts' OTR Plan, the Water Supply Bank will be utilized on an interim basis once the OTR Plan has been approved and an Order has been issued. See also Exhibit 2409. This process is commonly used during the pendency of the processing of the Transfer Applications which will then be filed.

The OTR Plan provides alternatives, including a selection of some or all of multiple well sites, as well as drilling a new well to pump from a single location at any one of the proposed well sites. Until the OTR Plan is approved, it is not known which water rights should be transferred, whether a two well approach will be allowed or whether all seven wells must be used or whether the concept itself is an acceptable method of mitigation. Transfer Applications

involve a separate administrative proceeding that may involve other parties (as so claimed by Clear Springs), requires specific notice, which has not yet been published, and requires a technical review of injury and mitigation requirements that cannot be done without first knowing if the OTR Plan is an acceptable mitigation method, and which wells (or combination thereof) can be used all of which is necessary in order to properly evaluate the injury and mitigation requirements that may arise under a transfer request.

Just as actual construction of the OTR Plan pipeline would be premature and unwise, so too would be the filing of a Transfer Application. Until there is an approval of the OTR Plan and until Clear Springs commits to take actual delivery of the water under the approved OTR Plan, there is no need to file a Transfer Application; an approved transfer will be necessary if and when actual delivery of water under the OTR Plan occurs. To date, Clear Springs has not decided if it would take water even under an approved OTR Plan. MacMillan Deposition, p. 142, L. 14- p. 143, L 17; Cope Deposition, p. 126, L. 23 – p. 127, L. 9 and p. 178, L. 18 – p. 179, L. 5.

2. THE GROUND WATER DISTRICTS' MOTION TO STRIKE TESTIMONY AND EVIDENCE AND MOTION IN LIMINE SHOULD BE GRANTED.

On November 30, 2009, the Ground Water Districts filed a Motion to Strike to strike as irrelevant and outside of the scope of the hearing certain testimony, reports and exhibits submitted by Clear Springs' witnesses Cope, MacMillan and Brockway for various reasons including the fact that such testimony and evidence is in violation of the scope of the hearing set forth in the August 28, 2009 Scheduling Order, is irrelevant and untimely. See Motion to Strike

and the arguments contained therein which are incorporated here by reference.

The Scheduling Order clearly provided that the December 7, 2009 hearing would be limited to “whether the proposal for the over the rim delivery is an acceptable method to mitigate the obligations of the junior ground water users.” What is relevant is whether the OTR Plan will provide Clear Springs with water in sufficient quantity and quality to accomplish the beneficial use of raising fish. Both pre-filed testimony, reports and exhibits and the same presented at the hearing must be limited to the evidence and testimony that is related to whether the OTR Plan is an acceptable and proper method of mitigation and can deliver the quantity of water within suitable water quality parameters for use by Clear Springs to raise fish.

If, however, the Hearing Officer determines that Clear Springs’ concern that the well water might adversely affect the CLEAR SPRINGS brand and marketing, Clear Springs claim is relevant, it is entirely unsubstantiated and grossly exaggerated. Clear Springs’ testimony of witness Cope and MacMillan speculates that if they begin using well water, that their brand image would somehow be tarnished and that it would adversely affect their advertising and marketing campaigns. This, while based on pure speculation, is in direct contradiction with their admission that the well water and spring water are one and the same. Their arguments are also undermined by the fact that the source of Clear Springs’ largest production facility, the Box Canyon facility, is Box Canyon Creek which runs as an open stream for a considerable distance. See Exhibit 2103. It is also contradicted by the fact that Clear Springs markets trout imported from their Chilean and Argentine partners that are admittedly raised from a river water source. Cope Deposition, p. 46, L. 11- p. 47, L. 18 and p. 48, L. 4 – p. 49, L. 12. Furthermore, Clear

Springs imports or intends to import fish from the Mekong River Delta and also markets a salt water fish called Mahi Mahi. Cope Deposition, p. 51, L. 7 – p. 52, L. 11. Certainly, well water which is identical chemically and from the same aquifer should certainly be considered the same “pristine, pure water” utilized from the springs and far better than the several others described non-spring sources which Clear Springs has apparently successfully incorporated into its business and presumably marketing strategies.

3. THE GROUND WATER DISTRICTS’ OTR PLAN SHOULD BE APPROVED AS A RULE 43 MITIGATION PLAN AND FOUND TO PROVIDE SUITABLE WATER TO CLEAR SPRINGS

The OTR Plan is submitted as a mitigation plan pursuant to CM Rule 43 and it contains the information required by Rule 43.01. Additionally, the notice and hearing requirements under CM Rule 43.02 have been complied with as the OTR Plan has been published and scheduled for hearing. The Director has already made a determination of material injury and that mitigation is required as set forth in the Final Order which to date has been confirmed by the District Court on appeal. Accordingly, the OTR Plan must be analyzed to determine “whether a proposed mitigation plan will prevent injury to senior rights.” CM Rule 43.03.

The OTR Plan unquestionably will prevent material injury to Clear Springs because it is designed to deliver a quantity of water in the amount of up to 3.0 cfs which exceeds the 1.99 cfs existing shortfall and exceeds by 15% the full 2.6 cfs obligation to Clear Springs if the existing CREP and conversion programs ceased. CM Rule 43.03.a. and b. Furthermore, the supply provided to Clear Springs will be more certain than Clear Springs could ever expect through above-the-rim efforts or through mass curtailment. It is significant to note that the quantity of

water available under the seven wells available under the OTR Plan total 15.57 cfs, thus providing an ample excess supply. Furthermore, since only a portion of the water available under these wells will be used for the OTR Plan and the remaining amounts available under the rights left idle, there will actually be a resulting benefit to the aquifer, even though this has not been included in the calculation of OTR Plan benefits. Id.

Furthermore, the quality of water delivered from the wells is at least the same if not better than the existing spring supply utilized by Clear Springs. This is addressed in the pre-filed and rebuttal testimony, reports and exhibits of the Ground Water Districts' witnesses, Brendecke, Eldridge, Schurr and Scanlan. It is significant to note that Clear Springs' witnesses have already admitted in their pre-filed testimony that the well water is the same as the spring water. Mr. Cope states in his direct testimony as follows:

The well water and pipeline (2-3 cfs) being proposed for the mitigation of the Snake River Farm is water that would most likely be the same water that would naturally discharge through the Clear Lake spring complex and be delivered to the two Clear Springs and Idaho Trout Company Farms if they were not being pumped. (Direct Testimony, p. 6, L. 233-236.)

This pump water is the same water that contributes to the continual depletion of the spring flows in the total Clear Lakes spring complex included in the Idaho Trout Company Clear Lake Farm that has a pending delivery call with IDWR. (Id. at 7, L. 252-253.)

Dr. Brockway's testimony is in accord, to-wit:

Therefore, the wells draw from the same aquifer zones within the same geologic formation as the springs and do not tap the underlying aquifers within the Banbury Basalt. (Brockway p. 7, L. 21-22.)

The supplemental and rebuttal testimony and reports of the Ground Water Districts' witnesses Eldridge and Scanlan confirm that the well water and spring water is chemically

indistinguishable. Eldridge, Exhibit 2218; Scanlan, Exhibit 2025 at 6-10; Scanlan Supplemental Direct Testimony at 3-5 and Exhibits 2021-2024. The testimony of witness Schurr also confirms that the water from the wells is entirely suitable to raise rainbow trout of the same quality and quantity as currently raised from the springs. Schuur Direct Testimony at 4-5; Schuur Rebuttal Testimony at 6-7 and 9.

Clear Springs' witnesses Cope and MacMillan repeatedly assert in their pre-filed testimony that water from the wells is "polluted" and "contaminated". However, their depositions on the nitrate issue expose that they are only referring to wells 2 and 4. While wells 2 and 4 have nitrate levels that exceed the threshold of 10 mg/l, even these wells are less than some of the spring sources utilized by Clear Springs which apparently have posed no problem as they continue to use them. Cope Deposition, p. 148, L. 13-18, p. 149, L. 21- p. 150, L. 2; p. 151, L. 17-21; MacMillan Deposition, p. 93, L. 10-23. Notwithstanding, because of Clear Springs objections, the Ground Water Districts in its rebuttal testimony have eliminated wells 2 and 4 from being directly pumped to provide water over-the-rim to Clear Springs. Accordingly, the quality of water delivered from the OTR plans excluding wells 2 and 4 is actually better than the springs currently supplying Clear Springs at its Snake River Farm facility. Eldridge Rebuttal Report at 2-3.

The relevant facts demonstrated by the overwhelming weight of the testimony and evidence related to the nitrate issue can be summed up by the following key points.

- (1) Clear Springs simply does not know at what level nitrates become a problem for raising trout. This was acknowledged by Dr. MacMillan in his deposition. MacMillan Deposition, p. 38, L. 18 – p. 39, L. 5.

(2) Clear Springs has not conducted any empirical study or other analysis to determine if and when nitrates become a problem for raising trout.

(3) Under Idaho's Ground Water Quality Rule, the water quality standard for nitrate is 10 mg/L. IDAPA 58.01.11.200.01. This was recognized by the Department in FF 25 of the March 26, 2009 Order.

(4) At least one spring source that Clear Springs monitors, (sample site RD3), nitrite-nitrate N peaked at 13.14 mg/L in 2008 and was 16.9 mg/L in October of 2009. Additionally, the concentration in the spring water feeding Clear Springs' Visitor Center was 18.0 mg/L. This was acknowledged and discussed in the expert report of Dr. MacMillan, p. 31, lines 874-879.

(5) Even with wells 2 and 4, the OTR Plan delivers Clear Springs the same quality of water as their existing spring supply.

(6) By not using wells 2 and 4 for the OTR water, the well water supply quality is well within the drinking water standard of less than 10 mg/L and exceeds the quality currently used by Clear Springs and is suitable for raising Rainbow trout. T. Scanlan Rebuttal Report at 2-3 and at 5-8; Eldridge Rebuttal Report at 2-3.

(7) Clear Springs' witnesses Cope and Brockway in their Direct Testimony and Dr. MacMillan in his deposition all admit that the well water supply is the same chemically and is only distinguishable from the springs by reason of the well mechanism of delivery.

While Clear Springs initially raised concern that the OTR Plan might provide water of a different temperature, this objection has been eliminated. Because the well water will be delivered in a closed pipe that is buried 3 feet, it would actually be cooler by 0.1 degree Fahrenheit if delivered from a consolidated well location, and by 0.3 degrees Fahrenheit if multiple wells are used. Accordingly, there is no significant change in temperature and once the 3 cfs of water is blended with the roughly 90 to 100 cfs of spring discharge, any change would be nearly undetectable. Brendecke Direct at 16. Clear Springs' rebuttal testimony left this conclusion unchallenged. Furthermore, in his deposition, Dr. MacMillan admitted that the slightly reduced temperature would have no impact on Clear Springs' ability to raise fish.

(MacMillan Deposition. p. 160, L. 22 – p. 161, L. 15).

The Ground Water Districts have demonstrated that they have the means and ability to construct the OTR Plan and have secured the necessary water rights, leases and easements to carry out the project. Joint Direct Testimony at 13-14 and 19-20; Carlquist Supplemental Testimony and Exhibits 2501-2504 and 2507-2511; see CM Rule 43.03.h. Dr. Brendecke has provided an analysis of the water rights proposed to be used for the over-the-rim delivery and they are sufficient to meet the quantity obligations of the Ground Water Districts under the current orders. Brendecke Direct at 11-14 and Exhibits 2401-2404 and Brendecke, Exhibit 2407 at 3-4 and Exhibit 2408; see CM Rule 43.03.h. and i.

Further, Mr. Scanlan and Mr. Hardgrove propose monitoring efforts and adjustments in the design in order to monitor the project in a reliable and acceptable manner. Exhibit 2000 at 10. In addition, Dr. Brendecke's Direct Testimony indicates that a transfer is approvable and provided a draft Transfer Applications that could be filed if the OTR Plan is approved. See Brendecke Direct at 11-14 and Exhibits 2402 and 2403 and 2408; see CM Rule 43.03. h. and i. His testimony shows that using the transfer tool, the OTR Plan will benefit Clear Springs and will smooth out the seasonal variation that impacts Clear Springs' current water supply. *Id.* and Brendecke, Exhibit 2407 at 3-4. Further, any impact to other water rights can be determined in the transfer proceeding and because the entire historic amount of water is not needed from the wells proposed to be pumped under the OTR Plan, mitigation of impact, if any, to other water rights will occur.

Finally and perhaps most importantly, the OTR Plan promotes the optimum use and

development of the state's water resources and is in the public interest as it provides a permanent solution to Clear Springs' material injury while at the same time provides some certainty to the groundwater users and keeps them in business. See CM Rule 43.03.j As articulated by Mr. Carlquist, Mr. Maughan and Mr. Brendecke, there are no other viable solutions to meet the obligations to Clear Springs. Absent Clear Springs' consent to receive less water, the OTR Plan provides the only practical and reasonable method to deliver the quantity of water required under the Final Order to Clear Springs.

CONCLUSION

Clear Springs' Motion to Dismiss should be denied because it was untimely filed and does not comply with the procedural requirements of IRCP Rule 56(c). Further, the assertion that the OTR Plan is defective because the Transfer Application has not been filed is without merit, Clear Springs has provided no authority to support the argument, and Clear Springs' argument is entirely unsupported by the requirements for an approved mitigation plan under CM Rule 43 and the Director's process currently being pursued under other mitigation plan proceedings. The Department has already recognized the procedure enabling the use of the Water Supply Bank on an interim basis to permit the water to be delivered from the wells to Clear Springs for mitigation purposes once the OTR Plan is approved and the pipeline constructed. See Exhibit 2409. Like final design and construction of the pipeline facilities, it is not necessary or prudent to file a Transfer Application until the OTR Plan has been approved and the well configuration and other terms and conditions are known and until Clear Springs commits to actually take delivery of the water. Proposed Transfer Applications have been

prepared under various scenarios and are presented in Exhibit 2402, 2403 and 2408 can be filed to initiate a separate administrative proceeding when and if necessary.

The Ground Water Districts' Motion to Strike should be granted, thus limiting the scope of the evidence to that evidence that was contemplated under the Scheduling Order: "whether the proposal for over the rim delivery is an acceptable method to mitigate the obligations of the junior ground water users." Clear Springs has improperly tainted the record with evidence which exceeds the scope of the Scheduling Order and is irrelevant. Similarly, Clear Springs' testimony regarding the effect of the OTR Plan on their brand image and marketing is entirely irrelevant and bears no relationship to the factors the Director must consider in approving a mitigation plan under CM Rule 43.

The OTR Plan should be approved because it is feasible and is designed to reliably and safely deliver the quantity and quality of water sufficient to prevent material injury to Clear Springs.

RESPECTFULLY SUBMITTED this 1st day of December, 2009.

RACINE, OLSON, NYE, BUDGE &
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CERTIFICATE OF MAILING

I hereby certify that on this 1st day of December, 2009, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:



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