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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

**GROUND WATER DISTRICTS'
POST-HEARING BRIEF
(Over-the-Rim Mitigation Plan)**

North Snake Ground Water District and Magic Valley Ground Water District, acting for and on behalf of their members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities (collectively, the "Ground Water Districts"), through counsel, respectfully submit this *Post-Hearing Brief* to address the evidence presented at the hearing held December 7-8, 2009, before Hearing Officer Gerald F. Schroeder, 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" or "Plan"), together with

the issues discussed by the Hearing Officer at the conclusion of the hearing.

INTRODUCTION

It is vital that the Ground Water Districts secure approval of the OTR Plan. The Ground Water Districts' significant prior means of providing sufficient mitigation to Clear Springs Food, Inc. ("Clear Springs"), via drying up irrigated farmland, converting farmland from groundwater to surface water irrigation, and recharge to the aquifer are no longer adequate to meet the fully phased-in reach gains under the 2005 Orders. This resulted in the March 5, 2009, Notice of Curtailment ("March 5 Curtailment") of an estimated 41,000 groundwater irrigated acres. (March 5 Curtailment 14.) In response, the Ground Water Districts filed the OTR Plan.¹ Approval of the Plan is imperative in order to avoid massive, devastating and permanent curtailment of tens of thousands of acres of productive farmland.² As explained by Mr. Carlquist, Mr. Maughan and Mr. Brendecke, there are no other viable solutions to meet the Ground Water Districts' obligations to Clear Springs.³

The Ground Water Districts presented sound evidence at the hearing showing that the OTR Plan can be constructed to deliver the full quantity of water to Clear Springs when needed, with a suitable quality and temperature, and in a reliable manner. The Ground Water Districts addressed each and every objection raised in Clear Springs' March 17, 2009, letter and in its Protest filed with the IDWR. The Districts spent more than \$500,000 on the construction of new

1 The OTR Plan was initially approved on March 26, 2009 by the Director initially, as a "replacement water plan."

2 Chairmen of the Ground Water Districts, R. Lynn Carlquist and Orlo Maughan, testified that the Ground Water Districts have spent *over a million dollars* a year since 2005 in order to forestall curtailment under the Clear Springs' 2005 curtailment order, but that even spending that kind of money, they will be unable to meet the increased mitigation obligations to Clear Springs and still face curtailment. Joint Direct Testimony at 8-11. Dr. Brendecke testified that these many efforts are highly inefficient, costly and that these other mitigation options simply cannot increase the amount of water required under the current Orders because of the spring reach where Clear Springs' Snake River Farm facility is located. Brendecke Direct at 8-11.

3 Brendecke Direct at 5-11; Joint Direct Testimony at 8-9.

conversion facilities and the delivery of storage water in 2009, and nearly \$80,000 engineering the OTR Plan to address Clear Springs' purported concerns.⁴ To the Ground Water Districts' utter amazement, after having expended a great deal of money in engineering and legal expenses to deliver water to Clear Springs of the same quality and temperature as it currently uses to raise commercial rainbow trout, the hearing concluded with testimony from Clear Springs' CEO that water from the OTR Plan will not be accepted if approved and built. This means that the pipeline will never carry water.⁵

Clear Springs' witnesses Larry Cope and Dr. MacMillan indicated in their November 10, 2009, depositions that they were "not sure" that Clear Springs would accept water from the OTR Plan if it were approved and constructed.⁶ Until that point, Clear Springs had not so much as hinted that it would not accept water under the OTR Plan, though the question has lingered since Clear Springs sought and secured the May 15, 2009 Stay Order which stopped the construction of the OTR pipeline. In retrospect, the unfortunate reality is that Clear Springs has required the Ground Water Districts to chase phantom objections over considerable time and at substantial expense, when in fact Clear Springs would not accept water even after its purported concerns were alleviated. Clear Springs presumably knew this all along—at least since they filed their motion and secured the Director's May 15, 2009 Stay Order.

As a result of Mr. Cope's candid admission, it is apparent that Clear Springs' steadfast opposition to all of the Districts' mitigation proposals is not really about making up the relatively

4 Joint Direct Testimony at 15.

5 Cope Testimony, Tr. Vol II, p. 371 L. – 374 L. 16

6 Larry W. Cope is the President, Chief Executive Officer and Chairman of Clear Springs Food, Inc., and stated in his October 10, 2009 deposition that Clear Springs was undecided if it would accept well water. Exhibit 2027 to McHugh Aff. p. 126, L. 23 through p. 127, L. 9. Similarly John R. MacMillan, Clear Springs' Vice President of Research and Environmental Affairs concurred with Mr. Cope that it was uncertain Clear Springs would accept well water and that if the Plan were approved "it would be appropriate to have further dialogue on other solutions" before capital was expended. Id. at p. 143, L. 11-17.

small shortfall to Clear Springs' water supply, but is instead about securing the upper hand and negotiating strength to hold the Ground Water Districts hostage. But, in rather dramatic fashion at the very end of the hearing on December 9, 2009, Mr. Cope resolved all doubt when he announced for the first time that even if the Director approves the OTR Plan and the pipeline facilities were constructed, Clear Springs will not accept the delivery of water.⁷ Mr. Cope stated that the production benefits derived from accepting the small amount of additional water under the OTR Plan would be outweighed by the possible negative affect upon Clear Springs' brand name, image and marketing plans⁸ based on the belief that it could no longer represent its product as being grown in "pristine spring water"⁹ as compared with "pristine aquifer water." Yet, Clear Springs admitted that its current water supply is not strictly limited to spring flows.

The Ground Water Districts endeavored to design and engineer the OTR Plan with enough options and flexibility to meet or exceed Clear Springs' objections with the hope that, once approved, Clear Springs would work with the Districts' engineers so that water could be delivered to their facility in a manner that would be satisfactory to Clear Springs. That Clear

7 Cope Testimony Tr. Vol. II p. 371, L – 374, L. 16.

8 It is significant to note that Clear Springs' objections based upon perceived impacts to their brand image and marketing were raised for the first time when the rebuttal testimony and exhibits of Mr. Cope and Mr. MacMillan were filed on October 30, 2009, just five weeks before the commencement of the hearing. Clear Springs' letter to the Director dated March 17, 2009, incorporated in their March 19, 2009 *Clear Springs Food, Inc.'s Protest to the 2009 Replacement Water Plan and Third Mitigation Plan* made no mention that the OTR Plan would have any impact whatsoever on their brand image or marketing plan. Instead, Clear Springs' protest raised objections based primarily upon water quantity, water quality, temperature, reliability, timeliness. Even Clear Springs' responses to the Ground Water Districts' discovery requests filed October 19, 2009, some 11 days before their rebuttal testimony, simply referenced their March 17, 2009 objection letter to the Director and their March 19, 2009 formal protest as the basis for their objection to the OTR Plan, again making no mention of any concerns over Clear Springs' brand image or marketing.

9 Clear Springs readily admits that the source of the water for their springs is identical to the source of the water supplying the OTR Plan wells, being the aquifer. Cope Testimony, Tr. Vol. II, p. 342, L. 16 – p. 343, L. 14, Cope Direct Testimony pp. 6-7; Brockway Direct p. 7. As such, the water supply for both is the same water and could grow the same quality and quantity of trout, the only distinguishing factor being the mechanism of delivery. Cope Testimony, Tr. Vol. II, p. 343, L.15-22. Consequently, it could be marketed as "pristine water" or "pristine water from the aquifer", but apparently not "spring" water.

Springs will not take water under the OTR Plan should not dissuade the Department from approving the Plan, but instead warrants the Plan being approved with a condition that the Ground Water Districts have no obligation to pursue further administrative proceedings, including the filing of a Transfer Application, or to design or construct the pipeline facilities unless and until Clear Springs conclusively confirms it will accept the water. To do otherwise would force the Ground Water Districts to waste even more time and resources for no reason. Further, such a condition will facilitate a negotiated settlement, allowing the parties' and the Department's resources to be better spent to resolve real issues.

COURSE OF PROCEEDINGS

The course of proceedings is set forth in the Pre-Hearing Brief of the Ground Water Districts filed December 1, 2009, which is incorporated herein by reference.

ISSUES PRESENTED

The ultimate issue to be decided by the Hearing Officer is whether the Ground Water Districts' OTR Plan should be approved under CM Rule 43. To get to the conclusion that the OTR Plan is an acceptable method of mitigation, the Hearing Officer framed the following issues in discussions at the conclusion of the hearing:

1. In approving a mitigation plan under CM Rule 43, is evidence of the senior water users' brand, image or marketing plans relevant?
2. To approve the concept of the OTR Plan in concept, must a water right Transfer Application be first approved, or can the approved Transfer properly be made a condition of Plan implementation?
3. Since Clear Springs will not accept well water delivered under the OTR Plan even if it is approved and constructed, is it necessary for the Ground Water Districts to implement the Plan by proceeding to complete final design and engineering work, process a Transfer Application and construct the pipeline and other delivery facilities unless and until Clear Springs indicates it will accept delivery of water under the Plan?
4. How does the fact the final engineering and design is not completed and final

easements or permits are not secured affect the approval of the OTR Plan?

5. Do any issues remain relating to water quantity, quality, timing, temperature, and reliability?
6. What conditions should be imposed upon approval of the Plan?

Issue 1 is a pure legal question. Issues 2, 3, 4 and 6 primarily relate to the implementation of the OTR Plan but also implicate some legal questions. Issue 5 relates directly to whether or not the OTR Plan should be approved as an additional tool for the Ground Water Districts to use in order to meet their mitigation obligation to Clear Springs.

ARGUMENT

1. EVIDENCE RELATING TO CLEAR SPRINGS' BRAND, IMAGE OR MARKETING STRATEGY IS IRRELEVANT AND SHOULD BE DISREGARDED.

Clear Springs' last minute and newly created defense seeking to undermine the OTR Plan by claiming that it is inconsistent with its brand, image or marketing strategy should be summarily rejected. Not only was this new argument raised at the eleventh hour in ambush fashion, but the idea that the Director should, or is even qualified to, judge a proposed mitigation plan based on something as subjective, and fluid as a brand or marketing strategy is beyond reason. Nor is the Director's determination of whether a proposed mitigation plan is acceptable contingent upon the senior-priority water users' consent to the plan.

A. Subjective business decisions such are brand image and marketing strategy are not relevant to the Director's determination of whether the OTR Plan meets the mitigation requirements of CM Rule 43.

The defenses asserted by Clear Springs relating to brand, image and marketing strategy are an effort to usurp the discretion of the Director in approving mitigation plans. If permitted, it would establish debilitating precedent that would give senior-priority water right holders "veto power" over any mitigation plan, effectively granting a monopoly over the aquifer contrary to

the longstanding policies of Idaho water law established in *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1911). There is no basis in Idaho law to consider such objections, defenses or evidence.

The Idaho Supreme Court has addressed the question of whether a senior appropriator is entitled to demand water from a particular source, declaring unequivocally that “[t]he source of the water supply is immaterial ... so long as the landowners and water users receive the quantity of water as of the date of their priorities for beneficial use.” *In the Matter of the Petition of the Board of Directors of Wilder Irrigation District*, 64 Idaho 538, 554 (1943). While the prior appropriation doctrine grants water users a right in the *quantity* and *timeliness* of their appropriation, it does not create an entitlement to the source. *Id.* The Court confirmed the right of junior-priority water users

to substitute the waters of one stream for those of another It can make no difference to the appropriator of water, whether he gets his water from one stream or another ... so long as it is delivered to him at his headgate at the times and under the priorities to which his location and appropriation entitle him.

Id. at 551.

Accordingly, the CM Rules do not ask whether the replacement water is delivered by the same means of diversion, but simply whether the replacement water offsets the depletive impacts of junior-priority diversions. *See* CM Rule 43.03. The idea that Clear Springs could demand curtailment of groundwater diversions from the ESPA, while refusing to accept delivery of the water being curtailed, flies in the face of conjunctive management. Indeed, but for Clear Springs' assertion that groundwater users were diverting the same water that Clear Springs uses, there would have been no right to make a delivery call in the first place.

A very slippery slope is created if Clear Springs is allowed to demand only water delivered via a “spring” rather than by pump when it all comes from the same source, based

solely on the claim that pumped water offends its brand image or marketing strategy. Allowing such evidence in this case opens the door to any number of far-flung objections that have little if anything to do with the actual use of water, potentially turning the Director's review of mitigation plans into a circus of entirely subjective issues for which the Director has no expertise. For instance, an organic corn farmer could refuse mitigation in the form of stored Snake River water on the basis that the farmer advertises corn is grown from the "natural flow" of the Snake River. By filling the record with unsupported "evidence" the senior can force junior groundwater users to hire not only engineers, hydrogeologist and aquaculture specialists, but also hire marketing experts, financial analysts, aquaculture economists and businessmen in what is likely a futile effort to refute the senior's subjective opinions. If a senior water user is allowed to use marketing concerns to block mitigation the senior gains a strangle hold over the mitigation process, defeating the purposes of mitigation and moving water management from the purview of the Director to senior water users. If that occurs, then Idaho's water will not longer be managed to secure the optimum benefit in the public interest in a manner that does not block full economic development of the under ground water resource.

The Director's authority under the CM Rules and Idaho Supreme Court precedent allow junior-priority water users to provide replacement water from other sources is consistent with the laws of other western states that also aim to maximum beneficial use of their water resources. Oregon has adopted statutory provisions authorizing an appropriator "to use stored, surface or ground water from another source in exchange for supplying replacement water in an equal amount to satisfy the prior appropriations from the other source" Or. Rev. Stat. 540.5333(1); *see also*, Colo. Rev. Stat. 37-83-101. The Colorado Supreme Court thoroughly considered a claim "that the delivery of clear water instead of silty water would result in substantial damage to

the individual [appropriators].” *A-B Cattle Company v. United States*, 196 Colo. 539, 542, 589 P.2d 57, 59 (1978). In *A-B Cattle*, the appropriators claimed injury resulting from “substituting water of a quality which is not as useful to [the appropriator] as the natural stream water customarily diverted by [the appropriator].” *Id.* at 543, 59. Notwithstanding, the Court refused to recognize a compensable interest in the chemical make-up of the water source, stating “our constitution makes *water*—not silt and not silt and water—the *property* which is subject to appropriation.” *Id.* (italics in original). The Court reasoned that to hold otherwise

would seriously inhibit any subsequent upstream or downstream appropriation. ... Applied in its extreme, an appropriator located on lower reaches of a stream with a very early appropriation date could put a call on the river for the receipt of its natural silt concentration, which would have the practical effect of halting all upstream use and commanding substantially the entire stream flow to satisfy its appropriation.

Id. at 546. The New Mexico Supreme Court likewise held that an appropriator “does not have a right to receive a particular silt content that has existed historically.” Similarly, the Utah Supreme Court refused to recognize a compensable interest in the particular salt content of an appropriation. *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d 401 (1946).

Idaho’s Constitutional policy of optimum beneficial use of water resources, together with the statutory mandate for full economic development of ground water resources, militate against a constitutionally-protected property right in the precise mineral content that may be suspended or carried by Idaho’s water resources. Likewise, such policies preclude Clear Springs’ claim that it is entitled to “spring” water only. The evidence in this proceeding clearly shows that the water Clear Springs currently receives from spring outlets of the ESPA, and the water that will be delivered to Clear Springs under the OTR Plan, is one and the same. The distinction between springs and wells is simply the mechanism of delivery—water from the ESPA flows from the springs under pressure and flows from the wells via pumping. It is a distinction that is entirely

irrelevant for purposes of evaluating a CM Rule 43 mitigation plan.

Therefore, Clear Springs' evidence relating to brand, image, and marketing must be struck from the record and not considered by the Director.

B. Even if subjective marketing decisions were relevant, the evidence presented by Clear Springs was not timely disclosed and is therefore inadmissible.

Rule 26(e) of the Idaho Rules of Procedure requires parties supplement their responses to discovery requests with respect to “the subject matter on which [an expert witness] is expected to testify, and the substance of the person’s testimony.” I.R.C.P. 25(e)(1). The Rule “was designed to promote candor and fairness in the pre-trial discovery process.” *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89 (1991). Consequently, “failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence. *Radmer*, 120 Idaho at 89 (citing *Coleco Industries, Inc. v. Berman*, 567 F. 2d 569 (3d Cir. 1977)).

For example, in *Radmer* the defendant submitted an interrogatory asking the plaintiff to “[i]dentify all witnesses you intend to call or may call at the trial of this case, and specify the facts to which they will testify.” 120 Idaho at 90. At trial, the defendant introduced expert testimony that had not been timely disclosed in response to the interrogatory. The Idaho Supreme Court rejected the testimony on appeal, finding that the plaintiff had “continuously portrayed to [the plaintiff] their reliance upon [a different] theory of liability,” and that the plaintiff’s “failure to supplement their discovery responses with respect to this new analysis violated both the spirit and the letter of Rule 26(e).” *Id.*

Similarly, in *Edmunds v. Kraner* the Idaho Supreme Court condemned certain types of discovery orders which “give defendants every incentive to withhold information until after the plaintiff’s disclosure deadline has passed.” 142 Idaho 867, 873. The Court explained that

“discovery rules are not intended to encourage or reward those whose conduct is inconsistent with ... fair and expedient pre-trial fact gathering.” *Id.*

In this case, Clear Springs raised its purported concern over marketing and brand image for the first time in its rebuttal testimony filed on October 30, 2009. Clear Springs had filed a protest to the OTR Plan on March 19, 2009 and in its March 17, 2009 letter, identifying numerous concerns, none of which relate to its brand, image or market strategy. The Ground Water Districts served an interrogatory upon Clear Springs on September 18, 2009, asking in Interrogatory No. 3: “Please describe precisely and in detail each objection you have to the Over the Rim Mitigation Plan, including the factual basis for each objection and all evidence you intend to present at the hearing in support of your objections.” (emphasis added)¹⁰ In response, Clear Springs made no mention of concerns relating to its brand, image or market strategy. That discovery response was never supplemented. Instead, Clear Springs waited until the deadline to file pre-filed testimony to raise this concern, giving the Ground Water District no opportunity to find and consult with its own expert in the field of aquaculture marketing and branding (no small task) to rebut Clear Springs’ novel objection.

Clear Springs’ dilatory notice of its purported brand, image and marketing concerns was prejudicial to the Ground Water Districts, depriving them of a full and fair opportunity to rebut such evidence, contrary to the letter and spirit of Rule 26(e) of the Idaho Rules of Civil Procedure. Consequently, all evidence relating to the brand, image and marketing strategy of Clear Springs must be excluded from the record.

C. In the event Clear Springs’ evidence relating to brand, image and marketing strategy is deemed relevant and admissible, such evidence still does not justify denial of the OTR Plan

Clear Springs’ claims of damage to their brand image are unsubstantiated and grossly

¹⁰ Exhibits A and B to *Affidavit of Candice McHugh in Support of Motion to Compel and Motion to Strike*.

exaggerated.¹¹ Clear Springs own exhibits and testimony demonstrate that the claim of dependence on "pure spring water" is pure marketing spin, and the claim that the OTR Plan will impair that spin is pure speculation.

The argument that Clear Springs' image is dependent upon the strict use of spring flows is fatally undermined by the testimony of Clear Springs' CEO Larry Cope. First, Mr. Cope admitted the water right that supplies Clear Springs' largest aquaculture facility (Box Canyon, which rears over 40% of Clear Springs' fish supplies) identifies "Box Canyon Creek" as its source, not a spring. Furthermore, Box Canyon Creek flows for some distance before it was used by Clear Springs. Second, Clear Springs imports rainbow trout from South American that are marketed under CLEAR SPRINGS brand and tradename, "Splash!." Exhibit 4 states that "Splash! rainbow trout fillets [are] all natural and raised in pure spring waters." However, Mr. Cope admitted that the trout raised in Chile and Argentina South American trout are raised in rivers miles away from the headwaters.¹² Third, Exhibit 38 advertises under the CLEAR SPRINGS brand its Seafood Perfections trade name that markets Mahi Mahi & Swai—both of which are not raised in "pure spring water" but are instead raised in salt water or the Mekong River in Vietnam,¹³ although there appears no mention of that fact in their advertisements.

Evidence presented at the hearing also exposed as disingenuous Clear Springs' claims that its marketing strategy is dependent upon an ability to represent a spring-fed water supply, and that the OTR will prevent Clear Springs from making such a representation. Exhibit 5, a sales brochure produced by Clear Springs describes the source of Clear Springs' spring waters as

11 See pages 15-16 of the Ground Water Districts Pre-Hearing Brief the arguments of which are incorporated herein by reference.

12 Cope Testimony, Vol. II, p. 336, L. 7-14.

13 Cope Testimony, Vol. II, p. 336, L. 21- p. 337, L. 7

the Pioneer Mountains “a little east of Sun Valley,” presumably to capitalize on the well-known Sun Valley resort. The Pioneer Mountains are outside the ESPA and obviously contribute very little if any to Clear Springs' water supply. Exhibit 5 also lists Clear Springs' six most important reasons to feature Clear Springs' rainbow trout, yet there is no mention of the so-called critically important spring water source. In Exhibit 32 which is a collection of news articles and magazine materials, the source of water is described as an “under-ground river” and is referred to generally as “high-quality water,” again not emphasizing spring flows. Exhibit 33 includes an article, Biggest trout company adds more value to its products ... and applies strict environmental standards, stating that the “[m]ain reason for the importance of Idaho as the major trout producing state in the US is the presence of the South Idaho Aquifer from which the farms draw their water.” The article continues, saying that the temperature in the “Southern Idaho Aquifer” is “extraordinarily consistent.” The article discusses the aquifer and springs interchangeably, but emphasizes the treasure of the water derived from the aquifer, as opposed to fact that the water emits from springs.

In sum, what Clear Springs chooses to tell its customers through ads and news articles about the water source used to produce products sold under the CLEAR SPRINGS brand is a subjective business decision that is irrelevant to the Director's determination of whether the OTR Plan meets the mitigation plan requirements of CM Rule 43. All such evidence should therefore be stricken from the record.

Further, even if such evidence were relevant, Clear Springs' arguments and evidence should be stricken for failure to provide timely notice to the Districts of Clear Springs' purported marketing concerns as discussed above. Finally, Clear Springs' outcry that using well water from the same Southern Idaho Aquifer discussed in its articles would compromise its advertising

campaign are simply overstated and unsubstantiated.

C. The Director can approve the OTR Plan without Clear Springs' consent.

Clear Springs has argued, or at least inferred, that the Director should not approve the OTR Plan without Clear Springs' consent to accept water that is pumped from a well as opposed to emitted from a spring. That argument was recently considered and rejected by Judge Melanson in *Clear Springs Foods, Inc. v. Spackman*:

A related issue raised by the Ground Water Users is whether the Director can order mitigation over the objection of the senior suffering the material injury. This Court does not read that condition into the CMR. *Clearly the Director can approve and order mitigation over the objection of the senior.* However, as previously set forth, in ordering mitigation the Director is constrained by the authority delegated to him as well applicable law. The CMR provisions that address mitigation plans are structured to provide for notice, protests and a hearing. *See* CMR 043.02 (director to consider mitigation plan under procedural provisions of I.C. § 42-222 (transfer proceedings)). *Presumably, if the approval of a proposed mitigation plan required the consent of the senior suffering material injury this provision would essentially become meaningless.* Further, the CMR set forth a wide range of factors the Director is to consider in approving a proposed mitigation plan. *See* CMR 043.03 a-o. The consent of the senior suffering material injury is not one of the factors. *Id.*

Clear Springs Foods, Inc., v. Spackman, Case No. 2009-247 and 2009-270 (consolidated), Order on Petitions for Judicial Review at 18-19 (Gooding County). (Italics added; underline in original).

2. AN APPROVED WATER RIGHT TRANSFER CAN PROPERLY BE MADE A CONDITION OF APPROVAL OF THE OTR PLAN.

The Ground Water Districts recognize that an approved water right transfer will be required to implement the OTR Plan.¹⁴ As such, it is appropriate to add as a condition¹⁵ on the Director's approval of the OTR Plan a requirement that the transfer be secured. However,

¹⁴ Tim Luke Deposition Transcript, p. 40, L. 17-23

¹⁵ Because Clear Springs does not intend to take delivery of the water, it is the Ground Water Districts' position that requiring an actual transfer proceeding would be a waste of effort and resources.

approval of a transfer is certainly not required *before* the OTR Plan can be approved.

Nothing in the CM Rules requires that a transfer be approved prior to the approval of a mitigation plan. While some of the inquiries under CM Rule 43 may overlap to a degree with the analysis under a transfer, the question as to whether a proposed mitigation plan is an acceptable method of mitigation does not require that the water rights proposed to be used under the plan actually be changed prior to approval of the proposed mitigation plan. To require that a transfer be completed before the OTR Plan is approved is putting the cart before the horse. There is no need to spend the parties' and the Department's time and resources on a transfer proceeding only to have the mitigation plan denied. In fact, if that were to occur, the parties and the Department would have to repeat the same transfer process to change the water rights back to their original state.

Requiring a full transfer analysis as part of the mitigation plan hearing or prior to the mitigation plan hearing would unnecessarily complicate the matter, when the real inquiry is simply whether the proposed mitigation method is approvable. This case highlights exactly how impractical it would be to require an approved transfer upfront. A transfer requires publication and an opportunity for other water users to protest the transfer. I.C. § 42-222. In this case, there are many possible protestants to the transfer, including the Surface Water Coalition and Idaho Power Company who are also represented by Clear Springs' counsel. Other aquaculture users and holders of other surface or spring water rights may also claim an interest in the proposed transfer. These other participants would likely have no interest in the details of the proposed mitigation plan, yet they would be forced into the process.

By considering a mitigation plan separately from a transfer application, the Department can eliminate needless transfer proceedings and provide more efficient mitigation proceedings.

Further, any concerns Clear Springs has will be resolved if the Department simply makes its approval of the OTR Plan conditioned upon the Districts securing necessary water right transfers.¹⁶ An approved transfer is no different than any other implementation requirement, like building the pipe and other conveyance facilities. If the OTR Plan is approved, it is the Ground Water Districts' responsibility to implement the plan and if they cannot build the pipe, secure the water, or get an approved transfer, their implementation failed and they face curtailment.

The Ground Water Districts have satisfied every objection that Clear Springs asserted in its March 17, 2009, letter and Protest, demonstrating that the OTR Plan will provide Clear Springs with water of suitable (or better) quality, temperature and reliability. Clear Springs' Motion to Dismiss and continued argument that a transfer is required prior to approval of the OTR Plan is just another attempt to impose obstacles to the Districts' mitigation efforts and to delay approval of the OTR Plan.

3. THE GROUND WATER DISTRICTS SHOULD NOT BE REQUIRED TO IMPLEMENT THE OTR PLAN UNTIL CLEAR SPRINGS COMMITS TO ACCEPT THE DELIVERY OF WATER UNDER THE PLAN.

Discussion in sections 2 above and 4 below demonstrate why the Ground Water Districts should not be forced to pursue additional, costly design, construction, engineering or administrative hearings.

4. APPROVAL OF THE OTR PLAN IS NOT CONTINGENT UPON HAVING FINAL ENGINEERING AND DESIGN, PERMITS AND EASEMENTS.

Clear Springs' goals of delaying and blocking the Ground Water Districts' mitigation efforts are further manifest by its insistent that every engineering and design detail, permit and easement required to actually implement the Plan and construct the facilities must be secured

¹⁶ Further, if time becomes an issue, a temporary use of the Water Supply Bank could allow actual delivery of the water. Tim Luke Deposition Transcript p. 24, L. 22-25.

before the OTR Plan is approved. For the same reasons that a water rights transfer can appropriately be made a condition of approval, other permits and easements can also be made a condition of approval. The final design details can—and should—be worked out cooperatively with Clear Springs to ensure that water facilities are installed and water is delivered right where Clear Springs wants it. What matters is that the OTR Plan meets all of the key criteria to satisfy CM Rule 43, including all Clear Springs' objections.

The Ground Water Districts' testimony and evidence show, without any rebuttal from Clear Springs, that the OTR facilities and pipeline can be engineered and constructed in a timely fashion.¹⁷ In fact, construction was ready to begin in May and was expected to be completed by the June 1, 2009. Exhibit 2000 at 3. Mr. Scanlan testified that SPF had a plan and the expertise to complete the drawings, do pump tests and construction in the field and were prepared to do so.¹⁸

The wells that will supply water to Clear Springs have the same or better water quality and temperature as the spring source at Clear Spring as shown in Brendecke Direct at 14-16; Exhibit 2218; Exhibit 2025 at 6-10; Scanlan Supplemental Direct Testimony at 3-5 and Exhibits 2021-2024; see also the discussion in Section 5 below. The aeration structure is designed, can be

17 Exhibit 2000, p. 3, "SPF strongly believes the June 1, 2009 date for water delivery to Snake River Farm facility was achievable." Clear Springs expert Dr. Brockway agreed that the OTR facilities and pipeline "could be constructed" and demonstrated that even design of a two well system that could be flexible enough to use a multi well system was possible by increasing pipe sizes. Brockway Testimony, Vol. II, p. 319, L 21-23. Mr. Scanlan agreed and testified that even if a two well approach alone were not allowed, a system that used multiple wells some time and only two wells other times could be built and a transfer application could be fashioned to accommodate needed flexibility. Scanlan Testimony, Vol. II, p. 286, L. 11 – p. 287, L. 9. Hardgrove Testimony, p. 4 "the proposed pipeline alignments . . . are constructible and will provide a reliable means to transporting water from wells to the Snake River Farms' property." Schuur Direct Testimony p. 6 discussing the various aspects of the pipeline and facilities and concluding that "[h]aving designed and reviewed numerous facilities during my career, I have never seen a higher level of reliability engineered into a fish culture system."

18 Scanlan Testimony, Tr. Vol. II, p. 276, L. 5 – p. 277, L. 21

built, and there is a place to build it; Clear Springs admits it uses a similar structure at its Soda Springs brood station.¹⁹

However, in order to be responsive to water quality concerns that were unknown, a final operations design is not necessary or entirely possible, nor was a pumping regime. As such, the Ground Water Districts undertook to provide enough evidence to show that the OTR Plan would provide the quantity, quality and reliability of water needed for Clear Springs to raise fish. The Ground Water Districts also secured water from the wells²⁰ and purchased easements for the pipeline and other facilities.²¹ The engineers made initial contact with the county highway districts and have contacted some contractors. If additional easements are required, which does not appear to be the case, and landowners are not cooperative, Idaho Code § 42-5224(13) provides the Ground Water Districts the power to “exercise the power of eminent domain in the manner provided by law for the condemnation of private property for easements, rights-of-way, and other rights to access property necessary to the exercise of the mitigation powers herein granted, both within and without the district.” In any case, actual construction of the OTR Plan pipeline and facilities would be a requirement to implement the Plan and comply with an approval order, but if construction could not occur, the result would be that groundwater users would be curtailed.

There must be some reasonable stopping point, other than 100% complete design, that is allowed in order to approve a mitigation plan. Without knowing exactly what requirements may be imposed from the mitigation plan hearings or what future orders may come, having 100% complete designs, approved transfers and all necessary construction permits is simply not

19 Cope Testimony, Tr., Vol. II, p.332, L. 14-17.

20 Exhibits 2502-2504, and 2511; Rebuttal Testimony of R. Lynn Carlquist at 4.

21 Exhibits 2507-2510.

reasonable. The Ground Water Districts must have the ability, and the Director the authority to approve mitigation plan proposals, in advance of actually having to implement the activities under the mitigation plan. If that were not the case, the Ground Water Districts would have been required to spend far more than the \$80,000 spent to date to engineer the pipeline and facilities and the over \$400,000 to convert acreage from ground to surface water irrigation, without any assurance that their mitigation plans will be approved. It is simply impractical to require every design and construction detail to be set in stone before the OTR Plan can be approved, especially in light of the fact that the OTR Plan could be denied and in light of Clear Springs' refusal to take the water if approved.

5. NO ISSUES REMAIN RELATING TO WATER QUANTITY, QUALITY, TIMING, TEMPERATURE, AND RELIABILITY?

There is no objection that the OTR Plan can deliver the full quantity of water required under the March 5 Curtailment. And while Clear Springs initially raised a concern that the OTR Plan might provide water of a different temperature, Clear Springs conceded at the conclusion of the hearing that this concern has been satisfied. Therefore, the only potential issue remaining relates to water quality. However, as explained below, the evidence presented at the hearing clearly demonstrates that the OTR Plan will deliver to Clear Springs water of equal or better quality than it currently receives from spring flows.

Clear Springs' witnesses candidly 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.)

Clear Springs' witnesses Cope and MacMillan asserted in their pre-filed testimony that water from the wells is "polluted" and "contaminated". However, they admit that they were only referring to wells 2 and 4.²² While wells 2 and 4 have nitrate levels that exceed 10 mg/l, these nitrate levels are still less than some of the spring sources utilized by Clear Springs which apparently have posed no problem as they continue to use them.²³ The Ground Water Districts offered to eliminate 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 plan excluding wells 2 and 4 is actually better than the springs currently supplying Clear Springs at its Snake River Farm facility as shown in Exhibit 2218 Eldridge Rebuttal Report, at 2-3. The supplemental and rebuttal testimony and reports of the Ground Water Districts' witnesses Eldridge and Scanlan further confirm that the well water and spring water is chemically indistinguishable.²⁴ 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.²⁵

The overwhelming weight of the testimony and evidence related to the nitrate issue is

22 Cope Testimony, Tr. Vol. II, p. 357, L. 7-22

23 Id. and Exhibit 2027 to Aff of McHugh in Support of Pre-Hearing Brief, 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.

24 Eldridge, Exhibit 2218; Scanlan, Exhibit 2025 at 6-10; Scanlan Supplemental Direct Testimony at 3-5 and Exhibits 2021-2024.

25 Schuur Direct Testimony at 4-5; Schuur Rebuttal Testimony at 6-7 and 9.

summed up in the Ground Water Districts' Pre-Hearing Brief on pages 18-19 and can be summarized here as follows: Clear Springs does not really know at what level nitrates affect raising trout and they have not conducted any such studies, further, at least one spring source exceeds the nitrate concentration under Idaho's Ground Water Quality Rule but they are still raising trout with the water.

6. IF THE OTR PLAN IS APPROVED, WHAT CONDITIONS SHOULD BE IMPOSED?

As explained above, the OTR Plan can properly be approved with implementation conditions requiring that the Ground Water Districts obtain necessary water rights transfers, permits, and easements. However, given Clear Springs statement that it will not take water under the OTR Plan, the Director's approval must also contain a condition that tolls the Districts' obligation to implement the Plan until such time as Clear Springs confirms it will take water delivered under the Plan. *See* discussion at pages 14-19, *supra*.

It would be appropriate to require by condition that Clear Springs cooperate with the Districts to complete final design and installation of conveyance facilities in a reasonable manner that eliminates as much as practical disruption to Clear Springs. For instance, reasonable and standard construction methods should be employed. However, requirements that unnecessarily restrict the engineers should not be included without any reliable supporting evidence. For instance, since Clear Springs admitted that it has done some construction in and around its facilities in the past, used firecrackers to scare away birds, and they presumably have large trucks driving past their facilities daily to deliver and transport fish—all of which were done while growing their fish and becoming the world's leading rainbow trout producer—the OTR Plan cannot limit the Districts to hand tools and foot traffic.

In sum, all conditions must be reasonable. The Ground Water Districts do have a

concern that Clear Springs may aim to hamstring its implementation of the OTR Plan by imposing unreasonable restrictions on construction activities, sort of a back door approach to curtailment that places Clear Springs rather than the Director in charge of mitigation. This should not be allowed.

7. THE OTR PLAN MEETS THE MITIGATION PLAN REQUIREMENTS OF CM RULE 43 AND SHOULD THEREFORE BE APPROVED.

The CM Rules integrate "the concepts of priority time and superiority of right being subject to conditions of reasonable use, ... optimum development of water resources in the public interest, ... and full economic development as defined by Idaho law." CM Rule 20.03. Accordingly, the CM Rules authorize the Director to "[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director." CM Rule 40.01.b. CM Rule 43.03 contains a list of factors that the Director *may* consider in determining whether to approve a proposed mitigation plan. The OTR Plan satisfies the relevant and key factors of CM Rule 43, and it should therefore be approved.

The core requirement of CM Rule 43 is that the proposed mitigation plan "will provide replacement water, at a time and place required by the senior priority water right, sufficient to offset the depletive effect of ground water withdrawal." CM Rule 43.03.b. In this case, the March 5 Curtailment requires the Ground Water Districts to provide 1.99 cfs to Clear Springs. The OTR Plan far exceeds that requirement by providing up to 3.0 cfs to Clear Springs. Dr. Brendecke provided an analysis of the water rights proposed to be used in the OTR Plan, clearly demonstrating that they are sufficient to meet the quantity requirements of the March 5 Curtailment.²⁶ .. Furthermore, the supply of water provided to Clear Springs under the OTR

²⁶ 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.

Plan will be direct and far more certain than Clear Springs could ever expect to receive through above-the-rim efforts or through mass curtailment.²⁷

In addition, Dr. Brendecke's Testimony indicates the change from irrigation season pumping to year-round pumping will actually benefit Clear Springs and other spring users because it will increase the spring flows during the summer months when the flows are usually at their lowest and will slightly decrease the spring flows in the winter when the spring flows are usually at their highest.²⁸ Further, any negative impact during the non-irrigation season will be minimal and will not likely be measurable although theoretically calculable.²⁹ Dr. Brendecke testified that the impact would be tenths or hundredths of a cfs in reaches with 1100 – 1700 cfs in them³⁰. This shows that CM Rule 43.03. e., h. and j are satisfied. 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. CM Rule 43.03.i.

The OTR Plan also satisfies CM Rule 43 factors relating to the impact on the water resource. *See* CM Rule 43.03.g.(reasonably calculates consumptive use); 43.03.i (there will be no enlargement); 43.03.j (conservation of resources). The quantity of water deliverable to Clear Springs under the OTR Plan (3.0 cfs) is just a fraction of the 15.57 cfs that is actually available under the wells used in the OTR Plan. Since only a portion of the water available under these wells will be delivered to Clear Springs, with the remaining water left idle, there will be a decrease in consumptive use and a net benefit to the aquifer, which also provides a source of

27 Brendecke Direct Testimony at 6-11.

28 Exhibit 2407 at 3-4, Exhibits 2410-2412. Brendecke Testimony, Tr. Vol. I, p. 101, L 21- p. 102, L. 10

29 Exhibit 2413.

30 Brendecke Testimony, Tr. Vol II, p. 248, L. 7 – p. 250, L. 1.

mitigation that may be required under a transfer proceeding.

CM Rule 43.03.k asks whether a proposed mitigation plan "provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury." Exhibit 2000 and testimony by Mr. Scanlan and Mr. Eldridge describes monitoring efforts and adjustments to ensure that the OTR plan operates in a reliable and acceptable manner.³¹ Multiple well option enable the OTR Plan to adapt to changes that occur to a particular well, and act as a backup water supply as contemplated by CM Rule 43.03.c. The final design will include a monitoring plan, bio-security and operating and maintenance plan.³² Measurement devices that comply with the Department's minimum standards will be utilized, and are expected to be a condition of approval as with all water right transfers. Standard monitoring by the Watermaster will also insure compliance with mitigation flow requirements.

Finally, and perhaps most importantly, the OTR Plan enables full economic development of Idaho's water resources and is in the public interest, as contemplated by CM Rule 43.03.j. The OTR Plan provides a permanent supply of water to Clear Springs while at the same time enabling groundwater users to stay in business. As articulated by Mr. Carlquist, Mr. Maughan and Mr. Brendecke, there are no other viable solutions to meet the obligations to Clear Springs.³³

CONCLUSION

The Ground Water Districts' Motion to Strike should be granted and Clear Springs' testimony and evidence relating to its brand, image and marketing strategy struck as irrelevant to the Director's determination of whether the OTR Plan meets the mitigation plan requirements of CM Rule 43.

³¹ Exhibit 2000 at 10.

³² Eldridge Testimony, Tr. Vol. I, p. 146, L 12 – p. 148, L.11; Scanlan Testimony, Tr. Vol. II, p. 271, L. 13-19.

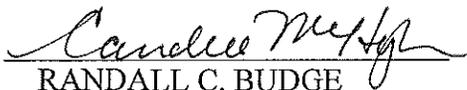
³³ Brendecke Direct at 5-11; Joint Direct Testimony at 8-9.

Further, the OTR Plan should not be derailed by the allegation that a water rights transfer must first be approved. Like final design and construction of the pipeline facilities, obtaining necessary water right transfers should be a requirement of implementation, not a bar to the Director's determination that the OTR Plan is feasible and acceptable in concept.

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 18th day of December, 2009.

RACINE, OLSON, NYE, BUDGE &
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CERTIFICATE OF MAILING

I hereby certify that on this 18th 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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