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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. 36-4103A, 36-  
4103B 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'  
MOTION FOR CLARIFICATION AND  
EXCEPTIONS TO THE OPINION AND  
RECOMMENDATION CONVERNING  
THE OVER-THE-RIM MITIGATION  
PLAN**

**(Over-the-Rim Mitigation Plan)**

North Snake Ground Water District and Magic Valley Ground Water District, (“Ground Water Districts”), through counsel, hereby request clarification pursuant to the Idaho Department of Water Resources (“IDWR” or “Department”) Procedure Rule 770 (IDAPA 37.01.01.770) and take exception under Procedure Rule 720.02.b. to the *Opinion and Recommendation Concerning*

*the Over-The-Rim Mitigation Plan* (“Recommended Order”) filed on February 9, 2010.

The Recommended Order is subject to review by the Director. Rule 720.01. In reviewing the Recommended Order, the Director “shall exercise all the decision-making power that he would have if [he] had presided over the hearing.” *Id.* And I.C. § 67-5277. As such, the Director is free to consider both the request for clarification and exceptions to the Recommended Order.

### REQUEST FOR CLARIFICATION

The Ground Water Districts request the following items be clarified:

1. On page 2 of the Recommended Order, the number of converted acres should be changed from 2,000 acres to 1,000 acres so that the sentence reads: “This proposal will convert up to 1,000 acres from ground water irrigation to surface water irrigation irrigated farmland of certain existing member of North Snake Ground Water District farming near the canyon rim above the Snake River Farm.”

The *Ground Water Districts’ Third Mitigation Plan* (“Over-the-Rim Plan”) originally estimated 1,060 acres, (Over-the-Rim Plan at 6) but the actual number of converted acres under the Over-the-Rim Plan is a little less than 1,000 acres. There was never an expectation to convert up to 2,000 acres and this appears to be a typographical error.

2. On page 17 of the Recommended Order, it states “There remain objections by Clear Springs.”

The Ground Water Districts request that the “remaining objections by Clear Springs” be identified and clearly set forth as the Ground Water Districts believe that all objections raised by Clear Springs had been completely addressed.

## EXCEPTIONS

### **A. Requiring the Ground Water Districts to Complete Certain Conditions Prior to Clear Springs' Agreement to Accept the Water is a Waste of the Parties' and the States' Time and Resources.**

The Ground Water Districts take exception to having to complete the following items contained in the Recommended Order before Clear Springs agrees it will accept the water:

1. The requirement that an approved transfer of the water rights to be used be completed. Recommended Order at 16.
2. The requirements that "easements and permits necessary for construction of the pipeline be" pre-approved. Id at. 17.
3. The requirement to provide a "detailed plan of maintenance and response to emergencies must be in place at the expense of the Ground Water Districts." Id. at 17.
4. The requirement that a complete engineering of the system be completed. Id.

The Recommended Order doesn't just make a transfer, complete engineering and maintenance plans, and pre-approval of permits and easements conditions of approval, but actually requires the Ground Water Districts to complete all of these costly endeavors, with the full knowledge that Clear Springs has not yet agreed to accept any water from the project once it is constructed. As found by the Hearing Officer, Clear Springs' CEO, Larry Cope testified that there is a "strong likelihood that Clear Springs will not use the water" nor can they be compelled to accept it. Recommended Order at 15. Without first requiring Clear Springs' advance commitment to accept the water, requiring the Ground Water Districts to actually meet all of the conditions is entirely unnecessary and would be unduly burdensome, inefficient and a waste of resources.

Not only will meeting these conditions be burdensome and waste the Ground Water Districts' time, but it will require the Department to expend considerable resources to advertise the transfers and conduct an administrative hearing, will require the counties or other local governmental entities to consider and issue pre-approvals, and will require private landowners to tie up their land with recorded easements; all of these efforts are for no gain, but are simply a formality with no actual purpose.

While the conditions may be appropriate as necessary for the actual implementation of the approved mitigation plan, requiring that these conditions actually be completed and resources expended on these efforts is unreasonable. As such, the Ground Water Districts request that the Director relieve them of having to actually meet all of these conditions until Clear Springs agrees to accept the water.

**B. Clear Springs Should Not Have the Ability to Thwart Mitigation Efforts by Having the Final Say on What is Acceptable Construction or to Object to the Reasonable Placement of Facilities on its Property.**

The Ground Water Districts take exception to the following items and request that these conditions be eliminated.

1. The condition that "eliminates construction or placement of facilities on Clear Springs' property." Recommended Order at 17.
2. The condition that Clear Springs approve the construction plan "to assure that there will be no disruption of the facility." Id.

Mitigation Plans are a necessary and valuable tool for the Director to manage the state's public resources in a manner that "equally guard[s] all the various interests involved" required by Idaho Code § 42-101, and that does not block full economic development of the state's under

ground water resources as mandated by Idaho Code § 42-226. However, the conditions in the Recommended Order that provide the senior user, Clear Springs, the ability to reject proposed construction plans or reasonable use and placement of facilities on its property, essentially robs the Director of his discretion to manage the aquifer in the public interest and in accordance with Idaho law. Nothing in the *Rules for the Conjunctive Administration of Surface and Ground Water Resources* (“CM Rules”) requires that the senior user be given this power and authority. Rather, if a mitigation plan meets the CM Rule 43 requirements, then the Director should approve it, with reasonable conditions relating to the delivery of the water to mitigate the material injury. In this case, the conditions that necessitate Clear Springs’ final approval of the construction plans and the elimination of any use of their property, no matter how small or practical are unreasonable and should be removed. So long as the construction is designed and constructed by professionals and so as long as any use of Clear Springs’ property is reasonable, the conditions should require nothing more.

### CONCLUSION

Based on the foregoing, the Ground Water Users request 1) clarification of the acreage number on page 2 of the Recommended Order and request that the “other objections by Clear Springs” be clearly specified, 2) that they be relieved of requirements to complete the transfer, construction and maintenance plans and permits and easements unless and until Clear Springs indicates it will accept water from the project as set forth above and 3) that the conditions that permit Clear Springs to approve the construction plans and locations of facilities be removed.

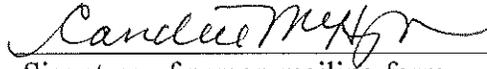
DATED this 23rd day of February, 2010.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By:   
RANDALL C. BUDGE  
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*Attorneys for Ground Water Districts*

## CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of February, 2010, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:



Signature of person mailing form

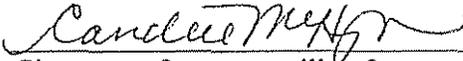
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*Amended*  
CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of February, 2010, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:

  
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