

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER)
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,) Docket No. CM-MP-2009-004
AND 36-07148 (Snake River Farm))
_____) **FINAL ORDER APPROVING**
) **MITIGATION PLAN**
IN THE MATTER OF THE 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))
_____)

On March 5, 2012, the Director of the Department of Water Resources (“Director” or “Department”) received a *Stipulated Mitigation Plan and Request for Order* (“Mitigation Plan”) filed jointly by counsel for Clear Springs Foods, Inc. (“Clear Springs”) and the Ground Water Districts (“GWD”). The Mitigation Plan was filed pursuant to Rule 43.03.o of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). IDAPA 37.03.11 *et seq.*

FINDINGS OF FACT

1. On July 8, 2005, the Director entered a final order finding that pumping by junior ground water users causes material injury to certain water rights held by Clear Springs.¹ The order was subject to an administrative hearing, judicial review, and an appeal to the Idaho Supreme Court, which upheld the Director’s decision. *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011).

¹ Additional material injury was found by the Director in his *Amended Final Order Regarding Seasonal Variability* (January 10, 2011). The January 10, 2011 order was not reviewed by the Idaho Supreme Court in its decision, *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). Hearings on the January 10, 2011 order were requested by Clear Springs and the GWDs. On February 7, 2011, the Director granted the parties’ requests for hearing, stating: “the hearing in this matter is continued until sometime after the issuance of a decision by the Idaho Supreme Court in [*Clear Springs*]. If a party wants to proceed with the hearing once a decision is issued by the Idaho Supreme Court in [*Clear Springs*], the party shall move the Department for [an] order resetting the hearing.” *Order Granting Requests for Hearing and Amended Order Continuing Proceeding* at 5.

2. Following the Director's July 8, 2005 order, the GWDs filed a series of mitigation plans, pursuant to CM Rule 43. The first mitigation plan, filed on June 13, 2008, sought to use a nearby, senior-priority surface water right as mitigation. The first mitigation plan was amended on September 5, 2008, to allow for direct pump-back of effluent water from the end of Clear Springs' raceways to the head of Clear Springs' raceways. The June 13, 2008 and September 5, 2008 plans were withdrawn by the GWD on February 17, 2009. The withdrawals were accepted by the Director on March 5, 2009. *Final Order Accepting Ground Water Districts' Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; Notice of Curtailment.*

3. On December 18, 2008, the GWD filed a second mitigation plan, which proposed to monetarily compensate Clear Springs for its decreased surface water supply. On February 23, 2009, the GWD amended the December 18, 2008 mitigation plan to provide replacement fish, in addition to money. The December 18, 2008 and February 23, 2009 plans were denied by the Director on March 5, 2009. *Final Order Accepting Ground Water Districts' Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; Notice of Curtailment.* The final order was affirmed by the district court. *Order on Petitions for Judicial Review*, Case Nos. 2009-241, 2009-270 (Fifth Jud. Dist., Gooding County, December 4, 2009).

4. On March 12, 2009, the GWD filed a third mitigation plan, seeking to supply Clear Springs with ground water pumped from the Eastern Snake Plain Aquifer.² The plan proposed to convey ground water via a pipeline above the Snake River canyon rim, to Clear Springs' facility, located below the canyon rim. The concept was referred to as the "Over-the-Rim plan."

5. Following an administrative hearing, independent hearing officer Gerald F. Schroeder approved the Over-the-Rim plan, subject to certain conditions. *Opinion and Recommendation Concerning the Over-the-Rim Mitigation Plan* (February 9, 2010). On May 28, 2010, Clear Springs and the GWDs requested a stay of the proceedings until November 15, 2010. On March 18, 2011, the Director entered a *Final Order Concerning the Over-the-Rim Mitigation Plan*. On April 20, 2011, Clear Springs and the GWDs moved the Director to stay the March 18, 2011 final order: "Clear Springs and the Ground Water Districts have entered into ongoing negotiations and are collaborating on a cooperative and good faith basis to explore other practical and feasible alternatives to the Ground Water Districts' 'Over-the-Rim Mitigation Plan'" *Stipulation and Request for Stay* at 1. "The parties agree to stay the present administrative proceeding . . . until further notice" *Id.* at 2. On April 21, 2011, the Director granted the stay: "The Department, having reviewed the stipulation, agrees that a stay is appropriate so the

² On October 6, 2009, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a mitigation plan for conversions, dry-ups, and recharge in response to a finding of material injury to senior-priority water rights. The GWDs are members of IGWA. The October 6, 2009 plan sought approval for conversions, dry-ups, and recharge was mitigation, in the form of calculated credits. The October 6, 2009 plan was not protested. On May 14, 2010, the Director entered an order approving the October 6, 2009 plan. *Order Approving Mitigation Plan*. The May 14, 2010 order stated, "If mitigation credit is sought by IGWA, the Director shall determine the appropriate credit, if any, to provide." *Order Approving Mitigation Plan* at 4. Mitigation credit for the Clear Springs delivery call has not been sought. Mitigation credit has been sought, however, in other conjunctive management delivery calls.

parties can work to pursue long-term solutions to stabilize and sustain the aquifer, reduce demands and resolve conflicts.” *Order Granting Request for Stay* at 1.

6. On March 5, 2012, Clear Springs and the GWDs filed the present Mitigation Plan. The Mitigation Plan stems from negotiations between the parties following the Director’s March 18, 2011 final order approving the GWD’s Over-the-Rim plan. The Mitigation Plan was entered into:

[F]or the purpose of fully and finally mitigating, compromising, and settling all current and future water delivery calls, water right administration disputes, and challenges to mitigation plans.

Whereas in consideration for the transfer of ownership of the Property (defined below), Clear Springs has agreed to accept the transfer of ownership of the Property as full and complete mitigation for any and all past and future injury caused by junior ground water pumping to all water rights owned or controlled by Clear Springs or any of its subsidiaries or affiliates, by reason of which they will have no right to make a delivery call or request administration against any District Member (defined below).

Whereas, this Agreement is made in accordance with IDAPA 37.01.11.043.03(o), and the parties shall submit the Agreement to the State of Idaho, requesting the State to recognize this Agreement as full and complete mitigation for any and all past and future injury caused by junior ground water pumping.

....

[T]he parties shall request a final Order be entered by the Director approving this Mitigation Settlement Agreement as a complete and final Mitigation Plan.

Mitigation Plan at 2-3.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. CM Rule O. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

3. CM Rule 42.02 states as follows: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.”

4. The June 13, 2008 and September 5, 2008 mitigation plans were withdrawn by the GWDs on February 17, 2009. The withdrawal was accepted by the Director on March 5, 2009.

5. The December 18, 2008 and February 23, 2009 mitigation plans were denied by the Director on March 5, 2009. The denial was affirmed by the district court on December 4, 2009.

6. Mitigation credit in the Clear Springs delivery call for conversions, dry-ups, and recharge has not been sought.

7. CM Rule 43.01 sets forth the criteria for submission of a mitigation plan to the Director.

8. CM Rule 43.03 establishes the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights. CM Rule 43.03.o states as follows: “Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not be fully in compliance with these provisions.”

9. The Mitigation Plan is entered into between Clear Springs and the GWDs in accordance with CM Rule 43.03.o. *Mitigation Plan* at 2. The purpose of the Mitigation Plan is to fully and completely satisfy “all current and future water delivery calls, water right administration disputes, and challenges to mitigation plans.” *Id.* Clear Springs agrees that the Mitigation Plan will serve as “full and complete mitigation for any and all past and future injury caused by junior ground water pumping to all water rights owned or controlled by Clear Springs or any of its subsidiaries or affiliates, by reason of which they will have no right to make a delivery call or request administration” *Id.* at 2. “The parties request that the Director enter an order without further notice of hearing accepting the Agreement as a complete and final

Stipulated Mitigation Plan in accordance with the parties' provisions as contained in the Agreement." *Id.* at 3.

10. Having reviewed the Mitigation Plan, the CM Rules, and the proceedings herein, the Director approves the Mitigation Plan. CM Rule 43.03.

ORDER


Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Mitigation Plan entered into between Clear Springs and the GWDs is APPROVED.

IT IS FURTHER ORDERED that this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying a petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.


DATED this 16th day of March, 2012.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2012, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Candice M. McHugh T.J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rbc@racinelaw.net tjb@racinelaw.net cmm@racinelaw.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



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