



Clear Springs seeks reconsideration on the following issues:

1. The conclusion that harm to Clear Springs' business image as a result of using pumped ground water instead of spring water is "conjectural" and "should not prevent approval of the mitigation plan," *OTR Order* at 8-11, where the evidence of Clear Springs' reliance on the spring source and the importance of that source to the company's image is uncontroverted.
2. The conclusion the OTR Plan "proposes the replacement of water ... differing only in the method of delivery." *OTR Order* at 9.
3. The decision to defer consideration of the impacts of the well location and pumping operation. *OTR Order* at 12-13.
4. The conclusion that "for purposes of this hearing the choices presented are curtailment of pumping for up to 41,000 acres or the Over-the-Rim plan." *OTR Order* at 11.

## INTRODUCTION

Clear Springs requests reconsideration of the above conclusions based upon applicable law and the evidence presented at hearing. The facts show that Clear Springs relies upon "spring water", a defined surface water source, for its operations and brand that it has developed over the past 40 years. The testimony and evidence further shows that implementation of the OTR Plan to provide a different source of water, "groundwater", is inconsistent with Clear Springs' brand and the historic use of its surface water rights. The testimony presented by Clear Springs' witnesses is not "conjectural" and should be reconsidered by the Hearing Officer.

In addition, the Ground Water Districts failed to present a complete plan and under the CM Rules the Hearing Officer should not "defer" decisions regarding the approvability of the plan, such as injury to other rights, to a separate administrative proceeding. Finally, the conclusion that the OTR Plan is the only mitigation option available is not supported by the evidence in this case where Dr. Brockway provided testimony about an alternative and the

Districts admittedly failed to explore other mitigation options available to them.

In summary, the Hearing Officer should reconsider the issues identified above and issue a new recommended order consistent with those findings.

## ARGUMENT

### I. **The Uncontroverted Evidence Shows that Clear Springs Relies on Natural “Spring Water” as the Cornerstone of a Brand Image that has Helped Turn Clear Springs into the World’s Largest Producer of Farmed Rainbow Trout.**

Pure spring water is so vital to the success of Clear Springs’ rainbow trout operations that it was incorporated into the name of the company. *MacMillan Report* at 15 (“With the selection of Clear Springs in the company name, the founders hoped to capitalize on the image such a name embodies”). Evidence and testimony presented at hearing conclusively demonstrated that:

From inception through heavy investment and time the Company has built its brand name CLEAR SPRINGS, and image around our claim of only growing our Idaho Rainbow Trout in spring water. ... *The CLEAR SPRINGS brand was built around this unique resource, not available any other place in the world.*

*Cope Testimony* at 3-4 (emphasis added). And,

**Clear Springs Foods historic marketing has focused on the fact that it’s Idaho produced trout (its core business) are grown in pure “spring” water flowing its farms. The general marketing approach has been holistic – addressing environmental stewardship, food safety, efficient production and that consumer value originates with Clear Springs Foods large supply of pure spring water.**

*MacMillan Report* at 10 (emphasis in original).

Importantly, the Ground Water Districts did not provide any testimony to rebut the evidence that the OTR Plan will injure Clear Springs’ business image and its reliance upon spring water for its operations and use of its decreed senior water rights. Yet, the Hearing Officer overlooks this substantial information and concludes that “the claim of damaged business

image in this case is too conjectural to cause rejection of the mitigation plan.” *OTR Order* at 10.<sup>1</sup>

This finding is not supported by the evidence in the record and should be reconsidered.

**A. Clear Springs Has Established Itself as a Producer of High Quality Farmed Rainbow Trout Raised in Pristine Spring Water.**

The seafood industry is a worldwide market, with over 800 species traded. *MacMillan Report* at 8. Given its size, it is very difficult to gain consumer recognition of a particular seafood or brand. *Id.* Furthermore, for the last 30 years, the United States has experienced a seafood trade deficit that is now believed to be as high as \$11 billion. *Id.* at 9. American businesses, including Clear Springs, must compete with operations in such countries as China, Norway and Chili, which supply a majority of the worlds’ farmed seafood. *Id.* Many of these countries have only recently become concerned with environmental stewardship and/or food safety. *Id.* Clear Springs, on the other hand, has always been concerned with environmental stewardship and has made such stewardship, including the reliance upon natural spring water, the cornerstone of its marketing plan. *Id.* at 12-15.

Faced with the challenges of an extremely competitive industry, Clear Springs entered the seafood market with a distinctive marketing strategy that it hoped would set it apart from the competition. “From inception through heavy investment and time the Company has built its brand name CLEAR SPRINGS, and image around our claim of only growing our Idaho Rainbow Trout in spring water.” *Cope Testimony* at 3-4. “The CLEAR SPRINGS brand was built around this *unique resource, not available any other place in the world.*” *Id.* (emphasis added). These

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<sup>1</sup> The Hearing Officer correctly based his “determination only [on] the Snake River Farm facility” and “not the entirety of the Clear Springs operations domestically and internationally.” *OTR Order* at 10. Importantly, while Clear Springs’ other global operations may not rely solely on spring water, the Snake River Farm facility always has relied on the “globally unique” spring water to create “a dramatic point of product differentiation that Clear Springs Foods has capitalized on.” *MacMillan Report* at 11.

springs are considered “world class” and “globally unique” and establish “a critical point of differentiation with other forms of aquaculture, and wild capture fisheries because the water itself is so unique.” *MacMillan Report* at 10-11.

In a market that is so competitive and so difficult to establish a unique product, Clear Springs has built a name on using water from its pristine “clear springs.” In addition, “[w]ith the selection of Clear Springs in the company name, the founders hoped to capitalize on the image such a name embodies.” *Id.* at 15; *see also MacMillan/Cope Supp. Test.* (discussing importance of “spring water” to Clear Springs’ brand); *Cope Test.* at 3 (“Current and past advertising pages and brochures as well as company videos depict the photos of the springs and the association of the spring water and our products”). To effectuate this business image, Clear Springs has engaged in a comprehensive marketing strategy that includes “advertisements in newspapers, trade journals, food shows, electronic (e-mail teasers), recipe books (our own and in one by the Monterey Bay Aquarium), celebrity chef endorsements, video, website, independent news stories, tours and the Clear Springs Foods own Visitor Center.” *MacMillan/Cope Supp. Test.* at 4.<sup>2</sup>

John R. MacMillan, Vice President of Research & Environmental Affairs, explained the importance of the use of spring water to Clear Springs:

In many respects, aquaculture is held to a high standard of stewardship that other types of agriculture and this has significant implications for product marketability and business viability. ... **But contrary to most agriculture**

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<sup>2</sup> Numerous examples of this comprehensive marketing strategy are found in the record. *See, e.g.,* Exhibit 4 (Clear Cuts Rainbow Trout, described as being “grown in pure spring water”); Exhibit 32 (Down on the Farm, describing the “vast store of water” in the aquifer that flows like an “underground river” until it is “interrupted by Snake River Valley” and “in torrents and trickles, more than a million gallons of water a minute spring and seep from sheer rock walls”); Exhibit 33 (Biggest Trout Company Adds More Value to its Products, quoting Clear Springs CEO Larry Cope as confirming “that pure natural spring water is our lifeblood”); Exhibit 36 (Trout as Wild as All Outdoors, Almost, discussing the importance of spring water to Clear Springs’ operations).

**products raised in Idaho, issues of water purity, water delivery mechanisms, environmental impacts both locally and globally, energy inputs and public/consumer perception are key factors impacting the marketability of farmed seafood. Clear Springs Foods, a domestic aquaculture based food company recognized that challenge in 1966. Its marketing program includes environmental stewardship, and the use of gravity flow, pure spring water. ... Clear Springs Foods must compete globally and relies significantly on its spring flow and water purity for its competitive advantage.**

*MacMillan Report* at 15 (bold in original, underline added).

In summary, the value of the image that Clear Springs has cultivated over the last four decades that is premised upon spring water should not be discounted.

**B. Potential Injury to Clear Springs' Business Image is Not "Conjectural."**

Contrary to the conclusion in the *OTR Order*, the testimony about the harm to Clear Springs' business image was more than mere "conjecture".

Without sustained pure, pristine spring water in Idaho at Clear Springs Foods fish farms, both the Company's image and the Company's financial futures are in jeopardy. That is why we have not elected to drill our own wells and that is why we maintain opposition to the over-the-rim mitigation plan.

*MacMillan/Cope Supp. Testimony* at 3. According to Clear Springs' marketing department, "the Company would have to modify and substantially change the marketing program if spring water were not the sole source of water available through the Snake River Farms operations."

*MacMillan/Cope Supp. Test.* at 5. After more than 40 years of developing a competitive brand through marketing and branding based on the sole use of pristine spring water, a forced change in marketing strategy cannot be disregarded in this case. Clear Springs' witnesses further provided testimony that its marketing and business would be impacted due to the requirement to not misrepresent the company's operations and the source of water.

A complete overhaul of the marketing concept for Clear Springs' rainbow trout products

– which are included in the only farmed finfish to receive recognition as “best-of-the-best” by the Monterey Bay Aquarium, *Cope Test.* at 3 – will have significant effects on the Clear Springs business and market share. *MacMillan/Cope Supp. Test.* at 5 (“The distinct market created by the sole use of spring water discharging from the aquifer as depicted in the brochures and replicated in the Company’s symbol would be compromised by the use of well water”).

The Hearing Officer recognizes that “under some circumstances, the claim of damage to a business reputation most likely could preclude a mitigation plan.” *OTR Order* at 10. This is one of those “circumstances.” Indeed, if the overhaul of a marketing strategy that has been in place for over 40 years and helped build Clear Springs into the largest farmed rainbow trout producer in the United States is not sufficient, it is unclear when any such “circumstances” would exist.

Moreover, IDWR has the responsibility to prevent injury caused by junior rights, not to simply change the form of that injury (i.e. preventing Clear Springs from first using the source of water under its decreed senior water rights). Further, IDWR is not in a position to simply ignore that injury or make recommendations which do not make the senior whole with respect to the injury suffered. Accordingly, the Hearing Officer should reconsider his conclusion that “the nature of the claim of damaged business image in this case is too conjectural to cause rejection of the mitigation plan.” *OTR Order* at 10.

### **C. Clear Springs Bases its Marketing Strategy on the Use of Pristine Spring Water.**

The conclusion that Clear Springs’ “reputation” is “arguably a little askew from scientific reality” is based on the improper belief that Clear Springs promotes the sole source of its spring water as being snowmelt from the Pioneer Mountains and the unsupported assertion that “much”

of the spring water “entered the aquifer after being spread on the ground by surface water irrigation on crops treated with fertilizer and pesticides, entering the aquifer as incidental recharge water.” *OTR Order* at 10. These conclusions contradict the evidence in the record.

First, Clear Springs’ brochure that references snows from the Pioneer Mountains that seep into the aquifer and then gush “out of the walls of Snake River Canyon”, does not state that all spring water originates from that location. *See* Ex. 7. At hearing Mr. Cope explained that although the brochure is over 20 years old, and much more information is known about the ESPA and its water supplies today than at that time, Clear Springs has consistently marketed its “springs” as the source of the water supply of its facilities and there is nothing misleading about the representation in the exhibit. *See* Tr. Vol. II, p. 362-63. Yet the Hearing Officer relies upon the brochure to state that “reality” undercuts Clear Springs’ marketing strategy. Contrary to this assertion, the brochure is accurate in that some water from the Big Lost River Basin is tributary to the Eastern Snake Plain Aquifer and does discharge in the Thousand Springs area.<sup>3</sup>

In addition, the conclusion that “much of” Clear Springs’ spring water “entered the aquifer after being spread on the ground by surface water irrigation on crops treated with fertilizer and pesticides” has no support in the record. *OTR Order* at 10. Nowhere in the record is there any discussion of either (1) the proportion of Snake River Farms’ water supply that is derived from incidental recharge, through canal leakage or on-farm application, (2) the fertilizer and pesticide application practices of the farms from which that incidental recharge originates or

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<sup>3</sup> Even the Ground Water Districts’ expert, Mr. Scanlan testified that water enters the ESPA from all over the eastern Snake River Plain, including the Pioneer Mountains drainage. *See* Tr. Vol. II, p. 282 (“Q. And the Big Lost would be an example of that area? A. Yes.”). *See also*, testimony from Larry Cope; Tr. Vol. II, p. 362 (“Over the last 20 years we’ve learned more about the ESPA. But it was always recognized that from the Lost River Valley from Pioneer Mountains, in that area, that was a source of water into the aquifer. And to my knowledge, it remains a source of the water. Not the total amount. That’s correct.”).

(3) the impact of such fertilizer and pesticide application practices on Clear Springs' water supply. The implication that Clear Springs' marketing strategy is "askew from scientific reality" because Clear Springs is using tainted irrigation water is not supported by the record and should be reconsidered.<sup>4</sup>

At a minimum, the question of the exact origin of the different supplies, or their proportionate percentage, that contributes water to the ESPA and then ultimately discharges as spring water at Clear Springs' Snake River Farms facility was not presented in the evidence in this case. Consequently, the Hearing Officer cannot generalize where the majority of that water originates and then use that as a reason to assert Clear Springs' marketing literature is "askew from scientific reality".

As to the water being provided in the OTR Plan, the Hearing Officer concluded that "the pool is the same and that some of the water that would be transported by pumping would go to the Snake River Farm if the wells were not utilized," *OTR Order* at 9, and that water of the same "quality" is being delivered over-the-rim, *id.* at 10. This finding is legally incorrect. Clear Springs has spent the last 4 decades building a reputation on its sole use of pristine spring water, a decreed surface water supply. *Supra*. The use of the "source", pristine spring water, is as important to Clear Springs' image as the quality of the water used.

It is unchallenged that spring water is "the best you can get" for fish production – even the Ground Water District's witness agreed. *Schuur Test.*, Tr. P. Vol. I, p. 185, lns. 20-23 ("But in a general hierarchy of the quality of water in aquaculture facilities, a spring such as you have

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<sup>4</sup> This implication is further inconsistent with the Hearing Officer's conclusions regarding the impact of incidental recharge resulting from surface water applied to the land previously irrigated by pumping. *OTR Order* at 9. Addressing this water, the Hearing Officer concluded that "whether this new water would alter the chemistry of the source is unknown but too speculative to bar consideration of the" OTR Plan. *Id.*

at Clear Springs is the best you can get, no question”). It is this spring water upon which Clear Springs has established its business reputation and marketing strategy. *See, supra*. This fact should not be discounted by reliance on misperceptions about the marketing strategy or unsupported conclusions about the origins of the spring water. Any attempt to tarnish that image by mandating a commingling of ground water with spring water should be rejected.

**D. The Source of Clear Springs’ Water Rights are “Springs” Not Ground Water.**

Clear Springs’ water rights were decreed in the SRBA with a surface water source identified as “springs.” The source is not identified as “ground water.” Yet, the Hearing Officer found that the only difference between Clear Springs’ spring water and the OTR water is “the method of delivery.” *OTR Order* at 9. This finding discounts the legal and factual difference of the source of the water and should be reconsidered.

First, the Hearing Officer previously recognized the legal source distinction in his *Order Granting in Part & Denying in Part Joint Motion for Summary Judgment & Motion for Partial Summary Judgment*, issued in the Spring Users’ call proceedings on November 14, 2007 (later adopted by the Director). On pages 7-8 of that *Order*, the Hearing Officer confirmed:

The Spring Users diversions are of water that has emerged from the ground, ***not by pumping or other artificial means***. The partial decrees identify Alpheus Creek and Springs as the sources of the Spring Users’ water. The points of diversion are locations ***after the water has left the ground***. Treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees. (Emphasis added).

The source is a legally binding element of a partial decree. Idaho Code §§ 42-1411(2)(b), 42-1412(6) & 42-1420. It is legally and factually incorrect, therefore, to conclude that the only difference between pumped water and spring water is “the method of delivery.”

Just the opposite, groundwater that is pumped by the OTR Plan does not change into “spring” water after it is delivered to Clear Springs, it is still defined as “groundwater”. See *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746 753 (2005).

In sum, Clear Springs uses spring water, not groundwater, pursuant to decreed surface water rights. Moreover, it is undisputed that Clear Springs relies upon this unique source for its operations and the place it has attained in the market. Accordingly, the Hearing Officer’s conclusion that the water is the same other than its “method of delivery” is legally and factually incorrect and should be reconsidered.

**II. The Hearing Officer is Obligated to Consider the Impact of the OTR Plan on Other Water Users.**

Clear Springs has repeatedly challenged the OTR Plan based on the failure to adequately analyze its impacts on existing water rights. The CM Rules include numerous factors to be considered in analyzing a mitigation plan. Among these, are:

- i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.
- j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

CMR 43.03.

Rather than consider these factors and issue a decision as to whether or not the OTR Plan satisfies the criteria, the Hearing Officer ordered the Department to consider these issues in a separate administrative proceeding relating to the anticipated transfer applications. However, the

CM Rules do not give the Hearing Officer the discretion to “pre-approve” a mitigation plan by deferring the required analysis of the injury caused by that mitigation plan.

A bifurcated analysis, such as this, is not appropriate under the CM Rules. If the OTR Plan cannot be implemented as filed, it is not approvable. Although the Ground Water Districts submitted their plan nearly a year ago, no transfer application has been filed. To date, only draft applications have been provided. The evidence in the record shows no defined pumping plan or location. While the evidence shows that the OTR Plan would injure existing rights by taking water away from other senior surface water users, that “injury” prevents approval of the plan.

Finally, it is unclear when the transfer applications will be filed and whether that process, including the resolution of any protests, can be completed before the stay expires at the end of the 2010 irrigation season. As such, the failure to address and resolve the plan’s impact on other water rights was improper and should be reconsidered.

### **III. Other Mitigation Options Were Presented and the Ground Water Districts Have Not Fully Explored All Mitigation Options.**

There are other alternate mitigation methods that were presented and discussed in this proceeding. However, the Hearing Officer deemed these methods to be “conjectural solutions” implying the OTR Plan is a “do-or-die” decision making process. *OTR Order* at 11 (“For purpose so of this hearing the choices presented are curtailment of pumping for up to 41,000 acres of the Over-the-Rim plan”). This characterization is wrong.

Upon motion by Clear Springs and approval by IDWR, implementation of the OTR Plan has been stayed through the 2010 irrigation season. *OTR Order* at 5. As such, the Ground Water Districts had sufficient time to develop a mitigation plan that would provide appropriate mitigation without jeopardizing Clear Springs’ image. Yet, the record demonstrates that the

Ground Water Districts have not fully explored all available mitigation options.

While the “burden is on the Ground Water Districts to develop a satisfactory alternative to curtailment,” *OTR Order* at 11, their witness Mr. Carlquist testified that they simply have not looked into many viable options – including expanded and/or targeted voluntary curtailment and fallowing programs, conversions within the American Falls Reservoir District No. 2 boundaries and the construction of alternate facilities to provide greater access to water for conversions, Tr. P. Vol. I, pp. 35-36 & 48-50. Consequently, there is no basis to rely upon limited capacities in canal systems owned by others and the claimed lack of mitigation alternatives when valid alternatives remain unchecked. Stated another way, the Ground Water Districts’ failure to consider other alternatives cannot be used against Clear Springs in order to present the OTR Plan as their only mitigation option to avoid curtailment. *OTR Order* at 11.

In addition, Dr. Brockway discussed that the ground water identified in the OTR Plan could simply be left in the ground and would thus decrease “depletion of the groundwater.” *Brockway Report* at 12. Instead, water could then be pumped from Clear Lake and onto the lands formerly irrigated with the groundwater. *Id.* This option is no more conjectural than the Districts’ own OTR Plan, which is constantly changing and has not been completed. Notably, the Districts did not present a final well location or pumping regime that could be analyzed, and they failed to prove how they would mitigate for the injury caused by the new year-round groundwater withdrawal. The record plainly demonstrates the Ground Water Districts have not completed designs on the plan (only 50% at hearing), do not have the necessary rights of way, have not provided a precise plan for maintenance and have not filed a transfer for the ground water rights. *Clear Springs Post-Hearing Memo* at Part I. At this point, it is unclear if the

necessary rights-of-way will ever be acquired or if the necessary transfer will ever be approved. In sum, if the other options for mitigation are not certain, then it is obvious the Districts' own OTR Plan falls into this same category at this time. Accordingly, the record does not support the conclusion that the only options available are curtailment or the OTR Plan.

### **CONCLUSION**

Importantly, the source of Clear Springs' water rights is spring water, and the company unquestionably relies upon that unique water source for use of its senior water rights and its business that has developed over time. The evidence of Clear Springs' brand image and the harm that would result from implementing the OTR Plan to provide a different water source, groundwater, is unchallenged. As such, the Ground Water Districts cannot replace injury to the quantity of Clear Springs' rights with injury to the source.

In addition, the Hearing Officer cannot "pre-approve" a plan and defer decisions on the criteria set forth in the CM Rules for separate administrative proceedings. Pursuant to those criteria it is clear the Districts have failed to submit an approval plan at this time. Under the CM Rules, the Hearing Officer has an obligation to address the Rule 43 criteria and determine whether or the plan should be approved.

Finally, as to the statement that the OTR Plan is the only alternative to curtailment, there are numerous mitigation options that were identified but have yet to be studied by the Ground Water Districts, including the alternative presented by Dr. Brockway. It cannot be said, therefore, that the only options are curtailment or the OTR Plan. For the reasons set forth above, the Hearing Officer should reconsider the identified findings and conclusions in the *OTR Order* and issue a new recommended decision.

DATED this 23<sup>rd</sup> day of February, 2010.

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## CERTIFICATE OF MAILING

I hereby certify that on this 23<sup>rd</sup> day of February, 2010, the foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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