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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE SECOND MITIGATION PLAN OF THE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS TO COMPENSATE SNAKE RIVER FARMS (Water District Nos. 130 and 140)	**CLEAR SPRINGS FOODS, INC.'S BRIEFING ON THE DIRECTOR'S AUTHORITY TO APPROVE A MITIGATION PLAN FOR MONETARY COMPENSATION**

COMES NOW, CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and hereby submits this brief pursuant to the Director's *Order on Status Conference and Providing Briefing Schedule on Second Mitigation Plan for Monetary Compensation*, dated February 20, 2009 ("*Briefing Order*"). The Director has requested

> [B]riefing on the legal issue of the Director's authority to approve a mitigation plan providing for monetary compensation as an alternative to replacement water supplies in response to a delivery call without approval of the holder of the calling right.

Briefing Order at 2.

As discussed below, the Director is without authority to consider a non-water mitigation plan when the holder of the senior water right does not accept of that plan.

INTRODUCTION

On December 18, 2008, the Magic Valley and North Snake Ground Water Districts ("Ground Water Districts" or "GWD") submitted their *Second Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District Providing for Monetary Compensation* (the "Money Plan").[1] Apparently deciding not the follow the Department's policy of providing mitigation "in-time, in-kind, and in-place," and alleging support from the phrase "or other appropriate compensation," in Rule 43.03(c) of the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("CM Rules"), the GWD claim that the Director is compelled to consider the Money Plan as an alternative to providing water to Clear Springs' injured senior water rights. The GWD demand this, even though Clear Springs, the holder of the injured water rights, has requested water and does not consent to the proposed Money Plan.

The Money Plan seeks to monetarily compensate Clear Springs' Snake River Farm facility for injurious depletions to Clear Springs' water rights caused by the GWD's out-of-priority depletions to the aquifer and springs. Importantly, the GWD admit that, if approved, they will not "provide physical replacement water supplies." Money Plan at 2. In other words, they hope to pay their money and retain the ability to pump their *full ground water rights* – all the while continuing their depletions to the springs and injuries to Clear Springs' water rights.

[1] On February 23, 2009, the Ground Water Districts filed an *Amended Second Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District for Other Appropriate Compensation.* That plan seeks to provide fish, instead of water, to mitigate for the material injury to the senior water right. Since the Director has not published this *Amended Second Plan,* it is not subject to these proceedings. *See* CM Rule 43.02. That notwithstanding, as discussed herein, the Director does not have any authority to compel acceptance of any mitigation plan that seeks to provide money, fish or any other non-water form of mitigation.

On February 23, 2009, Clear Springs filed a timely protest to the Money Plan – asserting, among other things, that the Money Plan is not authorized by law and would result in an unconstitutional taking of Clear Springs' senior water rights. Other protests to the Money Plan were also filed by Blue Lakes Trout Farms, Inc., Rangen, Inc., the Idaho Aquaculture Association, Inc. and the Surface Water Coalition.

During a status conference, on February 19, 2009, the Director advised the participants that he was seeking briefing on "the Director's authority to approve a mitigation plan providing for monetary compensation as an alternative to replacement water supplies in response to a delivery call without approval of the holder of the calling right." *Briefing Order* at 2. In addition, participants discussed the Director's response to a recent *Withdrawal of Amended Mitigation Plan*, filed by the GWD, on February 17, 2009.

As discussed below, the Director is without authority to consider and approve a non-water mitigation plan – such as the Money Plan – unless that plan has been accepted and agreed to by the holder of the senior water right. *See infra* Part III & CM Rules 43.03(o). Title 42, Chapter 6 defines the Director's and watermaster's authority for purposes of administering water rights. Any non-water mitigation plan is inconsistent with the Constitutional and statutory mandate that IDWR and the watermaster distribute ***water*** – not money – "first in time" "first in right." The CM Rules do not enlarge this authority. Moreover, the CM Rules do not allow non-water mitigation. Indeed, rather than distributing water to mitigate injury to the "senior water ***right***," as required by statute and the rules, the Ground Water Districts seek to pay off the ***holder*** of the senior water right with an arbitrary amount of money so that they can continue depleting the source.

In essence, a non-water mitigation plan – one where the injurious out-of-priority water user is allowed to "pay a price" (whether that be money or fish) to continue depleting the source – is simply a veiled request for condemnation. Indeed, the GWD (junior ground water right holders) seek to take and use part of Clear Springs' senior water rights by paying compensation. Yet, the Constitutional preference system places all agricultural users (i.e. irrigation and aquaculture) on the same level, prohibiting such a taking. That notwithstanding, the Director is without authority to preside over such an action – and acceptance of such a Money Plan would be tantamount to an unconstitutional taking of the senior water right. In addition, the Director is not authorized to preside over a damages case. While termed a "mitigation plan," the Money Plan is nothing more than an attempt to place a value on the injury suffered by Clear Springs.

It would prejudice the holder of a senior water right for the Director to consider and adopt a plan that the water user does not approve. Indeed, the Director has recognized that he is without authority to compel compensatory mitigation. The SRBA Court affirmed as much in its *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Order*") at 13-14 ("IDWR freely admits it cannot compel a senior user to accept mitigation" – including "mitigation in the form of money instead of ceasing [the juniors'] use of the called water") (Ex. A to the *Affidavit of Paul L. Arrington in Support of Clear Springs Foods, Inc.' Briefing on the Director's Authority to Approve a Mitigation Plan for Monetary Compensation* (*Arrington Aff.*")). Should the Director decide to consider a non-water mitigation plan – absent acceptance of that plan by the holder of the senior water right – then the senior right holder would be forced to participate in the proceedings (expending significant amounts of time and expense to prepare for the hearing) without any promise of water. One need only consider the GWD actions in relation to the *First Amended Mitigation Plan* to see how

prejudicial such a demand can be. In those proceedings, the GWD submitted a mitigation plan and then unexpectedly withdrew that plan at the eleventh hour, *after* months of preparation and well after Clear Springs was forced to spend significant time and resources (including preparation of expert reports and rebuttal reports) to address the plan in the contested case. Idaho's judiciary does not allow litigants to play "fast and loose" in such a situation and neither should the Department, particularly when it results in forcing a senior water right holder to suffer injury both to its water rights and its resources.

Finally, it should be noted that, while the Director is without authority to compel acceptance of a Money Plan, nothing in the Constitution, statutes or applicable regulations would prevent the holders of both senior and junior water rights from negotiating a resolution to a water shortage. Such a negotiated settlement could include monetary compensation. Clear Springs and the GWD have a history of such compromises (i.e. the Interim Stipulated Agreement) that have been approved by the Director consistent with the law.

Until such agreements can be made with the consent of Clear Springs, the Director, as set forth below, cannot consider the elements of nor compel acceptance of a monetary based mitigation plan that provides no water to the injured senior right.

THE MONEY PLAN

As discussed below, the Director does not have authority to compel a senior water right holder to accept money in lieu of water to mitigate for material injury. This lack of authority is independent of the GWD Money Plan and does not require any analysis of the Money Plan. However, the Money Plan provides an example of the impractical nature of a monetary mitigation plan.

First, the Money Plan fails to "provide physical replacement water supplies." Money Plan at 2. Rather, it seeks to provide compensation:

> [I]n the form of an annual cash payment in an amount equal to the actual lost net profit (defined as gross revenue less expenses) incurred by Snake River Farm resulting form the lost trout production associated with 2.0 cfs of reduced flow to Snake River Farm from the Final Order.

Id.

Rather than mitigating injury to the water right, the Money Plan seeks to compensate Clear Springs for depletions in the spring flows – claiming that, after considering "CREP and conversion benefits," "the Ground Water Districts' remaining mitigation requirement to Snake River Farm for 2009 is 2.0 cfs." *Id.* at 5.

The GWD assert that compensation of $17,820 per cfs per year (or $35,640 for 2 cfs) is adequate compensation for the material injury suffered by Clear Springs and would "fully compensate[e] Clear Springs for its financial losses." *Id.* at 7. This arbitrary amount is not based on the value of the taken water right, but instead is contrived from the alleged (i) number of fish that can be harvested for each cfs of water; (ii) cost of "freight, marketing and process" per pound of fish; and (iii) "direct production cost ... [including] feed labor and labor related costs, energy, maintenance, supplies, and depreciation." *Id.* at 6-7.

Although the Plan seeks to authorize the GWD to permanently "take" a portion of Clear Springs' senior water rights, it only proposes to pay a nominal annual value based upon fish production alone, not the complete value of the taken property. As a matter of law, this analysis fails on its face under the procedures of a condemnation action (assuming for argument's sake IDWR could even hear such a case). Nonetheless, the Director cannot even reach this question given the lack of authority to consider and approve such a plan. Whereas the Director is limited by statute to distribute water and oversee water right administration, he is not authorized to

transform that process into an amorphous financial scheme wherein actual water is eliminated and a senior's priority is eviscerated for the benefit of junior ground water rights. Fortunately for Clear Springs' and the sake of senior water right holders throughout Idaho, the law forbids such a result.

ARGUMENT

I. The Director Has No Legal Authority to Consider and Approve a Non-Water Mitigation Plan.

The Ground Water Districts' Money Plan is based on a misreading of the CM Rules – without any regard to the governing constitutional and statutory provisions. Notably, they ignore the constitutional and statutory mandate that "water" – not money – be distributed to seniors in times of shortage. The GWD forget that watermasters administer water rights not bank accounts. They ask the Director to overstep his statutory authority and condemn a senior water right and to preside over an attempt to value the injury suffered by the holder of a senior water right. None of these actions are supported by the law. In fact, as discussed below, with one minor exception, *see infra* Part III (upon agreement by the senior), the Director is without authority to consider a non-water mitigation plan.

A. The CM Rules Do Not Authorize Consideration of a Non-Water Mitigation Plan that is Not Approved by the Holder of a Senior Water Right.

The GWD rest their entire Money Plan on a misreading of the mitigation plan rules (CM Rule 43). *See* Money Plan at 2. The cited rule provides:

> 03. **Factors to be Considered.** Factors that may be considered by the Director in determining whether a proposed mitigation plan will ***prevent injury to the senior rights*** include, but are not limited to, the following:
>
> * * *

> c. Whether the mitigation plan provides replacement water supplies or ***other appropriate compensation*** to the senior-priority water right when needed during a time of shortage …

Rule 43.03.c (emphasis added).

In proposing to provide money (or fish) to Clear Springs, the Ground Water Districts misread this provision – and in doing so, demonstrate a misunderstanding of the focus of the CM Rules. According to the GWD, this rule authorizes the Director to accept a non-water mitigation plan – seeking to "compensate" the water ***user***. This focus is misguided and does not supplant Idaho's constitution and water distribution statutes. Instead, it perpetuates the material injury giving rise to the mitigation plan by allowing junior ground water right holders to continue depleting the source – so long as they "pay off" the injured water users. Such a plan would ensure that aquifer levels will continue to decline and guarantee that material injury will increase and spread throughout the Snake River Plain. The CM Rules cannot be interpreted to permit such an action.

Contrary to the Ground Water Districts' focus on the water user, the CM Rules focus on the water right – providing for "other appropriate compensation to the ***senior-priority water right***." (Emphasis added). In other words, the CM Rules recognize that material injury cannot be mitigated merely through the purchase of a lost crop, providing an extra fish or filling the water users' coffers. Such actions do not address the root of the problem – i.e. the depletionary diversions of junior priority water users and the impacts to the water source. Rather, mitigation demands that the focus be on replacing or returning flows at the source. Rule 43.01 plainly states that a proposed mitigation plan "***shall*** be submitted to the Director in writing and shall contain the following information" described in subparts (a) through (c). Subpart (c) of the Rule requires a mitigation plan to describe the "***water supplies proposed to be used for mitigation***."

(Emphasis added). These requirements are a mandatory element of a Rule 43 mitigation plan. As such, any plan that refuses to provide water must fail.

The GWD rely upon a reference to "other compensation" referenced in the "factors" criteria to justify not providing "water" for mitigation. However, when read in context with the entire Rule, including Rule 43.01 described above, it is obvious that "other compensation" means water not provided as direct replacement water. Indeed, other "compensation" that is not direct replacement water would include actions taken in the aquifer to improve water supplies or increase spring flows, such as voluntary curtailment, conversions, or effective recharge (all actions previously proposed and partly implemented by the GWD). Specifically, Rule 43.03(d) uses the term "compensating senior-priority water rights" in consideration of a plan that proposes artificial recharge.

While the CM Rules use the term "compensation" a number of times, in each context it is clear that "compensation" must address injury to "senior-priority ***water right***" and not the water ***user***. *See* CM Rules 43.03.d ("compensating senior-priority water rights").[2] In fact, the CM Rules mandate that the watermaster keep records of the mitigation provided – including "other compensation supplied." *See* CM Rules 40.02(d) & 40.06. As described above, if the GWD take other actions to affect the water supply (i.e. voluntary curtailment, conversion, recharge, etc.) besides providing direct replacement water, it is clear the watermaster must keep records to ensure that "compensation" is actually supplied. Direct "replacement water" is "provided" to a senior water right while "other compensation", such as the actions described above, is "supplied"

[2] The definition of "Mitigation Plan" includes the phrase "compensate holders of senior-priority water rights for, material injury." CM Rules 010.15. However, the term "material injury" concerns injury to the "water right", and in context with the rest of the Rules it is clear that a junior must take actions to prevent injury to the water right by providing water, not money, to a senior water right holder. Moreover, an "agreed to" mitigation plan may contain other provisions "or compensation" not necessarily tied to the water right. *See* Rule 43.03(o.) In this context, it is appropriate to reference compensation to the senior water right holder.

to the water source (in this case actions on the ESPA aimed to improve spring flows). When read together in context, it is clear that use of the term "other compensation" refers to other actions taken to affect or improve a senior's water supply.

The use of the term "other compensation" does not provide, as the GWD suggests, an independent source of authority for the Director and watermasters to approve non-water mitigation plans, and distribute "money" instead of water. Under that reading, the term "water right" would be read completely out of the CM Rules. If the Director were authorized to mandate non-water compensation, he would, in essence, turn the watermaster into a banker watching the mitigation accounts – monitoring the payment of money, fish or otherwise. The Water District 130 Watermaster has no such authority, instead she is charged with only distributing "the waters ... according to the prior rights of each respectively." Idaho Code § 42-607.

Since the CM Rules do not authorize the Director to compel acceptance of a non-water mitigation plan, any such plan – i.e. the Money Plan – cannot be approved.

B. Idaho's Priority Doctrine, as Established through the Constitution, Statutes, and Case Law, Requires the Director and Watermaster to Distribute "*Water*" and Administer "*Water Rights*" in Times of Scarcity.

As the SRBA Court recognized in the *Facility Volume Order*, at 14, the "right of senior water right holders to have ***water*** delivered 'first in time, first in right' is constitutionally protected." (Emphasis added). While recognizing that the water users may agree to different terms (including monetary compensation), the Court affirmed the long standing principle that "Priority of appropriation shall give the better right as between those using the ***water***." Idaho Const. art. XV, § 3 (emphasis added); *see also* Idaho Const. art. XV § 4 ("Whenever any ***waters*** have been ... appropriated or used for agricultural purposes ... such person, his heirs, executors,

administrators, successors or assigns, shall not thereafter … be deprived of the annual use of the same") (emphasis added); *Id.* § 5 ("Whenever more than one person has settled upon, or improved land …priority in time shall give superiority of right to the use of such ***water***") (emphasis added); Idaho Code § 42-106 ("As between appropriators, the first in time is first in right").

All Constitutional and statutory provisions direct that "***water***" be distributed to senior rights in times of shortage. There is no provision that allows the Director and watermaster to forego administering water rights and begin administering money, fish or otherwise. Counsel for the Ground Water Districts admitted as much during the February 19, 2009, telephonic status conference on this matter when he repeatedly categorized this question as one of "first impression." However, avoiding the law has never been viewed as a question of "first impression". In truth, the Money Plan is nothing more than an attempt to reverse the long-standing principle of water right administration established by the Idaho Constitution and water distribution statutes.

The Director is bound by the authority expressly provided through the statutes. *See* Idaho Code § 42-1805. These statutes demand that the Director and watermaster distribute the ***water*** based on the priorities. *See* Idaho Code § 42-602 ("The director of the department of water resources shall distribute ***water*** in water districts in accordance with the prior appropriation doctrine") (emphasis added); *Id.* § 42-607 ("It shall be the duty of said watermaster to distribute the ***waters*** of the public stream … in order to supply the ***prior rights*** of others") (emphasis added); *State v. Nelson*, 131 Idaho 12, 16 (1997) ("the watermaster is to distribute ***water*** according to the adjudication or decree") (emphasis added).[3] The CM Rules, which were

[3] The Idaho Supreme Court has recognized, both prior to and after statehood, that water must be distributed by priority. *See Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411 (1888) ("the law of this territory is that the first

promulgated pursuant to the Director's authority in Idaho Code section 42-603, affirm this fact. *See* CM Rule 0 ("These rules are promulgated pursuant to ... Section 42-603 ... which provides that the Director ... is authorized to adopt rules and regulations for the distribution of ***water***") (emphasis added); *see also* Idaho Code § 42-603 ("The director ... is authorized to adopt rules and regulations for the distribution of ***water***") (emphasis added). The above governs the Director's and watermaster's duties in "clear and unambiguous terms." *See R. T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). Finally, the Director has a "clear legal duty" to administer ***water rights*** within a water district by priority. *Musser v. Higginson*, 125 Idaho 392, 395 (1994).

Idaho law is devoid of any legal authority authorizing the Director to administer water rights through monetary compensation or the supply of extra fish, wheat, potatoes, cows, or any other form of non-water compensation. The Director cannot stretch his authority outside of the statutory bounds. As such, the Director is without authority to consider the Money Plan.

C. The Constitutional Preference System Does Not Authorize the Taking of One Agricultural Water Right in Favor of Another Agricultural Water Right.

Any attempt to force a senior water user to accept monetary compensation in exchange for water owed to an injured senior water right is tantamount to an unconstitutional taking of a property right. It is indisputable that a water right is a property right. Idaho Code § 55-101. Material injury is defined as the "hindrance to or impact upon the exercise of a water right [i.e. property right] caused by the use of water by another person." CM Rule 10.14. Any non-water

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appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld."); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9 (1944) ("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 5 (2007) ("When the arid regions of the West were initially settled, local custom and usage held that the first appropriator of water for a beneficial use had the better right to the use of the water to the extent of his actual use . . . That custom likewise prevailed among the early settlers in what became the State of Idaho.").

mitigation plan – such as the Money Plan – is nothing more than an unlawful attempt to provide compensation in exchange for the continued material injury, or taking, of a property right. In short, a non-water mitigation plan is nothing more than a request for the Director to effect the condemnation of senior water rights. The law does not allow for such an action, nor does it give the Director any authority to consider such action.

The Constitution does include a "preference" system for "domestic" use in those instances where there is "not sufficient [water] for the service of all those desiring the use of the same." Idaho Const. art. XV, § 3. However, while a domestic purpose has "preference over ... any other purpose," ***agricultural purposes have the same preference.*** *Id.* In addition, exercise of a domestic preference is still qualified as follows:

> [T]he usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

Id. Section 14 of article I provides that "Private property may be taken for **public use**, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." (emphasis added).

These provisions make two things clear. First, all agricultural water uses – whether they be irrigated farm land, ranching operations, dairies or aquaculture facilities – have the same constitutional preference. There is no right for one agricultural water user to seek preference over another agricultural water user in times of shortage. Rather, when water is short, "Priority of appropriations shall give the better right." *Id.* at art. XV, § 3; *see also* Idaho Code § 42-106 ("As between appropriators, the first in time is first in right").

Second, any attempt to exercise a "preference" necessarily involves following the proper condemnation procedure and "the payment of reasonable compensation." *See Parker v.*

Wallentine, 103 Idaho 506, 512. fn.9 (1982). Yet, the Director does not have any authority to preside over such an action. *See* Idaho Code § 42-1805 (listing the Director's authorized "duties"); *see also supra* Part I.B. *Cf.* Idaho Code §§ 7-701, *et seq.* (general condemnation provisions providing, in section 7-706, that "all proceedings under this chapter must be brought in the district court").

Furthermore, "eminent domain shall not be used to acquire private property" as a pretext to "transfer" the "condemned property or any interest in that property to a private party." Idaho Code § 7-701A(2). As such, the senior water right (i.e. a property right) cannot be condemned so that another private party (the GWD members) can continue to pump water for their own private interest.

Since (1) all agricultural water rights have the same constitutional preference, (2) water is to be distributed by priority in times of shortage and (3) the Director does not have any authority to preside over condemnation proceedings, any non-water mitigation plan – such as the Money Plan – cannot be accepted. Finally, should the Director accept a non-water mitigation plan, and seek to unilaterally impose that plan over the objection of a senior water right holder, an unconstitutional taking of private property would occur. Such actions are contrary to law and cannot be allowed.

D. The Director Does Not Have the Authority to Adjudicate a Damages Claim

Although couched as a CM Rule 43 mitigation plan, any non-water mitigation plan – such as the Money Plan – is nothing more than a damages claim in reverse. Yet, the GWD attempt to convince the Director that a mitigation plan – seeking to compensate the holder of a senior water right for material injury to its property interest – is distinguishable from a damages claim – wherein one party seeks compensation for an injury to its property or interests. This

alleged distinction is vital to the GWD claim since, as counsel for the Ground Water District admitted during the February 19, 2009 Status Conference, the Director does not have the authority to adjudicate a damages claim.

The GWD attempt to distinguish a Money Plan from a damages claim is unpersuasive. In either case, the presiding authority is asked to determine the level of injury and to place a monetary value on that injury. For example, in a crop damages case, to which counsel for IGWA frequently compared its Money Plan during the February 19th Status Conference, a farm is generally entitled to "lost profits." *See Casey v. Nampa & Meridian Irr. Dist.*, 85 Idaho 299, 303-04 (1963). In *Casey*, the Court recognized that

> The measure of damages for injury to a growing crop is the difference between the value of the crops actually raised upon the land and the crop which would have been raised upon it under normal conditions for the year in question, less the cost of maturing, harvesting and marketing such additional portion of the crop – the difference in value between the probable yield and the actual yield, less the probable cost of placing the additional crop in a marketable condition and marketing it.

Id. at 804. This is consistent with the GWD efforts to value only the lost profits suffered by Clear Springs based on price per pound less labor, marketing and other costs. *See* Money Plan at 6-7. Admittedly, the Money Plan does not value Clear Springs' water rights, and the result of a permanent taking of that property right interest. Instead, only "lost profits", or an arbitrary net value in lost fish production, is offered.

The fatal flaw in such a mitigation scheme, however, is the attempt to equate a water users' interest in a decreed water right – a statutorily recognized property right, Idaho Code § 55-101 – with a farmer's interest in a particular year's crops. In light of the specific constitutional protections afforded a decreed water rights, *see supra*, such a comparison is without merit.

Furthermore, attempting to equate damage to a senior water right with damage to a crop fails to recognize the entire and actual injury that is suffered by the holder of a senior water right. For example, in a crop claim, the question before the court revolves around the value of a particular year's crop – generally one crop per parcel of land. To the contrary, an aquaculture facility, such as Snake River Farm, operates year round and uses and reuses the water for multiple purposes, in research facilities and raceways.[4] At any given time, Snake River Farm will have fish ranging from infants to those fully grown and ready for harvest. These fish are spread throughout the facility – from the research center to the last raceway. As such, it would be nearly impossible to identify and isolate one particular use, let alone "crop", from which to base monetary damages.

Additionally, fish need water and less water results in fewer fish. Less water impacts research operations – thus impacting competitive advantage. Fewer fish will result in lost business opportunities and loss of market share. In short, the GWD attempt to minimize and isolate the injury suffered by Clear Springs, by limiting the proposed damages to "lost profits" only, as is generally done in a crop loss case, does not reflect the true injury to Clear Springs' water rights suffered by depletions to the spring source. As such, the Money Plan cannot stand.

II. Consideration of a Non-Water Mitigation Plan That is Not Accepted by the Holder of the Senior Water Rights Would Prejudice that Water User

Should the Director determine that he does have authority to *consider* a non-water mitigation plan not agreed to by a senior, consideration of that plan would prejudice the holder of the senior water right. The Director has long recognized that he does not have the authority to compel acceptance of a non-water mitigation plan without a senior's consent. In addition, non-

[4] This "reuse" is not the same as the Ground Water District's proposed pump back mitigation scheme that was dismissed by the Director. Clear Springs provided expert reports to explain why the pump back proposal would not properly mitigate injury to the water right.

water mitigation plans are inconsistent with the SRBA's interim management orders and the Director's orders in the Spring Users call proceedings. As such, the Director should not consider any non-water mitigation plan that is not "approved" by the holder of the senior water right. To do so would unnecessarily force the senior water user to expend a significant amount of time and money in challenging the non-water mitigation plan, leaving the injury to the water right to continue.[5]

A. The Director Only Has the Authority Provided in Law, Which Does not Grant Any Authority to Mandate Acceptance of Monetary Compensation

The Director may only conduct "duties prescribed by law." *See* Idaho Code § 42-1805. This includes the authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department." *Id.* at § 42-1805(8). The law is devoid, however, of any authority to mandate acceptance of a non-water mitigation plan. In fact, the Director previously testified to this fact and limitation upon IDWR in the SRBA.

During the Facility Volume proceedings, the SRBA Court was asked to determine whether it was appropriate to include a "facility volume" remark on an aquaculture water right. One justification for the remark, proffered by the Department, was that it "helps to 'define the extent of beneficial use' for purposes of mitigation in time of water shortage." *Facility Volume Order* at 13-14.

[5] Considering a non-water mitigation plan that is not approved by the senior water user would create a situation ripe for abuse. For example, in the proceedings on the *First Amended Mitigation Plan*, Clear Springs protested the plan and prepared for hearing by submitting expert reports and rebuttal reports. In addition, various motions were submitted and argued before the Hearing Officer. In short, significant time and resources were spent preparing for the hearing. Yet, in the eleventh hour (***after*** all the time and money had been spent by Clear Springs), the GWD unexpectedly withdrew the first amended mitigation plan. Similar prejudice would occur should the Director consider an unapproved non-water mitigation plan – thus forcing Clear Springs to participate – and then face the prospect that the GWD may withdraw that plan as well.

Director Tuthill, then the Department's SRBA Bureau Chief, was asked about this during a deposition. During that discussion, Director Tuthill made the following admission regarding the Department's lack of authority to compel acceptance of a mitigation plan:

> Q. Isn't it true that the Department has not made a rule yet that says you could impose mitigation involuntarily?
>
> A. Mitigation is one alternative solution to a water dispute. As far as it being a mandatory solution, I'm not aware that it is that, but it is an alternative that exists as a solution.
>
> Q. So the Department has – there are no rules in this state which allow the Department or purpose to allow the Department to impose mitigation as opposed to delivery of water?
>
> A. In position of mitigation, perhaps not, but mitigation as an alternative for problem solving is considered to be an acceptable alternative.
>
> Q. I'm not sure what the answer was. There is no rule in Idaho, there's no law in Idaho, to your knowledge, that says the Department can impose mitigation on a fish producer who is not receiving his water?
>
> A. I'm not aware of a rule about imposing mitigation; however, in response to a call, mitigation is one of the alternative solutions, perhaps not the imposed solution, but it is a solution.
>
> Q. Again, you don't know if it's a Constitutional solution?
>
> A. **Solutions that are acceptable to the two parties** may not go through a Constitutional challenge.
>
> Q. But the Constitution says you can't deny the fish propagator his right to water that has been diverted and put to beneficial use; right?
>
> A. The Constitution provides for first in time is first in right, so there are Constitutional protections to senior water users.

Tuthill Depo. at 37-39 (emphasis added) (Ex. B to *Arrington Aff.*).

Following a trial, Special Master Haemmerle issued *Findings of Fact & Conclusions of Law*. There, the Special Master recognized:

> The stated purpose of including facility volume was to define the extent of beneficial use in terms of fish production. IDWR believes this to be important for purposes of mitigation. In other words, if the Claimant made a call on junior water users, the junior users could offer money for lost fish production instead of delivery water. There is no question that water users may engage in mitigation between themselves in lieu of performing its duty to deliver water should a senior user make a call. The right of water users to have ***water*** delivered "first in time, first in right" is constitutionally guaranteed. Idaho Cons., art. VX (sic), § 3; *in Re SRBA Case No. 39576*, 125 Idaho 392, 871 P.2d 809 (1994). ***Since IDWR has no authority to force mitigation***, it is not necessary to include facility volume for purposes of water administration. Even if IDWR could force mitigation, as previously indicated, there is no rational relationship between facility volume and fish production.

Arrington Aff. Exhibit C at 7 (emphasis added).

Presiding Judge Wood subsequently confirmed the Special Master's opinion in the *Facility Volume Order, supra.*

> [S]ince 1997 IDWR has asserted that a facility volume remark helps to "define the extent of beneficial use" for purposes of mitigation in time of water shortage. In other words, if a senior fish propagator made a water delivery call on junior water users, the junior users could offer mitigation in the form of money instead of ceasing their use of the called water. However, while mitigation may be voluntarily exercised between private parties, ***IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call.*** The right of senior water right holders to have water delivered "first in time, first in right" is constitutionally protected. Idaho Constitution, art. VX. (sic) § 3. Therefore, ***since IDWR has no authority to compel mitigation***, this cannot serve as a legal basis for the inclusion of a facility volume remark.

Facility Volume Order at 13-14 (emphasis added).

Through these holdings and *Orders*, the Department recognized, and the SRBA Court affirmed, that the Director's statutory authority does not allow Director to compel acceptance of any non-water mitigation plan – including the Money Plan.[6] Such district court authority and

[6] Applicants to the Money Plan were parties to the Facility Volume Order and as such are bound by the decision as well. Failure to recognize the *res judicata* effect of those prior decisions, raises questions of merit and basis for the filing of the Money Plan in the first place requiring further consideration.

precedent is binding upon IDWR now. Accordingly, absent a senior's consent and approval, the Director has no basis to consider such a plan.

B. The Money Plan is Inconsistent with the SRBA Court's Interim Administration Orders

In late 2001, the State of Idaho sought approval for interim administration of recommended and decreed ground water rights in Basins 35, 36, 41, and 43 (areas now covered by Water Districts 120 and 130). In authorizing the State's request, the SRBA Court found:

> 2. The available water supply in all or portions of Administrative Basins 35, 36, 41, and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.
>
> * * *
>
> 1. Interim administration in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1 ***in accordance with the Director's Reports and the partial decrees for water rights is reasonably necessary*** to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.
>
> * * *
>
> The State of Idaho's *Motion for Interim Administration* is hereby GRANTED. Pursuant to Idaho Code § 42-1417, ***the Court authorizes distribution of water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and the partial decrees*** that have superseded the Director's Reports, in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1.

Order Granting State's Motion at 2 (emphasis added) (Ex. D to *Arrington Aff.*).

Responding to the *Order*, the Director issued two orders creating Water Districts 120 and 130, on February 18, 2002. In the Water District 130 order the Director specifically determined:

> 6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing ***the interim administration of water rights*** pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district ***to administer water rights*** within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on

the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

8. ***The Director concludes that immediate administration of water rights***, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), ***pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights***.

Water District 130 Order at 5, 6 (emphasis added) (Ex. E to *Arrington Aff.*).

Approval of a non-water mitigation plan – such as the Money Plan – is inconsistent with the SRBA Court's *Order Granting State's Motion* – which authorized the Director to administer "water rights" and distribute "water." Nothing in the SRBA Court's order, or the Director's order creating Water District 130, authorize the Director to consider distributing monetary compensation instead of "water" for purposes of administration.

C. The Money Plan is Contrary to the Mitigation Requirements in the Orders Issued in the Springs Users' Call Proceedings.

In the *Order*, dated May 19, 2005, *In the Matter of Distribution of Water to Water Rights Nos. 36-2356A, 36-7210 and 36-7427*, the Director provided the holders of junior priority ground water rights with three options for mitigating the material injury and avoiding involuntary curtailment. According to that *Order*, at pages 28-29, the water users could either (i) "provide mitigation by offsetting the entirety of the depletion," (ii) "conversions from ground water irrigation to surface water irrigation," or (iii) "substitute curtailment" – i.e. voluntarily "forego (curtail) consumptive uses." These mitigation alternatives were subsequently applied by the Director in the Clear Springs call proceedings. *See Order Approving IGWA's 2005 Substitute Curtailments (Clear Springs Call, Snake River Farm)* (April 29, 2006).

Importantly, the Director has issued a *Final Order* in that matter and the parties have appealed to the District Court. Yet, the Ground Water Districts, all parties to those proceedings, did not challenge this limitation provided in the Director's *Orders*. Rather, the Ground Water Districts proceeded to submit "Substitute Curtailment Plans" and "Replacement Water Plans," in accordance with the *Orders*. They cannot now, after failing to challenge those decisions, seek to attack the Director's *Orders* (including the ordered alternatives to curtailment).

In short, the GWD are barred from proposing any other form of mitigation – such as the Money Plan – that is inconsistent with the options offered in the prior orders. Indeed, the GWD, as parties to the prior case, are bound by these decisions and barred, by *res judicata*, from submitting the Money Plan. *Res judicata* bars litigation where:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Waller v. State, Dept. of Health and Welfare, 192 P.3d 1058 (2008). *Res Judicata* applies to administrative decisions. *See J&J Contractors/O.T. Davis Const. v. Idaho*, 118 Idaho 535, 537, 797 P.2d 1383, 1385 (1990). The Idaho Supreme Court succinctly explained the "fundamental purposes" for the rule in *Ticor Title Co. v. Stanion, II*, 144 Idaho 119, 157 P.3d 613, 617 (2007):

> The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel) ... Separate tests are used to determine whether claim preclusion or issue preclusion applies. *Res judicata* serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims.

157 P.3d at 617 (2007) (internal citations omitted); *see also D.A.R, Inc. v. Sheffer*, 134 Idaho 141, 144-45 (2000).

Res judicata bars non-water mitigation plans in these proceedings. The Ground Water Districts were parties to the Spring Users' call proceedings and had the opportunity to challenge the mitigation alternatives provided by the Director's prior orders. The GWD failed to make any such challenge. Now, the Director's decision is final and on appeal to the District Court. Accordingly, the Money Plan cannot stand.[7]

III. Water Users Are Still Free to Negotiate A Form of Mitigation – Even if it Does Not Comply with the Requirements of the CM Rules.

In the *Facility Volume Order*, at 14, the SRBA Court recognized that, while the Director cannot force mitigation on the holder of a senior water right, "mitigation may be voluntarily exercised between private parties." In fact, "the junior users could offer mitigation in the form of money instead of ceasing their use of the called water." *Id.* In other words, a ruling by the Director, recognizing the lack of authority to compel acceptance of monetary mitigation, does not foreclose the ability of the water right holders – senior and junior – to negotiate an agreeable form of mitigation for the material injury. Such negotiations could be outside of the parameters of the CM Rules.

In addition, the CM Rules authorize the Director to approve a ***negotiated settlement*** agreement "even though such plan may not otherwise be fully in compliance with these provisions." CM Rules 43.03(o). In other words, the Director could approve a non-water mitigation plan so long as the parties agreed to its terms. This in fact occurred during the 2001-

[7] In addition, the Director is without authority to change the *Final Order* when it is on appeal to the District Court. The effectiveness of the *Final Order* has not been stayed by the District Court or the Director. *See* Idaho Rule Civ. P. 84(m) (stay of decision on appeal is not automatic but must be entered by agency or "reviewing court"). Furthermore, while the Director retains jurisdiction to enforce the "action of an agency that is subject to the" appeal, *id.*, the Director is specifically prohibited from modifying or amending the *Final Order*, IDAPA 37.01.01.760 ("The agency head may modify or amend a final order ... at any time before notice of appeal to District Court has been filed").

2003 timeframe when the parties negotiated and implemented the Interim Stipulated Agreement. Under such an agreement, the watermaster could keep records of "other compensation" in this context as well. Such a reading of the Rules is consistent with this provision.

IV. The Ground Water Districts' First Amended Mitigation Plan Should be Dismissed With Prejudice.

During the February 19, 2009 Status Conference Clear Springs inquired of the Director of the Department's view of the Ground Water District's recent notice of withdrawal of the *First Amended Mitigation Plan.* This issue was raised in light of the CM Rules not providing guidance as to how and when a mitigation plan may be withdrawn. The procedural facts are not in dispute. The *First Amended Mitigation Plan* was filed in the Summer of 2008. The Director held a Status Conference in September and ordered a hearing to be held in February of 2009. Because of the unavailability of an expert witness, the hearing was delayed until March 9, 2009. The Director was very clear that this mitigation plan must be heard and ruled upon prior to the 2009 irrigation season. Following the exchange of initial expert reports, Clear Springs filed rebuttal reports on February 17, 2009 pursuant to the parties' and Director's agreed to schedule. On the same day the Groundwater Districts filed a notice of withdrawal of the Plan. Considerable time and resources were spent responding to the various alternatives identified in the Plan. Further, while Clear Springs opposed such Plan, it also sought a ruling on the merits and sufficiency of each proposed alternative. The CM Rules do not address the procedural process or limitations when a Plan is withdrawn. Perhaps it was envisioned that if Plans were filed in good faith and upon sound foundation, the resources of the parties would be well spent in arriving at a final resolution.

However, when an applicant proposes to withdraw a plan, after protests have been filed, guidance for allowing that to occur, and upon what terms and conditions, can be found in the Idaho Rules of Civil Procedure:

> Rule 41(a)(2). Dismissal by order of court.
>
> > Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The Rule prevents a plaintiff from withdrawing a lawsuit after an answer has been filed. The Idaho Supreme Court has confirmed that it is improper to grant a unilateral dismissal after an answer has been filed. *See Parkside Schools Inc. v. Bronco Elite Arts & Athletics, LLC*, 145 Idaho 176 (2008). In the event a dismissal is sought, it must be upon such "terms and conditions" as the court deems proper.

In this case, the *First Amended Mitigation Plan* (and its accompanying applications for permit and transfer) serve as the initial filing. Clear Springs' protests were akin to answers and they have requested a decision on the Plan on its merits (similar to a counterclaim). Once the case was at issue, the GWD should not have the ability to unilaterally withdraw their applications, particularly on the eve of hearing. The Department has jurisdiction over mitigation plans filed and therefore, has the authority to allow dismissal (or withdrawal) upon such terms and conditions that are warranted by the facts and circumstances.

Here, both Clear Springs and the Department have spent considerable time, resources, and effort responding to the various alternatives in the *First Amended Mitigation Plan* and the associated motions. The proceeding was moving towards a hearing in the immediate future for a

resolution on the merits. At the last moment the Ground Water Districts, on their own volition, decided to dismiss their Plan. To allow such action without conditions is without merit and equity. Simply speaking it would allow a party to discover the opposing party's position and basis, then simply re-file at some later date.

At a minimum, equity and justice demand that the Plan and the alternatives contained therein be dismissed "with prejudice", so that the notice of withdrawal would constitute a final resolution of the matters contained therein. To allow an alternative precedent would lay the foundation for mischief by applicants. The Ground Water Districts' sole foundation for withdrawing the Plan was statements by counsel that the contents of the Plan were unacceptable to Clear Springs. Whether or not that is sufficient basis is beyond the scope of this issue. However, if true, then the Ground Water Districts should have no issue with an ordered dismissal of the first plan with prejudice.

REQUEST FOR BRIEFING SCHEDULE

Should the Director determine that he does have authority to consider the Ground Water District's Money Plan, then Clear Springs requests a briefing schedule on a *Motion to Dismiss* the Money Plan due to the fact that it is untimely, consistent with Director's November 26, 2008, *Order on Pre-Hearing Motions & Amending Schedule.*

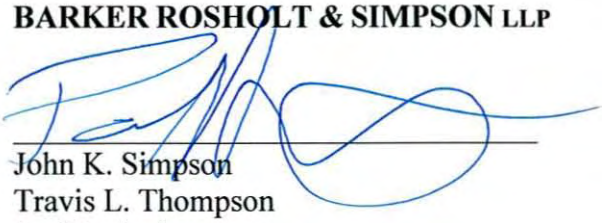
CONCLUSION

The Director does not have any authority to consider a non-water mitigation plan – such as the Money Plan – where the holder of the senior water right does not approve of such a plan. Any such attempt would result in an unconstitutional taking of a vested property right.

Accordingly, any plan that seeks to force non-water mitigation on a senior water right holder – such as the Money Plan – must be dismissed.[8]

DATED this 2nd day of March, 2009.

BARKER ROSHOLT & SIMPSON LLP



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[8] Clear Springs incorporated by reference, the Surface Water Coalition's *Memorandum Regarding IDWR's Lack of Authority to Order a Junior Water Right Holder to Pay "Money" Instead of Deliverying "Water" to an Injured Senior Surface Water Right*, filed on March 2, 2009, in these proceedings.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2009, I served a true and correct copy of the foregoing **CLEAR SPRINGS FOODS, INC.'S BRIEFING ON THE DIRECTOR'S AUTHORITY TO APPROVE A MITIGATION PLAN FOR MONETARY COMPENSATION**, by depositing same in the United States mail, postage prepaid, addressed to the following:

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