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, AND 36-07148 (SNAKE RIVER FARM)

IDAHOM DAIYMEN ASSOCIATION'S RESPONSE TO MARCH 5, 2009 FINAL ORDER AND NOTICE OF CURTAILMENT

The Idaho Dairymen's Association ("IDA"), through its counsel Givens Pursley LLP, hereby responds to the Idaho Department of Water Resources' 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; and Notice of Curtailment issued in the above-captioned matter ("March 5 Order"). IDA’s Response is provided to confirm those IDA members who are "Participating Dairymen” in the Mitigation Agreement entered into between the IDA, the Surface Water Coalition ("SWC"), Clear Springs Foods, and the Thousand Springs Water Users Association (collectively "Spring Users"), and to identify the actions the Idaho Dairy Water and Land Trust ("IDWLT") intends to take during 2009 in furtherance of the Mitigation Agreement on behalf of its Participating Dairymen.

BACKGROUND

On January 5, 2008, IDA, the SWC and the Spring Users filed with the Department a Mitigation Agreement by which the IDA proposed to undertake certain actions to offset the depletions to the ESPA attributable to the commercial and stockwater diversions of Idaho dairymen who agreed to be "Mitigating Dairymen” under the Mitigation Agreement (hereafter "Mitigating Dairymen” or "Participating Dairymen"). In the Mitigation Agreement, the parties stipulated that the basis for calculating the depletion would be 29.1 gallons per day ("gpd") per each mature, lactating dairy cow on a participating dairy. Among other things, the Mitigation Agreement also provided that IDA, through the IDWLT, would either arrange for the dry-up of sufficient acres of ground water-irrigated lands on the Eastern Snake River Plain to offset the diary depletions or acquire sufficient water to be used for aquifer recharge in areas above the rim of the several Thousand Springs reaches, so as to optimize the potential benefits to spring discharges in those several reaches. Where aquifer recharge was to be used, IDA is required to seek an appropriate quantity of storage water through the Water District 01 rental pool. The North Side Canal Company ("NSCC") has agreed that if water is not otherwise available to IDWLT from the rental pool, NSCC will make the requested water available to IDWLT from its...
own storage supply and will make its canal system available to deliver water for recharge in 
furtherance of the Mitigation Agreement.

In 2007, in response to the Department’s June 15, 2007 Orders in the Blue Lakes and 
Clear Springs delivery call matters, IDWLT proposed to provide water for aquifer recharge 
through the NSCC system for those IDA members who had indicated their intent to be 
Participating Dairymen under the Mitigation Agreement and that were within the curtailment 
area defined by the June 15, 2007 Orders. Based on the total signatures obtained by the IDA as 
of July 6, 2007 and Idaho State Department of Agriculture ("ISDA") dairy census data, the total 
number of mature dairy cows represented by Participating Dairymen was 174,310. At 29.1 gpd, 
this equated to a total aggregate depletion (and 2007 replacement water requirement under the 
Mitigation Agreement) of 5,681.85 acre-feet. This included mitigation for certain commercial 
and stockwater rights that were within the curtailment area, but were not subject to curtailment 
under the June 15, 2007 Orders due to their priority dates. Dairymen who agreed in 2007 to be 
assessed by IDWLT for its administrative costs and its costs of obtaining water for recharge 
were deemed to be “participating in mitigation.” Most dairymen whose commercial and 
stockwater rights were senior to the calling spring rights opted to be “participating in 
administration costs,” with the understanding that if their rights were subsequently impacted by a 
curtailment order, they could then opt to participate in mitigation.¹ The priority date of the 
operative call affecting IDA members was the Blue Lakes1974 right.

¹ As of December 4, 2007, thirty-four dairies, holding 77,915 cows, had elected to participate in administrative 
costs only. Sixty-nine facilities, holding 104,555 cows, were participating in mitigation and administrative costs.
On January 11, 2008, Clear Springs Foods, IDA and IDWR entered into a Stipulation and Agreement Regarding Certain Dairy Ground Water Use ("Stipulation"). Under the Stipulation, the parties agreed that IDA’s implementation of the Mitigation Agreement, as written, would constitute an approved mitigation plan for the Participating Dairymen through December 31, 2010. Among other things, IDWR agreed in the Stipulation to provide the Mitigating Dairymen credit, as carryover mitigation applicable to future years or otherwise, for that amount of replacement water in excess of 5,682 acre-feet of water that IDA provided as mitigation or replacement in 2007. IDA provided 9,500 acre-feet of replacement water as aquifer recharge through the NSCC system in October of 2007.

In 2008, the depletions attributable to Participating Dairymen’s commercial and stockwater rights were deemed by IDWR to be fully mitigated by the approved 2008 mitigation/replacement water plans implemented by the North Snake Ground Water District and the Magic Valley Ground Water District and by IDWLT’s 2007 recharge efforts.

**IDWLT 2009 IMPLEMENTATION OF THE MITIGATION AGREEMENT**

IDWLT intends to implement aquifer recharge of 3,687 acre-feet of storage water through the NSCC system in 2009 to provide mitigation contemplated by the Mitigation Agreement. The basis for the quantity of water proposed is described below.

IDWR’s March 5 Order would impose curtailment on ground water rights with priority dates junior to November 16, 1972. Thus, it implicates more commercial and stockwater rights of IDA members and 52,710 additional cows than the June 15, 2007 Order. Attached as

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2 Attached to the Stipulation was a full copy of the Mitigation Agreement, to which was appended the signature pages for each of the Participating Dairymen indicating whether they were participating in mitigation or only in administrative costs.

3 Participating Dairymen under the Mitigation Agreement also are assessed members of one or the other of these two ground water districts.
Exhibit A is a list showing those commercial and stockwater rights belonging to Participating Dairymen that were affected by IDWR’s 2007 curtailment order and those additional rights affected by the March 5 Order. Attached as Exhibit B is a list of the dairymen who participated for administrative purposes only in 2007, and the number of cows on their facilities that were not implicated by the June 15, 2007 curtailment order. Each of the listed water rights in Exhibit A are held by dairymen who, for purposes of IDWLT’s 2009 mitigation, will be Mitigating Dairymen (i.e., participating in mitigation for their implicated rights and in IDWLT’s 2009 administrative costs).

Exhibit A also provides March 2009 ISDA counts of the number of cows on each of the affected dairies. This “census” shows that the total number of cows on Participating Dairymen’s facilities has increased by approximately 2,000 head since 2007. Exhibit A also calculates the total number of acre-feet of depletion per dairy based on the 29.1 gpd/cow depletion established by the Mitigation Agreement and the Stipulation. For the 176,354 head on participating dairies, this amounts to 5,748.9 (5,749) acre-feet of 2009 depletion.

IDWLT intends to acquire 3,687 acre-feet of storage from the WD 01 rental pool (or from NSCC if not available from the rental pool) to deliver to late-season aquifer recharge to offset the 5,749 acre-feet of 2009 depletion attributable to Participating Dairymen’s dairy cows. In arriving at this number, IDWLT has assumed that it is entitled to a credit of 2,062 acre-feet of water from its 2007 recharge effort to be applied to the 2009 mitigation. Under the Stipulation, at 29.1 gpd per cow, IDWLT was obligated to provide 5,682 acre-feet of water to recharge in 2007. It provided 9,500 acre-feet, or 3,818 acre-feet more than required. The ESPAM indicates that in year two (2009), fifty-four percent of the 9,500 acre-feet water recharged in 2007 remains in storage in the aquifer and is contributing to reach gains in the calling reaches. As a result,
fifty-four percent of the 3,818 acre-feet of excess from the 2007 mitigation—or 2,062 acre-feet—remains in aquifer storage in 2009. Taking credit for the 2,062 acre-feet already in storage, IDWLT will recharge an additional 3,687 acre-feet in 2009.

IDA, on behalf of IDWLT and its Participating Members, has submitted a request to Lyle Swank to rent up to 5,749 acre-feet from the WD 01 rental pool. A copy of this request is attached as Exhibit C. Neither IDA nor IDWLT are proposing to provide the full 5,749 for recharge in 2009. The amount requested is for the full amount of the Participating Dairymen’s calculated depletions, solely as a contingency to confirmation of the credit IDA/IDWLT are claiming for the 2007 overage in recharge, for additional model analysis affecting the timing or distribution of recharge benefits, and subject to IDA’s opportunity to confirm the results of the ESPAM analysis concerning the percent of 2007 recharge remaining in aquifer storage.

IDA and IDWLT have begun discussions with the NSCC concerning the intended 2009 recharge efforts and intend to fully coordinate with NSCC to minimize or mitigate any operational issues that recharge through its system may impose, and discussions with IDWR and other Mitigation Agreement signatories concerning the nature and timing of its 2009 mitigation efforts. Given NSCC concerns, the potential differences between benefits to target reaches achievable through early-season and late-season recharge, and the time remaining before an accounting of water available in reservoir storage for 2009, IDA assumes its recharge effort will be post-irrigation season.

IDA is prepared to provide additional information as may be requested by IDWR.
DATED this 12th day of March, 2009.

GIVENS PURSLEY LLP

BY: [Signature]

Michael C. Creamer
Attorneys for Idaho Dairymen Association
CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2009, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

FIELDED:

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Director
Idaho Department of Water Resources
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Boise, ID 83720-0098

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Hagerman, ID 83332

U.S. Mail, postage prepaid
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Hand Delivery
Facsimile
Electronic Mail

To Michael C. Creamer

[Signature]
null
Environ INC (non operating dairy) 36-796 1/9/1981 - 0.0 AFA
Equity (livestock credit corp (ottencourt hofers/roys) 36-14898 12/31/1983 - 0.0 AFA
Equity (livestock credit corp (ottencourt hofers/roys) 36-14895 3/25/1974 - 0.0 AFA
G & G Danfey/M & P Dairy; Giffin, Bill; Giffith, Mike 36-164834 12/17/1979 - 0.0 AFA
Garcia, Jose J; Garcia, Mary (non operating dairy) 37-12628 9/25/1979 - 0.0 AFA
Garcia, Jose J; Garcia, Mary (non operating dairy) 36-14898 3/25/1974 575 18.7 AFA
Goedhart Dairy (non operating dairy) 36-8774 3/10/1998 - 0.0 AFA
Goedhart Dairy (non operating dairy) 36-7460AG 3/25/1974 - 0.0 AFA

2009 Mature Animal Totals: 52,715 1718.3 AFA
2007 & 2009 Combined Mature Animal Totals: 176,354 5,748.0 AFA
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<td><strong>77,915</strong></td>
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March 12, 2009

Lyle Swank
Idaho Department of Water Resources
Eastern Regional Office
900 North Skyline Drive
Idaho Falls, ID 83402-6105

Re: Water Bank Rental Request
Our File No. 7283-3

Dear Lyle,

I am writing this letter on behalf of Idaho Dairymen Association ("IDA") requesting that the IDA be able to rent up to 5,749 acre feet of water from the Water District 01 Rental Pool for 2009. The IDA is prepared to pay the going rental rate and administrative fees upon your confirmation of availability. This water would be used for mitigation for participating dairymen under the approved mitigation plan for 2009.

The total quantity not to exceed 5,749 will be contingent on the Idaho Department of Water Resources' approval of the IDA's March 12th mitigation proposal.

I look forward to hearing from you soon.

Sincerely,

Michael C. Creamer

MCC:ch
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