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ATTORNEYS FOR THE GROUND WATER DISTRICTS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-4013A, 36-40103B and 36-7148 (Snake River Farm) IN THE MATTER OF THE THIRD MITIGATION PLAN (OVER-THE-RIM) OF THE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS TO PROVIDE REPLACEMENT WATER FOR CLEAR SPRINGS SNAKE RIVER FARM (Water District Nos. 130 and 140)	Docket No. CM-MP-2009-004 **GROUND WATER DISTRICTS' RESPONSE TO CLEAR SPRINGS FOODS' HEARING MEMORANDUM** **(Over-the-Rim Mitigation Plan)**

North Snake Ground Water District and Magic Valley Ground Water District, acting for and on behalf of their members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities (collectively, the "Ground Water Districts"), submit this reply to *Clear Springs Foods, Inc.'s Post-Hearing Memorandum* ("*Memorandum*") in the above-captioned matter.

INTRODUCTION

The Ground Water Districts agree with one point made by Clear Springs in its

Memorandum: that the Hearing Officer at the August status conference determined that the mitigation hearing would be staged, and that the first stage would be a determination of "[w]hether the proposal for over-the-rim delivery is an acceptable method to mitigate the obligation of the junior ground water users." (*Memorandum* 4, emphasis added).

At the conclusion of the December evidentiary hearing on the Ground Water Districts' proposed "over-the-rim" mitigation plan ("OTR Plan" or "Plan")), the Hearing Officer requested answers to six specific issues, listed on pages 5 and 6 of the *Ground Water Districts' Post-Hearing Brief* ("*Post Hearing Brief*"). Surprisingly, Clear Springs' *Memorandum* does not address these issues in a discrete form, and it is unclear which arguments presented in its Memorandum address which issues.

DISCUSSION

The Ground Water Districts request that the OTR Plan be approved prior to actual implementation of the activities proposed under the Plan. While Clear Springs agrees that the purpose of the December hearing was to determine whether or not pumping wells and delivering the water via pipeline to Clear Springs was an acceptable mitigation method, Clear Springs argues in its *Memorandum* that the OTR Plan should not be approved because certain actions necessary to implement the plan, such as water right transfers, have not been completed. Clear Springs asks the Hearing Officer to require the Ground Water Districts to spend tens of thousands or even hundreds of thousands of dollars on implementation activities without knowing whether the OTR Plan is even approvable in concept. Clear Springs' argument is entirely impractical.

The Ground Water Districts proved, through reliable, competent evidence that the OTR Plan provides the quantity and quality of water in a manner and at a time and location that allows

Clear Springs to raise more fish.[1] Yet, Clear Springs still protests and is unwilling to accept the water, even if the OTR Plan is approved and built, because the water will be delivered through a pipeline rather than be emitted from a spring (though Clear Springs admits it's the same water). Instead, Clear Springs demands nothing less than widespread, wholesale curtailment.

In submitting their evidence and testimony, the Ground Water Districts responded to all of the known objections of Clear Springs and sufficiently demonstrated a) that the OTR Plan provides the quantity of water required under current orders to meet the Ground Water Districts' mitigation obligations, b) that the quality of water found in the OTR Plan wells is suitable to raise Rainbow Trout, and c) that the pipeline and delivery system can be engineered and designed in a manner to reliably provide the water to Clear Springs' springs collection site. Remarkably, Clear Springs' own experts and witnesses agree. Dr. Brockway agreed the plan can be constructed to deliver water to Clear Springs' collection site.[2] Mr. Cope agreed that the quality of water would raise trout of similar size, type and quality that is currently produced by Clear Springs.[3] Dr. MacMillan agreed that the temperature of the water provided by the OTR Plan wells was no longer a concern.[4]

The evidence in the record clearly shows that the OTR Plan will provide Clear Springs with water during the times of low-flow, which is the period of time that Clear Springs bases its fish stocking decision on.[5] And, that this quantity of water will be available, not only during the

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1 Joint Direct Testimony at 15.

2 Brockway Testimony, Tr. Vol. II at p. 319:21-22.

3 Cope Testimony, Tr. Vol. II, p. 343, L. 15-22.

4 Exhibit 2026, MacMillan Deposition, p. 160, L. 22 – p. 161, L. 15; Hearing Tr. Vol. II, p. 393, L. 15-17; MacMillan Expert Report p. 34, L. 978-980.

5 Exhibit 2407 at 3-4, Exhibits 2410-2412. Brendecke Testimony, Tr. Vol. I, p. 101, L. 21 – p. 102, L. 10.

months of lowest flow, but throughout the entire year. The bottom line is that the OTR Plan provides water to Clear Springs that it can actually use to raise more fish.[6] This is something that even mass curtailment cannot guarantee. Still, Clear Springs protests and asserts that it will not take the water. Without saying it directly, Clear Springs is insisting on curtailment as the only option to fully address material injury to its water rights.

ARGUMENT

Clear Springs' *Memorandum* urges the hearing officer to deny the OTR Plan for three primary reasons, all of which are without merit and contrary to the factual basis in the record. Clear Springs' arguments are:

1. The OTR Plan does not meet the requirements of the Conjunctive Management Rules because it does not provide a final analysis on how the operation might impact existing water rights, because the pipeline design is only 50% complete, and there is no final well location and pumping operation. (*Memorandum* 7-18.)

2. The OTR Plan does not provide water "in kind, in time, and in place" because the water provided by the mitigation plan is not of "[e]qual utility – in time, and in place as would have resulted from curtailment." (*Memorandum* 6, 19-25.) Clear Springs argues that the pumped water is not of "equal utility" even though the well water originates from the same Eastern Snake Plain Aquifer source that Clear Springs draws its spring water and the evidence shows it is suitable to raise fish of the same type, size and quality as they currently raise.

3. Finally, Clear Springs argues that its marketing decisions should trump the ability of junior groundwater users to maximize beneficial water use by supplying mitigation water in the least wasteful manner. (*Memorandum* 27-29.)

1. Approval Of The OTR Plan Does Not Require That All Final Requirements To Implement The Plan Be Completed And Meets The CM Rule Requirements.

Many of the arguments asserted by Clear Springs regarding the finality of design, pumping regimen, operation plan, and injury to existing water rights have already been

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6 Brendecke Testimony, Tr. Vol. I at p. 89, L. 23 – p. 91, L. 15.

addressed in the Ground Water Districts' *Post Hearing Brief*, where the Ground Water Districts point out that approval of the OTR Plan meets the CM Rule requirements and can be conditioned in a manner that requires an approved transfer and other reasonable engineering requirements before the proposal is actually implemented. (*Post-Hearing Brief* 16-19.) The requirement to secure an approved water rights transfer would answer the question on how the operation of the OTR Plan may injure other water rights, if at all, and whether mitigation for any injury is required. Final pumping and operation regimes will be set forth in alternate transfer applications as testified to by Mr. Scanlan, hopefully with the help and collaboration of Clear Springs should the OTR Plan method be approved.[7] Clear Springs also claims that because the OTR Plan pipeline design is only 50% complete, that the Districts have failed to meet their burden to prove a workable mitigation plan. (*Memorandum* 8-10.) However, while some of the engineering designs and plans were only 50% complete, other details were close to 100% complete and construction was ready to begin back in April, 2009, prior to the Stay Order.[8] Furthermore, Mr. Scanlan testified that his company had the expertise, ability and plan to actually begin construction in a very quick timeframe once the OTR Plan was approved.[9]

a. The Water Supply Is Sufficiently Reliable.

Clear Springs claims that the Ground Water Districts have not provided a reliable water supply as part of the Plan. However, as the Districts pointed out in their *Post-Hearing Brief*, there are several sources for water proposed for use under the Plan. First, there are several wells and water rights that provide water for the Plan and that can be interchanged and combined as

7 Scanlan Testimony, Tr. Vol. II, p. 279, L. 11 – p. 280, L. 6.

8 Scanlan Testimony, Tr. Vol. II. P. 276, L. 5 – p. 277, L. 21; Hardgrove Testimony, Tr. Vol. I, p. 122, L. 12-19, p. 125, L. 12-21.

9 Id.

necessary to provide a reliable water supply. In addition, the amount of water available from the wells in the OTR Plan is greater than the amount actually needed to satisfy the shortage to Clear Springs. Therefore, if one well needs repair, another well can take its place to provide the full supply of mitigation water. Furthermore, the Ground Water Districts have secured surface water in order to supply water to the land that has historically been irrigated from the wells used under the OTR Plan. The contracts with the irrigators state that the farmer cannot terminate the agreement and turn on their wells until after the irrigation season, providing the Ground Water Districts time throughout the winter months to secure additional water or any other agreements that may be necessary in order to meet their mitigation obligations. This flexibility was intended as testified to by Mr. Carlquist.[10]

b. The OTR Plan Provides Water To The Springs When They Are At Their Lowest, Allowing Clear Springs To Raise More Fish.

Clear Springs takes issue with the fact that the OTR Plan does not contain <u>any</u> analysis on the impact of the operation of existing water rights. (*Memorandum* 7.) Yet that claim is contrary to the facts in the record. Clear Springs ignores the testimony of Dr. Brendecke that shows three different operating scenarios which will all increase summer-time spring flows and may decrease winter-time springs flows. In his opinion, Dr. Brendecke believes that the operation of the OTR Plan will actually benefit Clear Springs by stabilizing its spring flows and will benefit other spring users in the reach because there will be an increase in spring flows during the period of the year where the flows are at their lowest.[11] Just because there is a decrease in winter-time spring flows that may occur under the proposed OTR Plan does not mean that water rights will

10 Carlquist Testimony, Tr. Vol. I, p. 38, L. 18-23; p. 56, L. 5 – p. 57, L. 5.

11 Brendecke Testimony, Tr. Vol. I, p. 100, L. 25 – p. 101, L. 19

be injured. There is no storage downstream from Clear Springs that would be impacted from decreased winter-time flows, and the spring users will benefit because they make their fish stocking decisions based on flows during the summer months.[12] Finally, less water will be pumped from the wells than has historically been pumped for irrigation purposes, providing additional benefits to not only Clear Springs but the ESPA itself.[13]

2. Clear Springs' Argument That The OTR Plan Does Not Provide Water "In Kind, In Time And In Place" Are Meritless, Contrary To The Facts And Unreasonable

Clear Springs argues that the OTR Plan does not provide "water in kind, in time, and in place" and argues that this is the "[h]eart of IDWR's policy" regarding an acceptable method of mitigation. *Memorandum* at 6 and 19-29. Clear Springs' argument is difficult to follow and irrational. The requirement that the mitigation water be provided "in kind, in time and in place" is not a written policy of IDWR, is not set forth in the CM Rules, and is not required by any statute. It is an excerpt of testimony given by former Director Karl Dreher to explain his opinion regarding curtailment. Regardless, the OTR Plan does provide water in kind, in time, and in place.

a. Replacing Water With Water Is "In Kind" Mitigation

The Ground Water Districts are providing Clear Springs with water from the same source that Clear Springs currently uses. In fact, Clear Springs agrees that the water pumped from the OTR Plan wells is the same water that it would receive from the springs.[14] There can be no

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12 *Id. fn 8*

13 Brendecke Testimony, Tr. Vol. I, p. 113, L. 13-24.

14 Cope Direct Testimony, p. 6, L. 233-236; Brockway Direct Testimony, p. 7, L. 21-22; Cope Testimony, Tr. Vol. II, p. 342, L. 23 – p. 344, L. 10

doubt that replacing water for water is "in kind" mitigation. (*See Post Hearing Brief* 7-10.)

Clear Springs presented as evidence articles that herald Clear Springs' "leadership" in the aquaculture industry, tout the aquifer as key to the pristine water enjoyed by Clear Springs, and refer to the aquifer and the springs synonymously in many of the articles.[15] It is quite remarkable that Clear Springs now argues that their spring water is from a different source than the ESPA. Clear Springs cannot have it both ways by insisting that the junior users are using its water by pumping it out of the ground, yet when they propose to provide that water to Clear Springs, it is suddenly transformed into a different source.

Clear Springs' argument that pumped groundwater would "injure its source" and offend its favored marketing strategy and brand image is a tiresome and costly game of semantics that is simply without merit. Clear Springs makes this argument because it knows that junior groundwater users cannot supply "spring" water without massive groundwater curtailment which appears to be Clear Springs' only consistent objective.

b. The OTR Water Will Be Delivered More Timely Than Other Mitigation Methods Or Curtailment

Clear Springs complains that the OTR Plan changes the timing of when Clear Springs would get its water. (*Memorandum* 21.) The truth is, however, that changing the timing is a benefit to Clear Springs and will provide them additional water during the low flow months which determine how much fish Clear Springs may stock, as testified to by Mr. Cope and by Dr. MacMillan.[16] Further, Dr. Brockway and Dr. Brendecke both agree that stabilizing the spring

15 *See* Exhibits 32 and 33.

16 *Id fn 8*

source by pumping the water from the OTR wells year-round will also benefit Clear Springs.[17] In the end, the change in timing allows Clear Springs to raise *more* fish. Yet, raising more fish is apparently not Clear Springs' primary objective. Rather, it appears that Clear Springs' only interest is to curtail junior groundwater rights.

c. The OTR Water Will Be Delivered "In Place."

Astonishingly, Clear Springs also claims that the water is not provided "[i]n place." (*Memorandum* 21.) The OTR pipeline provides water directly to the collection boxes that gather the water from the spring outlets of Clear Springs, where it is comingled directly with Clear Springs' current water supply. The Ground Water Districts have no idea how water could be delivered more "in place."

3. Clear Springs' Marketing Decisions Cannot Trump The Director's Discretion To Manage The State's Water Resource In A Reasonable Manner In The Public Interest.

Clear Springs' arguments are principally based on perceived injury to its marketing plan, advertising strategy, image and brand. As explained in the Ground Water Districts' *Post-Hearing Brief*, any evidence relating to Clear Springs' subjective marketing and business decisions is irrelevant and should be disregarded. (*Post-Hearing Brief* 6-10.) Further, even if subjective marketing decisions were relevant, Clear Springs' arguments are overstated and fatally compromised by Clear Springs' own evidence and do not justify denial of the OTR Plan. (*Post-Hearing Brief* 10-14.) Clear Springs insists that using pumped groundwater, which would be less than 3% of its total water supply, will somehow stain its reputation. Yet Clear Springs admits that it currently uses creek water and foreign supplies of fish without any apparent harm

17 Brockway Rebuttal Report, at Appendix 4 p. 3, the continual pumping would stabilize spring flows in the Buhl to Thousand Springs reach after about two years and would increase the amount of water available there during the summer months and "sustainable fish loads is based on minimum dependable spring discharge at SRF facilities." Id. at 17-18, cf. with Cope testimony that minimum flows usually occur in May. Tr. Vol. II, p. 341, L. 22 – p. 342, L. 6.

to its brand, advertising strategy or reputation. The double standard Clear Springs seeks to impose upon the Ground Water Districts is unavoidable.

The question in this case boils down to whether or not Clear Springs can demand that the Ground Water Districts deliver water through spring outlets as opposed to through a pipe. The cost of Clear Springs' position is an extreme waste of Idaho's groundwater resources via the permanent drying up of an estimated 41,000 acres of irrigated land since there is no way for the Ground Water Districts, through other methods such as conversions and recharge, to guarantee the amount of mitigation water required under current orders.[18] Compounding matters is the undisputed fact that even if 41,000 acres were dried up, there is no assurance that additional water will flow from Clear Springs' discrete spring outlets or that any additional water will arrive during the low-flow months which define Clear Springs' fish stocking decisions. One thing that is clear, the vast majority of any water that will result from curtailment will go to other reaches of the river and will not even be accessible to Clear Springs. And, of course, much of the water that would result from curtailment would not flow from the springs for decades.

CONCLUSION

Does the senior user get to demand not only that groundwater users be required to alleviate material injury, but how they should alleviate it, what methods are appropriate or approvable, what type of water they are willing to accept beyond simple quality and temperature issues, what source or perceived source of water will mitigate their injury, and to demand only a certain delivery mechanism? In other words, does the senior user get to act as the Director and to make the decisions on how this public resource shall be used? The obvious answer is no. The discretion lies within the Department of Water Resources to manage this public resource in a

18 Brendecke Direct Testimony at 6-8; Carlquist Testimony, Tr. Vol. I, p. 35, L. 6-23, p. 42, L. 1-21.

manner that is within the public interest in a way that does not block full economic development of the underground water resources while respecting priority and the beneficial use for which the water was originally appropriated. In this case, the Ground Water Districts are providing water of an appropriate quality and quantity that will allow Clear Springs to rear more fish. Therefore, the OTR Plan should be approved.

DATED this 8th day of January, 2010.

RACINE, OLSON, NYE, BUDGE &
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By: _____
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CERTIFICATE OF MAILING

I hereby certify that on this 8th day of January, 2010, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:

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