



Clear Springs seeks reconsideration on the following issues:

1. The Director's failure to address "injury" to other water rights resulting from implementation of the Ground Water Districts' mitigation plan and the resulting violation of CM Rule 43.
2. The Director's rejection of the Hearing Officer's recommendations and implementation of the conditions for approval of the Ground Water Districts' mitigation plan.
3. The Director's failure to take into account additional mitigation obligations owed by the Ground Water Districts and the proceedings in the administrative case concerning the July 19, 2010 final order ("Injury Order").
4. The Director's failure to address Clear Springs' remaining objections that were to be staged for hearing before the Hearing Officer.

### INTRODUCTION

Clear Springs requests reconsideration of the above conclusions based upon the Hearing Officer's February 9, 2010 order ("*Recommended Order*"), the facts in the record, and governing Idaho law.

As recognized by Hearing Officer Schroeder, the Ground Water Districts failed to present a complete and approvable mitigation plan under CM Rule 43. In a nutshell, the Hearing Officer held that "additional conditions must be met before the Over-the-Rim plan can be approved." *Recommended Order* at 16 (emphasis added). Rather than identify a process for addressing these conditions prior to approval, the Director issued a final agency order and completely disregarded the Hearing Officer's findings of fact without any supporting reasons. In doing so, the Director has prematurely "approved" the plan contrary to facts in the record and without knowing whether the Districts will have the ability or right to implement the plan in the first place.

This "concept only" mitigation plan does not comply with Idaho law. Since the Ground Water Districts cannot yet demonstrate the ability to implement the mitigation plan as promised,

and actually deliver Clear Springs any water, the Director is without authority to finally “approve” the plan on the assumption those conditions will be satisfied. The failure to have present legal access to water for mitigation purposes is fatal to both the plan and the Director’s *Final Order* approving the same.

Further, the Director has failed to take into account the Ground Water Districts’ additional obligations as set forth in the July 19, 2010 Injury Order.<sup>1</sup> Since the mitigation plan pending before the Director is facially deficient, there is not basis for final approval under Idaho law. At a minimum, the Director should require the Ground Water Districts to re-file a new mitigation plan to account for the additional mitigation obligations or stay these proceedings until the final mitigation obligation is determined.

The Director’s “new” process to approve the OTR Plan is an unlawful “Catch-22” for Clear Springs. This unprecedented procedure forces Clear Springs to “accept” the OTR Plan and “accept” the resulting injury to its water rights both at Snake River Farms and other facilities, or alternatively, refuse the OTR Plan and “accept” continued injury to its water rights at Snake River Farms. As the undisputed evidence in the record shows, pumping ground water under junior rights to implement the OTR Plan will take more water away from Snake River Farms in the winter and will further deplete other spring sources in the Thousand Springs reach. *See Post-Hearing Memo.* at 16-18; *Brockway Rebuttal Report* at 17, 19. The Director cannot ignore this resulting “injury” and has no authority to administer water rights in this manner. At a minimum, the Director cannot force Clear Springs, the senior water right holder, into making a premature decision on the OTR Plan since the “injury” question has not been addressed. This procedure violates the Idaho Constitution, water distribution statutes, and IDWR’s own CM Rules.

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<sup>1</sup> The order is subject to a separate contested case proceeding before IDWR. The Director cannot “finally” approve a mitigation plan that is deficient on its face, i.e. will not mitigate the injury to all of Clear Springs’ injured senior water rights.

Finally, the Director's *Final Order* is in error procedurally since Clear Springs has pending objections to the OTR Plan that were to be taken up in the second phase of the administrative hearing. In his *Recommended Order* the Hearing Officer stated:

**6. There remain objections by Clear Springs. A post-hearing conference should be conducted to determine which issues remain and the manner of proceeding to address them.**

*Recommended Order* at 17 (emphasis in original).

The post-hearing conference with the Hearing Officer was never held. Accordingly, Clear Springs is entitled to address its remaining objections in the second phase of the hearing. *See also*, August 28, 2009 *Scheduling Order* at 1 ("Hearing on the mitigation plan and the objections will be staged . . ."). By issuing a premature final order, the Director has deprived Clear Springs of the opportunity for hearing. That decision violates Idaho law, including the APA and the Department's Rules of Procedure. Therefore, the Director should withdraw the *Final Order* and schedule a post-hearing conference with the Hearing Officer so the parties can complete the hearing provided for by Idaho law.

## ARGUMENT

### **I. The Director is Obligated to Consider the Impact of the OTR Plan on Other Existing Water Rights.**

Clear Springs has repeatedly challenged the OTR Plan based on IDWR's failure to adequately analyze its impacts on existing water rights. These concerns have yet to be addressed through the second stage of the hearing or as part of a formal transfer proceeding.

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 sue 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 Rule's criteria, the Hearing Officer recommended the Department to consider these issues as part of a separate administrative proceeding relating to the anticipated transfer applications. Conditioning approval of the Districts' plan, contingent upon separate proceedings, is not permitted under the Conjunctive Management Rules.

The CM Rules do not give IDWR the discretion to "pre-approve" a mitigation plan by deferring the required analysis of the injury caused by that mitigation plan. The Director cannot ignore the evidence in the record that demonstrates the OTR Plan will result in "injury" to Clear Springs' and other water rights in the Thousand Springs reach. *See Clear Springs' Post-Hearing Memo.* at 14-18.

At a minimum, the Director's final decision on the mitigation plan must be withdrawn and withheld until the transfer proceeding is complete. Moreover, if implementation of the mitigation plan results in "injury" to other water rights, it cannot be approved. At a fundamental level, unless the Districts have "proof" of the legal right to use water as intended, there is no mitigation plan. For example, if the Districts' mitigation plan relied upon storage water from a yet to be built storage facility, or water from a new application for permit, would that constitute a reliable source of replacement water to support an approvable mitigation plan? Clearly that answer is "no". Clear Springs submits that offering "irrigation" ground water rights as mitigation even though those rights cannot currently be used for that purpose is no different. The Director wrongly brushes over this requirement without any supporting reasons.

Furthermore, 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 over two years ago, no transfer application has been filed. The evidence in the record shows no defined pumping plan or location. Instead, 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 under the CM Rules.

Unless the Districts can demonstrate a reliable replacement water supply, including the legal right to provide that water as offered, the Director must deny the mitigation plan under Idaho law. The Director’s failure to address and resolve the plan’s impact on other water rights in the *Final Order* is improper and the decision should be reconsidered and withdrawn accordingly.

## **II. The Director Erroneously Failed to Adopt the Hearing Officer’s Findings Regarding the OTR Plan’s Conditions of Approval.**

Based upon the evidence in the record, the Hearing Officer set forth specific findings of fact regarding conditions that needed to be met “before” the OTR Plan could be approved.

Those conditions are stated as follows:

- a. ***There must be approved transfers*** of the water rights that will be utilized.
- b. ***There must be pre-approval from the appropriate entities for easements and permits*** necessary for construction of the pipeline.
- c. A detailed plan of maintenance and response to emergencies must be in place at the expense of the Ground Water Districts.
- d. ***Wells two and four must be removed*** from the configuration of wells to be utilized. The remaining wells may be utilized in whatever configuration meets the requirements of reliability.
- e. ***The construction plan must not intrude upon Clear Springs’ right to use*** or market ***its real property*** in the future which eliminates construction or the placement of facilities on Clear Springs property.

- f. ***There must be no blasting*** in the vicinity of the Snake River Farm facilities during construction.
- g. Clear Springs must be given an opportunity to review construction plans in the vicinity of the Snake River Farm facilities to assure that there will not be disruption of the facility.

*Recommended Order* at 16-17 (emphasis added).

Despite the Hearing Officer's detailed findings, the Director erroneously rejected all recommended conditions of approval except (c) and (g). Such a decision clearly contradicts the evidence in the record and Idaho law. Moreover, the Director provides no justification for his departure from the Hearing Officer's decision other than the claim that the Districts "are entitled to know whether Clear Springs will in fact refuse the replacement water prior to incurring the time and expense of a transfer proceeding." *Final Order* at 7. Nothing under Idaho's CM Rules states that junior water right holders causing injury "are entitled to know" a senior will accept replacement water before the juniors can demonstrate they are capable of actually mitigating through an approvable plan. The Director's decision not only violates the premise of Idaho's prior appropriation doctrine in administration, it simply has the "cart before the horse". Clear Springs addresses the Hearing Officer's conditions individually below (same subpart letters).

**a. Transfers**

The Hearing Officer required the Districts to obtain approval of transfers for the water rights to be used prior to approval of the OTR Plan. While Clear Springs submits that the transfer approvals should have been obtained prior to even filing the mitigation plan with IDWR, the Hearing Officer at least recognized the OTR Plan was not ripe for final approval without them.

The Hearing Officer stated:

Valid transfers are precedent to the implementation of the proposed mitigation plan, but the issues presented in transfer applications can be addressed in separate proceedings. ***Regardless of the efficacy of the Over-the-Rim plan it cannot be approved without those transfers. . . . If the transfer applications fail to obtain approval, the Over-the-Rim plan cannot receive approval.***

*Recommended Order* at 12 (emphasis added).

Without a legal supply of water there is no approvable mitigation plan under CM Rule 43. The Director's *Final Order* ignores this critical condition. In essence, the Director absolves IDWR of its duty to even process the transfers to determine whether or not they would be approved. Whereas the Hearing Officer shifted the question of "injury" to other water rights to other proceedings, *see Recommended Order* at 12-13, the Director's *Final Order* avoids the issue altogether by "approving" the OTR Plan regardless. The Director has no authority to avoid the agency's required analysis of "injury" to other water rights. Moreover, Clear Springs does not have to pre-approve a mitigation plan that does not even have a legal water supply to support it. If the water rights cannot be transferred, then no OTR Plan exists for Clear Springs to "accept" or "reject".

The Hearing Officer properly recognized the timing of approvals in this regard, and the Director has no legal or factual basis to reject this determination. The Director's *Final Order* should be reconsidered and withdrawn accordingly.

**b. Easements / Permits**

Next, the Hearing Officer required the Districts to obtain the necessary easements and permits from local governmental entities prior to approval of the OTR Plan. It is undisputed that the Districts do not have any formal agreements or easements to construct the pipeline or make necessary county road crossings. At hearing, the Districts' engineers testified as follows:

Q. [BY MR. THOMPSON]: And looking at this alignment within the county road, do the districts have that permission to place that pipeline in that area?

A. [BY MR. ELDRIDGE]: Not to my knowledge.

Tr. Vol. I, p. 137, lns. 15-18.

Q. [BY MR. THOMPSON]: And if this new alignment is pursued within the road right-of-way, would you agree that county permission would need to be sought for that?

A. [BY MR. SCANLAN]: Yes.

Q. And isn't it true at this time that none of those permits or permissions have been acquired?

A. That's true.

Tr. Vol. II, p, 255, lns. 12-20.

Given the plan's deficiency the Hearing Officer rightly conditioned its approval upon the District obtaining the necessary easements, approvals, and permits from local governments. Contrary to the facts, the Director wholly ignored this condition in the *Final Order*.

**d. Removal of Wells Two and Four**

The Hearing Officer concluded that wells two and four could not be used to implement the Districts' OTR Plan due to water quality. *Recommended Order* at 14. The Districts apparently removed the wells from their proposed plan, but the Hearing Officer's recommendation is clear that they cannot be utilized. The Director's *Final Order* does not even address this condition.

**e. Construction Plan / No Intrusion Upon Clear Springs' Property**

Similar to the lack of detail for a pipeline route, the Ground Water Districts did not present a final engineering design plan for construction and operation of the OTR pipeline. Evidence in the record shows that the engineering plans were only 50% complete. *Recommended Order* at 13. Consequently, in the face of this uncertainty the Hearing Officer

concluded that a complete engineering plan was a necessary condition prior to final approval of the OTR Plan. *See id.* at 13-14.

Although the Director's new condition states that the Districts must "prepare a full conceptual plan for review by Clear Springs consistent with the Idaho Public Works Construction Standards", it is unclear if the Director's "conceptual plan" is the same as the "complete engineering plan" identified by the Hearing Officer's finding of fact. To the extent the Director's "conceptual plan" contemplates something less than what is recommended by the Hearing Officer, the condition should be revised accordingly.

In addition, the Director's *Final Order* does not address the Hearing Officer's condition that prevents the Districts from intruding upon the property of Clear Springs, in either construction or placement of the OTR pipeline and facilities. Instead, the Director wrongly concludes that if Clear Springs rejects construction on its land, then the Districts' mitigation obligations will be suspended. *See Final Order* at 7. The Director's finding is unconstitutional. Nowhere in Idaho law does the director of a state agency have the authority to demand consent to "construction" and permanent placement of a pipeline or any other facility on Clear Springs' private property. Moreover, the Director cannot with the stroke of a pen waive any required condemnation proceedings the Ground Water Districts would be required to undertake under Idaho law, if Clear Springs' consent is withheld. *See I.C. § 7-701 et seq.* Finally, the Director cannot "suspend" the Districts' mitigation obligations if Clear Springs does not allow the ordered trespass or unlawful "taking" of its property. Again, such a finding is clearly unconstitutional and violates the state's water distribution statutes.

Given the numerous legal issues implicated by the Director's "new" condition, the *Final Order* must be reconsidered and withdrawn accordingly.

**f. No Blasting During Construction.**

The Hearing Officer provided detailed conditions to protect Clear Springs' aquaculture facilities at Snake River Farms during construction of the OTR pipeline. The Director's *Final Order* erroneously omits the condition without any justification. The Director's order should be revised accordingly.

**III. The Director's *Final Order* Fails to Consider the Districts' Mitigation Obligations Set Forth in the July 19, 2010 Injury Order.**

The Director purports to finally approve the Districts' mitigation plan despite the fact that it is now facially deficient. The Director's July 19, 2010 Injury Order identifies an additional mitigation obligation for injury to Clear Springs' 1955 priority senior water right.<sup>2</sup> Whether the extent of that injury has been properly determined is the subject of an outstanding contested case before IDWR.

Before the Director can finally approve any mitigation plan concerning Clear Springs' water rights at Snake River Farms, the full extent of Clear Springs' injury must be identified. Accordingly, the Director's *Final Order* should be withdrawn and proceedings on the mitigation plan should be stayed pending resolution of the July 19, 2010 Injury Order.

**IV. The Director's *Final Order* Fails to Address Clear Springs' Outstanding Objections to be Determined in the Second Phase of the Hearing.**

That the Director's *Final Order* is premature is further evidenced by the fact that Clear Springs' protest to the plan has yet to be completely heard and decided by the Hearing Officer. The Hearing Officer ordered the proceedings to be "staged, determining first whether the proposal for the over the rim delivery is an acceptable method to mitigate the obligations of junior ground water users." *Scheduling Order* at 1.

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<sup>2</sup> Clear Springs disputes the Director's determination and requested an administrative hearing on the findings in the July 19, 2010 Injury Order. A status conference in the matter has yet to be scheduled.

The bases for Clear Springs' protest to the OTR Plan were identified in a letter to the Director dated March 17, 2009 and two protests dated March 19 and 20, 2009, and were summarized by the Hearing Officer on pages 3-4 of the *Recommended Order*.

Not all of Clear Springs' protests were addressed by the first stage of the hearing and the resulting *Recommended Order*. For example, the *Recommended Order* does not address the relative propriety of the water rights proposed to be used for the mitigation plan and the fact that 12 of the rights have a junior priority than the previously established November 16, 1972 curtailment date. *Protest* at 4 (Mar. 20, 2009). Injury to other water rights is another issue that has yet to be determined. *Recommended Order* at 12-13. The Hearing Officer recognized this fact and ordered that a "post-hearing conference should be conducted to determine which issues remain and the manner of proceeding to address them." *Id.* at 17. No such post-hearing conference was ever held.

The law requires that IDWR provide Clear Springs with a complete and fair opportunity to present its protests to the mitigation plan. CM Rule 43.02; *see also* I.C. §§ 42-222(4)(b) (whenever a protest is filed the Director "shall" "conduct a hearing thereon"); 42-1701A; 67-5242. The Director has no legal authority to ignore issues or bifurcate a proceeding and issue multiple final orders. *C.f. Order on Petition for Judicial Review, A&B Irr. Dist., et al. v. Spackman, et al.* (Case No. 2008-551) (Jul. 28, 2009) (finding that the Director "abused his discretion" by issuing two final orders in the Surface Water Coalition call proceeding). It is undisputed that Clear Springs has outstanding protests to the OTR Plan that have not been heard. Since the Director cannot issue "two" final orders in compliance with Idaho's APA, the Director must withdraw the *Final Order* and wait until the proceeding before the Hearing Officer is complete. The Director should schedule a post-hearing accordingly.

## CONCLUSION

It is undisputed that the OTR Plan is incomplete and the Districts have not yet obtained the necessary approvals for its implementation. It is further undisputed that the second stage of the hearing over the OTR Plan has yet to be held. The Director is without authority to bifurcate the case and cannot issue a final approval of the Districts' mitigation plan at this time. Consequently, the Director's *Final Order* is premature and must be withdrawn. Clear Springs therefore requests reconsideration and withdrawal of the *Final Order*.

DATED this 1<sup>st</sup> day of April, 2011.

**BARKER ROSHOLT & SIMPSON LLP**



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## CERTIFICATE OF MAILING

I hereby certify that on this 1<sup>st</sup> day of April, 2011, 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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