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Attorneys for IGWA, North Snake Ground Water District, and Magic Valley Ground Water District

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

IDAHO GROUND WATER
 APPROPRIATORS,
 INC., NORTH SNAKE GROUND WATER
 DISTRICT, and MAGIC VALLEY GROUND
 WATER DISTRICT,

Petitioners,

vs.

GARY SPACKMAN, in his capacity as
 Interim Director of the Idaho Department of
 Water Resources; and the IDAHO
 DEPARTMENT OF WATER RESOURCES,
 Respondents.

vs.

CLEAR SPRINGS FOODS, INC.

IN THE MATTER OF DISTRIBUTION OF
 WATER TO WATER RIGHT NOS. 36-
 04103A, 36-04013B AND 36-7148 (Snake
 River Farm)

(Water District Nos. 130 and 140)

STATE OF IDAHO)
 : ss
 County of Bannock)

Case No.

**AFFIDAVIT OF
 RANDALL C. BUDGE**

**North Snake Ground Water District, and
 Magic Valley Ground Water District**

Affidavit of Randall C. Budge - 1

Randall C. Budge, being first duly sworn under oath deposes and states as follows:

1. That I am now and was at all times mentioned herein a duly-licensed and practicing attorney at law in good standing under the laws of the State of Idaho, holding Idaho State Bar License No. 1949, and member of the law firm of Racine, Olson, Nye, Budge & Bailey, Chartered, Pocatello, Idaho, attorneys of record for the Petitioner Ground Water Districts.

2. I am familiar with the Orders, pleadings and record established before the Idaho Department of Water Resources in the matter of the delivery call of Clear Springs Food, Inc., which is the subject matter of this appeal.

3. To the best of my knowledge, information and belief, the exhibits identified below and attached hereto are true and correct copies of the originals on file in this matter before the Idaho Department of Water Resources or the Court in Gooding County Case No. CV-2008-444, to-wit:

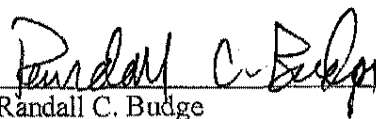
Exhibit No.	Date	Description
1	3/12/2009	2009 Replacement Water Plan and Third Mitigation Plan (Over the Rim) of North Snake Ground Water District and Magic Valley Ground Water District
2	3/19/2009	Augmentation to 2009 Replacement Water Plan and Third Mitigation Plan (Over the Rim) of North Snake Ground Water District and Magic Valley Ground Water District
3	3/26/2009	Order Approving Ground Water Districts' Replacement Water Plan for 2009
4	4/1/2009-6/4/2009	Ground Water Districts Weekly Status Reports to Director
5	4/27/2009	Clear Springs Food, Inc.'s Motion for Partial Stay of Implementation of Director's March 26, 2009 Order Approving Ground Water Districts' Replacement Water Plan for 2009.
6	5/15/2009	Order Granting Partial Stay of Ground Water Districts' Replacement Water Plan for 2009.
7	5/15/2009	Order Appointing Hearing Officer; Granting Petition to Intervene; and Consolidating Matters for Hearing.

9	6/19/2009	Order on Petition for Judicial Review, Gooding County Case No. CV-2008-444
10	6/25/2009	Response letter from Ground Water Districts.
11	6/30/2009	Director David R. Tuthill, Jr. letter.
12	7/9/2009	Ground Water District letter to Interim Director Spackman.
13	7/10/2009	Ground Water Districts' Petition for Rehearing in Gooding County Case No. CV-2008-444.
14	7/22/2009	Order Curtailing Ground Water Rights in Water District Nos. 130 and 140 junior to January 8, 1981.
15	7/24/2009	Order Granting Rehearing in Gooding County Case No. CV-2008-444.
16	7/28/2009	Ground Water Districts' Plan of Action, Petition for Reconsideration, and Request for Hearing.
17	7/29/2009	Order Regarding Ground Water Districts' Plan of Action.
18	8/3/2009	Ground Water Districts' Second Plan of Action, Petition for Reconsideration and Request for Status Conference.
19	8/4/2009	Order Denying Petition for Reconsideration.
20	8/7/2009	Amended Curtailment Order
21	7/5/2007	Order Approving Dairymen's and IGWA's 2008 Replacement Water Plans, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule.

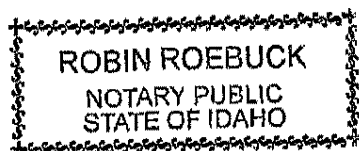
FURTHER YOUR AFFIANT SAYETH NAUGHT.

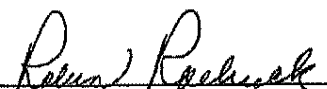
DATED this ____ day of August, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED


Randall C. Budge

SUBSCRIBED AND SWORN TO before me this 11th day of August, 2009.




NOTARY PUBLIC FOR IDAHO,
Residing at Pocatello.
My Commission Expires 8/18/2012.

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Attorneys for North Snake and Magic Valley Ground Water Districts

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
0413A, 36-04013B AND 36-7148

(Snake River Farm)

**2009 REPLACEMENT WATER PLAN
AND THIRD MITIGATION PLAN
(OVER-THE-RIM) OF NORTH SNAKE
GROUND WATER DISTRICT AND
MAGIC VALLEY GROUND WATER
DISTRICT**

COMES NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively "Ground Water Districts"), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby submit this 2009 Replacement Water Plan pursuant to the July 8, 2005 Order and Third Mitigation Plan (collectively referred to as "Plan")¹ pursuant to Conjunctive Management Rule 43, IDAPA 37.03.11.043 to provide direct replacement water sufficient to offset the depletive effect of ground water withdrawal to satisfy the rights of diversion from the surface or ground water

¹ The Ground Water Districts are providing this Plan as both a Replacement Water Plan that the Director can approve on an interim basis in response to a curtailment order and as a Mitigation Plan under CM Rule 43 which requires other procedures to be followed. Both the Replacement Water Plan and the Mitigation Plan are identical in substance but are submitted pursuant to different authority held by the Director and the Plan provides sufficient relief to Clear Springs to alleviate injury under water right nos. 36-04913B and 36-7148.

source under Clear Springs Food, Inc.'s - Snake River Farm's Right Nos. 36-04913B and 36-07148 (collectively "the Snake River Farm Water Rights"). This Plan takes into consideration the history and seasonal availability of water for diversion under said rights so as to not require replacement water at times when the rights have not historically received a full supply, such as during seasonal and yearly low-flow periods. This Plan is provided in response to the Idaho Department of Water Resources (IDWR or Department) Director's July 8, 2005, *Order in the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148* (Snake River Farm), subsequent orders thereto and specifically pursuant to the *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* dated March 5, 2009. These orders are referred to herein collectively as the Director's Orders.

I. RESERVATION OF DEFENSES

By submitting this Plan, the Ground Water Districts do not waive and expressly reserve any and all objections and defenses they have made to the Director's Orders.

II. INTRODUCTION

The Director's Orders require that the Ground Water Districts provide mitigation in lieu of involuntary curtailment of ground water rights located in Water District 130. The Director's Orders provided for an accelerated schedule of curtailment or mitigation over a five year period.²

² The July 8, 2005 Order at page 37 provided that "involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008 and 2009, such that based on simulations using the Department's Ground Water Model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gauge to Thousand Springs Reach . . . for the water rights held by Clear Springs for **2009 REPLACEMENT WATER PLAN AND THIRD MITIGATION PLAN (OVER-THE-RIM) OF NORTH SNAKE GROUND WATER DISTRICT AND MAGIC VALLEY GROUND WATER DISTRICT**"

Page 2 of 12

The Director's Orders further provide that Snake River Farm gets 6.9 percent of the Buhl Gauge to Thousand Springs reach gain.³ In the March 5, 2009 Curtailment Order, the Director increased the amount of mitigation owed to the Buhl Gauge to Thousand Springs spring reach to 38.72 cfs. See March 5, 2009 Curtailment Order at 6 ¶¶23 and 24. Accordingly, the 2009 delivery requirement to Snake River Farm to comply with the Director's Orders is 2.67 cfs.⁴ Id.

III. 2005, 2006, 2007 and 2008 REPLACEMENT WATER PLANS

The Ground Water Districts previously submitted Replacement Water Plans for 2005, 2006, 2007 and 2008. Orders were entered approving the 2005, 2007 and 2008 Replacement Water Plans. Because of litigation and appeal relating to the constitutionality of the Conjunctive Management Rules, in *American Falls Reservoir Dist. No 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), the Director did not issue any order approving or disapproving the Ground Water Districts' 2006 Replacement Water Plan.

IV. REPLACEMENT WATER PLAN AND MITIGATION PLAN

(1) Submission of Plan

This proposed Plan is submitted to the Director to provide "replacement water" to the Clear Springs Food, Inc's Snake River Farm facility intake sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source,

Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively." The March 5, 2009 Order at page 6 increased the 2009 obligation to 38.72 cfs.

³ Finding of Fact 9 at page 3 of the Final Order Regarding Blue Lakes and Clear Springs Delivery Calls dated July 11, 2008

⁴ The 2009 reach gain requirement for the Buhl to Thousand Springs Reach of 38.72 cfs multiplied by 6.9% equals 2.67 cfs.

with consideration to be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when these rights historically have not received the full supply.

The following information is provided:

(a) The names and mailing addresses of the Ground Water Districts submitting the plan are:

North Snake Ground Water District
1092 South 2500 East
Hazelton, Idaho 83335

Magic Valley Ground Water District
P.O. Box 430
Paul, Idaho 83347

(b) The water rights for which benefit the Third Mitigation Plan is proposed are: 36-04013B, 36-07148 ("Snake River Farm Water Rights").

(2) Mitigation Requirement

Based on simulations using the Department's Ground Water Model for the ESPA, the July 8, 2005 Order at page 37 required simulated cumulative increases to the average discharge of springs to the Buhl Gauge to Thousand Springs spring reach for steady-state conditions. The amount of cumulative increases required to the Buhl Gauge to Thousand Springs spring reach is 38.72 cfs for 2009. March 5, 2009 Curtailment Order at 6. Because the Director's Orders state that Snake River Farm gets 6.9 percent of the Buhl Gauge to Thousand Springs reach gain, the 2009 delivery requirement to Snake River Farms to comply with the Director's Orders is 2.67 cfs.

The Department calculated that 2008 CREP lands and conversions are anticipated to provide 9.88 cfs to the Buhl to Thousand Springs reach as described in the Director's March 5, 2009 Curtailment Order on page 8 as follows:

Using the ESPA Model, the simulated benefit to the Buhl Gage to Thousand Springs spring reach from those activities is 9.88 cfs, or 0.66 cfs directly to Clear Springs (6.9% of 9.88 cfs). Because the Ground Water Districts are required to provide 38.72 cfs to the Buhl Gage to Thousand Springs spring reach or 2.67 cfs directly to Clear Springs in 2009, the resulting deficiency is 28.84 cfs to the reach, or 1.99 cfs to Clear Springs (6.9% of 28.87 cfs).

Based upon the foregoing calculations of the Department and the same estimated CREP and conversions benefit of 9.88 cfs to the Buhl to Thousand Springs reach, the Ground Water Districts' remaining mitigation requirement to Snake River Farm for 2009 is 1.99 cfs. The method used by the Department, although subject to dispute by the Ground Water Districts, meets the requirements of CM Rule 43.03.d. e. f. and g.

(2) Plan Proposals

(a) CREP and Conversion Deliveries

This part of the Plan has been approved by the Director's March 5, 2009 Order and included herein for convenient reference.

Flows to the Buhl to Thousand Springs spring reach will be increased by the Conservation Reserve Enhancement Program (CREP) and by the delivery of water to acres that have been converted from ground water irrigation to surface water irrigation within the North Snake Ground Water District ("conversion deliveries"). Reach gains resulting from CREP may vary annually based upon increases or decreases in CREP acreage. Reach gains resulting from conversion acres may increase or decrease annually depending on the amount of water delivered annually to conversion acres.

Approximately 9,300 acres within the North Snake Ground Water District have been converted from ground water irrigation to surface water irrigation to increase incidental recharge to the aquifer. The Ground Water Districts plan to continue to deliver 35,000 acre feet of water for the existing 9,300 acres of conversions as they have done for the past several years. The same Water Conveyance Agreement entered into in previous years between the Ground Water Districts and NSCC is expected to be renewed to provide for the delivery of 35,000 AF of storage water to be delivered through conversion acres through the NSCC system. The Ground Water Districts have several water leases which are ongoing that have supplied ample mitigation water to meet all Mitigation Plan requirements in Water Districts 120 and 130 since 2005. The amounts committed by these Lessors for 2009 far exceed the 35,000 AF required under this Mitigation Plan. The Lessors include the following:

Aberdeen-Springfield Canal Company
New Sweden Irrigation District
People's Canal and Irrigation Company
Snake River Valley Irrigation District
City of Pocatello
Enterprise Canal Company
Idaho Irrigation District

The Ground Water Districts also intend to continue to support and fund the CREP program.

(b) "Over-the-Rim" Replacement Water Plan and Mitigation Proposal

This Plan provides for the "Over-the-Rim" direct delivery of ground water from existing wells to Snake River Farm's intake. This proposal will convert up to 2,000 acres from ground water irrigation to surface water irrigation irrigated farmland of certain existing members of North Snake Ground Water District farming near the canyon rim above Snake River Farm. Surface water leased from the Upper Snake reservoir system will be delivered through the North Side Canal Company ("NSCC") "S Coulee" to replace the ground water irrigation. **Exhibit 1**

provides further detail of the Plan. The Ground Water Districts will lease the water rights of the members converted to surface water and utilize their existing wells, pumps and motors to pump water into such additional pipelines and facilities as needed to deliver pumped ground water directly from the wells to Snake River Farm. **Exhibit 2** shows a schematic showing locations, places of use, and proposed pipeline routes. Depicted on this exhibit are wells of North Snake Ground Water District members that committed to convert to surface water irrigation and lease their water rights to the Ground Water Districts to facilitate this Plan to deliver direct replacement water over-the-rim together with a schematic of the facilities necessary to accomplish this delivery.

The converted ground water rights will be the supply of water to Snake River Farm. **Exhibit 3** is a table showing number of acres, wells, well owners, water rights and historical average pumping for these water rights for the water rights owners who have currently committed to participate in the conversions and water leases with the Ground Water Districts. The total acres proposed to be converted is approximately 1,060 acres. Additionally, these land owners and others near the rim have committed to provide the necessary pipeline easements to facilitate the delivery of replacement water. Based on a commitment of cooperation from NSCC representatives, it is anticipated that a second long-term Conveyance Agreement will be entered into with the Districts to supply surface water for these conversions. The proximity of these conversions lands to each other, to NSCC's "S Coulee" and the canyon rim demonstrates that replacement surface water supplies can readily be delivered to the lands participating in the over-the-rim project and the replacement water delivered from their wells to Snake River Farm.

The data in **Exhibit 3** show that the targeted wells have historically pumped more water on an annual basis than is required for full mitigation at Snake River Farm. The full mitigation

requirement, from the 2005 Order and with the 2009 increase can be provided to Snake River Farm as a continuous flow of 1.99 cfs or 1,441 acre-feet per year. The average annual pumping of the targeted wells over the last three years is about 2,400 acre-feet per year; thus, these wells are able to supply more than 3.0 cfs on a continuous basis. The Ground Water Districts intend to design and implement the over-the-rim delivery to provide as much as possible above the 1.99 cfs requirement up to a maximum of 3.0 cfs of direct delivery to Snake River Farm in order to make up for any previous year short falls and in recognition of the fact that some further delay in delivering this replacement water will be incurred until the necessary construction of the facilities has been completed.

Based on this commitment to “over-mitigate” for such period of time as is necessary to fully make up any shortfall, the Ground Water Districts request immediate action to rescind the pending 2009 Curtailment Order. This commitment will in fact prevent any material injury by providing Snake River Farm more mitigation water both in quantity, certainty and duration than it would realize from the curtailment of ground water users, which is estimated to be only 0.7 cfs for the first year of curtailment of 41,000 acres.

The Ground Water Districts will file Transfer Applications with IDWR for each of the leased water rights as may be required by IDWR to change the place of use, period of use and nature of use for year-round mitigation and fish propagation at Snake River Farm. However, the annual amount of pumping from those wells will not increase from what has historically been done and will likely be less.

Because the source of replacement water is the identical source used by Snake River Farm, ground water from the Eastern Snake Plain Aquifer, water quality of pumped ground water is expected to be the same as that emanating from the springs.

The final design and engineering of the facilities to fully implement the Plan is in process and construction will begin as soon as possible upon the Director's approval of the Plan. **Exhibit 4** shows a table of projected engineering components and approximate costs associated with the delivery of water for the over-the-rim proposal.

(c) Alternative and/or Supplemental Mitigation Through Direct Delivery of Idaho Fish and Game Water Right No. 36-4076

In the event the over-the-rim mitigation proposal set forth above is rejected or conditioned, or to the extent the the quantity supplied is inadequate, the following alternative and/or supplemental mitigation proposal is presented.⁵ **Exhibit 5** provides a schematic of this part of the Plan. The water right proposed to be used for mitigation consists of up to 3.59 cfs of water available under Decreed Water Right No. 36-4076 with a priority date of January 1, 1893, which will be delivered directly to the head of the Snake River Farm raceway. The priority date of Water Right No. 36-4076 is earlier than all Snake River Farm water rights and all other known rights in the vicinity. Recent spot measurements by Watermaster Cindy Yenter indicate that the flows available from the springs supplying this right sometimes are less than the decreed quantity and may not be adequate on a continuous basis to meet the full mitigation requirement, but there is consistently about 1.1 cfs of water available which would be an adequate supplemental or additional supply of water for Snake River Farm. **Exhibit 6** is a table of components and costs for this part of the plan.

Exhibit 7 is a copy of the Lease Agreement entered into on May 28, 2008, between the Ground Water Districts and the Idaho Department of Fish and Game ("IDFG") pursuant to which the Ground Water Districts have leased the water available under Decreed Right No. 36-4076.

⁵ Exhibit 1 also provides a description for this part of the Plan

The Lease Agreement was entered into for the specific purpose of providing mitigation and replacement water to Snake River Farms (§ 1); provides the Ground Water Districts access to the IDFG property as may be necessary to provide mitigation or replacement water to Snake River Farms (§ 4); authorizes the Ground Water Districts to divert and utilize the entire right non-consumptively to provide replacement water to Snake River Farms' raceway (§ 5); authorizes the Ground Water Districts to construct and maintain all pumps, pipes, diversion and delivery facilities and other improvements in order to utilize the water right for mitigation and replacement water purposes to the head of the Snake River Farm's raceway, including any changes or improvements to the point of diversion or other elements of the water right (§ 5a); and, authorizes the Ground Water Districts to amend any elements of the water rights as may be required by the Department to accomplish the contemplated use (§ 5c). As a condition of the lease, the Ground Water Districts agree to provide replacement water to the IDFG wetlands in an amount equal to the amount of water provided to Snake River Farm (§ 6).

Water Right 36-4076 exists by way of a Partial Decree entered August 27, 2001, with a year-round use in the amount of 3.59 cfs with a priority date of January 1, 1893, and is therefore more than adequate to meet the alternative or supplemental mitigation requirements under this part of the Plan.

REQUESTED ACTION

The Ground Water Districts request:

A. That an Order be entered approving the 2009 Replacement Water Plan on a temporary basis, forestalling physical curtailment and rescinding the March 5, 2009 Curtailment Order. This request is based on the Ground Water Districts' commitment to over-design the over-the-rim delivery system to exceed the 1.99 cfs obligation to Snake River Farm and to

directly deliver up to 3.0 cfs to the Snake River farm intake for such period as the Director deems necessary to make up for any shortfall during the period of construction of the facilities together with any past shortfall. Clear Springs will thereby receive more water in quantity, certainty and duration than it could anticipate from curtailment.

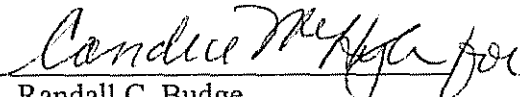
B. That the Director expedite the processing of the Transfer Applications deemed necessary to implement the proposed over-the-rim replacement water plan.

C. That the Third Mitigation Plan be set for hearing with notice given to the parties as deemed necessary pursuant to CM Rule 43.02.

D. That an Order to be entered authorizing the parties to conduct discovery in the form of interrogatories, requests for production, requests for admissions and depositions with respect to this Plan and any objections filed thereto.

DATED this 12th day of March, 2009.

RACINE OLSON NYE BUDGE &
BAILEY CHARTERED

By: 
Randall C. Budge
Attorneys for North Snake and
Magic Valley Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of March, 2009, the above and foregoing was sent to the following by U S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

Randall C. Budge Candice M. McHugh RACINE OLSON NYE BUDGE & BAILEY, CHTD P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net jdj@racinelaw.net cmu@racinelaw.net	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> Hand Delivery
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson, Suite 102 P.O. Box 2139 Boise, Idaho 83701 jks@idahowaters.com tlr@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail


Randall C. Budge

Exhibit 1

Description of Infrastructure and Operation associated with Direct Delivery of Replacement Water to Snake River Farm

**Prepared for:
North Snake Ground Water District
and
Magic Valley Ground Water District**

March 2009

**Prepared by:
AMEC Earth and Environmental
1002 Walnut Street, Suite 200
Boulder, CO 80302**



IMPORTANT NOTICE

This document was prepared exclusively for the Idaho Ground Water Appropriators by AMEC Earth & Environmental, Boulder Office (AMEC). The quality of information, conclusions and estimates contained herein is consistent with the level of effort involved in AMEC's services and based on: i) information available at the time of preparation, ii) data supplied by outside sources and iii) the assumptions, conditions and qualifications set forth in this report. This document is intended to be used by the Idaho Ground Water Appropriators only, subject to the terms and conditions of its contract with AMEC. Any other use of, or reliance on, this document by any third party is at that party's sole risk.

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1.0 INTRODUCTION

A direct replacement water plan has been developed to offset the depletive effect of junior-priority ground water withdrawals on the Snake River Farm's (SRF) water rights. This plan includes the direct delivery of replacement water from existing wells on the Plain above SRF over the canyon rim and down to the SRF facility. A back-up plan for delivery of replacement water from spring rights leased from the Idaho Department of Fish and Game (IDFG) is provided to supplement the over-the-rim delivery, if necessary. This report describes the conceptual design of the direct delivery and back-up plans.

2.0 DIRECT DELIVERY TO SNAKE RIVER FARM

Under this plan the North Snake and Magic Valley Ground Water Districts ("Districts") have secured the agreement of certain ground water right holders on the Eastern Snake River Plain immediately above SRF to convert their irrigation operations from ground water to surface water supply, to lease their ground water rights to the Districts and authorizing Transfer Applications to be filed with IDWR to change the points of diversion, place of use, period of use and nature of use as needed to enable these ground water rights to be used pursuant to the Districts Mitigation Plan at SRF. The existing wells will continue to pump ground water at their historical annual rates, but rather than applying that water to irrigated crop land will deliver it via a collection pipeline to SRF. The mitigation benefits to SRF will include this direct water delivery plus incidental recharge associated with delivery and use of surface water on the converted parcels.

The Districts have effected similar conversion of approximately 9300 acres of ground water-supplied parcels within their boundaries which have been functioning for several years. Mitigation credit for incidental recharge from these conversions has been approved by the IDWR Director. It is anticipated that this direct delivery and incidental recharge will provide a benefit to SRF in excess of the 1.99 cfs replacement water requirement imposed by the Director's Order of March 9, 2009, and up to as much as 3.0 cfs. It is anticipated that amounts in excess of the 1.99 cfs requirement will be delivered upon completion of the necessary construction in order to "over-mitigate" for such period as may be required by the Director to make up any shortfall resulting from prior years and during the construction.

A schematic of the proposed direct delivery system is shown in Exhibit 2. The wells and water rights subject to conversion are described in Exhibit 3. Authorized Places-of-Use (POU) of the water rights are also shown by shading on Exhibit 2. The wells for the participating water rights will pump their historical annual volumes on a continuous basis. Water will be collected in a pipeline network and delivered to a point on the canyon rim above SRF. The pipeline will then drop into the canyon to a pressure-reducing facility from whence it will be delivered via pipeline to a point in the hatchery complex designated by SRF. At that point it will be blended with diversions from the SRF spring outlet. Because the water so delivered comes from the same

source as feeds the SRF spring outlet, this blending will not materially affect the quality of water used in SRF operation.

It is anticipated that existing well pumps can be utilized for this direct delivery operation, since required instantaneous delivery rates from each well will be less than their historical values. This will also provide redundant delivery capacity in the event of maintenance or failure of any individual well pump. The Ground Water Districts will evaluate and replace well pumps as necessary to provide sufficient delivery rates and pressures to effect the operation.

The extent and alignment of the collection pipeline shown in Exhibit 2 may be adjusted based on more complete pumping records and more detailed design to address property boundaries and utility locations. Exhibit 4 summarizes the major physical components of the direct delivery plan and their estimated costs. This is a preliminary conceptual estimate of infrastructure requirements and does not include minor components and connections, such as those into SRF facilities. A more detailed design will be prepared upon authorization and direction by the IDWR to further pursue this plan.

The direct delivery plan would not impact any other water users within the local area as pumping will simply continue at historical annual rates. The use of replacement water delivered under this alternative is non-consumptive and, consequently, all water delivered to SRF will flow to Clear Lake and the Snake River. Detailed negotiation and coordination with affected non-participating landowners is in progress and is expected to result in the various conversion and lease agreements as well as such easements and rights-of-way as may be necessary to undertake and complete the project.

3.0 DELIVERY OF IDF&G WATER RIGHT NO: 36-4076 TO SNAKE RIVER FARM (BACK-UP ALTERNATIVE)

If for unanticipated reasons the direct delivery plan cannot provide at least the minimum replacement water requirement of 1.99 cfs required by the March 2009 Order, the Districts may pursue a supplemental plan using the water rights leased from IDF&G. The IDF&G owns and manages the Clear Lake Grade wetland mitigation site neighboring SRF to the east. The Districts entered a Lease Agreement on May 28, 2008, with the IDF&G for IDF&G's Decreed Water Right No. 36-4076 for the purpose of providing mitigation and replacement water to SRF.

The IDF&G currently receives water from at least four spring outlets on the north side of the Snake River Canyon near the Clear Lakes Grade, as shown in Exhibit 5. The supplemental replacement supply will be derived by capturing the discharge of the westernmost of these outlets in enclosed spring boxes and delivered via pipeline to a point designated by SRF where it will be blended with discharge from the SRF spring outlet. Enclosed collection and delivery will insure that no contaminants are introduced into the spring water. Since the IDF&G springs

emanate from a source common to the SRF spring outlet, the blending of these waters will not materially affect the quality of water used in SRF operation.

Replacement water will be provided to IDF&G from the Snake River as necessary to maintain wetlands function. This water would be pumped from the Snake River to the inlet of the IDF&G wetlands south of the highway, as shown in Exhibit 5.

Exhibit 6 summarizes the major components and estimated costs for this back-up plan. This is a preliminary conceptual estimate of infrastructure requirements and does not include power supply, connections to the SRF raceway inlet, and other minor components. A more detailed design will be prepared upon direction by the IDWR to further pursue this back-up plan.

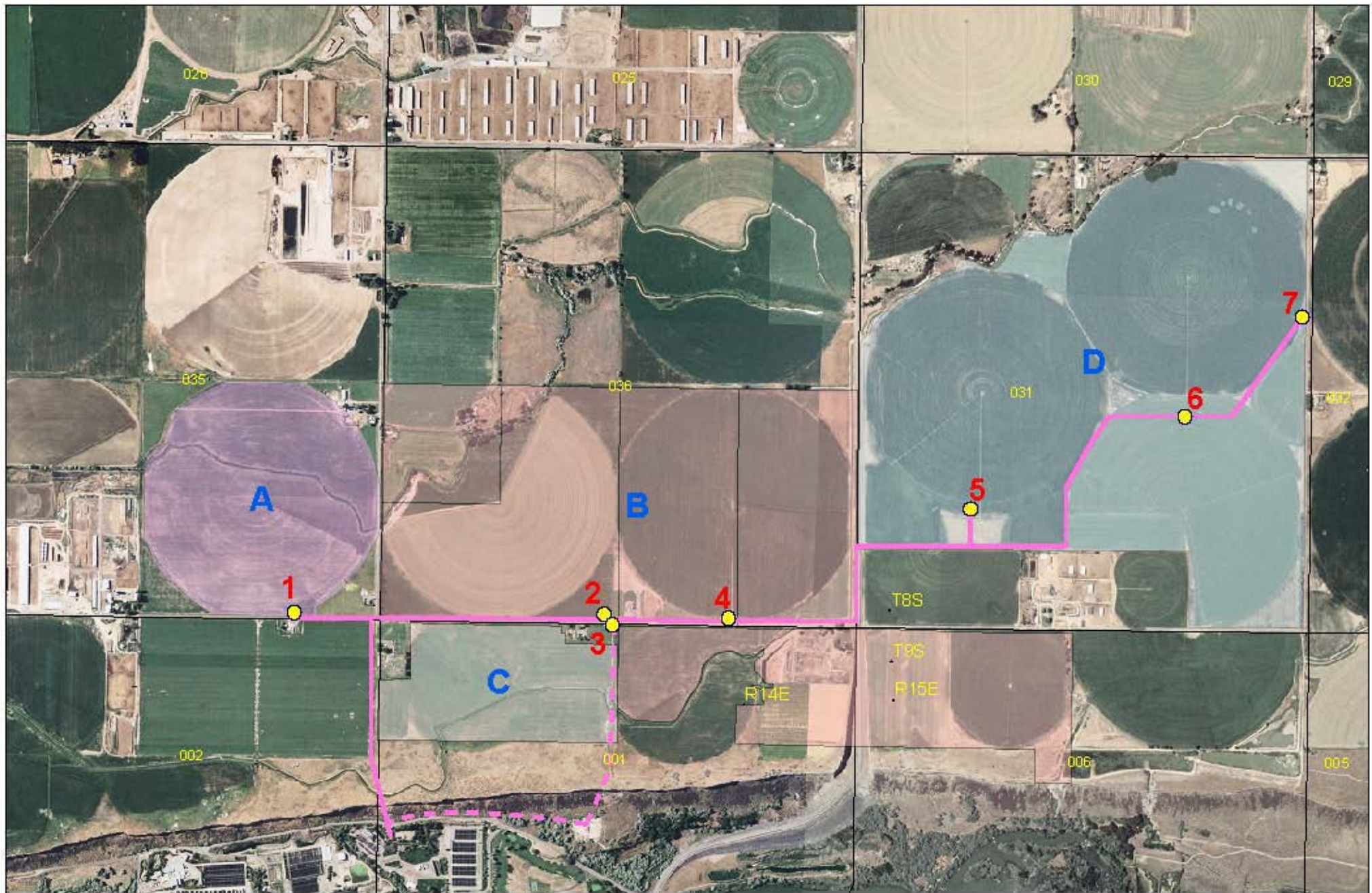


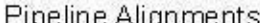

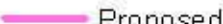

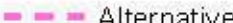



Exhibit 2
Over-the-Rim
Delivery Plan Schematic



- | | | | |
|--|---------------------------------|---|-------|
|  | Wells for Over-the-Rim Delivery |  | POU A |
|  | Pipeline Alignments |  | POU B |
|  | Proposed |  | POU C |
|  | Alternative |  | POU D |



0 0.125 0.25 0.5 Miles

Exhibit 3

Parcels, Wells and Water Rights to be Converted

Place of Use	Wells	Owner	Water Rights	Historical Average Pumping 2003-2007 (af/yr)	POU acres
A	1	Box Canyon Dairy	36-2426 36-10044	322.9	124
B	2 & 4	Mary Jane & Thomas Heida Grace V & John Madalena	36-2493B 36-07682 36-2228B 36-07597B 36-02228A (1) 36-07597A (1) 36-02493C 36-8276 (1)	724.2	412
C	3	Melvin & Norma Brown	36-4046	238.1	80
D	5 & 6	Box Canyon Dairy	36-16256 36-16258 36-16260 36-16262 36-16264 36-16266 36-16268 36-16270 36-16272 36-16274 36-16276 36-16278 36-16280 36-16282 36-16284	946.5	444
	7	Same as 5 & 6	Same as 5 & 6	211.9	
Total				2443.6	1060

Exhibit 4 Principal Constructed Components of Plan

Name	Quantity	Estimated cost (2008)
Proposed Pipeline	16,000 feet of 8" PVC pipe (low pressure)	\$290,000
	900 feet of 6" ductile iron pipe	\$32,000
Road crossing	100 feet jacking	\$146,000
Pressure reducing facility	Cast in place vault and pressure reducing valve	\$6,000
Proposed Pipeline Total Estimated Costs:		\$474,000
Alternative Pipeline	4,000 feet of 8" PVC pipe (low pressure)	\$73,000
	700 feet of 6" ductile iron pipe	\$25,000
Alternative Pipeline Total Estimated Costs:		\$98,000



Exhibit 6 - Principal Components of IDF&G Back-up Plan

<u>Component</u>	<u>Quantity</u>	<u>Approximate Cost</u>
Spring collection box	2	\$ 10,000
Pump station 5 hp	1	\$ 10,000
Delivery pipeline 6-inch dia.	1100 l.f.	<u>\$ 10,000</u>
		\$ 30,000
 Pump station 10 hp	 1	 \$ 15,000
Delivery pipeline 10-inch dia.	500 l.f.	<u>\$ 5,000</u>
		\$ 20,000
	Total	\$ 50,000

**IDAHO FISH & GAME LEASE FOR
WATER RIGHT NO. 36-4076
DATED MAY 28, 2008**

EXHIBIT 3

**WATER LEASE
WATER RIGHT NO. 36-4076**

This Lease Agreement ("Lease") is made and entered into this 28th day of May, 2008, between the IDAHO DEPARTMENT OF FISH AND GAME COMMISSION, whose mailing address is P.O. Box 25, Boise, Idaho 83701 ("LESSOR"); and the NORTH SNAKE GROUND WATER DISTRICT and the MAGIC VALLEY GROUND WATER DISTRICT whose joint mailing address for purposes of this Lease is P.O. Box 1391, Pocatello, Idaho 83204 (hereinafter referred to collectively as "LESSEE").

RECITALS:

WHEREAS, LESSOR is the owner of the decreed Water Right No. 36-4076, pursuant to the records of the Idaho Department of Water Resources ("IDWR") in multiple spring discharges near Clear Lakes in the cumulative amount of up to 3.59 cubic feet per second "cfs" of non-consumptive use water with a priority date of January 1, 1893 (hereinafter referred to as the "Water Right" or the "Leased Water"), which Water Right is graphically represented by the following table:

Water Right No.	Source	Quantity	Point of Diversion	Priority Date
36-4076	Springs	3.59 cfs	SWSWNE Lt 7 SWSENE Lt 8 SESENE Lt 8 SESWNW Lt 5 SESENW Lt 13, Sec. 1, T. 9S R. 14E, Gooding Cty SESENE Lt 5, Sec. 2, T. 9S R. 14E, Gooding Cty SWSWNW Lt 5, Sec. 6, T. 9S R15E, Gooding Cty	01-01-1893

AGREEMENT:

NOW THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, the parties mutually agree as follows:

1. Lease Property. LESSEE leases from LESSOR, and LESSOR leases to LESSEE, the Leased Water for the purpose of providing mitigation or replacement water to Snake River Farms.

2. Term. The initial term of this Lease shall be for a term of four (4) years, commencing effective as of May 1, 2008. Thereafter, this Lease shall be renewed for two successive terms of three (3) years each provided the parties can reach agreement on the lease amount which shall be subject to renegotiation and unless either party gives notice of intention not to renew the Lease to the other party not less than 180 days notice prior to the end of the

Lease, which may be given at any time prior to the expiration of the original term or any successive term(s). Additionally, LESSEE reserves the right to terminate this Lease upon ninety (90) days written notice to LESSOR in the event the Idaho Department of Water Resources does not approve LESSEE'S Mitigation or Replacement Water Plan to Snake River Farms and allow the use of the Leased Water for such purposes, or, if for any other reason LESSEE is unable to utilize the Leased Water for mitigation or replacement water purposes for Snake River Farms.

3. Rent. LESSEE shall pay to LESSOR rent in the amount of two hundred and fifty dollars (\$250) per month per cfs or pro rata for such portion of each cfs of water actually utilized by LESSEE, with the first monthly rental payment to be due and owing on the first day of the month following the execution of this Lease, and with each monthly payments due thereafter through the term of this Lease determined as provided herein..

4. Use by LESSOR. LESSOR reserves the unrestricted first right to use the Leased Water as allowed by the defined elements of the Water Right. LESSOR will have no responsibility for the operation, maintenance or use of LESSEE'S facilities or any damages related to, or caused by, LESSEE'S use of the Leased Water pursuant to this Lease. LESSOR grants LESSEE access to LESSOR'S property as may be necessary and appropriate to allow LESSEE to fulfill the purpose of this Lease to provide mitigation or replacement water to Snake River Farms.

5. Use by LESSEE. During the term of this Lease, LESSEE may, at LESSEE'S sole cost and risk (including but not limited to those risks identified in paragraph 6 below), divert and utilize the Leased Water non-consumptively (except for minor evaporation) for mitigation purposes to provide replacement water to Snake River Farm's raceway.

- a. LESSEE may design, construct and maintain at its sole risk and expense all pumps, pipes, diversion and delivery facilities and other improvements in order to utilize the Leased Water for mitigation or replacement water purposes to the head of the Snake River Farm raceway. This includes any changes or improvements LESSOR may wish to make to the point(s) of diversion or other elements of the Water Right.
- b. LESSEE shall submit the design of any facilities and improvements to be constructed and operated to LESSOR for approval prior to the commencement of construction.
- c. LESSEE shall comply with any permit requirements and any water right amendment requirements that may be determined necessary by any state agency to accomplish the use of the water contemplated by LESSEE, with LESSEE authorized to procure the same at their sole expense, and providing copies to LESSOR.

6. Available Water. As a condition of this Lease, LESSEE agrees to provide and make available to LESSOR'S wetlands an amount equal to the amount of water provided to Snake River Farms and of acceptable quality. Additionally, LESSEE shall comply with all terms and conditions of LESSOR'S water right.

7. Indemnification. LESSEE shall indemnify, protect, defend and hold LESSOR and its elected and appointed officials, officers, agents and employees, and each of them, free and harmless from any and all liabilities, claims, losses, damages, actions, costs and expenses of every kind (including defense costs and legal fees), which they, or any of them, may suffer or incur by any reason arising by reason of bodily injury, death, personal injury or property damage

resulting from the use or diversion of the Leased Water under this Lease by or from LESSEE, or any agent, employee, guest or invitee of LESSEE.

8. Default and Termination. If LESSEE fails to perform any obligation required of it hereunder, and such default continues for a period of 30 days after written notice thereof has been mailed or delivered to LESSEE by LESSOR, the LESSOR may, at its option, in addition to all other rights provided hereunder or otherwise available to LESSOR by law, immediately curtail and prevent the use and continued use of the Leased Water by LESSEE; and/or terminate this Lease; whereupon all rights accruing to LESSEE hereunder shall cease

9. Notices. All notices required or provided for by this Lease shall be deemed given when delivered or mailed by certified mail, postage prepaid, to the each of the respective parties at the following addresses:

To LESSOR:

Idaho Department of Fish and Game Commission
P.O. Box 83720
Boise, Idaho 83720-0098

To LESSEE:

North Snake Ground Water District
153 E. Main Street
Jerome, Idaho 83338

Magic Valley Ground Water District
P.O. Box 430
Paul, Idaho 83347

With a copy to:

Randall C. Budge
Racine, Olson, Nye, Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, Idaho 83201

10. Warranty of Authority. LESSOR warrants and represents that it is the lawful owner of the Water Right and has all necessary power and authority to enter into this Lease.

11. Assignment and Subletting. LESSEE shall not assign or sublet any portion of the Water accruing to the Water Right, nor any interest in this Lease without LESSOR'S consent which will not be unreasonably withheld.

12. Law. This Lease shall be governed by the laws of the state of Idaho.

LESSOR:

IDAHO DEPARTMENT OF
FISH AND GAME

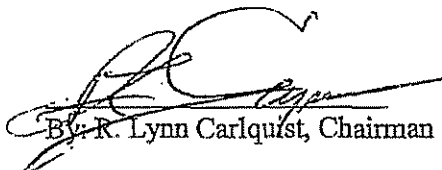
Dated: 5-28-08, 2008


By: Cal Groen, Director

LESSEE:


NORTH SNAKE GROUND WATER
DISTRICT

Dated: 6/3/08, 2008


By: R. Lynn Carlquist, Chairman

MAGIC VALLEY GROUND WATER
DISTRICT

Dated: 6/9, 2008


By: Orlo Maughan, Chairman

Randall C. Budge (ISB # 1949)
Candice M. McHugh (ISB #5908)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
PO Box 1391
Pocatello, ID 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109

Attorneys for North Snake and Magic Valley Ground Water Districts

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
04013A, 36-04013B AND 36-7148

(Snake River Farm)

**AUGMENTATION TO 2009
REPLACEMENT WATER PLAN AND
THIRD MITIGATION PLAN (OVER-
THE-RIM) OF NORTH SNAKE GROUND
WATER DISTRICT AND MAGIC
VALLEY GROUND WATER DISTRICT**

COMES NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively "Ground Water Districts"), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby submit this Augmentation to 2009 Replacement Water Plan pursuant to *Order On Scheduling and Holding Notice of Curtailment in Abeyance* dated March 16, 2009.

I. INTRODUCTION

On March 17, 2009, the parties to this matter had a meeting to discuss the technical matters of concern to IDWR and the parties. At that meeting, certain issues were raised and IDWR requested that the Ground Water Districts provide additional information to address three

**AUGMENTATION TO 2009 REPLACEMENT WATER PLAN AND THIRD MITIGATION PLAN
(OVER-THE-RIM) OF NORTH SNAKE GROUND WATER DISTRICT AND MAGIC VALLEY GROUND
WATER DISTRICT**

primary issues relating to their 2009 Replacement Water Plan and Third Mitigation Plan (Over-The-Rim) of North Snake Ground Water District and Magic Valley Ground Water District (“Over-The-Rim” Plan”). The issues addressed herein are: 1) water quality and temperature; 2) operational plan for wells, including a measurement plan; 3) timing of conversions and construction.

II. ADDITIONAL INFORMATION

Over-The-Rim

1. Water Temperature and Quality – As part of the proposed Over-the-Rim Plan, the Ground Water Districts will institute a monitoring program that will measure water quality and temperature the results of which can be periodically reported to the Department and Clear Springs as needed. Water temperature data from surrounding wells indicates that the temperature of the water supplied is nearly the same as the temperature of the water emanating from the spring outlet at Clear Springs, Snake River Farm. Some temperature and presumably water quality variations exist inter-year and intra-year at Clear Springs, yet are apparently suitable now for fish raised by Clear Springs. Clear Springs has not disclosed any of this information and should be required to do so in order to establish base lines and parameters for both. Because the pipeline will be buried and because the water source is the same, temperatures in the mitigation water supplied should remain nearly constant throughout the winter and summer months and will approximate the same temperatures as exist in the aquifer supplying Clear Springs with the same or similar inter-year and intra-year variations. Since the pipe line proposed over the rim will also be buried or covered aquifer temperatures will be maintained even in the summer. **Exhibit 8** provided herewith is a technical memo from Dr. Brendecke and describes a preliminary analysis of heat gain in the buried pipeline and concludes

the under worst-case conditions, the increase in delivered water temperature would be less than 0.2 degrees Centigrade and would cause less than 0.01 degree Centigrade change in water temperature of hatchery influent. If unexpected water temperature increases are found beyond existing variations and unsuitable for trout rearing then simple aeration of the water at the spring box can be done to provide any needed evaporative cooling.

Available data reported from surrounding wells indicates that water quality is not an issue either, as one would reasonably conclude since the aquifer is the same source for the Over-the-Rim Plan wells and Clear Springs. This conclusion is further supported by the fact that many domestic wells supply homeowners in the same area. **Exhibit 9** is a spreadsheet that contains water quality data for surrounding wells. This water quality data from surrounding wells show very similar quality to that found at Clear Springs, Snake River Farm spring outlet. Reasonable steps, such as locked cages or well houses will be taken to insure that the wellheads are secure and that contamination at the wells will not occur. Because the pipeline will be buried, there is no possibility of contamination in the pipeline itself. Please refer to **Exhibit 10**, which is a technical memo from Mr. Schuur that provides for further explanation on both water temperature and quality.

2. Operation Plan – A final system operation plan has not yet been developed but will be when the system becomes operational. This will be undertaken once the Over-the-Rim Plan is approved and any conditions imposed by the Director are known. However, the operation plan will provide for the delivery of water from the seven wells as needed to provide a continuous flow of water to Clear Springs, Snake River Farm within the combined historical annual pumping volume for the wells. Delivery of water will come from two or more wells at any one time and will be designed in a manner to provide a reliable, year-round water supply.

Routine maintenance will be rotated between the wells in a manner so as to not interrupt water delivery to Clear Springs. This redundancy will also insure that water can be delivered in the event of failure of a well. As concluded in **Exhibit 11**, rotation of pumping among the wells is not expected to create any material change in impact to Clear Springs, Snake River Farm.

The wells utilized to deliver water will not be used for irrigation purposes. All of the water right owners have agreed in principle to the long-term lease of their water rights and the conversion of their lands to surface water irrigation. A long-term water lease and conversion agreement has been circulated to the water right owners to confirm these commitments.

District members indicate that the power supply in the area is very reliable with outages uncommon and short in duration. Ground Water Districts are attempting to confirm this information with Idaho Power. Because multiple wells will be available to supply water to Clear Springs there is built-in redundancy in the proposal. This redundancy provides excess capacity to further reduce any risks of short-term interruptions. Furthermore, Clear Springs, Snake River Farm's operation would not be substantially effected by short-term flow variations of a small magnitude as they already are accustomed to that when the Clear Lake Country Club takes approximately 2 cfs directly from the raceway intake when their pumps turn on each night and off each day during the irrigation season to water the golf course.


Finally, the Ground Water Districts operational plan will measure the amount of water pumped from each well and the total amount of water delivered to Clear Springs. The measuring devices will also record water quality data, or a plan will be employed to perform periodic water quality testing.

Conversions and Construction

Once the Over-the-Rim Plan is approved, it is expected that the conversion of the approximately 1100 acres can be completed within one month. The over-the-rim delivery pipeline and facilities is being designed and it is anticipated the construction will proceed simultaneously with the conversion work.

DATED this 19th day of March, 2009.

RACINE OLSON NYE BUDGE &
BAILEY CHARTERED

By: 
Randall C. Budge
Candice M. McHugh
Attorneys for North Snake and
Magic Valley Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of March, 2009, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

DAVID R. TUTHILL, DIRECTOR PHILLIP J. RASSIER IDAHO DEPARTMENT OF WATER RESOURCES P.O. BOX 83720 BOISE, IDAHO 83720-0098 Dave.tuthill@idwr.idaho.gov Phil.rassier@idwr.idaho.gov Chris.bromley@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
JOHN K. SIMPSON TRAVIS L. THOMPSON PAUL L. ARRINGTON BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson, Suite 102 P.O. Box 2139 Boise, Idaho 83701 jks@idahowaters.com tlr@idahowaters.com pla@idahowaters.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail


Candice M. McHugh

MEMORANDUM

TO: Candice McHugh, Randy Budge
FROM: Chuck Brendecke
SUBJECT: Temperature Gain Analysis
DATE: March 19, 2009

In the technical review discussion held on March 17th questions were raised about the potential for water temperature gain in the delivery pipeline proposed in the Ground Water District's over-the-rim mitigation plan. This memo addresses this concern.

A preliminary steady-state heat transfer analysis was conducted to determine the expected water temperature change in the pipeline transporting water from the seven wells to the Snake River Farm. The alternative route shown on Exhibit 2 "Over the Rim Delivery Plan Schematic" was assumed. The pipeline was analyzed in sections based on well locations. Flow rates, pipe sizes, pipe lengths, and materials of construction were based on the same assumptions used for reconnaissance level cost estimates submitted with the mitigation plan. The heat transfer computations considered factors such as:

- Burial depth;
- Flow rates;
- Pipe size, length, materials of construction and associated properties;
- Soil type, moisture content, and associated properties;
- Soil temperature; and
- Well water temperature.

ARS personnel in Kimberly suggested that soil temperatures in the area at a depth of 3 ft could range from a low of 30 degrees F in the winter to a high of 65 degrees F in summer. The heat transfer analysis assumed that soil temperature would be at the peak summer level year-around.

Observation well 08S 15E 33ABB1 is the nearest upgradient observation well to the mitigation wells. In 2004, the last year observed, the water temperature in this well was 14.7 degrees Centigrade (58.5 degrees F). Thus for most periods of the year when soil temperatures are less than 58.5 degrees F the pipeline will likely cool the well water rather than heat it.

Nevertheless, the heat transfer analysis showed that, based on a 3 foot burial depth, a well water temperature of 14.7 °C, and a year-around soil temperature of 65 °F, the water

delivered to Snake River Farm would be approximately 14.9 °C. Thus, a 0.2 °C temperature rise could be expected in delivered water under worst-case conditions.

Considering the dilution afforded by mixing the 2 cfs of delivered mitigation water with the roughly 90 cfs of spring discharge, it is not likely that hatchery influent temperatures will be measurably increased by mitigation water delivery.

EXHIBIT 9

Statewide Groundwater Quality Monitoring Program

Station: 08S 15E 33ABB1

Site ID: 424138114420801

Metal Tag #: A0009144

Sample years: 1991, 1995, 1999, and 2004

Sample Date	Contents	Analyte	Reported Value	Numeric Value	Units
08/28/1991	Inorg & Field	Alkalinity	160	160	mg/L
08/28/1991	Inorg & Field	Ammonia	<0.010	BRL	mg/L
08/28/1991	Inorg & Field	Arsenic	2	2	ug/L
08/28/1991	Inorg & Field	Bicarbonate	195	195	mg/L
08/28/1991	Inorg & Field	Cadmium	<1.0	BRL	ug/L
08/28/1991	Inorg & Field	Calcium	50	50	mg/L
08/28/1991	Inorg & Field	Carbonate	0	0	mg/L
08/28/1991	Inorg & Field	Chloride	40	40	mg/L
08/28/1991	Inorg & Field	Chromium	2	2	ug/L
08/28/1991	Inorg & Field	Copper	1	1	ug/L
08/28/1991	Inorg & Field	Cyanide	<0.01	BRL	mg/L
08/28/1991	Inorg & Field	Fecal Coliform	<1	BRL	col/100 ml
08/28/1991	Inorg & Field	Fluoride	0.60	0.6	mg/L
08/28/1991	Inorg & Field	Hardness	211	211	mg/L
08/28/1991	Inorg & Field	Iron	7	7	ug/L
08/28/1991	Inorg & Field	Lead	<1	BRL	ug/L
08/28/1991	Inorg & Field	Magnesium	21	21	mg/L
08/28/1991	Inorg & Field	Manganese	<1	BRL	ug/L
08/28/1991	Inorg & Field	Mercury	<0.1	BRL	ug/L
08/28/1991	Inorg & Field	Nitrate	1.80	1.8	mg/l as N
08/28/1991	Inorg & Field	pH	7.75	7.75	pH

EXHIBIT 9

08/28/1991	Inorg & Field	Phosphorus	0.020	0.02 mg/L
08/28/1991	Inorg & Field	Potassium	4.4	4.4 mg/L
08/28/1991	Inorg & Field	Selenium	<1	BRL ug/L
08/28/1991	Inorg & Field	Silica	35	35 mg/L
08/28/1991	Inorg & Field	Sodium	26	26 mg/L
08/28/1991	Inorg & Field	Solids	328	328 mg/L
08/28/1991	Inorg & Field	Specific Conductance	535	535 uS/cm
08/28/1991	Inorg & Field	Sulfate	48	48 mg/L
08/28/1991	Inorg & Field	Water Temperature	14.2	14.2 °C
08/28/1991	Inorg & Field	Zinc	98	98 ug/L
08/28/1991	Radiochem	Alpha, Gross (as Americium)	0 ± 2	0 pCi/l
08/28/1991	Radiochem	Beta, Gross	6.7 ± 2.5	6.7 pCi/l
08/28/1991	VOCs	1,4-Dichlorobenzene	<0.21	BRL ug/L
08/28/1991	VOCs	1-ethyl-2,4- dimethylbenzene	<0.22	BRL ug/L
08/28/1991	VOCs	Benzene	<0.10	BRL ug/L
08/28/1991	VOCs	Bromobenzene	<0.14	BRL ug/L
08/28/1991	VOCs	Bromochloromethane	<0.01	BRL ug/L
08/28/1991	VOCs	Bromoform	<0.20	BRL ug/L
08/28/1991	VOCs	Bromomethane	<0.19	BRL ug/L
08/28/1991	VOCs	Butylbenzene, n-	<0.14	BRL ug/L
08/28/1991	VOCs	Butylbenzene, -sec	<0.16	BRL ug/L
08/28/1991	VOCs	Carbon Tetrachloride	<0.17	BRL ug/L
08/28/1991	VOCs	Chlorobenzene	<0.09	BRL ug/L
08/28/1991	VOCs	Chloroethane	<0.13	BRL ug/L
08/28/1991	VOCs	Chloroform	<0.10	BRL ug/L
08/28/1991	VOCs	Chlorotoluene-p	<0.07	BRL ug/L

EXHIBIT 9

08/28/1991	VOCs	Dibromochloromethane	<0.11	BRL ug/L
08/28/1991	VOCs	Dibromochloropropane (DBCP)	<0.2	BRL ug/L
08/28/1991	VOCs	Dibromoethane, 1,2- (EDB)	<0.17	BRL ug/L
08/28/1991	VOCs	Dibromomethane	<0.07	BRL ug/L
08/28/1991	VOCs	Dichlorobenzene, 1,2-	<0.17	BRL ug/L
08/28/1991	VOCs	Dichlorobenzene, 1,3-	<0.19	BRL ug/L
08/28/1991	VOCs	Dichlorobromomethane	<0.16	BRL ug/L
08/28/1991	VOCs	Dichlorodifluoromethane	<0.29	BRL ug/L
08/28/1991	VOCs	Dichloroethane, 1,1-	<0.12	BRL ug/L
08/28/1991	VOCs	Dichloroethane, 1,2-	<0.12	BRL ug/L
08/28/1991	VOCs	Dichloroethene, 1,1-	<0.26	BRL ug/L
08/28/1991	VOCs	Dichloroethene, 1,2, cis-	<0.05	BRL ug/L
08/28/1991	VOCs	Dichloroethene, 1,2, trans-	<0.17	BRL ug/L
08/28/1991	VOCs	Dichloropropane, 1,2-	<0.12	BRL ug/L
08/28/1991	VOCs	Dichloropropane, 1,3-	<0.02	BRL ug/L
08/28/1991	VOCs	Dichloropropane, 2,2-	BRL	BRL ug/L
08/28/1991	VOCs	Dichloropropene, 1,1-	<0.05	BRL ug/L
08/28/1991	VOCs	Dichloropropene, 1,3 cis-	<0.15	BRL ug/L
08/28/1991	VOCs	Dichloropropene, 1,3 trans-	<0.20	BRL ug/L
08/28/1991	VOCs	Ethylbenzene	<0.09	BRL ug/L
08/28/1991	VOCs	Ethylbenzene, 2,3- Dimethyl-	<0.11	BRL ug/L
08/28/1991	VOCs	Hexachlorobutadiene	<0.09	BRL ug/L
08/28/1991	VOCs	Isodurene	<0.15	BRL ug/L
08/28/1991	VOCs	Isopropylbenzene	<0.14	BRL ug/L
08/28/1991	VOCs	Methylene chloride	<0.14	BRL ug/L
08/28/1991	VOCs	Naphthalene	<0.05	BRL ug/L

EXHIBIT 9

08/28/1991	VOCs	o-Chlorotoluene	<0.04	BRL ug/L
08/28/1991	VOCs	Paraldehyde	<0.16	BRL ug/L
08/28/1991	VOCs	Styrene	<0.08	BRL ug/L
08/28/1991	VOCs	Tetrachloroethane, 1,1,1,2-	BRL	BRL ug/L
08/28/1991	VOCs	Tetrachloroethane, 1,1,2,2-	<0.28	BRL ug/L
08/28/1991	VOCs	Tetrachloroethylene	<0.31	BRL ug/L
08/28/1991	VOCs	Tetralin	<0.1	BRL ug/L
08/28/1991	VOCs	Toluene	<0.05	BRL ug/L
08/28/1991	VOCs	Toluene, 2-Isopropyl-	<0.13	BRL ug/L
08/28/1991	VOCs	Trichlorobenzene, 1,2,3-	<0.06	BRL ug/L
08/28/1991	VOCs	Trichlorobenzene, 1,2,4-	<0.08	BRL ug/L
08/28/1991	VOCs	Trichloroethane, 1,1,1-	<0.12	BRL ug/L
08/28/1991	VOCs	Trichloroethane, 1,1,2-	<0.04	BRL ug/L
08/28/1991	VOCs	Trichloroethylene	<0.16	BRL ug/L
08/28/1991	VOCs	Trichlorofluoromethane	<0.34	BRL ug/L
08/28/1991	VOCs	Trichloropropane	<0.02	BRL ug/L
08/28/1991	VOCs	Trimethylbenzene, 1,2,4-	<0.10	BRL ug/L
08/28/1991	VOCs	TRIMETHYLBENZENE, 1,3,5-	<0.11	BRL ug/L
08/28/1991	VOCs	Vinyl chloride	<0.52	BRL ug/L
07/06/1995	Inorg & Field	Air Temperature	26.0	26 °C
07/06/1995	Inorg & Field	Alkalinity	158	158 mg/L
07/06/1995	Inorg & Field	Ammonia	0.050	0.05 mg/L
07/06/1995	Inorg & Field	Arsenic	2	2 ug/L
07/06/1995	Inorg & Field	Bicarbonate	193	193 mg/L
07/06/1995	Inorg & Field	Cadmium	<1.0	BRL ug/L
07/06/1995	Inorg & Field	Calcium	51	51 mg/L

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07/06/1995	Inorg & Field	Carbonate	0	0 mg/L
07/06/1995	Inorg & Field	Chloride	41	41 mg/L
07/06/1995	Inorg & Field	Chromium	2	2 ug/L
07/06/1995	Inorg & Field	Copper	2	2 ug/L
07/06/1995	Inorg & Field	Fecal Coliform	<1	col/100 BRL ml
07/06/1995	Inorg & Field	Fluoride	0.60	0.6 mg/L
07/06/1995	Inorg & Field	Hardness	214	214 mg/L
07/06/1995	Inorg & Field	Iron	<3	BRL ug/L
07/06/1995	Inorg & Field	Lead	<1	BRL ug/L
07/06/1995	Inorg & Field	Magnesium	21	21 mg/L
07/06/1995	Inorg & Field	Manganese	<1	BRL ug/L
07/06/1995	Inorg & Field	Nitrate	2.10	2.1 mg/l as N
07/06/1995	Inorg & Field	Nitrite	<0.010	BRL mg/L
07/06/1995	Inorg & Field	pH	7.75	7.75 pH
07/06/1995	Inorg & Field	Phosphorus	0.040	0.04 mg/L
07/06/1995	Inorg & Field	Potassium	4.4	4.4 mg/L
07/06/1995	Inorg & Field	Selenium	<1	BRL ug/L
07/06/1995	Inorg & Field	Silica	33	33 mg/L
07/06/1995	Inorg & Field	Sodium	26	26 mg/L
07/06/1995	Inorg & Field	Solids	330	330 mg/L
07/06/1995	Inorg & Field	Specific Conductance	566	566 uS/cm
07/06/1995	Inorg & Field	Sulfate	49	49 mg/L
07/06/1995	Inorg & Field	Water Temperature	14.3	14.3 °C
07/06/1995	Inorg & Field	Zinc	60	60 ug/L
07/06/1995	Pesticides	Alachlor	<0.002	BRL ug/L
07/06/1995	Pesticides	Atrazine	0.0130	0.013 ug/L

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07/06/1995	Pesticides	Atrazine, desethyl (DEET)	0.003	0.003 ug/L
07/06/1995	Pesticides	Benefin	<0.002	BRL ug/L
07/06/1995	Pesticides	BHC, alpha-	<0.002	BRL ug/L
07/06/1995	Pesticides	BHC, gamma- (Lindane)	<0.004	BRL ug/L
07/06/1995	Pesticides	Carbaryl (Sevin)	<0.003	BRL ug/L
07/06/1995	Pesticides	Carbofuran	<0.003	BRL ug/L
07/06/1995	Pesticides	Chlorpyrifos	<0.004	BRL ug/L
07/06/1995	Pesticides	Cyanazine	<0.004	BRL ug/L
07/06/1995	Pesticides	Dacthal (DCPA)	<0.002	BRL ug/L
07/06/1995	Pesticides	DDE,4,4'-	<0.006	BRL ug/L
07/06/1995	Pesticides	Diazinon	<0.002	BRL ug/L
07/06/1995	Pesticides	Dieldrin	<0.001	BRL ug/L
07/06/1995	Pesticides	Diethylaniline,2,6-	<0.003	BRL ug/L
07/06/1995	Pesticides	Dipropylthiocarbamate, S-	<0.002	BRL ug/L
07/06/1995	Pesticides	Ethyl (EPTC)	<0.002	BRL ug/L
07/06/1995	Pesticides	Disulfoton	<0.017	BRL ug/L
07/06/1995	Pesticides	Dyfonate	<0.003	BRL ug/L
07/06/1995	Pesticides	Ethalfuralin	<0.004	BRL ug/L
07/06/1995	Pesticides	Ethoprop	<0.003	BRL ug/L
07/06/1995	Pesticides	Guthion	<0.001	BRL ug/L
07/06/1995	Pesticides	Linuron	<0.002	BRL ug/L
07/06/1995	Pesticides	Malathion	<0.005	BRL ug/L
07/06/1995	Pesticides	Metolachlor	<0.002	BRL ug/L
07/06/1995	Pesticides	Metribuzin	<0.004	BRL ug/L
07/06/1995	Pesticides	Molinate	<0.004	BRL ug/L
07/06/1995	Pesticides	Napropamide	<0.003	BRL ug/L
07/06/1995	Pesticides	Parathion	<0.004	BRL ug/L

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07/06/1995	Pesticides	Parathion-methyl	<0.006	BRL ug/L
07/06/1995	Pesticides	Pebulate	<0.004	BRL ug/L
07/06/1995	Pesticides	Penoxalin	<0.004	BRL ug/L
07/06/1995	Pesticides	Permethrins	<0.005	BRL ug/L
07/06/1995	Pesticides	Phorate	<0.002	BRL ug/L
07/06/1995	Pesticides	Pronamide	<0.003	BRL ug/L
07/06/1995	Pesticides	Propachlor	<0.007	BRL ug/L
07/06/1995	Pesticides	Propanil	<0.004	BRL ug/L
07/06/1995	Pesticides	Propargite	<0.013	BRL ug/L
07/06/1995	Pesticides	Simazine	<0.005	BRL ug/L
07/06/1995	Pesticides	Tebuthiuron	<0.010	BRL ug/L
07/06/1995	Pesticides	Terbacil	<0.007	BRL ug/L
07/06/1995	Pesticides	Terbufos	<0.013	BRL ug/L
07/06/1995	Pesticides	Thiobencarb	<0.002	BRL ug/L
07/06/1995	Pesticides	Triallate	<0.001	BRL ug/L
07/06/1995	Pesticides	Trifluralin	<0.002	BRL ug/L
07/06/1995	Pesticides	2,4-D	BRL	BRL ug/L
07/06/1995	Pesticides	Alachlor	BRL	BRL ug/L
07/06/1995	Pesticides	Aldicarb	BRL	BRL ug/L
07/06/1995	Pesticides	Atrazine	BRL	BRL ug/L
07/06/1995	Pesticides	Carbofuran	BRL	BRL ug/L
07/06/1995	Pesticides	Cyanazine	BRL	BRL ug/L
07/06/1995	Pesticides	Metolachlor	BRL	BRL ug/L
07/06/1995	Radiochem	Alpha, Gross (as Americium)	1.7 ± 2.6	1.7 pCi/l
07/06/1995	Radiochem	Beta, Gross	6.4 ± 2.4	6.4 pCi/l
07/06/1995	VOCs	1,4-Dichlorobenzene	<0.5	BRL ug/L

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07/06/1995	VOCs	Benzene	<0.5	BRL ug/L
07/06/1995	VOCs	Bromobenzene	<0.5	BRL ug/L
07/06/1995	VOCs	Bromochloromethane	<0.5	BRL ug/L
07/06/1995	VOCs	Bromoform	<0.5	BRL ug/L
07/06/1995	VOCs	Bromomethane	<0.5	BRL ug/L
07/06/1995	VOCs	Butylbenzene, n-	<0.5	BRL ug/L
07/06/1995	VOCs	Butylbenzene, -sec	<0.5	BRL ug/L
07/06/1995	VOCs	Carbon Tetrachloride	<0.5	BRL ug/L
07/06/1995	VOCs	Chlorobenzene	<0.5	BRL ug/L
07/06/1995	VOCs	Chloroethane	<0.5	BRL ug/L
07/06/1995	VOCs	Chloroform	<0.5	BRL ug/L
07/06/1995	VOCs	Chlorotoluene-p	<0.5	BRL ug/L
07/06/1995	VOCs	Dibromochloromethane	<0.5	BRL ug/L
07/06/1995	VOCs	Dibromochloropropane (DBCP)	<0.5	BRL ug/L
07/06/1995	VOCs	Dibromoethane, 1,2- (EDB)	<0.2	BRL ug/L
07/06/1995	VOCs	Dibromomethane	<0.5	BRL ug/L
07/06/1995	VOCs	Dichlorobenzene, 1,2-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichlorobenzene, 1,3-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichlorobromomethane	<0.5	BRL ug/L
07/06/1995	VOCs	Dichlorodifluoromethane	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloroethane, 1,1-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloroethane, 1,2-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloroethene, 1,1-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloroethene, 1,2,cis-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloroethene, 1,2,trans-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloropropane, 1,2-	<0.5	BRL ug/L

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07/06/1995	VOCs	Dichloropropane, 1,3-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloropropane, 2,2-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloropropene, 1,1-	<0.5	BRL ug/L
07/06/1995	VOCs	Dichloropropene, 1,3 cis-	<0.5	BRL ug/L
07/06/1995	VOCs	Ethylbenzene	<0.5	BRL ug/L
07/06/1995	VOCs	Hexachlorobutadiene	<0.5	BRL ug/L
07/06/1995	VOCs	Isodurene	<0.5	BRL ug/L
07/06/1995	VOCs	Isopropylbenzene	<0.5	BRL ug/L
07/06/1995	VOCs	Methyl tertiary butyl ether (MTBE)	<0.5	BRL ug/L
07/06/1995	VOCs	Methylene chloride	<0.5	BRL ug/L
07/06/1995	VOCs	Naphthalene	<0.5	BRL ug/L
07/06/1995	VOCs	o-Chlorotoluene	<0.5	BRL ug/L
07/06/1995	VOCs	Paraldehyde	<0.5	BRL ug/L
07/06/1995	VOCs	Styrene	<0.5	BRL ug/L
07/06/1995	VOCs	Tetrachloroethane, 1,1,1,2-	<0.5	BRL ug/L
07/06/1995	VOCs	Tetrachloroethane, 1,1,2,2-	<0.5	BRL ug/L
07/06/1995	VOCs	Tetrachloroethylene	<0.5	BRL ug/L
07/06/1995	VOCs	Tetralin	<0.5	BRL ug/L
07/06/1995	VOCs	Toluene	<0.5	BRL ug/L
07/06/1995	VOCs	Toluene, 2-Isopropyl-	<0.5	BRL ug/L
07/06/1995	VOCs	Trichlorobenzene, 1,2,3-	<0.5	BRL ug/L
07/06/1995	VOCs	Trichlorobenzene, 1,2,4-	<0.5	BRL ug/L
07/06/1995	VOCs	Trichloroethane, 1,1,1-	<0.5	BRL ug/L
07/06/1995	VOCs	Trichloroethane, 1,1,2-	<0.5	BRL ug/L
07/06/1995	VOCs	Trichloroethylene	<0.5	BRL ug/L
07/06/1995	VOCs	Trichlorofluoromethane	<0.5	BRL ug/L

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07/06/1995	VOCs	Trichloropropane	<0.5	BRL ug/L
07/06/1995	VOCs	Trimethylbenzene, 1,2,4-	<0.5	BRL ug/L
07/06/1995	VOCs	TRIMETHYLBENZENE, 1,3,5-	<0.5	BRL ug/L
07/06/1995	VOCs	Vinyl chloride	<0.5	BRL ug/L
07/06/1995	VOCs	Xylenes	<0.5	BRL ug/L
07/28/1999	Field	Air Temperature	29.0	29 °C
07/28/1999	Field	Alkalinity	217	217 mg/L
07/28/1999	Field	Ammonia	<0.20	BRL mg/L
07/28/1999	Field	Arsenic	2	2 ug/L
07/28/1999	Field	Barium	39	39 ug/L
07/28/1999	Field	Bicarbonate	260	260 mg/L
07/28/1999	Field	Cadmium	<1.0	BRL ug/L
07/28/1999	Field	Calcium	48	48 mg/L
07/28/1999	Field	Carbonate	0	0 mg/L
07/28/1999	Field	Chloride	36	36 mg/L
07/28/1999	Field	Copper	1.3	1.3 ug/L
07/28/1999	Field	Depth to Water	76.61	76.61 ft
07/28/1999	Field	Dissolved Oxygen	7.3	7.3 mg/L
07/28/1999	Field	Fecal Coliform	<1	BRL ml
07/28/1999	Field	Fluoride	59	0.59 mg/L
07/28/1999	Field	Hardness	200	200 mg/L
07/28/1999	Field	Iron	<10	BRL ug/L
07/28/1999	Field	Lead	<1.0	BRL ug/L
07/28/1999	Field	Magnesium	21	21 mg/L
07/28/1999	Field	Manganese	<3.0	BRL ug/L
07/28/1999	Field	Nitrate	2.50	2.5 mg/l as N

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07/28/1999	Inorg & Field	Nitrite	< 0.10	BRL mg/L
07/28/1999	Inorg & Field	pH	7.5	7.5 pH
07/28/1999	Inorg & Field	Phosphorus	0.64	0.064 mg/L
07/28/1999	Inorg & Field	Potassium	4.5	4.5 mg/L
07/28/1999	Inorg & Field	Selenium	1	1 ug/L
07/28/1999	Inorg & Field	Silica	34	34 mg/L
07/28/1999	Inorg & Field	Sodium	26	26 mg/L
07/28/1999	Inorg & Field	Solids	359	359 mg/L
07/28/1999	Inorg & Field	Specific Conductance	547	547 uS/cm
07/28/1999	Inorg & Field	Sulfate	48	48 mg/L
07/28/1999	Inorg & Field	Water Temperature	16.6	16.6 °C
07/28/1999	Inorg & Field	Zinc	22	22 ug/L
07/28/1999	Pesticides (Immu)	Alachlor	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Aldicarb	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Atrazine	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Carbofuran	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Chlorpyrifos	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Cyanazine	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Metolachlor	BRL	BRL ug/L
07/28/1999	Pesticides (Immu)	Metribuzin	BRL	BRL ug/L
07/28/1999	VOCs	1,4-Dichlorobenzene	<0.50	BRL ug/L
07/28/1999	VOCs	Benzene	<0.50	BRL ug/L
07/28/1999	VOCs	Bromobenzene	<0.50	BRL ug/L
07/28/1999	VOCs	Bromochloromethane	<0.50	BRL ug/L
07/28/1999	VOCs	Bromoform	<0.50	BRL ug/L
07/28/1999	VOCs	Bromomethane	<0.50	BRL ug/L

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07/28/1999	VOCs	Butylbenzene, n-	<0.50	BRL ug/L
07/28/1999	VOCs	Butylbenzene, -sec	<0.50	BRL ug/L
07/28/1999	VOCs	Carbon Tetrachloride	<0.50	BRL ug/L
07/28/1999	VOCs	Chlorobenzene	<0.50	BRL ug/L
07/28/1999	VOCs	Chloroethane	<0.50	BRL ug/L
07/28/1999	VOCs	Chloroform	<0.50	BRL ug/L
07/28/1999	VOCs	Chlorotoluene-p	<0.50	BRL ug/L
07/28/1999	VOCs	Dibromochloromethane	<0.50	BRL ug/L
07/28/1999	VOCs	Dibromochloropropane (DBCP)	<0.50	BRL ug/L
07/28/1999	VOCs	Dibromoethane, 1,2- (EDB)	<0.20	BRL ug/L
07/28/1999	VOCs	Dibromomethane	<0.50	BRL ug/L
07/28/1999	VOCs	Dichlorobenzene, 1,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichlorobenzene, 1,3-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichlorobromomethane	<0.50	BRL ug/L
07/28/1999	VOCs	Dichlorodifluoromethane	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloroethane, 1,1-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloroethane, 1,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloroethene, 1,1-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloroethene, 1,2,cis-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloroethene, 1,2,trans-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloropropane, 1,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloropropane, 1,3-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloropropane, 1,3-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloropropane, 2,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Dichloropropene, 1,1-	<0.50	BRL ug/L
07/28/1999	VOCs	Ethylbenzene	<0.50	BRL ug/L

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07/28/1999	VOCs	Hexachlorobutadiene	<0.50	BRL ug/L
07/28/1999	VOCs	Isodurene	<0.50	BRL ug/L
07/28/1999	VOCs	Isopropylbenzene	<0.50	BRL ug/L
07/28/1999	VOCs	Methyl tertiary butyl ether (MTBE)	<0.50	BRL ug/L
07/28/1999	VOCs	Methylene chloride	<0.50	BRL ug/L
07/28/1999	VOCs	Naphthalene	<0.50	BRL ug/L
07/28/1999	VOCs	o-Chlorotoluene	<0.50	BRL ug/L
07/28/1999	VOCs	Paraldehyde	<0.50	BRL ug/L
07/28/1999	VOCs	Styrene	<0.50	BRL ug/L
07/28/1999	VOCs	Tetrachloroethane, 1,1,1,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Tetrachloroethane, 1,1,2,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Tetrachloroethylene	<0.50	BRL ug/L
07/28/1999	VOCs	Tetralin	<0.50	BRL ug/L
07/28/1999	VOCs	Toluene	<0.50	BRL ug/L
07/28/1999	VOCs	Toluene, 2-Isopropyl-	<0.50	BRL ug/L
07/28/1999	VOCs	Trichlorobenzene, 1,2,3-	<0.50	BRL ug/L
07/28/1999	VOCs	Trichlorobenzene, 1,2,4-	<0.50	BRL ug/L
07/28/1999	VOCs	Trichloroethane, 1,1,1-	<0.50	BRL ug/L
07/28/1999	VOCs	Trichloroethane, 1,1,2-	<0.50	BRL ug/L
07/28/1999	VOCs	Trichloroethylene	<0.50	BRL ug/L
07/28/1999	VOCs	Trichlorofluoromethane	<0.50	BRL ug/L
07/28/1999	VOCs	Trichloropropane	<0.50	BRL ug/L
07/28/1999	VOCs	Trimethylbenzene, 1,2,4-	<0.50	BRL ug/L
07/28/1999	VOCs	TRIMETHYLBENZENE, 1,3, ,5-	<0.50	BRL ug/L
07/28/1999	VOCs	Vinyl chloride	<0.50	BRL ug/L
07/28/1999	VOCs	Xylenes	<0.50	BRL ug/L

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09/02/2004	Inorg & Field	Air Temperature	16	16 °C
09/02/2004	Inorg & Field	Alkalinity	158	158 mg/L
09/02/2004	Inorg & Field	Ammonia	<0.04	BRL mg/L
09/02/2004	Inorg & Field	Arsenic	2.2	2.2 ug/L
09/02/2004	Inorg & Field	Barium	44.7	44.7 ug/L
09/02/2004	Inorg & Field	Bicarbonate	193	193 mg/L
09/02/2004	Inorg & Field	Cadmium	<0.04	BRL ug/L
09/02/2004	Inorg & Field	Calcium	55.7	55.7 mg/L
09/02/2004	Inorg & Field	Carbonate	0	0 mg/L
09/02/2004	Inorg & Field	Chloride	39.9	39.9 mg/L
09/02/2004	Inorg & Field	Dissolved Oxygen	4.7	4.7 mg/L col/100
09/02/2004	Inorg & Field	Fecal Coliform	<1	BRL ml
09/02/2004	Inorg & Field	Fluoride	0.6	0.6 mg/L
09/02/2004	Inorg & Field	Hardness	230	230 mg/L
09/02/2004	Inorg & Field	Iron	E4	4 ug/L
09/02/2004	Inorg & Field	Magnesium	22.8	22.8 mg/L
09/02/2004	Inorg & Field	Manganese	<0.8	BRL ug/L
09/02/2004	Inorg & Field	Nitrate	2.2	2.2 mg/l as N
09/02/2004	Inorg & Field	Nitrite	<0.008	BRL mg/L
09/02/2004	Inorg & Field	pH	7.3	7.3 pH
09/02/2004	Inorg & Field	Phosphorus	0.03	0.03 mg/L
09/02/2004	Inorg & Field	Potassium	4.96	4.96 mg/L
09/02/2004	Inorg & Field	Selenium	0.8	0.8 ug/L
09/02/2004	Inorg & Field	Silica	33.2	33.2 mg/L
09/02/2004	Inorg & Field	Sodium	28.2	28.2 mg/L
09/02/2004	Inorg & Field	Solids	338	338 mg/l

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09/02/2004	Inorg & Field	Specific Conductance	562	562 uS/cm
09/02/2004	Inorg & Field	Sulfate	49.7	49.7 mg/L
09/02/2004	Inorg & Field	Water Temperature	14.7	14.7 °C

Results Codes:		Legend Hardness Scale:	
<	below the laboratory reporting limit	<75 mg/l	soft
BRL	below the laboratory reporting limit	75-150 mg/l	moderatel y hard
ND	not detected	151-300 mg/l	hard
E	estimated	>300 mg/l	very hard
IN	indetermina te		

Unit Abbreviations:	
ug/l	micrograms per liter (parts per billion)
mg/l	milligrams per liter (parts per million)
‰	parts per thousand
uS/cm	microSieme ns per centimeter
pCi/l	picoCuries per liter
ft	feet
°C	degrees Celsius
col/100 ml	colonies per 100 milliliters

Miscellaneous:

EXHIBIT 9

means
Immunoassay (enzyme)
testing
IMMU

The data on these pages

Idaho Department of
Telephone:
322. E (208) 287-
Front Street 4800
Boise,
Idaho FAX: (208)
83720-0098 287-6700

Technical Memorandum

**Water Quality and Temperature
Considerations in
Over the Rim Mitigation Proposal**

Prepared by Anthonie M. Schuur¹
Aquaculture Management Services
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Galt, CA 95632
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amschuur@aol.com

¹ Appendix 1 hereto provides Mr. Schuur's qualifications and background information.

I. INTRODUCTION

This Technical Memorandum is being provided to augment information contained in the 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District dated March 12, 2009.

II. DISCUSSION

The principal categories of water quality concern for the Over the Rim (OTR) mitigation proposal are temperature, dissolved gas, and dissolved solids. Each of these requires a more detailed description of specific issues as provided below:

A. TEMPERATURE

Temperature is a physical property of water that can be changed by heat transfer from the surrounding environment. Based on my review of SRF records supplied to the Idaho Department of Environmental Quality, the typical SRF temperature at the spring outlet is 14.5 C. Assuming that the well water in the well is similar to the typical SRF temperature of 14.5 C (to be determined by samples and evaluation), temperature change depends on the heat transfer to (or from) the water through the pipe.

The present information indicates that the proposed supply wells above the rim have water temperatures at discharge that are within a degree of Snake River Farm (SRF) raceway temperature of 14.5 C. We anticipate that the delivered water temperature at the spring box will be very close to the existing temperature range at SRF. I suggest that for the very worst case in which we would mix 3% of the flow with water that is 1.5 C warmer than the existing temperature of 14.5 C the result would be 3% of 1.5 C or about 0.045 C warming. That is less than 0.1 C and would therefore not even be detectable with normal thermometers. Even in what I anticipate as an extreme, the OTR mitigation supply is very unlikely to cause any change in the SRF raceway temperature and that it will remain in the optimal growth range for trout and that the trout will experience no stress from temperature fluctuations caused by the OTR flow.

B. DISSOLVED GAS SUPERSATURATION

Dissolved gas supersaturation is another physical property of water that arises when the dissolved gas in solution exceeds the solubility of the gas in water. This can be dangerous to fish but is, with proper and simple engineering, unlikely to occur in the OTR mitigation proposal pipeline. One of the likely means of delivering water to the SRF spring box is likely to be a spray aeration system that will dissipate the energy from the water at about 100 psi on a rock bed. This accomplishes three things:

- Equilibration of dissolved gases to atmospheric pressure
- Saturation of the flow with oxygen
- Evaporative cooling that would offset any warming in the pipe

The two principal ways of inducing supersaturation are increasing the temperature of water that is already saturated and entraining air in the pipe by the Venturi effect caused by leaks in the pipe or joints. The temperature increase is not indicated because of the inherent temperature stability of the system. Any entrainment of air is prevented by proper pipe installation. Even if supersaturation should occur, the aeration system at delivery would rectify any supersaturation.

C. DISSOLVED SOLIDS

Dissolved solids are the dissolved chemical constituents in the water that are likely to be constant from the well to the spring box. Assuming acceptable chemical quality in the well water is determined, it is unlikely to change during conveyance to the spring box.

APPENDIX 1

Anthony M. Schuur

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Galt, CA 95632
Phone (cell) 772-971-6500 Fax 916 687-8823
e-mail amschuur@aol.com

Personal: Born Whittier, California August 12, 1945

Languages: English, Spanish

Education: B.S. Biological Science, University of California, Irvine, 1969;
Graduate Studies in Agricultural Economics, University of California,
Davis.

Employment Summary:

1988 to present, **Aquaculture Management Services**
Principal Aquaculture Consultant

1994 to 1997, **Altrix International/Jamaica Flour Mills Investments**
Project Development Manager
Project Manager, Altrix Panama shrimp farm expansion
Project Manager, Hellshire Hatchery design and construction

1984 to 1988, **Agrifuture Inc.**
Vice President, Director, Agrifuture, Inc.
Vice President, Tomales Shellfish Farms, Inc.
Vice President, Aquafuture, Inc.
Consultant to the World Bank (Indonesia)

1978 to 1984, **James M. Montgomery Consulting Engineers, Inc.**
Supervising Aquaculture Scientist
Senior Aquaculture Scientist

1976 to 1978, **Maricultura, S.A.**, Costa Rica
Production Manager
Assistant Operations Manager

1972 to 1976, **University of California, Davis**
Postgraduate Research Economist, Department of Agricultural Economics
Program Manager, Aquaculture Development Program
Staff Research Associate

1970 to 1972 **Brown and Caldwell, Consulting Engineers**
Water Quality Biologist

1965 to 1967 **United States Marine Corps**
Sergeant, communications specialist

Specific Experience Areas:

- Preparation of commercial fish and shrimp farm studies for clients in Panama, Guatemala, Jamaica, Honduras, Nicaragua, Colombia, Venezuela, Ecuador, Mexico, Trinidad, India, Malaysia, South Africa, Sri Lanka, Bangladesh, and Indonesia
- Operational management of commercial shrimp, shellfish, and finfish production programs.
- Preparation of business plans and financial projections for commercial aquaculture ventures.
- Preparation of bioengineering criteria and design studies and for commercial intensive and semi-intensive aquaculture production systems.
- Mathematical modeling of bioengineering systems.
- Preparation of rural development project plans in Africa, Asia, and Latin America.
- Instruction in bioenergetics and bioengineering (Associate Instructor, Aquaculture Department, Harbor Branch Oceanographic Institution)
- Project management including construction of water systems, supervision of civil including pump stations, water control structures, and ponds.

Publications:

Co-author of Bioeconomics of Aquaculture, a monograph. Author or co-author of the following academic papers and more than 60 technical reports, system designs, and financial plans.

Schuur, A.M., Allen, P.G., and Botsford, L.W. 1974. An analysis of three facilities for the commercial production of *Homarus americanus*. American Society of Agricultural Engineers. Paper No. 74-5517.

Shleser, R.A., and Schuur, A.M. 1975. Utilization of power plant thermal effluent for mariculture. In: Water Management by the Electrical Power Industry. Water Resources Symposium. 8:307-312. Center for Research in Water Resources.

Botsford, L. W., Raush, H.E., Schuur, A.M. and Shleser, R.A. 1975. An economically optimum aquaculture facility. Proceedings of the World Mariculture Society, 6:407-420.

Schuur, A.M., Fisher, W.S., Van Olst, J., Carlberg, J., Shleser, R.A., and Ford, R. 1976.

Hatchery Methods for the Production of Juvenile Lobsters (*Homarus americanus*). University of California Sea Grant Program. Publication 48.

Wickham, D.E., Shleser, R.A., and Schuur, A.M. 1976. Observations on the inshore population of Dungeness Crab, *Cancer magister*, in Bodega Bay. California Fish and Game, 62(1): 89-92.

Allen, P.G., L.W. Botsford, A.M. Schuur, and W.E. Johnston, 1984. Bioeconomics of Aquaculture. A Systems Approach. Elsevier, New York, 386 pp.

Schuur, A.M. 1991. A bioenergetic model for application to intensive fish culture system management. Fisheries Bioengineering Symposium, American Fisheries Society Symposium 10: 393-401.

Rolland Laramore, S. Allen, P.Hitchens, X. Romero, and A. Schuur. 2000. Artificial induction of active accommodation for white spot syndrome virus (WSSV) in *Penaeus vannamei* with tolentine products. Presented at 4th Congreso Centroamericano de Acuicultura, June 2000.

Schuur, A.M. 2003. Evaluation of biosecurity applications for intensive shrimp farming. Aquacultural Engineering 28 (1-2): 3-20.

Organizations:

California Aquaculture Association, President, 1988, Chairman of the Board, 1989; National Aquaculture Association, founding Director, 1990, Newsletter Editor, 1991; Editorial Board, Aquacultural Engineering, 1998-present; member World Aquaculture Society, and Aquacultural Engineering Society; California Aquaculture Association, Vice President and Chairman of the Governmental Affairs Committee, 2006 to present.

NARRATIVE SUMMARY

Anthonie M. Schuur

Mr. Schuur is a professional aquaculture scientist with over 30 years of experience in aquaculture both as an operational manager and as a consultant. He has direct experience as the manager of commercial fin-fish, shrimp, and bivalve production facilities encompassing both intensive and extensive production methods. His consulting experience includes 7 years as a Supervising Environmental Scientist with James M. Montgomery Consulting Engineers and 18 years as an independent consultant specializing in services to commercial aquaculture clients. The scope of his consulting includes bioengineering studies, facility planning and design, operational advisory services, expert testimony, marketing development, and financial analysis.

He is a co-author of *Bioeconomics of Aquaculture*, a monograph describing the interrelationships between the biological, engineering, and economic aspects of aquaculture production. His scientific publications often emphasize the field of bioenergetics that underlies many of the criteria for aquaculture production facilities. He has conducted several seminars demonstrating the use of bioenergetics models for aquaculture systems management at national aquaculture technical meetings and at the University of California, Davis.

He has completed several comprehensive planning studies that include conceptual development, facility engineering, capital cost assessment, and analysis of projected financial performance. Under contract to the International Finance Corporation of the World Bank, he prepared an extensive shrimp farming feasibility study for a 6,000-acre site in Nicaragua. The study included an integrated plan for a shrimp farming industry complex including a hatchery, a shrimp farm capable of five million pounds of output per year, and a processing facility. In 1997, he completed an assignment as the project manager of a shrimp farm and hatchery complex in Panama and Jamaica. The Panama farm expansion involved construction of 300 hectares of new ponds, renovation of 100 hectares, construction of a 12 cum/sec pump station, and other ancillary structures. The Jamaica hatchery has the capacity to produce approximately 30 million shrimp post-larvae per month. In 1999, he prepared a comprehensive planning study for a shrimp-farming venture in Venezuela comprising more than 5,000 acres.

He has also prepared plans and system designs for several intensive fin-fish farming ventures including the facilities employed by The Fishery near Sacramento, California. The intensive facility is used for the production of sturgeon caviar and produces several tons of select caviar annually. He has also prepared similar designs for intensive culture of several kinds of fish including catfish, tilapia, and striped bass.

Due to his specialization in aquaculture economics and the financial assessment of aquaculture ventures, Mr. Schuur has served several institutional clients requiring appraisals for aquaculture facilities. On five occasions, he prepared expert opinions for submission in court proceedings. His expert testimony was used to ascertain asset values and other financial issues. Mr. Schuur has also assisted lending institutions and development agencies in assessing loans for proposed aquaculture projects.

Mr. Schuur has served as a technical and management advisory resource to many commercial aquaculture production clients such as The Fishery, Shrimp Culture Inc., Sea Ark International, Sierra AquaFarms, SeaChick of Mississippi, Solar AquaFarms (Chiquita Brands), Grupo Granjas Marinas de San Bernardo, Altrix International, Jamaica Flour Mills (ADM) and Bluepoints Company, Inc. Services for these clients span a diversity of species and culture system approaches.

As an independent consultant, Mr. Schuur provides planning and bioengineering professional services to private, corporate, and public clients and serves on the editorial board of the journal, Aquacultural Engineering.

MEMORANDUM

TO: Candice McHugh, Randy Budge
FROM: Chuck Brendecke
SUBJECT: Operation of Over-the-Rim Delivery
DATE: March 19, 2009

In the technical review discussion held on March 17th questions were raised about the proposed spatial distribution of pumping under the Ground Water District's over-the-rim mitigation plan. The concern was, as I understand it, that concentration of pumping from the wells nearest the canyon rim would change the spatial distribution of pumping impact on the Buhl-Thousand Springs reach, possibly increasing it. This memo addresses this concern.

I reviewed the historical pumping of the wells in terms of its spatial distribution vis-à-vis the ESPA ground water model. The table below summarizes the essential information from this review.

Exhibit 2 <u>Well #</u>	<u>Well</u> <u>Tag #</u>	<u>ESPA</u> <u>Cell ID</u>	<u>Avg* Pumped</u> <u>acre-ft/yr</u>
1	A0001689	050013	322.9
2	A0001521	050013	222.8
3	A0003643	050013	<u>238.1</u> 783.8
4	A0001510	050014	501.4
5	A0003548	050014	<u>446.2</u> 947.6
6	A0003549	050015	500.3
7	A0003550	050015	<u>211.9</u> 712.2

* For years 2003-2007

These data indicate that the mitigation wells all lie in 3 adjacent model cells. Each of these model cells has a slightly different response relationship to the Buhl-Thousand Springs reach. Cell 050013, the nearest to Snake River Farm, has a 59.5% response to the reach (4.1% response to SRF) while cell 050015, the furthest from Snake River Farm, has a 38.4% response to the reach (2.6% to SRF).

Applying the model's steady state response functions for each of the three cells to the historical pumping in each cell reveals that the impact on Snake River Farm from this

pumping in its historical locations is 0.11 cfs. If all historical pumping were concentrated in cell 050013, the nearest to Snake River Farm, the impact of that pumping on SRF would be 0.14 cfs, an increase of 0.03 cfs.

This 0.03 cfs (13 gallons per minute) represents about 1.5% of the mitigation requirement of 1.99 cfs and would be below that limits of accuracy of most measurement devices sized to monitor that mitigation requirement delivery. However, even if this minute increase were to be made an additional mitigation requirement, it could easily be delivered via the proposed system within the historical parameters.

From this I would conclude that the operation of this mitigation plan could move historical pumping among any of the mitigation wells with negligible change in pumping impact to Snake River Farm.

**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	)	ORDER APPROVING
FARM)	)	GROUND WATER DISTRICTS'
	)	REPLACEMENT WATER
	)	PLAN FOR 2009
)	
(Water District Nos. 130 and 140))	
_____)	

FINDINGS OF FACT

1. On March 5, 2009, the Director of the Department of Water Resources ("Director" or "Department") issued a *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* ("Notice of Curtailment"). The Notice of Curtailment stated that because there was no longer an acceptable mitigation plan before the Director, it would be necessary to order curtailment of junior ground water rights, starting on March 16, 2009, unless a plan to replace depletions to Clear Springs Foods, Inc. ("Clear Springs") was received by March 12, 2009. *Notice of Curtailment* at 14.
2. In order to provide the required 28.87 cfs to the Buhl Gage to Thousand Springs spring reach, or 1.99 cfs directly to Clear Springs (6.9% of 28.87 cfs), the Notice of Curtailment stated that it would be necessary to curtail ground water rights junior to November 16, 1972. The resulting curtailment would impact approximately 860 ground water rights located in Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls counties. The curtailment would impact approximately 41,000 acres of land irrigated by ground water.
3. On March 12, 2009, the Director received the Magic Valley Ground Water District and the North Snake Ground Water District (collectively referred to herein as "Ground Water Districts") *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* ("2009 Plan").
4. The 2009 Plan proposed two actions to make up the 1.99 cfs direct deficit to Clear Springs. First, the Plan proposed to provide ground water to Clear Springs from irrigation wells that are situated directly above Clear Springs' facility. The Plan proposed the construction of a piping system that would integrate numerous irrigation wells and pipe the water down the canyon wall to Clear Springs. The amount of water that the Ground Water Districts proposed to provide Clear Springs was between 1.99 cfs and 3.0 cfs. "The Ground Water Districts intend to design and implement the over-the-rim delivery to provide as much as possible above the 1.99 cfs requirement . . . in order to make up for any previous year shortfalls and in recognition of the

fact that some further delay in delivering this replacement water will be incurred until the necessary construction of the facilities has been completed.” *Id.* at 8. The Ground Water Districts estimated that installation cost of the over-the-rim proposal will be approximately \$500,000.

5. The second proposal, to convey water right no. 36-4076 directly to Clear Springs, would be implemented if the over-the-rim proposal “is rejected or conditioned, or . . . inadequate” *Id.* at 9. Water right no. 36-4076 is a partially decreed spring right held by the Idaho Department of Fish and Game. The Ground Water Districts estimate that it would cost approximately \$50,000 to implement this proposal.

6. The 2009 Plan requested that the Director treat it both as a temporary replacement water plan to allow junior ground water users to continue to divert during the 2009 irrigation season, as well as a mitigation plan under Rule 43 of the Department’s Rules for Conjunctive Management of Ground and Surface Water Sources, IDAPA 37.03.11 *et seq.* (“CM Rules”).

7. After receiving the 2009 Plan, the Director noticed a status conference to occur on March 13, 2009. At the March 13 status conference, the Director stated that the 2009 Plan could be approvable, but identified four core concerns that were not fully addressed: water quality, temperature, reliability of the system, and the time it would take the Ground Water Districts to implement the proposal(s). Verbal responses were given at the status conference to the Director’s concerns by attorneys for the Ground Water Districts. Additional concerns were raised by attorneys representing Clear Springs and other interested parties. At the status conference, the Director discussed the need for the Ground Water Districts to secure a bond equal to the estimated cost of the over-the-rim proposal. Attorneys for the Ground Water Districts did not object to this process.

8. The Director notified parties that the Department would host a technical review working group, to begin on Tuesday, March 17, 2009, at the Department’s main office in Boise. The Director invited the parties’ technical consultants to attend and discuss the issues identified by the Director with Department staff. The Director solicited written responses from the parties, which could be in the form of bullet points, to be submitted to the Director by March 17, 2009.

9. Because the 2009 Plan could be approvable if concerns could be addressed, the Director provided time to allow for augmentation of the Plan. The Director stated that the technical working group should endeavor to provide information to the Director by Thursday, March 19, 2009.

10. On March 17, 2009, the technical working group met to discuss the four issues previously identified by the Director. Representatives from Clear Springs, the Department, the Ground Water Districts, and Rangen, Inc. (“Rangen”) participated. Additional issues were discussed, including measurement of water deliveries, how the transfer process would work for the water rights that were proposed by the Ground Water Districts to be utilized for direct delivery to Clear Springs, the source and construction of diversion devices for conversion acres, and cost.

11. On March 17, 2009, written responses in opposition to the 2009 Plan were submitted by Clear Springs and Rangen. Clear Springs was concerned that the 2009 Plan does not adequately mitigate for injury caused to it by junior ground water diversions; that the 2009 Plan does not address previous shortfalls; that the 2009 Plan does not specify benefits from conversions or CREP; that the irrigation water rights to be used for direct replacement to Clear Springs should be subject to the transfer process; that the 2009 Plan does not analyze the impact on the ESPA; that the 2009 Plan does not adequately consider water quality; that the 2009 Plan does not consider “bio-security;” that the 2009 Plan does not address operation and maintenance; that the 2009 Plan does not identify where conversion water will be acquired; that the 2009 Plan does not identify necessary easements; and that the 2009 Plan does not identify necessary engineering design and safety to the facilities below the rim.

12. On March 19, 2009, the Department received an *Augmentation to 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“2009 Augmentation”). The 2009 Augmentation addresses: “1) water quality and temperature; 2) operational plan for wells, including measurement plan; 3) timing of conversions and construction.” *2009 Augmentation* at 2. The 2009 Augmentation is supported by exhibits 8, 9, 10, and 11.

13. On March 19, 2009, the Department received *Clear Springs Foods, Inc.’s Protest of the 2009 Replacement Water Plan and Third Mitigation Plan of North Snake Groundwater District and Magic Valley Groundwater District* (“Clear Springs Protest”).

Ground Water Districts’ Replacement Water Requirement to Clear Springs

14. As stated in the Notice of Curtailment, the Department has reviewed the Ground Water Districts’ reporting and has independently reviewed the number of acres enrolled in the federal government’s Conservation Reserve Enhancement Program (“CREP”) and the number of conversion acres for years prior to 2009. Using the ESPA Model, the Department has determined the resulting benefit to the Buhl Gage to Thousand Springs spring reach from those activities.

Conversions	CREP	Total Provided	Required	Shortfall to Reach	Shortfall to Clear Springs
9.44 cfs	0.44 cfs	9.88 cfs	38.72 cfs	28.84 cfs	1.99 cfs

Notice of Curtailment at 6, ¶ 23.

15. In 2009, the final year of the phased-in curtailment period, the Ground Water Districts are required to provide 38.72 cfs to the Buhl Gage to Thousand Springs spring reach, or 2.67 cfs directly to Clear Springs (6.9% of 38.72 cfs). *Id.* at 6, ¶ 24. The resulting deficiency is 28.84 cfs to the Buhl Gage to Thousand Springs spring reach and 1.99 cfs directly to Clear Springs. *Id.*

16. The 2009 Plan provides for the conversion of 1,060 acres from ground water to surface water irrigation. Surface water from the Snake River for the conversion acres will be

diverted through the North Side Canal Company's "S Coulee." *2009 Plan* at 6. According to the 2009 Augmentation, the Ground Water Districts can have their conversions operational within a month of approval. *2009 Augmentation* at 5. Assuming that the conversions could be in place by June 1, 2009, the Department has determined, using the ESPA Model, that the resulting benefit to the Buhl Gage to Thousand Springs spring reach from the 2009 Plan will be:

Conversions	Deep Percolation	Conveyance Loss	Total
1.74 cfs	0.35 cfs	0.26 cfs	2.35 cfs

17. The resulting benefit to the Buhl Gage to Thousand Springs spring reach as a result of all of the existing and proposed activities of the Ground Water Districts would be as follows, in cfs:

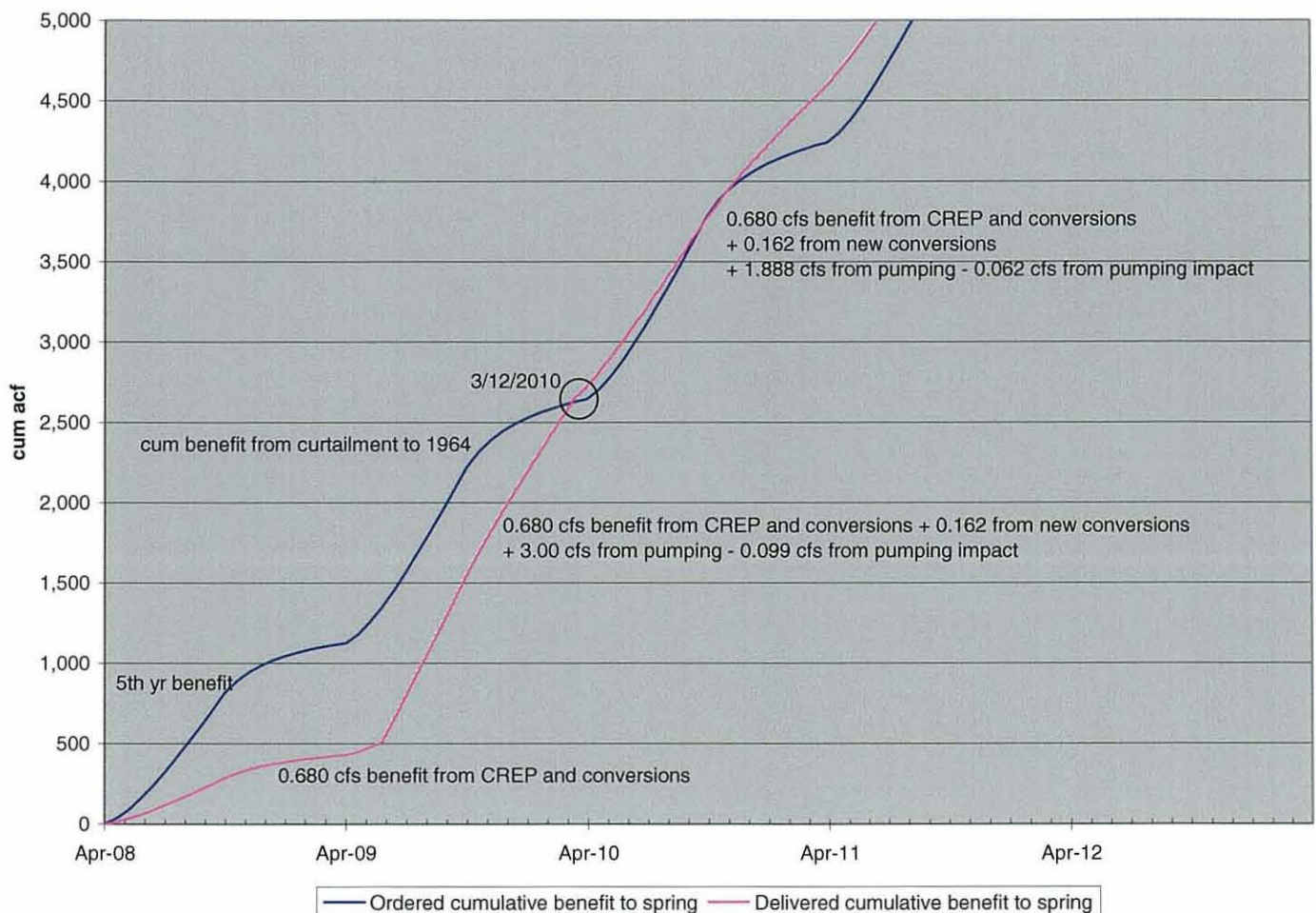
Conversions	CREP	Deep Percolation	Conveyance Loss	Total Provided	Required	Shortfall to Reach	Shortfall to Clear Springs
11.18	0.44	0.35	0.26	12.23	38.72	26.49	1.83

18. The "Total Provided," 12.23 cfs, in the above table, is the amount of water that the Ground Water Districts have added to the Buhl Gage to Thousand Springs spring reach. The total provided to Clear Springs is therefore 0.84 cfs (6.9% of 12.23 cfs).

19. "[I]n order to make up for any previous year shortfalls and in recognition of the fact that some further delay in delivering this replacement water will be incurred until the necessary construction of the facilities has been completed[,] the Ground Water Districts propose to provide up to 3.0 cfs directly to Clear Springs. *2009 Plan* at 8.

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20. As stated above, and assuming the new conversions (1,060 acres) are in place by June 1, 2009, the Ground Water Districts will have provided 0.84 cfs to Clear Springs. The Ground Water Districts are required to provide 1.99 cfs directly to Clear Springs by the end of the five-year phased-in period of curtailment, for a total of 2.67 cfs. The ESPA Model shows that if direct delivery of 3.0 cfs to Clear Springs begins on June 1, 2009, the present shortfall of 1.15 cfs ($1.99 - 0.84 = 1.15$) will be made up by March 12, 2010. Assuming all factors remain the same, when the shortfall is made up, the Ground Water Districts may reduce their direct delivery to Clear Springs from 3.0 cfs to 1.89 cfs ($1.89 + 0.84 - 0.06$ [impact of 3.0 cfs pumping on Clear Springs] = 2.67).



Water Quality

21. Water quality was raised by the Director and Clear Springs as a concern with the 2009 Plan. According to the 2009 Augmentation, the water quality of ground water in the immediate area is "very similar quality to that found at Clear Springs, Snake River Farm spring outlet." *2009 Augmentation* at 3; *see also* exhibits 9 and 10. The Ground Water Districts state that a "monitoring program" will be instituted "that will measure water quality . . . the results of which can be periodically reported to the Department and Clear Springs as needed." *Id.* at 2

22. The ground water in the Eastern Snake Plain Aquifer (“ESPA”) is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and springs tributary to the Snake River is in the Thousand Springs area. Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become ground water, and the amount that becomes one or the other is largely dependent on ground water elevations.

23. A primary concern regarding water quality is nitrate level. At least one spring source that Clear Springs monitors has nitrate levels in excess of “13 mg/L.” *Id.* at 50. The “source of nitrate-nitrite nitrogen in the spring water feeding the Snake River Farm complex is unknown. . . .” *Id.* According to data from 2006 through 2008 that was provided to the Department of Environmental Quality, influent spring water collected by Clear Springs at six of its points of diversion have average nitrate levels of 2.24, 2.32, 3.07, 3.37, 3.51, and 6.73 mg/L.

24. According to the United States Fish and Wildlife Service, the suggested nitrate value for hatchery water supplies for trout is 0-3.0 mg/L. Robert G. Piper et al., United States Department of the Interior, *Fish Hatchery Management* 15 (1989).

25. Since 1990, the Department has operated the Statewide Ground Water Quality Monitoring Program. The Department works with the United States Geological Survey in this effort. Each year, approximately 400 monitoring sites statewide are sampled, with most sites being sampled once every four years. In total, there are approximately 1,600 wells that are monitored by the Department. The Department tests for the presence of nitrate. Under Idaho’s Ground Water Quality Rule, the water quality standard for nitrate is 10 mg/L. IDAPA 58.01.11.200.01.

26. One well that the Department monitors is upgradient and in the general area of the wells that the Ground Water Districts have proposed would provide direct replacement water to Clear Springs. Well 08S 15E 33ABB1, sampled on September 2, 2004, showed nitrate at 2.2 mg/L. The depth of this well is 126 feet. A second well, MV-14, located at 08S 15E S32, is monitored by the Idaho National Lab. MV-14 is located near well no. 7 in exhibit 2 to the 2009 Plan. A sample taken from MV-14 on July 19, 2006 shows nitrate at 2.1 mg/L. Wells monitored by the Department that are just downgradient from the wells proposed by the Ground Water Districts to provide direct replacement water to Clear Springs, 09S 14E 02BBB1 and 02BBB2, were tested on June 18, 2003 and September 26, 2008, respectively. Nitrate levels were 1.11 mg/L and 2.19 mg/L, respectively. The depths of these wells are 105 and 185 feet, respectively.

27. The over-the-rim proposal is a closed system. Of the seven wells that have been proposed by the Ground Water Districts, the Department has drilling records for four (identified in Exhibit 2 to the Ground Water Districts’ 2009 Plan as wells 1, 2, 3, and 4). The depths of these wells are 85, 113, 144, and 180 feet. The wells proposed to be used by the Ground Water Districts are similar in depth and location to the monitoring wells. The nitrate levels in the monitoring wells are lower than nitrate levels in the springs feeding Clear Springs’ facility.

28. After construction of the pipeline is complete, the Ground Water Districts must flush the system and monitor water quality before coupling the pipeline to Clear Springs’

facility. If nitrate levels from the direct replacement water supply are similar to levels that Clear Springs receives from its spring sources, the water may be used by the Ground Water Districts as a replacement supply.

29. At its election, Clear Springs may direct the Ground Water Districts to connect the pipeline directly to its manifold or to a separate raceway. As agreed to by the Ground Water Districts, “locked cages or well houses” must be constructed “to insure that the wellheads are secure and that contamination at the wells will not occur.” *2009 Augmentation* at 3. Assuming these steps are taken and that the wells are properly cased to the surface, it is reasonably certain that the water will be of suitable quality for the intended beneficial use.

Water Temperature

30. Water temperature was another concern raised by the Director. Observed temperatures in the “nearest upgradient observation well to the mitigation wells . . . [show] water temperature in this well was 14.7 degrees Centigrade (58.5 degrees F).” *Exhibit 8* at 1 to *2009 Augmentation*. The well identified by the Ground Water Districts is 08S 15E 33ABB1, which was most recently tested by the Department’s Statewide Ground Water Quality Monitoring Program on September 2, 2004. Well MV-14, located at 08S 15E S32, and monitored by the Idaho National Lab, reported temperatures of 14.5 °C on August 17, 1989, 15.0 °C on August 19, 1990, 14.1 °C on August 8, 1996, 14.3 °C on July 17, 2000, and 14.4 °C, on August 12, 2003. MV-14 is located near well no. 7 in exhibit 2 to the 2009 Plan.

31. According to the United States Fish and Wildlife Service, the temperature range for rainbow trout is 33-78 °F (1-26 °C); the optimum temperature is 50-60 °F (10-16 °C); and the temperature for spawning is 50-55 °F (10-13 °C). Piper, *Fish Hatchery Management* at 134.

32. Spring water utilized by Clear Springs has a near constant temperature of 15 °C. *See Expert Report of John R. MacMillan, Ph.D.* In order to ensure that temperature remains within scientifically acceptable levels, the Ground Water Districts have committed to bury the pipeline three feet. *Exhibit 8* at 1 to *2009 Augmentation*. With a burial of three feet, the Ground Water Districts’ heat transfer analysis shows that “a 0.2 °C temperature rise could be expected in delivered water under worst-case conditions.” *Exhibit 8* at 2 to *2009 Augmentation*. If temperatures increase by 0.2 °C, the ground water to be delivered to Clear Springs will remain within the scientifically acceptable range. In order to ensure that water temperature does not increase in the pipeline in areas that it cannot be buried—such as on the canyon rim, canyon wall, and talus slope below the canyon wall—the Ground Water Districts must insulate the pipeline.

Diversion, Quality, and Temperature Monitoring

33. As agreed to by the Ground Water Districts, they must measure the diversions from each well and the total amount delivered to Clear Springs. The Ground Water Districts must also monitor water quality and temperature.

Change of Water Rights

34. The Ground Water Districts state they are prepared to file water right transfer applications for the water rights to be used for mitigation to change the place of use, period of use, and nature of use to authorize year-round mitigation and fish propagation at Snake River Farm. *2009 Plan* at 8. Clear Springs and others have expressed concern that processing a transfer application with the required public notice and potential for protests will delay the delivery of replacement or mitigation water under the 2009 Plan.

35. On an interim basis, the Water Supply Bank, operated by the Idaho Water Resource Board pursuant to sections 42-1761 through 42-1766, Idaho Code, provides a means of authorizing the necessary change in use of the water rights intended to be used for mitigation purposes. Idaho Code § 42-1764 provides that, "The approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code."

Reliability

36. The Director sought clarification on the issue of reliability. The 2009 Augmentation provided an analysis of the over-the-rim project. Because there are seven wells that would be integrated into the system, and no more than two wells would be pumping at any given time, there is redundancy in the system. "This redundancy will also insure that water can be delivered in the event of failure of a well." *2009 Augmentation* at 4. "Routine maintenance will be rotated between the wells in a manner so as to not interrupt water delivery to Clear Springs." *Id.* "A final system operation plan has not yet been developed but will be when the system becomes operational." *Id.* at 3. In addition, representatives of the Ground Water Districts committed at the technical working group meeting to the use of back-up generators to ensure required water delivery in the event of a power failure. If these measures are implemented, the over-the-rim project is reasonably certain to be reliable enough to satisfy the intended beneficial use.

Timing and Construction of the Over-the-Rim Project

37. Timely completion of the over-the-rim project was another concern of the Director's. In reviewing the 2009 Plan, the information presented during the technical working group meeting, and the written responses, Department staff have determined that it would take 49 days to obtain the necessary permits and easements, conduct surveys, design, purchase materials, and construct and test the over-the-rim project. In order to provide a suitable margin for construction, the project must be completed in 60 days.

38. In order to begin construction of the over-the-rim project, the Ground Water Users must post a bond equal to the cost of construction of the project. The Ground Water Districts estimate that the cost will be approximately \$500,000. Proof of a bond in an amount equal to the cost of construction must be submitted to the Director.

39. Construction of the over-the-rim project should be completed by June 1, 2009. The Ground Water Districts will be required to pay a \$10,000 penalty for each additional day that it takes to complete the project. The Ground Water Districts must report weekly progress on the project to the Director. Any unforeseen delays must be reported to the Director. If a delay is documented to be beyond the control of the Ground Water Districts, and the Ground Water Districts are attempting to move forward in good faith, the Director may grant an extension of time for completion of the project without penalty.

40. In order to safeguard facilities below the canyon rim, the Ground Water Districts must properly engineer the pipeline to account for the canyon rim, the canyon wall, and talus slope beneath the rim.

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the Notice of Curtailment are incorporated into this order by reference. All findings of fact in this order later deemed to be conclusions of law are hereby made as conclusions of law.

2. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

3. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

4. While parts of these proceedings are on judicial review, the Director maintains jurisdiction for the ongoing administration of water rights. Idaho Code § 42-602.

5. The 2009 Plan is approved as a one-year replacement water plan, subject to certain restrictions. The Ground Water Districts must post a bond before beginning construction of the project that is equal to the cost of the project. Construction of the over-the-rim project must be completed no later than June 1, 2009. If the project is not completed by June 1, 2009, the Ground Water Districts will be required to pay a \$10,000 penalty for each additional day that it takes to complete the project. Extensions without penalty may be granted by the Director if unforeseen circumstances arise that are beyond the control of the Ground Water Districts' and the Ground Water Districts are attempting to move forward in good faith.

6. The Ground Water Districts must submit a system operation plan before the system becomes operational. The system operation plan shall provide a detailed description of the operation, maintenance and monitoring components of the plan including provision for back-up power in the event of a power failure. As expressed in the Findings of Fact, the over-the-rim project is reasonably reliable.

7. In comparing the quality and temperature of the water from the monitoring wells to the quality and temperature of the sources that Clear Springs diverts for beneficial use, the monitoring wells indicate that the local ground water is reasonably certain to be within suitably established scientific ranges. The Ground Water Districts must test and monitor its production wells and pipeline prior to connecting the over-the-rim system to Clear Springs' facility. If the production wells and pipeline are of suitable quality, they may be used as a direct replacement supply. Clear Springs may elect to have the Ground Water Districts connect the over-the-rim system directly to its manifold or to a specific raceway.

8. If Clear Springs begins receiving direct replacement water on June 1, 2009, the Ground Water Districts will be required to deliver 3 cfs until March 12, 2010 in order to make up previous shortfalls. As the five-year phased-in period of curtailment was ordered on July 8, 2005, March 12, 2010 is within the phased-in period of curtailment—July 8, 2005 to July 7, 2010. The over-the-rim project will provide water in-time and in-place to Clear Springs. Water of suitable quality and temperature that is provided directly to Clear Springs meets the in-place requirement. Because the shortfall to Clear Springs will be made up before the end of the five-year phased-in period of curtailment, the in-time requirement is met.

9. The Director will publish the 2009 Plan in accordance with the CM Rules. An approved mitigation plan must be in place by the end of the five-year phased-in period of curtailment. If an approved mitigation plan is not in place that fully replaces depletions determined by the Director to have been caused by junior-priority ground water diversions, the Director will order curtailment until such a plan is in place.

10. The Director's approval of the 2009 Plan as a replacement water plan does not prejudice the 2009 Plan as a CM Rule 43 mitigation plan. Issues not addressed in this order may be addressed in proceedings on the Ground Water Districts' CM Rule 43 mitigation plan.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED as follows:

That the Ground Water Districts' 2009 Plan is APPROVED as a Replacement Water Plan for the 2009 irrigation season, subject to the conditions discussed above.

IT IS FURTHER ORDERED that the Director will process the 2009 Plan as a Mitigation Plan in accordance with the CM Rules. The Director's approval of the 2009 Plan as a Replacement Water Plan does not prejudice the 2009 Plan as a CM Rule 43 Mitigation Plan.

IT IS FURTHER ORDERED that the Notice of Curtailment will continue to be held in abeyance pending satisfactory completion of the over-the-rim project and resolution of the Ground Water Districts' CM Rule 43 Mitigation Plan.

DATED this 26th day of March 2009.

A handwritten signature in blue ink, reading "David R. Tuthill, Jr.", written over a horizontal line.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

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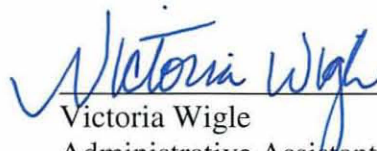
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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 1 - April 2, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan	Individual lease source to be identified prior to commencement of delivery	6-1-09	90%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights.	4-15-09 filing date	20%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Verbal commitment provided by NSCC officers/directors. Proposed Conversion Agreement provided to NSCC for review 3-12 -09. NSCC Board approved Conversion Agreement 3-30-09 to be signed by parties.	4-15-09	90%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-15-09	25%
5. Lease and	Lease and Conversion	Verbal commitments	4-15-09	50%

Conversion Agreements	Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	previously received from each participating owner. Draft Lease and Conversion Agreement provided to participating Land/Water Right Owners 3/25-4/1/09.		
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed.	5-1-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09.	Ongoing	10%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan	5-15-09 submit preliminary Plan to IDWR	0%
9. Construction Contracts: A. Conversions B. OTR Pipeline	A. Conversions: Construction Contract to be let for conversion work. B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	A. Individual land owners working with Districts and private contractors. B. Contract to be secured after engineering/design completed.	A. 5-1-09 to commence construction B. 5-1-09 to commence construction	A. 0% B. 0%
10. Construction Work: A. Conversions to Surface Water	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms. Convert landowners from ground to surface water irrigation. Construct pipeline to delivery water OTR to	 District working with landowners and contractors to coordinate construction work. Upon completion of conceptual design general work contacts to be secured	 4-1-09 start 5-1-09 complete	 0%

B. OTR Pipeline	Snake River Farms	to expedite work.	4-15-09 start 5-25-09 complete	0%
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	5-15-09 start 6-1-09 complete	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	"	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.		0%
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility		5-25-09 start 6-1-09 complete	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays		Ongoing	

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 2 - April 9, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan	Individual lease source to be identified prior to commencement of delivery	6-1-09	90%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights.	4-15-09 filing date	20%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Verbal commitment provided by NSCC officers/directors. Proposed Conversion Agreement provided to NSCC for review 3-12 -09. NSCC Board approved Conversion Agreement 3-30-09 to be signed by parties.	4-15-09	90%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-15-09	25%

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Verbal commitments previously received from each participating owner. Draft Lease and Conversion Agreement provided to participating Land/Water Right Owners 3/25-4/1/09. Proposed Agreement approved by owners and in process of signatures.	4-15-09	75%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond.	5-1-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09.	Ongoing	20%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan	5-15-09 submit preliminary Plan to IDWR	20%
9. Construction Contracts:				
A. Conversions	A. Conversions: Construction Contract to be let for conversion work.	A. Individual land owners working with Districts and private contractors. (3) Bids obtained and under review.	A. 4-10-09 to commence construction 5-1-09 completion	A. 70%
B. OTR Pipeline	B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review.	B. 4-10-09 to commence construction	B. 20%

10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	District working with landowners and contractors to coordinate construction work.	4-10-09 start 5-1-09 complete	0%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work.	4-10-09 start 5-25-09 complete	0%
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	5-15-09 start 6-1-09 complete	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	"	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	5-1-09 start 6-1-09 complete	0%
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility		5-25-09 start 6-1-09 complete	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays		Ongoing	

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 3 - April 16, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan	Individual lease source to be identified prior to commencement of delivery	6-1-09	90%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights.	4-15-09 filing date	20%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Verbal commitment provided by NSCC officers/directors. Proposed Conversion Agreement provided to NSCC for review 3-12 -09. NSCC Board approved Conversion Agreement 3-30-09 to be signed by parties.	4-15-09	90%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-15-09	25%

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Verbal commitments previously received from each participating owner. Draft Lease and Conversion Agreement provided to participating Land/Water Right Owners 3/25-4/1/09. Proposed Agreement approved by owners and in process of signatures.	4-15-09	75%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond.	5-1-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09.	Ongoing	50%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan	5-15-09 submit preliminary Plan to IDWR	20%
9. Construction Contracts:				
A. Conversions	A. Conversions: Construction Contract to be let for conversion work.	A. Contract entered into with Don's Irrigation for all conversion work.	A. 4-10-09 to commence construction 5-1-09 completion	A. 100%
B. OTR Pipeline	B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review.	B. 4-10-09 to commence construction	B. 30%

10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	District working with landowners and contractors to coordinate construction work. Don's Irrigation commenced construction 4-8-09.	4-10-09 start 5-1-09 complete	30%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work.	4-10-09 start 5-25-09 complete	0%
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	5-15-09 start 6-1-09 complete	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	"	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	5-1-09 start 6-1-09 complete	0%
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility		5-25-09 start 6-1-09 complete	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays		Ongoing	

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 4 - April 27, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Individual lease source to be identified prior to commencement of delivery	6-1-09	90%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights. Adequate is water available.	4-30-09 filing date	30%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Verbal commitment provided by NSCC officers/directors. Proposed Conversion Agreement provided to NSCC for review 3-12 -09. NSCC Board approved Conversion Agreement 3-30-09 to be signed by parties.	4-15-09	90%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-30-09	25%

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Verbal commitments previously received from each participating owner. Draft Lease and Conversion Agreement provided to participating Land/Water Right Owners 3/25-4/1/09. Proposed Agreement approved by owners and in process of signatures.	4-15-09	75%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond.	5-1-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09.	Ongoing	55%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan	5-22-09 submit preliminary Plan to IDWR	20%
9. Construction Contracts: A. Conversions B. OTR Pipeline	A. Conversions: Construction Contract to be let for conversion work. B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	A. Contract entered into with Don's Irrigation for all conversion work. B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review.	A. 4-10-09 to commence construction 5-1-09 completion B. 4-30-09 to commence construction	A. 100% B. 30%
10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			

A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	District working with landowners and contractors to coordinate construction work. Don's Irrigation commenced construction 4-8-09.	4-10-09 start 5-1-09 complete	75%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work.	4-30-09 start 6-1-09 complete	0%
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	5-15-09 start 6-1-09 complete	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	"	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	5-1-09 start 6-1-09 complete	0%
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility		5-25-09 start 6-1-09 complete	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays		Ongoing	

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 5 - April 30, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Individual lease source to be identified prior to commencement of delivery	6-1-09	90%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights. Adequate is water available.	4-30-09 filing date	30%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Final Conveyance Agreements executed 4/23/09 and . NSCC to deliver water to conversions.	4-15-09	100%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-30-09	25%

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Verbal commitments previously received from each participating owner. Draft Lease and Conversion Agreement provided to participating Land/Water Right Owners 3/25-4/1/09. Proposed Agreement approved by owners and in process of signatures.	4-15-09	75%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond. GWD to IWRB on 4/30/09 for \$500,000 loan to complete project..	5-1-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09.	Ongoing	55%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan	5-22-09 submit preliminary Plan to IDWR	20%
9. Construction Contracts: A. Conversions B. OTR Pipeline	A. Conversions: Construction Contract to be let for conversion work. B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	A. Contract entered into with Don's Irrigation for all conversion work. B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review.	A. 4-10-09 to commence construction 5-1-09 completion B. 4-30-09 to commence construction	A. 100% B. 30%

10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	District working with landowners and contractors to coordinate construction work. Don's Irrigation commenced construction 4-8-09.	4-10-09 start 5-8-09 complete	75%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work. OTR construction on hold as of 4/20/09 due to ongoing negotiations with Clear Springs on mitigation options and stay. See CS motion for partial stay.	4-30-09 start partial stay requested, completion date dependent on outcome	0%
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	" "	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	"	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	"	0%
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility		5-25-09 start 6-1-09 complete	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays		See 10 above.	

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LOUIS F. RACINE (1917-2008)
WILLIAM D. OLSON, OF COUNSEL

May 7, 2009

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Re: *Week 6 Progress Report - 2009 Mitigation Plan for Clear Springs*

Dear Director Tuthill:

Attached please find the Sixth Weekly Progress Report we are submitting on behalf of North Snake Ground Water District and Magic Valley Ground Water District in compliance with your March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009*, Finding of Fact 39. A courtesy copy is being provided to Clear Springs attorney, John Simpson. Please advise if it is desired that other parties be served with Weekly Progress Reports.

On Monday, May 4, 2009, a status conference was held on Clear Springs' *Motion for Partial Stay of Implementation of Director's March 26, 2009 Order Approving Ground Water Districts' Replacement Water Plan for 2009*. The Ground Water Districts are awaiting a decision from that status conference before continuing with construction on the over-the-rim portion of the Third Mitigation Plan.

Please contact me if you have any questions or comments.

Sincerely,



CANDICE M. MCHUGH

CMM:kh

Enclosures

cc: Brian Patton, IDWR (w/encl.)
John Simpson (w/encl.)
North Snake Ground Water District
Magic Valley Ground Water District

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 6 - May 7, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Individual lease source to be identified prior to commencement of delivery	6-1-09	95%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights. Adequate is water available.	4-30-09 filing date	30%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Final Conveyance Agreements executed 4/23/09 and . NSCC to deliver water to conversions.	4-15-09	100%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-30-09	25%

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Verbal commitments previously received from each participating owner. Draft Lease and Conversion Agreement provided to participating Land/Water Right Owners 3/25-4/1/09. Proposed Agreement approved by owners and in process of signatures.	4-15-09	75%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond. GWD to IWRB on 4/30/09 for \$500,000 loan to complete project..	5-1-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09.	Ongoing	55%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan	Temporarily on hold pending outcome on Motion for Partial Stay. See 10 below.	80%
9. Construction Contracts: A. Conversions B. OTR Pipeline	A. Conversions: Construction Contract to be let for conversion work. B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	A. Contract entered into with Don's Irrigation for all conversion work. B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review.	A. 4-10-09 to commence construction 5-1-09 completion B. 4-30-09 to commence construction	A. 100% B. 30%

10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	District working with landowners and contractors to coordinate construction work. Don's Irrigation commenced construction 4-8-09.	4-10-09 start 5-8-09 complete	80%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work. OTR construction on hold as of 4/20/09 due to ongoing negotiations with Clear Springs on mitigation options and stay. See CS motion for partial stay.	Clear Springs partial stay requested, completion date dependent on outcome	0%
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	"	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	"	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	"	0%
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility		5-25-09 start 6-1-09 complete	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays		See 10 above.	

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LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

May 14, 2009

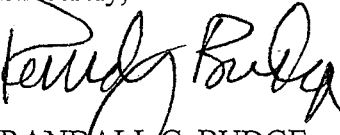
David R. Tuthill, Jr., Director
Idaho Department of Water Resources
P.O. box 83720
Boise, Idaho 83720-0098

Re: *Week 7 Progress Report - 2009 Mitigation Plan for Clear Springs*

Dear Director Tuthill:

Attached please find the Seventh Weekly Progress Report we are submitting on behalf of North Snake Ground Water District and Magic Valley Ground Water District in compliance with your March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009*, Finding of Fact 39. A courtesy copy is being provided to Clear Springs' attorney, John Simpson. Please advise if it is desired that other parties be served with Weekly Progress Reports.

Sincerely,


RANDALL C. BUDGE

RCB:rr

Attachment

cc: John Simpson (w/attachment)

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
 FROM: North Snake and Magic Valley Ground Water Districts
 RE: Compliance with March 26, 2009 Order
 DATE: Week 7 - May 14, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Individual lease source to be identified prior to commencement of delivery	6-1-09	95%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery. Districts will rent this water from the Water Supply Bank to permit delivery to Clear Springs per Plan.	Applications to Lease and Rent being prepared for all water rights. Adequate is water available.	6-1-09 filing date	50%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Final Conveyance Agreement executed 4/23/09 with NSCC to deliver water to conversions.	4-15-09 start 4-23-09 completed	100%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and from conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. (Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below).	4-30-09	25%

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Lease and Conversion Agreements approved by owners and in process of signatures.	4-15-09	90%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond. GWD to IWRB on 4/30/09 for \$500,000 loan to complete project. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery	5-1-09 On Hold 4-8-09	25%
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. Districts coordinating conversion design/plans w/landowners. This work began 3-26-09. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery	 On Hold 4-08-09	55%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery	 On hold 4-8-09	80%
9. Construction Contracts: A. Conversions	A. Conversions: Construction Contract to be let for conversion work.	A. Contract entered into with Don's Irrigation for all conversion work.	A. 4-10-09 start 5-1-09 complete	A. 100%

B. OTR Pipeline	B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery	B. 4-30-09 to commence construction On hold 4-8-09	B. 30%
10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	Don's Irrigation commenced construction 4-8-09. Ground work nearing completion and waiting on Idaho Power to complete electrical.	4-8-09 start 5-20-09 complete	90%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery	On hold 4-8-09	0%
C. Back-up Power (FF36)	Construct back-up power supplies.		On hold 4-8-09	0%
D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Generator to be installed to supply wells 2 and 3. Bids being obtained. Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	On hold 4-8-09	0%
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	On hold 4-8-09	0%

11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery	5-25-09 start 6-1-09 complete On hold 4-8-09	0%
12. Unforeseen Delays (FF39)	Report unforeseen delays	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR Delivery	See 10 above.	

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LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

May 21, 2009

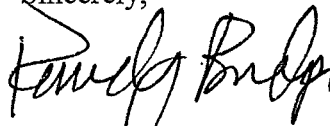
David R. Tuthill, Jr., Director
Idaho Department of Water Resources
P.O. box 83720
Boise, Idaho 83720-0098

Re: *Week 8 Progress Report - 2009 Mitigation Plan for Clear Springs*

Dear Director Tuthill:

Attached please find the Eighth Weekly Progress Report we are submitting on behalf of North Snake Ground Water District and Magic Valley Ground Water District in compliance with your March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009*, Finding of Fact 39. A courtesy copy is being provided to Clear Springs' attorney, John Simpson. Please advise if it is desired that other parties be served with Weekly Progress Reports.

Sincerely,



RANDALL C. BUDGE

RCB:rr

Attachment

cc: John Simpson (w/attachment)

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
 FROM: North Snake and Magic Valley Ground Water Districts
 RE: Compliance with March 26, 2009 Order
 DATE: Week 8 - May 21, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Private Lease Agreements have been entered into to supply all conversion water requirements.	6-1-09	100%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery and conversions.	Applications to Lease and Rent being prepared to submit to Water Supply Bank for all leased storage water.	6-1-09 filing date	50%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Final Conveyance Agreement executed 4/23/09 with NSCC to deliver water to conversions.	4-15-09 start 4-23-09 completed	100%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and for conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below.	4-30-09 On hold 4-8-09	100% for conversions

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Lease and Conversion Agreements approved by owners and in process of signatures.	4-15-09	95%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond. GWD to IWRB on 4/30/09 for \$500,000 loan to complete project. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Stay Order issued 5-15-09.	5-1-09 On Hold 4-8-09	
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works. Districts to coordinate conversion work w/landowners and contractors	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery; Partial Stay Order issued 5-15-09 Districts coordinating conversion design/plans w/landowners.	On Hold 4-08-09 Began 3-26-09. Completed 5-1-09	55% 100%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay	On hold 4-8-09	80%

		Order re: OTR delivery. Partial Stay Order issued 5-15-09		
9. Construction Contracts:				
A. Conversions	A. Conversions: Construction Contract to be let for conversion work.	A. Contract entered into with Don's Irrigation for all conversion work.	A. 4-10-09 start 5-1-09 complete	A. 100%
B. OTR Pipeline	B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery; Partial Stay Order issued 5-15-09	B. 4-30-09 to commence construction On hold 4-8-09	B. 30%
10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	Construction commenced 4-8-09. Ground work completed for Heida and Box Canyon, nearing completion for Van Dyke. Idaho Power electrical work in progress.	4-8-09 start 5-27-09 complete	95%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5-15-09	On hold 4-8-09	
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	On hold 4-8-09	

D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	On hold 4-8- 09	
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5- 15-09	On hold 4-8- 09	
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5- 15-09	On hold 4-8- 09	
12. Unforeseen Delays (FF39)	Report unforeseen delays	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR Delivery. Partial Stay Order issued 5- 15-09	None, other than Partial Stay Order.	

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LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

May 28, 2009

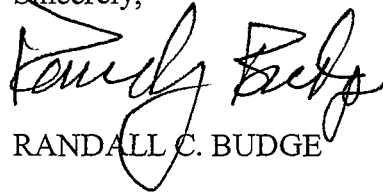
David R. Tuthill, Jr., Director
Idaho Department of Water Resources
P.O. box 83720
Boise, Idaho 83720-0098

Re: *Week 9 Progress Report - 2009 Mitigation Plan for Clear Springs*

Dear Director Tuthill:

Attached please find the Ninth Weekly Progress Report we are submitting on behalf of North Snake Ground Water District and Magic Valley Ground Water District in compliance with your March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009*, Finding of Fact 39. A courtesy copy is being provided to Clear Springs' attorney, John Simpson. Please advise if it is desired that other parties be served with Weekly Progress Reports.

Sincerely,


RANDALL C. BUDGE

RCB:rr

Attachment

cc: John Simpson (w/attachment)

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
FROM: North Snake and Magic Valley Ground Water Districts
RE: Compliance with March 26, 2009 Order
DATE: Week 9 - May 28, 2009

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Private Lease Agreements have been entered into to supply all conversion water requirements.	6-1-09	100%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery and conversions.	Applications to Lease and Rent being prepared to submit to Water Supply Bank for all leased storage water.	6-1-09 filing date	50%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Final Conveyance Agreement executed 4/23/09 with NSCC to deliver water to conversions.	4-15-09 start 4-23-09 completed	100%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and for conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below.	4-30-09 On hold 4-8-09	100% for conversions

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Lease and Conversion Agreements approved by owners and in process of signatures.	4-15-09	95%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond. GWD to IWRB on 4/30/09 for \$500,000 loan to complete project. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Stay Order issued 5-15-09.	5-1-09 On Hold 4-8-09	
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works.	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery; Partial Stay Order issued 5-15-09	On Hold 4-08-09	55%
	Districts to coordinate conversion work w/landowners and contractors	Districts coordinating conversion design/plans w/landowners.	Began 3-26-09. Completed 5-1-09	100%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay	On hold 4-8-09	80%

		Order re: OTR delivery. Partial Stay Order issued 5-15-09		
9. Construction Contracts:				
A. Conversions	A. Conversions: Construction Contract to be let for conversion work.	A. Contract entered into with Don's Irrigation for all conversion work.	A. 4-10-09 start 5-1-09 complete	A. 100%
B. OTR Pipeline	B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery; Partial Stay Order issued 5-15-09	B. 4-30-09 to commence construction On hold 4-8-09	B. 30%
10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	Construction commenced 4-8-09. Ground work completed for Heida and Box Canyon, nearing completion for Van Dyke. Idaho Power electrical work completed.	4-8-09 start 5-27-09 complete	100%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5-15-09	On hold 4-8-09	
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids being obtained.	On hold 4-8-09	

D. Measuring/Monitoring Devices	Install water measurement and monitoring devises at each well and SRF delivery point.	Bids being obtained for measuring devises and aeration system to boost oxygen and address any nitrogen issues.	On hold 4-8- 09	
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5- 15-09	On hold 4-8- 09	
11. Pre-Delivery Testing and Monitoring (CL7)	Test and monitor production wells and pipeline prior to connecting OTR system to Clear Springs facility	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5- 15-09	On hold 4-8- 09	
12. Unforeseen Delays (FF39)	Report unforeseen delays	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR Delivery. Partial Stay Order issued 5- 15-09	None, other than Partial Stay Order.	

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LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

June 3, 2009

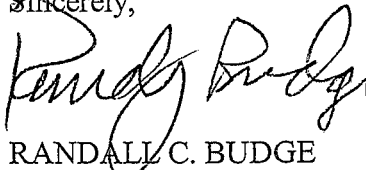
David R. Tuthill, Jr., Director
Idaho Department of Water Resources
P.O. box 83720
Boise, Idaho 83720-0098

Re: *Week 10 Progress Report - 2009 Mitigation Plan for Clear Springs*

Dear Director Tuthill:

Attached please find the Tenth and Final Weekly Progress Report we are submitting on behalf of North Snake Ground Water District and Magic Valley Ground Water District in compliance with your March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009*, Finding of Fact 39. A courtesy copy is being provided to Clear Springs' attorney, John Simpson. Please advise if it is desired that other parties be served with Weekly Progress Reports.

Sincerely,


RANDALL C. BUDGE

RCB:rr

Attachment

cc: John Simpson (w/attachment)

WEEKLY PROGRESS REPORT:
2009 MITIGATION PLAN FOR CLEAR SPRINGS
(Conversions and Over-the-Rim Pipeline)

TO: David R. Tuthill, Jr., IDWR Director
 FROM: North Snake and Magic Valley Ground Water Districts
 RE: Compliance with March 26, 2009 Order
 DATE: Week 10 - June 4, 2009 (FINAL REPORT)

Matter	Description	Status	Target Dates	Percent Completed
1. Conversion Water Supply	Conversion water will be supplied by existing IGWA storage water leases identified in Plan.	Private Lease Agreements have been entered into to supply all conversion water requirements.	6-1-09	100%
2. Water Supply Bank (FF 35)	IDWR Form App. To Lease Water to the State Water Supply Bank to be submitted for all water rights to be used for the OTR delivery and conversions.	Applications to Lease and Rent to submit to Water Supply Bank previously submitted for WD 120 will continue this year and be updated for 2009 for this plan.	6-15-09 for updated quantities	95%
3. Conveyance Agreement	Conveyance Agreement to be entered into between North Side Canal Company (NSCC) and Districts to provide for the delivery of leased water through canal system to conversion acres.	Final Conveyance Agreement executed 4/23/09 with NSCC to deliver water to conversions.	4-15-09 start 4-23-09 completed	100%
4. Pipeline Easements	Pipeline Easements required for OTR pipeline and for conversion participants.	OTR Landowner L&M Corp. contacted and provided verbal commitment for Easement Agreement. Draft Pipeline Easement Agreement provided to L&M 3-18-09; revision sent 4-16-09. Easements for conversion participants included in Lease and Conversion Agreements, No. 5 below.	4-30-09 On hold 4-8-09	100% for conversions

5. Lease and Conversion Agreements	Lease and Conversion Agreements to be entered into with Land/Water Right Owners providing for the long-term lease of water rights and conversion from ground to surface water.	Lease and Conversion Agreements signed by Landowners Heida, Box Canyon Dairy and VanDyke.	4-15-09	100%
6. Bond (FF38, CL5)	Post bond equal to the cost of construction of the project, estimated at \$500,000.	Districts' insurer contacted, cost estimate obtained with bond application being processed. Each contractor will also be required to provide performance bond. GWD to IWRB on 4/30/09 for \$500,000 loan to complete project. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Stay Order issued 5-15-09.	5-1-09 On Hold 4-8-09	
7. Project Engineering & Design	Licensed engineers to be employed to prepare conceptual design/engineering and oversee OTR pipeline construction works.	AMEC (C. Brendecke) and SPF (B. Hargrove/T. Scanlan) employed to prepare conceptual design/engineering as necessary to expedite bidding, construction contracts and work commencement. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery; Partial Stay Order issued 5-15-09	On Hold 4-08-09	55%
	Districts to coordinate conversion work w/landowners and contractors	Districts coordinating conversion design/plans w/landowners.	Began 3-26-09. Completed 5-1-09	100%
8. System Operating Plan (CL6)	System Operating Plan to be developed and submitted to IDWR.	Engineers to prepare System Operating Plan "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay	On hold 4-8-09	80%

		Order re: OTR delivery. Partial Stay Order issued 5-15-09		
9. Construction Contracts:				
A. Conversions	A. Conversions: Construction Contract to be let for conversion work.	A. Contract entered into with Don's Irrigation for all conversion work.	A. 4-10-09 start 5-1-09 complete	A. 100%
B. OTR Pipeline	B. OTR Pipeline: Construction Contract to be entered into for OTR pipeline and related work.	B. Contract to be secured after engineering/design completed. Bids obtained for boring and under review. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery; Partial Stay Order issued 5-15-09	B. 4-30-09 to commence construction On hold 4-8-09	B. 30%
10. Construction Work:	Construct pipelines and facilities to convert participants to surface water and delivery well water OTR to Snake River Farms.			
A. Conversions to Surface Water	Convert landowners from ground to surface water irrigation.	Construction commenced 4-8-09 and completed on or before 6/1/09 for Heida, Box Canyon and VanDyke. Ground work completed for Heida and Box Canyon, nearing completion for Van Dyke. Idaho Power electrical work completed.	4-8-09 start 5-27-09 complete	100%
B. OTR Pipeline	Construct pipeline to delivery water OTR to Snake River Farms	Upon completion of conceptual design general work contacts to be secured to expedite work. "On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5-15-09	On hold 4-8-09	
C. Back-up Power (FF36)	Construct back-up power supplies.	Generator to be installed to supply wells 2 and 3. Bids	On hold 4-8-09	

D. Measuring/Monitoring Devices	Install water measurement and monitoring devices at each well and SRF delivery point.	being obtained. Bids being obtained for measuring devices and aeration system to boost oxygen and address any nitrogen issues. Awaiting Clear Springs' designation of point of delivery. Coordination efforts to be undertaken.	On hold 4-8-09	
E. Clear Springs Connection (FF29)	Connect OTR pipeline to Snake River Farms raceway or intake.	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR delivery. Partial Stay Order issued 5-15-09	On hold 4-8-09	
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12. Unforeseen Delays (FF39)	Report unforeseen delays	"On-Hold" since 4-8-09 per R. MacMillan and pending SRF Motion for Partial Stay Order re: OTR Delivery. Partial Stay Order issued 5-15-09	None, other than Partial Stay Order.	

Attorneys for Clear Springs Foods, Inc.

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS NOS. 36-
04013A, 36-04013B, AND 36-07148 (SNAKE
RIVER FARM)

IN THE MATTER OF THE MITIGATION
PLAN 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)

1

Water Plan for 2009. The reasons for Clear Springs' motion are set forth below.

BACKGROUND

On March 5, 2009 the Director issued a *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* ("March 5 Order"). In brief, the Director denied the Ground Water Districts' Second Mitigation Plan, or "Money Plan", wherein the GWD sought to provide money compensation to Clear Springs in lieu of water for mitigation purposes. The Director further ordered curtailment of affected ground water rights to occur unless "further actions are taken by March 12, 2009". See March 5 Order at 11, 14. In response, the GWD filed its *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim)* on March 12, 2009 ("2009 Plan"). In substance, the 2009 Plan proposed: 1) to continue participation in CREP and existing conversions; 2) convert an additional 2,000 acres within NSGWD to a surface water supply; 3) pump and deliver water to Clear Springs through an "over-the-rim" pipeline project; and 4) alternatively, deliver water to Clear Springs from IDFG water right no. 36-4076.

On March 13, 2009, the Director held a Status Conference wherein the Director ordered a March 17, 2009 "Technical Meeting" to discuss certain issues identified with the Plan. On March 16, 2009 the Director issued a supplemental order on scheduling. See *Order on Scheduling and Holding Notice of Curtailment in Abeyance*. On March 26, 2009, the Director approved the GWD's plan "as a Replacement Water Plan for the 2009 irrigation season." See *Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("Replacement

Plan Order”) at 11.¹ In approving the 2009 Plan, the Director included the following with respect to the timing of the construction of the “over-the-rim” project:

37. Timely completion of the over-the-rim project was another concern of the Director’s. In reviewing the 2009 Plan, the information presented during the technical working group meeting, and the written responses, Department staff have determined that it would take 49 days to obtain the necessary permits and easements, conduct surveys, design, purchase materials, and construct and test the over-the-rim project. In order to provide a suitable margin for construction, the project must be completed in 60 days.

38. In order to begin construction of the over-the-rim project, the Ground Water Users must post a bond equal to the construction of the project. The Ground Water Districts estimate that the cost will be approximately \$500,000. Proof of a bond in an amount equal to the cost of construction must be submitted to the Director.

39. Construction of the over-the-rim project should be completed by June 1, 2009. The Ground Water Districts will be required to pay a \$10,000 penalty for each additional day that it takes to complete the project. The Ground Water Districts must report weekly progress on the project to the Director. Any unforeseen delays must be reported to the Director. If a delay is documented to be beyond the control of the Ground Water Districts, and the Ground Water Districts are attempting to move forward in good faith, the Director may grant an extension of time for completion of the project without penalty.

40. In order to safeguard facilities below the canyon rim, the Ground Water Districts must properly engineer the pipeline to account for the canyon rim, the canyon wall, and talus slope beneath the rim.

Replacement Plan Order at 8-9.

Despite approving the 2009 Plan pursuant to the above terms, the Director then concluded that the plan would be processed as a mitigation plan “in accordance with the CM Rules”. *Id.* at 11. Clear Springs filed a timely protest to the plan and the matter is now proceeding to hearing, both on Clear Springs’ protest and its earlier petition requesting hearing

¹ Notice of the Plan as a CM Rule 43 mitigation plan was then published on April 2nd and 9th and Clear Springs filed a timely Protest on April 20, 2009.

on the Director's *March 5 Order*. In light of these facts, among others, Clear Springs seeks a stay of the implementation of the above provisions of the Director's *Replacement Plan Order* for 2009 as explained below.

REASONS FOR STAY

Rule 780 of the Department's Rules of Procedure allows IDWR to "stay any order, whether interlocutory or final". 37.01.01.780. Clear Springs submits that a partial stay of the implementation of the Director's *Replacement Plan Order* is warranted for several reasons.

1. Hearing on 2009 Plan.

Clear Springs has protested the 2009 Plan and the matter is proceeding to a hearing before IDWR. Since the Director has concluded that the *Replacement Plan Order* does not "prejudge the 2009 plan as a CM Rule 43 Mitigation Plan" common sense dictates that construction of the project proposed by the 2009 Plan should not proceed until a full hearing on the plan is held. In other words, the Director has ordered the GWD to construct an approximately \$500,000 "straw" while acknowledging there may be no "water" to fill the "straw", i.e. the plan may not be approved as a Rule 43 Mitigation Plan. The situation is akin to the Director approving an application for permit (outside of the statutory process) and then ordering the applicant to construct his facilities even though the permit has not been issued and a hearing on pending protests has not been held. The Director's order not only prejudices Clear Springs, in forcing Clear Springs to temporarily accept water from a project that has not been approved in compliance with the CM Rules, it also unfairly forces the GWD to design, construct, and install a pipeline project that may be rendered useless depending upon the outcome of the Mitigation Plan hearing.

Moreover, the Director's Order presumes that water quality is not an issue; that the project design will adequately protect the integrity of the Aquifer and Snake River Canyon wall; and that the project will not impair Clear Springs' operations and existing water supply. Furthermore, the *Replacement Plan Order* appears overly optimistic in setting a June 1, 2009 completion date. While the Director has provided for extensions due to delays "beyond the control" of the GWD, and given the nature of engineering work and construction, it is inevitable that the June 1st completion date will not be met. *See Replacement Plan Order* at 9. In the event delays postpone the project's completion for an indefinite time, it's possible that a hearing on the 2009 Plan and Clear Springs' protest could be held prior to the completion of the project. If that turns out to be the case, it is obvious that the Director's requirement regarding a June 1st construction and installation of the pipeline will be of no value or assistance to the parties. Following proper due process associated with the CM Rules (Rule 43 Mitigation Plan procedure) is warranted in this matter, particularly where the Director is attempting to force Clear Springs to accept a project which is based upon a supply of replacement water that has yet to be thoroughly tested and analyzed through the hearing process. *See id.* at 11.

Since a hearing must be held on the 2009 Plan and Clear Springs' protest of the same, there is no reason to pursue construction and installation of the pipeline portion of the project before that time. Whereas the project and 2009 Plan could be denied, it makes little sense for the Director to order the GWD to undertake the expense and effort in advance of that denial. Again it would be akin to the granting of a new water right permit, only to condition or reject the ultimate license in a way that jeopardizes the viability of the project. The implementation of that portion of the Director's *Replacement Plan Order* should be stayed accordingly.

2. Judicial Review Proceeding.

Apart from the pending hearing on the 2009 Plan identified above, the status of litigation in the Gooding County District Court further favors a partial stay of the Director's *Replacement Plan Order*. Since the appeal of the Director's July 11, 2008 *Final Order* is presently before Judge Melanson (Gooding County Dist. Ct., 5th Jud. Dist., Case No. 08-444), and a hearing on the petitions for judicial review is set for April 28, 2009, it is obvious that the foundation for the Director's approval of the GWD "over-the-rim" replacement water plan for 2009 could change as the result of that litigation. The Court's decision in that case, including a ruling upon the Director's injury calculation and the use of "replacement water plans" could affect the validity of the Director's *Replacement Plan Order*. Accordingly, any actions taken pursuant to that *Order*, including the construction of a \$500,000 pipeline project, could be rendered moot.

Again, given the timing of that proceeding and the likelihood that the Court will issue a decision within the near future, it makes little sense to forge ahead with construction and installation of a project that may not meet the requirements identified by the District Court. Clearly, a partial stay is warranted in these circumstances.

3. Acceptance of the Additional Conversions by Clear Springs.

Rather than be subject to the Director's forced mitigation, or questionable supply of water from the "over-the-rim" project, Clear Springs would instead accept the remainder of the 2009 Plan as acceptable mitigation for this year (i.e. CREP, existing conversions, additional 2,000 acres conversion).² Clear Springs would accept this mitigation, including the commitment to

² By making this request Clear Springs does not accept the Director's "replacement water plan" process, the amount of injury determined, or the effectiveness of the mitigation offered in the 2009 Plan. As such, Clear Springs does not waive any rights or defenses relative to any action taken by the Director in this respect. Instead, Clear Springs

implement the additional conversion acres, on the condition that the Director partially stay implementation of the *Replacement Plan Order* as requested above. Moreover, Clear Springs' acceptance of this mitigation would be for the sole purpose of proceeding to an immediate hearing on the 2009 Plan on the issues identified by Clear Springs' protest. Acceptance of the mitigation described above for 2009 under the existing order doesn't waive or preclude Clear Springs from asserting the inadequacy of previous years mitigation or any of the other issues raised in pleadings filed with IDWR regarding the adequacy of the GWD's 2009 Replacement Water Plan and Mitigation Plan.

Clear Springs would reserve all rights and defenses relative to the mitigation offered, including the issues to be decided in the pending appeal before Judge Melanson, and all requirements for administration deemed necessary under Idaho law. However, Clear Springs would not require the construction and installation of the "over-the-rim" project for 2009. Given the myriad of issues associated with the viability of the "over-the-rim" project, Clear Springs would rather proceed to a full hearing on the 2009 Plan than be forced to temporarily accept mitigation from a project that may ultimately be denied.

4. GWD Request for Loan from Idaho Water Resource Board.

Based upon a pending request to the Idaho Water Resource Board ("Board"), it appears the GWD do not have funds available to construct and install the "over-the-rim" project. By requesting a loan from the Board, the GWD's proposed project has in part triggered the Board to convene a special meeting to be held on Thursday April 30, 2009. *See Ex. A* (4/21/09 news

views the acceptability of a portion of the 2009 Plan as a "common sense" path to proceed to hearing on the 2009 Plan and Clear Springs' protest without forcing the GWD to construct and install a project that may be ultimately denied.

release, 4/30/09 meeting agenda).

The Board's news release regarding the April 30, 2009 special meeting explains as follows:

Also on the agenda is a time sensitive loan request by the North Snake and Magic Valley Ground Water Districts for \$500,000 to fund a water pipeline project in the Hagerman Valley. The project is being constructed to comply with an order issued by the Director of the Idaho Department of Water Resources to provide replacement water to senior water right holder Clear Springs Foods with a June 1, 2009 deadline.

See **Ex. A** (4/21/09 news release).

Since the viability of the project is presently in question, and a hearing is pending on the 2009 Plan, there is no reason for the Board to issue a loan for a project that may ultimately be denied.³ Given the Board's statutory duties and responsibilities it is not appropriate to request a loan for a project that is subject to a contested case before IDWR and which could be denied (particularly within a matter of months). Moreover, given the outstanding questions surrounding the 2009 Plan it is unlikely the loan request satisfies the statutory criteria set forth in Idaho Code § 42-1756 and the Board's Funding Program Rules (37.02.02 *et seq.*). Importantly, it appears the Board's Funding Program Rules do not authorize a loan for the GWD's "over-the-rim" mitigation project. See Rule 25.01.

If the Board cannot authorize the loan requested, and the GWD cannot finance the "over-the-rim" project to comply with the Director's *Replacement Plan Order*, there is no reason to proceed with the project at this time, particularly in advance of the hearing on the 2009 Plan and given Clear Springs' conditional acceptance of the other mitigation proposed for this year.

³ Clear Springs is providing a copy of this motion to the Idaho Water Resource Board for its information given the request is set to be taken up at the April 30, 2009 special meeting.

Fortunately, the answers to the above questions do not have to be litigated or further discussed since the Director is authorized to partially stay the *Replacement Water Order* as requested.

In summary, partially staying the construction and installation of the “over-the-rim” project for 2009, clearly benefits the GWD by not forcing them to post a bond, request a loan from the Board for the project, and face the prospect of a \$10,000⁴ per day fine for delays. A partial stay is certainly in the interests of all parties under these circumstances.

CONCLUSION

Clear Springs requests a partial stay of the Director’s *Replacement Plan Order* for the reasons set forth above. As explained, there are several reasons to partially stay implementation of the Director’s order so as not to require construction and installation of the GWD’s “over-the-rim” project at this time. In short, “common sense” dictates that a project which may be denied, should not be constructed and installed. At a minimum, it is in the parties’ best interests to have the Director order a partial stay. Whereas numerous legal and factual questions surround the 2009 Plan, a full hearing on these issues must be held prior to forcing parties to accept the results or go to the expense of constructing the project in the first place. Clear Springs would request such a hearing during the summer or early fall of 2009 in order that mitigation be in place prior to 2010.

Since the Idaho Water Resource Board is set to take up the GWD loan request at its April 30, 2009 special meeting, Clear Springs requests expedited consideration of this motion by the Director. In addition, Clear Springs requests an immediate scheduling conference for purposes of scheduling the hearing on Clear Springs’ protest to the 2009 Plan.

⁴ The Director’s authority for such a “penalty” is not stated in the *Replacement Plan Order*. Staying implementation of this portion of the order avoids further legal dispute over any “penalties” and the cause of any inevitable delays.

DATED this 27th day of April, 2009.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in blue ink, appearing to read 'J. K. Simpson', is written over a horizontal line.

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of April, 2009, the foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

David R. Tuthill, Director Idaho Department of Water Resources 322 E. Front Street P.O. Box 83720 Boise, ID 83720-0098 Dave.tuthill@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail
Randall C. Budge Candice M. McHugh Racine Olson 201 E. Center St. P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail
Daniel V. Steenson Charles L. Honsinger S. Bryce Farris Ringert Clark P.O. Box 2773 Boise, ID 83701-2773 dvs@ringertclark.com clh@ringertclark.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail
Tracy Harr, President Clear Lake Country Club 403 Clear Lake Lane Buhl, ID 83316	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Stephen P. Kaatz, V.P. Clear Lake Homeowners Assoc. 223 Clear Lake Lane Buhl, ID 83316	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Allen Merritt Cindy Yenter Watermaster – WD 130 IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380 allen.merritt@idwr.idaho.gov cindy.yenter.@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail
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Courtesy Copy:

Idaho Water Resource Board 322 E. Front St. P.O. Box 83720 Boise, Idaho 83720-0098	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
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 Travis L. Thompson

Exhibit A



NEWS RELEASE

IDAHO WATER RESOURCE BOARD

The Idaho Water Center, 322 E. Front St., Boise ID – Phone: (208) 287-4800 FAX: (208) 287-6700
www.idwr.idaho.gov

Release 2009-16

For Immediate Release
Boise, Idaho – April 21, 2009

For Media Information Contact:
Bob McLaughlin – 208-287-4828

Water Board Holds Special Meeting To Address Important Issues

A special meeting of the Idaho Water Resource Board will be held April 30, 2009 to address several pressing issues that can't be delayed until the board's regular meeting in May.

Foremost among those issues is a framework reaffirming the Swan Falls Settlement signed by Idaho Power, the Attorney General's office, and Governor Otter. The settlement requires the board to enter into a memorandum of agreement with Idaho Power. The agreement reaffirms the Swan Falls Settlement and recognizes the recently adopted Eastern Snake Plain Aquifer (ESPA) Comprehensive Aquifer Management Plan (CAMP) as the basis for long term aquifer management. The agreement will be discussed and acted upon by the board.

Also on the agenda is a time sensitive loan request by the North Snake and Magic Valley Ground Water Districts for \$500,000 to fund a water pipeline project in the Hagerman Valley. The project is being constructed to comply with an order issued by the Director of the Idaho Department of Water Resources to provide replacement water to senior water right holder Clear Springs Foods with a June 1, 2009 deadline.

The implementation of the ESPA CAMP will also be discussed. The plan was recently approved by the Legislature and is expected to be signed into law by the Governor.

The meeting will include a session for new and existing board members to be briefed by personnel from the Attorney General's Office on open meeting, public records, and ethics in government laws and guidelines. The agenda also includes an executive session that will be closed to the public to communicate with legal counsel to discuss legal ramifications and options concerning pending litigation. The complete agenda of the board meeting is posted on the IDWR website at:

http://www.idwr.idaho.gov/waterboard/Meetings_Minutes/minutes.htm

(end)



IDAHO WATER RESOURCE BOARD

AGENDA

MEETING NO. 7-09 OF THE IDAHO WATER RESOURCE BOARD

C.L. "Butch" Otter
Governor

Terry T. Uhling
Chairman
Boise
District 2

Gary M. Chamberlain
Vice-Chairman
Challis
At Large

Bob Graham
Secretary
Bonners Ferry
At Large

Charles "Chuck" Cuddy
Orofino
District 1

Leonard Beck
Burley
District 3

Roger W. Chase
Pocatello
District 4

Vince Alberdi
Kimberly
At Large

Jerry R. Rigby
Rexburg
At Large

April 30, 2009

10:00 a.m., Boise Time

Idaho Department of Water Resources

Conference Rooms C and D, 322 East Front Street, Boise, Idaho

1. Roll Call
2. Public Comment
3. Idaho Power Swan Falls Settlement Agreement
4. Palisades Storage
5. ESPA CAMP Implementation
- Lunch
- Work Session
6. Groundwater Districts Loan Request
7. Open Meeting, Public Records and Ethics in Government
8. **Executive Session** to communicate with legal counsel to discuss the legal ramifications of and legal options for pending litigation.
9. Other Items Board Members May Wish to Present.
10. Adjourn

The Board will occasionally need to convene in Executive Session, pursuant to Section 67-2345, Idaho Code. *Executive Session is closed to the public*

AMERICANS WITH DISABILITIES

The meeting will be held in facilities that meet the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations to attend, participate in or understand the meeting, please let Patsy McGourty, Administrative Assistant, know in advance so arrangements can be made. The phone number is (208) 287-4800 or email patsy.mcgourty@idwr.idaho.gov

**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))
(Water District Nos. 130 and 140))
_____)

**ORDER GRANTING PARTIAL
STAY OF GROUND WATER
DISTRICTS' REPLACEMENT
WATER PLAN FOR 2009**

On March 26, 2009, the Director of the Department of Water Resources ("Director" or "Department") issued his *Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("Replacement Plan Order"). The approved 2009 Replacement Water Plan included as one component a proposal for the Ground Water Districts to pump and deliver ground water to Clear Springs through an "over-the-rim" pipeline project ordered to be completed by June 1, 2009.

On April 27, 2009, Clear Springs Foods, Inc. ("Clear Springs") filed *Clear Springs Foods, Inc.'s Motion for Partial Stay of Implementation of Director's March 26, 2009 Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("Partial Stay Motion"). For several legal and practical reasons Clear Springs requested that the Director partially stay implementation of the Replacement Plan Order for one year "so as not to require construction and installation of the GWD's 'over-the-rim' project at this time." *Partial Stay Motion* at 9.

Clear Springs stated in its *Partial Stay Motion* that it would "accept the remainder of the 2009 Plan as acceptable mitigation for this year" and that "Clear Springs' acceptance of this mitigation would be for the sole purpose of proceeding to an immediate hearing on the 2009 Plan on the issues identified by Clear Springs' protest" to the Ground Water Districts' Third Mitigation Plan (Over-the-Rim). *Id.* at 6-7. Among the other reasons asserted by Clear Springs in support of the requested partial stay were that the project "should not proceed until a full hearing on the plan is held;" and that the "pipeline project[] could be rendered moot" as a result of the district court's pending decision on the appeal of the Director's July 11, 2008 *Final Order*. *Id.* at 4-6.

On May 4, 2009, the Director conducted a status conference with the parties to discuss their positions regarding the requested partial stay. At the status conference, an officer of Clear Springs and the attorney for the Ground Water Districts stated that each party respectively agreed to a two-year partial stay of the requirement for completion of the over-the-rim project, while continuing with the other approved replacement water requirements for the two-year period. The parties were not able to reach agreement at the status conference on the timing for holding a hearing on the Ground Water Districts' Third Mitigation Plan.

**ORDER GRANTING PARTIAL STAY OF GROUND WATER
DISTRICTS' REPLACEMENT WATER PLAN FOR 2009 – Page 1**

The Ground Water Districts expressed a preference to conduct the hearing on the mitigation plan after judicial review of the Director's July 11, 2008 *Final Order* was fully completed, including any further appellate review following receipt of an order from the district court. Through its attorney, Clear Springs agreed to communicate to the Director following the status conference its position regarding the timing for a hearing. On May 14, 2009, counsel for Clear Springs informed the Director by letter of Clear Springs' position requesting that the hearing should be held "as soon as possible, but beginning no later than the fall of 2009."

ORDER

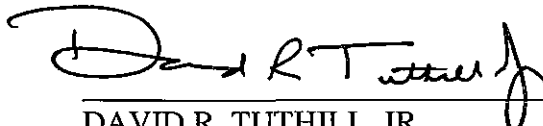
Based upon the foregoing,

IT IS HEREBY ORDERED that the motion for partial stay of implementation of the March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009* is GRANTED for a period of two years so as not to require construction and installation of the authorized "over-the-rim" pipeline project proposed to provide a portion of the replacement water or mitigation that would otherwise be required from the Ground Water Districts for the 2009 and 2010 calendar years.

IT IS FURTHER ORDERED that, based upon Clear Springs' acceptance of the terms of the two-year partial stay, satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.

IT IS FURTHER ORDERED that concurrent with the entry of this order, the Director shall issue an order appointing Gerald F. Schroeder as Hearing Officer for the Department to conduct a hearing on the *Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District*.

Dated this 15th day of May, 2009.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

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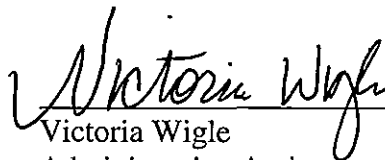
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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

**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))
_____)

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))
_____)

**ORDER APPOINTING
HEARING OFFICER;
GRANTING PETITION
TO INTERVENE; AND
CONSOLIDATING MATTERS
FOR HEARING**

Clear Springs Foods, Inc., on April 20, 2009, filed a timely protest and request for hearing in response to publication of the *Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District*. On April 22, 2009, the Idaho Dairymen's Association filed an *Amended Petition to Intervene* in this matter, to which no objection was made.

On April 9, 2009, the Director of the Idaho Department of Water Resources ("Department" or "Director") issued his *Order Denying Clear Springs Foods, Inc.'s Petition for Reconsideration; and Granting Request for Hearing* in a related proceeding which provided that "The requested hearing on the Department's 'post-audit' of the Ground Water Districts' prior mitigation actions shall be consolidated with any hearing to be held on the Ground Water Districts' Third Mitigation Plan."

Now, therefore, the Director enters the following order providing for a contested case hearing in this matter:

ORDER

IT IS HEREBY ORDERED that the above-captioned matter is designated a contested case before the Department; and good cause having been shown, the *Amended Petition to Intervene* of the Idaho Dairymen's Association in this matter is granted.

IT IS FURTHER ORDERED that the hearing requested in a related proceeding by Clear Springs Foods, Inc. on the Department's "post-audit" of the Ground Water Districts' prior mitigation actions shall be consolidated with the hearing in the present matter.

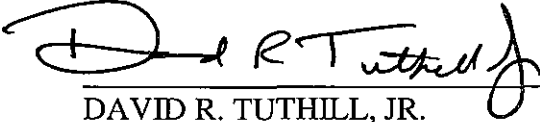
IT IS FURTHER ORDERED that Gerald F. Schroeder is hereby appointed to serve as hearing officer, and is authorized to conduct a hearing in these consolidated matters on behalf of the Department and to issue a recommended order pursuant to IDAPA Rule 37.01.01.410 and - 413 and the provisions of chapter 52, title 67, Idaho Code.

IT IS FURTHER ORDERED that any petition for intervention in this proceeding shall be considered only if the persons or entities seeking intervention agree to accept the appointed hearing officer.

IT IS FURTHER ORDERED that the Director maintains jurisdiction over the ongoing administration of all water rights affected by this proceeding.

IT IS FURTHER ORDERED that the original of all documents and pleadings filed in this matter shall be served upon the Department c/o Victoria Wigle, Administrative Assistant to the Director, with a copy served upon the Hearing Officer.

Dated this 15th day of May, 2009.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

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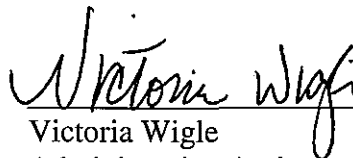
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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

June 19, 2009

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Robert Williams
Fredericksen Williams
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Jerome, ID 83338-0168

RE: Implementation of Non-Stayed Portion of Ground Water Districts' Snake River
Farm Replacement Plan for 2009 and 2010

Dear Parties:

The Order in this matter dated May 15, 2009 states that, based upon Clear Springs' acceptance of the terms of the two-year partial stay, satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years. Thus, the accepted replacement plan for 2009 and 2010 consists of the following elements:

1. The conversion of 1,060 acres above the rim from ground water to surface water irrigation.
2. Continued conversion from ground water to surface water irrigation of approximately 9,300 acres within the North Snake Ground Water District.
3. Continued participation in the Conservation Reserve Enhancement Program (CREP).

The deadline for compliance with the replacement plan was June 1, 2009. To ensure compliance with element (1) above, I requested Ms. Cindy Yenter, Watermaster of Water District 130, to conduct a field examination on June 2, 2009 of the conversion of acres above the rim from ground water to surface water irrigation. Her report of this inspection, and a follow-up inspection on June 10, 2009, is attached.

To summarize the results of the inspection, Ms. Yenter found as follows:

1. It appears that since June 1, 2009, no water has been diverted from ground water for use on the converted acres above the rim. As stated in Ms. Yenter's report, however, the Watermaster must be provided a mechanism for ensuring this status is maintained.
2. Some conversion acres have changed since the original plan was submitted. As as-built plan, showing the acres actually converted and addressing the concerns identified in Ms. Yenter's report is required.
3. It appears that there is a shortfall in the number of acres for which conversion has been conducted.

Based on the results of the Watermaster's Report, compliance with the replacement plan does not appear to have been achieved. In recognition that the inspections might not have revealed all of the compliance activities, this letter provides the Ground Water Districts with an opportunity to augment the information available to the Department. The replacement plan specified 1,060 acres, and that is the number of acres for which conversion is expected. Conversion of fewer acres is not an acceptable solution.

Please provide additional information in this regard no later than June 25, 2009, to enable the Department to view all of the facts prior to ruling on the adequacy of compliance with the replacement plan.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. R. Tuthill, Jr.", with a stylized flourish at the end.

David R. Tuthill, Jr.
Director

cf: Cindy Yenter, Allen Merritt

Attachment: Report on Implementation of Non-Stayed Portion of IGWA Snake River
Farms Replacement Plan #3

Report on Implementation of Non-Stayed Portion of IGWA Snake River Farms Replacement Plan #3

Cindy Yenter, Watermaster, Water District 130
June 12, 2009

On June 2, 2009, in accordance with the Director's request, I conducted an initial compliance investigation of the conversion project sites. I was accompanied by Don Aardema, a North Snake GWD board member who has been providing project construction oversight. On June 10, 2009 I made a followup visit to the site. My findings are as follows:

Deep Wells

None of the conversion wells were in operation during either of my field visits, although the power meters I looked at all had KWH data on them, indicating they have all been used within the May billing cycle. Mr. Aardema indicated that the electrical plan called for all peripheral power connections at the deep well demand meters, including those to pivots, to be moved to the associated relift station demand meters. I found several new power poles and meters which had been installed specifically to power pivots which could not be easily powered from the relift stations. Mr. Aardema thought that power might ultimately be disconnected to the deep wells, although he could not confirm this. I contacted Lynn Carlquist about it and he indicated there is really not a firm plan regarding disabling the wells. Mr. Carlquist was adamant the wells would not be operated from this point forward. Unless the wells are completely disabled, however, I am equally adamant they must be secured in some manner so I have some confirmation that no use is occurring. I have recorded some of the kwh readings, and have inspected the pump control panels to see if there are lock-out points where a security seal might be placed. For some systems there is an isolation lock-out at the pump control, and for others there is not and the seal may have to be placed on the main electrical panel.

Relift Ponds

Three ponds (ponds 1-3) serving pou parcels A, B and D are fully constructed, filled, and relift booster pumps are installed. For these three ponds, a new and separate power source and demand meter has been installed at each pond. New dedicated mainline has been installed from each relift pump (some ponds have multiple pumps) to pivots and corner systems. The surface water mainline system is not connected to existing ground water mainlines. A map is attached which shows the approximate location of the new mainlines (except for new parcel E; see next paragraph). I did observe new mainline coming into one center pivot in Section 31, and the old supply line appeared to have been disconnected. I have not verified this on other systems.

Acreege Shortfalls and Plan Substitutions

There have been substitutions of some of the conversion acres that I was not aware of. The 80 Brown acres, identified as pou parcel C, and well #3, are no longer participating. Acres owned by Gary VanDyk in 9S 14E S2 have been substituted (identified on my map as parcel E, and well #8). A fourth pond is being constructed on VanDyk's property and it was not complete as of June 2, 2009. I have not been able to confirm the operating configuration from the conversion pond, other than being informed that a VFD was being installed and it would be connected at the deep well panel. The VanDyk farm contains a total of 150 irrigated acres, and 74 acres are authorized under a ground water irrigation right. Use of the well appears to be supplemental to surface water. There are 136 NSCC shares already appurtenant to the farm; the water users

contend that their existing canal pump cannot divert them all, and therefore they must use their well on more than just the 14 acres without surface water. The NSCC ditch rider I spoke to indicates that all 136 shares are called for each year, but some are allowed to flow down the ditch to another user.

The PCC which has been developed for the VanDyk well is invalid, since the existing canal booster is connected to it. The reported volumes for this well are consequently inaccurate and likely overestimate the historic diverted ground water volume. I am fairly certain there has been irrigation from ground water in excess of 14 acres, but I have no way of confirming an equivalent number of primary ground water acres converted to surface supply. I am concerned this project represents more of an enhancement of an existing surface system, than a full ground water conversion. The exact shortfall to the replacement plan is unknown, but it could be as much as 66 acres. (Brown 80 ac less VanDyk 14 non-supplemental gw acres)

Certain acres identified on the plan attachments were found to not be a part of the conversion acres. 134 acres from plan pou parcel B, in 9S 14E Sec 1 and 9S 15E Sec 6, are authorized under water rights 36-2493C from plan wells 2 and 4. These acres are not owned by Box Canyon dairy or any other plan participant, and cannot receive replacement water from any of the project conversion ponds. The Box Canyon representative that we contacted said the new owners have had no access to the wells since their acquisition of the property in about 2002. The recent NSCC list I have shows 80 shares in Section 1 and 70 shares in section 6; NSCC confirms that shares have been appurtenant to these acres for decades. IGWA will most likely assert that ground water use on these lands has not occurred from the project wells, and replacement credit should be given. However, IGWA has no contract with the land owners relevant to this replacement plan, and cannot guarantee that the landowners will not exercise their ground water rights in the future by filing a transfer to add a well. Moreover, this type of credit would amount to a "status quo credit" which IDWR has not approved in any prior replacement plan. The 134 acres must be considered a shortfall to the identified replacement plan acres.

Existing NSCC shares and total irrigated acres within the project area

Aside from the VanDyk property, and the excluded 134 acres in pou B, there are not significant existing NSCC shares found within the replacement plan area. There are 20 NSCC shares in SESW Sec 36 (parcel B), 20 shares in NWNE Sec 31 (parcel D), and approximately 8 shares in SE Section 35 (parcel A), under the pivot. There are additional NSCC shares in SE S35 which reside in the pivot corners. The pivot corners are owned by a separate party who is not participating in the plan but who may be the system operator. As with the other conversion projects, NSCC will credit private shares prior to delivery of replacement water.

Except where noted above in shortfalls, total irrigated acres within the pou parcels is consistent with the appurtenant ground water rights for the past 5 years, within a few acres. The pivot corner in SWSE Sec 36 contains a home which has been constructed within the past two years on part of the water right pou; this home likely has a private domestic well and a lawn was observed which did not appear to exceed the *de minimus* definition. The balance of the corner was dry. Conversion of these lands to surface water supply should result in a reduction of ground water depletions.

Cross-Connected Wells

I have a non-verified report from Dan Nelson that a well outside the replacement plan area may be interconnected with plan wells #2 and #4. This well is situated in NWNE Sec 36, north of

pou parcel B. Lands and water rights are owned by Tom Heida / Box Canyon Dairy, the owners of parcel B. Water rights are separate from those appurtenant in parcel B. Mr. Nelson conducted audits of GWD well measurements last year, and was told by Box Canyon that the three wells had been interconnected due to production problems with plan well #4, and that water from the north well had been used within parcel B. I have not yet inspected the pivot connections at the two pivots within parcel B which might be receiving water from the well to the north. Box Canyon will need to verify that the ground water supply line has been disconnected at both south pivots in Sec 36, and replaced with the surface supply line. Alternatively, or perhaps in addition, Box Canyon will need to identify the mainline coming in from the north well, and disconnect it. This is probably the preferred alternative since use of the north point of diversion is not authorized for the south pivots in Section 36.

During the site visit I also found a well within NWSE Sec 31, site tag A0003503, which is situated very close to the center of a pivot within parcel D, but which is associated with water rights used to the south of parcel D on other lands under separate ownership (Southfield Dairy). This well may or may not be interconnected with the Box Canyon wells 5, 6 and 7, and I could not tell in the field. Diversions from the well are very close to exceeding the water right limit. The use and association of this well requires further investigation.

Cross-connectivity would be a problem under the replacement plan, but might be a moot issue if dedicated mainline has in fact been installed for surface water delivery.

Conclusions and remaining tasks

The non-stayed portion of Snake River Farm Replacement Plan #3 is mostly implemented. Infrastructure is in place, but there is a shortfall of converted acres from those identified in the Plan. I have not verified the completion of Pond 4, at the VanDyk property, but I was told by Mr. Aardema that the pond was completed this past week. Due to the rain in the Magic Valley over the past two weeks, irrigation from the conversion ponds has not yet occurred to any great extent.

There is a shortfall of up to 200 acres from the plan's proposed 1060 acres to be converted from ground water to surface water supply. The shortfall is the result of identification of acres not participating in the plan, and selection of participating acres that were not irrigated primarily with ground water.

Additional field work will be required over the next two weeks, to complete the following tasks:

- Place a security seals or locks on each project well, nos 1, 2, 4, 5, 6 and 7; or verify that the well has been otherwise disabled and cannot be used.
- Verify the kwh reading at each demand meter.
- Verify the system details at the VanDyk pond #4 and well #8, and conduct additional investigation into prior ground water use. Since this relift station may use the same demand meter as the deep well, the well and groundwater pumping plant must be locked out to ensure that ground water diversions do not occur, or the well must be disabled and the mainline disconnected.
- Verify that the Box Canyon well in NWNE Sec 36 is not connected to pivots in S1/2 Sec 36.
- Confirm that the Southfield well in NWSE Sec 31 is not used within the project area and not interconnected to Box Canyon wells.

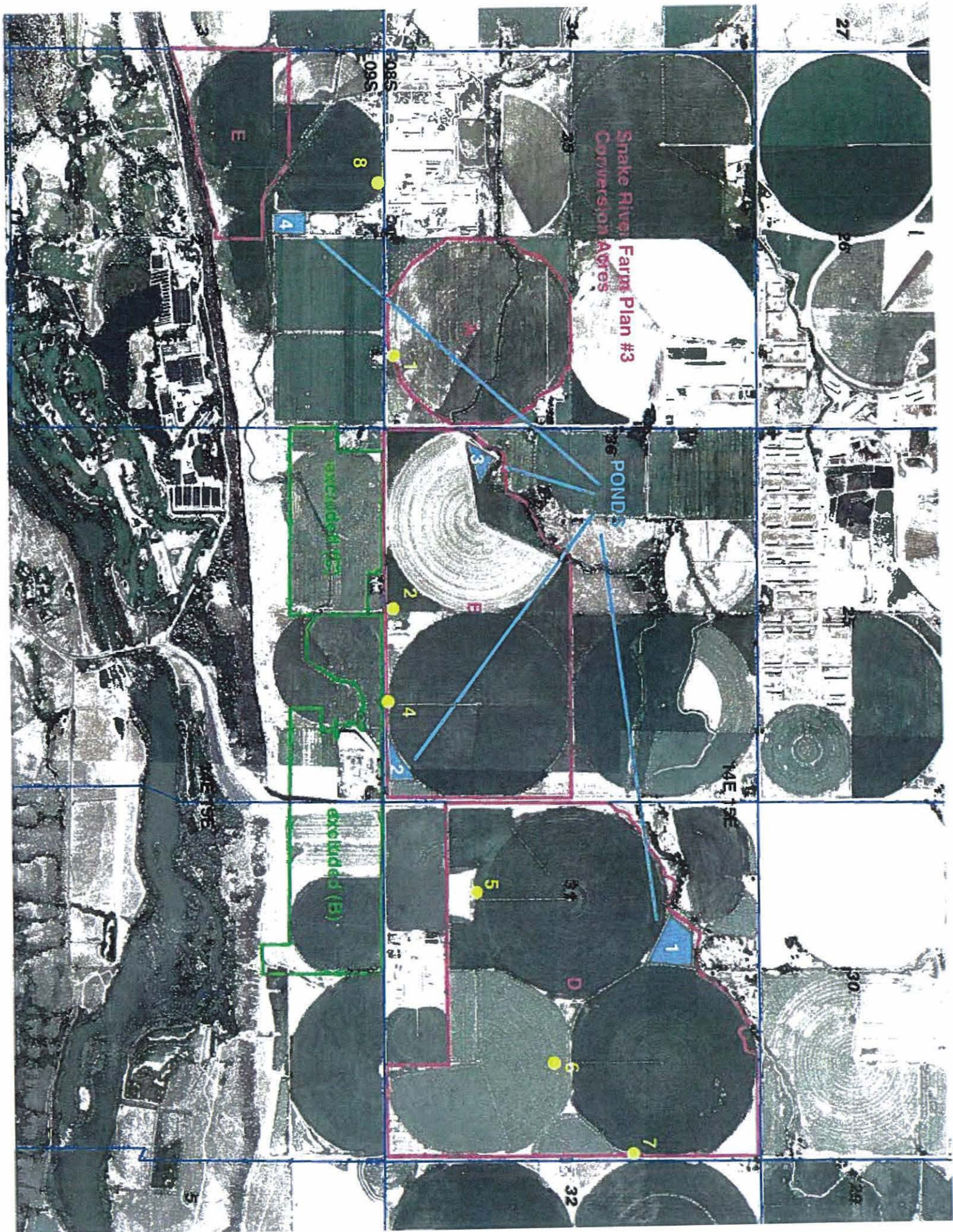


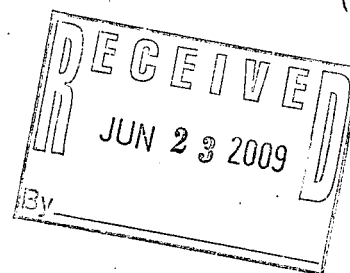


Exhibit 2
Over-the-Rim
Delivery Plan Schematic



Mitigation Plan #3, 6.12.09 Review of Water Rights and Wells														
Plan Well # / POU	WMIS #	Site ID	PLS	Meas Method	Last Test	Meas Comments	Water Right No.	Rate	Volume	WR Acres	Total Ac	Rate Limit	Vol Limit	Comments
1 A	100468	A0001689	08S14E35 SWSESE	2	2005	shown as one condition, pivot w/ endgun, 850 gpm, same condition measured twice and averaged in at 5%. 2007 vol 372 AF qual 1.	36-2426 36-10044	1.47 0.55	312 184	78 46	124 124	1.47 1.47	496 496	Pivot w/ corners irrigated - exceeds water right acres. wr notes 20 ac canal shares. Meas flow exceeds wr rate. Diverted vol OK.
							System total				124	1.47	496	150+ acres irrigated, some parcels in NESE / SESE may be irrigated w/ domestic wells. 40 canal shares appurtenant w/in 160, corners owned by Connor.
2	100472	A0001521	08S14E36 SESESW	2	2005	shown as one condition but describes combination with other wells for multiple pivots. 650 gpm, 2007 div 56 AF qual 1.	36-2228A	1.58		114	121	2.42	484	wr notes canal shares, 4.28 cfs limit with 2228B, 2249B, 2493B, 2493C, 7957B & 7682
4 B	100473	A0001510	08S14E36 SESWSE	2	2007 WWC, 2008 IDWR audit	wwc meas and idwr audit not entirely consistent. idwr verifies that system runs in combination with surface water, but not on the same demand meter. Meas flows 1000-1400 gpm. 2007 div 478 AF, qual 2 but should be 4 or 5.	36-7597A 36-8276 36-2228B 36-7597B 36-2493B 36-7682	0.7 0.14 0.4 1.18 0.36 1.24		114 7 79 79 20 58	121 121 79 79 78 78	2.42 2.42 1.58 1.58 1.56 1.56	484 484 316 316 312 312	stacked right, canal shares, 4.28 cfs limit must use full allotment of sw; 4.28 cfs limit canal shares, 4.28 cfs limit stacked right, canal shares, 4.28 cfs limit canal shares, 4.28 cfs limit canal shares, 4.28 cfs limit
							36-2493C	2.38	536	134	134	2.38	536	canal shares, 4.28 cfs limit; acres not included in conversion, not owned by BoxCanyon, using canal water, 150 shares.
							System total				278	4.28	1112	acres/volume do not include 2493C. All acres irrigated <2005, 270 acres irr 2005-2009. 20 NSCC shares in SESW Sec 36.
3 C	100825	A0003643	09S14E1 NENENW	2	2004	has old flowmeter, NSG using pcc. last meas 662 gpm on wheel lines. 2007 vol 303 AF, qual 1, seems high and qual probably not appropriate. multiple demand loads possible. Reported 2007 QM vol 78 AF; old Grainland has not been tested.	36-4046	1.6	320	80	80	1.6	320	acres not included in conversion
5	100540	A0003548	08S15E31 SWNESW	2	2007	condition = one pivot and endgun. 2 meas were made on same condition, w/in 10%. avg 1163 gpm. 2007 vol 466AF, qual 3.	36-16256	0.88	222	55.5	444	8.65	1776	sum of individual rate and vol exceeds system limits.
6	100539	A0003549	08S15E31 NENWSE	2	2007 WWC, 2008 IDWR audit	not sure all conditions are being measured, or wwc is not properly describing them. IDWR audit conditions w/in 10% and overall close to the earlier meas. IDWR flows 900 gpm.. 2007 vol 326 AF qual 3.	36-16258	0.46	90.2	22.5	444	8.65	1776	
7 D	100537	A0003550	08S15E31 NESENE	2	2008 WWC, 2008 IDWR audit	wwc conditions not completely described. idwr conditions w/in 10% and total pcc w/in 10% of earlier pcc. 900 gpm avg meas. 2007 vol 268 AF qual 2.	36-16260 36-16262 36-16264 36-16266 36-16268 36-16270 36-16272 36-16274 36-16276 36-16278 36-16280 36-16282 36-16284	0.28 0.1 0.54 0.36 0.75 0.59 0.91 0.29 0.29 0.86 0.08 0.26 2.54	53.5 29.3 109 110.7 170.1 113 382.5 57.8 54.5 176.6 27.6 52.8 948.8	13.4 7.3 27.2 27.7 42.5 28.3 281.3 14.5 13.6 44.1 6.9 13.2 237.2	444 444 444 444 444 444 444 444 444 444 444 444	8.65 8.65 8.65 8.65 8.65 8.65 8.65 8.65 8.65 8.65 8.65 8.65	1776 1776 1776 1776 1776 1776 1776 1776 1776 1776 1776 1776	enlargement 430 acres irrigated 2005-2009, 435 acres irr <2005, all acres irr <1987. 20 NSCC shares in NWNE S31
8 E	100286	A0003642	09S14E02 NWNENW	1	2007 WWC	Developed PCC is invalid. last wwc test showed 85 Kw demand for 75 HP pump. owner confirms that canal pump has always been connected to demand meter. new pond VFD will also be on the demand meter. old badger meter not working.	36-7319 36-7454	1.11 0.28	240 56	60 14	74 74	1.39 1.39	296 296	system supplemental to NSCC These acres replaced Parcel C. Total farm 144 ac, only 58 irr w/in wr pou since 2005. 136 NSCC shares in NW 1/4 and SWNE.
							System total				74	1.39	296	
							WR Total				920	15.79	3680	

Pendy



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER
APPROPRIATIONS, INC., NORTH
SNAKE GROUND WATER DISTRICT
and MAGIC VALLEY GROUND WATER
DISTRICT,

Cross-Petitioner,

vs.

IDAHO DAIRYMEN'S ASSOCIATION,
INC.

Cross-Petitioner,

vs.

RANGEN, INC.

Cross-Petitioner,

Filed pursuant to
I.R.C.P. 5(e)(1),
on June 19, 2009,
at 2:02 p.m.
~~J. C. Doe~~ John Melanson,
District Judge

Case No. 2008-444

ORDER ON PETITION FOR
JUDICIAL REVIEW

vs.

DAVID R. TUTHILL, JR., in his capacity
as Director of the Idaho Department of
Water Resources, and THE
DEPARTMENT OF WATER
RESOURCES,

Respondents.

IN THE MATTER OF DISTRIBUTION
OF WATER TO WATER RIGHTS NOS.
36-0413A, 36-04013B, and 36-07148.

(Clear Springs Delivery Call)

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS NOS. 36-
02356A, 36-07210, and 36-07427.

(Blue Lakes Delivery Call)

Ruling:

**Remanded on issue of seasonal variation; Director abused discretion in ordering
"replacement plan" and failure to provide timely hearings; affirmed in other
respects.**

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, of Barker Rosholt & Simpson,
LLP, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, of Racine Olson Nye Budge
& Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators,
North Snake Ground Water District, and Magic Valley Ground Water District.

Daniel K. Steenson, Charles L. Honsinger, S. Bryce Ferris, of Rigert Law Chartered,
Twin Falls, Idaho, attorneys for Blue Lakes Trout Farm, Inc.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for David R. Tuthill, in his capacity as Director of the Idaho Department of Water Resources.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

J. Justin May, of May Sudweeks & Browning, LLP, Boise, Idaho, attorney for Rangen, Inc.

I.

STATEMENT OF THE CASE

A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to two separate delivery calls filed by petitioner Clear Springs Foods, Inc. ("Clear Springs") and cross-petitioner Blue Lakes Trout Farm, Inc. ("Blue Lakes") (collectively as "Spring Users"). The delivery calls were filed as a result of reductions in spring flows discharging from the Eastern Snake Plain Aquifer (ESPA) and which Spring Users hold water rights for fish propagation. Cross-petitioners, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District and Magic Valley Ground Water District (collectively as "Ground Water Users") represent various ground water users holding ground water rights from the ESPA junior to those of the Spring Users and to which the delivery calls were directed. The *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("Final Order"), from which judicial review is sought was issued July 11, 2008, ordered curtailment of junior ground water rights or alternatively a phased-in replacement water plan in lieu of curtailment. Petitioners and cross-petitioners both contend the Department erred in response to the delivery calls and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

B. Course of Proceedings

1. Blue Lakes' Delivery Call

The Blue Lakes delivery call was initiated by hand delivered letter dated March 22, 2005. Record ("R."). Volume ("Vol.") 1 at 1. The letter demanded that then-Director Karl J. Dreher direct the water master for Water District 130 to administer water rights within the district as required by Idaho Code § 42-607 in order to satisfy Blue Lakes' senior rights. The letter stated that Blue Lakes was entitled to delivery of a total of 197.06 cfs from Alpheus Creek pursuant to water rights 36-02356 (52.23 cfs with December 29, 1958, priority), 36-07210 (45 cfs with November 17, 1971, priority) and 36-07427 (52.23 cfs with December 28, 1973, priority). The letter stated that Blue Lakes was only receiving 137.7 cfs and at a low point in 2003 it received only 111 cfs and that the shortages resulted in reduced fish production. The letter expressed that Alpheus Creek is hydrologically connected to the ESPA.

On May 19, 2005, Director Dreher issued an order ("*May 19, 2005, Blue Lakes Order*") in response to Blue Lakes' demand. R. Vol. 1 at 45. Pursuant to the application of the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* IDAPA 37.03.11 *et. seq.* ("CMR"), Director Dreher found that junior ground water diversions from the ESPA were materially injuring the 36-07427 water right. *Id.* at 58-59. The Director ordered a phased-in curtailment of ground water rights junior to the December 28, 1973, priority, determined to be causing the injury. *Id.* at 72-73. The equivalent of 57,220 acres was ordered curtailed based on the application of the ESPA model. *Id.* at 61. ESPA model simulations estimated that the level of curtailment would provide 51 cfs to the Devil's Washbowl to Buhl Gage spring reach of the Snake River, which includes the springs tributary to Alpheus Creek. The Director estimated that the 51 cfs would result in a 10 cfs increase to the springs that are the source for Blue Lakes' water right. The *May 19, 2005, Blue Lakes Order* provided that involuntary curtailment could be avoided by providing replacement water sufficient to offset the injury and that replacement water could be phased-in over a period of five years. *Id.* at 73-74. The Director issued the *May 19, 2005, Blue Lakes Order* on an emergency interim basis to

provide relief to Blue Lakes prior to conducting a hearing. *Id.* at 75. Blue Lakes filed a petition for reconsideration and requested a hearing. Vol. 2. R. at 278.

2. Clear Springs' Delivery Call

The Clear Springs delivery call was initiated by letter dated May 2, 2005, which included a graph depicting spring flow declines. R. Vol. 1 at 2. Clear Springs holds seven water rights for fish propagation at its Snake River Farm facility totaling 117.67 cfs. The graph showed spring flows falling below 85 cfs. The letter requested the administration of surface and ground water rights in Water District 130 to satisfy water rights 36-04013A (15 cfs with September 15, 1955, priority), 36-04013B (27 cfs with February 4, 1964, priority), and 36-07148 (1.67 cfs with January 31, 1971, priority).

On July 8, 2005, Director Dreher issued an order (*July 8, 2005, Clear Springs Order*) in response to Clear Springs' request. R. Vol. 3 at 487. The Director found that junior ground water diversions from the ESPA were materially injuring water rights 36-04013B and 36-07148. *Id.* at 501. The Director ordered a phased-in curtailment of ground water rights junior to the February 4, 1964, priority, determined to be causing the injury. *Id.* at 523. The equivalent of 52,470 acres was ordered curtailed based on the application of the ESPA model. *Id.* at 502. ESPA model simulations estimated that the level of curtailment would provide 38 cfs to the Buhl Gage to Thousand Springs reach of the Snake River, which includes the springs from which Clear Springs diverts for its Snake River Farm facility. The Director estimated that the 38 cfs would result in a 2.7 cfs increase to the springs that provide the source for Clear Springs' water rights. *Id.* at 503. The *July 8, 2005, Clear Springs Order* provided that involuntary curtailment could be avoided by providing replacement water sufficient to offset the injury and that replacement water could be phased-in over a period of five years. *Id.* at 523. The *July 8, 2005, Clear Springs Order* was issued on an emergency interim basis to provide relief to Clear Springs prior to conducting a hearing. *Id.* at 525. Clear Springs filed a petition for reconsideration and requested a hearing. R. Vol. 3. at 557.

3. Ground Water User's Response

The Ground Water Users objected to the *May 19, 2005, Blue Lakes Order* and the *July 8, 2005, Clear Springs Order* and filed petitions for reconsideration and requests for hearings. R. Vol. 1 at 161, Vol. 3 at 547 (Blue Lakes); Vol. 8 at 1499 (Clear Springs). The Ground Water Users also filed a replacement water plan in response to the Director's *May 19, 2005, Blue Lakes Order*, which the Director approved (after requesting that a supplemental plan be filed) on July 6, 2008, but before the issuance of the *July 8, 2005, Clear Springs Order*. R. Vol. 3 at 449. On April 26, 2006, the Director issued an *Order Approving IGWA's 2005 Substitute Curtailments* in the Clear Springs delivery call. R. Vol. 5 at 801. This *Order* recognized the substitute curtailment already being provided by IGWA under the Blue Lakes' call, and requested "that, on or before May 30, 2006, the North Snake Ground Water District and the Magic Valley Ground Water District must submit plans for substitute curtailment to the Director..." *Id.* at 811. IGWA submitted no such plan and a hearing was held on June 5, 2006, for the sole purpose of whether the Director should modify his "prior Orders approving the Idaho Ground Water Appropriators' 2005 substitute curtailments in response to both the Blue Lakes delivery call and the Clear Springs delivery call for its Snake River Farms facility." R. Vol. 6 at 1186. Previous to the hearing, the Ground Water users submitted joint replacement plans for 2006 in response to both delivery calls. R. Vol. 5 at 881.

4. Hearing on Petitions for Reconsideration, Recommended Order and Final Order

On July 5, 2007, current Director, David R. Tuthill issued an *Order Regarding Petitions for Reconsideration (Blue Lakes and Clear Springs Delivery Calls)* setting a hearing on the petitions for reconsideration.¹ R. Vol. 9 at 1931. A hearing was held November 28 through December 13, 2007, before independent hearing officer Hon. Gerald F. Schroeder ("Hearing Officer").² Previously, on November 14, 2007, the hearing Officer issued an *Order Granting In Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*. R. Vol. 14 at 3230. On

¹ Various other interested parties also timely filed petitions for reconsideration. R. Vol. 9 at 1931.

January 11, 2008, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation*. (“*Recommended Order*”). R. Vol. 16 at 3690. Summarily stated, the *Recommended Order* concluded: 1) In responding to the delivery calls, the Director properly considered pre-decree information regarding the Spring Users’ water rights, R. Vol. 16 at 3699; 2) that the Spring User’s means of diversion is reasonable and therefore they are not obligated to pursue alternative means of diversion or reuse water; *Id.* at 3700-01; 3) the Director’s assignment of 10% uncertainty to the ESPA model and use of the “trim-line” was reasonable, *Id.* at 3703-04, 3711-12; 4) the Director’s consideration of seasonal variation in analyzing material injury was reasonable; *Id.* at 3707-08; 5) the Director’s determination regarding the amount of useable water resulting from curtailment [through “linear analysis”] was supported by the evidence, *Id.* at 3710; 6) the finding of financial impact of responding to call has limited relevance; *Id.* at 3713; 7) under the circumstances the orders of curtailment were proper; *Id.* at 3714; and 8) the Director’s order of replacement water plans as a form of mitigation was proper, *Id.* at 3715-16.

On February 29, 2008, the Hearing Officer issued *Responses to Petitions for Reconsideration and Clarification and Dairyman’s Stipulated Agreement* clarifying aspects of the *Recommended Order*. R. Vol. 16 at 3839. Director Tuthill issued a *Final Order Regarding Blue Lakes and Clear Springs Delivery Call* (“*Final Order*”) on July 11, 2008. R. Vol. 16 at 3950. The *Final Order* adopted the findings of fact and conclusions of law of the *July 8, 2005, Clear Springs Order* and the *May 19, 2005, Blue Lakes Order* and orders of the hearing officer except as specifically modified. *Id.* at 3959.

5. Petitions for Judicial Review

Petition for judicial review of the *Final Order* was timely filed by Clear Springs Foods, Inc. on July 28, 2008. Cross-petition for judicial review was timely filed by Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District on August 8, 2008. In addition, Blue Lakes Trout Farm,

² The delay in the delivery call proceedings resulted among other things from a constitutional challenge to the CMR. See *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho

Inc. timely filed a cross-petition for judicial review on August 11, 2008. This case was assigned to this Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication, on July 31, 2008. Intervention in this matter was granted to the Idaho Dairymen's Association on October 2, 2008. Intervention was also granted to Rangen, Inc. on November 25, 2008.

C. Relevant Facts

1. The Water Rights at Issue

a) Blue Lakes

Blue Lakes raises trout for commercial production. Blue Lakes holds three water rights that it uses at its facility. Partial decrees were issued in the SRBA for all three rights in 2000. Water right 36-02356A authorizes a diversion rate of 99.83 cfs with a priority date of May 29, 1958; water right 36-07210 authorizes a diversion rate of 45 cfs with a priority date of November 17, 1971; and water right 36-07427 authorizes a diversion rate of 52.23 cfs with a priority date of December 28, 1973. Hearing Exhibit (Exh.) 31. The three rights authorize a total diversion rate of 197.06 cfs for fish propagation with a year-round period of use (January 1 through December 31). *Id.* The quantity elements are also defined in AFA (acre-foot per annum). *Id.* The AFA is not a quantity limitation as the volume is consistent with the authorized rate of diversion 24 hours per day and 365 days a year. The source for the rights is "Alpheus Creek Tributary: Snake River." *Id.* The decrees do not contain any conditions or limitations on use. The source of Alpheus Creek is discrete springs discharging from the ESPA in the Devil's Washbowl to Buhl reach of the Snake River which is approximately 24 miles long. R. Vol. 9 at 1908.

b) Clear Springs

Clear Springs raises trout and other fish for commercial production. Clear Springs owns six water rights used at its Snake River Farm facility. Partial decrees were

862, 154 P.3d 433 (2007).

issued in the SRBA for all six rights in 2000. Water right 36-02703 authorizes a diversion rate of 40 cfs with a priority date of November 23, 1933; water right 36-02048 authorizes a diversion rate of 20 cfs with a priority date of April 11, 1938; water right 36-04013C authorizes a diversion rate of 14 cfs with a priority date of November 20, 1940; water right 36-4013A authorizes a rate of diversion of 15 cfs with a priority date of September 17, 1955; water right 36-4013B authorizes a rate of diversion of 27 cfs with a priority date of February 4, 1964; and water right 36-7148 authorizes a diversion rate of 1.67 cfs with a priority date of January 31, 1971. Exh. 301-306. The six water rights authorize a total diversion rate of 117.67 cfs. All water rights are for fish propagation with a year-round period of use. *Id.* The source for the rights is "Springs Tributary: Clear Lake Source is also known as Clear Springs." *Id.* Clear Springs diverts from a collection system that receives spring flows discharging from outlets located on an approximately 300 foot length of the canyon wall. The partial decrees do not contain any conditions or limitations on the use. The springs discharge from the ESPA in the Buhl to Thousand Springs reach of the Snake River which is about 11 miles long. Exh. 262 at 6.

c) General Provision on Connected Sources

Blue Lakes' and Clear Springs' water rights are also subject to the decreed general provision on connected sources decreed in the SRBA for Basin 36, which provides:

The following water rights from the following sources of water in Basin 36 shall be administered separately from all other water rights in Basin 36 in accordance with the prior appropriation doctrine as established by Idaho law:

Water Right No.
NONE

Source
NONE

The following water rights from the following sources of water in Basin 36 shall be administered separately from all other water rights in the Snake River basin in accordance with the prior appropriation doctrine as established by Idaho law:

Water Right No.
NONE

Source
NONE

Except as otherwise specified above, all other water rights within Basin 36 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

Exh. 225 and 225A.

d) Ground Water Users

The Ground Water Users are comprised of more than 1700 agricultural, municipal and industrial water users across southern Idaho who divert from the ESPA.

2. Eastern Snake Plain Aquifer (ESPA)

The ESPA is an unconfined aquifer underlying a geographic area of approximately 10,800 square miles of southern and southeast Idaho. R. Vol. 16 at 3691, Exh. 429. The ESPA connects with the Snake River and its tributaries along a number of reaches resulting in either gains or losses to the River depending on the level of the aquifer in relation to the River. R. Vol. 3 at 488-89. The ESPA consists primarily of fractured basalt ranging in a saturated thickness of several thousand feet in the central part of the Eastern Snake River Plain, to a few hundred feet in the Thousand Springs area where the water is discharged through a complex of springs. Water flow through the ESPA is not uniform. Water travels through the system at rates ranging from 0.1 feet per day to 100,000 feet per day depending on subterranean geology, elevation and pressure differentials. *Id.* at 487. The ESPA is estimated to contain as much as one billion acre-feet of water. The ESPA receives approximately 7.5 million acre-feet per year from the following sources: irrigation related incidental recharge (3.4 million acre-feet), precipitation (2.2 million acre-feet) flow from tributary basins (0.9 million acre-feet) and losses from the Snake River and its tributaries (1.0 million acre-feet). *Id.* at 487-88. On average between May 1980 and April 2002, the ESPA discharged approximately 7.5 million acre-feet on an annual basis through spring complexes located in the Thousand Springs area and near the American Falls Reservoir and through the discharge of

approximately 2.0 million acre-feet per year through depletions from ground water withdrawals. *Id.* at 487.

Surface water irrigating on the Eastern Snake Plain began in the 1860's. Spring flow measurements were not taken until 1902. Hearing Transcript (TR.) at 1117 (Dreher Testimony). Irrigators diverted substantially more surface water than the consumptive use required by the crops. From 1902 to the early 1950's average daily springs discharge increased from 4200 cfs to an average of 6800 cfs through incidental recharge. *Id.* Also after the construction of Palisades Dam winter flow were stored in the reservoir as opposed to run through canal systems: Brendecke, R. Supp. Vol. 3 at 4432. In some places the level of the aquifer rose by as much as 100 feet. *Id.* at 1118. The early 1950's marked the beginning of the use of deep well pumps on the ESPA. Spring flows then began to decline as a result of conversion from flood irrigation to sprinkler irrigation as well as depletions caused by ground water pumping. *Id.* at 1120. As a result, spring discharges and ESPA ground water levels have been declining in the last 50 years. In 2004, the average daily discharge was approximately 5200 cfs which is higher than the 1902 level of 4200 cfs. *Id.* In the early 2000's, the worst consecutive period of drought years on record for the Upper Snake River Basin further reduced the level of the ESPA. R. Vol. 2 at 488.

In general, spring flows are dependent on aquifer levels. TR. at 1785 (Brendeke); (Harmon at 945); (Exh. 312 at 6, (Brockway). Ground water pumping from the ESPA causes depletion to spring flows in the Thousand Springs reach. *Id.* Further reductions in the aquifer are attributable to drought and conversions from sprinkler to flood irrigation. TR. at 845 (Wylie). Most impacts to the Snake River from ground water pumping from the ESPA are realized within in 20 years. TR. at 864 (Wylie). A moratorium on new ground water permits was issued in 1992. Since that time a reasonable estimate is that approximately 90% of the impacts to the Snake River from ground water pumping have been realized. TR. at 1222 (Dreher).

3. ESPA Model

A ground water model was used by the Director to predict the effects of curtailment. The model has strength and weaknesses. The model was designed to

simulate gains and losses on eleven different reaches as opposed to gains and losses to individual spring complexes. TR. at 806 (Wylie). It was not designed to predict what flows would be at individual springs in response to an administrative action. *Id.* at 857-58 (Wylie); *Id.* at 1133 (Dreher); Brendecke, R. Supp. Vol. 3 at 4456. The model divides the ESPA into approximately 11,500 individual one mile by one mile cells. *Id.* at 801. Despite the lack of homogeneity in the ESPA the model treats all cells as homogenous. The model was developed with input from stakeholders. *Id.* at 1130 (Dreher). The model is well calibrated. *Id.* at 1132. No model is perfect—all models have uncertainty. *Id.* at 1133 (Dreher); TR. at 816 (Wylie).

4. Interim Administration and Formation of Water District

On January 8, 2002, pursuant to I.C. § 42-1417, the SRBA District Court Ordered Interim Administration of water rights located in all or portions of Basins 35, 36, 41 and 47, which included the water rights at issue in this matter. *See* Exh. 8. As a precondition for interim administration Idaho Code 42-1417 requires that water rights either be reported in a director's report or partially decreed. I.C. § 42-1417 (a) and (b). On February 2, 2002, the Director entered an order creating Water District 130 pursuant to I.C. § 42-604. A Final Order revising the boundaries of the water district was entered January 8, 2003. The water rights at issue in this case are included in the water district. *See* Exh. 29.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held April 28, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or April 29, 2009.

IV.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code §42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code §67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code §67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code §67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code §67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code §67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.³ *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

³ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. See *eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); see also *Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2P.3d 738 (2000) (citations omitted); *see also*, *Cooper v. Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

V.

ISSUES PRESENTED FOR JUDICIAL REVIEW

A. Issues Raised by Spring Users

Director's Consideration of Conditions Prior to Entry of Partial Decree Including "Seasonal Variability"

1. Whether the Director's reliance on pre-decree conditions, and in particular "seasonal variations" in spring flows, in determining material injury to senior rights of Spring Users, was arbitrary, capricious or contrary to law?
2. Whether the Director's determination that Clear Springs' water right 36-4013A was not materially injured based on "seasonal variation" was factually contrary to the substantial evidence in the record?

3. Whether the Director erred both factually and as a matter of law in finding that Blue Lakes' water right 36-7210 was not materially injured by junior ground water pumping?

Director's use of the 10% "Trim-Line" in Applying ESPA Model

4. Whether the Director's use of a 10% "trim-line" resulting in the exclusion of certain junior priority groundwater rights from administration was arbitrary, capricious or contrary to law?

Director's Apportionment of affects of Curtailment to Reach Gain Segments

5. Whether the Director's use of a percentage of the reach gains to the Snake River to reduce the quantity required for mitigation in lieu of curtailment was arbitrary, capricious and contrary to law?

"Replacement Water Plans"

6. Whether the Director exceeded his statutory authority through the implementation of a "replacement water plan" process not provided for by statute or administrative rule?

7. Whether the Director's acceptance of "replacement water plans" in 2005, 2006 and 2007, despite Ground Water Users failure to comply with mitigation requirements set forth in the Director's orders, was contrary to law, exceeded the Director's authority or was arbitrary, capricious or a abuse of discretion?

8. Whether the Director's failure to properly account for and require Ground Water Users to fully perform outstanding mitigation obligations in 2005 (Clear Springs only), 2006 and 2007 (Spring Users) is arbitrary, capricious and contrary to law?

9. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary, capricious, contrary to law and the constitutional rights of Spring Users?

10. Whether use of phased-in curtailment or mitigation obligations of junior Ground Water Pumpers was contrary to law?

Public Interest Considerations

11. Whether the Director's consideration of the "public interest" in limiting or precluding administration of junior water rights is contrary to law?

B. Issues Raised by Ground Water Pumpers

Sufficiency of Evidence Regarding Material Injury

12. Whether the Director's finding that senior Spring Users suffered material injury was supported by substantial evidence that additional water accruing from curtailment of junior ground pumpers would enable Spring Users to increase fish production?

Swan Falls Agreement, State Water Plan and Full Economic Development of Ground Water Resources

13. Whether the Director's ordering of curtailment violates the State of Idaho's obligation to manage the ESPA in accordance with the minimum flows prescribed by the Swan Falls Agreement and the State Water Plan?

14. Whether the Director's ordering of curtailment is consistent with the full economic development provision of the Ground Water Management Act, I.C. 42-226 *et seq.* by curtailing tens of thousands of ground water-irrigated acres to fractionally increase quantities to senior Spring Users?

15. Whether the Director abused discretion by failing to compel Spring Users under the CMR to convert from a surface water source to a ground water source?

Futile Call

16. Whether the Director abused discretion by failing to apply the futile call doctrine with respect to the amount of time required for curtailment to produce increased spring flows?

Application of ESPA Model

17. Whether the Director erred by failing to account for known uncertainties in the ESPA Model resulting in curtailment without a reasonable degree of certainty that additional water will accrue to spring flows?

Due Process

18. Whether the Director exceeded his authority by ordering curtailment on an emergency basis without a prior hearing?

VI.

ANALYSIS AND DISCUSSION

A. The Director's reliance on pre-decree conditions, and in particular "seasonal variations" in spring flows, in determining material injury to senior rights is not contrary to law but in this case the Director impermissibly used the material injury analysis to shift burden of proof to senior.

The Spring Users assert that the Director erred as a matter of law by considering pre-decree conditions regarding the historic seasonal variability of spring flows in determining material injury to senior rights resulting from ground water pumping. The Spring Users hold multiple rights to the spring flows that supply water to their respective facilities. The rights are stacked and vary in priority. In determining material injury to the individual rights the Director took into account the inherent seasonal fluctuations in the spring flows in existence at the time the water rights were appropriated. To the extent the Director determined that a particular right was not historically satisfied on a continuous basis at the time of the appropriation the Director did not find injury to the right if current flows were sufficient to meet the decreed quantity for the water right

during any portion of the decreed period of use. Ultimately, the Director did not require the Ground Water Users to supply replacement water for seasonal lows where the full amount of the decreed right had historically never been satisfied. The Spring Users assert that this is a re-adjudication of their decreed rights. The argument being that the water rights were decreed for a specific quantity on a year-round basis and the Director is relying on historical conditions as opposed to the decreed elements of the water right. The seasonal variations are not reflected in the partial decrees. The issue of whether reliance on pre-decree conditions in responding to a delivery call constitutes a re-adjudication of the senior's decreed right is a difficult question. Perhaps the Hearing Officer summarized it best in referring to it as a "slippery situation." R. Vol. 16 at 3238. The short answer is it depends on the allocation of the burden of proof.

The CMR expressly authorize the Director to take seasonal variability into account in determining material injury to a senior right. CMR 010.14 defines "material injury" as "[h]inderance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set for in Rule 42." CMR 042.01.c provides:

042. DETERMINING MATERIAL INJURY AND REASONABLENESS
OF WATER DIVERSIONS (RULE 42)

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently without waste, include but are not limited to:

c. Whether the exercise of junior-priority ground water rights *individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right*. This may include the seasonal as well as the multi-year cumulative impacts of all ground water withdrawals from and area having a common ground water supply.

CMR 043.03.b provides with respect to mitigation plans:

Consideration will be given to the history and seasonal availability of water for diversion *so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods*.

(emphasis added). The Director's replacement water plan, despite creating issues addressed elsewhere in this opinion, is akin to a mitigation plan. Had the Director approved a mitigation plan in accordance with CMR 43 he would be acting according to the law by not requiring "*replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods.*"

An undisputed fact in this case is that the spring flows inherently fluctuate between high and lows on a seasonal basis and between years from factors other than ground water pumping. R. Vol. 16 at 3707-08. Therefore if all ground water pumping by all junior appropriators was eliminated, seasonal variations in flows would still exist. As a result, a decreed spring flow right may never have historically received the decreed flow rate for the entire decreed period of use. Ground water pumping by subsequent appropriators also can influence the timing and degree of these seasonal variations. Pursuant to the CMR, to the extent junior ground water pumpers are not the cause of the seasonal lows then there is no material injury or concomitant obligation to supply mitigation for the seasonal reductions in flows pursuant to a mitigation plan. CMR 010.14 (defining "material injury"); CMR 043.03.b (no replacement water where surface right has not historically received a full supply). Although considered as one of the factors in the material injury analysis, the determination is essentially akin to the application of the futile call doctrine. If ground water pumping by juniors is not the cause of the injury to the senior rights or not reducing the supply available to senior rights then curtailment should not result in providing a usable quantity of water to the senior. Director Dreher acknowledges this point throughout his testimony in explaining the material injury analysis.

Q. You also I believe testified that with respect to the seasonal variation question, that if junior ground water rights were to be curtailed to provide seasonal highs on a year round basis, then there would be no ground water development. Could you explain that?

A. Well, if the water rights held by the spring users are interpreted to mean that any time, at any time during the year when their authorized quantity is not being filled that injury is occurring, then there could be no ground water use because **if you curtailed all ground water on the plain there would be instances during the year when some, not necessarily all, but when some of the full quantity of the springs rights would not be met.**

Q. Curtailing juniors wouldn't produce water at that time and during -
-at that place in this [sic] quantities?

A. Not for all of the rights. But potentially for some of the rights it
would, but not for all of the rights.

TR. at 1376 (Dreher Testimony)(emphasis added).

Q. Then the third step would be to see if you curtailed the ground
water pumper, for example, would that water arrive at the spring
within a reasonable time in a reasonable quantity?

A. Well, **that's the opposite image of injury**. I mean, you can
evaluate, you know, are junior priority ground water rights reducing the
supply available to the senior by simulating what would happen if you
curtailed those junior priority.

TR. at 1249 (Dreher Testimony)(emphasis added).

Q. Mr. Dreher, do reduced spring flows necessarily constitute material
injury?

A. **Only to the extent that those reductions in spring flow are the
result of depletions associated with junior priority rights.**

TR. at 1152 (Dreher Testimony)(emphasis added).

Q. And again, I want to follow up on the issue of injury. If you
assume that someone had a water right that was 100 cfs water right on the
decree, and they were only receiving 50 cfs, if you would curtail juniors
and convert 25 cfs, would that additional shortage of 25 cfs be considered
injury also?

A. No.

Q. Because it's attributable to some other effects?

A. That's correct.

Q. Or its not attributable to junior depletions?

A. That's correct.

TR. at 1376-77 (Dreher Testimony). *See also Final Order* (R. Vol. 16 at 3950) (“Consequently, seasonal variations must be considered to **determine what the Spring Users would have received throughout the year absent junior water user’s appropriations**”) (citing *Recommended Order* at 19.)).

In responding to a delivery call the Director applies a ground water model to simulate the effects of curtailment of junior rights determined to be impacting senior rights. It follows that if all rights junior to the injured senior are curtailed, over time the seasonal fluctuations should return to as they existed at the time of the senior’s appropriation.⁴ The seasonal low flows will still be present and curtailment of juniors will not result in eliminating these seasonal lows. (i.e. seniors appropriated subject to the seasonal fluctuations prior to the subsequent ground water appropriation by juniors). As such, it becomes futile to curtail in an attempt to increase seasonal lows. It also would be contrary to law to require juniors to provide replacement water or other mitigation to compensate for these seasonal lows. Futile call is a well established part of the prior appropriation doctrine. *See e.g. Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976); *Martiny v. Wells*, 91 Idaho 215, 419 Idaho 470 (1966); *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921); *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904). Accordingly, taking into account seasonal variability is not necessarily a re-adjudication of the water right despite the partial decrees not including conditions pertaining to seasonal fluctuations. Rather, taking seasonal variability into account is a consequence of administering water rights based on the effects of curtailment simulated through the ground water model, the inherent fluctuating characteristics of spring flows, and the application of the futile call doctrine. Therefore is not arbitrary or capricious or contrary to law. Taking into account seasonal variability is also authorized under the CMR.

Simply put, a determination of material injury requires the Director to determine what portion of a senior’s water deficit is caused by naturally occurring seasonal lows as opposed to the portion of the deficit that results from the exercise of junior rights. Both the material injury analysis under the CMR and the futile call doctrine require the director

⁴ The flows may even return to lower than historical levels based on declining aquifer levels resulting from reductions in incidental recharge. In which case no amount of curtailment will result in increasing spring flows back to historical levels. *See Brendecke*, R. Supp. Vol. 3 at 4432 (never get back to pre-1955 levels).

to exclude any water deficit attributable to such seasonal variations. Juniors cannot be curtailed to provide water that a senior would not have received anyway due to seasonal variations; nor can juniors be required to provide replacement water for such amounts. In making the factual determination as to what portion of a senior's deficit is attributable to seasonal variations, the Director necessarily needs to examine evidence that would show what those seasonal variations looked like before pumping by hydraulically connected juniors – i.e. what were the seasonal variations at the time of the senior's appropriation? Such evidence may include computer modeling and/or historic records of spring discharges. An examination of evidence relative to seasonal variations of springs at the time of the senior's appropriation is not a re-adjudication of the senior's right; rather such examination is necessary to tease-out the effects of seasonal variations from the effects of groundwater pumping by juniors.

However, the justification of seasonal variability under aspects of futile call is not the end of the analysis. The problem arises, as occurred in this case, where there is disagreement or lack of data regarding historic flow conditions at the time of the senior's appropriation for purposes of determining whether or not material injury exists or, put differently, whether curtailment of juniors would be futile with respect to seasonal lows. In sum, who has the burden of proving the historical conditions and what is the evidentiary standard? *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d at 433 (2007) (*AFRD #2*) involved a facial constitutional challenge to the CMR. The district court declared the CMR to be facially unconstitutional for failing to “also integrate the concomitant tenets and procedures relating to a delivery call, which have historically been necessary to give effect to the constitutional protections pertaining to senior water rights. . . .” *Id.* at 870, 154 P.3d at 441. The district court concluded that “under these circumstances, no burden equates to impermissible burden shifting.” *Id.* at 873, 154 P.3d at 444. The issue arose as a result of senior surface users asserting the CMR were unconstitutional because the Rules required the senior making the call to prove material injury after the Director requested information from the surface users for the prior fifteen irrigation seasons instead of automatically giving effect to the decreed

However, this is also an aspect of futile call and should be determined pursuant to the appropriate burden of proof and evidentiary standard. See

elements of the water right. The Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards but held that **"the Rules do not permit the shifting of the burden of proof . . . requirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules."** *Id.* at 874, 154 P.3d at 445 (emphasis added). The Court held further that:

The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. . . . While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

Id. at 877-78, 154 P.3d at 448-49. The problem is that if aspects of futile call are cloaked in part of the material injury determination and not subject to the applicable burdens of proof then the burdens of proof are effectively circumvented.

In the instant case the Director found no material injury to certain water rights after taking into account seasonal variations despite the spring flows falling below the decreed amounts. There was disagreement between the Director and the Spring Users over whether or not the rights in question were historically satisfied up to their decreed quantities on a continuous basis or whether the rights were in fact impacted by seasonal lows. Further, there was a lack of data regarding the flows at the time some of the rights were appropriated. The Director noted in his testimony "so without additional historic

measurements, we're just not in a position to make a determination, a factual determination as to whether the seasonal variations are or are not more pronounced now than they were when these rights were first established." TR. at 1150-51. Despite the lack of data no presumptive weight was accorded the partial decree. This becomes painfully obvious in the respondent's brief. **"Inherent seasonal variability and the lack of any historical information to support that water right no. 36-4013A was filled at all times when it was appropriated led the Director to his conclusion that the right was not injured."** *Respondent's Brief* at 48 (emphasis added). **"Inherent seasonal variability and the lack of any historical information to support that water right no. 36-7210 was filled at all times when it was appropriated led the Director to his conclusion that the right was not injured."** *Id.* at 50 (emphasis added). In effect, the lack of data regarding historical conditions and the insufficiency of the evidence regarding conditions at the time of the appropriation was construed against the Spring Users. The Spring User is put in the position of having to prove up the historical use of his water right as opposed to defending against a futile call where the senior is accorded the established burdens of proof — this in effect became a re-adjudication of the quantity element of the right. While it is appropriate for the Director to address aspects of futile call and pre-decree information as part of the material injury analysis it is inappropriate to shift the burden of proof to the senior. In sum, seasonal variability is relevant to simulating and establishing the effects of a delivery call but not as a means for establishing the quantity to which a senior is entitled *viz a viz* a material injury analysis. Otherwise a senior right holder is put in the position of having to re-prove the historical beneficial use of the right. Presumably, this was already accomplished in the SRBA. The distinction is in the allocation of the burden of proof and evidentiary standard. Ultimately the result maybe the same, but the determination cannot be made based on a re-quantification of the senior's right, rather must be made based on determining the effects of curtailment of junior right holders.

Accordingly, this Court concludes that seasonal variations are relevant in predicting the affects of curtailment as opposed to re-defining the scope of the water right. However, if addressed as part of a material injury analysis, the Director must apply the concomitant burdens of proof and evidentiary standards.

Therefore, this matter shall be remanded for that purpose.

B. The implementation of a "trim-line" margin of error in applying the ESPA model is supported by the evidence and is not arbitrary and capricious.

The Director used the ESPA model to simulate the effects of curtailment of ground water rights junior to Clear Springs' 36-0413B water right (diversion rate of 27 cfs with February 4, 1964, priority) and to Blue Lakes' 36-07427 water right (diversion rate of 52.23 cfs with December 28, 1973, priority). A limitation of the ESPA model with respect to the instant delivery calls is that the model cannot predict or target the effect of well withdrawals on the particular springs from which the Spring Users are diverting. The model is designed to predict the effects of withdrawals to particular sub-reaches. The ESPA model divides the Thousand Springs area into six adjacent sub-reaches. Blue Lakes' diverts from discrete springs located in the Devil's Washbowl to Buhl Gage spring reach, which is approximately twenty four miles long. Clear Springs' diverts from discrete springs located in the Buhl Gage to Thousand Springs reach, which is approximately 11 miles long.

The model simulations demonstrated that curtailment of junior priority ground water rights would result in increased spring discharges to the Buhl Gage to Thousand Springs spring reach by an average of 38 cfs. The model simulations demonstrated that curtailment of junior priority ground water rights would result in increased spring discharges to the Devil's Washbowl to Buhl Gage spring reach by an average of 51 cfs. In conjunction with running the model simulations in response to both delivery calls, the Director assigned a 10 % margin of error factor, excluding from administration those junior rights identified by the model to be causing injury but within the 10 % margin of error or "trim-line."⁵ The Director concluded that rights outside of the trim-line were not subject to administration because of the uncertainty that they would contribute water to the particular sub-reach. The Director also determined that rights outside of the trim-line could not be used in conjunction with providing mitigation for injury.

⁵ Junior rights predicted by the model to provide less than 10 % of the quantity curtailed to the particular spring reach were excluded from administration.

The margin of error used by the Director was not established in conjunction with the development of the model nor was it developed pursuant to any scientific methodology or peer review process.⁶ Rather, in responding to the delivery calls the Director determined that because the model is a simulation it does not have 100 % certainty and therefore must have a margin of error or uncertainty factor. TR. at 1166 (Dreher Testimony). The finding that the model does not have 100 % certainty and should have a margin of error is supported by the evidence. No party offered testimony that the model has 100 % certainty. There was testimony presented that the margin of error was probably much higher than 10 % but that it had yet to be quantified by any scientific methodology. TR. at 1901-02 (Brendecke testimony) (10% not adequate -- 50% probably too high). The Director arrived at the 10 % margin of error by using the margin of error assigned to stream flow gauges used in the administration of surface rights. The Director reasoned that the margin of error for the ground water model cannot be better (less) than that for a surface gauge. Given the composition and lack of homogeneity of the ESPA this finding is consistent with the evidence. The Hearing Officer concluded that the Director's reasoning was sound as a matter of common sense until a better margin of error is established. This Court agrees that the evidence, albeit conflicting⁷, supports the use of the 10 % margin of error as a minimum and is not arbitrary or capricious. That is all that is available. No evidence was presented to establish a higher margin of error or to controvert that the margin of error is less than 10%.

The next issue concerns the application of the margin of error to exclude from administration junior rights falling within the margin of error. The Director justified excluding water rights within the margin of error based on applying a "full economic development of the aquifer" analysis. The Director reasoned:

You only curtail junior priority rights when you know it will result in a meaningful amount of water being available to the senior.

⁶ Development of the ESPA model has not proceeded to the point where a margin of error has been developed. R. Vol. 16 at 3702.

⁷ Exh. 312, Brockway Testimony at 12 (not possible to assign confidence level without extensive research).

And the reason ties back to into the 42-226 provision, is that if you're curtailing junior priority rights because it might make a difference but you don't know for sure that it will, that's not providing for full economic development pursuant to 42-226. And its also inconsistent with – the portion of the common law doctrine of prior appropriation that promotes maximum utilization of a scarce resource . . . [A]n equally important principle in the prior appropriation doctrine is that that's articulated in Idaho Code 42-226. And that[s] maximum utilization of the resource.

TR. at 1167-68 (Dreher testimony). The Hearing Officer justified the use of the timeline to exclude juniors from administration based on "public interest" considerations which are incorporated into CMR 020.03. CMR 020.03 provides:

Reasonable Use of Surface and Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right as being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

The Hearing Officer concluded although the CMR acknowledge the prior appropriation doctrine:

[CMR] 020.03 acknowledges other elements. . . . In *American Falls [AFRD #2]* the Supreme Court determined that the Conjunctive Management Rules are not facially unconstitutional. Rule 020.03 is at the heart of the rules and how they will be applied. Had any rule been subject to a facial challenge, 020.03 was one. It was adopted October 7, 1994, and has remained untouched by the Legislature or the Supreme Court. It incorporates the law as it developed. "First in time, first in right" is fundamental to water administration but is subject to consideration of the public interest. The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens. These conclusions have significance in

several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment was not ordered.

R. Vol. 16 at 3706.

Although "full economic development" of ground water and "public interest criteria" may bolster the Director's use of the trim-line, the Court concludes that the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model.⁸ This case does not involve a "battle of the models." Rather, there is only one model involved that was developed with input from various stakeholders and calibrated using data over a 22 year period. The Hearing Officer found that that despite its limitations, the ESPA model is the best science and administrative tool available. R. Vol. 16 at 3703. The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality. As such, the ESPA model, less any assigned uncertainty, must represent the most conclusive evidence regarding the significance of the hydraulic connectivity of ground water wells to a particular sub-reach and the effects of curtailment to that particular sub-reach. Given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error. Accordingly, the Director did not abuse discretion by applying the 10 % margin of error "trim line."

C. The Director's Apportionment of Flows to Spring Complexes is supported by the Evidence and is not Arbitrary or Capricious.

The ESPA model was designed to predict the effects of curtailment to sub-reaches but not to specific spring outlets within the sub-reach, which is a significant limitation with respect to responding to these two delivery calls. Blue Lakes diverts from Alpheus Creek which is fed from specific springs located in the Devil's Washbowl to Buhl Gage spring reach. The Devil's Washbowl to Buhl Gage sub-reach is approximately 24 miles

long. In conjunction with applying the ESPA model, Director Dreher determined that curtailment of 57,220 acres would result in a gain of 51 cfs to the sub-reach. Through the use of USGS data for particular springs used to calibrate the model, the Director concluded that the springs that supply Alpheus Creek would realize 20 % of the gain or 10 cfs. The remainder of the gain exits the aquifer through other spring outlets in the sub-reach. Clear Springs' diverts from a 300 foot section of springs located in the Buhl Gage to Thousand Springs reach, which is approximately 11 miles long. In conjunction with applying the ESPA model, Director Dreher determined that curtailment of 52,470 acres would result in a gain of 38 cfs to the sub-reach. Through the use of the USGS data the Director determined that the springs that supply Clear Spring's facility would realize 6.9 % of the gain or 2.7 cfs. The remainder of the gain to the sub-reach exits the aquifer through other spring outlets. The Hearing Officer concluded that the percentage calculations that would accrue to the respective springs were supported by the evidence. R. Vol. 16 at 3710. The Hearing Officer also found that the percentages of the gains that would accrue to the respective springs supplying the Spring User's facilities were usable quantities. R. Vol. 16 at 3710. While the methodology used by the Director to estimate the percentage allocation to the specific spring complexes is far from perfect, this Court agrees that the percentage allocation is supported by the evidence. The percentages allocated to the spring complexes are based on the spring flow data used to calibrate the ESPA model. While there was testimony presented that there may exist more accurate methods for determining gains to particular spring complexes, no evidence of the specifics for implementing the alternative methods or the results of such methods were presented. *See* TR. 1866-67, (Brendecke Testimony); Exh 312 at 12-13 (Brockway Testimony). Accordingly, given the data and methodology available to the Director, in light of the limitations of the model, despite being subject to differences of opinion, the apportionment was not arbitrary or capricious. While the Court does not find the methodology to be arbitrary or capricious, the end result however, raises significant issues with respect to the disparity between the useable quantity of water made available to the Spring Users and the scope of the curtailment to the Ground Water Users.

⁸ The Court included the Director's reliance on full economic development to show that the Director acknowledged that the concept of full economic development can appropriately be considered in

D. Reasonable Use and Full Economic Development, Public Interest Criteria, the Swan Falls Agreement and the State Water Plan

The Hearing Officer recommended curtailment or replacement water in lieu of curtailment based on the respective percentages calculated by the Director concluding:

The curtailment by the former Director would improve the position of the Spring Users to the level they could reasonably expect when their rights were adjudicated. From that there is harm to ground water users who are curtailed, but it is reasonable considering priorities and the effects of their pumping. The same would not be the case if the trim line were left out of the consideration. This is not a case of saying crop farmers are more important than fish farmers. It is the case where two businesses cannot "command the entirety of large volumes of water in a surface or ground water source to support [their] appropriation[s] contrary to the public policy of reasonable use of water as described in this rule. *Conjunctive Management Rule 020.03.*

R. Vol. 16 at 3713.

The Ground Water Users argue that the Director essentially protected the full extent of the Spring User's rights "to the level they could reasonably expect when their rights were adjudicated" without taking into consideration the requirement of full economic development of the aquifer, public interest criteria or the Swan Falls Agreement and the State Water Plan.

The Ground Water User's point out the significant disparity between the amount of water use curtailed and the anticipated benefit to Blue Lakes and Clear Springs:

Assuming the typical annual diversion of four acre-feet per acre for ground water rights located in the zone of curtailment, the curtailment of 57,220 ground water-irrigated acres eliminates the use of 228,880 acre-feet annually. The estimated gain of 10 cfs to Blue Lakes amounts to 7,276.0 acre-feet at steady state—just 3.2 percent of the total amount curtailed acre-feet. The disparity is even more severe with respect to Clear Springs where, assuming an annual diversion of four-acre feet per acre, the curtailment of 52,470 acres eliminates the use of 209,880 acre-feet at steady state. The estimated gain to the Snake River Farm of 2.6 cfs amounts to 1,896.8 acre-feet annually, or 0.9 percent of the total amount curtailed.

conjunctively administering ground and surface water sources.

Ground Water User's Opening Brief at 16.

This Court agrees in part and disagrees in part with position of the Ground Water Users. To add more perspective in the case of Clear Springs, the Director determined the wells impacting the sub-reach supply water to 52,470 acres. At an inch (.02 cfs) per acre standard approximately 1049 cfs is required to irrigate 52,470 acres. In essence the Director ordered curtailment of the diversion of 1049 cfs to provide a senior right with 2.7 cfs. In the case of Blue Lakes, the Director determined the wells impacting the reach supply water to 57,220 acres. At the same inch per acre standard 1144 cfs is required to irrigate 57,220 acres. The Director essentially ordered the curtailment of 1144 cfs to provide a senior right with 10 cfs. While the Director did take into account full economic development and the Hearing Officer considered the public interest criteria in support of using the margin of error trim-line, this Court reads the law regarding the state's policy of full economic development of ground water resources as standing for more than just lending support for factoring a margin of error into a scientific model to account for uncertainty. However, for the reasons discussed at length below, in the end, the result turns on the limitations of the model as applied to these particular set of circumstances; the constitutionally engrained burdens of proof; and treating all ground water pumpers as being similarly situated, which they are not.

1. The "Full Economic Development" policy of the Ground Water Act applies to hydraulically connected spring rights.

The prior appropriation doctrine is deeply rooted in Idaho law. Article 15 § 3 of the Idaho Constitution provides:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . Priority of appropriation shall give the better right as between those using the water .

Idaho Const. Art. 15 § 3; *see also Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888) (recognizing doctrine prior to statehood). A core tenet of the prior appropriation doctrine is the principle of "first in time first in right." 1899 Idaho Sess.

Laws 380 (codified at I.C. § 42-106) ("As between appropriators first in time is first in right."). Originally the Idaho Constitution was silent as to the appropriation of ground water. In 1899, the Idaho legislature addressed ground water by declaring that subterranean waters were subject to appropriation. 1899 Idaho Sess. Laws 380 (codified at I.C. § 42-103) ("The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within the state shall hereafter be acquired") Historically, the prior appropriation doctrine was also applied to disputes involving ground water. *Hinton v. Little*, 50 Idaho 371, 296 P. 582 (1931); *Silkey v. Tiegs*, 51 Idaho 344, 5 p. 2d 1049 (1931).

In *Noh v. Stoner*, 53 Idaho 651, 26 P. 531 (1933), the Idaho Supreme Court addressed the issue of maintenance of water tables in a dispute involving a junior well interfering with a senior ground water right. The Court concluded that senior well owners were protected absolutely to the extent of their historical pumping level. Junior well owners could continue to pump so long as they held the senior harmless for the cost modifying or lowering the senior's means of diversion such that the senior received the same flow of water. *Id.* at 657, 26 P.2d at 1114. In 1951, the Idaho legislature enacted the Ground Water Act, Idaho Code 42-226 *et. seq.*, which among other things, modified the common law ruling in *Noh*. 1951 Idaho Sess. Laws, ch. 200 § 1, p.423. Although amended several times since its enactment, in 1953 the Act was amended to include provisions still in effect today and that are relevant to these proceedings. These provisions include in relevant part:

The traditional policy of the state of Idaho, requiring the water resources of the state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of the state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.

I.C. § 42-226 (emphasis added). Idaho Code § 42-230 of the Act defines ground water as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."

In *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed the application of the Ground Water Act in a dispute between ground water pumpers. The Court noted that the holding in *Noh* was "inconsistent with the full economic development of our ground water resources" and that "the Ground Water Act was intended to eliminate the harsh doctrine of *Noh*." *Id.* at 581-82, 513 P.2d at 633-34. The Court concluded that the Act is "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Id.* at 584, 513 P.2d at 636 (citing Idaho Const. Art. 15 § 7). Ultimately the Court held that the Ground Water Act "clearly prohibits the withdrawal of ground water beyond the average rate of future recharge" but that:

[A] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development. . . .

In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water to promote full economic development of the resource

We conclude that our legislature attempted to protect historic water rights while at the same time promoting full economic development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of diversion demands an unreasonable pumping level his historic means of diversion will not be protected.

Id. at 584, 513 P.2d at 636 (citations omitted).

In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), a subsequent case that addressed the application of the Ground Water Management Act to a domestic water right, the Idaho Supreme Court acknowledged "Article XV § 7 of the Idaho Constitution

provides in relevant part: 'There shall be constituted a water resource agency . . . which shall have the power to formulate and implement a state water plan for optimum development of resources in the public interest . . . under such laws as may be prescribed by the legislature.' . . . The Ground Water Act was the vehicle chosen to by the legislature to implement optimum development of water resources." *Id.* at 511-12, 650 P.2d at 653-54.

Although the cases addressing the Ground Water Act involve disputes between ground pumpers, the language of the Act extends its application to hydraulically connected surface sources. Idaho Code 42-237(a) and (g) provide in relevant part:

a. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources *in his sole discretion* is empowered

g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. *Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act*⁹, *the present or future use of any prior surface or ground water right* or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge.

(emphasis added).

"Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect. . . . There is no indication that the words of the Ground Water Act

⁹ The language "contrary to the policy of this act" modifies "any prior or surface or ground water right" and therefore must be given effect. Senior surface and ground water users are protected in their means of diversion so long as their appropriations are consistent with the policy of the Act. See *supra* I.C. § 42-226 for declared policy of Act ("while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground resources. . .).

should be interpreted in any way other than as they are normally used.” *Parker* at 511, 650 P.2d 653 (citation omitted). Accordingly, under this Court’s plain reading of the language of the Act, any surface water appropriation fed from a hydraulically connected ground water source regulated by the Act is effected by the Act. The Court’s reading of the Ground Water Act is also consistent with the “Reasonable Use of Surface and Ground Water Policy” embodied in Rule 020.03 of the CMR, the constitutionality of which was upheld by the Idaho Supreme Court in *AFRD#2*. See *supra* (“An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule”).

The policy of full economic development of ground water resources is consistent with the prior appropriation doctrine which incorporates a “public interest” component. See *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 123 (1912) (appropriator not entitled to entire flow of river to support means of diversion); *Poole v. Olavson*, 82 Idaho 496, 502 356 P.2d 61, 67 (1960) (policy of law of state is to secure maximum use and benefit, and least useful use of its water resources); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1091 (1915) (policy of state to require highest and greatest possible duty from water of the state); *Farmer’s Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 535-36, 102 P. 481, 491-92 (1909) (economy must be required and demanded in the use and application of water); I.C. § 42-101 (“Water being essential . . . depending upon its just apportionment to, and economical use by, those making beneficial application of the same. . . .”); Idaho Const. Art XV § 5 (such priority of right shall be subject to such reasonable limitations . . .); Idaho Const. XV § 7 (State Water Resource Agency shall have power to formulate and implement state water plan for optimum development of water resources in the public interest).

Ultimately what this means is that a senior surface right that depends on a connected aquifer for essentially what amounts to “dead storage” to support the means of diversion may not be not absolutely protected in the historic means of diversion to the extent the “dead storage” is not subject to appropriation or development by subsequent appropriators. While the senior would still be protected as to the full quantity of the water right, the means of diversion may have to be modified to access the full quantity.

In the end, what constitutes reasonable or acceptable amount of "dead storage" is a determination left to the Director. **Accordingly, the Director did not act contrary to law by considering the public interest and full economic development in considering the scope of curtailment of ground water wells in order to satisfy the rights of the senior Spring Users.**

2. The Director did not err in his application of the full economic development or public interest analysis.

The next issue is whether the Director erred or abused his discretion in the determination of what constitutes full economic development. The Director used full economic development for his implementation of the "trim-line." The application of the "trim-line" effectively reduced the scope of curtailment in the case of Blue Lakes' delivery call from 300,000 acres to 57,220 acres and in the case of Clear Springs' delivery call from 600,000 acres to 52,470 acres. R. Vol. 16 at 3711. The Director concluded that this result was not a monopolization of the resource.¹⁰ The Ground Water Users point to the significant disparity between the useable quantities of water made available to the Spring Users and the scope of the curtailment to the Ground Water Users. This Court notes that the disparity is further exacerbated by the fact that the majority of the projected increase to the respective sub-reaches is water not used by the Spring Users and discharges from the aquifer through other spring complexes. While this Court acknowledges the disparity, ultimately the case has to be evaluated within the context of the standard of review.

The evidence in this case is overwhelming that the curtailment of ground water does not result in a timely proportionate increase to spring flows. Implicit in the CMR is the acknowledgment that there will be a disparity in the ground water use curtailed and the quantity of surface water produced. For example, the CMR provide for phased-in curtailment or mitigation where the effects of curtailment will not be immediately measurable. CMR 020.04, 040.01a. The CMR do not establish an acceptable or

¹⁰ Without the trim line the scope of curtailment would have been much larger. Accordingly, ground pumpers were permitted to continue to use water.

reasonable ratio nor has the Legislature. Nor do the CMR require that a surface right holder automatically convert to ground water pumping. Instead the CMR speak in terms of "reasonableness." Accordingly, any public interest or full economic development analysis has to start with the premise that a certain amount of undeveloped water or "dead storage" is acceptable. The reasonable use of surface and ground water provisions of CMR 020.03 and the full economic development provision of the Ground Water Act contemplate a certain amount of balancing of the reasonable exercise of senior priority rights against the State's policy of full economic development of its water resources. Finally, and right, wrong or indifferent, the Director is vested with a large amount of discretion in making the determination as to what is "reasonable." *AFRD #2* at 875, 154 P.3d at 446.

A significant issue in *AFRD #2* was the lack of objective criteria provided in the CMR, particularly with respect to the "reasonableness standard." This problem was addressed at length in the opinion of the district court:

The application of the CMR's is further problematic because of the absence of any objective standards from which to evaluate the criteria the Director is to consider when responding to a delivery call. The CMR's list the various criteria the Director is to consider when responding to a delivery call, and then evaluate these criteria in the context of a "reasonableness standard." However, there is nothing more concrete to establish what is or is not reasonable. . . . The way the CMR's are now structured, the Director becomes the final arbiter regarding what is "reasonable" without the application or governance of any express objective standards or evidentiary burdens. The determination essentially becomes one of discretion, which is inconsistent of the constitutional protections specifically accorded water rights. **The absence of any meaningful burdens also eliminates the possibility for any meaningful judicial review of the Director's action as under applicable standards of review, as any reviewing court would always be bound by the Director's recommendation as to what constitute reasonableness.**

American Falls Reservoir District # 2 v. IDWR, Gooding Dist. Court Case No. CV-2005-0000600, page 95 (June 2, 2006) (Hon. R. Barry Wood) (emphasis added). The Idaho Supreme Court upheld the constitutionality of the CMR despite the lack of objective standards or criteria. *AFRD #2* at 875-76, 154 P.3d at 446-47. If it is possible to define such standards, perhaps this is a matter for the legislature to address.

This however, does not mean the Ground Water Users were entirely without recourse. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge in some other constitutionally permissible way, the senior's call." *AFRD # 2*, at 877, 154 P.3d at 449. The parties were given the opportunity for a hearing and to present evidence in defense of the call and what is "reasonable." However, no results of alternative methodologies were presented from which to review the Director's determination of reasonableness. The ESPA model only predicts gains that would accrue to the specific sub-reaches as opposed to the specific spring complexes. The Director ordered curtailment based on the quantities that would accrue to the two sub-reaches. Replacement water was ordered based on estimated quantity that would accrue to the spring complexes supplying the facilities as a result of the curtailment. For want of a better available methodology, the Director treated all ground pumpers determined to be impacting the entire sub-reach the same, even though a well immediately adjacent the spring complex may have much more significant of an impact to spring flows than a well 40 miles away. Evidence was presented by experts for both parties that methods exist for more particularly analyzing which wells more directly impact specific spring complexes. TR. at 1866-67 (Brendeke Testimony); (Exh. 312 at 12-13, Brockway).

Those methods may well have reduced the scope of the curtailment to produce the same quantity of useable water to the Spring Users specific spring complexes, thereby making the Director's scope of curtailment "unreasonable." However, the results of any other methodology supporting a more targeted scope of curtailment were not presented at the hearing.¹¹ The Director made the determination based on the evidence and administrative tools that he had available.

The Director also made the finding that the Spring Users were employing reasonable diversion, conveyance efficiency and conservation practices pursuant to CMR 042.01.g. *May 19, 2005, Blue Lakes Order* at 59; *July 8, 2005, Clear Springs Order* at 36. He further found that based on the results of a field inspection there were no alternate

¹¹ The Court can only surmise that the Ground Water Users deliberately decided not to present such evidence. To have done so may have resulted in the interest of one ground water user being pitted against another. Thus far the ground water users have presented a united front in this litigation.

means of diversion or alternate points of diversion. *Id.* Director Dreher, in his testimony explained why it was not reasonable to require the Spring Users to drill horizontal wells in order to obtain their water.

A. Well, in my view it wasn't reasonable because those horizontal wells would simply capture water that otherwise would have been discharged through other spring complexes. And so it would have, assuming that other water right holders where the source of supply was the spring also drilled horizontal wells, essentially it would result in, you know a number of entities constructing and further constructing horizontal wells, essentially competing with each other for the same source of supply. It was not going to increase the supply overall and therefore was not reasonable.

Q. Were there any other reasons that you determined that requiring spring users to drill horizontal wells was not a reasonable requirement?

A. Well, if —there was a need to construct a horizontal well, and if the horizontal well would have enhanced [] the suppl[y]—which I already said it wouldn't have. — I determined that it wasn't —that was not a reasonable expense that should be born by the senior if the need for the horizontal well was caused by injury from junior priority rights.

TR. at 1360 (Dreher Testimony). The Director not only determined that sinking a horizontal well would not enhance water supplies but would also interfere with the spring flows of other spring users.

In the end, the Director balanced the reasonable use of the senior surface rights against the State's policy of full economic development and the public interest as required by the CMR. While there may be significant disagreement over the Director's determination of reasonableness and the result ultimately reached, no concrete evidence was presented of viable reasonable alternatives. **Accordingly, based on the applicable standard of review, this Court cannot conclude that that Director abused discretion or acted arbitrarily or capriciously in his determination.**

3. **The Swan Falls Agreement and State Water Plan, while defining full economic development of the ESPA, are insufficient for administering rights on a smaller scale.**

The Ground Water Users argue that the scope of curtailment also violates the provisions of the State Water Plan and the Swan Falls Agreement. The Ground Water Users' argument is that to the extent curtailment of ground water rights to maintain spring flows results in flows exceeding the minimum flow requirements at the Murphy Gauge, the State Water Plan and Swan Falls Agreement are violated. The Hearing Officer concluded on summary judgment that that the Spring Users were not parties to the Swan Falls Agreement and rejected the argument. R. Vol. 14 at 3240. While the Spring Users were not parties to the Swan Falls Agreement, the State Water Plan and the Swan Falls Agreement establish at least on a macro scale what constitutes "full economic development" of the ESPA. The intent of the Swan Falls Agreement was to provide for full development of the ESPA below Milner Dam and satisfy Idaho Power's hydropower rights by meeting the minimum flow requirements at the Murphy Gauge.¹² See Exh. 437 at 5. For the reasons previously discussed, the rights of the Spring Users are subject to the full economic development provisions of the Ground Water Act and the CMR.

The Ground Water Users argue that management of the ESPA based on the minimum flows at the Murphy Gauge not only facilitates full economic development but also provides protection to both spring users and hydropower rights. This is only partially true. The State Water Plan and Swan Falls Agreement establish an overall cumulative minimum for spring flows as measured at Murphy Gauge. The Murphy Gauge is located on the main stem of the Snake River well below the Thousand Springs area. Neither the State Water Plan nor the Swan Falls Agreement establishes minimum flows for the particular sub-reaches or individual spring complexes at issue in this matter.

¹² In brief terms, the State Water Plan sets a "zero flow" at Milner Dam to allow for full development of the River above Milner. The source for the Snake River below Milner relies on tributary flows and gains from spring discharges from the ESPA. The State Water Plan also sets minimum flows at the Murphy Gauge located below the Swan Falls Dam on the Snake River. Development of the ground water on the ESPA affects the minimum flows. In resolution of a dispute over the status of Idaho Power's hydropower rights, the State and Idaho Power entered into the Swan Falls Agreement. Among other things, the Swan Falls Agreement provided for the amendment of the State Water Plan raising the minimum flows at Murphy and for the development of additional ground water "trust rights" on the ESPA. The intent being that Idaho Power would be guaranteed minimum flows and the ESPA would be fully developed once the minimum flows were reached. In 1992, a moratorium was placed on the issuance of new rights.

The Thousand Springs area is divided into six different sub-reaches and according to the Director's finding regarding the trim-line, pumping in one sub-reach may have no effect on the spring flows in a different sub-reach. Therefore, it is possible for ground water pumping to disproportionately deplete a particular sub-reach without affecting other sub-reaches and still satisfy the terms of the Swan Falls Agreement. It is also possible for ground water pumping immediately adjacent to a spring complex to impact the spring complex and still satisfy the terms of the State Water Plan and Swan Falls Agreement. In other words, it is possible to over-develop a particular sub-reach and still satisfy the Swan Falls Agreement.

Second, the Swan Falls Agreement only provides a minimum protection for spring flows if the Director administers ground water rights on a long range and on an anticipatory basis to meet the minimum flows at Murphy Gauge. At one point between 2000 and 2004 there was concern that the flows at Murphy Gauge would drop below the minimum flows. As a result of the delayed effect of curtailing ground water rights, Director Dreher was prepared to issue curtailment orders to *surface right holders* on the Snake River and then follow up later with the curtailment of ground water rights if necessary. TR. at 1421-22. If surface rights were curtailed to meet the minimum flows, none of the water realized from the curtailment would have benefitted the aquaculture facilities.¹³ *Id.* Accordingly, because the Swan Falls Agreement does not define full economic development on a more regional basis and until such time as the ESPA is administered on a long range basis to meet the minimum flows¹⁴, the Swan Falls

¹³ Former Director Dunn illustrated this problem in his testimony when he explained his understanding of what would happen if the flows at Murphy were to drop below the minimums.

Its my opinion that the state would be obligated to do one of two things. Either have obtained storage water upstream that can be released down to augment the flow; or they're going to have to compensate Idaho Power Company in dollars to help then recover the loss of energy because the flows went down.

TR. at 1047 (Dunn).

¹⁴ Meaning the aquifer is managed such that sources other than ground water rights from the ESPA do not need to be relied on to satisfy minimum flows in times of shortage even on a short term basis. If the minimum flows are in danger of not being met then by implication spring flows are reduced. Relying on non-ESPA sources to satisfy minimum flows effectively bypasses the springs affording no relief to the Spring Users.

Agreement and State Water Plan are not conclusive of full economic development in responding to individual delivery calls.

E. The replacement water plans.

In the May 19, 2009 Blue Lakes *Order*, the Director found that Blue Lakes' water right no. 36-07427 suffered material injury, due to the pumping of junior priority ground water rights. Based on this determination, the Director ordered curtailment of 57,220 acres, which would produce 10 cfs to Blue Lakes. The Director further concluded that "[u]nless a replacement water supply of suitable water quality for use by Blue Lakes Trout is provided by the holders of junior priority ground water rights causing material injury to water right no. 36-07427, or by the ground water district(s) or irrigation district through which mitigation can be provided, the Director should order the curtailment of such rights..." R. Vol. 1 at 71. In sum, the Director ordered replacement water in lieu of curtailment provided by the holders of the junior ground water rights. On June 7, 2005, the Director partially approved the Ground Water Users' replacement water plan, without a hearing. However, the Director ordered that the ground users had seven days to amend their plan to sufficiently provide for the full 10 cfs required by the Director's original *Order*. On July 6, 2005, the Director approved the ground water user's supplemental replacement water plan.

Similarly, in his July 8, 2005 *Order*, the Director found material injury to Clear Springs' water right nos. 36-04013B and 36-07148. Again, the Director ordered curtailment of acres, but to be "offset by verified substitute curtailment, until there is no longer material injury." *Id.* at 520. In 2006, the Ground Water Users filed a joint replacement water plan in response to both *Orders* issued by the Director. R. Vol. 5 at 881. However, this plan was not approved by the Director, and the Director did not order curtailment at that time. On June 29, 2007, the Ground Water Users submitted another replacement water plan. This plan was submitted in response to an *Order Curtailing Junior Priority Ground Water Rights*, issued by the Director on June 15, 2007. R. Vol 7 at 1446. On July 5, 2007, the Director approved the Ground Water Users' replacement water plan. In addition, the Director ordered that a joint hearing, presided over by an

independent hearing officer, commence in the matter of both the Clear Springs and the Blue Lakes delivery calls. *Id.*

Under the CMR, the Director is charged with determining material injury to a senior water user in an organized ground water district, after that user has initiated a call by filing a petition with the Director. *See* CMR 040 and CMR 042. As a part of this process, if the Director finds material injury, he must determine what amount of water is owed to the senior user, in order to determine if curtailment of junior water rights is necessary. In this case, both parties argue that the Director exceeded his authority when he ordered replacement water in his May 19, 2009 Blue Lakes and his July 8, 2005 Clear Springs Orders. First, the Ground Water Users argue that the Director exceeded his authority by not providing the parties an opportunity for a hearing before ordering a replacement water plan. Second, the Spring Users argue that the Director does not have the power to order replacement water under the CMR. Third, the Spring Users argue the Director also exceeded his authority when he approved replacement water plans without a hearing, as required by the CMR. Finally, the Spring Users argue that the Director abused his discretion when he did not order curtailment after finding that the initial replacement water plans were insufficient to satisfy senior surface rights.

1. **I.C. § 42-607 and the CMR do not expressly require the Director to hold a hearing before issuing an order of curtailment in an organized water district.**

Blue Lakes and Clear Springs initiated the delivery calls at issue in this matter by requesting that the watermaster for Water District 130 administer water rights in Water District 130. Water District 130 contains water rights that are hydrologically connected through the ESPA to both Clear Springs' and Blue Lakes' water rights. I.C. § 42-607 provides for the distribution of water rights within a water district:

42-607. Distribution of water.

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of

water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.

I.C. § 42-607 makes clear that a watermaster in an organized water district, such as Water District 130, must administer adjudicated or licensed rights in times of shortage in order to supply senior water users. The legislature authorized the Director to create such water districts under I.C. § 42-604, in order to allow for ease of administration in times of shortage. There is no express requirement under this section for the watermaster to hold a hearing prior to shutting off the headgates or ditches of junior water right holders. However, because water rights are property rights, a due process argument can be made that notice and a hearing are indeed required before curtailment of such rights by a watermaster under I.C. § 42-607 even absent an expressed requirement for a hearing within the statute itself.

I.C. § 42-603 authorizes the Director to adopt rules and regulations for the distribution of water. The CMR supplement the Director's authority in I.C. § 42-607. The CMR expressly distinguish between delivery calls made within an organized water district (CMR 040), calls made outside an organized water district (CMR 030), and calls made within a ground water management area (CMR 040). The CMR treat delivery calls made outside of an organized water district as a "contested case" under IDAPA 37.01.01¹⁵, and expressly provide for notice and an administrative hearing process. CMR 030.02. Similarly, CMR 041.01 also requires a hearing, once a delivery call is initiated in a ground water management area:

**041. ADMINISTRATION OF DIVERSION AND USE OF WATER
WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).**

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows:

- a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient.
- b. *The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area.*

(emphasis added). However, the CMR do not require the same procedure before an order of curtailment is entered in an organized water district, under CMR Rule 40:

**040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY
THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND
WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-
PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING
A COMMON GROUND WATER SUPPLY IN AN ORGANIZED
WATER DISTRICT (RULE 40).**

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that

¹⁵ IDAPA 37.01.01 consists of IDWR's procedural rules.

regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures: ...

In an organized water district, as in this case, according to the CMR, the Director must either order curtailment of the junior water rights, or allow out-of priority diversions pursuant to an approved mitigation plan. Mitigation plans under the CMR are governed by Rule 43:

043. MITIGATION PLANS (RULE 43).

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, which provides in relevant part:

Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code; and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.

(emphasis added). While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such and upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

3. The Director exceeded his authority by ordering replacement water without a hearing and approving a mitigation plan without a hearing.

In this case, the Director issued two orders in response to the delivery calls initiated by Clear Springs and Blue Lakes. In each order, the Director ordered curtailment, but allowed the junior Ground Water Users time to submit "replacement water plans." The face of each order contained the following paragraph:

"IT IS FURTHER HEREBY ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after the receipt of written notice of the order, or receipt of actual notice, a written petition stating that the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department (IDAPA 37.01.01.) Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4)."

R. Vol. 1, at. 75 and R. Vol. 3, at. 525. As a result, while I.C. § 42-607 and the CMR do not provide for a hearing before an order of curtailment is entered, the Director appropriately provided for a hearing, should any person aggrieved by his orders request one: After the Director entered his May 19, 2005 Blue Lakes *Order*, the Ground Water Users filed a request for a hearing within the 15-day timeframe, on June 2, 2005. The Ground Water Users now argue that their due process rights have been violated because they were not afforded a hearing at that time.¹⁶ IDWR contends that the Director was

¹⁶ The Ground Water Users have filed six requests for hearing in this matter. Blue Lakes also filed at least one request for hearing. See July 5, 2007 *Order Approving Dairymen's and IGWA's 2007 Replacement*

within his authority to order replacement water without a hearing in either delivery call because such orders were issued on an "emergency basis." This Court disagrees.

The Director categorized the circumstances surrounding these calls as an emergency because the Ground Water Users had already made preparations for the upcoming irrigation season. As a result, the Director believed that the Ground Water Users required certainty as to what they were obligated to provide to the senior users, prior to the start of the irrigation season. All delivery calls are emergencies in this sense. However, the urgent nature of a delivery call does not excuse the Director from following the procedural requirements set out in the CMR, and in his own orders. The Director and IDWR are correct that issuing an initial order is proper because it puts the junior Ground Water Users on notice as to what is owed to the seniors, and places the senior Spring Users on notice as to what amount of water they are entitled to pursuant to the Director's investigation and determination of material injury. For practical reasons, before the Director can hear evidence about water supply, diversion, and use of water, he must first issue an order, informing the parties of his initial determination of material injury. However, once a hearing is requested by one of the parties pursuant to the provisions of the curtailment order itself, the Director is then required to hold a hearing. IDAPA 37.01.01.740; I.C. § 42-1701A.

Further, this is consistent with constitutional due process requirements. The Federal and the Idaho State Constitutions require that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. A court must weigh three factors in order to determine what procedures are required to satisfy constitutional due process: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, (1976). Generally, notice and a hearing are required by law before

Water Plan, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule, R. Vol. 9, 1910. Clear Springs also filed a request for hearing on July 25, 2005. R. Vol. 3 at 557.

deprivation of property rights, except in "extraordinary situations." *Lowder v. Minidoka County Joint School Dist.*, 132 Idaho 834, 840, 979 P.2d 1192, 1198 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, (1971)). In some cases, however, taking into consideration the *Mathews* factors above, a postdeprivation hearing will satisfy constitutional due process. *Zinerman v. Burch*, 494 U.S. 113, 128-129, 110 S. Ct. 975, 984-985 (1990).

In this case, the Director did not provide a hearing before issuing orders of curtailment.¹⁷ In addition, he did not hold a hearing on the 2005 orders of curtailment until 2007. Taking into consideration the interests of the senior and junior water users, along with the Director's interest in efficiently administering water rights, this Court finds that providing the parties with a hearing after the initial curtailment orders were issued would have been consistent with due process. A hearing is not required before the curtailment orders are issued because, as mentioned above, the Director is required by the CMR to make an initial material injury determination and must put both the senior and junior water users on notice of his decision. However, after the initial order is issued and pursuant to the constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before the junior rights are curtailed and before the senior rights are injured further.

4. The Director's order of replacement water was a mitigation plan for purposes of the CMR.

The Spring Users argue that the Director does not have the authority under the CMR to order a replacement water plan. They contend that the Director must either order curtailment of junior rights, or accept out-of-priority diversions pursuant to an approved mitigation plan. IDWR in turn argues that the Director has the authority to order replacement plans in order to offset the injury suffered by the senior water users as an alternative to curtailment, pursuant to his authority under I.C. § 42-602. Further, IDWR argues that the Director is not limited to the procedures set out in the CMR, because

¹⁷ The Director did hold a hearing on June 5, 2006, for the sole purpose of reviewing 2005 mitigation plans. See R. Vol. 6 at 1186. In addition, the Director ordered a hearing in front of an independent hearing officer, which took place in late 2007. See R. Vol. 7 at 1446.

under Rule 5, “[n]othing in these rules shall limit the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.”

Replacement water is a tool that the Director may use when administering water rights under I.C. § 42-602, in order to offset injury to senior users during times of shortage. Generally, however, replacement water provided by a junior to satisfy a senior water right is delivered directly to the senior’s place of use in order to replace the water that the senior cannot receive via his traditional means of diversion. In this case, the Director ordered that “replacement water” be delivered to Clear Springs and Blue Lakes via a number of methods, including substitute curtailment and aquifer recharge. Due to the unique relationship between surface and ground water, replacement water delivered via recharge and substitute curtailment is delayed, whereas replacement water delivered directly to the senior’s place of use has an immediate effect. Therefore, there is a distinct difference between a replacement water plan in the traditional sense and the replacement water plan ordered in this case. The replacement water plan ordered in this case is for all intents and purposes a mitigation plan under the CMR. Perhaps Mr. Luke characterized it best in this testimony where he states: “Yeah. It seems like semantics to me.” TR. at 748 (Luke). While the Director has the authority to order replacement water in order to immediately offset injury, in this case, the Director’s “replacement plan” was instead a “mitigation plan” within the application of the CMR.

Finally, while it is true that the Director’s authority is not limited to the standards set out in the CMR, the CMR provide the mechanism for the Director to use when conducting conjunctive administration. The Idaho Supreme Court upheld the constitutionality of these rules in *AFRD#2*. Therefore, the Director should adhere to the CMR when responding to a conjunctive management delivery call.

5. The Director exceeded his authority when he did not provide opportunity for a hearing in response to the submission of the Ground Water Users’ mitigation plans.

As mentioned above, CMR 043 sets out the procedures for responding to the submission of a mitigation plan. Once a junior water user files a mitigation plan with the

Director, the Director must hold a hearing as determined necessary before approving such a plan. Rule 43 requires the Director to follow the procedures for a transfer under I.C. § 42-222. In this case, the Director did not provide for a hearing after the junior Ground Water Users submitted mitigation plans. Instead, he approved such plans without a hearing, and therefore exceeded his authority.

Without providing an opportunity for a hearing consistent with CMR 043, the Director had no authority to approve a mitigation plan and should therefore have issued an order curtailing junior ground water pumping. While the Director held a hearing in June 2006, this was almost one year after his initial approval of the Ground Water User's Blue Lakes mitigation plan, and is an untimely response to a delivery call under *AFRD#2*. R. Vol. 6 at 1186. As was cited by all parties in this case, the Idaho Supreme Court held in *AFRD#2* that before having a hearing, "[i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the original facts." *Id.* at 875, P.3d at 446. However, the Court also held that "a timely response is required when a delivery call is made and water is necessary to respond to that call." *Id.* at 874, P.3d at 445. Clearly, this is such a case. Because the Director waited one year to hold a hearing on mitigation plans that were submitted to him soon after issuing his curtailment orders, he abused his discretion. The delay in holding a hearing as required by the CMR was unreasonable, in light of the "emergency" nature of all delivery calls. Under the CMR, a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury (as discussed in the previous section) and the mitigation plan at the same time.¹⁸

¹⁸ This matter was further complicated by the overlap between the two delivery calls. A mitigation plan submitted by the Ground Water Users in response to the Blue Lakes call was determined by the Director to apply to both delivery calls, even though it was submitted by the Ground Water Users prior to the Director's *July 8, 2005, Clear Springs Order*. See R. Vol. 5 at 805-811. The Director did not require an additional mitigation plan specific to Clear Springs until April 2006, nine months after his *July 8, 2005, Clear Springs Order*. *Id.* Thereafter, the Director held a hearing on the sufficiency of the mitigation plans submitted by the Ground Water Users. However, this hearing took place almost a year after approving the Ground Water Users 2005 mitigation plan and eleven months after issuing his *July 8, 2005, Clear Springs Order*. R. Vol. 6 at 1186.

In his July 5, 2007 *Order Approving Dairymen's and the Ground Water Users' 2007 Replacement Water Plan, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule*, the Director stated that the reason for the delay in hearing was due to "legal maneuvering of the parties, requests by the parties for schedule changes, and matters wholly unrelated to the delivery call proceeding initiated by Blue Lakes *see AFRD#2*." R. Vol. 9 at 1910. In addition, the Hearing Officer and IDWR argue that because the constitutionality of the CMR was up on review before the Supreme Court, the Director was within his discretion to delay the hearing. None of these factors provide an excuse for failure to conduct a timely hearing. When the Director recognized material injury to Clear Springs and Blue Lakes under the criteria set out under CMR 042, he was obligated to follow the procedures outlined in the CMR and provide the parties with due process. By delaying the hearing on this matter, both parties continued to suffer injury and uncertainty, at great expense to both sides.

6. The Director abused his discretion when he did not order curtailment once he found that the mitigation plans were inadequate to satisfy Clear Springs' and Blue Lakes' rights.

In 2005, the Ground Water Users submitted mitigation plans that were approved by the Director, both of which appeared to be sufficient to satisfy senior priority rights under the Director's original curtailment orders. However, in 2006 the Director did not approve the Ground Water Users' 2006 mitigation plans, due to Judge Wood's decision that the CMR were unconstitutional. At the time, the Director argued that he could not have approved mitigation plans until the Idaho Supreme Court heard the matter. The Spring Users argue that the Director still had the duty to administer water rights under Title 42, including the duty to accept mitigation plans. However, at that time, the Director took no action.

In 2007, after the Idaho Supreme Court's decision reviewing the CMR in *AFRD#2*, the Director once again ordered curtailment. R. Vol 7 at 1446. The Ground Water Users in turn submitted a joint mitigation plan in response to the Director's *Order of Curtailment*. The Ground Water Users were required by the Director to provide 30 cfs under phased-in curtailment, but the joint mitigation plan provided for only 19.6 cfs to

Blue Lakes. As a result, enforcement of the Director's *Order* was stayed so that the juniors could have a chance to provide the full amount of water required. In addition, the Ground Water Users were also required to provide 23 cfs under the phased-in curtailment. However, the Ground Water Users' mitigation plan provided for only 10.6 cfs to Clear Springs. Again, curtailment was suspended by the Director so that the junior Ground Water Users could submit another plan. Finally, after the Ground Water Users submitted a supplemental joint mitigation plan, the Director approved it without a hearing, even though the amount of mitigation provided still fell short of what he initially required. See Director's *Order*, R. Vol. 9 at 1911. The Director approved the Ground Water Users supplemental plan because he found that the senior users were owed less replacement water for two reasons: 1) it was late in the irrigation season, so they required less water and 2) the Director used a different analysis to determine how much water would be needed by the senior users (he used a 'steady-state' version of the model originally, but in this determination, switched to a 'transient' analysis). In any event, the Director acknowledged in his *Order* approving the supplemental plan that the amounts in the plan were insufficient to meet the senior's needs. However, the Director rescinded his earlier *Order of Curtailment* and approved the mitigation plan regardless. *Id.*

The Spring Users argue that the Director abused his discretion by approving mitigation plans that admittedly were insufficient to satisfy senior surface rights. This Court agrees. Under CMR 040, the Director, upon a finding of material injury, is required to order curtailment of junior rights, or accept out-of-priority diversions pursuant to an approved mitigation plan. CMR 043 provides the factors that the Director should take into account when approving such a plan:

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

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.

b. *Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion*

from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

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* even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

...
o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

(emphasis added). The CMR contemplate that the Director will take into account whether or not the plan will satisfy the senior priority water rights, and only approve such a plan if it accomplishes that goal, unless some other agreement can be reached between the Spring Users and the Ground Water Users. For instance, CMR 040.05 provides:

05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or *the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights*, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

(emphasis added). In this case, no agreement between the parties was reached, and the mitigation plan was by the Director's own admission inadequate to satisfy senior priority rights. See Director's Order, R. Vol. 9 at 1911. As stated above, the Idaho Supreme Court upheld the constitutionality of the CMR as the guidelines and procedures for conjunctive administration in the State of Idaho. The Director is obligated to follow the rules when administering ground and surface water rights in an organized water district in

response to a delivery call. As such, under the CMR, if a mitigation plan is not sufficient to satisfy senior priority water rights, the Director must order immediate curtailment. The rules do not provide for another alternative.

While the Court has determined that the Director abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing, and failing to order curtailment after finding the mitigation plans to be inadequate, the Court recognizes, as did Justice Schroeder, that the remedy at this point is to move forward since a hearing was ultimately held and curtailment may yet be ordered on remand.

F. The use of phased-in curtailment or mitigation obligations by junior Ground Water Pumpers is not contrary to law.

The use of phased-in curtailment is expressly authorized by the CMR. The Idaho Supreme Court upheld the constitutionality of the CMR pursuant to a facial challenge. Accordingly, this issue has already been decided. CMR 020.04. provides:

020. General Statements of Purpose and Policies for Conjunctive Management of Surface and Ground Water Resources (Rule 20).

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, *these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.*

(emphasis added). CMR 040.01 provides:

040. Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights From Areas Having a Common Ground Water Supply in an Organized Water District (RULE 40).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use *where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment;* or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

(emphasis added). Phased-in mitigation in the form of replacement water is in lieu of curtailment. Accordingly, mitigation need not put a senior in better position than would otherwise occur under curtailment. The use of phased-in curtailment is therefore not contrary to law.

G. The Director did not abuse discretion by failing to apply the futile call doctrine with respect to the amount of time required for curtailment to produce increased spring flows.

This issue was substantially answered in the issues pertaining to full economic development. However, CMR 010.08 defines "Futile Call" as:

A delivery call made by a holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions

under junior- priority ground water rights or that would result in waste of the resource.

IDAPA 37.03.11.010.08. The Hearing Officer determined:

The parameters of a futile call in surface to surface delivery do not fit the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile.

What these facts establish is that in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time from the results of curtailment to be fully realized may require years, not days or weeks. This is the reverse process of depletion of the water flowing to the springs from the aquifer over a substantial number of years. The Director's orders of curtailment recognized that the Spring User's calls were not futile, though remediation would take considerable time. The evidence supports that determination.

R. Vol. 16 at 3709.

The CMR acknowledge that relief from curtailment will not be immediate. CMR 020.04 "Delivery Calls" provides that the rules "may require mitigation or staged or phased in curtailment of junior priority use if diversion and use of water by the holder of the junior priority water right causes material injury . . . even though not immediately measurable . . . where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior priority water use was discontinued." IDAPA 37.03.11.020.04. The Ground water Users argue that the solution to reasonable use lies in reigning in the scope of the curtailment so that a significant portion of the curtailed water use will within a reasonable time accrue to the springs. *Opening Brief* at 47. The Director made a determination of "reasonableness." This Court acknowledges and the evidence supports that the lesser the distance between a curtailed ground water right and the target springs, the greater the return on curtailment and the less time it takes for the effects of curtailment to be realized. TR. at 931 (Harmon); TR. at 1414 (Dreher); Brendecke, R. Supp. Vol. 3 at 4455. Again, evidence was presented by experts for both parties that methodologies exist for more particularly analyzing which


wells more directly impact specific spring complexes. *See supra*. Those methods may well have reduced the scope of the curtailment to produce the same quantity of useable water to the Spring Users specific spring complexes, thereby making the Director's scope of curtailment "unreasonable." However, the burden was on the Ground Water Users to present the results of such an alternative. *AFRD # 2*, at 877, 154 P.3d at 449. In the context of the applicable standard of review, this Court can only affirm the Director's decision.

VI. CONCLUSION

1. The case is **remanded** so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination as explained herein.
2. While the Court has ruled that the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing and failing to order curtailment after finding the mitigation plans inadequate, there is no practical remedy at this point in these proceedings.
3. In all other respects, the decision of the Director is **affirmed**.

IT IS SO ORDERED

Dated June 19, 2009



JOHN M. MELANSON
District Judge

NOTICE OF ORDERS

I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the ~~22ⁿ~~ day of June, 2009, pursuant to Rule 77(d) I.R.C.P., I have filed this day and caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petition for Judicial Review of Agency Record to the parties listed below via US Mail postage prepaid:

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Chris Bromley
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

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Candace McHugh
RACINE OLSON
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CLERK OF THE DISTRICT COURT

BY 

Deputy Clerk

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LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

June 25, 2009

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
d.tuthill@idwr.idaho.gov

Re: *Implementation of Non-Stayed Portion of Ground Water Districts'
Snake River Farm Replacement Plan for 2009 and 2010*

Dear Director Tuthill:

This letter provides an initial response to your June 19, 2009, letter regarding the above-referenced matter on behalf of North Snake Ground Water District and Magic Valley Ground Water District (collectively "Ground Water Districts"). Because of the short response deadline of "no later than June 25, 2009," it is not possible to provide a complete response at this time. We will supplement this response as soon as reasonably possible after our consultant has had an opportunity to review Ms. Yenter's Report dated June 12, 2009.

The 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District ("2009 Plan") stated on page 7 that "the total acres proposed to be converted is approximately 1060 acres." However, it is important to remember that the objective of the 2009 Plan was to select wells that had enough historical average pumping to directly supply the full replacement water requirement to Snake River Farms on a continuous year-round basis without substantially changing the historical pumping regime. The objective was not to simply convert lands from ground water to surface water irrigation. The conversions were necessary and incidental to provide irrigation water to the lands that would no longer have ground water for irrigation because the ground water was going to be redirected to Snake River Farms.

June 25, 2009

Page 2

When the 2009 Plan was filed, the exact number of acres to be converted was unknown. It was contemplated that the properties belonging to Heida, Box Canyon and Brown would be converted as depicted on Exhibit 3 based upon verbal commitments. Subsequently, Brown refused to sign a Lease and Conversion Agreement. Therefore, the Van Dyk property and their Water Right Nos. 36-7319 and 36-7454 were substituted to meet the supply requirement for direct delivery to Snake River Farm, not to meet a specific acreage of conversions. The Van Dyk conversions were reflected in the Ground Water Districts' Weekly Progress Reports to the Director for Weeks 8, 9 and 10.

While the VanDyk authorized irrigated acreage is somewhat less, pumping records obtained from Ms. Yenter indicated that their historical average pumping was slightly greater than Brown's (255 af/yr vs. 238 af/yr). For this reason it was felt that the substitution would not compromise the primary objectives of the 2009 plan (the redirection of pumped groundwater to Snake River Farm). Also, their water right quantities were approximately the same as under the Brown right, resulting in a similar reduction of ground water depletion when converted to surface water.

Similarly, with respect to POU parcel B and wells 2 and 4, the wells were selected for their historical pumping amounts so as to support direct delivery of ground water to Snake River Farm. The records provided by Ms. Yenter indicated an average of 724 af/yr of pumping from those wells for the period 2003-2007, despite the fact that it appears the owners of the land in Section 1 of T9S were not using the wells during this period.

The Ground Water Districts would also like to address the 9,300 acres within the North Snake Ground Water District previously converted from ground water to surface water irrigation. Information which the Ground Water Districts are presently gathering indicates that some amount less than 9,300 acres will be converted this year. The Ground Water Districts are actively seeking additional conversion acres to replace those that have discontinued. This appears to be due in part to economic conditions and record rainfall. The dairy industry is in an extremely depressed state and the cost of the surface water delivery to the landowner has increased .

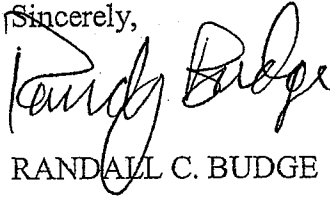
As you know, this is a unique water year with all-time record rainfall recorded throughout the region in June and virtually no pumping occurring since mid-May. As a result the Ground Water Districts indicate that there has been virtually no demand on the North Side Canal Company delivery system, nor any demand on the ground water resource. Accordingly nearly all water in the canal systems has gone to recharge, waste water or returned back to the river.

Participation in the CREP Program is continuing and it is anticipated there may be some increase in participation this year.

June 25, 2009
Page 3

If the foregoing, coupled with additional information to be submitted is not acceptable and the Director determines to remove the two-year partial stay, the Ground Water Districts are prepared to proceed with the construction of the over-the-rim delivery portion of the 2009 Plan.

Sincerely,



RANDALL C. BUDGE

RCB:rr

Enclosure

cc: Candice McHugh
Daniel Steenson
J. Justin May
John Simpson
Mike Creamer
Jeff Fereday
Robert Williams
Travis Thompson
Michael Gilmore
Lynn Carlquist, Chairman/North Snake GWD
Dean Stevenson/Magic Valley GWD



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

June 30, 2009

Randy Budge
Racine Olson
PO Box 1391
Pocatello, ID 83204-1391

Sent by U.S. Mail and by Electronic Mail

RE: Implementation of Non-Stayed Portion of Ground Water Districts' Snake River
Farm Replacement Plan for 2009 and 2010

Dear Mr. Budge:

Thank you for your letter in this matter dated June 25, 2009, which you characterized as an initial response. As you noted, my letter dated June 19, 2009 did not allow much time for response, and I appreciate your timely action. As you are aware, this is my last day as Director, and I want to take another step toward the review of this matter prior to my departure. On one hand, as all of the recipients of this letter are aware, this letter represents my understanding of the matter, and this entire contested case will be subject to review and modification by my replacement. On the other hand, this letter also represents the combined view of the legal and technical staff of the agency – it is not solely the view of one individual.

This response letter is sent in light of *Clear Spring Foods, Inc.'s Response to Ground Water Districts' June 25, 2009 Letter*, dated June 29, 2009. In this response, Clear Springs Foods, Inc. highlights the concerns in this matter of the calling party and underscores the importance of full compliance with the non-stayed portion of the 2009 Plan.

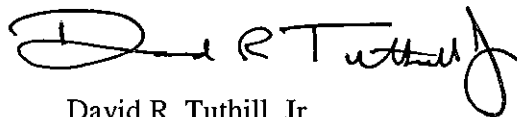
Regarding the number of acres to be converted from ground water to surface water above the rim, the agency understanding has been that under the approved replacement plan this number should be at least 1,060. You have taken the approach of identifying the historic ground water diversions of the original acres as compared with those of the replacement acres. The quantifications should be fully clarified in your follow-up response for review by all parties. The agency is seeking as-built specifications that conclusively demonstrate that as much conversion has taken place as had been proposed in the 2009 Plan.

In your letter you have indicated that if your response is not acceptable and the Director determines to remove the two-year partial stay, the Ground Water Districts are prepared to proceed with construction of the over-the-rim portion of the 2009 Plan. This remedy would not address the fact that too few acres above the rim have been converted. Even if the over-the-rim portion were to be completed, the Ground Water Districts would not be in compliance with the 2009 Plan. Thus, the Ground Water Districts need to pursue compliance with the plan that they have proffered and the Director has accepted. Compliance with this plan is urgent. It will not be acceptable to simply wait until next year to convert additional acres. While the Districts have made a good-faith effort to comply with the provisions of the 2009 Plan, we need to ensure that compliance with the accepted plan is complete.

Regarding the number of acres within the North Snake Ground Water District previously converted from ground water to surface water, you have provided some reasons why the number is expected to be less than 9,300 this year. In your follow-up report in this matter, please provide specific information that can be shared among the parties to enable the necessary oversight of this factor as well.

Thank you for your ongoing responsiveness, and for sharing information to enable this agency and the parties to become satisfied that the 2009 Plan is being fully implemented. We look forward to reviewing the follow-up information in this regard. I anticipate that a reasonable amount of time will have been provided if the time for this submittal is extended to July 10, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "David R. Tuthill, Jr.", with a stylized flourish at the end.

David R. Tuthill, Jr.
Director

cf: Candice McHugh
Daniel Steenson
J. Justin May
Jon Simpson
Mike Creamer
Jeff Fereday
Robert Williams
Travis Thompson
Michael Gilmore
Lynn Carlquist
Dean Stevenson
Cindy Yenter
Allen Merritt

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July 9, 2009

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v.wigle@idwr.idaho.gov

Re: *Implementation of Non-Stayed Portion of Ground Water Districts'
Snake River Farm Replacement Plan for 2009 and 2010*

Dear Acting Director Spackman:

On behalf of North Snake Ground Water District and Magic Valley Ground Water District (collectively "Ground Water Districts"), this letter will further respond to Director Tuthill's June 19, 2009 letter, supplement my initial response dated June 25, 2009, respond to Director Tuthill's June 30, 2009 letter and related issues subsequently raised.

INTRODUCTION

At the outset, emphasis must be made that the purpose and primary focus of the Ground Water Districts' 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District (2009 Plan) is to supply by direct delivery the full replacement water requirement to Snake River Farms on a continuous year-round basis. Pursuant to Lease and Conversion Agreements entered into between the Ground Water Districts and Heida, Box Canyon and Van Dyk (the "Landowners"), the Ground Water Districts leased the Landowners' water rights, wells, pumps and delivery facilities. This allows their wells to be pumped and provide for the direct delivery of mitigation water over-the-rim to Clear Springs Snake River Farm facility. The objective was not to simply convert land from ground water to surface water irrigation. The conversions were incidental and

became necessary to provide irrigation water to lands that would no longer have ground water supply for irrigation.

The design and construction of the over-the-rim facilities were underway, on schedule and would have met the Director's June 1, 2009 deadline under previous Orders, but for Clear Springs. Work on the over-the-rim delivery project was stopped at the request of Clear Springs, not the Ground Water Districts. Furthermore, it was pursuant to Clear Springs' Motion to Stay that the construction of the over-the-rim delivery facilities was stayed pursuant to the Director's Order. While the Ground Water Districts did not object to Clear Springs' Motion to Stay, nor did they stipulate to the same, largely because Clear Springs stated it did not wish to receive and would not accept any direct delivery of water.

Had the Ground Water Districts proceeded to complete the construction of the over-the-rim delivery facilities, which they remain willing to do, any issues relative to the conversion acres would be rendered entirely moot. This is simply because the Ground Water Districts would deliver the full mitigation requirement directly to Snake River Farm by pumping the leased water rights and operating the wells as needed to directly deliver the necessary quantities. It was noteworthy that the over-the-rim project was over-designed with the ability to deliver excess amounts to Snake River Farms as necessary should conversion acres or court orders alter the quantities needed to fully mitigate any injury to Clear Springs.

To date the Ground Water Districts have acted in good faith with due diligence to fully perform all of their obligations under their 2009 Plan. The Ground Water Districts have expended between \$500,000 and \$600,000 for design, engineering, new irrigation equipment and the lease and delivery of surface water pertaining to the Landowners new conversion acres under the 2009 Plan. The costs of leasing and delivering surface water remains an ongoing obligation and continuing annual expense to the Ground Water Districts.

By reason of the foregoing, the Ground Water Districts are extremely frustrated by the disingenuous complaints from Clear Springs and extensive scrutiny of the new conversion acres.

2009 CONVERSION ACRES

The Director's June 30 letter states: "The Agency understanding has been that under the approved Replacement Plan this number should be at least 1060." That understanding is incorrect. As stated on page 7 of the 2009 Plan, "the total acreage proposed to be converted is approximately 1,060 acres." When the 2009 Plan was filed, the exact number of acres to be converted was unknown and it was contemplated that Landowners Heida, Box Canyon and Brown would be converted as depicted in Exhibit 3 based upon verbal commitments. Subsequently Brown refused to sign a Lease and Conversion Agreement. Therefore, the Van Dyk property and their Water Right Nos. 36-7319 and 36-7454 were substituted to meet the supply requirement for direct delivery to Snake River Farm, not to meet a specific acreage of conversions. The Van Dyk

conversions were reflected in the Ground Water Districts' Weekly Progress Reports to the Director for Weeks 8, 9 and 10.

While the Van Dyk authorized acreage is somewhat less, pumping records obtained from Ms. Yenter indicate that their historic average pumping was something slightly greater than Browns (255 AF/year vs. 238 AF/year). For that reason, the substitution of Van Dyk did not compromise the objective of the 2009 Plan, being the delivery of pumped ground water to Snake River Farm. Also, the water right quantities were approximately the same as under the Brown right resulting in a similar reduction of ground water depletion when converted to surface water.

Again, the fundamental purpose and objective of the 2009 Plan was not simply to convert lands from ground water to surface water, instead to pump the wells and directly supply the full replacement water requirement to Snake River Farm on a continuous year-round basis. The conversions were incidental byproducts of the direct water delivery plan and necessary only to provide irrigation water to the lands that no longer have ground water for irrigation because that ground water was going to be redirected to Snake River Farm.

It is noteworthy that the Ground Water Districts in their 2009 Plan did not even calculate or include any mitigation benefits derived from the conversion acres. Accordingly, no expectation was created for the Department or Clear Springs.

The conversion of additional acres is not necessary to supply the full mitigation requirement over-the-rim to Snake River Farm because the existing water rights of the Landowners is more than adequate. The Ground Water Districts know of no other landowners in the vicinity that would be willing to convert to surface water.

The converted acres are those identified as the place of use under each of the Landowner's identified water rights. There are no "as-built" specifications with respect to the conversion work which was performed by contractors as described in the Weekly Status Reports submitted by the Ground Water Districts to the Director.

9,300 ACRES OF PRIOR CONVERSIONS

In previous years the Ground Water Districts paid the costs of converting approximately 9,300 acres within North Snake Ground Water District from ground water to surface water and have since paid the costs of leasing and delivering surface water to converted acres. Because the Ground Water Districts contemplated meeting their mitigation obligation to Snake River Farm by direct delivery of water over-the-rim pursuant to their 2009 Plan, the Modeled mitigation credit for conversion acres became less significant. Further, the 9,300 acres of conversion were rendered far less cost-effective than the 2009 Plan. Accordingly, the Ground Water Districts decided that the Districts could no longer afford the cost of leasing and delivering surface water

and would pass those costs on to the landowners.¹ When the 2009 Plan was filed, the Ground Water Districts had no reason to believe that passing the costs on to the landowners would have any significant effect on the number of converted acres because the added water costs to the landowners would still be considerably less than the avoided pumping costs. To the Ground Water Districts' surprise and for reasons not yet fully known, a number of the landowners appear to have discontinued use of surface water and have reverted to ground water. The current estimate is that surface water is being delivered to approximately 3,500 of the 9,300 previously converted acres, as well as to the new conversions under the 2009 Plan.

Thus far, the Ground Water Districts have leased 15,000 AF of water from their usual lessors and have a ready supply of additional water available to lease as needed. On the 15,000 AF which is currently being delivered through the North Side Canal Company system, the rent, Water District 01 Rental Pool fees and State Water Bank fees have previously been paid in full by the Ground Water Districts.

A number of other members of North Snake Ground Water District have expressed an interest and desire to convert to surface water in order to reduce their deep well pumping costs. It is anticipated that additional lands will be converted from ground water to surface water in the future, although no further details are known at this time. To facilitate these additional conversions, the Ground Water Districts have agreed to act as a broker and secure the necessary storage water from existing lessors and arrange for delivery through the canal systems, with the water acquisition and delivery costs paid by the landowner.

CORRECTION OF INADVERTENT MINOR PUMPING OF LEASED WATER RIGHTS

The Department brought to the Ground Water Districts' attention that there occurred some minimal pumping of certain ground water wells that were subject to the Lease and Conversion Agreements entered into with the Landowners. This problem was immediately investigated, has been corrected and is not expected to recur.

The water rights of each Landowner which converted to surface water pursuant to the Ground Water Districts' 2009 Plan were leased along with their pumps, motors, wells and facilities. The Ground Water Districts were given the sole and exclusive right to use the same to

¹During direct discussions between Ground Water District Representatives Lynn Carlquist and Dean Stevenson and Clear Springs representatives Larry Cope and Randy MacMillan in April 2009, Clear Springs was advised that conversion water acquisition and delivery costs previously incurred by the Ground Water Districts would no longer be paid by the Ground Water Districts, which costs were being transferred to the conversion landowners which could impact conversion acres.

July 9, 2009

Page 5

deliver the water over the rim to Snake River Farm for mitigation purposes. The Landowners have no right to use these water rights and facilities for irrigation purposes pursuant to the Lease and Conversion Agreements entered into. There was and remains no misunderstanding between the Ground Water Districts and the Landowners that their wells could not be pumped for irrigation purposes.

Immediately upon being informed by the Department that some unauthorized pumping of the converted wells had occurred, the matter was investigated by the Ground Water Districts. It was discovered that Ron Ambrose, a custom farmer who operates the Box Canyon and Heida irrigated land, experienced a problem and delay in getting surface water delivered to his pumps through the North Side Canal Company S Coulee. Mr. Ambrose apparently had received misinformation and/or had an erroneous belief that he could pump the converted wells if there was a problem getting surface water through the canal system. Mr. Ambrose acknowledged that he pumped a small well, believed to be Well No. 2, on two occasions, once for 8 to 10 hours and on another occasion for 2 hours. He also pumped a larger well believed to be Well No. 4 for a short period of time.

Information provided indicates that this occurred due to a lack of communication and misunderstanding between landowners Heida and Box Canyon and Mr. Ambrose concerning his responsibility for ordering surface water in through the canal system. When inadequate water was available, Mr. Ambrose thought it was acceptable to turn on the pumps and did so for a short period of time to avoid crop losses. The problem has now been corrected and is not expected to recur. Mr. Ambrose has met with representatives of North Side Canal Company and delivery problems have been resolved with no problems anticipated in the future. It has also been confirmed that there are no problems with the design and operation of the conversion facilities which are properly functioning. The minor amount of water pumped for a very short period is insignificant and is not expected to have any measurable impact upon spring discharge to Clear Springs.

Contact information has been provided to the Landowners for North Snake Ground Water District representatives. This is in an effort to improve communications, avoid further problems and further ensure that the conversions under the 2009 Plan work as contemplated,

Had the construction of the over-the-rim delivery facilities been completed, the landowners' water rights, wells and facilities leased to the Ground Water Districts would be used for direct delivery to Snake River Farm, thus eliminating any possibility of use for irrigation purposes on the converted acres. Should the Department desire, the Ground Water Districts have no objection to the watermaster pulling the fuses or locking these wells so they cannot be pumped for irrigation purposes. Those efforts should be coordinated directly between the watermaster, Ms. Yenter, and the landowners.

With respect to the reference in Ms. Yenter's report of expansions of use and of a "cross-

July 9, 2009

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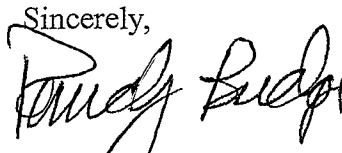
connected" well in the NW NE of Section 36, such would appear to be a matter of water rights administration which the Department has authority and responsibility to address. The Ground Water Districts have no authority to address any such "self transfer" that may have occurred by a water right holder without Department approval. Regardless, the Ground Water Districts have received assurance from the Landowners that their Lease and Conversion Agreements will be honored and that their wells will not be pumped to irrigate converted acres.

Ms. Yenter also raised the question concerning the Van Dyk property electric use records. It is our understanding that Van Dyk is using the same meter for his deep well pump leased to the Districts as is used for the new conversion acres pump. Arrangements need to be made to separate this and supply a new meter. Ms. Yenter can coordinate this with the Ground Water Districts which will pay any necessary costs.

CONCLUSION

It is the Ground Water Districts' belief that the foregoing response sufficiently addresses the issues raised by the Department and Clear Springs. If additional information is desired, please advise and we will promptly respond.

As indicated previously, if the foregoing and the prior information submitted is not acceptable and the Director determines to remove the two-year partial stay, the Ground Water Districts are prepared to immediately proceed with the construction of the over-the-rim delivery portion of the 2009 Plan. Should that be necessary, the Ground Water Districts request assurance from Clear Springs that it will accept the direct delivery of water pursuant to the over-the-rim facilities in light of previous indications given by Clear Springs that it would not do so. Alternatively, if the Director directs construction of the over-the-rim facilities without assurance from Clear Springs that it will accept the water, the Ground Water Districts request assurance from the Director that if they go to the expense of constructing the over-the-rim delivery facilities and Clear Springs refuses to accept the delivery of water, that the Ground Water Districts will be deemed to have satisfied their mitigation obligations.

Sincerely,

RANDALL C. BUDGE

RCB:rr

July 9, 2009
Page 7

cc: Candice McHugh
Daniel Steenson
J. Justin May
John Simpson
Mike Creamer
Jeff Fereday
Robert Williams
Travis Thompson
Michael Gilmore
Lynn Carlquist, Chairman/North Snake GWD
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Attorneys for the Ground Water Users

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS,
INC., NORTH SNAKE GROUND WATER
DISTRICT, and MAGIC VALLEY GROUND
WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director
of the Idaho Department of Water Resources; and the
IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2008-444

**GROUND WATER USERS'
PETITION FOR REHEARING**

IN THE MATTER OF DISTRIBUTION OF WATER
TO WATER RIGHT NOS. 36-02356A, 36-07210,
AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER
TO WATER RIGHT NOS. 36-04013A, 36-04013B,
AND 36-07148

(Clear Springs Delivery Call)

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the "Ground Water Users"), through counsel, respectfully petition the Court for rehearing pursuant to Idaho Appellate Rule 42 in response to the Court's *Order on Petition for Judicial Review* dated June 19, 2009 (the "*Order*"), on the following issues:

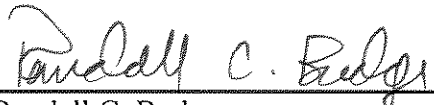
1. Since the Director did not independently apply the law of full economic development of ground water resources set forth in I.C. § 42-226, does the Director have discretion to reconsider that law on remand?
2. Does the *Order* stand for the proposition that the Director can order curtailment without first making a finding that curtailment will not unreasonably interfere with full economic development of the resource pursuant to I.C. 42-226?
3. Does the statutory mandate for full economic development of ground water resources set forth in I.C. § 42-226 require the Director consider the extent to which curtailment will enable the Spring Users to produce more, larger, or healthier fish?
4. Are individual water users entitled to, collectively or individually, preclude the additional development of the ESPA that was secured by the Swan Falls Agreement?
5. Does the *Order* stand for the proposition that the material injury and futile call analyses are one and the same?
6. How does the Director determine material injury without considering evidence about water supply, diversion, and use of water?
7. Can the Director find material injury without evidence being presented that the Spring Users in fact need additional water that can be put to beneficial use?

8. If the *Order* stands for the proposition that the Spring Users have no obligation to support their allegations of material injury, were the Ground Water Users wrongfully precluded from discovering records concerning diversions, fish production, facility design and improvements, etc.?

The Ground Water Users will within 14 days submit a brief in support of this request for rehearing pursuant to Idaho Appellate Rule 42.

DATED this 10th day of July, 2009.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED



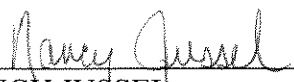
Randall C. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2009, the above and foregoing document was served in the following manner:

Clerk, Gooding County District Court 624 Main St. PO Box 417 Gooding, ID 83330	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input checked="" type="checkbox"/> Facsimile (208) 934-5085 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery
Daniel V. Steenson Charles L. Honsinger Ringert Clark P.O. Box 2773 Boise, Idaho 83701-2773 dvs@ringertclark.com clh@ringertclark.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Phillip J. Rassier Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Michael S. Gilmore Attorney General's Office P.O. Box 83720 Boise, Idaho 83720-0010 mike.gilmore@ag.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Jeff Fereday Mike Creamer Givens, Pursley P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail

J. Justin May May, Sudweeks & Browning P.O. Box 6091 Boise, Idaho 83707 jmay@may-law.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
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NANCY JUSSEL

**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	)	ORDER CURTAILING GROUND
FARM)	)	WATER RIGHTS IN WATER
	)	DISTRICT NOS. 130 AND 140
	)	JUNIOR TO JANUARY 8, 1981
(Water District Nos. 130 and 140))	
_____)	

FINDINGS OF FACT

Procedural Background

1. This matter was originally commenced in 2005 with the filing of a delivery call for administration of junior ground water rights by Clear Springs Foods, Inc. ("Clear Springs"). On July 8, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued an order in this matter ("July 2005 Order") finding that certain water rights held by Clear Springs were materially injured in accordance with the Department's Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 *et seq.* ("CM Rules"). The Director ordered curtailment of ground water rights junior to the most senior of Clear Springs' injured water rights (36-4013B; February 4, 1964), unless those users could replace the depletions that were causing injury to Clear Springs. Consistent with CM Rule 40.01.a, curtailment was phased-in over a period of five years to lessen the economic impact of curtailment.

2. At the time the July 2005 Order was issued, ground water depletions from Water District No. 140 had not yet been taken into account. With the inclusion of Water District No. 140, the Eastern Snake Plain Aquifer ("ESPA") Model simulates that the benefits of curtailing ground water rights junior to February 4, 1964 would increase reach gains in the 11-mile Buhl Gage to Thousand Springs reach by 38.72 cfs. *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* at 6, ¶ 23 (March 5, 2009) ("March 5 Order").

3. Clear Springs diverts from discrete springs located in the Buhl Gage to Thousand Springs reach. The Director has determined that 6.9% of the benefits of curtailment will accrue directly to Clear Springs at its facility. *Id.* at 2, ¶ 2.

4. In 2009, the fifth year of the phased-in period of curtailment, junior ground water users are required to provide 38.72 cfs to the Buhl Gage to Thousand Springs reach, or 2.67 cfs directly to Clear Springs (6.9% of 38.72 cfs). *Id.* at 6, ¶ 24.

5. Since 2005, junior ground water users, represented by the Idaho Ground Water Appropriators, Inc. (“IGWA” or “Ground Water Districts”), have responded to the requirements of the July 2005 Order by submitting replacement plans to offset depletions to the Buhl Gage to Thousand Springs reach. Water has been replaced by conversion of acres irrigated by ground water to surface water, conveyance losses, idling of lands through the Conservation Enhancement Reserve Program (“CREP”), and recharge.

6. In 2009, IGWA proposed to replace its depletions through conversion of approximately 9,300 acres that had been converted in previous years, continued enrollment of acres in CREP, and other activities.¹ In the March 5 Order, the Department determined that the benefits of conversion and CREP would result in a 9.88 cfs benefit to the Buhl Gage to Thousand Springs reach. *Id.* at 6, ¶ 23. The Director accepted those portions of IGWA’s 2009 replacement plan in the March 5 Order. *Id.* at 13, ¶ 2. The resulting shortfall at the time of the March 5 Order was 28.84 cfs to the reach (38.72 cfs – 9.88 cfs), or 1.99 cfs directly to Clear Springs (6.9% of 28.84 cfs). *Id.* at 6, ¶ 23.

7. Based on the shortfall, the Director provided notice to holders of ground water rights junior to November 16, 1972, that curtailment would occur if no action was taken by March 16, 2009. The resulting curtailment would have impacted approximately 860 ground water rights that irrigate approximately 41,000 acres in Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls counties.

8. On March 12, 2009, IGWA submitted its *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“2009 Plan”). The 2009 Plan proposed to eliminate the 1.99 cfs shortfall to Clear Springs by providing “direct delivery of ground water from existing wells to Snake River Farm’s intake.” *2009 Plan* at 6. The lands that were served by the wells that would comprise the over-the-rim component of direct replacement supply to Clear Springs would be converted from ground water irrigation to surface water irrigation. “The total acres proposed to be converted is approximately 1,060 acres.” *Id.* at 7. The over-the-rim pipeline would provide between 1.99 to 3.0 cfs directly to Clear Springs.

¹ IGWA had proposed to offset the remainder of its depletions by requesting that the Director order Clear Springs to accept direct monetary payment or replacement fish. For reasons discussed in the March 5 Order, the Director denied the request. This and other determinations made in the March 5 Order are on judicial review before the Honorable John M. Melanson of the Fifth Judicial District.

9. Upon receipt of the 2009 Plan, the Director held in abeyance the notice of curtailment in the March 5 Order until making a determination on the 2009 Plan. *Order on Scheduling and Holding Notice of Curtailment in Abeyance* (March 16, 2009).

10. On March 26, 2009, the Director approved the 2009 Plan, which required IGWA to construct the over-the-rim pipeline and implement the associated 1,060 new conversion acres. *Order Approving Ground Water Districts' Replacement Water Plan for 2009* (March 26, 2009) ("March 26 Order"). The order required construction of the pipeline and new conversion acres no later than June 1, 2009. Nothing in the March 26 Order altered the requirement of the March 5 Order that IGWA continue conversion of the existing 9,300 conversion acres and maintain enrollment of lands in CREP. The notice of curtailment continued to be held in abeyance.

11. On April 27, 2009, Clear Springs filed its *Motion for Partial Stay of Implementation of Directors' March 26, 2009 Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("Partial Stay Motion"). For several legal and practical reasons, Clear Springs requested that the Director partially stay implementation of the March 26 Order for one year, "so as not to require construction and installation of the GWD's 'over-the-rim' project at this time." *Partial Stay Motion* at 9. Clear Springs stated it would "accept the remainder of the 2009 Plan as acceptable mitigation for this year" and that "Clear Springs' acceptance of this mitigation would be for the sole purpose of proceeding to an immediate hearing on the 2009 Plan on the issues identified by Clear Springs' protest" to the Ground Water Districts' Third Mitigation Plan (Over-the-Rim). *Id.* at 6-7.

12. On May 4, 2009, the Director conducted a status conference with the parties to discuss their positions regarding the requested partial stay. At the status conference, an officer of Clear Springs and the attorney for the Ground Water Districts stated that each party respectively agreed to a two-year partial stay of the requirement for completion of the over-the-rim project, "while continuing with the other approved replacement water requirements for the two-year period. The parties were not able to reach agreement at the status conference on the timing for holding a hearing on the Ground Water Districts' Third Mitigation Plan." *Order Granting Partial Stay of Ground Water Districts' Replacement Water Plan for 2009* at 1 (May 15, 2009) ("May 15 Partial Stay Order"). "[B]ased upon Clear Springs' acceptance of the terms of the two-year partial stay, satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years." *May 15 Partial Stay Order* at 2.

13. On May 15, 2009, Gerald F. Schroeder was appointed to serve as independent hearing officer and conduct a hearing on the stayed portion of the 2009 Plan, as well as conduct a post-audit of the Ground Water Districts' prior replacement activities. *Order Appointing Hearing Officer; Granting Petition to Intervene; and Consolidating Matters for Hearing*.

14. On June 19, 2009, the Director sent a letter to attorneys for the Ground Water Districts regarding compliance with the non-stayed portions of the 2009 Plan: new conversions of 1,060 acres; continued conversion of 9,300 acres; and continued participation in CREP. In the letter, the Director stated that a field examination of the 1,060 new conversion acres was

performed by the watermaster for Water District Nos. 130 and 140 on June 2, 2009. One concern raised in the letter was a potential shortfall in the number of new conversion acres. The Director requested additional information on the new conversion acres by June 25, 2009.

15. On June 25, 2009, attorneys for the Ground Water Districts provided an initial response to the Director's June 19 letter. In the response letter, attorneys for the Ground Water Districts stated that, "When the 2009 Plan was filed, the exact number of acres to be converted was unknown." Actual implementation of the new conversions led to fewer acres. Secondly, attorneys for the Ground Water Districts notified the Director that, of the 9,300 existing conversion acres, fewer of those acres were converted than in previous years. Third, attorneys for the Ground Water Districts stated that participation in CREP is continuing and that more acres may be enrolled than in previous years. Finally, attorneys for the Ground Water Districts stated that if the actions taken thus far are "not acceptable and the Director determines to remove the two-year partial stay, the Ground Water Districts are prepared to proceed with the construction of the over-the-rim delivery portion of the 2009 Plan."

16. On June 29, 2009, Clear Springs filed its *Response to Ground Water Districts' June 25, 2009 Letter* ("Response"). In its Response, Clear Springs stated its concerns with the Ground Water Districts' failure to follow the requirements of the March 26 Order and May 15 Partial Stay Order regarding continued conversion of 9,300 acres and conversion of 1,060 new acres.

17. On June 30, 2009, the Director² responded by letter to attorneys for the Ground Water Districts. The Director stated that even if the two-year stay on construction of the pipeline were removed, there would be too few new conversion acres and the 2009 Plan would not be in compliance. Additionally, the Director requested additional information on how many of the existing 9,300 conversion acres would be irrigated with rented storage water.

18. On July 9, 2009, attorneys for the Ground Water Districts responded to the Director's June 30, 2009 letter. Attorneys for the Ground Water Districts reiterated the position on the new conversion acres from the June 25, 2009 letter. In the July 9, 2009 letter, attorneys for the Ground Water Districts explained a number of reasons that fewer than the existing 9,300 conversion acres would be irrigated by surface water this season. Ultimately, the letter stated "that surface water is being delivered to approximately 3,500 of the 9,300 previously converted acres, as well as to the new conversions under the 2009 Plan."

19. On July 16, 2009, attorneys for the Ground Water Districts supplemented the July 9, 2009 letter with additional information.

Technical Review of Non-Stayed Requirements of the 2009 Plan

20. In 2009, the final year of the phased-in period of curtailment, junior ground water users were to provide 38.72 cfs to the Buhl Gage to Thousand Springs reach, or 2.67 cfs directly

² On June 30, 2009, after thirty-three years of service to the Department, Director David R. Tuthill, Jr. retired. This was the final document issued by Director Tuthill in this proceeding. Gary Spackman was subsequently appointed Interim Director by the Governor on July 17, 2009.

to Clear Springs (6.9% of 38.72 cfs). In the March 5 Order, the Director accepted the Ground Water Districts' 2009 proposal to enroll the same number of acres in CREP and continue the same conversions as in 2008. Acceptance of the existing CREP and conversion acres reduced the 2009 obligation to "28.84 cfs to the reach, or 1.99 cfs to Clear Springs (6.9% or 28.8[4] cfs)." *March 5 Order* at 8, ¶ 6.

21. According to the orders of March 5, March 26, and the May 15 Partial Stay Order, acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years was to consist of: (1) continued conversion of 9,300 acres; (2) conversion of 1,060 new acres; and (3) continued enrollment of acres in CREP.

22. Using the ESPA Model, the simulations of above-mentioned efforts predict a reach gain of 12.23 cfs to the Buhl Gage to Thousand Springs reach, or 0.84 cfs directly to Clear Springs. But for the May 15 Partial Stay Order, the remaining difference of 26.49 to the reach, or 1.83 to Clear Springs, was to be made up by the Ground Water Districts via construction of the over-the-rim pipeline.

23. In accordance with the May 15 Partial Stay Order, the Ground Water Districts are required to provide 12.23 cfs to the Buhl Gage to Thousand Springs reach during the 2009 and 2010 calendar years through existing conversions, new conversions, and CREP.

(1) Continued Conversion of 9,300 Acres

24. In the March 5 and March 26 orders, the Director accepted the Ground Water Districts' proposal to continue surface water delivery to 9,300 conversion acres. The 9,300 conversion acres accepted in the March 5 and March 26 orders were the same conversion acres as in 2006, 2007, and 2008. *March 5 Order* at 6, ¶ 22. In order to irrigate the 9,300 conversion acres with surface water, the Ground Water Districts secured 35,000 acre-feet of storage water to be conveyed through the North Side Canal Co.'s delivery system. *2009 Plan* at 6.

25. As stated in the March 5 Order, the Department has reviewed the Ground Water Districts' reporting and has independently reviewed the number of conversion acres from previous years. Using the ESPA Model, the Department has determined the resulting benefit to the Buhl Gage to Thousand Springs reach from existing conversion acres is 9.44 cfs. *March 5 Order* at 6, ¶ 23.

26. The Ground Water Districts' June 25, 2009 letter stated that fewer than 9,300 acres were expected to be converted this season. The Ground Water Districts' July 9, 2009 letter stated that "surface water is being delivered to approximately 3,500 of the 9,300 previously converted acres"

27. In reviewing data provided by the North Snake Ground Water District, the Department determined that approximately 4,202.6 of the original 9,300 conversion acres have received or will receive some surface water in 2009 for conversion purposes. The volume of water that has been delivered or has been ordered for those acres is 9,249.96 acre-feet.

28. The Department used the above-mentioned volume and the physical location of the particular acres within the ESPA Model that have received or will receive surface water deliveries to determine the benefit to the Buhl Gage to Thousand Springs reach. The anticipated benefit to the Buhl Gage to the Thousand Springs reach is 3.54 cfs, resulting in a shortfall of 5.90 cfs (9.44 cfs – 3.54 cfs).

(2) Conversion of 1,060 New Acres

29. The March 26 Order and May 15 Partial Stay Order required 1,060 new conversion acres. The ESPA Model predicted that the benefit of these new conversion acres to the Buhl Gage to Thousand Springs reach would be 2.35 cfs. *March 26 Order* at 3-4, ¶ 16.

30. The model simulation performed by the Department for the March 26 Order assumed that the location of the new conversion acres would be consistent with the 2009 Plan, and that the number of acres converted would be 1,060. The model simulations assumed that the required irrigation volume for the new conversion acres would be four acre-feet per acre.

31. Subsequent to the March 26 Order, the watermaster determined that there were fewer acres converted than required, and that the location of the acres was different than expected.³ As found by the watermaster, 920 of the expected 1,060 acres have been converted to surface water irrigation. Assuming delivery of four acre-feet per acre, the expected delivery to the 920 converted acres during the 2009 irrigation season is 3,680 acre-feet.

32. The most significant changes in the new conversion acres were the substitution of 74 Van Dyke acres for 80 Brown acres, and the loss of 132 acres which were originally thought to be owned by Box Canyon. The location of the Van Dyke acres in the ESPA Model results in an approximately 10% greater benefit to the Buhl Gage to Thousand Springs reach; therefore, despite fewer new conversion acres than required, the simulated benefit to the reach is 2.82 cfs, which is 0.47 cfs more than anticipated in the March 26 Order.

(3) Continued Enrollment of Acres in CREP

33. In the March 5 and March 26 orders, the Director accepted the Ground Water Districts' proposal to continue enrollment of acres in CREP. The Department has reviewed the Ground Water Districts' reporting and has independently reviewed the number of acres enrolled in CREP. As of the issuance of the March 5 and March 26 orders, the modeled benefit to the Buhl Gage to Thousand Springs reach was 0.44 cfs. *March 5 Order* at 6, ¶ 23; *March 26 Order* at 4, ¶ 17. Based on the Department's present understanding of the acres enrolled in CREP, the simulated benefit to the Buhl Gage to Thousand Springs reach is 0.68 cfs, or 0.24 cfs more than anticipated in the March 5 and March 26 orders.

³ The report of the watermaster is attached to the Director's June 19, 2009 letter.

Shortfall to the Buhl Gage to Thousand Springs Reach;
Curtailment of Ground Water Rights Junior to January 8, 1981

34. While the benefit to the Buhl Gage to Thousand Springs reach is greater than anticipated for CREP and the new conversion acres, there exists a shortfall as a result of the Ground Water Districts converting fewer than the existing 9,300 conversion acres.

Existing Conversions	New Conversions	CREP	Total Provided	Required	Shortfall
3.54 cfs	2.82 cfs	0.68 cfs	7.04 cfs	12.23 cfs	5.19 cfs

35. As a result of fewer existing conversions, the ESPA Model predicts a shortfall of 5.19 cfs to the Buhl Gage to Thousand Springs reach. The parties agreed and the Director ordered that 12.23 cfs would “constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.” *May 15 Partial Stay Order* at 2.

36. Using the ESPA Model, and taking into account 10% model uncertainty and only those rights located within the area of common ground water supply, curtailment of ground water rights junior to January 8, 1981 will result in a 5.24 cfs benefit to the Buhl Gage to Thousand Springs reach, or 0.36 cfs directly to Clear Springs. Selecting a more junior priority date for curtailment will not satisfy the 5.19 cfs shortfall.

37. Included with this order is a map depicting the area of curtailment and a list of all junior priority ground water rights that are subject to curtailment. In Water District No. 130, there are approximately 302 junior priority ground water rights that are subject to curtailment. Curtailment of junior priority ground water rights in Water District No. 130 would result in the curtailment of approximately 8,425 acres. In Water District No. 140, there are approximately 13 junior priority ground water rights that are subject to curtailment. Curtailment of junior priority ground water rights in Water District No. 140 would result in the curtailment of approximately 464 acres.

38. In total, the curtailment will impact the holders of approximately 315 ground water rights that irrigate approximately 8,889 acres in portions of Blaine, Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls counties.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to

the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted the CM Rules. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. CM Rule 1.

3. In the fifth and final year of the phased-in period of curtailment, the Ground Water Districts were to provide 38.72 cfs to the Buhl Gage to Thousand Springs reach, or 2.67 cfs directly to Clear Springs.

4. As agreed to by the parties and required by the Director in the May 15 Partial Stay Order, 12.23 cfs to the Buhl Gage to Thousand Springs reach shall “constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.” *May 15 Partial Stay Order* at 2.

5. For 2009, the Ground Water Districts have provided 7.04 cfs to the Buhl Gage to Thousand Springs reach, resulting in a shortfall of 5.19 cfs.

6. As stated in the Findings of Fact, these proceedings were initiated in 2005 by Clear Springs as a call for delivery of water under the CM Rules. Under the July 2005 Order, it was stated as follows:

If at any time the mitigation or substitute curtailment is not provided as required herein, the water rights subject to curtailment as provided herein shall be immediately curtailed by the watermaster for Water District No. 130, based on the priorities of the rights, to the extent mitigation or substitute curtailment has not been provided.

July 2005 Order at 38, ¶ 5.

7. The ESPA Model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the ESPA Model that can be used to determine the effects of

ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

8. Using the ESPA Model, and taking into account 10% model uncertainty and only those rights located within the area of common ground water supply, curtailment of ground water rights junior to January 8, 1981 is simulated to result in at least 5.19 cfs benefit to the Buhl Gage to Thousand Springs reach. The curtailment will impact the holders of approximately 315 ground water rights that irrigate approximately 8,889 acres in portions of Blaine, Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls counties.

9. In their June 25 and July 9, 2009 letters to the Director, attorneys for the Ground Water Districts state that the Director could lift his May 15 Partial Stay Order and instruct the Ground Water Districts to move forward with construction of the over-the-rim pipeline in order to alleviate the shortfall to Clear Springs. As stated by the Director in his June 30, 2009 letter, the Ground Water Districts are not in compliance with the non-stayed portions of the 2009 Plan, which was agreed to by the parties and ordered by the Director. The Ground Water Districts were specifically required to construct 1,060 new conversion acres, continue conversion of the existing 9,300 conversion acres, and continue enrollment of acres in CREP. A shortfall to the Buhl Gage to Thousand Springs reach exists and the appropriate remedy is curtailment of junior ground water rights, not removal of the two-year partial stay.

10. Description of actions to comply with the terms of the May 15 Partial Stay Order may be submitted on behalf of holders of junior priority ground water rights by the ground water district(s) in which such water rights are located within six (6) days of the issuance of this order. If a plan of action submitted by a ground water district to comply with the terms of the May 15 Partial Stay Order is received by the Department on or before July 28, 2009 and the plan is deemed acceptable by the Director, in whole or in part, the Director should modify the priority date identified for curtailment and reduce the number of curtailed junior priority ground water rights in the affected water district(s), or possibly rescind the ordered curtailment. The Director will only accept a plan to comply with the terms of the May 15 Partial Stay Order that is submitted by a ground water district.

11. On July 31, 2009, at 12:01 a.m., unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights, users of ground water within Water District Nos. 130 and 140 holding consumptive water rights bearing priority dates junior to January 8, 1981, listed in the attachment to this order, shall curtail/refrain from diversion and use of ground water pursuant to those water rights.

12. In 2007, a mitigation plan was submitted by the Idaho Dairymen's Association ("IDA") and approved by the Director to mitigate for ground water depletions caused by its members. Based on acceptance of the IDA mitigation plan, participating members of the IDA are not subject to curtailment, provided the terms of the plan are being followed.

13. Ground water users who hold junior priority ground water rights and are not members of a ground water district that is providing approved mitigation, replacement water supply, or substitute curtailment, should be deemed a non-member participant for mitigation

purposes pursuant to H.B. 737 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain*, ch. 356, 2006 Idaho Sess. Laws 1089) and should be required to pay the ground water district that is providing approved mitigation, replacement water supply, or substitute curtailment nearest the lands to which the water right is appurtenant for mitigation purposes pursuant to Idaho Code § 42-5259. If the holder of such a junior priority ground water right elects not to join the ground water district, the Director should order curtailment.

14. Curtailment will apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

15. In the event that junior priority ground water users do not voluntarily comply with ordered curtailment, the Director should enforce the terms of this order in accordance with Idaho law, which includes, but is not limited to, the procedures outlined in Idaho Code §§ 42-351 (Illegal diversion or use of water—Enforcement procedure—Injunctive relief), 42-607 (Distribution of Water), and 42-1701B (Enforcement procedure—Notice—Consent order).

ORDER

Based on the foregoing, IT IS HEREBY ORDERED as follows:

IT IS HEREBY ORDERED that, at 12:01 a.m. on July 31, 2009, users of ground water within Water District Nos. 130 and 140 holding consumptive water rights bearing priority dates junior to January 8, 1981, listed in the attachment to this order, shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights. This order shall apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that the watermaster for Water District Nos. 130 and 140 is directed to issue written notices to the holders of the consumptive ground water rights located in Water District Nos. 130 and 140, listed in the attachment to this order, and bearing priority dates junior to January 8, 1981. The written notices are to advise the holders of the identified ground water rights that their rights are subject to curtailment in accordance with the terms of this order.

IT IS FURTHER ORDERED that description of actions to comply with the terms of the May 15 Partial Stay Order may be submitted on behalf of holders of junior priority ground water


rights by the ground water district(s) in which such water rights are located within six (6) days of the issuance of this order. If a plan of action submitted by a ground water district to comply with the terms of the May 15 Partial Stay Order is received by the Department on or before July 28, 2009 and the plan is deemed acceptable by the Director, in whole or in part, the Director should modify the priority date identified for curtailment and reduce the number of curtailed junior priority ground water rights in the affected water district(s), or possibly rescind the ordered curtailment. The Director will only accept a plan to comply with the terms of the May 15 Partial Stay Order that is submitted by a ground water district.

IT IS FURTHER ORDERED that a mitigation plan was previously approved by the Director for the Idaho Dairymen's Association ("IDA") to mitigate for ground water depletions caused by its members. Based on acceptance of the IDA mitigation plan, participating members of the IDA are not subject to curtailment, provided the terms of the plan are being followed.

IT IS FURTHER ORDERED that if junior priority ground water right holders for whom curtailment is ordered do not comply with this order, the Director shall immediately enforce the terms of this order in accordance with Idaho law.

IT IS FURTHER ORDERED that this is a final order of the agency effective upon issuance. A hearing was previously held on the mitigation obligations of the Ground Water Districts. The mitigation obligation for the 2009 and 2010 calendar years, as agreed to by the parties and ordered by the Director, is less than the obligation for the final year of the five-year, phased-in period of curtailment. This order is entered to enforce the terms of the Director's previous orders. The decision made in this order is final and subject to review by reconsideration or judicial review.

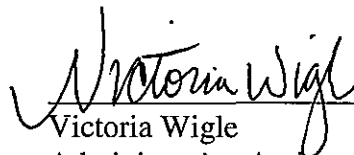
Dated this 22nd day of July, 2009.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

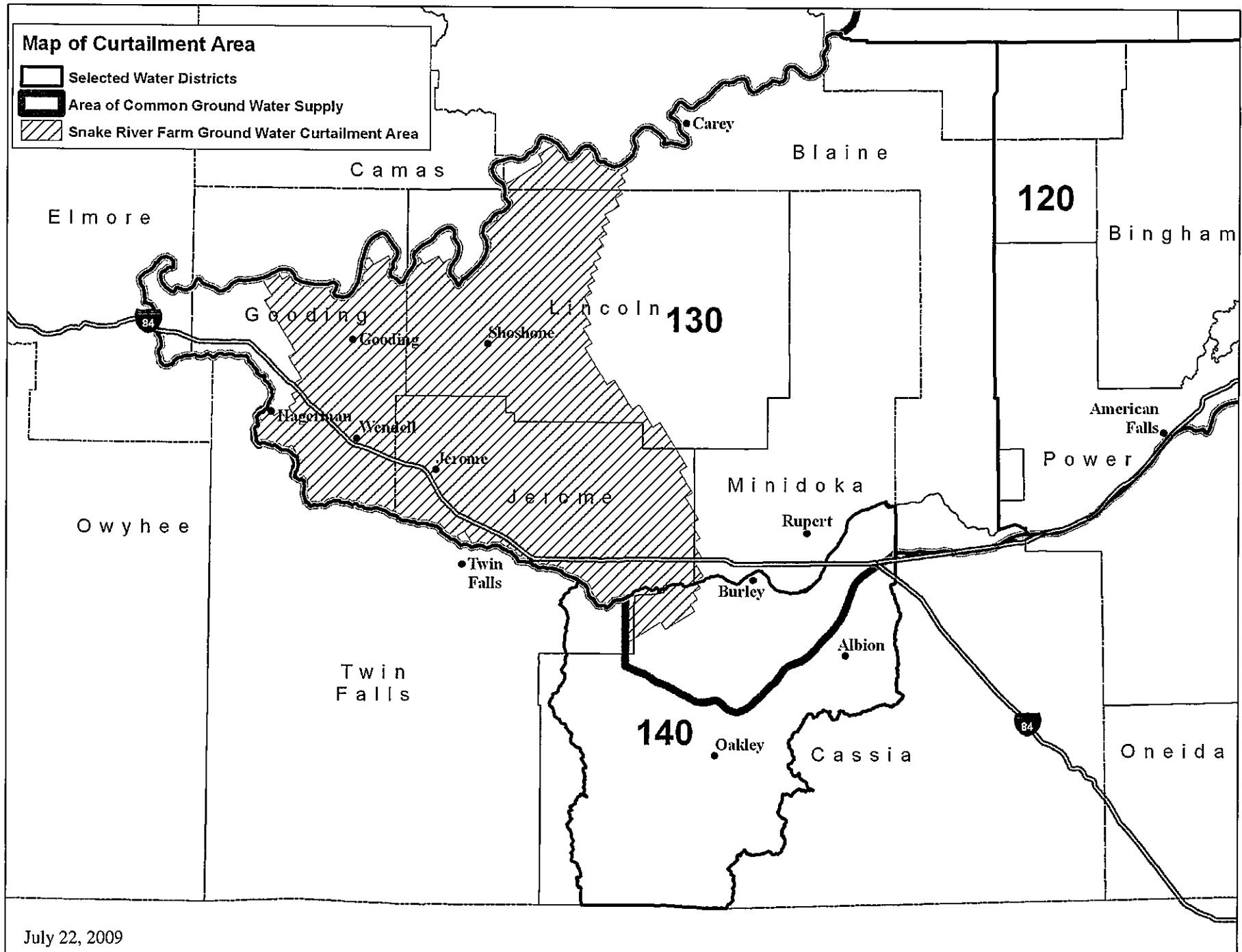
I HEREBY CERTIFY that on this 22nd day of July 2009, the above and foregoing, was served by first class U.S. Mail and electronic mail to the following:

RANDY BUDGE RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net	CANDICE M. MCHUGH RACINE OLSON 101 S. CAPITOL BLVD., STE. 208 BOISE ID 83702 cmm@racinelaw.net	JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 jks@idahowaters.com
TRAVIS THOMPSON PAUL ARRINGTON BARKER ROSHOLT 113 MAIN AVE. WEST, STE. 303 TWIN FALLS ID 83301-6167 tlt@idahowaters.com pla@idahowaters.com	DANIEL V. STEENSON CHARLES L. HONSINGER RINGERT LAW PO BOX 2773 BOISE ID 83701-2773 dan@ringertlaw.com clh@ringertlaw.com	MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 mcc@givenspursley.com jeffereday@givenspursley.com
MICHAEL S. GILMORE ATTORNEY GENERAL'S OFFICE PO BOX 83720 BOISE ID 83720-0010 mike.gilmore@ag.idaho.gov	J. JUSTIN MAY MAY SUDWEEKS & BROWNING 1419 W. WASHINGTON BOISE ID 83702 jmay@may-law.com	ROBERT E. WILLIAMS FREDERICKSEN WILLIAMS MESERVY 153 E. MAIN ST. P.O. BOX 168 JEROME ID 83338-0168 rewilliams@cablone.net
ALLEN MERRITT CINDY YENTER WATERMASTER - WD 130, 140 IDWR – SOUTHERN REGION 1341 FILLMORE ST., STE. 200 TWIN FALLS ID 83301-3380 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov		



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

Attachment 1



Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

Current Owner	Water Right Number	Priority Date	Diversion Rate (cfs)	Acres	Purpose of Use
4 BROS DAIRY INC	37-7033	7/5/1988	3.2	160	IRRIGATION
A & B IRRIGATION DISTRICT; UNITED STATES OF AMERICA ACTING THROUGH	36-15127B*	4/1/1984	28.89	1751.5	IRRIGATION
A & B IRRIGATION DISTRICT; UNITED STATES OF AMERICA ACTING THROUGH	36-15193B*	4/1/1965	0.31	18.9	IRRIGATION
A & B IRRIGATION DISTRICT; UNITED STATES OF AMERICA ACTING THROUGH	36-15194B*	4/1/1968	2.51	152.4	IRRIGATION
A & B IRRIGATION DISTRICT; UNITED STATES OF AMERICA ACTING THROUGH	36-15195B*	4/1/1978	2.24	135.6	IRRIGATION
A & B IRRIGATION DISTRICT; UNITED STATES OF AMERICA ACTING THROUGH	36-15196B*	4/1/1981	0.08	4.7	IRRIGATION
AARDEMA FARMS LTD PARTNERSHIP	36-8179	1/10/1997	0.06		STOCKWATER, DOMESTIC
AARDEMA, CORNELIA; AARDEMA, FRANS; BOX CANYON DAIRY; HEIDA, MARY JANE; HEIDA, THOMAS	36-15181*	3/15/1982	0.23	54	IRRIGATION
AARDEMA, CORNELIA; AARDEMA, FRANS; BOX CANYON DAIRY; HEIDA, MARY JANE; HEIDA, THOMAS	36-8305	2/14/1986	1.9	95	IRRIGATION
AARDEMA, DONALD J; AARDEMA, DONALD JOHN; AARDEMA, EVELYN L; AARDEMA, GAYLE; AARDEMA, KRISTYN; AARDEMA, MICHAEL D; AARDEMA, RONALD J; AARDEMA, SARAH J	36-10225F	5/1/1985	0.01		STOCKWATER
AARDEMA, DONALD J; AARDEMA, DONALD JOHN; AARDEMA, EVELYN L; AARDEMA, GAYLE; AARDEMA, KRISTYN; AARDEMA, MICHAEL D; AARDEMA, RONALD J; AARDEMA, SARAH J	36-16283*	5/1/1985	0.17	302.7	IRRIGATION
AARDEMA, DONALD JOHN	36-10225H*	5/1/1985	0.01	3	IRRIGATION
AARDEMA, DONALD JOHN	36-15256C*	3/15/1975	0.92	524.4	IRRIGATION
ABC AGRA LLC	36-8484	12/11/1989	0.08		COMMERCIAL, DOMESTIC
ADKINS, GINA; ADKINS, RICK	36-8525	3/2/1990	0.06	1	IRRIGATION, DOMESTIC
ALLEN, HERB; ALLEN, MARY CHUGG; LLOYD, DANIEL; TIERNEY LLOYD, MONA LISA	36-8523	4/25/1990	1.89	115	IRRIGATION
ANDERSON, DONALD M; ANDERSON, JOAN	36-8285	6/14/1985	0.04	2	IRRIGATION
ANDERSON, LARRY; ANDERSON, RETHA	36-8232	9/27/1983	0.09	1	IRRIGATION, COMMERCIAL, DOMESTIC
ANDERSON, LARRY; ANDERSON, RETHA	36-8233	12/17/1991	0.93		HEATING, RECREATION
ASTLE, DOUGLAS D; ASTLE, JANIS L	37-8296	5/11/1987	5	491	IRRIGATION
ASTORQUIA, FRANK	37-7460	7/3/2002	4	199.5	IRRIGATION
ASTORQUIA, FRANK	37-8338	5/19/1994	0.6	72	IRRIGATION
BARNES, T H; COLLINS, LARRY	36-8780	4/17/1998	0.04	1	IRRIGATION, DOMESTIC
BARRYMORE EST SUBDIVISION WATER USERS	36-8155	3/4/1983	0.07		STOCKWATER, DOMESTIC
BECKLEY, BONNIE B; BECKLEY, R K	37-8138	6/29/1983	0.12		STOCKWATER, COMMERCIAL
BENNETT, CAROLE R; BENNETT, JOHN D	37-20931	5/5/2003	0.12	4.3	IRRIGATION
BEORCHIA PROPERTIES AND HOLDINGS LLC	36-8108	8/16/1982	0.03	5	IRRIGATION, STOCKWATER, DOMESTIC
BETTENCOURT, LUIS M	36-14285*	5/1/1977	0.32	274	IRRIGATION
BETTENCOURT, LUIS M	36-15161*	3/15/1977	0.14	258	IRRIGATION

* Enlargement right subordinate to rights earlier than April 12, 1994

Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

BETTENCOURT, LUIS M	36-8081	3/7/1983	0.42	22	IRRIGATION
BETTENCOURT, LUIS M	36-8302	11/14/1985	0.96	193.4	IRRIGATION
BETTENCOURT, LUIS M	36-8739	5/10/1995	1	108.6	IRRIGATION
BETTENCOURT, LUIS M	36-8740	5/10/1995	0.53	126.5	IRRIGATION
BETTENCOURT, LUIS M; BETTENCOURT, SHARON L	36-14394*	6/28/1967	0.16	618	IRRIGATION
BETTENCOURT, LUIS M; BETTENCOURT, SHARON L	36-14595A*	5/1/1978	1.31	414.8	IRRIGATION
BHB FARMS INC	36-8144	2/2/1983	0.84	42	IRRIGATION
BICKETT, HARVEY B; BICKETT, MYRNA	37-8366	7/14/1988	0.06	0.8	IRRIGATION, DOMESTIC
BIG SKY DAIRY	37-8054	7/1/1983	3.34	167	IRRIGATION
BLACK BUTTE HILLS LLC	36-15233*	4/6/1980	0.73	180	IRRIGATION
BLALACK, JOANN K; SCHMIDT, CHESTER A	36-8208	5/20/1985	0.1	2	IRRIGATION, DOMESTIC
BLUE SKY RANCH; KRUCKER, KATHLEEN; KRUCKER, ROBERT	36-16184	6/30/1983	0.13		STOCKWATER, DOMESTIC
BLUE SKY RANCH; KRUCKER, KATHLEEN; KRUCKER, ROBERT	36-8482	11/7/1989	0.05		STOCKWATER
BOLINGBROKE, EDNA	36-16499*	4/1/1984	0.04	24	IRRIGATION
BONAWITZ, DANI; BONAWITZ, DUKE	36-8065	2/17/1982	0.12	5	IRRIGATION, DOMESTIC
BOOT JACK DAIRY PARTNERSHIP	37-20395	3/16/1982	2.1	277.4	IRRIGATION
BORBA, JOSE; BORBA, MARIA	36-8731	7/13/1994	0.08		STOCKWATER, DOMESTIC
BOTHOF, GERALD A; BOTHOF, ROGER W	36-8805	10/31/2000	0.03	0.8	IRRIGATION
BOX CANYON DAIRY	36-10044*	3/1/1984	0.55	124	IRRIGATION
BOX CANYON DAIRY	36-16282*	5/1/1985	0.26	444	IRRIGATION
BRADLEY, DAWN ANN; BRADLEY, R BRUCE	36-8112	9/7/1982	0.04	1	IRRIGATION, COMMERCIAL, DOMESTIC
BRANCHFLOWER, KATHERINE L; BRANCHFLOWER, MICHAEL G	36-8581	3/13/1991	0.74	39	IRRIGATION
BRANDSMA, ANN; BRANDSMA, HILL A	36-16036*	5/1/1985	0.18	318	IRRIGATION
BRANDSMA, DEBRA K; BRANDSMA, KENNETH A	36-8787	1/22/1999	1.05	152	IRRIGATION
BRANDSMA, HILL A	36-8063D	3/18/1982	0.28		STOCKWATER, COMMERCIAL
BREAULT, LEONARD; BREAULT, RUTH	36-8372	8/3/1988	0.06	3	IRRIGATION
BROWN, JAY A; BROWN, MARIE H	36-8111	8/20/1982	0.76	312	IRRIGATION
BURGOYNE, GLENDA; BURGOYNE, J H	36-8114	6/16/1982	0.04	3	IRRIGATION, DOMESTIC
CALLEN, JERRY; CALLEN, PATRICIA	36-7975	3/20/1981	0.03		STOCKWATER
CAMPBELL, ANNIE M.; CAMPBELL, WILLIAM ROY	36-8535	4/12/1990	0.13	4	IRRIGATION, DOMESTIC
CANNEDY, BARRY S	36-8503	2/21/1990	0.04	2	IRRIGATION
CARNEY FARMS	36-16395	12/8/1981	0.62	524	IRRIGATION
CARNEY FARMS	36-7949	2/4/1981	1.41	524	IRRIGATION
CARRELL, F DUANE	36-8342	1/5/1988	0.02		COMMERCIAL
CARRILLO, CUTBERTO	36-8407	1/19/1989	0.08	3	IRRIGATION, DOMESTIC
CHATTERTON, DANIEL GROVER; CHATTERTON, RONDA D	36-8537	4/12/1990	0.16	5	IRRIGATION, STOCKWATER, DOMESTIC
CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS	36-11278*	4/1/1977	2.55	1610	IRRIGATION
CIOCCA, ANN A; CIOCCA, EDWARD M	36-8219	6/30/1983	1.72	86	IRRIGATION
CIOCCA, TONY M; CIOCCA, TRINA A	36-8255	12/7/1984	1.16	154	IRRIGATION
CITY OF DIETRICH	37-8783	2/21/1992	0.45		MUNICIPAL
CITY OF JEROME	36-8237	12/22/1983	2.71		MUNICIPAL
CITY OF WENDELL	36-8421	9/14/1998	2.76		MUNICIPAL
CITY OF WENDELL	36-8764	3/28/1997	1.27		MUNICIPAL

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Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

CLARK, BETTE L; CLARK, RAYMOND G	36-15253*	3/15/1985	0.34	211	IRRIGATION
CLARK, RAYMOND G	36-8286	6/26/1985	0.21	225	IRRIGATION
CNOSSEN BROTHERS CO INC	36-8468	9/26/1989	0.86		COMMERCIAL
CNOSSEN BROTHERS CO INC; NORTHWEST FARM CREDIT SERVICES FLCA	36-8417	3/1/1989	0.76		STOCKWATER, DOMESTIC
CORP OF THE PRESIDING BISHOP	36-8145	2/14/1983	0.04	0.5	IRRIGATION, DOMESTIC
CORP OF THE PRESIDING BISHOP	36-8239	1/12/1984	0.88	630	IRRIGATION
COUNTRY CLUB ESTATES WATER ASSN INC	36-8607	11/18/1991	0.5		STOCKWATER, DOMESTIC, FIRE PROTECTION
CROCKER, BRENT; CROCKER, TONIA	36-8375	7/18/1988	0.04	2	IRRIGATION, DOMESTIC
DANSIE, BERTHA D; DANSIE, ELVOY H	37-8363	8/6/1988	0.05		STOCKWATER, COMMERCIAL, DOMESTIC
DAVIDSON, JOSEPH E	36-8790	4/12/1999	0.05		DOMESTIC
DE KRUYF, ALICE RUTH; DE KRUYF, CALVIN	36-10082A*	3/15/1976	0.21	162.7	IRRIGATION
DEVELOPMENT WEST CORPORATION	37-8379	8/22/1988	0.36	17	IRRIGATION, DOMESTIC
DICKINSON, DALE; DICKINSON, MARSHA	36-8681	10/16/1992	0.03	1	IRRIGATION, DOMESTIC
DINOS LLC; DINOS LLC	36-8680	10/21/1992	0.1		DOMESTIC
DOTSON, MARK; HOLLANDER, LEWIS	37-8944	11/30/2000	0.2		DOMESTIC
DOUBLE V LLC	37-8756A	2/4/1987	2.41	146.5	IRRIGATION
DOUBLE V LLC	37-8756B	2/4/1987	2.41	146.5	IRRIGATION
DOUBLE V LLC; VANDERVEGT, RAY	36-8047E	12/9/1981	0.8	81	IRRIGATION
DOUBLE V LLC; VANDERVEGT, RAY	36-8313B	8/20/1986	0.32	16	IRRIGATION
DURAND, DANIEL G; DURAND, VICKY S	37-8410	10/4/1988	0.03		STOCKWATER, COMMERCIAL, DOMESTIC
DURFEE, BRENDA J; DURFEE, JAMES M	36-8367	6/21/1988	0.11		STOCKWATER, COMMERCIAL
DURFEE, DEWEY D	36-7641	5/19/1983	1.19	64	IRRIGATION
EDWARDS, KENT F	36-8628	11/26/1991	0.18	8	IRRIGATION, STOCKWATER, DOMESTIC
EQUITY LIVESTOCK CREDIT CORP	36-14988	12/31/1983	0.07		STOCKWATER, COMMERCIAL, DOMESTIC
ESTATE OF RAY CHUGG	36-8266	3/18/1985	0.12		STOCKWATER, COMMERCIAL, DOMESTIC
EVERS BROTHERS PARTNERSHIP; NORTHWEST FARM CREDIT SERVICES FLCA	36-8584	2/26/1991	2.08	144	IRRIGATION
FAIRVIEW POULTRY FARM	37-8112	6/2/1983	0.02		COMMERCIAL, COOLING
FATTIG, PATSY; FATTIG, WAYNE	36-8637	12/6/1991	0.23	245	IRRIGATION
FAULKNER LAND & LIVESTOCK CO INC	37-8005B	3/20/1982	2.02	264	IRRIGATION
FAULKNER LAND & LIVESTOCK CO INC	37-8005C	3/20/1982	1.6	264	IRRIGATION
FAULKNER LAND & LIVESTOCK CO INC	37-8005D	3/20/1982	0.41	264	IRRIGATION
FAULKNER LAND & LIVESTOCK CO INC	37-8720	4/23/1991	3.2	324	IRRIGATION
FORD, JOYCE A; FORD, THOMAS RAY	36-14617*	5/1/1982	0.9	378	IRRIGATION
FORD, JOYCE A; FORD, THOMAS RAY	36-14619*	5/1/1965	1.32	311	IRRIGATION
FORSYTH, DANNY R; FORSYTH, GINGER	36-8531	4/24/1990	0.05	0.8	IRRIGATION, DOMESTIC
FRANCIS, MARK	36-8371	7/20/1988	0.06	2	IRRIGATION, DOMESTIC
FRAZIER FAMILY TRUST DTD 6/19/80 4% UNDIVIDED INT; FRAZIER, JAMES F; FRAZIER, JEFFREY W; FRAZIER, JOE K; FRAZIER, JORDAN P	36-8049	12/21/1981	0.94	47	IRRIGATION

* Enlargement right subordinate to rights earlier than April 12, 1994

Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

FREDERICKSEN, BETTY; FREDERICKSEN, CRAIG	37-22386	10/16/2008	0.04		DOMESTIC
FUNK, DARRELL M	45-13657	1/1/1983	0.06		STOCKWATER
FUNK, DARRELL M	45-4103	6/30/1985	1.6	305	IRRIGATION
FUNK, DARRELL M; FUNK, PATRICIA M	45-13917	6/8/1982	0.06		STOCKWATER, COMMERCIAL
GILLETTE, CINDY L; GILLETTE, LARRY R	37-8742	3/28/1991	4.21	995.5	IRRIGATION
GLANBIA FOODS INC	37-8903	9/17/1999	1.67		COMMERCIAL
GLEN CAPPS INC	36-8176	3/31/1983	0.04		COMMERCIAL, DOMESTIC
GOEDHART, HUGO; GOEDHART, MARY	36-8774	3/10/1998	0.13		STOCKWATER, DOMESTIC
GOOCH, BEATRICE; GOOCH, ELLIS	37-8839	11/22/1994	0.1		STOCKWATER
GOODING URBAN RENEWAL AGENCY	37-8289	2/23/1987	0.11		COMMERCIAL
GOTT, MIKE	36-8534	4/27/1990	0.1	2.5	IRRIGATION, DOMESTIC
GRANT, ANGELA; GRANT, RANDY; HAGAN, ROCKY	36-14202*	5/1/1975	0.2	130	IRRIGATION
GULICK, LARRY	36-8507	2/1/1990	0.06		STOCKWATER, COMMERCIAL
GULLEY, JUDY L; GULLEY, WILLIAM F	36-8789	3/23/1999	0.39	12	IRRIGATION
GUNNING, F F; GUNNING, G C	36-8063A	2/16/1982	2.14	329	IRRIGATION
H & S FARMS INC	36-8401	11/28/1988	0.68	360	IRRIGATION
H & S FARMS INC	36-8402	11/28/1988	0.84	314	IRRIGATION
HAAGSMA FAMILY TRUST	36-8345	4/9/2001	1		STOCKWATER, COMMERCIAL
HANEY SEED CO	36-8416	3/30/1989	0.04		COMMERCIAL
HEIDA, MARY JANE; HEIDA, THOMAS	36-8276	6/6/1985	0.14	121	IRRIGATION
HENRY FARMS	36-15163*	5/1/1981	0.66	286	IRRIGATION
HENRY, AUDREY; HENRY, ROBERT P	36-14844*	3/15/1983	0.25	94	IRRIGATION
HIRAI, JACK J; MATTHEWS, J W	36-8585	8/11/1988	0.22	171	IRRIGATION
HOLTZEN FARMS INC	36-8603	6/14/1991	0.14		STOCKWATER
HORIZON ORGANIC DAIRY LLC	36-16045	10/19/1981	1.95	182	IRRIGATION
HORIZON ORGANIC DAIRY LLC	36-16055	12/8/1981	4.12	522.6	IRRIGATION
HORIZON ORGANIC DAIRY LLC	36-8008	12/8/1981	0.84	314	IRRIGATION
HORIZON ORGANIC DAIRY LLC	36-8011A	12/24/1981	0.15		DOMESTIC
HUBSMITH, IRIS B; HUBSMITH, LOUIS L	37-8093	3/17/1984	0.08		STOCKWATER, COMMERCIAL
INFANGER, DEBRA A; INFANGER, JOHN N	37-20800	9/10/2002	0.14		DOMESTIC
J R SIMPLOT CO	36-8471	10/4/1989	0.18		COMMERCIAL
JACKSON, LAVAR R; VEENSTRA, FRANK W; VEENSTRA, MARY JANE	36-8101	7/13/1982	0.8	40	IRRIGATION
JEROME COUNTRY CLUB INC	36-8344	2/12/1988	0.41	104	IRRIGATION
JEROME COUNTY ROD & GUN CLUB	36-8620	11/14/1991	0.02	0.5	IRRIGATION, COMMERCIAL
JEROME JOINT SCHOOL DISTRICT NO 261	36-16440	7/10/2006	1.07		HEATING
JEROME JOINT SCHOOL DISTRICT NO 261	36-16441	7/10/2006	0.45		HEATING
JOE & MARTIN TRUCKING INC	37-8355	8/9/1988	0.04		COMMERCIAL, DOMESTIC
JOHN L WARREN TRUST; WARREN, ARTHELLA U	45-13567*	11/14/1983	0.21	163	IRRIGATION
JOHN, GLORIA; JOHN, KIT M	37-8346	6/21/1988	0.03		COMMERCIAL
JOHNSON, BECKY; JOHNSON, CHARLES; NELSON, JACK; NELSON, KATHY	37-21644	2/2/2006	0.12		DOMESTIC
K & W DAIRY	36-10225K*	5/1/1985	0.58	1064.7	IRRIGATION
KEARLEY, SUSAN L; KEARLEY, WILLIAM P	36-10547*	4/1/1980	0.25	154	IRRIGATION
KEARLEY, WILLIAM P	36-8200	5/26/1983	0.28	154	IRRIGATION
KECHTER, RICHARD L	45-10679*	4/1/1977	0.52	729.5	IRRIGATION
KECHTER, RICHARD L	45-10777B*	3/15/1976	0.23	151	IRRIGATION

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Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

KERNER, HERSHEL	37-8361	6/16/1988	0.03		COMMERCIAL
					STOCKWATER,
KIME, MARK	37-7998	1/29/1982	0.04		COMMERCIAL
KISLING FARMS	37-8078	5/15/1983	2	116	IRRIGATION
KLOSTERMAN, KENT L	36-7974	3/25/1981	2.6	201	IRRIGATION
KUNSMAN, SHIRLEY	36-8249	7/12/1984	0.09	2.5	IRRIGATION, DOMESTIC
KUNSMAN, SHIRLEY	36-8306	2/26/1986	0.08	2.5	IRRIGATION
LANIER, BLANCHE; LANIER, MELVIN	36-8501	2/21/1990	0.07	1.5	IRRIGATION, DOMESTIC
LAST RANCH LLC	36-16140*	3/15/1974	0.03	32	IRRIGATION
LAZY P FARMS; PAULS, DEBBRAH; PAULS, EMIL V; PAULS, RONALD	37-8147	6/27/1983	0.04	1.8	IRRIGATION, STOCKWATER, DOMESTIC
LEE, MARTIN R	36-8410	2/10/1989	0.03		COMMERCIAL
LEED CORP	37-21952	9/26/2006	0.44		DOMESTIC
LENORE HUETTIG FAMILY LIMITED PARTNERSHIP	36-8147	3/1/1983	1.6	511	IRRIGATION
LIND, ELDEN; LIND, MELBA JEAN	36-8583	2/22/1991	3.99	238.9	IRRIGATION
LLOYD, CARL; LLOYD, JANICE	36-8580	2/19/1991	0.7	35	IRRIGATION
LONG VIEW DAIRY	36-16185	6/30/1983	2.03	131	IRRIGATION
MAY, DAVID C; MAY, DEBRA J	36-15226*	6/15/1973	0.36	658	IRRIGATION
MC CABE, LINDA JOY; MC CABE, ROBERT	37-20747*	4/1/1978	0.56	300	IRRIGATION
MC CAUGHEY, MARGARET; MC CAUGHEY, WALTER L	36-8579	2/8/1991	0.68	52	IRRIGATION
MC DONALD, FRANK F	36-8516	3/2/1990	0.11	3	IRRIGATION, DOMESTIC
MC KNIGHT, SPARR	37-22201	7/5/2007	0.2		DOMESTIC
MCKEAN, EDWARD; MCKEAN, LYNETTE	36-8186	5/17/1983	0.04		COMMERCIAL, DOMESTIC
MEEKS, DIANE SAWYER; MEEKS, JAMES D	36-7336	8/8/1986	0.88	87	IRRIGATION
MEYERS, ROBERT J	36-7854	2/16/1990	2.71	142	IRRIGATION
MEYERS, ROBERT J	37-8801	10/20/1992	0.1		DOMESTIC
MILLARD, DAVID; SLIGAR, KEITH; STANLEY, RONALD L	36-8234	1/11/1984	1.23	14	IRRIGATION, COMMERCIAL, DOMESTIC, RECREATION
MILLENKAMP, SUSAN; MILLENKAMP, WILLIAM J	36-8054	4/24/1990	2.3	217.8	IRRIGATION
MILLER, DIANE M; MILLER, GUS E	37-8373	8/10/1988	0.04	2	IRRIGATION, STOCKWATER, DOMESTIC
MIPAD LIMITED PARTNERSHIP	37-8707	3/26/1991	2	100	IRRIGATION
MORGAN, CODY G; MORGAN, KATHY J	36-16094	3/10/1992	0.03		STOCKWATER
MORGAN, CODY G; MORGAN, KATHY J	36-16407	3/10/1992	1.53	390.5	IRRIGATION
MORGAN, CODY G; MORGAN, KATHY J	36-16408	3/10/1992	0.08		STOCKWATER, COMMERCIAL
MOSS GREENHOUSES INC; MOSS, CAROLYN A	36-8298	9/23/1985	0.27		COMMERCIAL
MOUNTAIN VIEW WATER CORP	37-21278	3/22/2004	0.06		DOMESTIC
MOYLE, ALLEN; MOYLE, KARLA	36-8768	6/16/1997	0.17		STOCKWATER, COMMERCIAL
MUNSEE, G K; MUNSEE, LAREE; MUNSEE, MARK	36-8559	9/4/1990	1.86	93	IRRIGATION
MURPHY, LA VERN A	36-8361	5/31/1988	0.09	3	IRRIGATION
NALLEY, TINA L	37-8750	7/12/1991	0.13	6	IRRIGATION, STOCKWATER, DOMESTIC
NAPIER, DIANNA K	36-8521	12/19/1991	0.03	1	IRRIGATION, DOMESTIC
NELSON, JACK; NELSON, KATHY	37-8717	3/1/1991	0.08	2.6	IRRIGATION
NELSON, JACK; NELSON, KATHY	37-8740	3/14/1991	0.09	3	IRRIGATION

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Water Rights Subject to Curtailment - Snake River Farm Delivery Call

NORTH RIM FAIRWAYS OWNERS ASSN INC	36-8399	1/5/1995	0.41		DOMESTIC
NORTHSIDE DAIRY	36-8490	11/7/1989	0.27		STOCKWATER, DOMESTIC
NORTHVIEW WATER ASSN INC	36-16204	2/9/2004	0.18	9	IRRIGATION
NORTHVIEW WATER ASSN INC	36-8747	2/2/1996	0.35	8	IRRIGATION, DOMESTIC
NORTHWEST FARM CREDIT SERVICES FLCA; VAN DYK, MARIE C; VAN DYK, RICHARD B	36-8547	4/25/1990	0.33		STOCKWATER, DOMESTIC
NOTCH BUTTE FARMS LLC	36-16139*	3/15/1974	0.18	188	IRRIGATION
NOTCH BUTTE FARMS LLC	37-20816	11/12/1981	0.49	195.4	IRRIGATION
NOTCH BUTTE FARMS LLC	37-20817	11/12/1981	0.47	187	IRRIGATION
NOTCH BUTTE FARMS LLC	37-8909*	3/15/1974	0.02		STOCKWATER
OAK VALLEY LAND CO LLC	45-13930	6/30/1985	1.29	3844.4	IRRIGATION
OAK VALLEY LAND CO LLC	45-13934	6/30/1985	2.3	3844.4	IRRIGATION
OAK VALLEY LAND CO LLC	45-13944	11/24/1981	6.09	3844.4	IRRIGATION
OAK VALLEY LAND COMPANY LLC	45-10777A*	3/15/1976	0.47	463	IRRIGATION
OAK VALLEY LAND COMPANY LLC	45-4176*	3/15/1976	0.18	463	IRRIGATION
OLSEN, BETTY M; OLSEN, GEORGE L	36-8605	5/23/1991	0.04	1.4	IRRIGATION
OLSEN, RICHARD ARTHUR	37-8374	7/8/1988	0.15	3	IRRIGATION, STOCKWATER, DOMESTIC
OPPIO FAMILY LIMITED PARTNERSHIP	37-19848*	4/15/1987	0.29	142.4	IRRIGATION
OPPIO FAMILY LIMITED PARTNERSHIP	37-8010	12/5/1982	2.52	142.4	IRRIGATION
OPPIO FAMILY LIMITED PARTNERSHIP	37-8756C	2/4/1987	1.34	67	IRRIGATION
PARKINSON, ROBERT J	36-8591	3/6/1991	1	66	IRRIGATION
PATTERSON LAND & LIVESTOCK INC	37-7952	11/18/1981	0.15	10	IRRIGATION
PETERS, THOMAS R	36-8577	2/28/1991	1.68	94	IRRIGATION
POPA, DAN; POPA, PAM	36-8197	6/7/1983	0.08	2.5	IRRIGATION, DOMESTIC
PRICE, BERTHA; PRICE, EUGENE F	45-10000*	4/1/1971	0.74	202.1	IRRIGATION
RANGEN INC	36-8048	12/21/1981	0.41	20.2	IRRIGATION
RAY, JUDITH K; RAY, LEO E	36-7995	7/17/1981	0.2		COMMERCIAL, DOMESTIC
REED, CAROL A; REED, ROBERT W	36-15227*	8/27/1973	0.7	163	IRRIGATION
RESERVOIR LAND CO INC	36-8466	10/4/1989	0.03		COMMERCIAL
RITCHIE, JAMES M; RITCHIE, KARLYN	36-8077	7/12/1984	1.6	330	IRRIGATION
RODRIGUEZ, EMMA J; RODRIGUEZ, RAFAEL	37-8033	8/6/1982	0.06	1	IRRIGATION, DOMESTIC
ROOST POTATO CO INC	36-15152*	8/30/1984	0.08	633	IRRIGATION
ROTH INVESTMENTS LLC	36-15222*	7/5/1985	0.52	235	IRRIGATION
ROYCE, DAN; ROYCE, JO ANNE	36-8609	10/21/1991	0.02	2.5	IRRIGATION, STOCKWATER, DOMESTIC
SALMON FALLS LAND & LIVESTOCK CO INC	36-10033*	3/15/1975	1.07	370	IRRIGATION
SALMON FALLS LAND & LIVESTOCK CO INC	36-10035*	3/15/1981	0.47	370	IRRIGATION
SALMON FALLS LAND & LIVESTOCK CO INC	36-10037*	3/15/1974	1.65	404	IRRIGATION
SAWTOOTH SHEEP CO INC	37-8702	1/31/1991	2.5	260	IRRIGATION
SCARROW, JIM D	36-8164	6/27/1985	2.08	104	IRRIGATION
SCARROW, JIM D	36-8263	2/3/1985	0.85	128	IRRIGATION
SCARROW, JIM D	37-8152	6/30/1983	0.25		STOCKWATER
SCHAEFFER, DAN; SCHAEFFER, JAMES K	36-8220B	2/7/1990	1.2	162	IRRIGATION
SCHOTH, WARREN E	36-8589	5/9/1991	0.13	3	IRRIGATION, DOMESTIC
SEYMOUR, JOHN R	45-13542*	3/15/1976	1.28	479	IRRIGATION
SHAW, WILLIAM HUBERT	37-8705	2/21/1991	7	420	IRRIGATION
SIRUCEK, BECKY; SIRUCEK, MIKE	36-8569	12/10/1990	0.46	67	IRRIGATION
SLADE, DELILAH; SLADE, KEVIN L	36-15229*	8/17/1972	0.3	153	IRRIGATION
SLADE, WILLIAM J; SLADE, WYLENE	36-15228*	3/15/1973	0.1	459	IRRIGATION
SLIMAN, MICHAEL E; SLIMAN, MIKE G	37-8060	12/9/1982	0.01		COMMERCIAL

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Water Rights Subject to Curtailment - Snake River Farm Delivery Call

SLIMAN, MICHAEL E; SLIMAN, MIKE G	37-8061	12/9/1982	0.07	1	IRRIGATION, DOMESTIC
SLUDER, GILBERT T; SLUDER, GONDA O; SLUDER, RONALD E	37-8108	6/1/1983	0.08		DOMESTIC
SMITH, RONNIE D; SMITH, SHARLENE M	36-8333	8/25/1987	3.66	183	IRRIGATION
SOUTH VIEW DAIRY	36-10225B*	5/1/1985	0.17	273	IRRIGATION
SOUTHFIELD DAIRY	36-2907	4/26/1990	0.8	436	IRRIGATION
SOUTHFIELD DAIRY	36-8387	8/31/1988	2.48	149	IRRIGATION
SOUTHFIELD DAIRY	37-8326	1/6/1988	1.36	602	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-10666*	5/1/1987	0.19	142	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8063C	2/21/1982	0.3	99	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8252E	10/17/1984	0.1	99	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8313A	8/20/1986	1.2	60	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8529	4/5/1990	0.66	33	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8560A	9/7/1990	1.03	135	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8560B	9/7/1990	0.12	6	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8582	2/20/1991	0.46	23	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8760	12/4/1990	1.52	436	IRRIGATION
SOUTHFIELD PROPERTIES LLC	37-8732	4/13/1991	3	587	IRRIGATION
SPENCER, GLEN D	36-8536	4/12/1990	0.03	1	IRRIGATION, DOMESTIC
STANDLEE, MIKE; STANDLEE, WHENDY	36-15119*	3/1/1975	1.31	417	IRRIGATION
STANDLEE, MIKE; STANDLEE, WHENDY	36-15178*	3/1/1975	0.04	456	IRRIGATION
STANDLEE, MIKE; STANDLEE, WHENDY	36-16500*	4/1/1984	0.51	348	IRRIGATION
STAR FALLS FARMS LLC; THE ESTATE OF GERALD HUETTIG DECEASED	36-8289	6/26/1985	0.04	511	IRRIGATION
STATE OF IDAHO; STATE OF IDAHO	37-7372	6/30/1999	6.54	320	IRRIGATION, STOCKWATER
STEVENSON, SCOTT A; STEVENSON, TAMARA LYNN	36-8161	3/31/1983	1.8	446	IRRIGATION
STEWART, FRED R; STEWART, PHYLLIS L	36-8568	11/7/1990	0.79	240	IRRIGATION
STOKES, SHIRLEY W	36-8409	1/23/1989	0.2	10	IRRIGATION
SUHR, DANIEL A; SUHR, DONNA DEE	36-14317*	3/20/1976	0.67	153	IRRIGATION
TABER, BEVERLY	37-7877A	2/5/1981	0.02	1	IRRIGATION
TABER, DONALD	37-10158*	4/1/1974	1.78	466	IRRIGATION
TABER, DONALD	37-8401	9/20/1988	6.68	334	IRRIGATION
TANNER, BARBARA; TANNER, ROBERT	36-8512	2/27/1990	0.02		COMMERCIAL STOCKWATER, COMMERCIAL
TELFORD, MICHAEL S	37-7949	11/4/1981	0.25		
THE ALTON & PAULA HUYSER TRUST UNDER TRUST AGREEMENT DTD 4-1-2001	37-8679	8/23/1990	0.16	8	IRRIGATION
THOMPSON, KURT; THOMPSON, LINDA B	36-8615	10/30/1991	0.05	1.5	IRRIGATION
TOWNE, DELORIS E; TOWNE, RALPH W P	37-8211	5/16/1983	0.05		STOCKWATER, COMMERCIAL
TRAVELERS OASIS TRUCK PLAZA; WILLIE, DANIEL L	36-8766	6/8/1997	0.11		COMMERCIAL
TRAVELERS OASIS TRUCK PLAZA; WILLIE, DANIEL L	36-8767	6/19/1997	0.11		COMMERCIAL
TRIPLE C CONCRETE INC	36-16401	3/31/2006	0.04		DOMESTIC
UNIT 3 WATER ASSN INC	36-8090	6/16/1982	0.51	24	IRRIGATION, STOCKWATER, DOMESTIC, FIRE PROTECTION
UNIT 3 WATER ASSN INC	36-8727	5/5/1994	0.45		DOMESTIC
UNITED STATES OF AMERICA ACTING THROUGH	37-20851*	3/15/1983	0.02	30	IRRIGATION

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Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

U-U RANCH LLC	36-8050	12/11/1981	4.06	699	IRRIGATION
V & L DAIRY	36-15211*	1/30/1970	0.33	75	IRRIGATION
VALLEY CO-OPS INC	36-8452	8/22/1989	0.16		COMMERCIAL
VALLEY SCHOOL DISTRICT #262	36-16299	9/22/2004	2		DOMESTIC, FIRE PROTECTION
VAN BEEK, DIANNE; VAN BEEK, JACK	36-7958	1/9/1981	5.8	290	IRRIGATION
VAN DYK, RICHARD B; VAN DYK, TAMMY D	36-8389	9/1/1988	0.18		STOCKWATER, COMMERCIAL
VAN TASSELL, AFTON; VAN TASSELL, GAIL	36-7966	2/23/1981	0.37	837	IRRIGATION
VANDERHAM, KEN	36-16101	5/9/1988	0.04		DOMESTIC
VASQUAZ, DUFIA; VASQUAZ, J REUBEN	36-10243*	5/1/1985	0.4	205	IRRIGATION
VEENSTRA, CHERYL; VEENSTRA, PETE	36-8803	7/13/2000	0.13		STOCKWATER, COMMERCIAL
VEENSTRA, FRANK W	36-15077*	4/1/1982	0.91	198.5	IRRIGATION
VERBREE JR, JACK; VERBREE, MARGARET	36-8351	6/15/1988	0.19		STOCKWATER, COMMERCIAL, DOMESTIC
VICTOR, SALLY; VICTOR, STEVE	36-8128	12/30/1982	0.03		COMMERCIAL
WAHLSTROM, LESLIE; WAHLSTROM, RON	36-8612	10/24/1991	0.03	1	IRRIGATION
WARTLUFT, HAROLD; WARTLUFT, LOIS	37-8375	8/11/1988	0.15	3.5	IRRIGATION, DOMESTIC
WEBER, JEFF L; WEBER, KERI JO	37-20850*	3/15/1983	0.4	634	IRRIGATION
WERT, LOREN; WERT, RITA	36-8000	9/11/1981	0.8	40	IRRIGATION
WEST ONE BANK IDAHO	36-15215*	3/15/1972	1.1	609	IRRIGATION
WESTERN IDAHO POTATO PROCESSING CO	36-8324	4/3/1987	2		FIRE PROTECTION
WHITTAKER, JAMES A	37-8063	1/6/1983	2	658	IRRIGATION
WHITTAKER, KEITH	36-8553	7/9/1990	0.13	4.3	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-15165*	3/15/1970	2.2	2785	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-16421	12/30/1983	0.13	2785	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-16425*	5/1/1976	0.15	2785	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-4200*	3/15/1974	0.84	2785	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-8403	11/28/1988	0.31	2785	IRRIGATION
WILCOX, FRANCIS; WILCOX, MARGARET	36-8515	3/2/1990	0.03	1	IRRIGATION
WILD WEST INC	37-21719	3/22/2006	0.11		DOMESTIC
WILDMAN, LINDA; WILDMAN, MAURICE	37-8377	8/19/1988	0.03	1	IRRIGATION
WISE, EARL; WISE, INEZ	36-8638	1/7/1992	0.04	1	IRRIGATION, DOMESTIC
WOOD RIVER RANCH CO INC	36-8312	8/15/1986	0.05		STOCKWATER
YERION, GEORGE A; YERION, SUSAN F	37-20717	4/29/2002	0.1	4	IRRIGATION

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DISTRICT COURT
GOODING CO. IDAHO
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2009 JUL 23 PM 2:24 DEPARTMENT OF
WATER RESOURCES

GOODING COUNTY CLERK

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC.,)

Petitioner,)

vs.)

BLUE LAKES TROUT FARM, INC.,)

Cross-Petitioner,)

vs.)

IDAHO GROUND WATER
APPROPRIATIONS, INC., NORTH
SNAKE GROUND WATER DISTRICT
and MAGIC VALLEY GROUND WATER
DISTRICT,)

Cross-Petitioner,)

vs.)

IDAHO DAIRYMEN'S ASSOCIATION,
INC.)

Cross-Petitioner,)

vs.)

RANGEN, INC.)

Cross-Petitioner,)

vs.)

DAVID R. TUTTILL, JR., in his capacity
as Director of the Idaho Department of
Water Resources, and THE
DEPARTMENT OF WATER)

Case No. 2008-0000444

SCHEDULING ORDER ON
PETITIONS FOR REHEARING

COPY

RESOURCES,

Respondents.

**IN THE MATTER OF DISTRIBUTION
OF WATER TO WATER RIGHTS NOS.
36-0413A, 36-04013B, and 36-07148.**

(Clear Springs Delivery Call)

**IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS NOS. 36-
02356A, 36-07210, and 36-07427.**

(Blue Lakes Delivery Call)

This Court issued its *Order on Petition for Judicial Review* in this matter on June 19, 2009. On July 10, 2009, Blue Lakes Trout Farms, Inc. and Clear Springs Foods, Inc. filed a *Joint Petition for Rehearing*. On July 13, 2009, the Ground Water Users also filed a *Petition for Rehearing*. Pursuant to Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 34(c), IT IS HEREBY ORDERED that the following briefing schedule applies:

1. **September 10, 2009:** Deadline for filing Petitioners' opening briefs.
2. **October 8, 2009:** Deadline for filing Respondent's brief.
3. **October 29, 2009:** Deadline for filing Petitioners' reply briefs.

The Court will set the date for Oral Argument after briefing has been filed.

IT IS SO ORDERED.

Dated 31-7-23, 2024

JOHN M. MELANSON
-District Judge

Certificate of Mailing

I, Cynthia R. Eagle-Ervin, Deputy Clerk, do hereby certify that the foregoing Scheduling Order on Petitions for Rehearing was filed and served upon counsel of record this 23rd day of July, 2009:

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CLERK OF THE DISTRICT COURT

By: _____


Deputy Clerk

CERTIFICATE OF MAILING

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Attorneys for North Snake and Magic Valley Ground Water Districts

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
0413A, 36-04013B AND 36-7148

(Snake River Farm)

**GROUND WATER DISTRICTS' PLAN
OF ACTION AND PETITION FOR
RECONSIDERATION AND REQUEST
FOR HEARING**

COMES NOW North Snake Ground Water District and Magic Valley Ground Water District (collectively "Ground Water Districts"), through counsel of record and hereby submit this Plan of Action, Petition for Reconsideration and Request for Hearing in response to the Interim Director's July 22, 2009 *Order Curtailing Ground Water Rights In Water Districts Nos. 130 and 140 Junior to January 8, 1981* (July 22, 2009 Order). The July 22, 2009 Order directed that the Ground Water Districts submit a "plan of action" to comply with the terms of the May 15, 2009 *Partial Stay Order* on or before July 28, 2009; and, further, indicated that a petition for reconsideration of the final order may be submitted within fourteen (14) days of the service date.¹ This filing is submitted to do both and to request a hearing.

The Interim Director's July 22, 2009 Order ignores the fact that on March 12, 2009, the

¹ The July 22, 2009 Order to curtail ground water users will actually go into effect before a petition for reconsideration is even due, therefore, this filing is also a Petition for Reconsideration and Request for Hearing.

Ground Water Districts filed their *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“2009 Plan”) and the plan was approved by the March 26, 2009 *Order Approving Ground Water Districts Replacement Water Plan For 2009* (“March 26 Approval Order”).

The 2009 Plan includes an “over-the-rim” direct delivery to Clear Springs of 3.0 cfs, 12% more than the entire 2.67 cfs obligation even with credit for conversion acres or CREP program. Thus, the very minor 0.36 cfs shortfall to Clear Springs (5.19 cfs reach shortfall multiplied by 6.9%) is without consequence; it can be easily offset by direct delivery to Clear Springs if the stay is removed and the Ground Water Districts proceed to complete the construction of the over-the-rim direct delivery facilities pursuant to their 2009 plan approved by the March 29 Approval Order.

The “shortfall” to Clear Springs that this July 22 Order is attempting to fix is purely an artifact of Clear Springs derailing the over-the-rim delivery. They knew when they sought the Partial Stay that old conversion acreage weren’t guaranteed and that new conversion acres were approximate. If over-the-rim delivery had proceeded there would be no shortage to Clear Springs, in fact they would now be getting 3 cfs.

The Ground Water District’s were entirely surprised and frankly stunned by the July 22, 2009 Order. To the Ground Water District’s puzzlement, the Interim Director is radically departing from the course of ongoing dialog between the parties which was working towards permanent long term solutions (one of the reasons Clear Springs wanted a partial stay). Instead, the July 22, 2009 Order is hurtling the parties toward more controversy, litigation and costs all of which is unnecessary.

THE GROUND WATER DISTRICTS’ 2009 PLAN

The Ground Water Districts' first replacement water/mitigation plan to Clear Springs dated June 13, 2008 proposed the direct delivery replacement water to Clear Springs race ways from water made available under Water Right No. 36-4076 from an adjacent spring. Water Right No. 36-4076 was leased from the Idaho Department of Fish and Game to fill the remaining obligations to Clear Springs from the July 8, 2005 Order above the reach gain benefits from CREP and conversion activities. This plan was amended on September 5, 2008 to provide a direct replacement alternative which included the direct pump back from water discharged from the Clear Springs raceway(s) to the head of the raceway to supplement any shortfall in the direct delivery from Water Right No. 36-4076.

On December 18, 2008, the Ground Water Districts filed a second mitigation plan as an alternative which was subsequently amended on February 23, 2009, to provide monetary compensation to Clear Springs or "direct delivery of fish consisting of Rainbow Trout of the same type, size and timing as could be produced at Clear Springs Snake River Farms to replace the lost fish production association with the 2.0 cfs of reduced flow based upon the actual production records of Clear Springs." *Amended Second Mitigation Plan* at 10. Each of these plans were objected to by Clear Springs.

On February 17, 2009, the Ground Water Districts filed a Notice of Withdrawal of Amended Mitigation Plan. Without any hearing, on March 5, 2009, the Director entered a *Final Order Accepting Ground Water District's Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan In Part; and Notice of Curtailment* (March 5, 2009 Order). The March 5, 2009 Order is also pending on appeal to the District Court in Gooding County.

In response to the March 5, 2009 Order, the Ground Water Districts filed the 2009 Plan

as both a temporary replacement water plan to allow junior ground water users to continue to divert during the 2009 irrigation season, as well as a permanent mitigation plan under CM Rule 43.

The 2009 Plan proposed two actions to make up the then existing 1.99 cfs direct deficit (2.67 cfs less CREP and existing conversion benefits) to Clear Springs. The 2009 Plan proposed to provide ground water to Clear Springs from irrigation wells that are situated directly above Clear Springs facility by construction of a piping system that would integrate numerous irrigation wells and pipe the water over-the-rim to Clear Springs. The over-the-rim delivery was designed to provide between 1.99 cfs and 3.0 cfs. The 3.0 cfs provided substantial excess capacity and would enable the full 2.67 cfs obligation to Clear Springs to be supplied, even if there were no other reach gain benefits from conversion acres or CREP, as well as to provide a surplus or cushion should the mitigation requirement increase as a result of future changes such as the pending court appeal. In the short term, the surplus capacity could also make up for any shortfalls in delivery obligations from previous years, if so required. March 26 Approval Order, FF 4, 2009 Plan, pp. 3-10. The 2009 Plan included additional conversion acres which were simply incidental to the over-the-rim delivery since those wells would no longer be available to provide water to the lands previously irrigated from the wells.

MAY 15, 2009 ORDER GRANTING PARTIAL STAY

Once the March 26 Approval Order was entered approving the 2009 Plan, the Ground Water Districts immediately proceeded with design and construction of the over-the-rim delivery facilities and to convert the acres previously irrigated by surface water to ground water. The Plan was on schedule to meet the June 1, 2009, deadline with weekly progress reports timely submitted and approved by the Director. As reflected in the reports, the design and construction

of the over-the-rim facilities was placed “on hold” on April 8, 2009 at which time Clear Springs representative, Mr. MacMillan, contacted representatives of Ground Water Districts indicating that the direct delivery of water over-the-rim would not be accepted. Mr. MacMillan and Mr. Cope on behalf of Clear Springs voluntarily entered into negotiations for a partial stay, with the clear an agreement that any lost time due to the delay would be added on to the completion deadline if necessary.

The parties could not agree to the terms of a stipulation providing for partial stay; hence, Clear Springs filed on April 27, 2009 its *Motion for Partial Stay of Implementation of Director’s March 26, 2009 Order Approving Ground Waters Districts Replacement Water Plan for 2009* (“Motion for Stay”). At the Director’s May 4th, 2009 status conference, the Ground Water Districts confirmed that they were on track to complete the project by June 1, but did not object to Clear Springs’ request for stay as to the construction of the over-the-rim plan, except the Ground Water Districts requested a two-year rather than one-year stay in order to facilitate discussions regarding term solutions. The Ground Water Districts wanted a longer stay in order to allow more time for settlement discussions and to allow the appeals taken from the Spring Users’ delivery calls orders to be heard in District Court and hopefully the Supreme Court which would provide the parties with additional certainty and lend in possible resolution of the issues. The Director entered the May 15, 2009 *Order Granting Partial Stay of Ground Water Districts Replacement Water Plan for 2009* (“May 15 Partial Stay Order”) which provided for a two-year stay:

so as not to require construction and installation of the authorized "over-the-rim" pipeline project proposed to provide a portion of the replacement water or mitigation that would otherwise be required from the Ground Water Districts for the 2009 and 2010 calendar years.

IT IS FURTHER ORDERED that, based upon Clear Springs' acceptance of the

terms of the two-year partial stay, satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.

Id. at 2. On May 22, 2009, former Director David Tuthill sent a letter stating that the “over the rim” component of the 2009 Plan was the only stayed portion in the May 15 Partial Stay Order. On June 19, 2009, former Director David Tuthill sent a letter to the parties saying that the Watermaster, Ms. Yenter found some issues regarding the new conversions: “ The replacement plan specified 1,060 acres, and that is the number of acres for which conversion is expected. Conversion of fewer acres is not an acceptable solution.” On June 25, 2009, the Ground Water Districts provided an initial response to the June 19, 2009, letter and emphasized that the “it is important to remember that the objective of the 2009 Plan was to select wells that had enough historical average pumping to directly supply the full replacement water requirement to Snake River Farms on a continuous year-round basis without substantially changing the historical pumping regime. The objective was not to simply convert lands from ground water to surface water irrigation.” Furthermore, in an effort to be forthright with IDWR and the parties, the Ground Water Districts response also stated:

The Ground Water Districts would also like to address the 9,300 acres within the North Snake Ground Water District previously converted from ground water to surface water irrigation. Information which the Ground Water Districts are presently gathering indicates that some amount less than 9,300 acres will be converted this year. The Ground Water Districts are actively seeking additional conversion acres to replace those that have discontinued.

As you know, this is a unique water year with all-time record rainfall recorded throughout the region in June and virtually no pumping occurring since mid-May. As a result the Ground Water Districts indicate that there has been virtually no demand on the North Side Canal Company delivery system, nor any demand on the ground water resource. Accordingly nearly all water in the canal systems has gone to recharge, waste water or returned back to the river.

(emphasis added). In follow-up, by letter dated June 30, 2009, former Director Tuthill wrote:

In your letter you have indicated that if your response is not acceptable and the Director determines to remove the two-year partial stay, the Ground Water Districts are prepared to proceed with construction of the over-the-rim portion of the 2009 Plan. This remedy would not address the fact that too few acres above the rim have been converted. Even if the over-the-rim portion were to be completed, the Ground Water Districts would not be in compliance with the 2009 Plan.

He then requested additional information from the Ground Water Districts to be sent to the Department and the parties. By letter dated July 9, 2009, the Ground Water Districts provided their response and again addressed the issue relating to the prior 9,300 conversion acres among other issues. In that response the Ground Water Districts said:

A number of other members of North Snake Ground Water District have expressed an interest and desire to convert to surface water in order to reduce their deep well pumping costs. It is anticipated that additional lands will be converted from ground water to surface water in the future, although no further details are known at this time. To facilitate these additional conversions, the Ground Water Districts have agreed to act as a broker and secure the necessary storage water from existing lessors and arrange for delivery through the canal systems, with the water acquisition and delivery costs paid by the landowner.

It is the Ground Water Districts' belief that the foregoing response sufficiently addresses the issues raised by the Department and Clear Springs. If additional information is desired, please advise and we will promptly respond.

(emphasis added) The Ground Water Districts again expressed an ability and willingness to go forward with their 2009 Plan and build the over-the-rim delivery structure, but wanted some assurances from Clear Springs.

It is as indicated previously, if the foregoing and the prior information submitted is not acceptable and the Director determines to remove the two year partial stay, the Ground Water Districts are prepared to immediately proceed with the construction of the over-the-rim delivery portion of the plan. Should that be necessary, the Ground Water Districts request assurance from Clear Springs that it will accept the direct delivery of water pursuant to the over-the-rim facilities in light of previous indications given by Clear Springs that it would not do so. Alternatively, if the director directs construction of the over-the-rim facilities without assurance from Clear Springs that it will accept the water, the Ground Water Districts request assurance from the Director that if they go to the expense of constructing the over-the-rim facilities and Clear Springs refuses to accept the

delivery of water, that the Ground Water Districts will be deemed to have satisfied their mitigation obligations.

Based on their July 9, 2009 letter, the Ground Water Districts understood that the Interim Director was waiting to hear from Clear Springs regarding the information that the Ground Water Districts had voluntarily provided to date regarding questions posed in Department letters regarding the conversion acres. To the Ground Water Districts knowledge, Clear Springs has not yet responded to the information provided by the Ground Water Districts nor has Clear Springs indicated whether it would accept the explanation and existing conversions in order to continue with the two year stay. The Ground Water Districts also understood that the ongoing dialog between the Ground Water Districts and Clear Springs was to continue as contemplated by the 2 year stay order.

The Ground Water Districts have provided information to IDWR regarding its good faith efforts to comply with the May 15 Partial Stay Order and to complete its obligation under the 2009 Plan.

A. New Conversion Acres

As previously indicated, the purpose and primary focus of the Ground Water Districts' 2009 Plan is to supply by direct delivery the full replacement water requirement to Clear Springs on a continuous year round basis. At that time, based upon verbal commitments from certain members of the Districts, the Ground Water Districts contemplated leasing sufficient wells which would be pumped for the direct delivery of mitigation water over-the-rim to Clear Springs. The objective was never simply to convert land from ground water to surface water irrigation in order to enhance reach gains: such conversions alone could never practically or economically satisfy the 2.67 mitigation obligation to Clear Springs. The conversions were simply a by-product of the over-the-rim delivery and were necessary to provide irrigation water

to the lands that would no longer have ground water for irrigation because the ground water was going to be redirected to Clear Springs.

When the 2009 Plan was filed, the exact number of acres to be converted was unknown and therefore the proposed acreage to be converted was estimated at “approximately 1,060 acres”. *Id.* at 7. As part of the permanent solution to Clear Springs, the Ground Water Districts entered into conversion agreements with various landowners in order to preclude pumping from the wells that would be used to provide direct replacement water to Clear Springs. There was a well and location change after Brown refused to sign a lease and conversion agreement and therefore VanDyk was substituted. The July 22, 2009 Order in Findings of Fact 32 and 33 clearly recognize based upon updated calculations that as a result of the substitution of the new Van Dyk acres for the Brown acres, the benefit to the reach is “0.47 cfs more than anticipated in the March 26 Order” and likewise, that the CREP acres apparently increased which also increased the simulated benefit to the reach: “0.24 cfs more than anticipated in the March 5 and March 26 Orders”. *July 22, 2009 Order FF 32.*

The new conversion facilities were timely constructed and operating by the June 1 deadline and the Ground Water Districts have fully performed all of their obligations under the March 26 Order with respect to new conversion acres. Yet, the Interim Director in his July 22, 2009, Order now seeks to curtail 350 ground water rights junior to January 8, 1981, that irrigate approximately 8,889 acres to obtain a simulated benefit of 5.19 cfs to the Buhl Gage to Thousand Springs reach and 0.36 cfs to Clear Springs.

B. Old 9,300 Acres

The July 22, 2009 Order faults the Ground Water Districts because the original 9,300 conversion acres were reduced to something less than 9,300. The records of the Ground Water

Districts show that actual converted acres presently in operation exceed the 4202.6 acres the Department estimates in the July 22, 2009 Order, FF 27. The Ground Water Districts are continuing to evaluate the number of acres and will provide the Department with updated numbers as soon as they become available. The Ground Water Districts request the Department provide their information in support of their found acreage for comparison purposes. The Ground Water Districts had no prior notice or reason to believe the old converted acres would unexpectedly change substantially during the irrigation season, a decision by the owners.

The “9,300 conversion acres” were established in response to the 2005 curtailment orders, the exact number of acres and variations from year-to-year are not precisely known by the Ground Water Districts but presumably have been determined and field verified by the Department. However, unlike the new conversions, the Ground Water Districts did not enter into any lease and conversion agreements with the owners of the old conversion acres that would preclude the owners from converting back to ground water pumping. Thus the Ground Water Districts have no legal right to force these landowners to continue with the conversions although phone calls and requests have been made. These conversions were constructed and partially paid for by the Ground Water Districts with the owners voluntarily participating in response to the then existing curtailment orders.

The Ground Water Districts have paid the costs associated with acquiring and delivering storage water to the converted acres up to 2008 in which year they were shared between the Ground Water Districts and the landowners. Then in 2009, the landowners were to pay all the costs. At the outset the Ground Water Districts planned that these costs would be moved to the owners within five years. This occurred in 2009 in response to the significant costs incurred by the Ground Water Districts in performing their 2009 Plan which was intended to permanently

resolve material injury to Clear Springs. When the 2009 Plan was filed the Ground Water Districts had no reason to believe that the passing of the water costs to the landowners would have significantly reduce the number of old converted acres. The added cost of the surface water was expected to be less in most instances than the cost to pump water from the ground for these acres.

The Ground Water Districts were entirely forthright in immediately bringing this to the attention of the Director in their June 25, 2009 letter. This honesty which could well have been delayed until the normal end of the irrigation season accounting is now apparently being used by the Interim Director (and perhaps at the insistence of Clear Springs) as the sole basis of non-performance by the Ground Water District giving rise to the July 22, 2009 Order. Regardless, the impact of the reduced old conversion acres on Clear Springs is *de minimis*, an estimated impact of some 5.19 cfs to the reach and 0.36 cfs to Clear Springs at some future date when steady state is reached. July 22, 2009 Order, FF 5,7.

The Ground Water Districts are and have been actively seeking additional new conversions to replace those that have discontinued as part of their good faith efforts to work on long-term solutions and because the Ground Water Districts understood that Clear Springs preferred this type of solution. The risk and uncertainty that conversion acres as well as CREP acres will vary in the future due to economic or other reasons are some of the very reasons the Ground Water Districts chose to move in a different direction with their 2009 Plan.

It is noteworthy that the 2009 Plan did not rely upon or even calculate any reach gain benefits associated with the new conversions. The 3.0 cfs of direct delivery provides substantial excess capacity. The reach gain benefits are merely incidental and any changes in those acreages are irrelevant since the entire mitigation requirement would be met by direct delivery of water to

Clear Springs. The 2009 Plan provided for direct delivery to Clear Springs and would provide replacement water immediately and with certainty. The 2009 Plan avoids use of the ESPA Model and “10% trimline” questions and, most importantly, established a permanent solution to Clear Springs’ endless complaints to every other mitigation plan proposed by the Ground Waters Districts.¹ Obviously these factors influenced the Director’s decision to approve the 2009 Plan.

While an expensive proposition, the 2009 Plan to Clear Springs was for the purpose of providing a permanent solution, one similar to the permanent solution provided in response to the Blue Lakes Trout delivery call which the Ground Water Districts permanently satisfied by acquiring 10 cfs of the Pristine Springs water right at a cost of \$11 million. The Pristine Springs water right has been directly delivered to Blue Lakes since April 2008 in full satisfaction of that delivery call. It is noteworthy, that the 10 cfs delivered to Blue Lakes also provides substantial capacity in excess of the current 8.6 cfs mitigation requirement.

MITIGATION OBLIGATION TO CLEAR SPRINGS

While the Ground Water Districts’ mitigation obligation to Clear Springs arising out of the July 8, 2005 order and previous orders remain pending on appeal to the Gooding County District Court, there is no dispute for purposes of ongoing administration by the Department that the Ground Water District’s mitigation obligations is to supply 2.67 cfs directly to Clear Springs. This is based on 2009 being the fifth year of the phased-in curtailment.

It must be kept clearly in mind that the end result and the only legal obligation of ground water users is to provide 2.67 cfs to Clear Springs. This amount provides 100% of the mitigation

¹ During direct discussions between Ground Water District representatives Lynn Carlquist and Dean Stevenson and Clear Springs representative Larry Cope and Randy MacMillan in April, 2009, Clear Springs was advised that conversion water acquisition and delivery costs previously incurred by the Ground Water Districts would no longer be paid by the Ground Water Districts, with costs being transferred to the conversion landowners.

requirement, eliminates any material injury to Clear Springs that is caused by the use of water by junior ground water rights. The findings in the July 22, 2009 Order that the parties agreed to provide a specific gain to the Buhl Gage at Thousand Springs as part of the “agreement” to stay the construction of the over-the-rim delivery structure under the Ground Water Districts’ approved 2009 Replacement Water Plan are wrong. The Ground Water District’s present and former plans, as well as all prior orders provide for the delivery of replacement water directly to Clear Springs to off set any material injury Clear Springs may be suffering. Any reach gain enhancements are relevant for purposes of determining and calculating the modeled depletions or benefits resulting to the reach from ground water pumping, curtailment, conversions or recharge, but, the bottom line obligation is to provide 2.67 cfs to Clear Springs.

The Interim Director’s July 22, 2009 Order in effect deems revoked Clear Springs conditional “acceptance of the two-year partial stay” and therefore the Ground Water Districts are back to the March 26 Approval Order.

MARCH 26, 2009 ORDER APPROVING 2009 PLAN

Under the various orders that remain in full force and effect, the Ground Water Districts can meet the 2.67 cfs obligation to Clear Springs by the direct delivery to water alone or by any combination of direct delivery, conversions, CREP or recharge. The March 26 Approval Order remains in effect and the Ground Water Districts have no choice but to resume construction of the over-the-rim portion of the plan. However, they must be provided a reasonable time to do so because of delays as a result of Clear Springs’ Motion for Stay and in accordance with prior commitments made by Clear Springs on April 8, 2009, which Clear Springs agreed to at the time of their stay. The March 26 Approval Order approved the Ground Water Districts’ 2009 Plan as a replacement water plan for the 2009 season, subject to conditions pertaining to the construction

and operation of the direct delivery facilities to be completed no later than June 1, 2009. *Id.* at

10. The March 26 Approval Order provided that:

Clear Springs begin receiving direct replacement water on June 1, 2009, the Ground Water Districts will be required to deliver 3 cfs until March 12, 2010 in order to make up previous shortfalls ... the over-the-rim project will provide water in time and in place to Clear Springs.

Id. at 10.

It is clearly recognized in Findings of Fact No. 2 and 15 of the March 26 Approval Order that the Ground Water Districts could:

Provide the required 28.87 cfs to the Buhl Gage at Thousand Springs reach **or 1.99 cfs directly to Clear Springs** (6.9% of 28.87 cfs)...

Id. at 1,3. (emphasis added). While the March 26 Approval Order calculated the reach gain benefits from conversions and CREP in Findings of Fact 14 through 17 to arrive at a short fall to Clear Springs of 1.83 cfs, nowhere was there any mandate or other requirement that a certain level of conversions and/or CREP acres be maintained, implicitly recognizing acreage fluctuations may occur yet could not effect the viability of the 2009 Plan since the design to deliver 3.0 cfs substantially exceeded the 2.67 cfs obligation to Clear Springs. The 2009 Plan eliminates material injury to Clear Springs even if there are no conversions or CREP acreage whatsoever. Without question the 2009 Plan was to deliver water directly to Clear Springs with the number of conversions and CREP acres and the resulting reach gain benefits purely incidental and secondary. The Director's acceptance of the conversion acre credits was simply an acknowledgment that they existed or would continue at some level for which a credit would be calculated.

Notwithstanding, the July 22, 2009 Order mischaracterizes the 2009 Plan and the March 26 Approval Order by mandating a certain number of conversion and CREP acres in order to

achieve a certain reach gain benefit. Had Clear Springs not sought to stay construction of the over-the-rim delivery in the 2009 Plan, they would now be enjoying full satisfaction of the mitigation obligation.

PLAN OF ACTION

For the reasons described above, the Ground Water Districts interpret the July 22, 2009 Order to be removal of the May 15 Partial Stay Order and therefore are ready to immediately proceed with construction of their 2009 over-the-rim delivery plan approved by the Director's March 26 Approval Order.

PETITION FOR RECONSIDERATION

Consistent with the foregoing, the Ground Water Districts ask the Interim Director to reconsider the July 22, 2009 Order. Specifically, the Ground Water Districts request:

(1) that the July 22, 2009 Order be revised to confirm that the March 26, 2009 Order approving the Ground Water District's 2009 Plan remains in full force and effect and entitles the Ground Water Districts to proceed with the construction and implementation of their remaining direct deliver plan upon withdrawal of the May 15, 2009 Stay Order.

(2) that the July 22, 2009 Order and any curtailment of ground water pumping be suspended until such time as Clear Springs confirms whether it desires to have the May 15, 2009 stay order a) remain in effect in consequence of the new information that has been submitted by the Ground Water Districts, or b) be rescinded to allow the Ground Water Districts to resume construction of the over-the-rim project in accordance with the March 26, 2009 Order approving the Ground Water Districts' 2009 Plan;

(3) alternatively, that the July 22, 2009 Order be suspended until the Ground Water Districts have been granted a hearing which is hereby requested in compliance with the Gooding

County District Court's *Order on Petition for Judicial Review Entered June 19, 2009*:

pursuant to the constitutional requirement of due process, the parties pursuant to notice and upon request are entitled to a hearing before the junior rights are curtailed and before the senior rights are injured further.

Id. at 49.

(4) that the July 22, 2009 Order be suspended until the Interim Director makes specific findings and conclusions applying the law of full economic development set forth in Idaho Code § 42-226. Specifically, the Interim Director must explain how it does not unreasonably interfere with full economic development of the ESPA to curtail 8,889 acres during the middle of the growing season, causing immediate and irreparable crop loss, in an effort to provide 0.36 cfs to Clear Springs at some unknown future date when steady state conditions are reached;

(5) that the July 22, 2009 Order be suspended until the Interim Director makes specific findings and conclusions that the delivery of an additional 0.36 cfs to Clear Springs is a usable quantity of water that will enable Clear Springs to produce more, larger or healthier fish.

(6) to reconsider Findings of Fact 6, 10, 20, 21, 22, 23, 35 and Conclusions Nos. 4 and 9 that erroneously and improperly characterize the Ground Water Districts' 2009 Plan and the March 26, 2009 Order approving the same as mandating a specific reach gain resulting from conversion and CREP acres and mischaracterizing the reach gain amount as something "agreed to by the parties and required by the Director in the May 15, partial stay order."

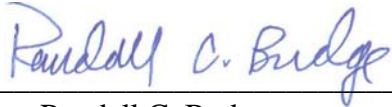
(7) revising Conclusion of Law No. 10 and Paragraph 3 of the July 22, 2009 Order stating that:

The Director won't accept the Plan to comply with the terms of the May 15 partial stay order that is submitted by a Ground Water District.

That requirement is arbitrary and capricious and is inconsistent with the March 26, 2009 Order.

DATED this 28th day of July, 2009.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
Randall C. Budge
Attorneys for North Snake and
Magic Valley Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of July, 2009, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

Idaho Department of Water Resources Interim Director Gary Spackman P.O. Box 83720 Boise, Idaho 83720-0098 phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson, Suite 102 P.O. Box 2139 Boise, Idaho 83701 jks@idahowaters.com tlr@idahowaters.com pla@idahowaters.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail


Randall C. Budge

**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	)	ORDER REGARDING
FARM)	)	GROUND WATER DISTRICTS'
	)	PLAN OF ACTION
)	
(Water District Nos. 130 and 140))	
_____)	

On July 22, 2009, the Director of the Department of Water Resources (“Director” or “Department”) issued his *Order Curtailing Ground Water Rights In Water District Nos. 130 and 140 Junior to January 8, 1981* (“Curtailment Order”). The Curtailment Order informed the Magic Valley and North Snake Ground Water Districts (“Ground Water Districts”) that they were no longer in compliance with the terms of their *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* (“2009 Plan”), as approved by the Director’s *Order Approving Ground Water Districts’ Replacement Water Plan for 2009* (March 26, 2009) (“March 26 Order”), and subsequently modified by the Director’s *Order Granting Partial Stay of Ground Water Districts’ Replacement Water Plan for 2009* (May 15, 2009) (“May 15 Partial Stay Order”).

In order to comply with the terms of the 2009 Plan, as approved by the March 26 Order, the Ground Water Districts were required to: (1) construct the over-the-rim pipeline; (2) convert approximately 1,060 new conversion acres; (3) continue conversion of approximately 9,300 acres; and (4) continue enrollment of acres in the Conservation Reserve Enhancement Program (“CREP”).

Of the four requirements from the March 26 Order, only the over-the-rim pipeline was stayed. Therefore, “satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.” *May 15 Partial Stay Order* at 2 (emphasis added). As stated in the Curtailment Order, the deficiency that exists in implementation of the 2009 Plan, as modified by the May 15 Partial Stay Order, is full conversion of the existing 9,300 conversion acres. The deficiency is not minor—fewer than half of the acres proposed for conversion have or will receive surface water delivery for the 2009 irrigation season.

On July 28, 2009, the Department received the *Ground Water Districts' Plan of Action and Petition for Reconsideration and Request for Hearing* ("Plan of Action"). The Plan of Action does not state that the Ground Water Districts intend to convert the existing 9,300 conversion acres, as required by the Director's previous orders and agreed to by the parties. Instead, the Ground Water Districts request that the Director remove the May 15 partial stay and require construction of the over-the-rim pipeline to satisfy Clear Springs. Citing Judge Melanson's recent *Order on Petition for Judicial Review* (June 19, 2009), the Ground Water Districts request that the Director suspend the Curtailment Order until a hearing has occurred.

The 2009 Plan was proposed by the Ground Water Districts as a replacement water plan and a mitigation plan. The Director approved the 2009 Plan as a replacement water plan, but also published notice of the Plan in accordance with Rule 43 of the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), IDAPA 37.03.11.043. The 2009 Plan was published in the Twin Falls *Times News* on April 2 and 9, 2009, with a protest end date of April 20, 2009. A timely protest to the 2009 Plan was filed by Clear Springs. A petition to intervene was filed by the Idaho Dairymen's Association. On May 15, 2009, Gerald F. Schroeder was appointed by the Director to serve as independent hearing officer in the mitigation plan hearing. It is the Department's intention that a hearing on the 2009 Plan will have occurred and a decision will be in place prior to the start of the 2010 irrigation season.

When the March 26 Order that approved the 2009 Plan as a replacement water plan was issued, the Director and the parties did not have the guidance of Judge Melanson's June 19, 2009 decision. Based on Judge Melanson's decision, the Director should not have approved the Ground Water Districts' 2009 Plan as a replacement water plan. The 2009 Plan was published as a mitigation plan in accordance with CM Rule 43. Based on guidance from Judge Melanson, the Ground Water Districts may not construct the pipeline to satisfy the mitigation obligation to Clear Springs until it has been approved as a CM Rule 43 mitigation plan. If the 2009 Plan is approved as a CM Rule 43 mitigation plan, the mitigation obligation of the Ground Water Districts would then be satisfied and the Curtailment Order rescinded.

After the 2009 Plan was published and the protest deadline expired on the mitigation plan, the Director entered the May 15 Partial Stay Order. The May 15 Partial Stay Order accepted the agreement of Clear Springs and the Ground Water Districts that, for 2009 and 2010, acceptable "mitigation" would consist of: (1) continued conversion of approximately 9,300 acres; (2) conversion of approximately 1,060 new acres; and (3) continued enrollment of acres in CREP. The May 15 Partial Stay Order is consistent with CM Rule 43.03.o,¹ which allows the Director to approve a mitigation plan if it is agreed to by the parties. The Curtailment Order was entered to enforce the terms of the agreement. If the Ground Water Districts can demonstrate conversion of the 9,300 existing conversion acres, the 2009 mitigation obligation could be satisfied and the Curtailment Order rescinded.

¹ "Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include . . . [w]hether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions." CM Rule 43.

Based upon the contents of the Ground Water Districts' Plan of Action, the Director determines that the Ground Water Districts are not complying with the terms of the May 15 Partial Stay Order. Based on the response of the Ground Water Districts, the Director will not alter the requirement that ground water rights junior to January 8, 1981, must curtail on July 31, 2009, starting at 12:01 a.m.

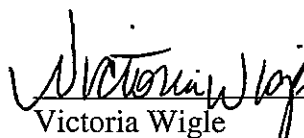
Dated this 29th day of July, 2009.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July 2009, the above and foregoing, was served by first class U.S. Mail and electronic mail to the following:

RANDY BUDGE RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net	CANDICE M. MCHUGH RACINE OLSON 101 S. CAPITOL BLVD., STE. 208 BOISE ID 83702 cmm@racinelaw.net	JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 jks@idahowaters.com
TRAVIS THOMPSON PAUL ARRINGTON BARKER ROSHOLT 113 MAIN AVE. WEST, STE. 303 TWIN FALLS ID 83301-6167 tlt@idahowaters.com pla@idahowaters.com	DANIEL V. STEENSON CHARLES L. HONSINGER RINGERT LAW PO BOX 2773 BOISE ID 83701-2773 dan@ringertlaw.com clh@ringertlaw.com	MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 mcc@givenspursley.com jefffereday@givenspursley.com
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ALLEN MERRITT CINDY YENTER WATERMASTER - WD 130, 140 IDWR - SOUTHERN REGION 1341 FILLMORE ST., STE. 200 TWIN FALLS ID 83301-3380 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov		



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

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Attorneys for North Snake and Magic Valley Ground Water Districts

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
04103A, 36-04013B AND 36-7148 (Snake
River Farm)

(Water District Nos. 130 and 140)

**GROUND WATER DISTRICTS' SECOND
PLAN OF ACTION, PETITION FOR
RECONSIDERATION AND REQUEST
FOR STATUS CONFERENCE**

COME NOW North Snake Ground Water District and Magic Valley Ground Water District (collectively "Ground Water Districts"), through counsel of record and hereby submit this Second Plan of Action, Petition for Reconsideration and Request for Status Conference in response to the Interim Director's July 22, 2009 *Order Curtailing Ground Water Rights in Water Districts Nos. 130 and 140 Junior to January 8, 1981* ("July 22, 2009 Order") and July 29, 2009 *Order Regarding Ground Water Districts' Plan of Action* ("July 29, 2009 Order"). The July 22, 2009 Order directed that the Ground Water Districts submit a "plan of action" to comply with the terms of the May 15, 2009 *Partial Stay Order* on or before July 28, 2009; and, further, indicated that a petition for reconsideration of the final order may be submitted within fourteen (14) days of the service date. In response on July 28, 2009, the *Ground Water Districts' Plan of Action and Petition for Consideration* ("Plan of Action") was filed. In the July 29 2009 Order, the

Interim Director rejected the Ground Water Districts' Plan of Action indicating "the Director will not alter the requirement that ground water rights junior to January 8, 1981, must curtail on July 31, 2009, starting at 12:01 a.m." This filing is submitted by the Ground Water Districts to provide a Second Plan of Action, request further reconsideration of the July 22, 2009 Order, reconsideration of the July 29, 2009 Order and request an immediate status conference with Clear Springs.

The effect of the Interim Director's July 22 Order and July 29 Order is to reject the Ground Water Districts' request that the stay be lifted and that they be allowed to proceed to construct their over-the-rim facilities to deliver the full mitigation obligation of 2.67 cfs to Clear Springs in accordance with the March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009* ("March 26 Approval Order"). While the Ground Water Districts considered the old 9,300 conversion acres as unnecessary and not a firm obligation, the Interim Director has ruled otherwise and effectively by the July 2009 Orders has changed the rules in the middle of the game ("irrigation season") that were established by the March 26 Approval Order approving the Ground Water Districts' 2009 Plan to deliver the full mitigation obligation directly to Clear Springs. According to the July 29 Order, this change was based on Judge Melanson's June 19, 2009 *Order on Petition for Judicial Review* finding that the Director should not have approved the Ground Water Districts' 2009 Plan as a replacement water plan without first conducting a hearing, notwithstanding the fact that Judge Melanson has now granted rehearing on that decision.¹

¹ It is noteworthy that the Ground Water Districts' 2009 Plan was also filed as a Rule CM 43 Mitigation Plan, that Clear Springs demanded an immediate hearing and that the matter has been assigned to Hearing Office Gerald Schroeder who has not yet scheduled a prehearing conference or hearing schedule, there being no urgency to do so by reason of the two-year Stay Order.

Certain ground water irrigators voluntarily participated in the old conversion program but converted back to ground water in 2009 reducing the 9,300 acres of old conversions to an estimated 4202.6 acres. July 22, 2009 Order, FF 27. The impact of the reduced acres on Clear Springs was estimated based on the model to reduce the flow to the Thousand Springs reach by 5.19 cfs and 0.35 cfs to Clear Springs when steady state is reached. July 22, 2009 Order, FF 5, 7. This Second Plan of Action is intended to address the reduction in conversion acres and 0.35 cfs steady state impact upon Clear Springs in the manner described below.

SECOND PLAN OF ACTION

The Ground Water Districts' Second Plan of Action proposes to immediately reduce and ultimately eliminate the 0.35 cfs impact on Clear Springs caused by the reduced conversion acres in the following ways: (1) by immediately increasing the old conversion acres to 7,745 acres; (2) by late season recharge through the North Side Canal Company system in 2009; and (3) by adding new conversion acres in 2010 in an effort to bring the total to over 9,000 acres. Since the July 29, 2009 Order was entered, the Ground Water Districts have made personal contact with each of the ground water irrigators they discovered had opted out of the conversion program this year. Of those, a total of 15 representing an additional 2,989 acres of conversion agreed to immediately discontinue all ground water pumping and fully convert back to surface water. Their names and acreage are set forth in Exhibit A attached. In addition, Robert Meyers has agreed to convert to surface water for the rest of this year. Notably, Mr. Meyers' well is located right above the rim at Clear Springs. The Ground Water Districts have also discovered that Loren Wert and McReits LLC have not pumped their wells at all this year and have been taking NSCC shares to irrigate their property. Exhibit A consists of the conversions that the Ground

Water Districts are aware of as of August 3, 2009 that relate to the old 9,300 acres; the new total is 7,745 including Mr. Meyers, Mr. Wert and McReits LLC.

From their existing Lessors² the Ground Water Districts have leased 27,500 AF to deliver storage water through the North Side Canal Company system to conversion acres. To the extent that amount is not fully delivered to conversion acres during the 2009 irrigation season, the Ground Water Districts will make that amount available to do late season recharge, first through the North Side Canal Company system to areas nearest the rim above Clear Springs, and then other areas within the system to where late season recharge was performed in previous years. Representatives of the Ground Water Districts have met with NSCC Manager Ted Diehl who has given a verbal committed to work with the Ground Water Districts on late season recharge this year the exact amount of which would depend upon the irrigation season and available capacity in their canal system.

Finally, the Ground Water Districts will use their best efforts to add new conversion acres in 2010 in an effort to provide at over 9,000 conversion acres in 2010. Some ground water irrigators have indicated a willingness to convert acres from ground water to surface water in 2010. The Ground Water Districts will make this option known to their members and help coordinate additional conversion efforts for the delivery of storage water through surface water delivery systems as feasible.

Representatives of the Ground Water Districts have recently met with representatives of Clear Springs and have discussed the general terms of the Second Plan of Action. A follow-up meeting is in the process of being scheduled to discuss the details now known and set forth in this Second Plan of Action in the hope that it will be deemed acceptable for purposes of the two-

² The Department has on file copies of the ongoing Lease Agreements which remain in effect between IGWA and eight Lessors pursuant to which IGWA has a minimum of 27,500 AF and maximum of 69,000 AF of water available each year based upon these Lessors' storage contracts in the Upper Snake Reservoir System.

year stay so that the parties' efforts to cooperatively explore other long-term solutions may continue.

PETITION FOR RECONSIDERATION


Based on the foregoing, the Ground Water Districts respectfully request that the Interim Director reconsider the July 22 and July 29, 2009 Orders. Specifically, the Ground Water Districts request: (1) that the curtailment of ground water pumping as ordered by the July 22, 2009 and July 29, 2009 Orders be suspended until such time as Clear Springs confirms whether or not this Second Plan of Action is acceptable; (2) that the Ground Water Districts' Second Plan of Action be approved and the July Curtailment Orders rescinded; (3) alternatively, that the scope of the curtailment be reevaluated and reduced to reflect resulting benefit to Clear Springs from the additional conversion acres added and late season recharge described in this Second Plan of Action.

REQUEST FOR STATUS CONFERENCE

The Ground Water Districts request a status conference be scheduled and conducted between the Ground Water Districts, Clear Springs and the Interim Director to discuss and determine if this Second Plan of Action is acceptable to Clear Springs or if it is acceptable to the Interim Director; and, if not, to discuss and determine the reduced acres, water rights and owners subject to the Curtailment Order and the enforcement procedures the Interim Director intends to take under Idaho Code §42-351, §42-1701B of §42-607 or otherwise. This is important to effectively communicate to the farmers subject to curtailment to avoid misunderstandings, and reduce the potential risk of property damage or personal injury arising out of the use of force.

DATED this 3rd day of August, 2009.

RACINE, OLSON, NYE, BUDGE & BAILEY

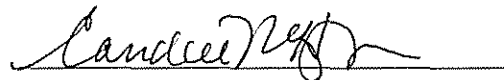


RANDALL C. BUDGE, Attorneys for
North Snake and Magic Valley Ground
Water Districts

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August, 2009, the above and foregoing was served by first class U.S. Mail and/or electronic mail to the following:

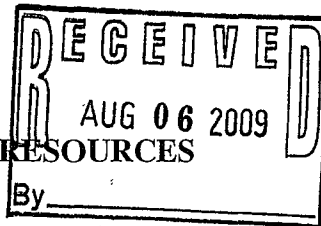
Idaho Department of Water Resources Interim Director Gary Spackman P.O. Box 83720 Boise, Idaho 83720-0098 Victoria.wigle@idwr.idaho.gov phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
John Simpson Barker Rosholt PO Box 2139 Boise, ID 83701-2139 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Mike Creamer Jeff Fereday Givens Pursley PO Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jefffereday@givenspursley.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Robert Williams Fredericksen Williams Meservy 153 E. Main St. PO Box 168 Jerome, ID 83338-0168 rewilliams@cableone.net	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Allen Merritt Cindy Yenter Watermaster-WD 130, 140 IDWR – Southern Region 1341 Fillmore St, Ste 200 Twin Falls, ID 83301-3380 Allen.merritt@idwr.idaho.gov Cindy.yenter@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail



NAME	ACRES	Continued Conversions for 2009	Renewed as of August 3, 2009	No Ground water pumped 2009
Benedictine Monks of ID Inc.	425	x		
Bettencourt (Rodney Bolich)	304	x		
Bettencourt Dairies	435	x		
Big Sky West	304	x		
Claar, Ron	160	x		
C. DeKruyf Dairy Partnership	163	x		
Niagra - Adrian Boer Canyonside /K&W Dairy	1010	x		
Hults, Kay (Harm's place)	22	x		
Henry Farms	286	x		
Huettig Brothers	160	x		
Huettig Brothers	100	x		
Ravenscroft, Bryan	27	x		
Roth Family LLC	161	x		
Ruby, Ken	134	x		
Sawtooth Sheep Co. Inc.	374	x		
Sawtooth Sheep Co. Inc.	352	x		
Subtotal	4417			
2+ (Adrian Boer) - Miller Farms	345		x	
Anderson, Ken	144		x	
Boer Dairy LLC (Davis Place S,M, N)	405		x	
Brandsma Dairy	140		x	
Brandsma Dairy - lost well	160		x	
Dewit Dairy	144		x	
Dewit Dairy	80		x	
Hirai, Jack	75		x	

Johnson Jr., Elmer	231		x	
Richard Trail Trust	500		x	
Ted Miller Dairy	130		x	
Strickland, Evelyn	41		x	
U-U Ranch LLC	130		x	
Veenstra, Frank	320		x	
Wert, Keith	144		x	
Subtotal	2989			
Robert Meyers*	70		x	
Wert, Loren**	40			x
McReits LLC**	229			x
Subtotal	339			
GRAND TOTAL AS OF 8/3/09	7745			
* New as of 8/3/09.				
** Prior converters who purchased water directly from NSCC				

Randy



BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR)
DELIVERY CALL OF A&B IRRIGATION) **ORDER DENYING PETITION**
DISTRICT FOR THE DELIVERY OF GROUND) **FOR RECONSIDERATION**
WATER AND FOR THE CREATION OF A)
GROUND WATER MANAGEMENT AREA)
_____)


On June 30, 2009, the Director of the Department of Water Resources ("Director" or "Department")¹ issued a *Final Order Regarding the A&B Irrigation District Delivery Call* ("Final Order") in response to exceptions filed by the A&B Irrigation District ("A&B") to the independent hearing officer's recommended orders. On July 14, 2009, A&B timely filed its *Petition for Reconsideration of Director's June 30, 2009 Final Order Regarding the A&B Irrigation District Delivery Call* ("Petition for Reconsideration").

On July 28, 2009, the Department received *IGWA and Pocatello's Response to A&B's Petition for Reconsideration of Director's June 30, 2009 Final Order Regarding the A&B Irrigation District's Delivery Call*, in which it was stated that: "The record in this matter supports the Director's June 30, 2009 Final Order that A&B is not water short and has not suffered material injury to its Ground Water Right No. 36-2080. . . . Therefore, the Director's June 30, 2009 Final Order should be affirmed and A&B's Request for Reconsideration should be denied."

ORDER

The Director has reviewed the Final Order, Petition for Reconsideration, and considered A&B's arguments. The Director concludes that no further action is necessary. Based upon the foregoing, it is hereby ordered that A&B's Petition for Reconsideration is DENIED.

Dated this 4th day of August 2009.


GARY SPACKMAN
Interim Director

¹ On June 30, 2009, former Director David R. Tuthill, Jr. retired. Gary Spackman was appointed Interim Director of the Department by Governor Otter on July 17, 2009.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by electronic mail to those persons listed with e-mail addresses, on this 4th day of August 2009.

John K. Simpson Barker Rosholt & Simpson 1010 West Jefferson, Ste. 102 PO Box 2139 Boise, ID 83701-2139 jks@idahowaters.com	Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave West, Suite 303 P.O. Box 485 Twin Falls, ID 83303-0485 tlt@idahowaters.com	Roger D. Ling PO Box 623 Rupert, ID 83350 rdl@idlawfirm.com
Randall C. Budge Racine Olson Nye Budge & Bailey PO Box 1391 201 E Center Street Pocatello, ID 83204-1391 rcb@racinelaw.net	Candice M. McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Suite 208 Boise, ID 83702 cmm@racinelaw.net	Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street Suite 500 Denver, CO 80202 sarahk@white-jankowski.com
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Lary S. Larson Hopkins Roden Crockett Hansen & Hoopes PLLC PO Box 51219 Idaho Falls, ID 83405-1219	Gregory P. Meacham MEACHAM & DUSTIN, PLLC 2000 Jennie Lee Drive Idaho Falls, ID 83404	William A. Parsons Parsons Smith & Stone, LLP 137 West 13 th Street PO Box 910 Burley, ID 83318
James C. Tucker Idaho Power Company 1221 West Idaho Street Boise, ID 83702-5627	James S. Lochhead Michael A. Gheleta Brownstein Hyatt Farber Schreck PC. 410 Seventeenth Street Suite 2200 Denver, CO 80202	Michael D. O'Hagan Office of Chief Counsel U.S. Department of Energy 1955 Fremont Avenue MS 1209 Idaho Falls, ID 83415-1510
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Michael Patterson, President Desert Ridge Farms, Inc. PO Box 185 Paul, ID 83347	Neil and Julie Morgan 762 West Hwy 39 Blackfoot, ID 83221	Charlene Patterson, President Patterson Farms of Idaho 277 N 725 Lane W Paul, ID 83347

City of Firth Box 37 Firth, ID 83236	B.J. Driscoll McGrath Meacham & Smith PLLC 414 Shoup PO Box 50731 Idaho Falls, ID 83405	City of Castleford PO Box 626 300 Main Castleford, ID 83321
Winding Brook Corporation C/o Charles W. Bryan Jr. UBS Agrivest LLC PO Box 53 Nampa, ID 83653	LaDell and Sherry R. Anderson 304 N 500 W Paul, ID 83347	O.E. Feld & Berneta Feld 1470 S 2750 W Aberdeen, ID 83210
Mary Ann Plant 480 N 150 W Blackfoot, ID 83221	Jeff Feld 719 Bitterroot Drive Pocatello, ID 83201	Eugene Hruza PO Box 66 Minidoka, ID 83343
Todd Lowder 2607 W 1200 S Sterling, ID 83210	City of Basalt PO Box 178 Basalt, ID 83218	F. Randall Kline PO Box 97 American Falls, ID 83211
Fred & Phyllis Stewart 300 Sugar Leo Road St. George, UT 84790	Richard J. Kimmel 867N 800E Shelley, ID 83274	Steve L. Stephens City of Arco 260 Grand Avenue PO Box 736 Arco, ID 83213



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

EXPLANATORY INFORMATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5243, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the date of issuance (not service) of the final order, b) the date of issuance of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHTS NOS. 36-04013A,	)	AMENDED
36-04013B, AND 36-07148 (SNAKE RIVER	)	CURTAILMENT ORDER
FARM))	
)	
)	
(Water District Nos. 130 and 140))	
_____)	

FINDINGS OF FACT

1. On July 22, 2009, the Director of the Department of Water Resources ("Director" or "Department") issued his *Order Curtailing Ground Water Rights In Water District Nos. 130 and 140 Junior to January 8, 1981* ("Curtailment Order"). The Curtailment Order informed the Magic Valley and North Snake Ground Water Districts ("Ground Water Districts") that they were no longer in compliance with the terms of their *2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* ("2009 Plan"), as approved by the Director's *Order Approving Ground Water Districts' Replacement Water Plan for 2009* (March 26, 2009) ("March 26 Order"), and subsequently modified by the Director's *Order Granting Partial Stay of Ground Water Districts' Replacement Water Plan for 2009* (May 15, 2009) ("May 15 Partial Stay Order").

2. In order to comply with the terms of the 2009 Plan, as approved by the March 26 Order, the Ground Water Districts were required to: (1) construct the over-the-rim pipeline; (2) convert approximately 1,060 new conversion acres; (3) continue conversion of approximately 9,300 acres; and (4) continue enrollment of acres in the Conservation Reserve Enhancement Program ("CREP").

3. Of the four requirements from the March 26 Order, only the over-the-rim pipeline was stayed by the May 15 Partial Stay Order: "satisfaction of the remainder of the 2009 Plan, approved by the March 26, 2009 Order of the Director, shall constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years." *May 15 Partial Stay Order* at 2 (emphasis added). As stated in the Curtailment Order, the deficiency that exists in implementation of the 2009 Plan, as modified by the May 15 Partial Stay Order, is full conversion of the existing 9,300 conversion acres. Due to the deficiency in conversion acres, the Curtailment Order found a resulting shortfall of 5.19 cfs to the Buhl Gage

to Thousand Springs reach, or 0.36 cfs directly to Clear Springs Foods, Inc. (6.9% of 5.19 cfs). To alleviate the shortfall, curtailment of ground water rights junior to January 8, 1981 was ordered.

4. On July 28, 2009, the Department received the *Ground Water Districts' Plan of Action and Petition for Reconsideration and Request for Hearing* ("Plan of Action"). The Plan of Action did not state that the Ground Water Districts intended to convert the 9,300 conversion acres, as required by the Director's previous orders and agreed to by the parties. Based on the contents of the Plan of Action, the Director did not alter the Curtailment Order. *Order Regarding Ground Water Districts' Plan of Action* (July 29, 2009). As a result, ground water rights junior to January 8, 1981 have been ordered curtailed since July 31, 2009.

5. On August 3, 2009, the Department received the *Ground Water Districts' Second Plan of Action, Petition for Reconsideration and Request for Status Conference* ("Second Plan of Action"). The Second Plan of Action requested that the Curtailment Order be rescinded or modified based on implementation of the following actions: "(1) by immediately increasing the old conversion acres to 7,745 acres; (2) by late season recharge through the North Side Canal Company system in 2009; and (3) by adding new conversion acres in 2010 in an effort to bring the total to over 9,000 acres." *Second Plan of Action* at 3. The Ground Water Districts requested an immediate status conference on the Second Plan of Action "so that the parties' efforts to cooperatively explore other long-term solutions may continue." *Id.* at 4.

6. On August 4, 2009, the Director held a status conference to discuss the Second Plan of Action. The Director informed the parties at the status conference that he would consider the reinstatement of formally converted acres for purposes of revising the curtailment date in the Curtailment Order. The Director stated that he would not consider proposed actions that were not part of the previous agreement between Clear Springs and the Ground Water Districts, as accepted by the Director in his May 15 Partial Stay Order.

7. The Department has reviewed the Second Plan of Action and the reinstitution of conversion acres. The Department has modeled the benefit of those additional acres. The resulting benefit to the Buhl Gage to Thousand Springs reach is as follows:

Existing Conversions	New Conversions	CREP	Total Provided	Required	Shortfall
6.32 cfs	2.82 cfs	0.68 cfs	9.82 cfs	12.23 cfs	2.41 cfs

8. The additional conversion acres have increased the reach gain benefit from 3.54 cfs to 6.32 cfs (+ 2.78 cfs). The Total Provided has increased from 7.04 to 9.82 (+ 2.78 cfs).

9. Using the Eastern Snake Plain Aquifer ("ESPA") Model, and taking into account 10% model uncertainty and only those rights located within the area of common ground water supply, curtailment of ground water rights junior to April 11, 1990 will result in a 2.46 cfs benefit to the Buhl Gage to Thousand Springs reach, or 0.17 cfs directly to Clear Springs. Selecting a more junior priority date for curtailment will not satisfy the 2.41 cfs shortfall. The

curtailment will impact the holders of approximately 153 ground water rights that irrigate approximately 4,154 acres in portions of Cassia, Gooding, Jerome, and Lincoln counties.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

2. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted the CM Rules. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. CM Rule 1.

3. As agreed to by the parties and required by the Director in the May 15 Partial Stay Order, 12.23 cfs to the Buhl Gage to Thousand Springs reach shall “constitute acceptable and sufficient replacement water or mitigation by the Ground Water Districts for the 2009 and 2010 calendar years.” *May 15 Partial Stay Order* at 2.

4. Based on the Second Plan of Action, the Ground Water Districts have provided 9.82 cfs to the Buhl Gage to Thousand Springs reach, resulting in a shortfall of 2.41 cfs to the reach, or 0.17 cfs directly to Clear Springs (6.9% of 2.41 cfs).

5. The ESPA Model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the ESPA Model that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

6. Using the ESPA Model, and taking into account 10% model uncertainty and only those rights located within the area of common ground water supply, curtailment of ground water

rights junior to April 11, 1990 is simulated to result in at least a 2.41 cfs benefit to the Buhl Gage to Thousand Springs reach. The curtailment will impact the holders of approximately 153 ground water rights that irrigate approximately 4,154 acres in portions of Cassia, Gooding, Jerome, and Lincoln counties. A map depicting the area of curtailment and a list of water rights that are to remain curtailed is attached hereto.

7. Ground water users who hold junior priority ground water rights and are not members of a ground water district that is providing approved mitigation, replacement water supply, or substitute curtailment, should be deemed a non-member participant for mitigation purposes pursuant to H.B. 737 (*Act Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain*, ch. 356, 2006 Idaho Sess. Laws 1089) and should be required to pay the ground water district that is providing approved mitigation, replacement water supply, or substitute curtailment nearest the lands to which the water right is appurtenant for mitigation purposes pursuant to Idaho Code § 42-5259. If the holder of such a junior priority ground water right elects not to join the ground water district, the Director should order curtailment.

8. Curtailment will apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

9. In the event that junior priority ground water users do not voluntarily comply with ordered curtailment, the Director should enforce the terms of this order in accordance with Idaho law, which includes, but is not limited to, the procedures outlined in Idaho Code §§ 42-351 (Illegal diversion or use of water—Enforcement procedure—Injunctive relief), 42-607 (Distribution of Water), and 42-1701B (Enforcement procedure—Notice—Consent order).

10. In order for the Department to verify delivery of surface water to the conversion acres, the Ground Water Districts shall provide weekly replacement delivery reports to the watermaster for Water District Nos. 130 and 140 through the end of the irrigation season.

11. In order for the Department to verify the conversion acres have not been irrigated with ground water and that curtailed acres have not been irrigated, the Ground Water Districts shall, upon request by the watermaster for Water District Nos. 130 and 140, provide the watermaster for Water District Nos. 130 and 140 with diversion records for wells associated with the conversion projects and wells that are, and have been, subject to curtailment.

12. This Amended Curtailment Order supersedes the Director's *Order Curtailing Ground Water Rights In Water District Nos. 130 and 140 Junior to January 8, 1981* (July 22, 2009).

ORDER

Based on the foregoing, IT IS HEREBY ORDERED as follows:

IT IS HEREBY ORDERED that the Director's July 22, 2009 *Order Curtailing Ground Water Rights In Water District Nos. 130 and 140 Junior to January 8, 1981* is amended and superseded by this Order. Curtailment will only apply to ground water rights bearing priority dates of April 12, 1990, or junior to April 12, 1990. Ground water rights bearing priority dates of April 11, 1990, or senior to April 11, 1990 are no longer subject to curtailment. This order shall apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that the watermaster for Water District Nos. 130 and 140 is directed to issue written notices to the holders of consumptive ground water rights identified in the July 22, 2009 *Order Curtailing Ground Water Rights In Water District Nos. 130 and 140 Junior to January 8, 1981*, bearing priority dates of April 11, 1990, or senior, that their water rights are no longer subject to curtailment.

IT IS FURTHER ORDERED that the Ground Water Districts shall provide weekly replacement delivery reports to the watermaster for Water District Nos. 130 and 140. Upon request, the Ground Water Districts shall provide the watermaster for Water District Nos. 130 and 140 with diversion records for wells associated with the conversion projects and wells that are, and have been, subject to curtailment.

IT IS FURTHER ORDERED that if junior priority ground water right holders for whom curtailment is ordered do not comply with this order, the Director shall immediately enforce the terms of this order in accordance with Idaho law.

IT IS FURTHER ORDERED that this is a final order of the agency effective upon issuance. A hearing was previously held on the mitigation obligations of the Ground Water Districts. The mitigation obligation for the 2009 and 2010 calendar years, as agreed to by the parties and ordered by the Director, is less than the obligation for the final year of the five-year, phased-in period of curtailment. This order is entered to enforce the terms of the Director's previous orders. The decision made in this order is final and subject to review by reconsideration or judicial review.

Dated this 7th day of August, 2009.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

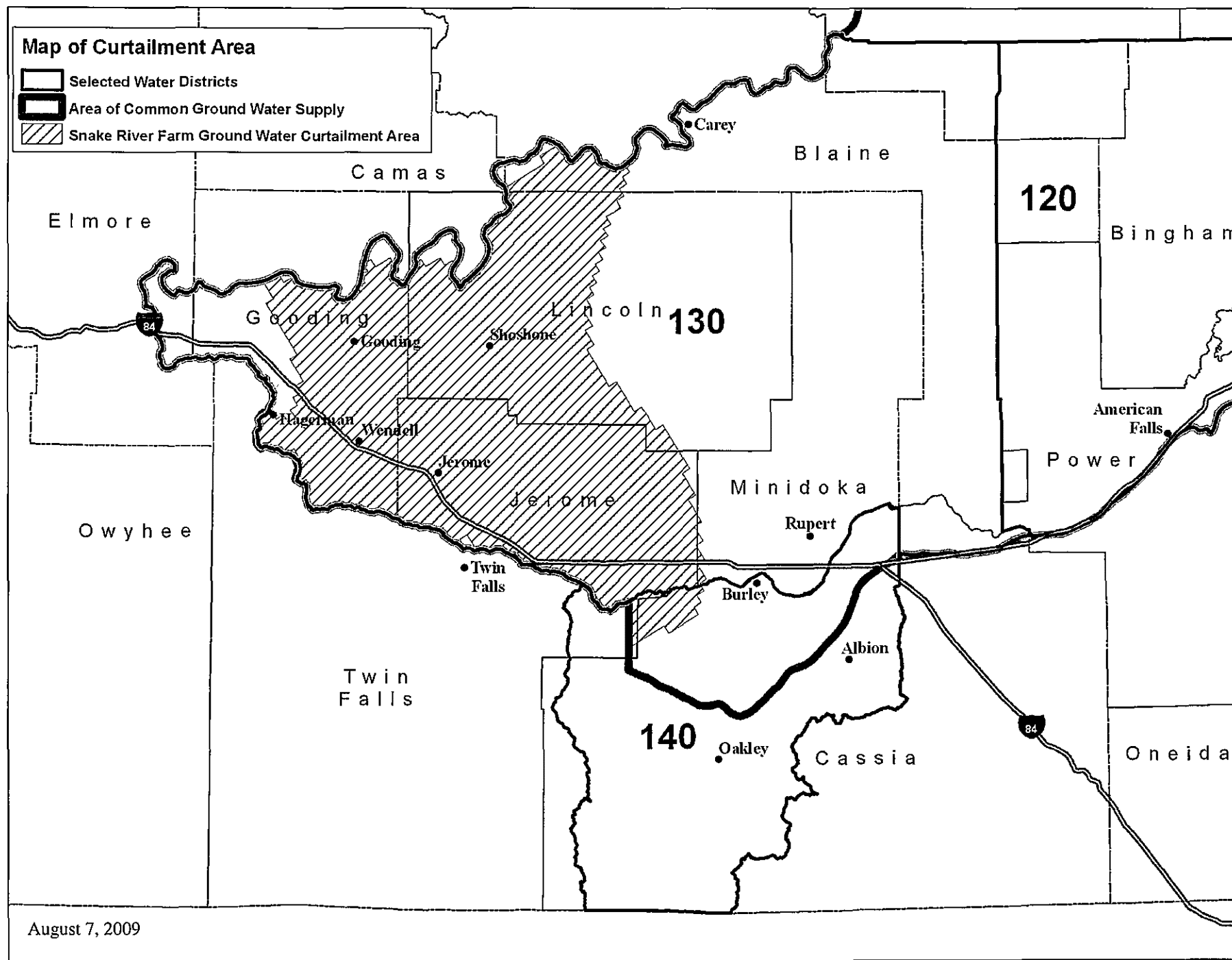
I HEREBY CERTIFY that on this 7th day of August 2009, the above and foregoing, was served by first class U.S. Mail and electronic mail to the following:

RANDY BUDGE RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net	CANDICE M. MCHUGH RACINE OLSON 101 S. CAPITOL BLVD., STE. 208 BOISE ID 83702 cmm@racinelaw.net	JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 jks@idahowaters.com
TRAVIS THOMPSON PAUL ARRINGTON BARKER ROSHOLT 113 MAIN AVE. WEST, STE. 303 TWIN FALLS ID 83301-6167 lt@idahowaters.com pla@idahowaters.com	DANIEL V. STEENSON CHARLES L. HONSINGER RINGERT LAW PO BOX 2773 BOISE ID 83701-2773 dan@ringertlaw.com clh@ringertlaw.com	MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 mcc@givenspursley.com jefffereday@givenspursley.com
MICHAEL S. GILMORE ATTORNEY GENERAL'S OFFICE PO BOX 83720 BOISE ID 83720-0010 mike.gilmore@ag.idaho.gov	J. JUSTIN MAY MAY SUDWEEKS & BROWNING 1419 W. WASHINGTON BOISE ID 83702 jmay@may-law.com	ROBERT E. WILLIAMS FREDERICKSEN WILLIAMS MESERVY 153 E. MAIN ST. P.O. BOX 168 JEROME ID 83338-0168 rewilliams@cableone.net
ALLEN MERRITT CINDY YENTER WATERMASTER - WD 130, 140 IDWR - SOUTHERN REGION 1341 FILLMORE ST., STE. 200 TWIN FALLS ID 83301-3380 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov		



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

Attachment 1



Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

Current Owner	Water Right Number	Priority Date	Diversion Rate (cfs)	Acres	Purpose of Use
AARDEMA FARMS LTD PARTNERSHIP	36-8179	1/10/1997	0.06		STOCKWATER, DOMESTIC
AARDEMA, CORNELIA; AARDEMA, FRANS; BOX CANYON DAIRY; HEIDA, MARY JANE; HEIDA, THOMAS	36-15181*	3/15/1982	0.23	54	IRRIGATION
AARDEMA, DONALD J; AARDEMA, DONALD JOHN; AARDEMA, EVELYN L; AARDEMA, GAYLE; AARDEMA, KRISTYN; AARDEMA, MICHAEL D; AARDEMA, RONALD J; AARDEMA, SARAH J	36-16283*	5/1/1985	0.17	302.7	IRRIGATION
AARDEMA, DONALD JOHN	36-15256C*	3/15/1975	0.92	524.4	IRRIGATION
AARDEMA, DONALD JOHN	36-10225H*	5/1/1985	0.01	3	IRRIGATION
ALLEN, HERB; ALLEN, MARY CHUGG; LLOYD, DANIEL; TIERNEY LLOYD, MONA LISA	36-8523	4/25/1990	1.89	115	IRRIGATION
ANDERSON, LARRY; ANDERSON, RETHA	36-8233	12/17/1991	0.93		HEATING, RECREATION
ASTORQUIA, FRANK	37-8338	5/19/1994	0.6	72	IRRIGATION
ASTORQUIA, FRANK	37-7460	7/3/2002	4	199.5	IRRIGATION
BARNES, T H; COLLINS, LARRY	36-8780	4/17/1998	0.04	1	IRRIGATION, DOMESTIC
BENNETT, CAROLE R; BENNETT, JOHN D	37-20931	5/5/2003	0.12	4.3	IRRIGATION
BETTENCOURT, LUIS M	36-14285*	5/1/1977	0.32	274	IRRIGATION
BETTENCOURT, LUIS M	36-8739	5/10/1995	1	108.6	IRRIGATION
BETTENCOURT, LUIS M	36-8740	5/10/1995	0.53	126.5	IRRIGATION
BETTENCOURT, LUIS M	36-15161*	3/15/1977	0.14	258	IRRIGATION
BETTENCOURT, LUIS M; BETTENCOURT, SHARON L	36-14394*	6/28/1967	0.16	618	IRRIGATION
BETTENCOURT, LUIS M; BETTENCOURT, SHARON L	36-14595A*	5/1/1978	1.31	414.8	IRRIGATION
BLACK BUTTE HILLS LLC	36-15233*	4/6/1980	0.73	180	IRRIGATION
BOLINGBROKE, EDNA	36-16499*	4/1/1984	0.04	24	IRRIGATION
BORBA, JOSE; BORBA, MARIA	36-8731	7/13/1994	0.08		STOCKWATER, DOMESTIC
BOTHOF, GERALD A; BOTHOF, ROGER W	36-8805	10/31/2000	0.03	0.8	IRRIGATION
BOX CANYON DAIRY	36-10044*	3/1/1984	0.55	124	IRRIGATION
BOX CANYON DAIRY	36-16282*	5/1/1985	0.26	444	IRRIGATION
BRANCHFLOWER, KATHERINE L; BRANCHFLOWER, MICHAEL G	36-8581	3/13/1991	0.74	39	IRRIGATION
BRANDSMA, ANN; BRANDSMA, HILL A	36-16036*	5/1/1985	0.18	318	IRRIGATION
BRANDSMA, DEBRA K; BRANDSMA, KENNETH A	36-8787	1/22/1999	1.05	152	IRRIGATION
CAMPBELL, ANNIE M.; CAMPBELL, WILLIAM ROY	36-8535	4/12/1990	0.13	4	IRRIGATION, DOMESTIC
CHATTERTON, DANIEL GROVER; CHATTERTON, RONDA D	36-8537	4/12/1990	0.16	5	IRRIGATION, STOCKWATER, DOMESTIC
CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS	36-11278*	4/1/1977	2.55	1610	IRRIGATION
CITY OF DIETRICH	37-8783	2/21/1992	0.45		MUNICIPAL
CITY OF WENDELL	36-8764	3/28/1997	1.27		MUNICIPAL
CITY OF WENDELL	36-8421	9/14/1998	2.76		MUNICIPAL
CLARK, BETTE L; CLARK, RAYMOND G	36-15253*	3/15/1985	0.34	211	IRRIGATION
COUNTRY CLUB ESTATES WATER ASSN INC	36-8607	11/18/1991	0.5		STOCKWATER, DOMESTIC, FIRE PROTECTION
DAVIDSON, JOSEPH E	36-8790	4/12/1999	0.05		DOMESTIC
DE KRUYF, ALICE RUTH; DE KRUYF, CALVIN	36-10082A*	3/15/1976	0.21	162.7	IRRIGATION

* Enlargement right subordinate to rights earlier than April 12, 1994

Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

Current Owner	Water Right Number	Priority Date	Diversion Rate (cfs)	Acres	Purpose of Use
DICKINSON, DALE; DICKINSON, MARSHA	36-8681	10/16/1992	0.03	1	IRRIGATION, DOMESTIC
DINOS LLC; DINOS LLC	36-8680	10/21/1992	0.1		DOMESTIC
DOTSON, MARK; HOLLANDER, LEWIS	37-8944	11/30/2000	0.2		DOMESTIC
EDWARDS, KENT F	36-8628	11/26/1991	0.18	8	IRRIGATION, STOCKWATER, DOMESTIC
EVERS BROTHERS PARTNERSHIP; NORTHWEST FARM CREDIT SERVICES FLCA	36-8584	2/26/1991	2.08	144	IRRIGATION
FATTIG, PATSY; FATTIG, WAYNE	36-8637	12/6/1991	0.23	245	IRRIGATION
FAULKNER LAND & LIVESTOCK CO INC	37-8720	4/23/1991	3.2	324	IRRIGATION
FORD, JOYCE A; FORD, THOMAS RAY	36-14619*	5/1/1965	1.32	311	IRRIGATION
FORD, JOYCE A; FORD, THOMAS RAY	36-14617*	5/1/1982	0.9	378	IRRIGATION
FORSYTH, DANNY R; FORSYTH, GINGER	36-8531	4/24/1990	0.05	0.8	IRRIGATION, DOMESTIC
FREDERICKSEN, BETTY; FREDERICKSEN, CRAIG	37-22386	10/16/2008	0.04		DOMESTIC
GILLETTE, CINDY L; GILLETTE, LARRY R	37-8742	3/28/1991	4.21	995.5	IRRIGATION
GLANBIA FOODS INC	37-8903	9/17/1999	1.67		COMMERCIAL
GOEDHART, HUGO; GOEDHART, MARY	36-8774	3/10/1998	0.13		STOCKWATER, DOMESTIC
GOOCH, BEATRICE; GOOCH, ELLIS	37-8839	11/22/1994	0.1		STOCKWATER
GOTT, MIKE	36-8534	4/27/1990	0.1	2.5	IRRIGATION, DOMESTIC
GRANT, ANGELA; GRANT, RANDY; HAGAN, ROCKY	36-14202*	5/1/1975	0.2	130	IRRIGATION
GULLEY, JUDY L; GULLEY, WILLIAM F	36-8789	3/23/1999	0.39	12	IRRIGATION
HAAGSMA FAMILY TRUST	36-8345	4/9/2001	1		STOCKWATER, COMMERCIAL
HENRY FARMS	36-15163*	5/1/1981	0.66	286	IRRIGATION
HENRY, AUDREY; HENRY, ROBERT P	36-14844*	3/15/1983	0.25	94	IRRIGATION
HOLTZEN FARMS INC	36-8603	6/14/1991	0.14		STOCKWATER
INFANGER, DEBRA A; INFANGER, JOHN N	37-20800	9/10/2002	0.14		DOMESTIC
JEROME COUNTY ROD & GUN CLUB	36-8620	11/14/1991	0.02	0.5	IRRIGATION, COMMERCIAL
JEROME JOINT SCHOOL DISTRICT NO 261	36-16441	7/10/2006	0.45		HEATING
JEROME JOINT SCHOOL DISTRICT NO 261	36-16440	7/10/2006	1.07		HEATING
JOHN L WARREN TRUST; WARREN, ARTHELLA U	45-13567*	11/14/1983	0.21	163	IRRIGATION
JOHNSON, BECKY; JOHNSON, CHARLES; NELSON, JACK; NELSON, KATHY	37-21644	2/2/2006	0.12		DOMESTIC
K & W DAIRY	36-10225K*	5/1/1985	0.58	1064.7	IRRIGATION
KEARLEY, SUSAN L; KEARLEY, WILLIAM P	36-10547*	4/1/1980	0.25	154	IRRIGATION
KECHTER, RICHARD L	45-10777B*	3/15/1976	0.23	151	IRRIGATION
KECHTER, RICHARD L	45-10679*	4/1/1977	0.52	729.5	IRRIGATION
LAST RANCH LLC	36-16140*	3/15/1974	0.03	32	IRRIGATION
LEED CORP	37-21952	9/26/2006	0.44		DOMESTIC
LIND, ELDEN; LIND, MELBA JEAN	36-8583	2/22/1991	3.99	238.9	IRRIGATION
LLOYD, CARL; LLOYD, JANICE	36-8580	2/19/1991	0.7	35	IRRIGATION
MAY, DAVID C; MAY, DEBRA J	36-15226*	6/15/1973	0.36	658	IRRIGATION
MC CABE, LINDA JOY; MC CABE, ROBERT	37-20747*	4/1/1978	0.56	300	IRRIGATION
MC CAUGHEY, MARGARET; MC CAUGHEY, WALTER L	36-8579	2/8/1991	0.68	52	IRRIGATION
MC KNIGHT, SPARR	37-22201	7/5/2007	0.2		DOMESTIC
MEYERS, ROBERT J	37-8801	10/20/1992	0.1		DOMESTIC
MILLENKAMP, SUSAN; MILLENKAMP, WILLIAM J	36-8054	4/24/1990	2.3	217.8	IRRIGATION

* Enlargement right subordinate to rights earlier than April 12, 1994

Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

Current Owner	Water Right Number	Priority Date	Diversion Rate (cfs)	Acres	Purpose of Use
MIPAD LIMITED PARTNERSHIP	37-8707	3/26/1991	2	100	IRRIGATION
MORGAN, CODY G; MORGAN, KATHY J	36-16094	3/10/1992	0.03		STOCKWATER
MORGAN, CODY G; MORGAN, KATHY J	36-16407	3/10/1992	1.53	390.5	IRRIGATION
MORGAN, CODY G; MORGAN, KATHY J	36-16408	3/10/1992	0.08		STOCKWATER, COMMERCIAL
MOUNTAIN VIEW WATER CORP	37-21278	3/22/2004	0.06		DOMESTIC
MOYLE, ALLEN; MOYLE, KARLA	36-8768	6/16/1997	0.17		STOCKWATER, COMMERCIAL
MUNSEE, G K; MUNSEE, LAREE; MUNSEE, MARK	36-8559	9/4/1990	1.86	93	IRRIGATION
NALLEY, TINA L	37-8750	7/12/1991	0.13	6	IRRIGATION, STOCKWATER, DOMESTIC
NAPIER, DIANNA K	36-8521	12/19/1991	0.03	1	IRRIGATION, DOMESTIC
NELSON, JACK; NELSON, KATHY	37-8717	3/1/1991	0.08	2.6	IRRIGATION
NELSON, JACK; NELSON, KATHY	37-8740	3/14/1991	0.09	3	IRRIGATION
NORTH RIM FAIRWAYS OWNERS ASSN INC	36-8399	1/5/1995	0.41		DOMESTIC
NORTHVIEW WATER ASSN INC	36-16204	2/9/2004	0.18	9	IRRIGATION
NORTHVIEW WATER ASSN INC	36-8747	2/2/1996	0.35	8	IRRIGATION, DOMESTIC
NORTHWEST FARM CREDIT SERVICES FLCA; VAN DYK, MARIE C; VAN DYK, RICHARD B	36-8547	4/25/1990	0.33		STOCKWATER, COMMERCIAL, DOMESTIC
NOTCH BUTTE FARMS LLC	36-16139*	3/15/1974	0.18	188	IRRIGATION
NOTCH BUTTE FARMS LLC	37-8909*	3/15/1974	0.02		STOCKWATER
OAK VALLEY LAND COMPANY LLC	45-4176*	3/15/1976	0.18	463	IRRIGATION
OAK VALLEY LAND COMPANY LLC	45-10777A*	3/15/1976	0.47	463	IRRIGATION
OLSEN, BETTY M; OLSEN, GEORGE L	36-8605	5/23/1991	0.04	1.4	IRRIGATION
OPPIO FAMILY LIMITED PARTNERSHIP	37-19848*	4/15/1987	0.29	142.4	IRRIGATION
PARKINSON, ROBERT J	36-8591	3/6/1991	1	66	IRRIGATION
PETERS, THOMAS R	36-8577	2/28/1991	1.68	94	IRRIGATION
PRICE, BERTHA; PRICE, EUGENE F	45-10000*	4/1/1971	0.74	202.1	IRRIGATION
REED, CAROL A; REED, ROBERT W	36-15227*	8/27/1973	0.7	163	IRRIGATION
ROOST POTATO CO INC	36-15152*	8/30/1984	0.08	633	IRRIGATION
ROTH INVESTMENTS LLC	36-15222*	7/5/1985	0.52	235	IRRIGATION
ROYCE, DAN; ROYCE, JO ANNE	36-8609	10/21/1991	0.02	2.5	IRRIGATION, STOCKWATER, DOMESTIC
SALMON FALLS LAND & LIVESTOCK CO INC	36-10033*	3/15/1975	1.07	370	IRRIGATION
SALMON FALLS LAND & LIVESTOCK CO INC	36-10037*	3/15/1974	1.65	404	IRRIGATION
SALMON FALLS LAND & LIVESTOCK CO INC	36-10035*	3/15/1981	0.47	370	IRRIGATION
SAWTOOTH SHEEP CO INC	37-8702	1/31/1991	2.5	260	IRRIGATION
SCHOTH, WARREN E	36-8589	5/9/1991	0.13	3	IRRIGATION, DOMESTIC
SEYMOUR, JOHN R	45-13542*	3/15/1976	1.28	479	IRRIGATION
SHAW, WILLIAM HUBERT	37-8705	2/21/1991	7	420	IRRIGATION
SIRUCEK, BECKY; SIRUCEK, MIKE	36-8569	12/10/1990	0.46	67	IRRIGATION
SLADE, DELILAH; SLADE, KEVIN L	36-15229*	8/17/1972	0.3	153	IRRIGATION
SLADE, WILLIAM J; SLADE, WYLENE	36-15228*	3/15/1973	0.1	459	IRRIGATION
SOUTH VIEW DAIRY	36-10225B*	5/1/1985	0.17	273	IRRIGATION
SOUTHFIELD DAIRY	36-2907	4/26/1990	0.8	436	IRRIGATION
SOUTHFIELD PROPERTIES LLC	37-8732	4/13/1991	3	587	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8560A	9/7/1990	1.03	135	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8560B	9/7/1990	0.12	6	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8582	2/20/1991	0.46	23	IRRIGATION
SOUTHFIELD PROPERTIES LLC	36-8760	12/4/1990	1.52	436	IRRIGATION

* Enlargement right subordinate to rights earlier than April 12, 1994

Attachment 2, p3

Attachment 2
Water Rights Subject to Curtailment - Snake River Farm Delivery Call

Current Owner	Water Right Number	Priority Date	Diversion Rate (cfs)	Acres	Purpose of Use
SOUTHFIELD PROPERTIES LLC	36-10666*	5/1/1987	0.19	142	IRRIGATION
SPENCER, GLEN D	36-8536	4/12/1990	0.03	1	IRRIGATION, DOMESTIC
STANDLEE, MIKE; STANDLEE, WHENDY	36-15178*	3/1/1975	0.04	456	IRRIGATION
STANDLEE, MIKE; STANDLEE, WHENDY	36-16500*	4/1/1984	0.51	348	IRRIGATION
STANDLEE, MIKE; STANDLEE, WHENDY	36-15119*	3/1/1975	1.31	417	IRRIGATION
STATE OF IDAHO; STATE OF IDAHO	37-7372	6/30/1999	6.54	320	IRRIGATION, STOCKWATER
STEWART, FRED R; STEWART, PHYLLIS L	36-8568	11/7/1990	0.79	240	IRRIGATION
SUHR, DANIEL A; SUHR, DONNA DEE	36-14317*	3/20/1976	0.67	153	IRRIGATION
TABER, DONALD	37-10158*	4/1/1974	1.78	466	IRRIGATION
THE ALTON & PAULA HUYSER TRUST UNDER TRUST AGREEMENT DTD 4-1-2001	37-8679	8/23/1990	0.16	8	IRRIGATION
THOMPSON, KURT; THOMPSON, LINDA B	36-8615	10/30/1991	0.05	1.5	IRRIGATION
TRAVELERS OASIS TRUCK PLAZA; WILLIE, DANIEL L	36-8766	6/8/1997	0.11		COMMERCIAL
TRAVELERS OASIS TRUCK PLAZA; WILLIE, DANIEL L	36-8767	6/19/1997	0.11		COMMERCIAL
TRIPLE C CONCRETE INC	36-16401	3/31/2006	0.04		DOMESTIC
UNIT 3 WATER ASSN INC	36-8727	5/5/1994	0.45		DOMESTIC
UNITED STATES OF AMERICA ACTING THROUGH	37-20851*	3/15/1983	0.02	30	IRRIGATION
V & L DAIRY	36-15211*	1/30/1970	0.33	75	IRRIGATION
VALLEY SCHOOL DISTRICT #262	36-16299	9/22/2004	2		DOMESTIC, FIRE PROTECTION
VASQUAZ, DUFIA; VASQUAZ, J REUBEN	36-10243*	5/1/1985	0.4	205	IRRIGATION
VEENSTRA, CHERYL; VEENSTRA, PETE	36-8803	7/13/2000	0.13		STOCKWATER, COMMERCIAL
VEENSTRA, FRANK W	36-15077*	4/1/1982	0.91	198.5	IRRIGATION
WAHLSTROM, LESLIE; WAHLSTROM, RON	36-8612	10/24/1991	0.03	1	IRRIGATION
WEBER, JEFF L; WEBER, KERI JO	37-20850*	3/15/1983	0.4	634	IRRIGATION
WEST ONE BANK IDAHO	36-15215*	3/15/1972	1.1	609	IRRIGATION
WHITTAKER, KEITH	36-8553	7/9/1990	0.13	4.3	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-4200*	3/15/1974	0.84	2785	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-15165*	3/15/1970	2.2	2785	IRRIGATION
WICKEL, ARDEL W; WICKEL, JUDY M	36-16425*	5/1/1976	0.15	2785	IRRIGATION
WILD WEST INC	37-21719	3/22/2006	0.11		DOMESTIC
WISE, EARL; WISE, INEZ	36-8638	1/7/1992	0.04	1	IRRIGATION, DOMESTIC
YERION, GEORGE A; YERION, SUSAN F	37-20717	4/29/2002	0.1	4	IRRIGATION

* Enlargement right subordinate to rights earlier than April 12, 1994

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHTS NOS. 36-04013A,	)	ORDER APPROVING
36-04013B, AND 36-07148 (SNAKE RIVER	)	DAIRYMEN'S AND IGWA'S
FARM)	)	2007 REPLACEMENT WATER
	)	PLANS, RESCINDING 2007
	)	CURTAILMENT, AND SETTING
	)	HEARING AND PREHEARING
	)	SCHEDULE
)	
	)	(Clear Springs, Snake River
	)	Farm Delivery Call)
)	

Background

On April 9, 2007, the Idaho Ground Water Appropriators, Inc., on behalf of its member ground water districts, North Snake Ground Water District and Magic Valley Ground Water District (collectively referred to herein as "IGWA"), submitted its 2007 replacement water plan ("Replacement Plan"). The Replacement Plan was submitted in response to the Director of the Department of Water Resources' ("Director" or "Department") July 8, 2005 order ("July 2005 Order"), which was issued in response to the May 2, 2005 call for delivery of senior water rights by Clear Springs Foods, Inc. on behalf of its Snake River Farm ("Clear Springs"). Because the Replacement Plan was deemed insufficient by the Director to mitigate for estimated material injury to Clear Springs, the Director, on April 30, 2007, sent letters to junior ground water users in the Thousand Springs Area of his intention to issue notices of curtailment on May 14, 2007.

The Director was temporarily enjoined from taking action when the Honorable John K. Butler of the Fifth Judicial District in and for the County of Jerome granted IGWA's request for a temporary restraining order. The temporary restraining order was later dissolved and IGWA's additional requests for judicial relief were denied by the Honorable John M. Melanson. *Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction*, Case No. CV 2007-526 (Fifth Jud. Dist. Jerome Co. June 12, 2007) (hereinafter *Melanson Order*).

On June 15, 2007, the Director issued his order curtailing junior priority ground water rights effective July 6, 2007 in portions of Water District No. 130 unless acceptable mitigation was provided by June 29, 2007. *Order Curtailing Junior Priority Ground Water Rights (Clear Springs, Snake River Farm Delivery Call)* (hereinafter "June 2007 Order"). Based on the Director's calculations using the Eastern Snake Plain Aquifer ("ESPA") ground water model, the June 2007 Order found that IGWA had provided 10.6 of the required 23.0 cubic feet per second

("cfs") of substitute curtailment water to the Buhl Gage to Thousand Springs reach of the Snake River in 2007. IGWA's estimated shortage of 12.4 cfs was reduced to 10.1 cfs based on the Director's conditional acceptance of the mitigation plan submitted by the Idaho Dairymen's Association ("IDA"), which was estimated to provide 2.3 cfs to the Buhl Gage to Thousand Springs reach of the Snake River in 2007.

Based on the Director's calculations using the ESPA ground water model, the Director ordered that the curtailment of ground water rights on an ongoing basis within Water District No. 130 that have priority dates junior to February 13, 1977, totaling 14,588 acres, would mitigate the estimated deficiency of 10.1 cfs to the Buhl Gage to Thousand Springs reach of the Snake River.

To avoid curtailment on July 6, 2007, ground water districts and individual junior priority ground water right holders were given until June 29, 2007 to file plans for replacement water, mitigation, or substitute curtailment. "To the extent that the plan is deemed acceptable by the Director, in whole or in part, the Director shall modify the identified priority date and reduce the number of curtailed junior priority ground water rights, or possibly rescind the ordered curtailment." *June 2007 Order* at 16.

On June 18, 2007, IGWA filed its *Sixth Request for Hearing, Request for Expedited Hearing, Request for Stay, and Request for Consolidation* with the Department.

On June 29, 2007, IGWA filed its *North Snake Ground Water District and Magic Valley Ground Water District Joint Supplemental Replacement Water Plan* with the Department ("Supplemental Plan"). The 2007 Supplemental Plan pledged an additional 10,000 acre-feet of water to be run through the North Side Canal and its associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete.

Based upon the Director's consideration of this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Findings of Fact set forth in the July 2005 Order and June 2007 Order, as well as all orders related thereto, as applicable, are incorporated into this order by reference.

IGWA's June 18, 2007 Request for Hearing

2. In its *Sixth Request for Hearing, Request for Expedited Hearing, Request for Stay, and Request for Consolidation* ("Request for Hearing"), IGWA states that the Director, by issuing the June 2007 Order without an opportunity for hearing, violated its constitutional right to due process; accordingly, the matter should be stayed until a hearing has been held:

The Spring Users have been provided due process by the Department acting expeditiously on issuing the 2005 Orders, making findings of fact and conclusions of law as to the nature and extent of material injury to the Spring Users' water

rights because of alleged ground water withdrawal from the Eastern Snake Plain Aquifer.

....

Because of the complex nature of the administration of the Spring Users' water rights and the potential permanency of curtailment ordered, it is reasonable to allow the junior water users an opportunity to assert affirmative defenses before being physically curtailed.

....

This case presents very different issues than a normal water delivery call that occurs between surface water users and even in the parallel case involving the Surface Water Coalition. . . . Unlike in normal water delivery call situations where the watermaster has a century's worth of knowledge about which water users are junior and which ones are senior, the issues raised in this matter are not tested. Certainly the junior water users should not bear the unreasonable weight of having their property rights destroyed and the economic devastation to the region occur when there are very real and unresolved legal questions concerning the severity of the calling water rights. Prudent, deliberate and judicious action is warranted and this includes the opportunity for the junior water users to assert their affirmative, legal defenses prior to suffering complete, physical curtailment.

....

Given the gravity of this situation and the questions of the validity of the Spring Users' Delivery Calls, it is appropriate that the Department exercise its discretion . . . and stay physical curtailment under the 2005 Orders and subsequent orders until such time as the Ground Water Districts have been afforded an opportunity to present their legal defenses and get final answers to these important questions.

Request for Hearing at 4-6.

IGWA Supplemental Plan

3. The Supplemental Plan states that the "Ground Water Districts propose to provide an additional 10,000 acre-feet of water through the North Side Canal Company delivery system for late season recharge. . . . This brings the total amount of water to be conveyed to Wilson Lake or other locations for recharge purposes to 20,000 acre-feet. Delivery of this surface water to Wilson Lake will result in recharge to the aquifer from seepage or conveyance loss through the canal itself and seepage from the lake itself." *Supplemental Plan* at 2. "This Supplemental Replacement Water Plan and the proposed activities are contingent upon approval of the Joint Replacement Water Plans for 2007, resulting in no curtailment of ground water users for the 2007 calendar year." *Id.*

Gains to the Buhl Gage to Thousand Springs Reach of the Snake River

4. The IDA has pledged 9,500 acre-feet of water to be run through the North Side Canal and associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete.¹ The 9,500 acre-feet of recharge water pledged by IDA is in lieu of mitigation measures that were estimated using the ESPA ground water model to provide 2.3 cfs to the Buhl Gage to Thousand Springs reach of the Snake River in the June 2007 Order.

5. In its Replacement Plan, IGWA devoted 10,000 acre-feet of water to recharge to be run through the North Side Canal and associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete. As stated in the June 2007 Order, the amount of water credited to IGWA for purposes of recharge was 0.9 cfs.

6. In its Supplemental Plan, IGWA has pledged an additional 10,000 acre-feet of water for purposes of recharge to be run through the North Side Canal and associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete.

7. The total amount of water committed for recharge by IGWA and IDA for 2007 is 29,500 acre-feet. The estimated capacity of the North Side Canal and associated laterals for purposes of recharge after irrigation of lands serviced by the North Side Canal Company is complete is 30,000 acre-feet.

8. Based on simulations using the ESPA ground water model, if curtailment of the rights that were identified in the June 2007 Order occurred on or about July 1, 2007,² the following gains, expressed in cfs, are predicted to appear in the Buhl Gage to Thousand Springs reach of the Snake River:³

1st yr	3.7	6th yr	0.1	11th yr	0.1	16th yr	0.0
2nd yr	0.6	7th yr	0.1	12th yr	0.1	17th yr	0.0
3rd yr	0.3	8th yr	0.1	13th yr	0.1	18th yr	0.0
4th yr	0.2	9th yr	0.1	14th yr	0.0	19th yr	0.0
5th yr	0.2	10th yr	0.1	15th yr	0.0	20th yr	0.0

¹ For purposes of prediction using the ESPA ground water model, water provided by IDA for recharge has been simulated as if the commitment were for 9,000 acre-feet.

² For purposes of prediction using the ESPA ground water model, July 1 was used instead of July 6.

³ The reduction in crop consumptive use and the benefit to the aquifer due to a partial year curtailment was computed using METRIC and the ESPA ground water model. METRIC stands for Mapping EvapoTranspiration at high Resolution with Internalized Calibration. METRIC is a satellite-based image-processing model that computes and maps evapotranspiration at the earth's surface using digital images collected by remote-sensing satellites measuring visible, near-infrared, and thermal infrared radiation.

9. Based on simulations using the ESPA ground water model, the 10,000 acre-feet of water pledged by IGWA in its Supplemental Plan, if run through the North Side Canal and associated laterals after irrigation of lands serviced by the North Side Canal Company is complete, will result in the following predicted gains, expressed in cfs, in the Buhl Gage to Thousand Springs reach of the Snake River:

1st yr	0.9	6th yr	0.1	11th yr	0.0	16th yr	0.0
2nd yr	0.3	7th yr	0.1	12th yr	0.0	17th yr	0.0
3rd yr	0.2	8th yr	0.1	13th yr	0.0	18th yr	0.0
4th yr	0.1	9th yr	0.0	14th yr	0.0	19th yr	0.0
5th yr	0.1	10th yr	0.0	15th yr	0.0	20th yr	0.0

10. Based on simulations using the ESPA ground water model, the 20,000 acre-feet of water pledged by IGWA (10,000 acre-feet from the Replacement Plan and 10,000 acre-feet from the Supplemental Plan), combined with the 9,500 acre-feet pledged by IDA, totaling 29,500 acre-feet, if run through the North Side Canal and its associated laterals after irrigation of lands serviced by the North Side Canal Company is complete, will result in the following predicted gains, expressed in cfs, in the Buhl Gage to Thousand Springs reach of the Snake River:

1st yr	2.6	6th yr	0.2	11th yr	0.1	16th yr	0.1
2nd yr	0.7	7th yr	0.2	12th yr	0.1	17th yr	0.1
3rd yr	0.4	8th yr	0.1	13th yr	0.1	18th yr	0.0
4th yr	0.3	9th yr	0.1	14th yr	0.1	19th yr	0.0
5th yr	0.2	10th yr	0.1	15th yr	0.1	20th yr	0.0

11. The currently estimated shortfall to the Buhl Gage to Thousand Springs reach of the Snake River is 10.7 cfs.

Recharge	Voluntary Reductions	Conveyance Loss	Conversions	CREP	Total Provided	Required	Shortfall
2.6	0.0	2.1	7.3	0.3	12.3	23.0	10.7

12. Comparing curtailment of 14,588 acres on or about July 1, 2007 for the remainder of the 2007 irrigation season, *Finding of Fact 8*, with an additional 10,000 acre-feet of recharge for 2007, *Finding of Fact 9*, results in a deficit of 2.8 cfs to the Buhl Gage to Thousand Springs reach of the Snake River.

13. As stated in the July 2005 Order:

The segment that includes the springs providing the source of water from which Clear Springs diverts surface water for its Snake River Farm is the Buhl Gage to Thousand Springs spring reach. Based on measurements published by the USGS (USGS Maps 1-1947-A through 1-1947-E) of spring discharges in the Buhl Gage to Thousand Springs spring reach taken at various times when the discharges from springs in the Thousand Springs area were near the historical maximums and used to calibrate the ESPA ground water model, the maximum authorized amount of

water diverted by Clear Springs for its Snake River Farm (equal to the total diversion rate of 117.67 cfs under the water rights for the Snake River Farm) accounted for 7 percent of the measured reach gains in the Buhl Gage to Thousand Springs spring reach.

July 2005 Order at 5, ¶ 15.

14. The ESPA ground water model simulates gains and depletions to particular reaches of the Snake River under a range of conditions. Site specific characteristics are not identified in the ESPA ground water model and therefore the model does not simulate gains and depletions to discrete springs. In order to arrive at a predicted gain or depletion to a discrete spring, historical spring flow measurements are used to develop a proportionate share of reach gain for each individual spring. There is uncertainty associated with individual spring gain and depletion predictions because of the lack of homogeneity in the aquifer. The actual gain or depletion to a particular spring will be affected by the specific geologic characteristics above the spring.

15. The reach of the Snake River in which the Buhl Gage to Thousand Springs reach is located is approximately 11 miles long.

16. Seven percent of the 2.8 cfs difference expressed in *Finding of Fact 8* and *Finding of Fact 9* is 0.2 cfs.

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the July 2005 Order and June 2007 Order, as well as all orders related thereto, as applicable, are incorporated into this order by reference. All findings of fact in this order later deemed to be conclusions of law are hereby made as conclusions of law.

2. The Director of the Department of Water Resources is vested with authority to exercise his discretion in supervising water distribution within water districts in the state of Idaho:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-602.

3. Over more than a century, administration of surface water rights under the prior appropriation doctrine has evolved. As the Idaho Supreme Court has recently reaffirmed, "While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception." *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (hereinafter *AFRD#2*). Some notable exceptions include the duty of the senior to use a reasonable means of diversion, *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), to only divert that amount necessary to achieve the authorized beneficial use, *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935), and the authority of the Director to deny a delivery call based on the futile call doctrine, *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966). These unexclusive exceptions to the first in time first in right principle seek to resolve the tension between the two management objectives of the prior appropriation doctrine: providing security of right to the senior water user while precluding waste or less than optimum use of the resource.

4. In large part, administration of surface water rights has been aided by the simple fact that surface water is visible, which allows the Director and his water masters to monitor water supplies during times of scarcity.

When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower.

AFRD#2 at 877, 154 P.3d at 448 citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 73 (1987).

The hydrologic complexity of administering surface to ground water calls is simply not the same as administering solely surface water delivery calls. *Id.* "While the Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine, those principles are more easily stated than applied" in the context of surface to ground water calls. *Id.* at 869, 154 P.3d at 440.

5. Relative to surface water administration, Idaho, like other western states, has only recently begun to conjunctively administer surface water and ground water. In 1951, Idaho's legislature passed the Idaho Ground Water Act, which has been amended over time and is currently codified, in part, at Idaho Code § 42-226. Idaho Code § 42-226 states in pertinent part:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

See *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (“We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest.”).

6. The issue of how to integrate the administration of surface and ground water rights diverting from a common water source in the Eastern Snake Plain area has been a continuing point of controversy for more than two decades. To date, no Idaho court has fully addressed the issue of how to integrate the administration of surface and ground water rights that were historically administered as separate sources. The progress made in adjudicating ground water rights in the Snake River Basin Adjudication and development of the ESPA ground water model to simulate the effects of ground water depletions on hydraulically-connected tributaries and reaches of the Snake River now allows the State to address this issue during this period of unprecedented drought. Further progress has been made with the creation and adoption of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 *et seq.* While progress has been made, conjunctive administration of water rights remains in its infancy and the Department and water right holders continue to grow in their understanding of how best to conjunctively manage the resource, particularly in the context of a delivery call by a spring user where water must arrive at a discrete point of diversion within a multi-mile river reach.

7. In regard to conjunctive administration, the Director must balance the principle of “first in time is first in right” with “full economic development of underground water resources” to allow for “optimum development of water resources.” “Reasonableness” of use must also guide the Director in administration. *AFRD#2* at 875, 154 P.3d at 446. Recognizing the difficulty in administering water rights, the Idaho Supreme Court recently reaffirmed that “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *Id.*

8. This matter was originally commenced on May 2, 2005 following a delivery call by Clear Springs. While IGWA correctly notes in its Request for Hearing that it has made repeated requests for a hearing, the first of which was filed on July 19, 2005, at no time has the Director denied a request for hearing. Instead, because of legal maneuvering by the parties, requests by the parties for schedule changes, and matters wholly unrelated to the delivery call proceeding initiated by Clear Springs, *see AFRD#2*, the hearing schedule has been delayed. Clear Springs has also called for a hearing in this matter since the Director issued his July 2005 Order. *Motion for Reconsideration* (July 18, 2005).

9. While junior water right holders are entitled to a hearing to contest a determination by the Director that such rights are causing material injury to a senior water right holder, under Idaho law such hearing traditionally occurs after the notice of curtailment in order to avoid further injury to the rights of the senior water right holder. *AFRD#2* at 875, 154 P.3d at 446.

10. The circumstances presented in this matter are unique. As noted in Conclusion of Laws 3 through 7, and in *AFRD #2* at 877, 154 P.3d at 448, the application of the prior appropriation doctrine in the context of conjunctive administration of hydraulically connected surface and ground water rights is presently uncertain. Only through completion of an

administrative proceeding and subsequent appeals will the application of the prior appropriation doctrine in the context of conjunctive administration of surface and ground water rights become more clear.

11. Just like senior surface water rights, junior ground water rights are real property and are entitled to protection under the prior appropriation doctrine. It is imperative that both the senior and junior water right holders have a timely opportunity to be heard and present challenges and defenses to the orders issued in this case: "Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water." *AFRD#2* at 875, 154 P.3d at 446. What is timely will vary from case-to-case: "Given the complexity of the factual determinations that must be made in determining material injury, whether the water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts." *Id.*

12. While the Director has exercised his best professional judgment in determining how the prior appropriation doctrine should be applied in the context of Clear Springs' delivery call against junior ground water right holders, such determination is not free from doubt, as demonstrated by the pleadings that have been filed in this matter by both Clear Springs and IGWA that dispute the Director's determinations.

13. The Replacement Plan, Supplemental Plan, and water committed by IDA for recharge do not fully satisfy the June 2007 Order. *Finding of Fact 11*. Based on the Director's calculations using the ESPA ground water model, the additional 10,000 acre-feet of recharge pledged by IGWA is estimated to produce 0.9 cfs in gain to the Buhl Gage to Thousand Springs reach of the Snake River in 2007. *Finding of Fact 9*. If the Director were to order curtailment on July 6, 2007, the ESPA ground water model estimates that gains to the Buhl Gage to Thousand Springs reach of the Snake River for 2007 would result in 3.7 cfs. *Finding of Fact 8*. The resulting difference between curtailment and additional recharge in 2007 is 2.8 cfs. *Finding of Fact 12*.

14. Because the springs that provide water to Clear Springs for use at its Snake River Farm are located at discrete points within the 11-mile Buhl Gage to Thousand Springs reach of the Snake River, *Finding of Fact 15*, only 7 percent of the predicted difference of 2.8 cfs, *Finding of Fact 13*, resulting in a predicted difference of 0.2 would be expected to appear at Clear Springs, *Finding of Fact 16*.

15. The predicted difference of 0.2 cfs in gains to Clear Springs' discrete points of diversions is insignificant given the uncertainty surrounding the hydraulic relationship between the gain to the Buhl Gage to Thousand Springs reach of the Snake River, as determined by the ESPA ground water model, and actual gains to the springs. Thus, only for calendar year 2007 the Director shall deem that the proposed mitigation measures for Clear Springs are sufficient.

16. Given the complexity and uncertainty in the application of the prior appropriation doctrine in the context of conjunctive administration; that the ground water users have provided an acceptable level of mitigation for the material injury occurring as a result of depletions in

2007; that junior ground water users have committed to provide nearly as much water for recharging the ESPA through the North Side Canal and its associated laterals as is possible; and that more than two years have passed without a hearing since the initiation of the delivery call, the Director should approve IGWA's Replacement Plan and Supplemental Replacement Plan for 2007.

17. This determination is further bolstered by the fact that the 0.2 cfs in additional water expected to arrive at Clear Springs' discrete points of diversion in the 11-mile Buhl Gage to Thousand Springs reach of the Snake River, as a result of curtailment is not a significant enough quantity of water to justify the curtailment of 14,588 acres, especially given that the consequences of curtailment prior to a hearing will result in irreversible consequences to many junior priority ground water users.

18. Based on acceptance of IDA's pledge for 9,500 acre-feet of water to be used for recharge purposes in 2007 and IGWA's Replacement Plan and Supplemental Plan for 2007, the Director should rescind his June 15, 2007 *Order Curtailing Junior Priority Ground Water Rights (Clear Springs, Snake River Farm Delivery Call)*.

19. The water rights under which Clear Springs filed its delivery call are located in the immediate downstream reach of the Snake River from the water rights under which Blue Lakes Trout Farm, Inc. filed its delivery call ("Blue Lakes"). Because of their relative locations, many impacts to Blue Lakes are felt downstream by Clear Springs. Based on the pleadings filed in those matters, it is the Director's professional judgment that the delivery calls filed by Clear Springs and Blue Lakes are inextricably related in many issues of law and fact. Furthermore, many of IGWA's factual and legal defenses to each delivery call are also related. Therefore, for purposes of economy and the need to provide a timely hearing that will settle the contested issues in the affected reaches before the commencement of the 2008 irrigation season, *AFRD#2* at 875, 154 P.3d at 446, a joint hearing should be held in the Clear Springs and Blue Lakes delivery calls. If issues are identified that are unique to Clear Springs or Blue Lakes, the joint hearing will allow for separate times to put on evidence and make argument on those points.

20. The determination to approve IGWA's Replacement Plan and Supplemental Plan for the balance of the calendar year is directly linked to the need to hold a joint hearing in these matters, the parties' repeated requests to hold a hearing, and the public interest that a hearing be held and an order issued prior to commencement of the 2008 irrigation season.

21. These points are further underscored by Judge Melanson in the accompanying transcript to his June 12, 2007 ruling that dissolved IGWA's temporary restraining order and dismissed its other requests for judicial relief when he stated that a hearing should be "conducted with dispatch . . . [so] that the matters are concluded expeditiously . . ." *Melanson Order*, Transcript at 10-11.

22. Based on the above, the Director should order a joint hearing to commence on October 10, 2007 in the delivery calls filed by Blue Lakes and Clear Springs. No extensions of time will be granted, as timely resolution of these delivery calls before the start of the 2008 irrigation season is paramount. The Director should order the following prehearing schedule:

August 22, 2007—deadline for submitting expert reports;

August 22, 2007—deadline for pre-filed direct testimony (required for retained consultants/optional for others), and all exhibits to be used at hearing with experts;

September 5, 2007—deadline for rebuttal reports;

September 5, 2007—deadline for pre-filed rebuttal testimony and all exhibits to be used in rebuttal;

September 7, 2007—disclose all lay witnesses/identify all exhibits to be used at hearing with lay witnesses (as well as any pre-filed direct testimony for lay witnesses, if desired);

September 26, 2007—deposition deadline/discovery completed deadline;

October 3, 2007—written opening brief/trial brief (if desired);

October 4, 2007—pre-hearing conference and hearing on pre-hearing motions; and

October 10, 2007—hearing commences (with expected hearing to run through October 31, 2007, if necessary).

23. The Director will appoint an independent hearing officer to preside over this matter.

ORDER

In response to the water delivery call made by Clear Springs Foods, Inc. on behalf of its Snake River Farm, and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director ORDERS as follows:

IT IS HEREBY ORDERED that the pledge of 9,500 acre-feet of water for purposes of recharge in 2007 from the Idaho Dairymen's Association and the *North Snake Ground Water District and Magic Valley Ground Water District Joint Replacement Water Plan* and the *North Snake Ground Water District and Magic Valley Ground Water District Joint Supplemental Replacement Water Plan*, submitted by the Idaho Ground Water Appropriators, Inc., are APPROVED.

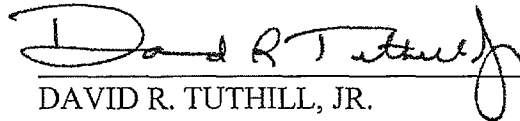
IT IS FURTHER ORDERED that the Director's June 15, 2007 *Order Curtailing Junior Priority Ground Water Rights (Clear Springs, Snake River Farm Delivery Call)* is RESCINDED.

IT IS FURTHER ORDERED that a hearing *In the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm)* shall commence on October 10, 2007 and in accordance with the above prehearing schedule. The hearing shall be presided over by an independent hearing officer.

IT IS FURTHER ORDERED that the watermaster for Water District No. 130 and the Idaho Department of Water Resources' supervisor for water distribution for Water District No. 34 are directed to issue written notices within five (5) days of the date of this order to the holders of certain consumptive ground water rights located in Water District Nos. 34 and 130, listed in the attachment to the June 15, 2007 *Order Curtailing Junior Priority Ground Water Rights (Blue Lakes Delivery Call)*, and bearing priority dates junior to December 9, 1990, that the June 15, 2007 order is rescinded and their rights are no longer subject to curtailment during this irrigation season. Junior water right holders, however, should anticipate that administration of their rights in 2008 will be conducted in accordance with the outcome of the October 10, 2007 hearing, which may result in curtailment.

IT IS FURTHER ORDERED that this is a final order of the agency and all aspects of the order shall be subject to review at the hearing that will take place on October 10, 2007.

Dated this 5th day of July, 2007.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July, 2007, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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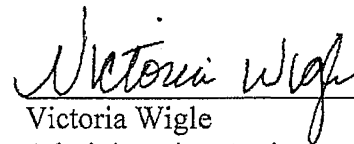
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Victoria Wigle
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Idaho Department of Water Resources