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DEPARTMENT OF
WATER RESOURCES

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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. <u>The Ground Water Districts are actively seeking additional conversion acres to replace those that have discontinued.</u>
>
> 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. <u>New Conversion Acres</u>

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. <u>Old 9,300 Acres</u>

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, no where 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, 2009Order 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:

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