

Randall C. Budge, ISB #1949
Candice M. McHugh, ISB #5908
RACINE OLSON NYE
BUDGE & BAILEY, CHARTERED
101 S. Capitol Blvd., Suite 208
Boise, Idaho 83702
Telephone: (208) 395-0011
rcb@racinelaw.net
cmm@racinelaw.net

ATTORNEYS FOR THE GROUND WATER DISTRICTS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF
DISTRIBUTION OF WATER TO
WATER RIGHT NOS. 36-4013A, 36-
4103B and 36-7148 (Snake River
Farm)

IN THE MATTER OF THE THIRD
MITIGATION PLAN (OVER-THE-
RIM) OF THE NORTH SNAKE AND
MAGIC VALLEY GROUND WATER
DISTRICTS TO PROVIDE
REPLACEMENT WATER FOR
CLEAR SPRINGS SNAKE RIVER
FARM

(Water District Nos. 130 and 140)

Docket No. CM-MP-2009-004

**AFFIDAVIT OF CANDICE MCHUGH
IN SUPPORT OF PRE-HEARING
BRIEF**

(Over-the-Rim Mitigation Plan)

CANDICE M. MCHUGH, 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. 5908, and member of the law firm of Racine, Olson, Nye, Budge &

Bailey, Chartered, Pocatello, Idaho, attorneys of record for the Ground Water Districts.

2. I am familiar with the Orders, pleadings, and depositions taken in the above captioned matter.

3. To the best of my knowledge, information and belief, Exhibit No. 2027 attached hereto contains true and correct copies of the deposition pages referenced in the *Ground Water Districts Pre-Hearing Brief and Response to Motion to Dismiss*.

4. Exhibit 2028 is a true and correct transcription of a portion of the audio from the November 24, 2009 scheduling conference *In the Matter of North Snake and Magic Valley Ground Water Irrigation Districts' 2009 Joint Mitigation Plan to Compensate Blue Lakes Trout Farm, Inc.*, IDWR Docket No. CM-MP-2009-01.

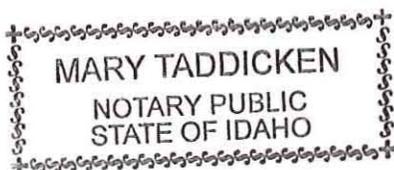
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 1st day of December, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED


Candice M. McHugh

SUBSCRIBED AND SWORN TO before me this 1st day of December, 2009.




NOTARY PUBLIC FOR IDAHO,
Residing at Boise.
My Commission Expires 9-12-13

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of December, 2009, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:



Signature of person mailing form

Gary Spackman, Interim
Director
c/o Victoria Wigle
Idaho Dept of Water Resources
PO Box 83720
Boise ID 83720-0098
Gary.spackman@idwr.idaho.gov
Phil.rassier@idwr.idaho.gov
Chris.Bromley@idwr.idaho.gov

Gerald F. Schroeder
Hearing Officer
Home address
Boise ID 83704
fcjschroeder@gmail.com

John Simpson
Barker Rosholt & Simpson
1010 W Jefferson, Ste 102
PO Box 2139
Boise, ID 83701-2139
jks@idahowaters.com

Mike Creamer
Jeff Fereday
Givens Pursley
PO Box 2720
Boise, ID 83701-2720
mcc@givenspursley.com
jefffereday@givenspursley.com

EXHIBIT 2027

Snake River Farm OTR

Luke, Timothy James

11/16/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

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) Docket No.
 (SNAKE RIVER FARM)) CM-MP-2009-004
 (Water District Nos. 130 and 140))
 Third Mitigation Plan)

_____)

DEPOSITION OF TIMOTHY JAMES LUKE

NOVEMBER 16, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 A. Yes.

2 Q. And in your view, would that transfer
3 and the approval of that transfer be necessary in
4 order to determine the validity of their
5 mitigation plan?

6 A. Well, mitigation plan? There's a
7 separate hearing process, of course, for the
8 mitigation plan. So if the question is -- I don't
9 think the transfer on itself would dictate the
10 validity of the mitigation plan.

11 Q. So if the transfer injures other water
12 rights which are not mitigated through either the
13 transfer or the mitigation plan, would the
14 mitigation plan be approvable?

15 MR. BROMLEY: Calls for a legal conclusion.

16 Q. (BY MR. SIMPSON): Answer if you can.

17 A. Well, I think that would be an issue,
18 yes.

19 Q. And, Mr. Luke, are you familiar with
20 the conjunctive management rules, generally?

21 A. Yes.

22 Q. Okay. I'm going to hand you a copy of
23 Rule 43 and draw your attention to 43.03, which
24 identifies the factors to be considered in
25 approval of a mitigation plan and give you an

1 ground water counsel and suggested that they file
2 a water right transfer application sooner rather
3 than later?

4 A. Yeah, I think it makes sense to view
5 the transfer with the mitigation plan.

6 Q. That both the transfer and the
7 mitigation plan be considered at the same time?

8 A. Yeah, that -- I mean there's a timing
9 issue there. I think the transfer -- when they
10 filed the original over-the-rim plan, they
11 indicated a transfer would be filed. And of
12 course, the two-year stay came, so that likely put
13 a perhaps -- put that in the background, I guess,
14 at best.

15 So -- but we had expected a transfer
16 to be filed all along. So the question had come
17 up, I think sometime in September, had we received
18 the transfer. And we hadn't, so we reminded them
19 of the need to do that.

20 But I think there's a lot of reasons,
21 you know, for further delay. It is another
22 process that has to be done, but it makes sense to
23 look at them together.

24 Alternatively, they could -- and I
25 think this is something they probably ought to do

1 as well, is make application to at least those
2 rights to the water supply bank, and perhaps rent
3 them out just as a plan B or a precaution. That
4 was identified, I believe, in Director Tuthill's
5 approval of the original plan, at least as a
6 replacement plan before a hearing would be held.

7 Q. Has the Department completed an
8 analysis of the injury question as to the injury
9 that would result from the transfer?

10 A. No.

11 Q. So the Department hasn't looked or ran
12 the model or did any type of an analysis which
13 would consider the effects of the movement of
14 water and the change in the nature of use, period
15 of use as to either the Snake River Farms water
16 rights or any other water rights in that reach?

17 A. Not that I'm aware of.

18 Q. Okay. Mr. Luke, could the mitigation
19 plan be constructed without an approvable plan?

20 A. No, I don't -- I guess it could be,
21 but it would be foolish.

22 Q. Okay. Could water be delivered
23 pursuant to the plan without an approved transfer?

24 A. I think it could be, but there would
25 have to at least be an approved water supply bank,

1 acceptable parameter to rear fish at Clear
2 Springs?

3 A. Correct.

4 Q. Do the conjunctive management rules
5 require that an approved transfer first be done
6 before a mitigation plan or a concept of a
7 mitigation plan could be approved?

8 A. Not specifically, but it -- as I
9 pointed out earlier, there are similar criteria.

10 Q. And isn't it true that the transfer
11 would be required to actually deliver the water to
12 Clear Springs --

13 A. I guess --

14 Q. -- as part of an implementation of an
15 approved mitigation plan?

16 A. It would.

17 Q. Okay. So the mitigation plan could
18 itself be approved, and then the actual delivery
19 of water under it may have to require additional
20 steps or additional implementation, such as actual
21 construction and an approved transfer in this
22 case?

23 A. Yes.

24 Q. Now, I think you looked at Appendix 5
25 of Exhibit 31, which is the transfer processing

Snake River Farm OTR

Yenter, Cindy

11/16/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

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) Docket No.
 (SNAKE RIVER FARM)) CM-MP-2009-004
 (Water District Nos. 130 and 140))
 Third Mitigation Plan)
 _____)

VIDEOCONFERENCE DEPOSITION OF CINDY YENTER

NOVEMBER 16, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 given time.

2 Q. Okay.

3 A. That is really what my understanding
4 was.

5 Q. Okay. And depending on the water
6 quality that the different ground water wells may
7 produce because of the time the over-the-rim plan
8 was filed, was it your understanding that the
9 ground water districts over-the-rim plan may need
10 to have a different combination of wells,
11 depending on what the water-quality testings have
12 shown?

13 A. Yes, I was generally aware of that
14 fact.

15 Q. Okay. So at this point, until the
16 over-the-rim mitigation plan, first of all, is
17 considered as a viable option for mitigating Snake
18 River Farms and until it's known what parameters
19 may need to be met as far as water quality or
20 reliability of the delivery system, filing a final
21 transfer to capture that could be considered
22 premature?

23 MR. SIMPSON: Objection. Speculation,
24 foundation.

25 Q. (BY MS. McHUGH): You can answer if

Snake River Farm OTR

***MacMillan, Ph.D., John Randolph -
Vol. II***

11/11/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

1 A. That's correct. That's correct.

2 Q. Okay. Has there been any studies or
3 empirical data that support this concern that
4 you've expressed and Mr. Cope expressed yesterday
5 that somehow Clear Springs' product marketability
6 would be jeopardized?

7 A. No, there's not been any studies.
8 That kind of quantitative study is -- you have to
9 do it after the fact. And so what -- we have to
10 make the judgment, Mr. Cope has to make the
11 judgment whether or not -- and our marketing
12 people would have to make the judgment what would
13 be the actual implications of that.

14 Q. Would you have any different opinion
15 than was expressed by Mr. Cope as to whether or
16 not Clear Springs would accept water from the plan
17 if it were approved and constructed? If I recall
18 his testimony, he suggested that would have to be
19 a decision made at a later date.

20 A. That's the current state of our
21 discussions, that's correct. So I agree with
22 Mr. Cope.

23 Q. Okay.

24 A. We obviously would prefer that you do
25 not build that pipeline because we're opposed to

1 it. And the reason we are in the current
2 conditioned stay, if you'll recall in a different
3 proceeding, is that we think that there are better
4 ways to address things than in the OTR and in the
5 current process we're in.

6 Q. So Clear Springs obtained that stay
7 order I believe of May 15th, 2009, and I believe
8 it's Clear Springs' position that that stay order
9 remains in effect for a two-year period?

10 A. That's correct.

11 Q. And is it your view, I believe
12 consistent with what Mr. Cope testified, that if
13 the plan were approved, that before any capital
14 expenditures were made -- I think that's how he
15 characterized it -- it would be appropriate to
16 have further dialogue on other solutions?

17 A. That's correct.

18 Q. Do you have any specific proposals --
19 I know your testimony and Mr. Cope's suggested
20 that there were other proposals that should be
21 pursued by the ground water districts short of
22 curtailment.

23 Do you have any elaboration or
24 information you could provide on what other
25 proposals would be acceptable to Clear Springs in

Snake River Farm OTR

Cope, Larry W.

11/10/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

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) Docket No.
 (SNAKE RIVER FARM)) CM-MP-2009-004
 (Water District Nos. 130 and 140))
 Third Mitigation Plan)
 _____)

DEPOSITION OF LARRY W. COPE

NOVEMBER 10, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 all have to live with the order until it's
2 changed?

3 A. I agree the reason we're here today is
4 the mitigation plan. And I understand that.

5 Q. So as I understand your testimony, the
6 obligation that we're here dealing with, which is
7 the ground water's desire to use this plan to
8 provide additional water, and that amount would be
9 3 second-feet for a period of time until the
10 shortfalls are made up, and then whatever
11 remaining obligation is ongoing under the current
12 orders.

13 My understanding is correct on that?

14 A. That's my understanding of what the
15 mitigation plan is, yes.

16 Q. And so if the additional 3 second-feet
17 of water is supplied pursuant to this plan, it, in
18 fact, would be utilized to grow more fish;
19 correct?

20 A. If -- I guess it remains to be seen if
21 that's where the order -- if the order is issued
22 to that.

23 Q. Yeah, correct. But assuming that the
24 over-the-rim plan were approved and the facilities
25 constructed and additional 3 second-feet of water

1 were delivered to the Snake River Farms facility,
2 that water could be used to grow fish?

3 A. That probably could be used to grow
4 fish, I believe, that internally we will have to
5 make an assessment on a risk/value basis if we
6 should do that --

7 Q. Okay.

8 A. -- because of our image of our
9 products.

10 Q. And I think you said earlier that the
11 amount of water equates to a level of fish
12 production, which equates to a level of profit
13 that could be achieved by Clear Springs with the
14 additional water?

15 A. That's correct. There's a definite
16 relationship between water flows and the success
17 of our business.

18 Q. And if the ground water districts were
19 to replace the fish that couldn't be produced by
20 acquiring them from another supplier, as you do
21 now with Sea-Pac or with Blue Lakes, would that
22 not make Clear Springs whole?

23 A. It really doesn't, because it's what
24 we're talking about is what the impact on the
25 value of our business. And if our business -- if

1 water proposed on a reliable basis?

2 A. Over time if it did.

3 Q. So the actual operation will give us a
4 better gauge as to whether or not, one, the system
5 will function, and two, whether the water quality
6 will be equal to or not equal to the existing
7 supply, and number three, whether or not the
8 additional water could be used in the same manner
9 to grow commercial rainbow trout that Clear
10 Springs now does?

11 A. That if it's proven over the long
12 term? I don't know how I could disagree with that
13 if it's proven that it does.

14 Q. Okay.

15 A. The question is whether it can be
16 proven and as to whether it's sustainable to
17 continue pumping by the ground water pumpers.

18 Q. You indicated earlier that Clear
19 Springs has not yet made a decision whether they
20 would accept that delivery if it were approved and
21 were constructed.

22 If the director were to approve the
23 plan, would you think it would be likely or
24 reasonable to give some indication of whether the
25 water would be accepted by Clear Springs before

1 the ground water districts went to the cost of
2 construction?

3 A. Actually, I would want to have a
4 complete discussion before -- before the
5 investment was ever made.

6 Q. Okay. On page 6, line 219, you made a
7 suggestion there that there was going to be
8 blasting that would injure the fish. And I don't
9 recall anything in the plan suggesting that any
10 blasting would be done at any location.

11 And I was wondering what you base that
12 concern on?

13 A. I used the term "comma, and perhaps
14 blasting" in my testimony here.

15 Q. All right.

16 A. Because I think it's perhaps just
17 knowing the geology, knowing what we know about
18 the work we've done around there, there's -- you
19 hit really hard rock underneath that ground most
20 places where you excavate.

21 It seems to me, based on our
22 experience, it's a bigger task than backhoe work.
23 So whether it be blasting or perhaps using
24 jackhammers, that's where my concern lies in
25 getting a trench around there.

Snake River Farm OTR

Cope, Larry W.

11/10/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

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) Docket No.
(SNAKE RIVER FARM)) CM-MP-2009-004
(Water District Nos. 130 and 140))
Third Mitigation Plan)
_____)

DEPOSITION OF LARRY W. COPE
NOVEMBER 10, 2009

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

1 Q. Okay. And then do you do the
2 processing of it in the United States?

3 A. They do all of the processing.

4 Q. They do everything?

5 A. And they do all of the packaging.

6 Q. So you're basically doing the
7 marketing?

8 A. Well, we buy the product. We're the
9 customer. We own the product. And that product
10 goes through private-label channels.

11 Q. What's the source of water that the
12 Chilean company uses?

13 A. They have a -- it's a very pristine
14 water. They're located up in southern Chile
15 nestled up against the Andes Mountains, and
16 there's nothing really essentially between their
17 operations and the runoff out of the Andes. Very
18 pristine water that they utilize in the rivers.

19 They don't have the benefit that we
20 have in the type of water. Their culture has to
21 be different because they have different water
22 temperatures seasonally with it, and they have
23 different flows as well. But they're very
24 hands-on in what they do, and they're successful
25 at what they do.

1 Q. So you've been to that facility, then?

2 A. Many times.

3 Q. And when you say they utilize rivers,
4 explain what you mean. Are fish grown in the
5 rivers?

6 A. No. No. They divert the water up
7 close to the Andes Mountains when it comes out,
8 and there's no -- there's not any type of usage of
9 that water between them and the runoff coming out
10 of the Andes. They divert the water out of the
11 river and then into their farms.

12 Q. So similar raceway-type growth
13 operation?

14 A. Very similar culture practices as what
15 we utilize.

16 Q. And rather than having spring water,
17 they divert out of the river?

18 A. They do.

19 Q. Okay. Are there other users in that
20 river of that water source?

21 A. Not above them.

22 Q. And then what portion of your rainbow
23 trout sales come from product produced in Chile?

24 A. Well, between Chile and Argentina,
25 just -- I don't have the precise number, but a bit

1 more than 10 percent of our total sales. And
2 that's one way we've been able to expand our
3 topline business in recent years.

4 Q. And describe your Chilean partner.

5 A. They're two individuals, two families.
6 It's a private company. There's entrepreneurial
7 partners. Native Chileans, just a family
8 business.

9 Q. And they're also raising rainbow
10 trout?

11 A. Yes.

12 Q. And what's their water source?

13 A. The Chilean?

14 Q. Yes.

15 A. I thought that is what we just went
16 through.

17 Q. Or excuse me. The Argentine. We've
18 moved to the Argentine on the two owners.

19 A. I'm sorry. The Argentines, similar
20 practice to them. The water source comes out of
21 the Andes, only the other side of the Andes.

22 Q. The water source, I assume, is a
23 spring at some point.

24 How far downriver, how many miles of
25 river are there between the place where the water

1 originates and it's actually diverted out of the
2 river? Do you know?

3 A. I'm not sure I really know. It is not
4 a great distance.

5 Q. "Great" meaning a few hundred feet or
6 a few miles?

7 A. Oh, no, a few miles. But if you've
8 ever been to that part of the world, you don't
9 build everyplace there. A lot of that world is
10 straight up and down. So it's --

11 Q. We'd be talking a few miles?

12 A. -- first access, yeah.

13 Q. Okay. And what are the names of the
14 companies for the Chilean partner and the
15 Argentine partner?

16 A. It's a Spanish name. I'd have to get
17 it to you later. I don't have it in front of me.

18 Q. Is it a corporate name or --

19 A. It is, uh-huh. It's a family
20 corporation, yeah.

21 Q. And then did I understand you to say
22 that the 10 percent or so of rainbow trout that
23 come from these two foreign partners are not
24 labeled and sold as a part of Clear Springs' other
25 products, but they're a different label?

1 A. It's in the Sysco label.

2 Q. Okay. Is any of it sold under the
3 Clear Springs label?

4 A. A small amount would be.

5 Q. That's the specialty product?

6 A. The frozen products.

7 Q. Does Clear Springs have other fish
8 products besides rainbow trout?

9 A. We do in our specialty products plant.
10 We source mahi mahi. We have a retail mahi mahi
11 product.

12 Q. And what's the source of those
13 products?

14 A. It -- the source of those products are
15 Peru, Ecuador, Panama for sourcing.

16 Q. Are they farmed products or wild
17 products?

18 A. No, wild. Mahi mahi is a wild-caught
19 product.

20 Q. So mahi mahi, and I saw a product
21 called Splash or something like that?

22 A. Splash is a brand name.

23 Q. Okay.

24 A. It's a retail brand name that we have,
25 yes.

1 Q. What else besides mahi mahi?

2 A. Nothing in the market right now. One
3 that we're working with is a new product called
4 swai, s-w-a-i, I believe.

5 Q. I saw that. Is that a type of fish?

6 A. It is.

7 Q. Where is that grown?

8 A. Vietnam.

9 Q. Is that one of those products in the
10 Mekong River that's in the cages?

11 A. Uh-huh.

12 Q. And what percent of your sales would
13 be represented by these mahi mahi sales and this
14 swai product?

15 A. At this time very, very small. Very
16 small.

17 Q. Okay. And again, you purchase from
18 foreign suppliers, and then distribute and sell in
19 the U.S.?

20 A. Well, those products we purchase the
21 raw material, either directly from those companies
22 or through traders.

23 Q. Okay.

24 A. Fish and seafood business globally is
25 a very dynamic business, a lot of product moving.

Snake River Farm OTR

Cope, Larry W.

11/10/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

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) Docket No.
 (SNAKE RIVER FARM)) CM-MP-2009-004
 (Water District Nos. 130 and 140))
 Third Mitigation Plan)
 _____)

DEPOSITION OF LARRY W. COPE

NOVEMBER 10, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 A. Well, I think the threshold is 10
2 parts per million, my understanding.

3 Q. The drinking water threshold?

4 A. Yes, uh-huh.

5 Q. Okay. When I looked at
6 Dr. MacMillan's testimony on page 31, he testified
7 concerning nitrate levels that are in the Clear
8 Springs water supply. And he stated at RD3 sample
9 site the nitrates ranged from 9.8 to 16.9, which
10 was higher than either of the wells. He also
11 testified that the nitrates at the visiting center
12 was 18.0 milligrams per liter.

13 So would you consider that water that
14 Clear Springs is utilizing to be contaminated and
15 polluted?

16 A. Well, I would consider it the same as
17 the other water. And it's a concern that we have
18 that we're working on. It's a small portion.

19 There seems to be, my understanding,
20 some specific spring that's bringing that water to
21 us. And they're doing a study to determine what
22 that is. And it's a concern to our company.

23 Q. Now, I can appreciate it's a concern.
24 But your testimony, and Dr. MacMillan's,
25 characterizes the water that would be delivered

1 pursuant to the plan to be polluted and
2 contaminated based on two of the --

3 What have we got, nine wells?

4 MS. MCHUGH: Seven.

5 MR. SIMPSON: Seven.

6 Q. (BY MR. BUDGE): -- two of the seven
7 wells being contaminated by nitrates being above
8 10 milligrams per liter.

9 So I guess my question again is, if
10 the water described in Dr. MacMillan's testimony
11 on page 31 shows that Clear Springs is currently
12 using water at levels that are even higher than
13 the two worst wells, would you characterize that
14 water supply that Clear Springs uses also as being
15 polluted and contaminated?

16 A. Well, you would have to characterize
17 it in the same manner as the other wells, yes.

18 Q. Okay.

19 A. But to receive more of that water is
20 not acceptable.

21 Q. With respect to those identified
22 sources that exceed the 10 milligrams per liter
23 standard, has Clear Springs discontinued use of
24 those sources by reason of the elevated nitrate
25 levels?

1 A. Not to my knowledge. And I'm not -- I
2 don't believe it's actually possible to do that.

3 Q. To your knowledge, has there been any
4 fish loss as a result of that use by Clear Springs
5 of water with elevated nitrate levels?

6 A. To my knowledge, no.

7 Q. And exactly what is being undertaken
8 to deal with that problem? You mentioned you're
9 consulting with DEQ. Is there any active effort
10 undertaken by Clear Springs to identify the source
11 and remove it or eliminate it?

12 A. I'd defer that to Dr. MacMillan again.

13 Q. Okay.

14 A. That's a project he's working on and
15 engaged in.

16 Q. Let's go to page 6 of your testimony,
17 if we could. Towards the bottom of page 6 on
18 lines 233 through 236, you make the statement,
19 "The well water in the pipeline being proposed for
20 mitigation of the Snake River Farm is water that
21 would most likely be the same water that would
22 naturally discharge through the Clear Lake Springs
23 complex."

24 And then on the next page, page 7,
25 lines 252 through 253, you make basically the same

1 statement, saying, quote, "This pumped water is
2 the same water that contributes to the continued
3 depletion of the spring flows in the total Clear
4 Lakes Spring."

5 So are you agreeing, Larry, then, that
6 the water pumped through the over-the-rim plan is
7 the same water that emanates from the springs
8 which supplies Clear Springs?

9 A. Oh, most likely it would be, yes.

10 Q. Okay. And so would you also consider
11 that water to be pristine, by your definition?

12 A. Well, when you look at the total
13 spring flow, that's the way I would consider it.

14 Q. It would still be pristine spring
15 water?

16 A. Yes.

17 Q. And so to that extent, if it were
18 delivered, it could raise the same fish of the
19 same size and the same quality and the same health
20 as the water emanating from the springs?

21 A. That water would, yes.

22 Q. Okay. So the primary concern that
23 seems to be expressed in your testimony and
24 Dr. MacMillan's is the adverse impact it may have
25 on your marketing plan where you rely largely upon

Snake River Farm OTR

***MacMillan, Ph.D., John Randolph -
Vol. II***

11/11/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

1 looking at, only RD3 has three tests taken over
2 this three-year period -- or excuse me, four tests
3 taken over this three-year period that would
4 exceed the 10 milligram per liter drinking-water
5 standard. And I understood -- and maybe I was
6 wrong. I understood you to say maybe yesterday,
7 or certainly Larry Cope did, that it would only be
8 considered polluted by him if you exceeded the
9 drinking-water standard of 10.

10 So are you considering water at the
11 Clear Springs facility now, based on these
12 samples, to be polluted or contaminated, other
13 than those four samples that were taken at RD3?

14 A. Yes. Pollution occurs, according to
15 state law, state regulations, if you exceed the
16 background level of the concentrations in ground
17 water, you are polluting the water. There's
18 pollution.

19 The way the Safe Drinking Water Act
20 works, they do identify a maximum contaminant
21 level of 10 milligrams per liter nitrate-nitrogen.
22 And the way the -- but that doesn't mean it's not
23 polluted until you get to 10.

24 Q. Would DEQ look at this sample and say
25 there is any risk or concern for people who are

Snake River Farm OTR

***MacMillan, Ph.D., John Randolph Vol
I***

11/10/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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) Docket No.
(SNAKE RIVER FARM)) CM-MP-2009-004
(Water District Nos. 130 and 140))
Third Mitigation Plan)
_____) VOLUME I
(Pages 1-62)

DEPOSITION OF JOHN RANDOLPH MacMILLAN, PH.D.
NOVEMBER 10, 2009

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

1 to identify biological mechanisms for that
2 endocrine disruption.

3 Q. When you say the in vitro phase, what
4 do you mean? What phase?

5 A. Lab bench, dealing with cells in
6 tissue culture.

7 Q. So the in vitro phase in your
8 operation would be at the Soda Springs food
9 facility?

10 A. No. These are -- no. The in vitro
11 studies would be done by other scientists in the
12 world looking at the biological, the biochemical,
13 and genetic effects of changing, of affecting
14 proteins in cell membranes that might affect.

15 Q. With all of that --

16 A. Yeah.

17 Q. -- scientific background, back to the
18 original question, which was, in your opinion, is
19 there a nitrate level in the water at which you
20 believe there will be a negative effect on Clear
21 Springs' ability to raise commercial rainbow trout
22 at the Snake River Farms facility?

23 A. I believe there is a nitrate level
24 that eventually could be identified that would not
25 be inimical to our research, our brood stock, and

1 our production system. But that has not happened
2 yet. We do not know.

3 Q. So your answer is you do not really
4 know?

5 A. That's correct.

6 Q. And do you have an opinion of your own
7 as an expert in this area whether or not the
8 drinking-water-quality standard of 10 milligrams
9 per liter is safe or unsafe for your rainbow trout
10 production?

11 A. Historically, I think the
12 concentrations of nitrate that Clear Springs has
13 received in the water, in the spring water, those
14 have been acceptable for our system.

15 Whether the increased levels we're
16 seeing now are bad, we don't know. We have
17 instituted what we can, projects, to try to
18 identify the source of the nitrate-nitrogen and --
19 and are trying to encourage scientists with far
20 greater expertise and facility than we have to
21 investigate what impact 10 milligrams per liter or
22 15 or 20 or more milligrams per liter
23 nitrate-nitrogen might have on the entire life
24 cycle of the rainbow trout.

25 Q. I don't mean to delve too deeply into

Snake River Farm OTR

***MacMillan, Ph.D., John Randolph -
Vol. II***

11/11/2009

Full-size Transcript

Prepared by:

Becky
Racine Olson Nye Budge & Bailey, Chtd

Tuesday, December 01, 2009

1 A. Yes, it does not confirm that rainbow
2 trout, early life stages, can tolerate
3 100 milligrams per liter.

4 Q. On page 34, lines 978 through 980, you
5 state, "The water temperature measured at the well
6 sites at the Fred Nihart Fountain is all
7 consistent with the water temperature delivered to
8 the Clear Springs Foods Snake River Farm complex."

9 A. Correct.

10 Q. So are you basically stating there
11 that based on those measurements water temperature
12 is no longer an issue?

13 A. No. All I said was that they are
14 consistent. If through to the OTR project water
15 temperature is altered -- and I'm not equipped to
16 make that kind of analysis or prediction, but if
17 it were, then temperature could still be an issue.

18 But based on this, water temperature
19 in the ground water wells is essentially the same
20 as the temperature of the spring water that we
21 receive.

22 Q. According to the analysis by
23 Dr. Brendecke -- and I appreciate you may not have
24 read that -- he analyzed the effect of pumping the
25 water. And his testimony, if I recall it

1 correctly, concluded that if the water was pumped
2 from a number of the wells, the overall
3 temperature would decline minus .3/10ths of a
4 degree Fahrenheit, and I believe he concluded that
5 if there was a single consolidated well, which was
6 part of the proposal --

7 A. No. 4.

8 Q. Yes.

9 -- the overall decline would be a
10 minus .1/10th of a degree Fahrenheit.

11 Would that reduction in temperature of
12 a tenth to a third of a degree Fahrenheit have any
13 concern upon your ability to use the water at the
14 facility?

15 A. No.

16 Q. Okay.

17 A. Thank you for not smiling when you
18 were saying that.

19 Q. Would it even be detectable?

20 A. If it is -- well, we could detect it.

21 We would not detect it impacting production or
22 research or the brood -- selective breeding
23 program.

24 Q. Is there temperature variation from
25 year to year or seasonally or by site at any of

EXHIBIT 2028

Transcription of a portion of the audio from the November 24, 2009 scheduling conference *In the Matter of North Snake and Magic Valley Ground Water Irrigation Districts' 2009 Joint Mitigation Plan to Compensate Blue Lakes Trout Farm, Inc.*, IDWR Docket No. CM-MP-2009-01.

Audio beginning at **40:33** – Director Spackman states: “Candice, I would not expect a mitigation plan hearing would include or would bring in with it separate applications for transfer it seems to me that those would be separate, separately considered by the Department and I don’t know if any of those would be pending.”