



*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.<sup>1</sup> 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

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<sup>1</sup> Notice of the Plan as a CM Rule 43 mitigation plan was then published on April 2<sup>nd</sup> and 9<sup>th</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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., 5<sup>th</sup> 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).<sup>2</sup> Clear Springs would accept this mitigation, including the commitment to

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<sup>2</sup> 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

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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.<sup>3</sup> 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.

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<sup>3</sup> 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 \$10,000<sup>4</sup> 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.

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<sup>4</sup> 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 27<sup>th</sup> day of April, 2009.

**BARKER ROSHOLT & SIMPSON LLP**



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

*Attorneys for Clear Springs Foods, Inc.*

## CERTIFICATE OF MAILING

I hereby certify that on this 27<sup>th</sup> 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:

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

Allen Merritt Cindy Yenter Watermaster – WD 130 IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380 <a href="mailto:allen.merritt@idwr.idaho.gov">allen.merritt@idwr.idaho.gov</a> <a href="mailto:cindy.yenter.@idwr.idaho.gov">cindy.yenter.@idwr.idaho.gov</a>	<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](http://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](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

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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](mailto:patsy.mcgourty@idwr.idaho.gov)