

1701A(3), on the following findings and conclusions in the Director's Order:

I. Post-Audit of GWDs' Prior Mitigation Actions (FF 22, 23; CL 6)

The Director states that IDWR has "performed a post-audit" of the GWDs' prior mitigation actions (presumably from 2005 – 2008), and has determined the resulting benefit from those actions. *See Order* at 6, ¶¶ 22-23, at 8, ¶ 6. However, the *Order* provides no supporting facts or analysis to demonstrate how IDWR determined the resulting benefits from actions taken in 2005 to 2008. While the Ground Water Districts supplied certain information on CREP and conversion acres from prior years, IDWR has not revealed its analyses of those activities. Simply identifying bare numbers in the table provided at finding of fact 23 does not provide sufficient factual information to show how IDWR arrived at those calculations. Accordingly, to date, Clear Springs has been provided with no information to evaluate the analysis undertaken by IDWR to determine if it is complete or accurate. At a minimum, that analysis should be revealed and the subject of a hearing so that a proper review by Clear Springs can be completed.

Next, the Director has failed to carryover the shortfalls from the GWDs' failed mitigation actions in 2006 through 2008. As held in the July 11, 2008 *Final Order*, the Director affirmed the Hearing Officer's decision that "A failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years". *See* January 11, 2008 *Opinion* at 27. Consequently, the GWDs' required mitigation in 2009 has yet to be finally determined since the shortfalls from 2006 through 2008 have not been carried over and ordered by the Director. Therefore, the *Order* should be reconsidered to identify the prior shortages and carry those requirements over to 2009.

Further, to the extent that the Director's post-audit calculations are incorporated into the

evaluation of the Groundwater Users' 2009 Replacement Water Plan and Third Mitigation Plan, said calculations should be the subject of review and evaluation through the hearing process.

II. The Director Does Not Have Authority to Approve Mitigation Plan Over the Objection of the Holder of the Senior Water Right (CL 10-11)

The Director's *Order* misinterprets various constitutional and statutory provisions, as well as prior cases, to claim that the Director can approve a mitigation plan over the objection of a senior water right holder. *See Order* at 9. Although junior priority water right holders are authorized to "mitigate" their "depletions", there are certain procedural protections afforded a senior water right holder that must be provided. *See* CM Rule 43. Moreover, in this matter, the junior ground water right holders are not replacing their "depletions", as should be required. Instead, the Director has only determined injury to Clear Springs' 1964 priority water right and has not required all ground water rights junior to that year to mitigate their "depletions". If an approved "mitigation plan" is not in place *prior to the time a junior water right holder diverts*, the Director does not have authority to "approve a mitigation plan over the objection of a senior". Further, the Director does not have the authority to approve a plan that allegedly mitigates for depletions, irrespective of what it is called, without providing due process and an opportunity for a hearing. Moreover, none of the constitutional or statutory provisions or case law cited by the Director support the proposition.

To the extent the Director's legal conclusions in this *Order*, including the interpretation of Art. XV, § 7 and Idaho Code § 42-226, or procedural steps are at issue before the Gooding County District Court in *Clear Springs Foods, Inc. v. Tuthill* (Case No. 08-444), the Director does not have jurisdiction to rule on those here. However, as identified above, the Director's legal conclusions are in error on this point and should be corrected.

III. The First Amended Mitigation Plan Should be Dismissed with Prejudice (CL 12)

The *Final Order* does not address Clear Springs' arguments as to why the *First Mitigation Plan* should be dismissed with prejudice. In particular, the *Final Order* fails to address Idaho Civil Rules 41, and its implications in this matter. As provided in *Clear Springs Briefing on the Director's Authority to Approve a Mitigation Plan for Monetary Compensation*, Clear Springs expended a considerable amount of time, money and efforts in responding to the various alternatives in the *First Mitigation Plan*, including motions to dismiss, expert reports and rebuttal reports. A hearing was scheduled and Clear Springs was preparing for that hearing. At the last moment, the Ground Water Districts, on their own volition, decided to dismiss their plan. Allowing the Ground Water Districts to take such an action without any condition, is without merit and equity – especially after Clear Springs had expended so much time and money in preparing for the hearing.

The *Final Order* states that dismissing the action with prejudice would remove “sources of direct replacement water to Clear Springs.” Such a statement ignores the fact that the Ground Water Users withdrew their own Plan and that they waited until right before the hearing. Clear Springs should not be prejudiced by the dismissal. As such, the *First Amended Plan* should be dismissed “with prejudice.”¹

IV. Clear Springs' Request for Costs and Attorneys' Fees in its Protest (CL 21-24)

The Director denied Clear Springs' request for costs and attorneys' fees identified in its February 23, 2009 *Protest* to the GWDs' Second Mitigation Plan. The Director's decision on this issue relies upon the analysis that the Ground Water Districts are not “taxing” districts and

¹ Since the Ground Water District's sole assertion for withdrawing the Plan is that it was unacceptable to Clear Springs, they should have no issue with an order dismissing the Plan “with prejudice.”

that Clear Springs did not cite an applicable rule or statute in its *Protest*. See *Order* at 12.

At the outset, the Director's ruling on this request is premature. Similar to the procedures under Idaho's civil rules, Clear Springs should be provided an opportunity to file a memorandum of costs with IDWR "at any time after the verdict of a jury or a decision of court." See I.R.C.P. 54(d)(5). Such memorandums must be filed within 14 days after entry of judgment and would identify the basis for the claim. The Director has yet to issue a final order in this case given Clear Springs' present *Petition for Reconsideration*. Since any party can seek reconsideration, there is no final judgment to determine the prevailing party yet. Consequently, once the Director rules on this petition (and any others filed), the *Order* will become final and Clear Springs will have an opportunity to seek costs and fees through the filing of an appropriate memorandum with the Director. Accordingly, the Director's ruling was premature.

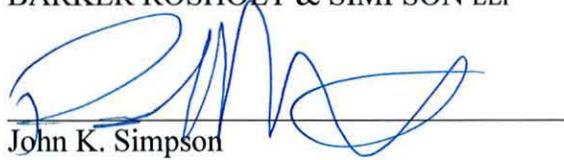
Accordingly, Clear Springs will file the necessary memorandum of costs once the *Order* is final. As such, the Director should reconsider and vacate that portion of the *Order* until a request is filed by Clear Springs after judgment in its favor (presuming the final order rules in Clear Springs' favor in this case).

CONCLUSION

Clear Springs requests reconsideration of the issues stated above. Further, Clear Springs request a hearing, pursuant to I.C. § 42-1701A(3), on IDWR's "post-audit" of the GWDs' prior mitigation actions. Such a hearing could be consolidated and included in any hearing to be held on the GWDs' Third Mitigation Plan.

DATED this 19th day of March, 2009.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in blue ink, appearing to be "John K. Simpson", is written over a horizontal line.

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CERTIFICATE OF MAILING

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

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