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Attorneys for North Snake and Magic Valley Ground Water Districts

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

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

(Snake River Farm)

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

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

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

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

I. RESERVATION OF DEFENSES

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

II. INTRODUCTION

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

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

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

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

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

IV. REPLACEMENT WATER PLAN AND MITIGATION PLAN

(1) Submission of Plan

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

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

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

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

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

The following information is provided:

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

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

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

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

(2) Mitigation Requirement

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

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

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

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

(2) Plan Proposals

(a) CREP and Conversion Deliveries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUESTED ACTION

The Ground Water Districts request:

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

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

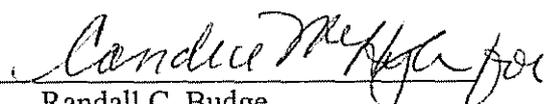
B. That the Director expedite the processing of the Transfer Applications deemed necessary to implement the proposed over-the-rim replacement water plan.

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

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

DATED this 12th day of March, 2009.

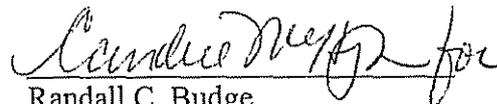
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By: 
Randall C. Budge
Attorneys for North Snake and
Magic Valley Ground Water Districts

CERTIFICATE OF MAILING

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

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