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 (SNAKE RIVER FARM)	)	**ORDER APPROVING GROUND WATER DISTRICTS' REPLACEMENT WATER PLAN FOR 2009**
(Water District Nos. 130 and 140)	)	

FINDINGS OF FACT

1. On March 5, 2009, the Director of the Department of Water Resources ("Director" or "Department") 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* ("Notice of Curtailment"). The Notice of Curtailment stated that because there was no longer an acceptable mitigation plan before the Director, it would be necessary to order curtailment of junior ground water rights, starting on March 16, 2009, unless a plan to replace depletions to Clear Springs Foods, Inc. ("Clear Springs") was received by March 12, 2009. *Notice of Curtailment* at 14.

2. In order to provide the required 28.87 cfs to the Buhl Gage to Thousand Springs spring reach, or 1.99 cfs directly to Clear Springs (6.9% of 28.87 cfs), the Notice of Curtailment stated that it would be necessary to curtail ground water rights junior to November 16, 1972. The resulting curtailment would impact approximately 860 ground water rights located in Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls counties. The curtailment would impact approximately 41,000 acres of land irrigated by ground water.

3. On March 12, 2009, the Director received the Magic Valley Ground Water District and the North Snake Ground Water District (collectively referred to herein as "Ground Water Districts") *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").

4. The 2009 Plan proposed two actions to make up the 1.99 cfs direct deficit to Clear Springs. First, the Plan proposed to provide ground water to Clear Springs from irrigation wells that are situated directly above Clear Springs' facility. The Plan proposed the construction of a piping system that would integrate numerous irrigation wells and pipe the water down the canyon wall to Clear Springs. The amount of water that the Ground Water Districts proposed to provide Clear Springs was between 1.99 cfs and 3.0 cfs. "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 . . . in order to make up for any previous year shortfalls 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." *Id.* at 8. The Ground Water Districts estimated that installation cost of the over-the-rim proposal will be approximately $500,000.

5. The second proposal, to convey water right no. 36-4076 directly to Clear Springs, would be implemented if the over-the-rim proposal "is rejected or conditioned, or . . . inadequate . . . ." *Id.* at 9. Water right no. 36-4076 is a partially decreed spring right held by the Idaho Department of Fish and Game. The Ground Water Districts estimate that it would cost approximately $50,000 to implement this proposal.

6. The 2009 Plan requested that the Director treat it both as a temporary replacement water plan to allow junior ground water users to continue to divert during the 2009 irrigation season, as well as a mitigation plan under Rule 43 of the Department's Rules for Conjunctive Management of Ground and Surface Water Sources, IDAPA 37.03.11 *et seq.* ("CM Rules").

7. After receiving the 2009 Plan, the Director noticed a status conference to occur on March 13, 2009. At the March 13 status conference, the Director stated that the 2009 Plan could be approvable, but identified four core concerns that were not fully addressed: water quality, temperature, reliability of the system, and the time it would take the Ground Water Districts to implement the proposal(s). Verbal responses were given at the status conference to the Director's concerns by attorneys for the Ground Water Districts. Additional concerns were raised by attorneys representing Clear Springs and other interested parties. At the status conference, the Director discussed the need for the Ground Water Districts to secure a bond equal to the estimated cost of the over-the-rim proposal. Attorneys for the Ground Water Districts did not object to this process.

8. The Director notified parties that the Department would host a technical review working group, to begin on Tuesday, March 17, 2009, at the Department's main office in Boise. The Director invited the parties' technical consultants to attend and discuss the issues identified by the Director with Department staff. The Director solicited written responses from the parties, which could be in the form of bullet points, to be submitted to the Director by March 17, 2009.

9. Because the 2009 Plan could be approvable if concerns could be addressed, the Director provided time to allow for augmentation of the Plan. The Director stated that the technical working group should endeavor to provide information to the Director by Thursday, March 19, 2009.

10. On March 17, 2009, the technical working group met to discuss the four issues previously identified by the Director. Representatives from Clear Springs, the Department, the Ground Water Districts, and Rangen, Inc. ("Rangen") participated. Additional issues were discussed, including measurement of water deliveries, how the transfer process would work for the water rights that were proposed by the Ground Water Districts to be utilized for direct delivery to Clear Springs, the source and construction of diversion devices for conversion acres, and cost.

11. On March 17, 2009, written responses in opposition to the 2009 Plan were submitted by Clear Springs and Rangen. Clear Springs was concerned that the 2009 Plan does not adequately mitigate for injury caused to it by junior ground water diversions; that the 2009 Plan does not address previous shortfalls; that the 2009 Plan does not specify benefits from conversions or CREP; that the irrigation water rights to be used for direct replacement to Clear Springs should be subject to the transfer process; that the 2009 Plan does not analyze the impact on the ESPA; that the 2009 Plan does not adequately consider water quality; that the 2009 Plan does not consider "bio-security;" that the 2009 Plan does not address operation and maintenance; that the 2009 Plan does not identify where conversion water will be acquired; that the 2009 Plan does not identify necessary easements; and that the 2009 Plan does not identify necessary engineering design and safety to the facilities below the rim.

12. On March 19, 2009, the Department received an *Augmentation to 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) of North Snake Ground Water District and Magic Valley Ground Water District* ("2009 Augmentation"). The 2009 Augmentation addresses: "1) water quality and temperature; 2) operational plan for wells, including measurement plan; 3) timing of conversions and construction." *2009 Augmentation* at 2. The 2009 Augmentation is supported by exhibits 8, 9, 10, and 11.

13. On March 19, 2009, the Department received *Clear Springs Foods, Inc.'s Protest of the 2009 Replacement Water Plan and Third Mitigation Plan of North Snake Groundwater District and Magic Valley Groundwater District* ("Clear Springs Protest").

Ground Water Districts' Replacement Water Requirement to Clear Springs

14. As stated in the Notice of Curtailment, the Department has reviewed the Ground Water Districts' reporting and has independently reviewed the number of acres enrolled in the federal government's Conservation Reserve Enhancement Program ("CREP") and the number of conversion acres for years prior to 2009. Using the ESPA Model, the Department has determined the resulting benefit to the Buhl Gage to Thousand Springs spring reach from those activities.

Conversions	CREP	Total Provided	Required	Shortfall to Reach	Shortfall to Clear Springs
9.44 cfs	0.44 cfs	9.88 cfs	38.72 cfs	28.84 cfs	1.99 cfs

Notice of Curtailment at 6, ¶ 23.

15. In 2009, the final year of the phased-in curtailment period, 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 (6.9% of 38.72 cfs). *Id.* at 6, ¶ 24. The resulting deficiency is 28.84 cfs to the Buhl Gage to Thousand Springs spring reach and 1.99 cfs directly to Clear Springs. *Id.*

16. The 2009 Plan provides for the conversion of 1,060 acres from ground water to surface water irrigation. Surface water from the Snake River for the conversion acres will be

diverted through the North Side Canal Company's "S Coulee." *2009 Plan* at 6. According to the 2009 Augmentation, the Ground Water Districts can have their conversions operational within a month of approval. *2009 Augmentation* at 5. Assuming that the conversions could be in place by June 1, 2009, the Department has determined, using the ESPA Model, that the resulting benefit to the Buhl Gage to Thousand Springs spring reach from the 2009 Plan will be:

Conversions	Deep Percolation	Conveyance Loss	Total
1.74 cfs	0.35 cfs	0.26 cfs	2.35 cfs

17. The resulting benefit to the Buhl Gage to Thousand Springs spring reach as a result of all of the existing and proposed activities of the Ground Water Districts would be as follows, in cfs:

Conversions	CREP	Deep Percolation	Conveyance Loss	Total Provided	Required	Shortfall to Reach	Shortfall to Clear Springs
11.18	0.44	0.35	0.26	12.23	38.72	26.49	1.83

18. The "Total Provided," 12.23 cfs, in the above table, is the amount of water that the Ground Water Districts have added to the Buhl Gage to Thousand Springs spring reach. The total provided to Clear Springs is therefore 0.84 cfs (6.9% of 12.23 cfs).

19. "[I]n order to make up for any previous year shortfalls 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[,]" the Ground Water Districts propose to provide up to 3.0 cfs directly to Clear Springs. *2009 Plan* at 8.

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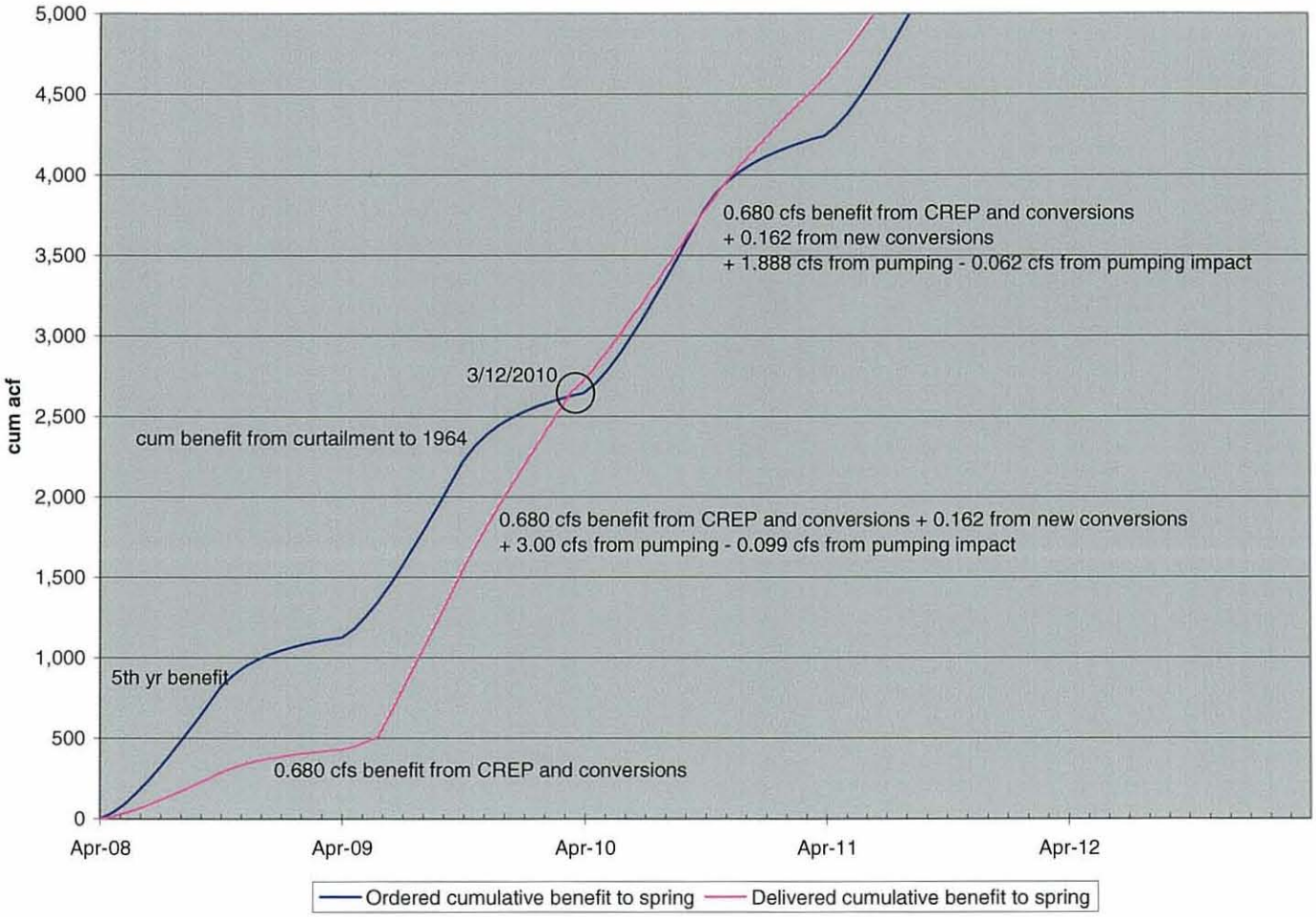
20. As stated above, and assuming the new conversions (1,060 acres) are in place by June 1, 2009, the Ground Water Districts will have provided 0.84 cfs to Clear Springs. The Ground Water Districts are required to provide 1.99 cfs directly to Clear Springs by the end of the five-year phased-in period of curtailment, for a total of 2.67 cfs. The ESPA Model shows that if direct delivery of 3.0 cfs to Clear Springs begins on June 1, 2009, the present shortfall of 1.15 cfs (1.99 - 0.84 = 1.15) will be made up by March 12, 2010. Assuming all factors remain the same, when the shortfall is made up, the Ground Water Districts may reduce their direct delivery to Clear Springs from 3.0 cfs to 1.89 cfs (1.89 + 0.84 - 0.06 [impact of 3.0 cfs pumping on Clear Springs] = 2.67).



Water Quality

21. Water quality was raised by the Director and Clear Springs as a concern with the 2009 Plan. According to the 2009 Augmentation, the water quality of ground water in the immediate area is "very similar quality to that found at Clear Springs, Snake River Farm spring outlet." *2009 Augmentation* at 3; *see also* exhibits 9 and 10. The Ground Water Districts state that a "monitoring program" will be instituted "that will measure water quality . . . the results of which can be periodically reported to the Department and Clear Springs as needed." *Id.* at 2

22. The ground water in the Eastern Snake Plain Aquifer ("ESPA") is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and springs tributary to the Snake River is in the Thousand Springs area. Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become ground water, and the amount that becomes one or the other is largely dependent on ground water elevations.

23. A primary concern regarding water quality is nitrate level. At least one spring source that Clear Springs monitors has nitrate levels in excess of "13 mg/L." *Id.* at 50. The "source of nitrate-nitrite nitrogen in the spring water feeding the Snake River Farm complex is unknown. . . ." *Id.* According to data from 2006 through 2008 that was provided to the Department of Environmental Quality, influent spring water collected by Clear Springs at six of its points of diversion have average nitrate levels of 2.24, 2.32, 3.07, 3.37, 3.51, and 6.73 mg/L.

24. According to the United States Fish and Wildlife Service, the suggested nitrate value for hatchery water supplies for trout is 0-3.0 mg/L. Robert G. Piper et al., United States Department of the Interior, *Fish Hatchery Management* 15 (1989).

25. Since 1990, the Department has operated the Statewide Ground Water Quality Monitoring Program. The Department works with the United States Geological Survey in this effort. Each year, approximately 400 monitoring sites statewide are sampled, with most sites being sampled once every four years. In total, there are approximately 1,600 wells that are monitored by the Department. The Department tests for the presence of nitrate. Under Idaho's Ground Water Quality Rule, the water quality standard for nitrate is 10 mg/L. IDAPA 58.01.11.200.01.

26. One well that the Department monitors is upgradient and in the general area of the wells that the Ground Water Districts have proposed would provide direct replacement water to Clear Springs. Well 08S 15E 33ABB1, sampled on September 2, 2004, showed nitrate at 2.2 mg/L. The depth of this well is 126 feet. A second well, MV-14, located at 08S 15E S32, is monitored by the Idaho National Lab. MV-14 is located near well no. 7 in exhibit 2 to the 2009 Plan. A sample taken from MV-14 on July 19, 2006 shows nitrate at 2.1 mg/L. Wells monitored by the Department that are just downgradient from the wells proposed by the Ground Water Districts to provide direct replacement water to Clear Springs, 09S 14E 02BBB1 and 02BBB2, were tested on June 18, 2003 and September 26, 2008, respectively. Nitrate levels were 1.11 mg/L and 2.19 mg/L, respectively. The depths of these wells are 105 and 185 feet, respectively.

27. The over-the-rim proposal is a closed system. Of the seven wells that have been proposed by the Ground Water Districts, the Department has drilling records for four (identified in Exhibit 2 to the Ground Water Districts' 2009 Plan as wells 1, 2, 3, and 4). The depths of these wells are 85, 113, 144, and 180 feet. The wells proposed to be used by the Ground Water Districts are similar in depth and location to the monitoring wells. The nitrate levels in the monitoring wells are lower than nitrate levels in the springs feeding Clear Springs' facility.

28. After construction of the pipeline is complete, the Ground Water Districts must flush the system and monitor water quality before coupling the pipeline to Clear Springs'

facility. If nitrate levels from the direct replacement water supply are similar to levels that Clear Springs receives from its spring sources, the water may be used by the Ground Water Districts as a replacement supply.

29. At its election, Clear Springs may direct the Ground Water Districts to connect the pipeline directly to its manifold or to a separate raceway. As agreed to by the Ground Water Districts, "locked cages or well houses" must be constructed "to insure that the wellheads are secure and that contamination at the wells will not occur." *2009 Augmentation* at 3. Assuming these steps are taken and that the wells are properly cased to the surface, it is reasonably certain that the water will be of suitable quality for the intended beneficial use.

Water Temperature

30. Water temperature was another concern raised by the Director. Observed temperatures in the "nearest upgradient observation well to the mitigation wells . . . [show] water temperature in this well was 14.7 degrees Centigrade (58.5 degrees F)." *Exhibit 8* at 1 to *2009 Augmentation*. The well identified by the Ground Water Districts is 08S 15E 33ABB1, which was most recently tested by the Department's Statewide Ground Water Quality Monitoring Program on September 2, 2004. Well MV-14, located at 08S 15E S32, and monitored by the Idaho National Lab, reported temperatures of 14.5 ° C on August 17, 1989, 15.0 ° C on August 19, 1990, 14.1 ° C on August 8, 1996, 14.3 ° C on July 17, 2000, and 14.4 ° C, on August 12, 2003. MV-14 is located near well no. 7 in exhibit 2 to the 2009 Plan.

31. According to the United States Fish and Wildlife Service, the temperature range for rainbow trout is 33-78 ° F (1-26 ° C); the optimum temperature is 50-60 ° F (10-16 ° C); and the temperature for spawning is 50-55 ° F (10-13 ° C). Piper, *Fish Hatchery Management* at 134.

32. Spring water utilized by Clear Springs has a near constant temperature of 15 ° C. *See Expert Report of John R. MacMillan, Ph.D.* In order to ensure that temperature remains within scientifically acceptable levels, the Ground Water Districts have committed to bury the pipeline three feet. *Exhibit 8* at 1 to *2009 Augmentation*. With a burial of three feet, the Ground Water Districts' heat transfer analysis shows that "a 0.2 ° C temperature rise could be expected in delivered water under worst-case conditions." *Exhibit 8* at 2 to *2009 Augmentation*. If temperatures increase by 0.2 ° C, the ground water to be delivered to Clear Springs will remain within the scientifically acceptable range. In order to ensure that water temperature does not increase in the pipeline in areas that it cannot be buried—such as on the canyon rim, canyon wall, and talus slope below the canyon wall—the Ground Water Districts must insulate the pipeline.

Diversion, Quality, and Temperature Monitoring

33. As agreed to by the Ground Water Districts, they must measure the diversions from each well and the total amount delivered to Clear Springs. The Ground Water Districts must also monitor water quality and temperature.

Change of Water Rights

34. The Ground Water Districts state they are prepared to file water right transfer applications for the water rights to be used for mitigation to change the place of use, period of use, and nature of use to authorize year-round mitigation and fish propagation at Snake River Farm. *2009 Plan* at 8. Clear Springs and others have expressed concern that processing a transfer application with the required public notice and potential for protests will delay the delivery of replacement or mitigation water under the 2009 Plan.

35. On an interim basis, the Water Supply Bank, operated by the Idaho Water Resource Board pursuant to sections 42-1761 through 42-1766, Idaho Code, provides a means of authorizing the necessary change in use of the water rights intended to be used for mitigation purposes. Idaho Code § 42-1764 provides that, "The approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code."

Reliability

36. The Director sought clarification on the issue of reliability. The 2009 Augmentation provided an analysis of the over-the-rim project. Because there are seven wells that would be integrated into the system, and no more than two wells would be pumping at any given time, there is redundancy in the system. "This redundancy will also insure that water can be delivered in the event of failure of a well." *2009 Augmentation* at 4. "Routine maintenance will be rotated between the wells in a manner so as to not interrupt water delivery to Clear Springs." *Id.* "A final system operation plan has not yet been developed but will be when the system becomes operational." *Id* at 3. In addition, representatives of the Ground Water Districts committed at the technical working group meeting to the use of back-up generators to ensure required water delivery in the event of a power failure. If these measures are implemented, the over-the-rim project is reasonably certain to be reliable enough to satisfy the intended beneficial use.

Timing and 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 cost of 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.

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the Notice of Curtailment are incorporated into this order by reference. All findings of fact in this order later deemed to be conclusions of law are hereby made as conclusions of law.

2. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against junior-priority ground water rights in an area having a common ground water supply. CM Rule 1.

4. While parts of these proceedings are on judicial review, the Director maintains jurisdiction for the ongoing administration of water rights. Idaho Code § 42-602.

5. The 2009 Plan is approved as a one-year replacement water plan, subject to certain restrictions. The Ground Water Districts must post a bond before beginning construction of the project that is equal to the cost of the project. Construction of the over-the-rim project must be completed no later than June 1, 2009. If the project is not 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. Extensions without penalty may be granted by the Director if unforeseen circumstances arise that are beyond the control of the Ground Water Districts' and the Ground Water Districts are attempting to move forward in good faith.

6. The Ground Water Districts must submit a system operation plan before the system becomes operational. The system operation plan shall provide a detailed description of the operation, maintenance and monitoring components of the plan including provision for back-up power in the event of a power failure. As expressed in the Findings of Fact, the over-the-rim project is reasonably reliable.

7. In comparing the quality and temperature of the water from the monitoring wells to the quality and temperature of the sources that Clear Springs diverts for beneficial use, the monitoring wells indicate that the local ground water is reasonably certain to be within suitably established scientific ranges. The Ground Water Districts must test and monitor its production wells and pipeline prior to connecting the over-the-rim system to Clear Springs' facility. If the production wells and pipeline are of suitable quality, they may be used as a direct replacement supply. Clear Springs may elect to have the Ground Water Districts connect the over-the-rim system directly to its manifold or to a specific raceway.

8. If Clear Springs begins 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. As the five-year phased-in period of curtailment was ordered on July 8, 2005, March 12, 2010 is within the phased-in period of curtailment—July 8, 2005 to July 7, 2010. The over-the-rim project will provide water in-time and in-place to Clear Springs. Water of suitable quality and temperature that is provided directly to Clear Springs meets the in-place requirement. Because the shortfall to Clear Springs will be made up before the end of the five-year phased-in period of curtailment, the in-time requirement is met.

9. The Director will publish the 2009 Plan in accordance with the CM Rules. An approved mitigation plan must be in place by the end of the five-year phased-in period of curtailment. If an approved mitigation plan is not in place that fully replaces depletions determined by the Director to have been caused by junior-priority ground water diversions, the Director will order curtailment until such a plan is in place.

10. The Director's approval of the 2009 Plan as a replacement water plan does not prejudge the 2009 Plan as a CM Rule 43 mitigation plan. Issues not addressed in this order may be addressed in proceedings on the Ground Water Districts' CM Rule 43 mitigation plan.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED as follows:

That the Ground Water Districts' 2009 Plan is APPROVED as a Replacement Water Plan for the 2009 irrigation season, subject to the conditions discussed above.

IT IS FURTHER ORDERED that the Director will process the 2009 Plan as a Mitigation Plan in accordance with the CM Rules. The Director's approval of the 2009 Plan as a Replacement Water Plan does not prejudge the 2009 Plan as a CM Rule 43 Mitigation Plan.

IT IS FURTHER ORDERED that the Notice of Curtailment will continue to be held in abeyance pending satisfactory completion of the over-the-rim project and resolution of the Ground Water Districts' CM Rule 43 Mitigation Plan.

DATED this 26th day of March 2009.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE CANDICE M. MCHUGH RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
TRAVIS THOMPSON PAUL ARRINGTON BARKER ROSHOLT 113 MAIN AVE WEST STE 303 TWIN FALLS ID 83301-6167 tlt@idahowaters.com pla@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
DANIEL V. STEENSON CHARLES L. HONSINGER RINGERT CLARK PO BOX 2773 BOISE ID 83701-2773 (208) 342-4657 dan@ringertlaw.com clh@ringertlaw.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 (208) 388-1300 mcc@givenspursley.com jeffffereday@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

MICHAEL S. GILMORE
ATTORNEY GENERAL'S OFFICE
PO BOX 83720
BOISE ID 83720-0010
(208) 334-2830
mike.gilmore@ag.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

J. JUSTIN MAY
MAY SUDWEEKS & BROWNING
1419 W. WASHINGTON
BOISE ID 83702
(208) 429-0905
jmay@may-law.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ROBERT E. WILLIAMS
FREDERICKSEN WILLIAMS MESERVY
153 E. MAIN ST.
P.O. BOX 168
JEROME, ID 83338-0168
rewilliams@cableone.net

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
WATERMASTER - WD 130 and 140
IDWR – SOUTHERN REGION
1341 FILLMORE STREET SUITE 200
TWIN FALLS ID 83301-3380
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources