

COMES NOW, CLEAR SPRINGS FOODS, INC. (“Clear Springs”), by and through its attorneys of record, and hereby responds to the mitigation actions audit submitted by IDWR through the *Second Affidavit of Phillip J. Rassier* (“*Second Rassier Aff.*”) and the conversion acres report filed by the Ground Water Districts. Clear Springs’ response supplements its earlier *Petition for Clarification* of the Court’s *Order Conditionally Granting Motion for Stay Upon Compliance with Proposed Alternative*, dated August 24, 2009 (“*Stay Order*”). The response is supported by the *Second Affidavit of Travis L. Thompson* and exhibits filed together herewith.

BACKGROUND

The Court conditionally stayed the curtailment order issued by the Director of the Idaho Department of Water Resources (“Department”) based upon the Ground Water Districts’ (“Districts”) promise, as stated in their *Second Plan of Action*, to: 1) convert 7,745 acres to surface water for 2009; 2) provide 10,000 acre-feet for late season recharge through the North Side Canal Company (“NSCC”) system; and 3) add “new conversion acres” for the 2010 irrigation season “in an effort to bring the total to over 9,000 acres”. *Second Plan* at 3; Ex. 18 to *Budge Aff.* Specifically, the Court stayed the curtailment “pending further order of the court *contingent upon the District’s providing security as described in their ‘Second Plan of Action’* . . . with additional requirement that the recharge be ‘targeted’ to the area of the rim immediately above Clear Springs’ facility in accordance with the representations made in the Brendecke Affidavit”. *Stay Order* at 5 (emphasis added).

Clear Springs requested the Court to clarify the necessary elements and conditions for implementation of the terms of the Districts’ “security”, or *Second Plan or Action*, through a *Petition for Clarification* filed on August 31, 2009. Clear Springs’ *Petition* identified several issues that needed clarification including the details of the proposed late season recharge,

evidence of agreements with landowners who “agreed” to convert back to surface water in 2009 and those who agreed to convert in 2010, and an evaluation of the impact of groundwater pumping that occurred in 2009 on acres that were supposed to have received a surface water supply. *See Clear Springs’ Petition* at 3-5.

IDWR then filed the *Affidavit of Phillip J. Rassier* and attached exhibits on September 25, 2009 “for the purpose of informing the parties and the Court of the implementation status of the Second Plan of Action for 2009”. As detailed in Exhibit A (09/23/09 Spackman Letter to Budge), the Interim Director found the following with respect to the actions taken by the Ground Water Districts:

The spreadsheet you provided lists a total of 5,742 acres associated with conversion deliveries, as opposed to the approximate 7,745 acres that the Ground Water Districts identified in their Second Plan of Action.

* * *

Assuming recharge water is delivered in similar proportions to the same canals and laterals as delivered for 2007 late season recharge, ***the Ground Water Districts would be required to delivery approximately 25,600 acre-feet of recharge water in the fall of 2009 to satisfy the 5.97 cfs shortfall.*** The current projected shortfall of 5.97 cfs to the reach equates to a shortage of 0.41 cfs directly to Clear Springs. Assuming the Ground Water Districts will conduct late season recharge using 10,000 acre feet of surface water delivered through NSCC facilities, the anticipated benefit directly to Clear Springs will be at least 0.13 cfs. Although late season recharge may reduce the shortfall to Clear Springs to at least 0.28 cfs, this remaining shortfall is still significantly higher than the 0.17 cfs shortfall projected in the Department’s Amended Curtailment Order of August 7, 2009. ***As a result, the Ground Water Districts may need to increase 2009 late season recharge considerably in order to reduce the remaining shortfall.***

See Ex. A to September 25, 2009 Rassier Aff. at 1-2 (emphasis added).

Clear Springs filed the *Affidavit of Travis L. Thompson* on September 25, 2009 to provide the Court with additional information on the actions taken by the Ground Water Districts in 2009. This information supported the Interim Director’s finding that the Districts had failed to “reconvert” all 7,745 acres back to a surface water supply in 2009, despite the commitment

represented in their *Second Plan of Action*. The Court then held hearings on Clear Springs' *Petition* on September 29th and November 6th, 2009. Following the hearing on November 6th, the Court issued an *Amended Order Setting Deadlines for Filing of Verification of Conversion Acres and Shortfall Calculation* on November 18, 2009. In response to that order, IDWR filed the *Second Affidavit of Phillip J. Rassier* on January 11, 2010, and the Ground Water Districts filed their *Report to the Court on Conversion Acres* on January 19, 2010.

As described in greater detail below, the recent filings by IDWR and the Ground Water Districts demonstrate that insufficient mitigation was provided to Clear Springs in 2009 for injury caused by out-of-priority ground water diversions since the Districts did not comply with the *Second Plan of Action* as ordered by the Court. Second, IDWR has attempted to improperly "credit" the Districts with mitigation provided by another party, the Idaho Dairymen's Association ("IDA"), pursuant to a separate "Mitigation Agreement". Finally, the Districts have failed to verify through evidence of signed contracts that over 9,000 acres will be converted to a surface water supply for the 2010 irrigation season.

These issues should be properly addressed by the Court to: 1) address the remaining shortfall and injury suffered by Clear Springs in 2009; and 2) ensure that either administration or mitigation is implemented and properly accounted for in 2010 consistent with the terms of the Court's *Stay Order*.

I. IDWR IMPROPERLY CREDITED THE DISTRICTS FOR MITIGATION PROVIDED BY ANOTHER PARTY PURSUANT TO A SEPARATE MITIGATION AGREEMENT.

Exhibit A to the *Second Rassier Aff.* contains various memorandums from IDWR staff evaluating the mitigation actions performed by the Ground Water Districts in 2009. The first memorandum, dated January 11, 2010 from Tim Luke to the Interim Director, credits "3.00" cfs

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of modeled benefit from the fall recharge performed in 2009 to the Districts. This finding is based upon Allan Wylie's January 6, 2010 memo entitled *North Side Canal Co 2009 Recharge Post Audit* ("Recharge Memo"). Dr. Wylie analyzed the post season recharge conducted in NSCC's facilities, but erroneously combined recharge performed by the Districts (an assumed 10,000 acre-feet) with recharge performed by IDA (3,687 acre-feet) pursuant to a separate mitigation agreement.¹ IDWR therefore wrongly overstated the recharge benefit for the actions taken by the Ground Water Districts by approximately 30%, resulting in an inaccurate shortfall calculation. At a minimum, IDWR should be required to re-calculate the 2009 shortfall using the appropriate amount of water actually recharged by the Districts.

IDWR has no authority to "credit" the Districts with mitigation performed by IDA under a separate mitigation agreement entered into with Clear Springs and others. With respect to the Dairyman's Mitigation Agreement, IDWR signed a *Stipulation and Agreement Regarding Certain Dairy Ground Water Use* with IDA and Clear Springs on January 11, 2008. See Ex. B to *Second Thompson Aff.* Pursuant to the *Stipulation and Agreement*, IDWR agreed to the following:

1. Implementing the Mitigation Agreement for the years 2007, 2008, 2009, and 2010 will, for these years:
 - a. offset the impacts of ground water depletions, including any material injury, ***associated with the diversion and use of ground water from the ESPA for commercial and livestock uses by the Mitigating Dairyman*** ("Dairy Diversions"); and
 - b. mitigate any material injury caused by Dairy Diversions to the water rights of senior surface and/or spring water users diverting from

¹ There is no information supporting Dr. Wylie's use of "10,000 acre-feet" of recharge performed by the Districts. Information supplied by IDWR shows that the Districts used 17,833.1 acre-feet for conversions in 2009. See Ex. A to *Second Thompson Aff.* Since the Districts only leased 27,500 acre-feet of storage for all of their mitigation actions in 2009, that left only 9,666.9 acre-feet as a maximum volume to be recharged. Therefore, IDWR has apparently overstated the amount recharged by the Districts by at least 333 acre-feet.

hydraulically-connected sources, including all water rights of the parties signatory hereto.

* * *

3. ***The Department shall:***

a. by appropriate order, and subject to procedural rights of any parties deeming themselves aggrieved thereby, ***approve the Mitigation Agreement, and IDA's implementation of it as sufficient replacement water and/or mitigation for the effects of Dairy Diversions during the interim period of the years 2007, 2008, 2009, and 2010;***

Ex. B to *Second Thompson Aff.* at 2-3 (emphasis added).

The Hearing Officer recommended approval of the Agreement by order issued on February 29, 2008. *See Ex. C to Second Thompson Aff.* The Director adopted the Hearing Officer's recommendation and approved the Agreement in his *Final Order* issued on July 11, 2008. *See Ex. D to Second Thompson Aff.* No party appealed the approval of the Dairymen's Mitigation Agreement to District Court. By its terms, the stipulation signed by IDWR recognized that the mitigation provided by IDA would offset the "commercial and livestock" ground water use by IDA's members. Accordingly, IDWR has no authority to transpose the mitigation provided by IDA and credit it to the Districts for its members' benefit as mitigation for their ground water use in 2009.

The Mitigation Agreement signed by IDA, Clear Springs, and other parties did not provide mitigation for the Ground Water Districts in anyway. Specifically, the Agreement only provided mitigation for IDA's members' dairy water use described as follows:

The Mitigating Dairymen shall provide mitigation for their aggregate annual depletion of the spring and spring fed surface water supplies which are hydraulically connected to the ESPA. The aggregate annual depletion shall be calculated by multiplying the 29.1 gallons per cow, per day figure in Article 8 herein, times 365 days, times the number of mature dairy cows owned by the Mitigating Dairymen (29.1 gpd x 365 days x number of cows = Aggregate Annual Depletion).

See Ex. B to Second Thompson Aff. (Mitigation Agreement at 4, Ex. A to *Stipulation*).

Accordingly, pursuant to the terms of the Mitigation Agreement between IDA and Clear Springs, the *Stipulation and Agreement* signed by IDWR, and the Director's order approving the Mitigation Agreement, IDWR had no authority to "credit" the Districts with recharge performed by the Dairymen in the fall of 2009. At a minimum, IDWR overstated the recharge accomplished by the Districts by at least 3,687 acre-feet. The Court should require IDWR to recalculate the 2009 post-season recharge audit without including the water provided by the Dairymen pursuant to Mitigation Agreement between IDA and Clear Springs.

In addition, the Court should further require IDWR to report on the actual implementation of the Districts' recharge program in 2009. Specifically, the Recharge Memo contains no evaluation of whether all water diverted was actually recharged into the aquifer "and 'targeted' to the area of the rim immediately above Clear Springs' facility", or whether water was spilled or returned back to the Snake River or its tributaries at any locations. *See Stay Order* at 5. Although IDWR apparently takes the position that all water diverted into the NSCC canal system was actually "recharged" into the aquifer, there is no verification of that fact in the information submitted to the Court. At a minimum, IDWR should evaluate and report upon the actual implementation of the recharge performed to ensure the Districts' complied with the Court's *Stay Order*.

II. THE DISTRICTS HAVE FAILED TO COMPLY WITH THEIR SECOND PLAN OF ACTION AS APPROVED BY THE COURT.

The Ground Water Districts requested a stay of the Department's curtailment orders in this case on the premise that mitigation would be provided to Clear Springs as a result of "conversion acres above the rim consisting of 7,745 acres, voluntarily dried-up acreage enrolled in the CREP program" and "late season recharge of not less than 10,000 acre-feet through the

North Side Canal Company canal system.” *See Motion for Stay* at 2. The Districts further relied upon their *Second Plan of Action* filed with IDWR on August 3, 2009 again identifying their proposed mitigation actions, including additional conversions in 2010:

(1) by ***immediately increasing the old conversion acres to 7,745 acres***; (2) by ***late season recharge*** through the North Side Canal Company system in 2009; and (3) by ***adding new conversion acres in 2010 in an effort to bring the total to over 9,000 acres***.

See Ex. 18 to *Budge Aff.* at 3 (emphasis added).

The Districts represented that “a total of 15 [ground water irrigators] representing an additional 2,989 acres of conversion agreed to immediately discontinue all ground water pumping and fully convert back to surface water” as of August 3, 2009. *See id.* (emphasis added). Despite the Districts’ representations, of the 15 ground water irrigators that “agreed” to immediately convert back to surface water on August 3, 2009, only **two entities** were delivered any surface water through NSCC’s system. *Compare* Ex. A to *Second Plan of Action* (Ex. 18 to *Budge Aff.*) to Ex. A to *Second Thompson Aff.* In other words, although the Court ordered the Districts to increase the conversion acres back to 7,745 acres in 2009, the Districts failed to comply with this condition of the *Stay Order*.

Next, the Districts have failed to execute written contracts to ensure “over 9,000 acres” will be converted to a surface water supply for the 2010 irrigation season. Although nearly six months have passed since the Districts filed their *Second Plan of Action* with IDWR promising to add new conversion acres to bring the total to over 9,000 acres in 2010, the Districts admittedly only have 1,800 acres under signed contracts to receive a surface water supply during the 2010 irrigation season. *See Ground Water Users’ Report to Court on Conversion Acres* at 3. In addition, of these 1,800 acres under contract, approximately 320 acres are not associated with a conversion project but instead involve mitigation for a new ground water permit (#37-7372)

that is being developed by Sawtooth Sheep Co. *See* Ex. E to *Second Thompson Aff.* Water delivered for “recharge” purposes to mitigate for a new ground water permit is not part of the Districts’ conversion program. Counsel for Clear Springs recently requested copies of the signed contracts for the 2010 conversions. In response, counsel for the Districts represented that the 1,800 acres under contract involved three agreements for new conversions that occurred in 2009 associated with the “OTR Plan”, the above-referenced agreement with Sawtooth Sheep Co. (not a conversion), and two other agreements that have yet to be provided. *See* Exs. F, G to *Second Thompson Aff.*

Therefore, the Districts apparently only have about 1,500 acres under signed contracts to receive a surface water supply during the 2010 irrigation season. Admittedly, the Districts are approximately **7,500 acres short** of the required number of conversion acres approved by the Court’s August 24, 2009 *Stay Order*. At this time it is clear the Districts have failed to comply with the conditions of the Court’s *Stay Order*. The Court should address the Districts’ non-compliance accordingly.

III. THE COURT SHOULD TAKE ADDITIONAL ACTION TO ENSURE COMPLIANCE WITH THE *STAY ORDER*.

Clear Springs identified several issues for clarification of the Court’s *Stay Order* in its petition filed on August 31, 2009. Despite the recent filings by IDWR and the Districts, it appears that many of those questions raised by Clear Springs are still unanswered. Accordingly, the Court should further clarify the *Stay Order* and the remaining obligations of the parties in this matter.

1. Other than the 1,500 acres represented as under “signed contracts” in the District’s January 19, 2010 *Report to Court on Conversion Acres*, the Districts have provided no evidence of additional conversions that will occur in 2010. The Court should require evidence of

signed agreements for the “over 9,000 acres”, the specific acres converted, and provisions so that those agreements may be enforceable by IDWR, either through an agreement or by this Court’s *Stay Order* to ensure compliance with the terms of the *Stay Order*. In addition, despite the Districts’ prior representation to “immediately” convert back additional acres to bring the total up to 7,745 acres as of August 3, 2009, water delivery data shows that the Districts did not comply with this ordered mitigation action. *See Ex. A to Second Thompson Aff.*

2. The Court’s *Stay Order* should require IDWR to evaluate the impacts of groundwater pumping that occurred in 2009 on acres the Ground Water Districts previously represented would be converted to a surface water supply. Whereas not all 9,300 acres were converted in 2009, out-of-priority pumping occurred on “roughly 5,000 acres” by the Ground Water Users’ representations. Given the Districts’ failure to “reconvert” additional acres back as of August 3, 2009, it is likely that pumping occurred on more than 5,000 acres. The Court should require IDWR to evaluate the impact resulting from this pumping and whether or not it affects the estimates of the benefits of late season recharge that were evaluated by IDWR.

3. The Court should require IDWR to re-calculate the shortfall in 2009 without “crediting” the Districts with recharge performed by the Idaho Dairymen’s Association pursuant to a separate Mitigation Agreement approved by IDWR. The Districts’ *Second Plan of Action*, as conditionally approved by the Court, did not include water recharged pursuant to the Dairymen’s Mitigation Agreement. Moreover, IDWR had no authority to “credit” recharge performed under a separate Mitigation Agreement for the benefit of the Districts. Consequently, IDWR failed to accurately report the shortfall that exists from the Districts’ 2009 mitigation actions.

4. Finally, the Court should identify a remedy in the event the mitigation, as approved in the *Stay Order* is not implemented as ordered. Although the Court granted the stay of curtailment upon certain conditions, it is clear the Districts have failed to comply with those conditions, even now nearly six months later. The 2010 irrigation season is approximately two months away and the Districts have apparently only executed contracts for 1,500 acres of surface water conversions. Since the Districts have presently failed to provide evidence of agreements to ensure “over 9,000 acres” of conversions in 2010, the Court should identify a remedy for this failure to comply with the terms of the *Stay Order*.

CONCLUSION

It is clear the issues Clear Springs identified in its *Petition for Clarification* still exist today. First, IDWR has failed to properly account for the recharge that occurred this fall by attempting to “credit” the Districts with nearly 3,700 acre-feet recharged by the Idaho Dairymen’s Association pursuant to a separate approved Mitigation Agreement. IDWR has no authority to “mix-and-match” mitigation provided pursuant to separate agreements for the benefit of the Districts. Moreover, the IDA recharge water was not part of the Districts’ *Second Plan of Action*. The Court should require IDWR to re-calculate the audit of the recharge actions performed by the Districts, including an evaluation of the actual recharge that occurred.

Second, by failing to “reconvert” all of the acres back to a surface water supply in 2009 as promised, the Districts failed to comply with the terms of the Court’s *Stay Order*. Moreover, the Districts have failed to execute signed contracts with its members to document that “over 9,000 acres” will convert to a surface water supply in 2010. In summary, although the Districts enjoyed the benefit of out-of-priority diversions in 2009, they have not performed the mitigation

actions promised and ordered by this Court through the terms of the *Stay Order*. The Court should address the Districts' failure accordingly.

DATED this 27th day of January, 2010.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of January, 2010, I served true and correct copies of the *Notice of Appearance* upon the following by the method indicated:

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- Hand Delivery
- Overnight Mail
- Facsimile
- Email

Courtesy Copy to Judge's Chambers:
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Snake River Basin Adjudication
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Twin Falls, ID 83303-2707

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