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DEPT. OF WATER RESOURCES  
SOUTHERN REGION

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
Paul L. Arrington, ISB #7198  
**BARKER ROSHOLT & SIMPSON LLP**  
1010 W. Jefferson, Suite 102  
P.O. Box 2139  
Boise, Idaho 83701-21239  
Telephone (208) 336-0700  
Facsimile (208) 344-6034

*Attorneys for Clear Springs Foods, Inc.*

**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)

IN THE MATTER OF THE MITIGATION  
PLAN OF THE NORTH SNAKE AND MAGIC  
VALLEY GROUND WATER DISTRICTS TO  
PROVIDE REPLACEMENT WATER FOR  
CLEAR SPRINGS SNAKE RIVER FARM

(Water District Nos. 130 and 140)

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) **CLEAR SPRINGS FOODS, INC.'S**  
) **PROTEST TO THE 2009**  
) **REPLACEMENT WATER PLAN**  
) **AND THIRD MITIGATION PLAN**  
) **OF NORTH SNAKE GROUND**  
) **WATER DISTRICT AND MAGIC**  
) **VALLEY GROUND WATER**  
) **DISTRICT**  
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COMES NOW, Clear Springs Foods, Inc. ("Clear Springs"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLP, and submits this protest to the Replacement Water Plan and Third Mitigation Plan filed in the above-captioned matter. Clear Springs files this protest based upon Clear Springs' filing of March 17, 2009, which it fully incorporates and adopts as part of this filing herein.

**CLEAR SPRINGS FOODS, INC.'S PROTEST**

**FOR OFFICE USE ONLY**

Fee: \$25.00

Receipt No. 8030837

Receipt by: J Reeder

Date Received: 4/20/09

4:54

## INTRODUCTION

On March 12, 2009, the North Snake Ground Water District and Magic Valley Ground Water District (GWD) filed the 2009 Replacement Water Plan and Third Mitigation Plan (Plan) in response to the Director's March 5, 2009 Curtailment Order. 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. Notice of the Plan was then published on April 2<sup>nd</sup> and 9<sup>th</sup> and the deadline for filing Protests is April 20, 2009.

## PROTEST

Clear Springs protests the GWD's Plan for the following initial reasons:

1. On March 17, 2009 Clear Springs filed by letter to the Director issues #1-13 as specific issues Clear Springs initially identified in response to the Plan. Clear Springs hereby adopts and incorporates each and every issue identified by the letter into this protest as requiring evaluation, discovery and resolution prior to any portion of the Plan being subject to an order. As identified in the March 17, 2009 letter, the Plan does not adequately mitigate the injuries to Clear Springs' senior water rights caused by pumping under junior priority ground water rights. Clear Springs further requests that the March 17, 2009 letter be made a part of the record in this proceeding.

2. The lack of Water Quality data available for the wells identified in the Plan raise questions regarding the viability of the mitigation water for delivery and beneficial use at Snake River Farms. The standard of water quality acceptability as to the constituents identified and required for aquacultural use should be equal to the ambient water quality at the spring source identified by the water rights.
3. The Plan fails to provide Clear Springs with adequate protection from contaminants or other harmful, detrimental or lethal material transported in the water being delivered through the Plan.
4. The Plan fails to provide an opportunity for timely consideration and due processing of the Plan in accordance with rule or law. Although the Ground Water Districts have previously submitted CM Rule 43 Mitigation Plans, both in the Clear Springs and Blue Lakes delivery call matters, and the Director has processed those plans pursuant to the rules and statutes, components of the new plan are apparently not being noticed for protest or any hearing in accordance with the Idaho Code § 42-222 and the CM Rules. The process to “pre-approve” a transfer and/or mitigation plan for the purposes of avoiding conjunctive administration is not supported by Idaho law.
5. The Plan fails to include an accompanying application for transfer for the proposed irrigation water rights to be used. As such, the entire Plan is premised upon a transfer that has yet to be filed and properly noticed for protest pursuant to Idaho Code § 42-222. In essence, the Ground Water Districts are seeking approval of the Plan and construction of the plumbing without any approved right to deliver any water to Clear Springs. Although this approach was apparently rejected by the Director last year (compare

GWD First Mitigation Plan which was accompanied by applications for permit and transfer), the Director is apparently not requiring the necessary transfer to be filed at this time. Accordingly, it is possible the Plan may be approved yet the Ground Water Districts will have not water to provide to Clear Springs. At a minimum, the necessary applications should be required to be filed and noticed in conjunction with the Plan so that all issues and parties are before the Director for consideration.

6. The seven wells proposed for pumping to provide replacement water are apparently pumping under 26 different water rights as outlined in Exhibit 3 to the GWD plan. These water rights have decreed priority dates ranging from 1950 to 1985. Twelve (12) of the water rights have priority dates junior to the required curtailment date of November 16, 1972. The GWD Plan assumes that the nature of use of the irrigation water rights would be converted to 'mitigation' and that an average discharge, sufficient to supply the required mitigation flow to SRF, would be pumped continuously. The water rights which are junior to the curtailment date would, if continued to be used as irrigation wells, be curtailed under the present Order if no replacement plan or mitigation plan were approved. Therefore, absent an approved mitigation plan, the junior water rights could not continue to be pumped for irrigation or any other purposes.
7. Likewise, the senior water rights diverting from those wells should not be available for full credit if they are also being used to provide replacement water under the junior water rights. Absent an approved mitigation plan, these 12 junior water rights would be curtailed and there would be a net benefit to the SRF spring of some percentage of the total forgone depletion. The remainder of the forgone depletion would benefit springs

other than SRF. If a mitigation plan is approved and the junior wells pump their full right directly to SRF, then the net benefit from pumping as mitigation water may be only that portion of the forgone depletion which would have gone to springs other than SRF. For instance, suppose the historical consumptive use from a single junior well has been 10 acre-feet per time-step and curtailment of that well results in a benefit to SRF through the aquifer of 8 acre-feet. Pumping of 10 acre-feet or direct replacement from this well results in a full 10 acre-feet benefit to SRF. However, since that well would be curtailed absent a replacement plan, the new credit which should be allocated to that well is only 2 acre-feet. This concept should be evaluated and incorporated in the procedure for determining credit for direct ground water pumping for replacement water, if approved.

8. The determination of injury to senior spring rights should incorporate the evaluation of temporal effects on the historically available flow. Individual spring flow from the ESPA is not uniform over the entire year and fluctuates, usually with lows in March or April and peaks in September or October. The impact of junior groundwater pumping also has a temporal pattern. The time pattern of impact of junior ground water pumping when superimposed on the hydrograph of historical spring flow can have significantly different net effects than is depicted by steady state analysis of impact.

This concept is recognized in the amended IDWR Transfer Guidelines which require that the transient impact of a proposed transfer with mitigation must not exceed 5% of the historical transient impact. In other words, the impact from the proposed transfer with mitigation must follow or match the historical impact over the full time from

inception to steady state. Incorporation of this type of analysis, consistent with the Transfer Guidelines, could result in a determination of injury to earlier priority water rights (as opposed to those that a steady state analysis would otherwise provide). This requirement is not specified in a mitigation plan for which the net mitigation required is computed only at steady state and should be incorporated into all future determinations of IDWR on mitigation plans.

9. Clear Springs objects to the procedure being following in relation to the GWD Plan and the Director's *Replacement Plan Order*. These actions are not supported by any statute or rule and violate Clear Springs' right to due process. For example, the Director was made aware that Clear Springs challenged the plan specifically as it relates to the quality of water that would be provided through Clear Springs' March 17<sup>th</sup> filing and the March 19<sup>th</sup> filing of a *Protest* to the GWD Plan. The Director was fully aware of Clear Springs' protest prior to issuing the *Replacement Plan Order*. That notwithstanding, in the *Replacement Plan Order*, the Director determined, without any hearing or any evidence from Clear Springs, that the water being provided through the replacement water plan (which is identical in all respects to the mitigation plan) would be of suitable quality. The *Replacement Plan Order* then authorized the construction of a \$500,000 project that would temporarily deliver replacement water to Clear Springs until an order on the mitigation plan could be approved. The *Replacement Plan Order*, at 10, provides that "The Director's approval of the 2009 Plan as a replacement water plan does not prejudice the 2009 Plan as a CM Rule 43 mitigation plan." However, this process, which includes a decision on the water quality without any opportunity for hearing, prejudices

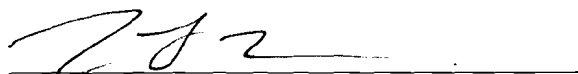
Clear Springs.

10. Clear Springs further objects to the Plan as premature given that no transfer of the rights identified in the Plan have been subject to a statutory transfer proceeding. Further, to the extent the Applicant or the IDWR envision utilizing the State Water Bank as the mechanism for changing elements of the rights, the State Water Bank requires the IDWR to make a finding of no injury to existing water rights as a result of the proposed lease through the Water Bank. Moreover, the record does not evidence the existence of any lease application or approval by the Idaho Water Resource Board, and is therefore deficient. Any such transfer or lease would injure existing rights, including Clear Springs' rights, including those not associated with this Plan.
11. Clear Springs requests the appointment of an independent Hearing Officer in this matter and the preclusion of the Director of the Department of Water Resources from presiding over any matter associated with this Mitigation Plan. The Director or employees under his supervision have been in direct verbal or written communication with the Applicant, either approving or otherwise acknowledging the work associated with the proposed plan. Such actions without due process violate Clear Springs' rights.

Clear Springs reserves the right to amend this Protest as necessary throughout the course of this proceeding.

DATED this 20<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 20<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:

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

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| Allen Merritt<br>Cindy Yenter<br>Watermaster – WD 130<br>IDWR – Southern Region<br>1341 Fillmore St., Suite 200<br>Twin Falls, ID 83301-3380<br><u>allen.merritt@idwr.idaho.gov</u><br><u>cindy.yenter.@idwr.idaho.gov</u> | <input type="checkbox"/> U.S. Mail, Postage Prepaid<br><input type="checkbox"/> Facsimile<br><input checked="" type="checkbox"/> E-mail |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|

  
Travis L. Thompson