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RECEIVED
AUG 04 2008
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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 RIGHT NOS.	)	
36-04013A, 36-04013B AND 36-07148	)	CLEAR SPRINGS FOODS, INC.'S
	)	PROTEST TO GROUND WATER
(Clear Springs Snake River Farm)	)	DISTRICT'S MITIGATION PLAN
_____	)	

CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through its counsel of record, hereby files this *Protest* to the approval of the mitigation plan ("GWD Plan") filed by the Magic Valley and North Snake Ground Water Districts ("Ground Water Districts") on June 13, 2008.

BASES FOR PROTEST

The initial bases for Clear Springs' protest are as follows:

1. The GWD Plan is untimely and deficient as a matter of law for failing to mitigate Clear Springs' injuries for over seven months in 2008. Attached hereto as **Exhibits A, B, and C** are letters and a response from Clear Springs' requesting timely water right administration and identifying the problems with the Ground Water Districts' lack of timely and meaningful

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Date 8/5/08

mitigation.¹ This is in addition to requests for timely administration made by Clear Springs at various status conferences over the last five months. (See Audio from Status Conferences held on May 7 and June 26, 2008; available at the Idaho Department of Water Resources' website at: <http://www.idwr.idaho.gov/Calls/Spring%20Users%20Calls/default.htm>). Any approval of a plan at this stage in the year does not constitute acceptable mitigation under Idaho law, including the Department's Conjunctive Management Rules ("CMRs") (IDAPA 37.03.11).

2. The GWD Plan is speculative and deficient since it is based upon the approval of other applications for permit and transfer (applications for permit #36-16645 and transfer #74904) that have been protested and are the subject of contested cases before the Department. The grounds for the protests to those applications are incorporated as if set forth herein.

3. The GWD Plan relies upon past "replacement water plans" and the allegation of the implementation of those plans to arrive at a "delivery requirement" to Clear Springs of 2.17 cfs for 2008. The past accounting for the Ground Water Districts mitigation actions has not been completed to Clear Springs' knowledge and the required mitigation obligation for 2008 has not been clearly defined by the Department. Accordingly, Clear Springs protests the representation regarding past actions undertaken by the Ground Water Districts and any credit that is being sought for purposes of the 2008 GWD Plan.

4. The GWD Plan proposes to use spring water available under water right #36-4076 owned by the State of Idaho Department of Fish & Game, yet it fails to specifically identify the amount of water presently available under that water right or the physical ability of the Ground Water Districts to convey any water to Clear Springs' Snake River Farm.

5. The GWD Plan relies upon unspecified and undocumented calculations made by the Department regarding anticipated benefits from the 2008 CREP program. Admittedly, the

¹ Clear Springs' prior letters and filings are incorporated as if set forth herein.

Ground Water Districts have not performed their own analysis or calculations regarding CREP acres. Clear Springs has repeatedly requested an updated accounting of lands enrolled in CREP and has yet to receive a response from the Department. To the best of Clear Springs' knowledge not all lands previously enrolled are actually participating in CREP in 2008. Accordingly, the GWD Plan's reliance upon the Department's estimate as to CREP benefits is inaccurate and does not meet the requirements of Rule 43.

6. The GWD Plan relies upon approximately 9,300 "conversion acres" yet provides no details as to location or identification of those lands. Instead, the GWD Plan instructs the Department to assume the conversion acres in 2008 are the same as those that participated in 2006 and 2007. In addition, the GWD Plan instructs the Department to "assume" that projected 2008 water deliveries to the conversion acres will be the same as actual deliveries made in 2006 and 2007 (est. 35,000 acre-feet). The GWD Plan is insufficient in details and analysis regarding the conversion acres and the alleged benefit to the spring reach. The GWD Plan further tiers to analysis by the Department regarding these acres which is not identified or provided. Furthermore, the Ground Water Districts have failed to demonstrate that they have access to 35,000 acre-feet, by lease or otherwise, to deliver through the North Side Canal Company. If that water has been leased the Ground Water Districts should be able to provide copies of the leases to document the availability of the water.

7. The GWD Plan relies upon an undefined and speculative "combination of conversion deliveries and late season recharge" to make up for any "shortfalls in direct delivery" in 2008. The plan is admittedly deficient as to these points.

8. The GWD Plan fails to "prevent injury" to Clear Springs' senior water rights and therefore does not comply with CMR 43.

9. The GWD Plan fails to comply with the criteria set forth in Idaho Code § 42-222.
10. Clear Springs reserves the right to supplement this Protest for such other and further reasons as may be discovered or set forth at the hearing on this matter.

REQUEST FOR RELIEF

1. Clear Springs submits that the GWD Plan is inadequate, fails to meet the standards established by the CMR and Idaho law, and fails to provide sufficient information to analyze the proposal and therefore the plan should be summarily dismissed or denied.
2. Clear Springs requests that the Director appoint an independent hearing officer who is not an employee of the Department to preside over these proceedings pursuant to Idaho Code § 42-1701A(2) and Rule 410 of the Department's Rules of Procedure.
3. For such other relief as may be determined by the Department.

DATED this 4th day of August 2008.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2008, I served a true and correct copy of the foregoing *Clear Springs Foods, Inc.'s Protest to Ground Water Districts' Mitigation Plan*, by depositing same in the United States mail, postage prepaid, addressed to the following:

Randy Budge
P.O. Box 1391
Pocatello, Idaho 83240-1391


Travis L. Thompson

Exhibit A



**CLEAR
SPRINGS
FOODS®**

JOHN R. MACMILLAN
VICE PRESIDENT

CLEAR SPRINGS FOODS, INC.
P.O. Box 712, Buhl, Idaho 83316
Phone 208 543-3456
Fax 208 543-4146

March 28, 2008

Director David K. Tuthill, Jr.
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

RECEIVED

MAR 31 2008

DEPARTMENT OF
WATER RESOURCES

Re: Clear Springs Foods, Inc.'s Snake River Farm (2008 Conjunctive Administration)

Dear Director:

I am writing in regards to Clear Springs Foods, Inc.'s ("Clear Springs") request for water right administration to satisfy Clear Springs' senior surface water rights at its Snake River Farm facility. As you are aware, the former Director entered an order on July 8, 2005 ("July 8 Order") that allowed for a 5-year phased-in curtailment program for purposes of administration of hydraulically connected junior priority ground water rights that are injuring Clear Springs' water rights. 2008 is the fourth year of that 5-year phased-in regime.

While the Director's July 8 Order was the subject of an administrative hearing last December before the Honorable Gerald F. Schroeder, and the Hearing Officer has issued recommended orders that must still go through the administrative process for final order by the agency, Idaho law still requires that you administer water rights pending final resolution of that contested case. You apparently recognized this fact last fall when you mailed letters to junior priority ground water right holders warning of potential curtailment in 2008. *See Exhibit A (encl.)*. With respect to Clear Springs' Snake River Farms call you stated:

The 2005 Clear Springs order provides that replacement water in the amount of 31 cfs shall be delivered during year four (2008) to the Buhl Gage to Thousand Springs reach. Without additional mitigation or replacement water being provided, year four of phased in curtailment shall require the curtailment of ground water rights having a priority date later than (junior to) December 10, 1973. This date could be adjusted based on the submittal of an acceptable mitigation plan, and it assumes continuation of existing conversion acres and CREP acres. *Director Tuthill October 17, 2007 Letter at 2. See Exhibit A (encl.)*.

While your letter identified the fourth year requirement from the July 8 Order, it failed to identify the outstanding obligations that ground water users still have to make up due to shortfalls in their "mitigation" actions for 2005, 2006, and 2007. First, IGWA's

Mr. David Tuthill
March 28, 2008
Page 2 of 3

2005 Replacement Water Plan was subject to a hearing before the Director on June 5, 2006. No order has been issued to address the problems with the 2005 plan that were raised at that hearing. Second, no order has been issued to identify what actions were actually implemented from IGWA's 2006 Replacement Water Plan, and what outstanding obligation remains from that year. Finally, last July you found IGWA's 2007 Replacement Water Plan to be 10.7 cfs short for the third year's required mitigation. See *Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans* at 5, ¶ 11.

Despite the obvious shortfalls in meeting the ordered mitigation requirements the last few years, ground water right holders have been authorized to divert and use water out-of-priority. This conflicts with Idaho law and perpetuates the injury to Clear Springs' senior surface water rights.

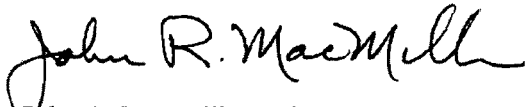
To Clear Springs' knowledge, no "replacement water plans" or "mitigation plans" have been submitted for 2008. Given the time needed for review of any such plan, and the process required by the conjunctive management rules (Rule 43), junior priority ground water right holders have admittedly failed to submit a plan in a timely manner this year. This is despite knowledge of the fourth year required mitigation since 2005 and the warning that you provided last fall. The failure to submit a plan and provide for a meaningful process to review that plan threatens to place junior priority ground water users in the same predicament as last year, a potential mid-season curtailment. Such a scenario provides no certainty to either junior priority ground water users or Clear Springs.

Accordingly, since the irrigation season is set to begin in the next few weeks a curtailment order should be issued promptly to prevent out-of-priority ground water diversions this year. Moreover, the projected priority date for curtailment should be adjusted as well to account for the additional obligations that need to be carried over from past shortfalls.

In sum, Clear Springs expects timely and lawful action by the Water District 130 Watermaster to implement the requirements of the July 8 Order so as to protect Clear Springs' senior water rights in 2008. Please respond and advise us as to the proposed action for 2008 within five (5) business days so that Clear Springs may pursue other legal options if necessary to protect its senior water rights this year.

Mr. David Tuthill
March 28, 2008
Page 3 of 3

Sincerely,

A handwritten signature in black ink, reading "John R. MacMillan". The signature is fluid and cursive, with the first name "John" and last name "MacMillan" clearly legible.

John R. MacMillan, Ph.D.
Vice-President

Encl: Exhibit A

cc: Mr. John Chatburn
Mr. David Hensley
Ms. Cindy Yenter



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

October 17, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

TO: Water Right Holder in the Eastern Snake Plain Aquifer

Re: **Notice of Potential Curtailment of Ground Water Rights in the Eastern Snake Plain Aquifer**

Dear Water Right Holder:

This letter is provided to inform you that you are the water right holder of record for one or more water rights that could **potentially** be subject to curtailment during 2008. The enclosed map depicts areas of potential curtailment based on three water right calls, described below. The delivery calls were made under the Department's Rules for *Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11). The calls include ground water rights for irrigation, commercial, industrial, municipal, non-exempt domestic use, and other consumptive uses. Non-consumptive uses and culinary in-house uses of water will not be subject to curtailment under the orders.

Hearings

Information in this letter might be modified as a result of hearings on the existing orders, scheduled to begin on November 28, 2007, for the Blue Lakes call and the Clear Springs call, and on January 16, 2008, for the Surface Water Coalition call. Information related to the hearings is posted on the IDWR website at www.idwr.idaho.gov.

Blue Lakes Call

The Blue Lakes water rights authorize the diversion of water from Alpheus Creek located in the Devil's Washbowl to Buhl Gage spring reach north of Twin Falls. An order issued on May 19, 2005 determined that diversion and use of ground water under water rights with junior priority dates causes material injury to Blue Lakes' water right no. 36-07427. A copy of the order can be found on IDWR's website at: <http://www.idwr.idaho.gov/Calls/Spring%20Users%20Calls/Blue%20Lakes%20Order%2005-19-05.pdf>.

The 2005 Blue Lakes order provides that replacement water in the amount of 40 cubic feet per second (cfs) shall be delivered during year four (2008) to the Devil's Washbowl to Buhl reach. Without additional mitigation or replacement water being provided, year four of phased curtailment shall require the curtailment of ground water rights having a priority date later than (junior to) March 3, 1982. This date could be adjusted based on the submittal of an acceptable mitigation plan, and it assumes continuation of existing conversion acres and CREP acres.

Clear Springs Call

The Clear Springs water rights for use at its Snake River Farm authorize the diversion of water from springs tributary to Clear Lakes located in the Buhl Gage to Thousand Springs reach east of Buhl. An order issued on July 8, 2005 determined that diversion and use of ground water under water rights with junior priority dates causes material injury to Clear Springs' water right no. 36-04013B. A copy of the order can be found on IDWR's website at: <http://www.idwr.idaho.gov/Calls/Spring%20Users%20Calls/Clear%20Springs%20Order%2007-08-05.pdf>.

The 2005 Clear Springs order provides that replacement water in the amount of 31 cfs shall be delivered during year four (2008) to the Buhl Gage to Thousand Springs reach. Without additional mitigation or replacement water being provided, year four of phased curtailment shall require the curtailment of ground water rights having a priority date later than (junior to) December 10, 1973. This date could be adjusted based on the submittal of an acceptable mitigation plan, and it assumes continuation of existing conversion acres and CREP acres.

Surface Water Coalition Call

The Surface Water Coalition call applies to ground water rights that impact the Snake River in the American Falls area where the aquifer and river are hydraulically connected. This priority administration of water rights is occurring as required by the order of May 2, 2005, issued in response to the water delivery call made by members of the Surface Water Coalition, comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. A copy of the order can be found on the IDWR website at:

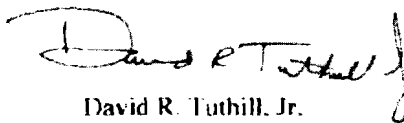
<http://www.idwr.idaho.gov/Calls/Surface%20Coalition%20Call/default.htm>.

Under the 2005 order, I am required to make a determination of the extent of material injury reasonably likely to occur to members of the Surface Water Coalition during the 2008 irrigation season as a result of depletions caused by the diversion of water under junior priority ground water rights. This determination will be made with forecasts of the expected runoff based on the snow survey conducted on April 1, 2008. Depending on the expected snow pack, the determination could result in the curtailment of consumptive ground water rights during the 2008 irrigation season. IDWR computations predict that if the expected runoff is 105% of normal, no curtailment will be required. If the predicted runoff is the same as in 2007, curtailment could impact priority dates as early as September 19, 1960. If the predicted runoff is the same as in 1977, the lowest runoff year on record, curtailment could impact priority dates as early as September 4, 1950. The submittal of acceptable mitigation plans could protect specified water rights from curtailment.

CREP

Issuance of a curtailment order will affect the eligibility of land to be enrolled in the Conservation Reserve Enhancement Program (CREP). The United States Department of Agriculture (USDA) Farm Service Agency's rules for CREP require that "the cropland must be physically and legally capable of being irrigated in a normal manner when offered for enrollment." Upon the issuance of a curtailment order, cropland irrigated with curtailed water rights is no longer "legally capable of being irrigated" and is therefore no longer eligible for CREP. Producers should also be aware that CREP is limited to an enrollment of 100,000 acres. For further CREP eligibility requirements, producers should seek advice from their local USDA Farm Service Agency office.

Sincerely,



David R. Tuthill, Jr.
Director

Enclosure: Location Map of Curtailment Areas

Map of Curtailment Areas

- Selected Water Districts
- Area of Common Ground Water Supply
- Blue Lakes Trout Ground Water Curtailment Area
- Snake River Farm Ground Water Curtailment Area
- Surface Water Coalition Ground Water Curtailment Area

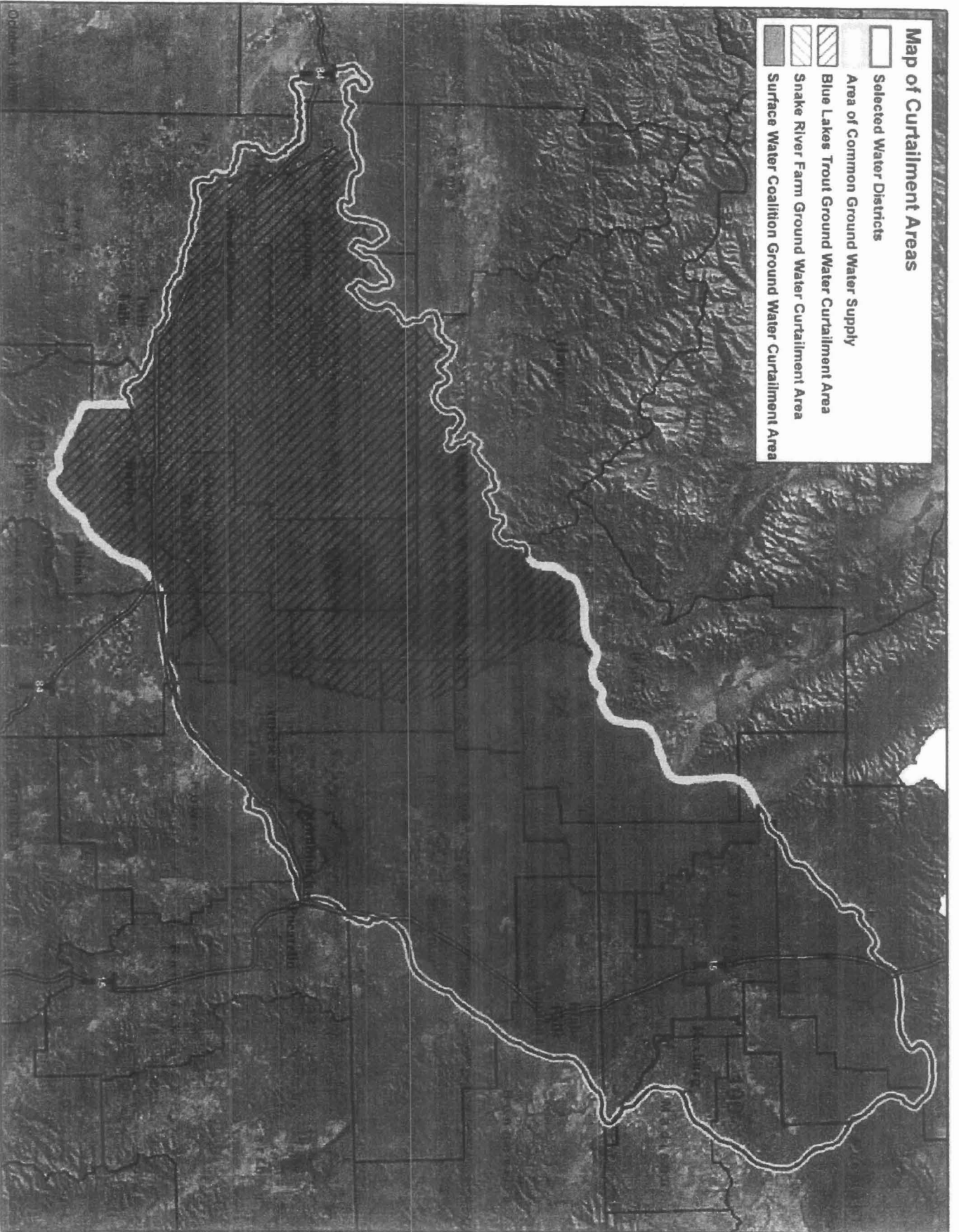


Exhibit B

Attorneys for Clear Springs Foods, Inc.

IN THE MATTER OF DISTRIBUTION OF	)	
WATER TO WATER RIGHTS NOS. 36-	)	CLEAR SPRINGS FOODS, INC.'S
04013a, 36-04013b AND 36-07148	)	RESPONSE TO GROUND WATER
(SNAKE RIVER FARM)	)	DISTRICTS' JOINT REPLACEMENT
	)	WATER PLAN FOR 2008
	)	

CLEAR SPRINGS' RESPONSE TO GWD JOINT 2008 REPLACEMENT WATER PLAN

immediate hearing on the 2008 Plan before the Director pursuant to Idaho Code § 42-1701A(3) prior to the Director's decision on that plan.

INTRODUCTION

On May 2, 2005, Clear Springs requested water rights administration in Water District No. 130 pursuant to Idaho Code § 42-607, in order to satisfy its senior surface water rights at the Snake River Farm facility. The Director responded by issuing an order, on July 8, 2005 ("July 8 Order"), which, among other things, implemented a five-year phased curtailment plan. This plan calls for "involuntary or substitute curtailment ... in 2005, 2006, 2007, 2008 and 2009, such that ... phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach." July 8 Order at 37. Such "involuntary or substitute curtailment" was required to result in an increase of "steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively." *Id.*

According to the 2005 Order, groundwater users, who were found to be depleting the aquifer by their out-of-priority diversions to the injury of certain Clear Springs' water rights (only 1964 and junior), could avoid mandatory curtailment by providing a "replacement water plan", which would result in "cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach." Nothing in the conjunctive management rules provides for "replacement water plans" or the unilateral approval by the Director of the same without any process provided for injured senior water right holders. While the Department and junior priority ground water right holders have used the term "replacement water plan" and "mitigation plan" interchangeably, the plans filed by the Ground Water Districts are not Rule 43 Mitigation Plans, and no process has been followed pursuant to that rule to date. Consequently, the "replacement water plan" process, something created *sua sponte* by the Director in 2005, just

provides for the Director's approval or disapproval of a plan, with no due process provided to the injured senior water right holder.

In 2005, 2006, and 2007, the Ground Water Districts filed "replacement water plans" and avoided mandatory curtailment. An untimely hearing on the 2005 plan was then held a year after-the-fact, on June 5, 2006, after junior ground water right holders had been authorized to pump unabated for the entire 2005 irrigation season. Several questions and issues were raised at that hearing regarding the efficacy of the 2005 plan. However, no decision was ever issued by the Department after that hearing despite multiple requests by Clear Springs and Blue Lakes Trout Farm, Inc. Accordingly, without a final decision regarding the issues addressed at the hearing, there is no way to determine whether or not the actions taken in 2005 actually met the curtailment goals prescribed in the July 8 Order.

Next, although the Ground Water Districts filed another plan in 2006, no Department accounting has taken place to determine which actions promised were ever actually implemented. The Ground Water Districts now appear to claim that since the conjunctive management rules were under legal challenge during that year they had no obligation to mitigate for their out-of-priority depletions in 2006. Contrary to the Districts' arguments being offered now, the litigation over the Department's rules did not constitute a "free pass" to water right administration for 2006. Indeed, the Department used the rules through the better part of the irrigation season to justify not curtailing out-of-priority junior ground water rights, yet there has been no decision to determine the level of mitigation by those juniors that was actually provided during that year. Without an accounting of 2006 actions, which was repeatedly requested by Clear Springs and Blue Lakes in 2007, the Department and Director failed to identify the proper

mitigation goals for 2007 (i.e. the carryover of the 2006 shortfalls added to the 2007 requirements).

Despite the lack of mitigation actions and accounting from 2006, the Ground Water Districts then filed a replacement water plan for 2007, which on its face did not meet the third year requirements from the July 8 Order. This plan failed to provide the required 23 cfs as stated in the Director's July 5, 2007 Order, which found the plan to be deficient by 10.7 cfs. *See Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans* at 5, ¶ 11. Consequently, Clear Springs' Vice-President John R. MacMillan sent the Director a letter on March 28, 2008 requesting an accounting of the actions taken under the prior "replacement water plans" so that proper mitigation or administration could occur in 2008. The Director responded with a letter on March 31, 2008 and required the Ground Water Districts to file an "acceptable mitigation or a replacement plan" by April 7, 2008, but the letter did not identify the prior years' shortfalls or the required amount of mitigation for 2008.

Nonetheless, on April 1, 2008, the Ground Water Districts filed yet another "replacement water plan" for 2008. Tiering to their prior plans and analyses, the Ground Water Districts identified certain actions and proposed to supply Clear Springs' Snake River Farm facility with pumped water from a new water right owned by the State of Idaho Department of Fish & Game (#36-7046).¹ As explained below, the Ground Water Districts' 2008 Plan, which relies heavily upon the use of water from the State of Idaho Department of Fish & Game's water right, fails to lawfully mitigate for the injury being continually suffered by Clear Springs' senior surface water rights. As such, the 2008 Plan should be denied.

¹ The 2008 Plan is completely devoid of any specific data or modeled analysis of the proposed actions to be taken by the Ground Water Districts. The reference to prior plans and submissions is insufficient and confusing. At a minimum, the Ground Water Districts should be required to submit all supporting data and information with any proposed "plan" to avoid curtailment.

RESPONSE

I. **The 2008 Plan Fails to Address and Cover the 2005-2007 Mitigation Shortfalls**

Initially, Clear Springs notes that the Director issued orders on previous replacement plans without input from any party, including the party being injured and the subject to receive the proposed mitigation. The Hearing Officer addressed this unilateral action through discussion of due process in the recommended order. *See January 11, 2008 Opinion* at p. 27. The Hearing Officer's Order further provided guidance on a number of issues raised in the 2008 Plan. First, the 2008 Plan fails to address shortfalls in previous years' plans and their lack of implementation. At hearing, Department employees testified that the 2007 plan did not meet the phased-in curtailment obligations, which the Director's July 5, 2007 had previously confirmed. The Hearing Officer was specific as to this circumstance:

2. Replacement plans must meet the targeted goals of curtailment. Replacement plans are an alternative to curtailment. To be valid they must meet the goals of curtailment within the time frames of curtailment. A failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years. The cap on phased in curtailment is five years. That period of time should apply also to any approved mitigation plan, unless an agreement is reached with the Spring Users that extends the period or provides a different alternative. That appears unlikely. Consequently, if the targeted goals are not met in the five year phase in period, curtailment to meet the initial goals is required.

3. The Director's approval of a mitigation plan does not eliminate the need to meet the goals to be achieved by curtailment. The fact that the Director approves a replacement water plan for a particular year does not eliminate the ultimate goal of providing the amount of water to the Spring Users set forth in the Orders. The value of the approval is that the rights of IGWA and the Spring Users are settled for that year and they may plan accordingly. But the ultimate obligation that would be met by curtailment remains and is carried over. This is relevant in this case, since it appears that the last approved mitigation plan falls short of the targeted goal.

January 11, 2008 Opinion at 27.

Clearly, the 2008 Plan is deficient in addressing the previous years' shortfalls. The 2007 Plan failed to incorporate the fact that the 2006 plan was not fully implemented. Likewise, the 2008 Plan further fails to address the 2007 Plan shortfalls, and the cumulative deficiencies from the prior years. Mitigation must be timely and real. "Close enough" is not the standard. As the Hearing Officer stated: "To be valid they must meet the goals of curtailment within the time frames of curtailment." *January 11, 2008 Opinion* at 27. The 2008 Plan fails in both regards, it does not meet the "goal", and it is not "timely", hence it should be denied.

II. Proposed Conversion Acres / Rental of 35,000 acre-feet of Storage Water

Next, the 2008 Plan apparently relies upon the same conversion acres in the North Snake Ground Water District, and the use of 35,000 acre-feet of storage water from the Upper Snake River reservoirs above Milner Dam to supply water to those acres. The 2008 Plan proposes to receive credit for the lack of ground water pumped on those conversion acres, any associated loss of surface water on those acres, and the 30% loss charged by the North Side Canal Company for surface water delivery to those acres. The Ground Water Districts' proposal for this action is insufficient since it:

- 1) Fails to provide written documentation and proof of rental of 35,000 acre-feet of storage in 2008.
- 2) Fails to provide written documentation and agreement that the surface water will be delivered through North Side Canal Company's system in 2008.
- 3) Fails to identify which acres will apparently receive surface water in 2008, which acres have received that water in the past, and documented proof that ground water has not and will not be pumped to those acres.
- 4) Fails to identify the expected modeled benefits.
- 5) Fails to provide any analysis or justification for the claimed 30% "incidental recharge" from the delivery of surface water to those conversion acres.

The Ground Water Districts have known about the pending curtailment requirements for months. Actions could have been taken on acquiring the necessary written documentation and proof to avoid the same controversies that have plagued previous years' filings. Additional

issues may be identified if and when the Ground Water Districts supply information related to the above deficiencies.

III. Pump Project Using Water Under State Fish & Game Water Right No. 36-7046

The Ground Water Districts propose to directly supply Clear Springs' Snake River Farm facility with water (allegedly 2 cfs) under the Idaho Department of Fish & Game's water right no. 36-7046. The Ground Water Districts apparently propose to construct a pump on Clear Springs' private property to collect this water and divert it to the Snake River Farm raceways.

Representatives from the Ground Water Districts met with Clear Springs' executives on Friday April 4, 2008 to discuss this proposed project. Unfortunately, no specific details about the project, beyond those stated in the 2008 Plan, were provided. Without specific details to support the project, it is impossible for Clear Springs to completely evaluate the proposal as suggested in the 2008 Plan. However, as identified in the plan, the proposed project is insufficient for the following reasons:

- 1) The 2008 Plan does not identify how or when the water would be conveyed to Snake River Farms, except by indicating that the water would be pumped. Apparently, the project is completely dependant upon pumping water from another source to the Snake River Farm head canal. Systems reliant on pumping to deliver a continuous supply of water are subject to sudden failure. As previously explained by Clear Springs at the recent hearing and in other forums, "pumping water" to Clear Springs' facilities significantly increases risk to its operations, specifically the health and survival of the rainbow trout. Rainbow trout are keenly sensitive to sudden diminishment of water flow regardless of the cause. Water contains dissolved oxygen which when deprived first causes significant physiological imbalance, stress and if prolonged acute death. Elevated stress alone causes chronic disease, delayed death and poor fish growth. As such, the risk of pump failure is unacceptable to the operations of Clear Springs' facilities.
- 2) The spring located at the periphery of the Snake River Farm that is proposed to be the source of the water to be pumped under the Department of Fish Game Water Right 36-7046 has insufficient water to satisfy the 2 cfs alleged in the plan. Neither the 2008 Plan nor the Department have provided any historic measurements or flow data of the spring water diverted under water right 36-7046. However, an on-site field examination (conducted by several Clear Springs' employees on April 3rd and April

4th, 2008) indicates that no more than 0.5 cfs is present. Presumably this flow would fluctuate over time and would be diminished with the onset of ground water pumping throughout the 2008 irrigation season.

- 3) The 2008 Plan does not provide any information related to the water quality in this spring to demonstrate that it would be compatible with rainbow trout propagation. While the spring emanates from an area similar to where Snake River Farm obtains its current water supply, spring water quality can vary. Of great concern to Clear Springs is whether the water contains contaminants that would be toxic to rainbow trout or would adulterate their flesh making them unwholesome for human consumption. Introducing new water to Clear Springs' facilities without ensuring the proper quality could be disastrous for its operations.
- 4) The Ground Water Districts indicate they have received verbal agreement with the Idaho Department of Fish & Game to utilize this spring water, yet the authority providing such verbal agreement is not identified nor is there an apparent written agreement to do so making it impossible to confirm such a commitment.
- 5) The 2008 Plan does not provide any written assignment of the State Department of Fish & Game water right no. 36-7046 or the filing of transfer documentation as would be required under Idaho law.
- 6) The 2008 Plan fails to explain how what is currently a non-existent project with inadequate water (approximately 0.5 cfs) at this point will provide "timely" mitigation to Clear Springs's senior surface water rights this year.

Additional issues may arise if and when specific details are actually provided by the Ground Water Districts relative to this proposed project.

Regardless of the lack of detail, as to the issue of pumping water for mitigation use, the Hearing Officer's opinion expressly identified the pitfalls and risks associated with relying upon pumped water through an aquaculture facility:

THE PROPOSAL FOR REUSE OF WATER BY THE SPRING USERS

1. The Spring Users are not obligated to pursue repumping of water beyond the current practices. IGWA maintains that the Spring Users should be required to institute systems for reuse of the water they receive before calling for the curtailment of junior rights. At the present time water is reused in the trout farms as it moves from one set of raceways in a pond to a lower set of raceways. The process works by gravity and utilizes a settling system between the ponds. IGWA maintains that this process can be replicated by repumping the water through the raceways. This is a theory. The burden of proof is upon IGWA to show that it is a realistic method.

Several problems prevent acceptance of this alternative: a) There is no showing that it is financially feasible to run pumps twenty-four hours a day, three hundred sixty-five days a year. b) There is evidence that there would be risks that make this process unacceptable. Any breakdown for even a brief time could be catastrophic to fish deprived of water containing adequate oxygen. c) While water is presently reused in a process of settling waste that works, there is no evidence that a similar quality of water could be maintained with repumping.

January 11, 2008 Opinion at 12.

The same risks are present with relying upon pumped water as a part of a “replacement water plan”. The 2008 Plan on its face proposes an insufficient project since it lacks any specific details that would support its implementation. In particular, the amount of water the Ground Water Districts allege could be provided (2 cfs) does not match up with what the spring source is actually producing (about 0.5 cfs) at this time. If the Ground Water Districts cannot identify alternative actions that would supply the required water, it is obvious the proposed project fails.

Setting aside the shortfalls in the 2008 Plan, the Hearing Officer determined based upon the testimony of Department staff that Snake River Farms’ 1955 water right (#36-04013A) was being materially injured by out-of-priority ground water diversions. Hence, any subsequent mitigation plan must address mitigation of injury to this water right, not just the 1964 water right (#36-04013B). Such would be the case with any on-going administration of water rights on a

year-to-year basis where available water supply fluctuates. Since the 2008 Plan does not address injury to Clear Springs' 1955 water right, it fails and must be denied.

CONCLUSION

For the foregoing reasons, Clear Springs requests that the Director deny the Ground Water Districts' 2008 Plan. In the event the Department and Director do not consider the 2008 Plan as a "Mitigation Plan" filed pursuant to Rule 43 and the procedures provided therein, or do not provide any process to satisfy Clear Springs' constitutional rights, Clear Springs would request an immediate hearing on the plan before the Director pursuant to Idaho Code section 42-1701A(3) prior to the Director's action the plan.

DATED this 7th day of April, 2008.



John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2008, I served a true and correct copy of the foregoing **CLEAR SPRINGS FOODS, INC.'S RESPONSE TO GROUND WATER DISTRICTS' JOINT REPLACEMENT WATER PLAN FOR 2008** by delivering it to the following individuals by the method indicated below, addressed as stated.

Director David K. Tuthill, Jr.
c/o Victoria Wigle
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
victoria.wigle@idwr.idaho.gov

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☐ Facsimile
☐ Overnight Mail
☐ Hand Delivery
☒ E-Mail

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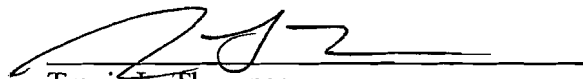

Travis L. Thompson

Exhibit C



**CLEAR
SPRINGS
FOODS®**

JOHN R. MACMILLAN
VICE PRESIDENT

CLEAR SPRINGS FOODS, INC.
P O Box 712, Buhl, Idaho 83316
Phone 208 543-3456
Fax 208 543-4146

June 4, 2008

Dr. David R. Tuthill
Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Clear Springs Foods, Inc.'s Snake River Farms Water Rights Administration.

Dear Director Tuthill

Clear Springs Foods, Inc. ("Clear Springs") is in receipt of the Ground Water Districts' May 28, 2008 submittal ("submittal") to the Director detailing certain actions taken in response to the Director's May 14, 2008 letter. In that letter the Director states:

"The Ground Water Districts are reminded that the need to provide additional water to Clear Springs is urgent, and this agency will continue to maintain a close watch on progress in this regard. The Ground Water Districts have committed to provide the amended plan within two weeks after the May 14, 2008 meeting with the Board of Clear Lakes Country Club. Significant progress needs to be made in this regard by May 28, 2008, to prevent a curtailment order."

The submittal does not conform with the Director's letter which requests an "amended plan" within the parameters of the Conjunctive Management Rules. The Ground Water Districts admit such in their submittal. Instead the submittal simply describes the actions taken since May 7, 2008. This failure alone justifies immediate action on the part of the Director. Alternatively, accepting the submittal as the Ground Water Districts' amended plan, Clear Springs again requests that the Director immediately rule on the adequacy of the amended plan.

Clear Springs reiterates arguments previously delineated in prior pleadings, letters or other communications to the Director regarding timely administration or mitigation, the problems associated with pumped water and deficiencies in the mitigation plans submitted. As acknowledged in the above quoted language from the Director's May 13, 2008, "the need to provide additional water to Clear Springs is urgent." What is required by law and by Administrative Order is timely delivery of water in the amounts and quality described by the July 8, 2005 Order.

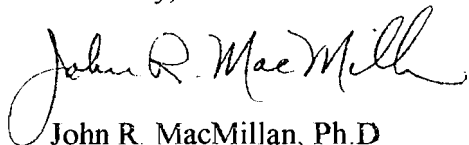
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Reviewing the May 28 submittal, only item No. 1 appears to have any degree of certainty associated with the proposed action. Items 2 through 4 simply re-iterate possible sources of water without any degree of certainty either as to quantity, quality, duration or timing of water delivery. These items must be dismissed. The Director has the ability then to model the benefits associated with the actual conversion water (Item No. 1) obtained and delivered into the North Side Canal Company to determine the adequacy of the mitigation plan. To further illustrate the inadequacies of items 2 through 4, one need only to look at the infrastructure that would have to be developed prior to the delivery of water. Under item 2, presumably Clear Lakes Country Club would not allow the Ground Water Districts to take the water without the infrastructure in place to ensure the supply to the Country Club. The same issues arise under item 3 of the submittal where no timetable or design drawings are provided. Item 4 suffers further from the need to obtain a well drilling permit and approval from IDWR to withdraw groundwater. Such timing estimates are not provided. However, given that the mitigation to date has not been delivered to the Snake River Farms collection box, further delay only magnifies the continual injury and taking of Clear Springs' property rights.

Finally, in the Director's May 13, 2008 letter, the issue of CREP benefits and its application to the mitigation calculation was raised. Clear Springs objects to the Ground Water Districts receiving credit for CREP. CREP is a publicly funded program designed to improve the over-all health of the ESPA. It fits well with the CAMP program but was never intended to replace the need for junior ground water users to mitigate for their depletions of the aquifer. Further, the Director references "anticipated" benefits accruing in the Buhl to Thousand Springs reach in 2008 from CREP. Numerous recent articles and IDWR personnel updates of CREP reveal substantial withdrawals from the CREP program. From these reports it is apparent that landowners are paying the financial penalties and bringing the CREP acreage back into production. With this recent information in the hands of the Director, Clear Springs would anticipate that any modeled benefit associated with CREP would acknowledge the latest information as opposed to out of date model runs using prior assumptions about the level of CREP participation.

As previously stated, Clear Springs desires timely, gravity delivered water of equivalent quality as currently being delivered at the collection box which will mitigate groundwater depletions causing injury. Clear Springs remains concerned that the Director's failure to act only increases the on-going injury and taking of Clear Springs' water, and continues to impair Clear Springs' ability to operate. We look forward to your immediate action.

Sincerely,



John R. MacMillan, Ph.D
Vice President

cc: John Simpson Cindy Yenter
Randy Budge