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 THE MITIGATION PLAN O FTHE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS IMPLEMENTED BY APPLICATIONS FOR PERMIT NOS. 02-10405 AND 36-16645 AND APPLICATION FOR TRANSFER NO. 74904 TO PROVIDE REPLACEMENT WATER FOR CLEAR SPRINGS SNAKE RIVER FARM (Water District Nos. 130 and 140)	**CLEAR SPRINGS FOODS, INC.'S RESPONSE TO GROUND WATER DISTRICTS' MOTION TO COMPEL DISCOVERY RESPONSES & MOTION TO EXTEND DEADLINES AND CONSOLIDATE HEARINGS**

COMES NOW, Clear Springs Foods, Inc. ("Clear Springs"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLP, and submits this response to the *Ground Water Districts' Motion to Compel Discovery Responses* and *Ground Water Districts' Motion to Extend Deadlines & Consolidate Hearings*, each filed by the North Snake and Magic Valley Ground Water Districts (hereinafter referred to as "IGWA"), on November 18, 2008. These motions are set for hearing November 20, 2008, pursuant to the Hearing Officer's November 19, 2008, *Order*

Granting Motion to Shorten Time Regarding Notice of Hearing. As discussed below, IGWA's motions should be denied.

Currently pending before the Hearing Officer is Clear Springs' *Motion to Dismiss and/or For Protective Order*. Clear Springs requests that a decision be made on *Motion to Dismiss* before rebuttal reports are due on January 7, 2009.

INTRODUCTION

IGWA has waited until the eleventh hour to seek to derail the proceedings in this matter. Now, on the eve of the deadline to file expert reports, IGWA seeks to extend the schedule and delay the hearings until March 17, 2009. After failing to provide adequate mitigation in 2006 and 2007 – and providing ***none*** in 2008 – this is nothing more than an attempt to evade any obligations for mitigation in 2009.

IGWA bases its motion on misrepresentations and overstatements of the facts – hoping that the Hearing Officer will overlook IGWA's own tardiness in raising these issues. As discussed below, the Hearing Officer should deny IGWA's motions.

STATEMENT OF FACTS

The following dates and deadlines are important to this response.

- September 10, 2007: Hearing Officer, Gerald F. Schroeder, issues an *Order RE Discover*. *See Johnson Aff.* Ex. C. In that *Order*, the Justice Schroeder held that pre-decree information is not discoverable, recognizing that "the likelihood of any relevant information developing from production of information of this nature prior to that time is slight and the burden significant." *Id.* at 2. As such, "Discovery is limited to information at the time of and following adjudication." *Id.*

- January 8, 2008: Hearing Officer, Gerald F. Schroeder, issues an *Opinion Constituting Findings of Fact, Conclusions of Law & Recommendation* ("*Recommended Order*"), holding that a pump-back system must be "prevented"

due to "several problems" that prevented water of quality from being delivered through usage of such a system. *Recommended Order* at 12.

- July 11, 2008: Director, David R. Tuthill, Jr., issues a *Final Order Regarding Blue Lakes & Clear Springs Delivery Calls* ("*Final Order*"), indicating that, unless "discussed" in the *Final Order*, then the Hearing Officer's *Recommended Order* is "accepted." *Final Order* at 2.

- October 1, 2008: IGWA serves its *First Discovery Request* on Clear Springs.

- October 24, 2008: Clear Springs files its *Motion to Dismiss and/or For Protective Order.*

- October 30, 2008: Clear Springs serves its *Reponses to Ground Water District's First Discovery Requests.*

- November 7, 2008: IGWA files its *Objection to Motion to Dismiss.*

- November 18, 2008: IGWA files the aforementioned *Motions*, alleging that the October 30, 2008 discovery responses were deficient, and impaired IGWA's ability to prepare its expert reports, due November 21, 2008, and requesting a hearing on the *Motions* on November 20, 2008 at 4 pm. IGWA set this hearing without any attempt to contact counsel for Clear Springs or to determine whether Clear Springs would be able to attend. Had IGWA contacted council for Clear Springs, it would have learned that Clear Springs council was unavailable at 4 pm on November 20, 2008, due to prior commitments, hearings and settlement conferences.

- November 19, 2008: The Hearing Officer issues an *Order* granting IGWA's motion to shorten time for the hearing and confirming that the hearing will be held on November 20, 2008.

- November 21, 2008: Deadline for submission of expert reports.

ARGUMENT

IGWA's last minute attempt to derail these proceedings should be rejected. IGWA has known that Clear Springs would object to discovery on the pump-back system and to pre-decree information precluded by the *Order RE Discovery*, since at least October 30, 2008. Objections relative to the pump-back system are thoroughly addressed in Clear Springs *Motion to Dismiss*

and/or for Protective Order and the *Reply in Support of Motion to Dismiss and/or For Protective Order*.

I. The Motion to Compel Should be Denied.

IGWA claims that the alleged deficiencies in Clear Springs' discovery responses have "significantly prejudiced and impaired" its ability to "prepare timely-filed expert reports." *Mtn. to Compel* at 3. Such a claim is disingenuous. In fact, IGWA has known of Clear Springs' objections since at least October 30, 2008. *See generally Johnson Aff.* Ex. A. Rather than filing its motions in a timely matter so that its concerns could be resolve without disrupting the schedule, IGWA waited until just 3 days before the expert reports were due to claim prejudice – hoping that the Director would extend the deadlines.

Notwithstanding the lateness of the filings, IGWA's motion is without basis. IGWA asserts that Clear Springs is evading IGWA's discovery requests by providing vague answers and demanding that IGWA and the Hearing Officer "accepts its conclusions as true." *Mtn. to Compel* at 4. As discussed in the pending *Motion to Dismiss and/or for Protective Order*, and the associated reply, Clear Springs' actions have been consistent with the holdings of the Director and Justice Schroeder in the Spring Users' call. In its responses, Clear Springs recognizes, as did the Hearing Officer, that the pump-back system is cost prohibitive, subject to catastrophic failure, and would impair the quality of the water. *Compare Johnson Aff.* Ex A at 5 *with Recommended Order* at 12. This matter has already been decided and it is improper to demand that Clear Springs provide additional evidence to support the *Recommended Order* after the fact. In addition, Clear Springs objected to the discovery of any pre-adjudication information, in accordance with the *Order RE Discovery*.

Contrary to IGWA's assertion, this information is not relevant to the matters properly before the Hearing Officer. As to the pump-back system, Justice Schroeder determined that a pump-back system was "prevented" due to high costs, risk of catastrophic failure, and impairment of water quality. *See Recommended Order* at 12. Clear Springs is not merely "claiming" or "asserting" this. Rather, it has been decided. IGWA's disregard of the *Recommended Order*, by including a pump-back system in its mitigation plan, does not somehow make the desired information relevant. *See Mtn. to Compel* at 6. As to pre-decree information, Justice Schroeder recognized that the "likelihood of any relevant information developing from production of information of this nature ... ***is slight***." *Order RE Discovery* at 2 (emphasis added). Importantly, while IGWA cites frequently to this *Order RE Discovery*, it ignores this language – apparently recognizing that the language proves fatal to its *Motion to Compel*.

Clear Springs' responses to IGWA's Requests for Production Nos. 2 and 10, are consistent with the *Order RE: Discovery*. *See Johnson Aff.* Ex. C. IGWA's attempts to discover pre-decree sales and production records have been denied over and over again. Justice Schroeder rejected IGWA's attempt to discover such information, holding that "discovery was limited to information at the time of and following the adjudication." *Id.* at 2. As such, pre-decree information is not discoverable and this request must, once again, be denied.

IGWA does not even address the "overly broad and unduly burdensome" nature of its request for "records of ***all*** fish disease incidents and pathology records for the facility" (Request for Production No. 9) (emphasis added). *See Mtn. to Compel* at 6. Justice Schroeder confirmed that, while discovery of pre-decree information is unlikely to produce any relevant information is

also imposed a "significant" burden. *Johnson Aff.* Ex. C at 2. As such, the objection should be affirmed.

Finally, IGWA's challenge to Clear Springs' response to Requests for Production Nos. 12 and 13 are blown out of proportion. Clear Springs responded to requests for certain documents by indicating that they are not available and that Clear Springs would "produce any documents and records as they become available." These documents are expected to be a part of Dr. Charles Brockway's expert report – due on November 21, 2008.

For the reasons discussed above, IGWA's *Motion to Compel* should be denied.

II. Deadlines Should Not be Extended & the Hearings Should Not Be Consolidated

As with its *Motion to Compel*, IGWA's attempt to extend the deadlines is based on untimely filings and IGWA's own dilatory actions. IGWA has known of Clear Springs' position relative to the pump-back system and pre-decree information since at least October 30, 2008. Yet, IGWA failed to take *any action* concerning this matter until just three days before the expert reports are due. Surely, had IGWA truly been concerned that the discovery responses were inadequate and impaired their ability to file an expert report, it would have taken action in a more timely manner – rather than waiting until the eleventh hour.

Likewise, IGWA's concerns over the production of documents are disingenuous. IGWA received Clear Springs' discovery responses on October 30, 2008. However, they did not go review those documents until November 11, 2008 – nearly 2-weeks later and less than 2-weeks before the expert reports were due. IGWA identified "approximately 2500 pages" of documents and was advised that they were ready to be picked up on November 14. *McHugh Aff.* at ¶¶ 5-6.

The documents were sent out for copying and returned on November 14. IGWA received the documents on November 17 and concerns over the lack of an index were promptly addressed and resolved that same day. *See McHugh Aff.* at ¶¶ 8-9.[1]

Furthermore, IGWA's concerns over the conflicts with the A&B hearing are without merit and confusing. First, counsel for Clear Springs are also involved in the A&B hearing and have been working diligently to ensure that they comply with the deadlines in this matter – including the deadline for expert reports on November 21, 2008. Clear Springs did not impair IGWA's ability to timely file its *Motions* and should not be prejudiced by delays in this mater caused by IGWA's own actions. Second, an extension of 6-weeks, as requested by IGWA, would not solve IGWA's concerns. A 6-week extension would cause the expert reports to be due in January – where they would conflict with the A&B hearing to the extent that it is extended into January.

Finally, it should be noted that this schedule was proposed by IGWA. In particular, IGWA proposed the bifurcated hearing schedule. Clear Springs agreed to the schedule and the Hearing Officer reluctantly approved. IGWA has now had second thoughts, however, since it has decided to use the same experts to testify on all issues. *Memo RE: Mtn. to Ext.* at 3-4. It asserts that "it would be judicially economical to have one hearing so the experts do not have to appear before the Director twice." *Id.* Contrary to IGWA's assertion, such economies are not "judicial." Rather, they are specific to IGWA and its failure to plan its case in accordance with

[1] There seems to be some confusion in IGWA's filings. According to the *McHugh Aff.* at ¶ 8, the documents were received on November 17, 2008. However, the memorandum supporting the motion to extend deadlines, at page 2, indicates that the documents were received on "November 18, 2008, three days before GWD's expert direct testimony is due." As demonstrated by the emails attached to the *McHugh Aff.*, the documents were received, "in a usable manner," on November 17, 2008.

the schedule ***it proposed***. Clear Springs, on the other hand, has organized its case in accordance with the scheduling order – including the bifurcated hearing. For these reasons, the requested extension and consolidation should be denied.

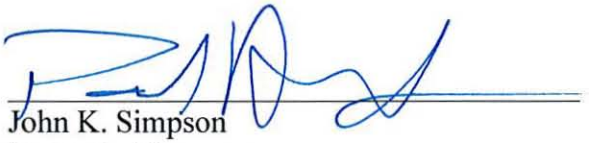
Should the Hearing Officer find that IGWA is somehow prejudiced, Clear Springs would agree to an extension of one-week for the deadline to file expert reports – on November 28, 2008. However, all other deadlines, including the hearings, should remain unchanged. Since 2006, IGWA has failed to provide mitigation in accordance with the Director's orders. In fact, in 2008, no mitigation or curtailment was provided! Delay of the hearings on this matter will only prevent Clear Springs from receive appropriate mitigation in 2009.

CONCLUSION

IGWA has come to the Hearing Officer seeking a delay of these proceedings to compensate for its own dilatory actions. Rather than promptly seeking to address its concerns, IGWA waited until the eleventh hour – hoping that its lateness in filing would provide justification for a delay in these proceedings. As discussed above, IGWA's *Motions* are not supported by the law or facts and should be denied.

DATED this 20th day of November, 2008.

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 20th day of November, 2008, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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

Allen Merritt Cindy Yenter Watermaster – WD 130 IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380 allen.merritt@idwr.idaho.gov cindy.yenter.@idwr.idaho.gov	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (X) E-mail

By 
John K. Simpson