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March 17, 2009

David R. Tuthill, Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: 2009 Replacement Water Plan and Third Mitigation Plan

Dear Director Tuthill:

In response to your March 13, 2009 request, Clear Springs Foods, Inc. has initially reviewed "2009 Replacement Water Plan and 3rd Mitigation Plan (Over-the-rim) of the North Snake Ground Water Districts and Magic Valley Ground Water Districts" submitted March 12, 2009. The following initial concerns are identified recognizing that Clear Springs has not had the ability to discuss the Plan with each of its consultants, nor formulate each and every objection to the Plan¹:

1. A Replacement Water Plan is without support in rule or law. As previously argued, the replacement water plan concept is not provided for in the Conjunctive Management Rules. This issue was ruled on by the Hearing Officer and Director, and is the subject of appeal to the District Court. It is Clear Springs' belief that the process is a violation of due process and fails to provide timely or adequate mitigation, as witnessed by the last four years. The Director of Water Resources and the watermasters have a clear duty to provide timely administration or mitigation

¹ In submitting this partial list of issues, Clear Springs Foods, Inc (Clear Springs) reserves the right to object to the proceedings, the form of the proceedings, the infringement of the proceedings upon property rights, impairment of said rights, continued infringement upon Clear Springs operations and the denial of due process.

resulting in water. The failure to do so is a violation of state law.(See Title 42 Chapter 6, Idaho Code)

The informal replacement water plan process that the Director has identified with respect to the GWDs 2009 Replacement Water Plan filed March 12, 2009, is without public notice and opportunity for protest, including adjacent landowners that may be affected by the proposal. In addition the Director has indicated that there will be no hearing. (See *Order on Scheduling and Holding Notice of Curtailment in Abeyance, dated March 16, 2009*) There is no formal briefing and no final order subject to appeal. This is a violation of the Administrative Procedures Act. The 2009 replacement plan proffered by the GWDs contemplates a transfer of water rights without due process which is clearly a violation of law and contrary to established IDWR transfer guidelines.

Because the legality of the Director's "replacement water plan" procedure is being considered by the District Court (scheduled for hearing April 27, 2009) Clear Springs has elected to participate in this meeting. Clear Springs' participation in this process is merely to identify issues with the 2009 replacement plan as requested by the Director. Clear Springs does not consent or waive any rights associated with the process or other matters therein.

2. The Replacement Water Plan does not adequately mitigate for the injury caused to Clear Springs Foods from out-of-priority ground water diversions. As recognized in the pending order, the determination of required volumes and flows for mitigation of injury to the Snake River Farms (SRF) water supply should be continually updated using updated and statistically defensible analyses as they become available. A statistically defensible determination of the uncertainty of the ESPA model should be incorporated in determinations of mitigation requirements. Clear Springs Foods is prepared at hearing to present updated analyses (Brockway, Koreny, and Schreuder). The replacement water plan does not provide opportunity to present this information nor for the IDWR to consider it. The Brockway, Koreny, Schreuder and Shaw reports submitted as a part of the proceedings in the Amended Mitigation Plan, are hereby adopted and incorporated as a part of Clear Springs submittal for the Third Amended Mitigation Plan. Clear Springs requests that those documents along with all previous filings in the Snake River Farms Delivery call proceedings be made a part of these proceedings and considered prior to any further order being issued.² In addition the following issues must be addressed prior to fully considering the adequacy of the replacement water plan or Third Amended Mitigation Plan relative to mitigating injury:

- Use of a "trim line" on the ESPA effectively creates a de-facto futile call line beyond which no ground water pumper is deemed to be causing injury to the spring flow subject to the water call. This use is technically unjustified. Use of a "trim line" based on the accuracy of any one ground water model parameter accuracy to exclude some junior ground water pumpers from responsibility for mitigation is not warranted and should not be used as a surrogate for ground water model uncertainty.

² Clear Springs would further incorporate the objections raised to the Amended Mitigation Plan filed with the IDWR, said objections filed on August 4, 2008.

- The use by the Director of a fixed percentage contribution (6.9%) of SRF springs to the Snake River reach gain from the Buhl Gage to Thousand Springs for determination of required mitigation discharge is not justified. Alternative procedures, such as prediction of junior priority ground water pumping impacts using the ESPAM model for prediction of impacts to individual calibrated springs should be considered.
- The ESPAM calibration for the Clear Lakes Springs is in error because the discharge of SRF springs was not included in the total calibration discharge. The procedure for ESPA calibration should be re-evaluated and the error corrected.
- Recent changes in ground water levels and water use on the ESPA warrant a re-evaluation of the ESPAM model calibration and/or configuration before a final determination of both current and long term impacts on affected springs is made.
- Seasonal impact of ground water pumping to a spring water supply used for fish propagations should be considered injury. Aquaculture facilities depend on steady, year around flow for stocking management and production planning. For SRF, the September 15, 1955 water right has not been available except at high flow periods. Consideration of impacts to the September 15, 1955 water rights results in approximately a 43% increase in required mitigation.

3. The Replacement Water Plan fails to address the previous failure to meet mitigation requirements. No documentation of the hydraulics and hydrology supporting the proposals or provisions to address the shortfalls in 2006, 2007, and 2008 were provided. The current line of mitigation plans began in March of 2008, intending to address previous year's shortfalls and 2008 mitigation requirements. Despite no observable progress, the Director determined that no administration for 2008 was required. No water was provided and Clear Springs continued to suffer injury. Now, once again, the Director has not followed through with timely administration, requiring mitigation. Any mitigation water contemplated in this plan would not be delivered until junior pumps have been on for months, if water is delivered at all.

4. The Water Plan fails to specify the alleged benefits from conversions or CREP. The Plan does not specify the location of conversion and specifies that up to 2000 acres will be converted from ground water irrigation to surface water irrigation irrigated farmland of certain existing members of the NSGED farming near the rim above the SRF. However, the aerial photo (GWD exhibit 2) provided along with Exhibit 1 for the replacement plan indicates about 800 acres available and the water rights proposed for use as replacement water, list only 1060 acres as the combined POU.

5. The ground water rights to be utilized for replacement are irrigation water rights with a specific period of use. The proposed plan does not address the necessity or adequacy of transfers to change the place of use, change the nature of use. The Plan fails to satisfy the strict requirements of the IDWR transfer processing guidelines. Additionally, transfer processing with public notice and potential for protests will delay delivery of water to Clear Springs.

6. The Replacement Water Plan fails to provide the necessary detail evaluate the groundwater rights. No information or calculations on the volume limitations of any ground water rights contemplated for replacement use have been provided. Current transfer rules by IDWR require that if a change in the nature of use is contemplated then the transfer volume is limited to the historical consumptive use under the rights to be transferred.

7. The Replacement Water Plan fails to analyze the impact of the proposed changes on the ESPA and connected water sources. No analysis of the net impact, negative or positive, on the ESPA locally or regionally has been performed. Changing the location of historical pumping, if that is contemplated, could change the distribution of spring flow in the Clear Lakes springs including the SRF springs.

8. The Replacement Water Plan fails to adequately consider water quality. No data or information relative to existing water quality from the proposed wells, or the potential for water quality changes due to distribution system impacts has been provided. Potential water quality constituents in well water which are adverse to fish propagation have not been addressed.

- Water quality issues of concern include:
 - a. excessive dissolved gas (super saturation). Engineering to remove gas is feasible but devices known to CSF experts indicate there is considerable potential for these devices to become colonized by algae or bacteria that can produce off-flavor compounds. Such off-flavor compounds could make the rainbow trout grown at the SRF facility un-marketable.
 - b. excess nutrients (nitrogen and phosphorous). No data has been provided to examine for potential problems. Elevated nitrogen concentrations have been detected in some spring flows at the SRF diversion. Elevated nitrate nitrogen is considered an endocrine disruptor of fish by some experts.
 - c. No data is provided to indicate the concentrations of pesticides in the well water. Pesticide presence would preclude acceptability for fish propagation because food fish would be unsafe for human consumption and pesticides could impact brood fish and research.
 - d. Water temperature is a potential concern if pipes are exposed to direct sunlight. Sufficient burial of pipes used in water transfer should address this issue.

9. The Replacement Water Plan fails to address Bio-security. Bio-security issues appear significant. It is not clear how the GWDs and State would ensure the safety of water delivered via the methods proposed. Arguably, individual's intent on causing harm to Clear Springs Foods could access the pipes used for water delivery and inject compounds deleterious to fish. GWDs and the State would assume considerable liability for such. Will the GWDs and the State carry sufficient liability insurance to cover complete recovery of CSF should there be a need for product recall? Additionally, land use above the wells would need to be consistent with preservation of water quality and a monitoring program to ensure water quality is maintained at each well needs to be instituted.

11. The Replacement Water Plan fails to address on-going operation and Maintenance issues. No information is provided detailing how the GWDs will maintain the integrity of the delivery system.

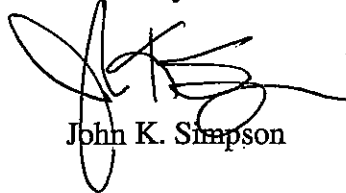
12. The Replacement Water Plan fails to identify with specificity where conversion water will be acquired. No information is provided detailing how conversion water will be acquired year to year?

13. The Replacement Water Plan fails to identify finalized easements to construct proposed pipelines to the point of delivery. Additionally, the Plan fails to identify the level of engineering design and safety to the facilities below the Snake River Canyon.

The preceding issues are submitted as a beginning point for the Director to consider legally the next steps in proper administration of water rights, consideration of the proposed mitigation plan and the timing of such plans. Clear Springs continues to be injured by the on-going actions of junior water users and the State of Idaho. The State's failure to fulfill its statutory duties perpetuates the injury to Clear Springs' SRF water rights.

As noted above, Clear Springs is providing this response as requested by the Director. Clear Springs is filing this under protest and does not accept the procedures being used. Clear Springs reserves all rights, including any judicial remedies, that may be available should the Director fail to carry out his statutory duty to properly administer water rights that are injuring Clear Springs' senior water rights in 2009.

Sincerely

A handwritten signature in black ink, appearing to read 'John K. Simpson', is written over the typed name. The signature is stylized and somewhat illegible.

John K. Simpson

cc. Randy Budge/Candice McHugh