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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 |) | CLEAR SPRINGS FOODS, INC.'S |
| RIVER FARM) |) | RESPONSE TO GROUND WATER |
| |) | DISTRICTS' JUNE 25, 2009 |
| (Water District Nos. 130 and 140) |) | LETTER |
| |) | |
| |) | |
| |) | |

COMES NOW, Clear Springs Foods, Inc. (“Clear Springs”), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and hereby responds to the letter filed by the Ground Water Districts on June 25, 2009. As explained below, the Ground Water Districts have admittedly failed to implement the “non-stayed” portion of their 2009 *Replacement Water Plan*, in violation of the Director’s prior orders and his June 19, 2009 letter. Consequently, the Director and Watermaster of Water District 130 should proceed to curtail junior priority ground water rights to prevent the ongoing injury to Clear Springs’ senior surface water rights.

RESPONSE

As the Director and the parties are well aware, Judge Melanson recently issued his *Order on Petition for Judicial Review* in Case No. 08-444 on June 19, 2009.¹ In that decision Judge Melanson held, among other things, that “the Director did not provide for a hearing after the junior Ground Water Users submitted mitigation plans. Instead, he approved such plans without hearing, and therefore exceeded his authority”. *Order* at 51. Consequently, the Director’s approval of the Ground Water Districts’ *2009 Replacement Water Plan* to authorize continued out-of-priority ground water diversions in 2009, without providing Clear Springs with a hearing, was contrary to Idaho law. Accordingly, the Director has wrongly authorized out-of-priority ground water diversions to the injury of Clear Springs’ senior surface water rights.

Although the basis for the Director’s actions to date are clearly in violation of Idaho law, it is apparent that the Ground Water Districts have further failed to implement the non-stayed portions of the plan they were required to complete by June 1, 2009. In other words, assuming for argument’s sake that the Director could approve the 2009 “replacement water plan”, it is now obvious that the Ground Water Districts have not fulfilled their obligations set forth in the plan as approved by the Director. The inadequate plan therefore has either been effectively withdrawn, or should be immediately denied by order of the Director.

Clear Springs filed a *Motion for Partial Stay* of implementation of the Director’s March 26, 2009 order in this matter on April 24, 2009. In that *Motion* Clear Springs agreed to stay implementation of part of the Ground Water Districts’ 2009 “replacement water plan”, the

¹ Clear Springs is still in the process of reviewing the decision and its impacts on this proceeding. As explained, even if the Director’s “replacement water plan” process was authorized it’s clear that the Ground Water Districts have failed to comply with the orders to date.

proposed construction and installation of an “over-the-rim” pipeline project, and accept the remaining mitigation offered for 2009 on the condition this matter would proceed to hearing on the Ground Water Districts’ Plan and the issues identified in Clear Springs’ protest. *See Clear Springs’ Motion* at 7. Clear Springs further understood at that time that the Ground Water Districts were proceeding to implement the remaining portions of their plan for 2009, which is clearly not the case now. Notably, what the Ground Water Districts pledged in their March 12, 2009 plan and what they have implemented (according to the June 25, 2009 letter) are not the same. The admitted discrepancies are described below:

I. Failure to Implement 9,300 acres of Conversions

First, in their 2009 Plan the Ground Water Districts committed to “continue to deliver 35,000 acre-feet of water for the existing 9,300 acres of conversion as they have done for the past several years”. *2009 Plan* at 6. The Ground Water Districts also claimed they “have several water leases which are ongoing” to meet the amounts committed for the conversion acres. *Id.*

In their June 25, 2009 letter to the Director, counsel for the Ground Water Districts now states that information presently gathered indicates “that some amount less than 9,300 acres will be converted this year”. *Letter* at 2. The Ground Water Districts then proceed to blame economic conditions and precipitation as the reasons for their failure to continue with the 9,300 conversion acres. *See id.* While “some amount” has not been clarified, it’s obvious that the 9,300 acres of existing conversions is no longer part of the Ground Water Districts’ 2009 Plan. In addition, as revealed by information from the Water District 01 Watermaster, it is obvious the Ground Water Districts have not leased any water or committed that water to the conversion acres for delivery through the NSCC canal system yet. *See Ex. A* (status of storage rentals as of

June 22, 2009).

Whereas the Director previously authorized out-of-priority pumping contingent upon “satisfaction of the remainder of the 2009 plan”, the Ground Water Districts have not complied with the Director’s order.

II. Failure to Implement 1,060 acres of Additional Conversions.

Originally, the Ground Water Districts pledged to convert up to an additional “2,000 acres from ground water irrigation to surface water irrigation” in their March 12, 2009 plan. *See 2009 Plan* at 6. That number was subsequently clarified to “1,060 acres”. *See Order Approving Ground Water Districts’ Replacement Water Plan for 2009* at 3.

In their June 25, 2009 letter to the Director, counsel for the Ground Water Districts now claims that when the “2009 Plan was filed, the exact number of acres to be converted was unknown”. *Letter* at 2. Admittedly, and as detailed in Watermaster Cindy Yenter’s June 12, 2009 *Report on Implementation of Non-Stayed Portion of IGWA Snake River Farms Replacement Plan #3*, there is “a shortfall of up to 200 acres from the plan’s proposed 1060 acres to be converted from ground water to surface water supply”. *Yenter Report* at 3. In other words, the Ground Water Districts are about 20% short of the additional conversions they pledged back in March 2009 in order to receive the Director’s “approval” of the plan to prevent curtailment this irrigation season.² Contrary to the Ground Water Districts’ effort to explain away this requirement in their letter, the Director has clarified that “Conversion of fewer acres is not an acceptable solution”. *Director’s June 19, 2009 Letter*. In addition, it appears that the “converted” ground water rights have already been used during the 2009 irrigation season.

² This is in addition to other issues identified in Ms. Yenter’s report. *See Yenter Report* and attached spreadsheet.

Yenter Report at 1 (“indicating they have all been used within the May billing cycle.”). Clear Springs’ *Motion for Stay* was filed based upon the understanding that 1,060 acres would be converted to surface water irrigation for the 2009 irrigation season. It appears that the number of acres converted is short and that ground water use has continued on the subject lands. The Ground Water Districts 2009 Plan has not been implemented as proposed and ordered.

Whereas the Director previously authorized out-of-priority pumping contingent upon “satisfaction of the remainder of the 2009 plan”, the Ground Water Districts have not complied with the Director’s order. The shortfall in additional conversion acres and the failure to meet the June 1, 2009 deadline are evident in this case as documented in the Watermaster’s Report (attached to *Director’s June 19, 2009 Letter*).

CONCLUSION

Clear Springs’ *Motion for Partial Stay* was based upon the understanding that the Ground Water Districts would actually implement the remainder of the *2009 Plan*. Since the Ground Water Districts have failed to implement the remaining portions of the *2009 Plan* as ordered by the Director, based upon their own admissions and findings by the Director, it is obvious that Clear Springs’ understanding back in April was misguided.

The Director should either: 1) consider the Ground Water Districts’ plan withdrawn; or 2) declare the Ground Water Districts’ out-of-compliance with the prior orders. In either case, the Director must administer junior priority ground water rights to prevent the on-going injury to Clear Springs’ senior surface water rights. Even assuming the Director’s authorization of the *2009 Plan* is effective, it’s clear the Ground Water Districts have not complied with the prior orders and should be subject to curtailment.

The Director and Watermaster have a clear legal duty to uphold the law and distribute water accordingly in 2009.

DATED this 29th day of June, 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 29th day of June, 2009, the foregoing was sent to the following by the method indicated:

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Exhibit A

Table 31 2009 Applications to Purchase from Water District 1 Rental Pool

Large Water Leases (over 100 acre-feet)
Water Available 50,000 acre-feet

| Request Date | Water User | Diversion Location | Amount (AF) | Rate Paid | \$ Collected |
|--|-------------|--------------------|----------------|-----------|---------------------|
| 4/15/2009 | Call, Brent | Burgess Canal | 400.0 | \$ 6.30 | \$ 2,520.00 |
| 5/4/2009 | IDWLT | North Side Canal | 3,687.0 | \$ 6.30 | \$ 23,228.10 |
| Total Large Water Leases (over 100 acre-feet) | | | 4,087.0 | | \$ 25,748.10 |

Small Water Leases (under 100 acre-feet) and Long-Term Leases
Water Available 5,000 acre-feet

| Request Date | Water User | Diversion Location | Amount (AF) | Rate Paid | \$ Collected |
|---|----------------------------|--------------------|----------------|-----------|---------------------|
| 4/15/2009 | Tejo, Roque Trejo | New Sweden | 1.0 | \$ 6.30 | \$ 6.30 |
| 4/15/2009 | Dean Snarr & Sons | Butte Market Lake | 50.0 | \$ 6.30 | \$ 315.00 |
| 4/15/2009 | Hansen, Steve | New Sweden | 5.0 | \$ 6.30 | \$ 31.50 |
| 4/15/2009 | Miller, Yvonne | Palisades Canal | 2.0 | \$ 6.30 | \$ 12.60 |
| 4/15/2009 | Grover, Gerald | Lenroot | 10.0 | \$ 6.30 | \$ 63.00 |
| 4/15/2009 | Moncur, J. Blair | Farmers Friend | 4.0 | \$ 6.30 | \$ 25.20 |
| 4/15/2009 | Zaugg, Alonzo N. | 13038147 SR Pump | 5.0 | \$ 6.30 | \$ 31.50 |
| 4/15/2009 | Denny, Eve L | Great Feeder | 5.0 | \$ 6.30 | \$ 31.50 |
| 4/15/2009 | Quapp, William & Catherine | New Sweden | 5.0 | \$ 6.30 | \$ 31.50 |
| 4/15/2009 | Breeding, Glen | Milner Pool | 500.0 | \$ 6.30 | \$ 3,150.00 |
| 4/24/2009 | Avery, Herman | Farmers Friend | 2.0 | \$ 6.30 | \$ 12.60 |
| 4/27/2009 | French, Gene | Burgess Canal | 100.0 | \$ 6.30 | \$ 630.00 |
| 5/11/2009 | Graham, Zeb | Parks & Lewisville | 0.5 | \$ 6.30 | \$ 3.15 |
| 5/14/2009 | Horsley, John & Angie | New Sweden | 3.0 | \$ 6.30 | \$ 18.90 |
| 6/4/2009 | Skaar Brothers | Dry Bed | 100.0 | \$ 6.30 | \$ 630.00 |
| | | | | \$ 6.30 | \$ - |
| Total Small Water Leases (under 100 acre-feet) | | | 792.5 | | \$ 4,992.75 |
| Total Water Leases (Large and Small) | | | 4,879.5 | | \$ 30,740.85 |

Private Leases

| Request Date | Water User | Supplier | Diversion Location | Amount (AF) | \$ per AF | \$ Collected |
|-----------------------------|----------------------------|-----------------------------------|------------------------------|-----------------|-----------|---------------------|
| 4/27/2009 | Southwest Irrigation Dist | Snake River Valley Irrig District | Twin Falls Canal Company | 1,000.0 | \$ 1.30 | \$ 1,300.00 |
| 4/27/2009 | Southwest Irrigation Dist | Snake River Valley Irrig District | Milner Irrigaiton District | 4,000.0 | \$ 1.30 | \$ 5,200.00 |
| 4/29/2009 | Ardel Wickel | Minidoka Irrigation District | Minidoka Irrigation District | 300.0 | \$ 2.80 | \$ 840.00 |
| 5/4/2009 | IGWA (Faulkner) | | | | | \$ - |
| 7/1/2009 | Southwest Irrigation Dist | Snake River Valley Irrig District | | 5,000.0 | \$ 1.30 | \$ 6,500.00 |
| 6/12/2009 | Water Mitigation Coalition | Minidoka Irrigation District | | 10,000.0 | \$ 2.00 | \$ 20,000.00 |
| Total Private Leases | | | | 20,300.0 | | \$ 33,840.00 |

| | | | | | | |
|--|--|--|--|-----------------|--|---------------------|
| Subtotal (Large, Small, Private Leases) | | | | 25,179.5 | | \$ 64,580.85 |
|--|--|--|--|-----------------|--|---------------------|

USBR Leases

| | | | | Amount (AF) | \$ per AF | \$\$ Collected |
|--------------------------|--|--|--|-------------|-----------|----------------|
| | | | | | 14.0 | \$0.00 |
| | | | | | 0.8 | \$0.00 |
| Total USBR Leases | | | | 0.0 | | \$0.00 |

| | | | | | | |
|----------------------------|--|--|--|------------------|--|--------------------|
| Total of all Leases | | | | 25,179.50 | | \$64,580.85 |
|----------------------------|--|--|--|------------------|--|--------------------|

** Pending on receiving Rental Pool Funds