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 83701-2139
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)	**Docket No. CM-MP-2009-04**
IN THE MATTER OF THE MITIGATION PLAN OFTHE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS TO PROVIDE REPLACEMENT WATER FOR CLEAR SPRINGS SNAKE RIVER FARM (Water District Nos. 130 and 140)	**CLEAR SPRINGS FOODS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS** **(Over-the-Rim Mitigation Plan)**

COMES NOW, Clear Springs Foods, Inc. ("Clear Springs"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLP, and herby submits this *Reply* in support of the motion to dismiss filed on November 25, 2009. As described below, the Districts' argument in response is unpersuasive and does not cure the facial defect in the OTR Plan, the failure to have an available water supply. The requirement to have a water supply available up front, to provide

assurance to protect the senior water right is a fundamental requirement of the CM Rules and was recently recognized by the Gooding County District Court. For these reasons the Hearing Officer should grant Clear Springs' motion to dismiss.

REPLY

The North Snake Ground Water District and Magic Valley Ground Water District ("Districts") filed a response to Clear Springs' Motion to Dismiss on December 1, 2009. The Districts claim the motion should be denied because: 1) it is untimely; 2) the Director's March 26, 2009 Order somehow applies; 3) Rule 43 does not require a transfer; and 4) there is no practical reason to file a transfer. Clear Springs will address each of these reasons separately. As explained below, the Districts arguments are unpersuasive and further support dismissal of the OTR Plan.

I. CM Rule 43 Requires Dismissal of the Districts' OTR Plan.

CM Rule 43.03.h requires the Hearing Officer to determine "The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan." (emphasis added). In addition, Rule 43.03.c states a "mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable." (emphasis added). As presented by the Districts, the OTR Plan has no water available, therefore there is no "reliability" of water under the term of the plan and there is no "assurance" to protect Clear Springs' senior water rights.

It is completely speculative at this point whether or the not the Districts will acquire the necessary approvals to obtain a water supply to implement their plan. This type of speculation-based mitigation plan was rejected by the Gooding County District Court. For example, in the context of the Surface Water Coalition delivery call, the former Director approved a "wait and

see" approach to determine injury to reasonable carryover storage. Judge Melanson rejected this method as applied by the former Director and held the CM Rules require protection of the senior water to "assure" the senior water right holder that the juniors could secure replacement water:

> However, the provision goes on to provide: "***The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.***" [citing CM Rule 43.03.c]
>
> * * *
>
> In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement water. . . . While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR. This does not mean that juniors must transfer replacement water in the season of injury, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage.

See Order on Petition for Judicial Review at 18-19 (Gooding County Dist. Ct., 5th Jud. Dist., July 24, 2009, Case No. 08-551) (emphasis in original).

The same "assurances" are required to approve the OTR Plan in this proceeding. Although the Districts have proposed irrigation ground water rights to supply water for the plan, there is no "assurance" this water will ever be available to use since they have not filed or received approval for the transfers necessary to implement the change in the water rights. The same point applies to the Districts' unfiled and unapproved water bank rentals.

Since this type of plan plainly violates the CM Rules and the requirement to protect senior water rights as found by Judge Melanson, the Districts plan should be dismissed as a matter of law. *See* CM Rule 43.03.c.; 30.h.

II. Clear Springs' Timing in Filing the Motion to Dismiss.

As to the timing of filing the motion to dismiss counsel for the Districts had previously stated an intent to file their applications for transfer during the pendency of this proceeding. *See*

Exhibit A; September 27, 2009 Email from Randy Budge to Tim Luke ("The transfer applications are prepared and exhibits to the pre-filed testimony ***so I see no problem filing them soon rather than later as you suggest.***") (emphasis added). For some unexplained reason the Districts refused to file any transfer applications with IDWR during the pendency of this proceeding. When it was realized those transfer applications had not been filed and apparently would not be filed before hearing, Clear Springs moved to dismiss the OTR Plan accordingly. This motion was filed following the depositions of the Districts' witnesses and prior to the time the Districts filed rebuttal testimony.

III. The I.RC.P. 56 Summary Judgment Deadlines Do Not Apply.

Clear Springs can raise a defense to move to dismiss the Districts' case for failure to state a claim at anytime at or before hearing. Since the Districts have failed to meet their burden with respect to a prima facie case for an approvable mitigation plan, even after submitting all of their direct and rebuttal testimony in support of that plan, dismissal is appropriate. Without a response to the timing requirement for filing a motion for failure to state a claim which is anytime at or before hearing, the Districts create a "strawman" and allege Clear Springs' motion is for "summary judgment" and therefore the deadline under I.R.C.P 56(c) applies. The Districts' argument is erroneous and should be disregarded.

Rule 12(g)(2) plainly states that a defense for failure to state a claim upon which relief can be granted "may be raised by motion made at or before the trial on the merits." The Districts do not dispute the rule.

Although the standard to apply requires "facts and inferences from the record" to be viewed in the Districts' favor for purposes of ruling on Clear Springs' motion, and that standard is similar to a summary judgment standard, that does not mean Clear Springs' motion is subject

to the timeframes set forth in Rule 56(c). The Districts' reference to Rule 12(b)(6) stating that a motion to dismiss "shall be treated as one for summary judgment" only applies in the event "matters outside of the pleading are presented". The OTR Plan is deficient on its face and the Hearing Officer can rule as a matter of law that the plan does not have an "available water supply" to provide for mitigation purposes.

III. The Director's March 26, 2009 is Invalid as a Matter of Law and a Proposed Use of the Water Bank Does Not Support the Districts' Argument.

The Districts' second argument relies upon the former Director's March 26, 2009 *Order Approving Ground Water Districts' Replacement Water Plan for 2009.* The Districts' hold this Order up as "approving" the OTR Plan and recognizing that filing a transfer application was unnecessary since the Water Supply Bank could be used on an "interim basis". *Response* at 12. Again, the Districts' arguments fails, both in reliance upon an Order that was rendered void by Judge Melanson's June 19, 2009 Order in Case No. 08-444, and since approving mitigation contrary to the CM Rules on an "interim basis" is invalid.

First, Judge Melanson held that the former Director exceeded his authority when he approved "replacement water plans" without following the procedures set out in CM Rule 43. *See Order on Judicial Review* at 50-52. Since former Director Tuthill issued his March 26, 2009 Order without providing for a hearing consistent with CM Rule 43, that order violated Idaho law and is therefore null and void. Moreover, if that Order had any validity, as suggested by the Districts, there would be no reason for this proceeding before the Hearing Officer. Accordingly, reliance upon a void order issued by the former Director does not warrant denial of Clear Springs' motion in this proceeding.

Second, since the "replacement water plan" process has been declared illegal by the Gooding County District Court it follows that using the water bank, which is an "interim"

procedure the former Director believed could be used, cannot provide a basis to approve a "permanent" CM Rule 43 mitigation plan. Moreover, the Districts only raised the possibility of using the water bank in "rebuttal testimony" filed last week, and it was not part of their mitigation plan filed on March 12, 2009. Even if the water bank could be used for purposes of a CM Rule 43 Mitigation Plan, it is clear that the Director is required to undertake the same injury analysis in reviewing the proposed rental as he would be in reviewing a transfer. *See* I.C. § 42-1763 ("The director of the department of water resources may reject and refuse approval for . . . any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented . . .") (emphasis added); *compare* Idaho Code § 42-222(1).

As set forth above, the Director has no authority to approve a "rental" where the proposal would injure other water rights or cause the use of water to be enlarged "beyond that authorized under the water right to be rented". Here, the Districts are proposing to use irrigation ground water rights with a defined season of use and transfer those into water rights to be used "year-round" for aquaculture purposes. Accordingly, on its face the OTR Plan violates the criteria set forth in the water bank statute and cannot be approved since it proposes to "enlarge" the use of water "authorized" under the existing irrigation ground water rights. As such, the Districts' reliance upon a "water bank" argument is unpersuasive and should be rejected.

Finally, the Districts' reference to Interim Director Spackman's comments at a recent status conference involving mitigation plans for the Blue Lakes Trout Farm, Inc. delivery call are not applicable here. The Districts conveniently omit the fact that no transfers are proposed in the

mitigation plans in those proceedings. Accordingly, any comments made by the Director at that conference were not in context and not aimed at a specific transfer application in front of him as he admitted "I don't know if any of those would be pending". *Response* at 12. Moreover, the Districts refuse to acknowledge the process they followed in 2008 where they filed accompanying applications for permit and transfer with their mitigation plan and the Director consolidated those separate proceedings for one hearing. Since that example is more appropriate in the context of the current OTR Plan, where a proposed transfer is at issue, the reference to a comment made at the Blue Lakes' status conference, where no transfer applications are part of the plan, is not applicable.

IV. CM Rule 43 Does Not Trump the Requirement in Idaho Code § 42-222(1).

The Districts ignore the fact that a permanent "change" in a water right can only be effected by a formal transfer filed with IDWR. *See* I.C. § 42-222(1); *Barron v. IDWR*, 135 Idaho 414, 417 (2001). CM Rule 43 does not replace or trump Idaho Code § 42-222(1). Although the Districts apparently seek "pre-approval" of a transfer in this proceeding, a hearing on the OTR Plan does not substitute the statutory requirements for a transfer. Without an available water supply, the OTR Plan cannot be approved as filed.

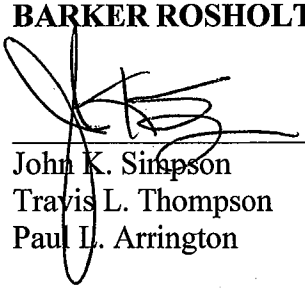
The Districts' reliance upon the water bank fails for the same reasons. Similar to the unfiled transfer application, an unfiled water bank application that has not yet been approved by the Director is not an "available water supply" that the OTR Plan can rely upon today. The Districts appear to take the position that approval of the OTR Plan in this phase of the hearing somehow automatically "approves" a future water bank application. Again, this is not the case, particularly where the Director is required to review the same injury and enlargement criteria on reviewing any water bank applications. *See* I.C. § 42-1763.

Finally, the Districts claim that it would be "premature and unwise" to file a transfer application at this point since the OTR Plan has not been approved and Clear Springs has not committed to take actual delivery of the water. *Response* at 14. Contrary to the Districts' argument, they have no legal authority to deliver any water to Clear Springs at this point, so whether Clear Springs has committed to take it or not is not relevant. Without an approved transfer, or now an approved water bank rental, the Districts cannot divert and supply any water to implement its OTR Plan.

Accordingly it would be "premature and unwise" to build a pipeline and system that would have no water to provide. Without an approved water supply available the OTR Plan is facially deficient and should be dismissed.

DATED this 4th day of December, 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 December 9, 2009, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email:

Hon. Gerald F. Schroeder
c/o Victoria Wigle
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov
fcjschroeder@gmail.com

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(X) E-mail
(X) Hand Delivery

Randy Budge
Candice M. McHugh
T.J. Budge
RACINE OLSON
P.O. Box 1391
Pocatello, Idaho 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(X) E-mail

Mike Creamer
Jeff Fereday
GIVENS PURSLEY
P.O. Box 2720
Boise, Idaho 83701-2720
mcc@givenspurlsey.com

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(X) E-mail

John K. Simpson

Exhibit A

John Simpson

From: Randy Budge [rcb@racinelaw.net]
Sent: Sunday, September 27, 2009 6:37 PM
To: Luke, Tim
Cc: Spackman, Gary; Rassier, Phil; Candice M. McHugh; Yenter, Cindy; Merritt, Allen; John Simpson; carlquil@yahoo.com; Steve; Brendecke, Chuck; Wylie, Allan; Peppersack, Jeff; rcbudge@cableone.net
Subject: RE: Director Spackman's 9-23-09 Letter re: Implementation of GWDs' Secon d Plan of Action for 2009

Tim,

The transfer applications are prepared and exhibits to the pre-filed testimony so I see no problem filing them soon rather than later as you suggest.

Randall C. Budge
Racine, Olson, Nye, Budge & Bailey, Chtd.
201 E. Center Street
P. O. Box 1391
Pocatello, ID 83204
(208) 232-6101 Ext. 340
(208) 232-6109 Facsimile
rcb@racinelaw.net

From: Luke, Tim [mailto:Tim.Luke@idwr.idaho.gov]
Sent: Friday, September 25, 2009 1:46 PM
To: Randy Budge
Cc: Spackman, Gary; Rassier, Phil; Candice M. McHugh; Yenter, Cindy; Merritt, Allen; jks@idahowaters.com; carlquil@yahoo.com; Steve; Brendecke, Chuck; Wylie, Allan; Peppersack, Jeff
Subject: RE: Director Spackman's 9-23-09 Letter re: Implementation of GWDs' Secon d Plan of Action for 2009

Randy,

Since I was copied on your e-mail I have taken the liberty to forward you the information that we compiled and used in the shortfall analysis as was requested in your response to the Director. Most of the attached data were reported to us directly by Northside Canal Co and North Snake GWD.

Your e-mail to the Director indicates that it is the ground water districts' "intention to timely complete the OTR plan as soon as approved by the Director and before the 2010 irrigation season." This raises a question as to whether the ground water districts also plan to proceed with filing a water right transfer application as intended by the districts before they agreed to the Two Year Stay of the OTR pipeline, and as referenced in the Director's Order Approving Ground Water District's Replacement Water Plan for 2009 dated March 26, 2009 (see Findings 34 and 35). The Department suggests that it is prudent for the districts to consider filing a water right transfer application sooner than later - there is at least a reasonable amount of time to process a transfer between now and the start of the 2010 irrigation season if in fact the OTR can be implemented as the districts "intend". In the event the transfer is protested, it can conceivably be consolidated with the mitigation plan hearing. This may provide some efficiency as well as avoid a need to use the water supply bank.

Regards,

Tim Luke
Idaho Department of Water Resources
322 E Front St, PO Box 83720
Boise, ID 83720-0098
208-287-4959