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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 RESPONSE TO GROUND WATER DISTRICTS' MOTION TO STRIKE AND MOTION IN LIMINE** **(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 hereby submits this response to the *Ground Water Districts' Motion to Strike Testimony and Evidence and Motion in Limine* ("Motion") filed on November 30, 2009.

INTRODUCTION

This is the second time in less than a month that Clear Springs has been forced to respond to a *Motion to Strike* filed by the Ground Water Districts ("Districts").[1] Clear Springs filed testimony of Dr. Charles Brockway, Dr. John R. (Randy) MacMillan, and Mr. Larry Cope and accompanying exhibits on October 30, 2009. Not satisfied with what was offered in that testimony, or Clear Springs' discovery responses, or the opportunity to depose those witnesses, the Districts then moved to compel the production of certain documents relating to the "value of Clear Springs", information that "would support Clear Springs' position that it is the world's largest rainbow trout producer and the value of CLEAR SPRINGS brand" as well as documents relating "to the production and marketing" of rainbow trout and Clear Springs' "share of the market". *See Motion to Compel* at 2-4; *McHugh Aff.*, Exs. C, D.

In seeking to compel their production, the Districts admitted the "documents are relevant and discoverable and may lead to the admissible information at hearing". *Motion to Compel* at 2 (emphasis added). Clear Springs complied with the Hearing Officer's order and produced the information on November 20, 2009, along with supplemental testimony describing those documents and how they supported previously filed testimony of Mr. Cope and Dr. MacMillan.

Notwithstanding the prior admission about the "relevance" of those documents, the Districts' now turn about 180 degrees and seek to strike and exclude the information they previously requested. In other words, the Districts now seek to prohibit the Hearing Officer and IDWR from considering the very documents and information they requested in the first place! This present motion to strike, like the first one, should be denied.

Although the Districts previously claimed they wanted to "test whether [Clear Springs'] objections can be supported or substantiated", they now would rather the Hearing Officer ignore

[1] *See* Districts' *Motion to Compel Discovery and Motion to Strike* filed on November 12, 2009.

that testimony and the flaws that have been exposed in the OTR Plan. Changing course from just three weeks ago, the Districts would prefer not to examine or "test" Clear Springs' objections at hearing, but instead they would have the Hearing Officer strike or exclude the evidence that is relevant to and supports Clear Springs' objections to the OTR Plan.

The Districts seek to strike testimony and evidence offered by Clear Springs' witnesses on the alleged basis that it is "irrelevant" and "outside the scope of the hearing" set to begin on December 7, 2009. However, the Districts offer no meritorious support for their argument and it is clear their efforts are squarely aimed at frustrating the development of the record contrary to IDWR's procedural rules, the CM Rules, and the Hearing Officer's prior orders in this case. For the reasons set forth below, the Districts' present Motion, like the first one they filed, should be denied.

BACKGROUND

The Districts filed their OTR Plan on March 12, 2009. In a nutshell the plan offered (a) CREP and Conversion Deliveries; (b) "Over-the-Rim" replacement water; and/or (c) delivery of water under IDFG water right 36-4076. Clear Springs protested the plan by letter of March 17, 2009, an initial protest filed on March 19, 2009, and its formal protest to the noticed plan on April 20, 2009. The basis for Clear Springs' protest centers around the injury to its senior water rights and the inadequacy of the Districts' plan to fully mitigate the injury caused by out-of-priority ground water depletions. A mitigation plan's proposed "source" of water is a primary component of the plan and is plainly relevant to the injury analysis and the adequacy of the plan.

At the August 26, 2009 Status and Scheduling Conference the parties decided upon a phased approach for hearing on the OTR Plan. The parties discussed the various issues raised by the plan and Clear Springs' protest. The Districts sought to have the "over-the-rim" proposal

heard first. The Hearing Officer set forth the approach in his Scheduling Order:

> Hearing on the mitigation plan and the objections will be staged, determining first whether the proposal for over the rim delivery is an acceptable method to mitigate the obligations of the junior ground water users. The remaining issues raised by the objections shall be addressed as and if they become relevant to a final determination.

Scheduling Order at 1.

Contrary to the Districts' claim, whether the OTR plan is "an acceptable method to mitigate the obligations of the junior ground water users" is not limited to solely a question of whether the plan "could be engineered to provide the quantity of water in a sufficiently reliable manner and could produce the quality of water needed" as argued by the Districts. *See Motion* at 3. Importantly, the efficacy of the OTR Plan depends upon whether the injury to Clear Springs' water rights will be fully mitigated, the effects of the proposed use of a "ground water" supply to replace "spring water" diverted and used under Clear Springs' water rights, and whether the plan satisfies the criteria of the CM Rules.

Additionally, whether the OTR plan is an acceptable method to mitigate strikes at the heart of IDWR's policy requiring mitigation to be provided "in kind, in time, and in place". *See Testimony of Karl J. Dreher* (Spring Users' Delivery Call Hearing Tr. p. 1178, lns. 12-15 ("the mitigation contemplated in the order had to be in kind – in other words water of equal utility – in time, and in place as what would have resulted from curtailment"). The source of a proposed replacement water supply is a critical element as to whether that water is "of equal utility" to the injured senior appropriator.

For example, if a commercial water company bottles spring water and a competing neighbor injures that spring by pumping water out-of-priority, the neighbor could physically replace the senior's supply by piping water from a local pond, or he could haul water in from

somewhere out of the area, however the water would not be of "equal utility" to the senior water company. In addition, if a water user relies upon a natural hot spring for commercial or recreational amenities on his property and a new development interferes and takes that water out-of-priority, replacing that source by simply buying the senior a few hot tubs and providing water to fill those tubs would not be water of "equal utility" as compared to the water from the hot spring. The same example applies in this case for Clear Springs where the "source" of the water that was originally appropriated is a fundamental aspect of the decreed water right.

Contrary to the Districts' characterization in their Motion, the issue for the December 7th hearing is not simply a question of "pumps and pipes" and whether water can by physically moved from one point to another. Instead, the CM Rules and IDWR's mitigation policy require further analysis into a Rule 43 plan beyond a basic engineering question. If IDWR were only left to answer the Districts' mechanical or civil engineering questions there would be no reason for the Rule 43 factors or the procedures employed to provide notice and allow other parties to protest mitigation plans. Fortunately, Idaho law protects senior water rights and requires analysis to fully determine the adequacy of mitigation plans offered by junior ground water users that cause injury to senior rights.

Moreover, to demonstrate the continual inconsistency in the Districts' positions, one need to look no further than the testimony they offer regarding water quality. Obviously, water quality is not described or captured in the quantity of water they intend to provide; nor is it part of the proposed engineering design offered by the Districts. However, the Districts, through testimony, have admitted that water quality is "relevant" and an important factor in determining whether Clear Springs's injury would continue as a result of the mitigation plan. Since water quality is relevant to the adequacy of the OTR Plan, it follows that the "source" of the

replacement water supply is relevant as well. Water which cannot be utilized in Clear Springs' operations fails to satisfy the mitigation requirements, and does not mitigate the injury to the senior water right. In other words, the Districts cannot use a Rule 43 mitigation plan to exchange one injury to Clear Springs' water right for another. Yet that is exactly what is proposed under the OTR Plan, exchanging an injury to the quantity element of Clear Springs' water rights with an injury to the source element instead. The Districts' plan does not meet IDWR's criteria under CM Rule 43 or the mitigation policy to provide water "in kind, time, and in place".

Accordingly, the testimony and evidence provided by Clear Springs in support of its objections to the OTR Plan, goes to the heart of the CM Rule 43 factors and the issues over the "acceptability" of the plan and should be considered by the Hearing Officer in this proceeding.

STANDARD OF REVIEW

Idaho's APA and IDWR's procedural rules provide the standard of review for the admission of evidence into the record in this matter. Idaho Code § 67-5251(1) provides that the presiding officer may exclude evidence that is "irrelevant, unduly repetitious, or excludable on constitutional or statutory ground, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state." The statute further provides that "[a]ll other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." I.C. § 67-5251(1). IDWR's Rules of Procedure follow the statute's approach:

> Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. . . . The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. . . .

IDAPA 37.01.01.600 (emphasis added).

ARGUMENT

A central issue in the review of the Districts' Mitigation Plan is whether the plan alleviates the injury caused by the junior water users under the factors identified in CM Rule 43. Further, Rule 43 provides that injury cannot be transferred from one water user to another through the plan. Clear Springs has proffered testimony that identifies that the injury to Clear Springs' operations from the junior's actions will continue if the OTR plan is approved. This continuing injury testimony is hydrologic (see testimony of Dr. Charles Brockway), Water Quality (see testimony of Brockway and MacMillan) and operational (see testimony of MacMillan, Cope and Brockway). It is this very injury analysis which the Districts are attempting to exclude from consideration, but which the Rules demand be considered. Whether the Hearing Officer and IDWR analyze the OTR Plan under the CMRs, the transfer guidelines, or even the water bank statutes and rules, each regulation requires an injury analysis to existing water rights. *See* I.C. §§ 42-222(1), 42-1763, CM Rule 43.03.j.

As IDWR's Water Distribution Section Manager Tim Luke testified at his deposition, the injury analysis for a mitigation plan is similar if not identical to a transfer or a water bank lease. *See Attachment #1, Deposition of Tim Luke*, Tr. pp. 21-26. It is with that requirement that the Districts' motion must be denied and the testimony and evidence offered by Clear Springs in support of its objections to the OTR Plan should be admitted.

I. The Testimony and Evidence Offered by Dr. Brockway is Relevant to the Acceptability of the OTR Plan.

A. Dr. Brockway's 2008 Report

At Dr. Brockway's deposition the Districts had the opportunity and in fact took the opportunity to inquire of Dr Brockway's reliance upon a number of reports he referenced or

identified either at his deposition or in his report. At the conclusion of his deposition Dr. Brockway was asked a series of questions in an effort to clarify his review and utilization of the documents identified. *See Attachment #2, Deposition of Charles E. Brockway.* Dr. Brockway clarified his review and use of the reports identified, including his 2008 report for which the Districts are now attempting to exclude. Specifically, Dr. Brockway relied upon that report in his rebuttal of Charles Brendecke's analysis regarding the proposed transfer applications offered in this proceeding. *See* Brockway Depo. Tr. p. 163-64.

As such, the prior report is clearly "of a type commonly relied upon by prudent persons in the conduct of their affairs." I.C. § 67-5251(1); IDAPA 37.01.01.600. Accordingly, Dr. Brockway's prior report is foundational to the testimony offered by him in this proceeding and should not be stricken or excluded.

B. Testimony Regarding use of ESPAM and Percentage Spring Flow

The Districts claim that the testimony offered by Dr. Brockway on pages 10-11 and 16 of his report is irrelevant and outside the scope of the December 7th hearing. *See Motion* at 6-7. However, the direct testimony of Charles Brendecke addresses the perceived benefits in spring flows at Snake River Farms from the proposed implementation of the OTR Plan. Dr. Brendecke's testimony relied heavily upon the ESPAM, spring flow data and other information related to the ESPA, modeling, model calibration and model results. *See generally, Brendecke Testimony.* The testimony provided by Dr. Brockway, addresses in part the opinions of Dr. Brendecke and squarely address CM Rule 43.03.e and the question of whether the OTR Plan properly relies upon "computer simulations and calculations" and whether these methods are appropriate for calculating the "depletive effect of the ground water withdrawal." This testimony is relevant as to the "acceptability" of the OTR Plan and "is of a type commonly relied upon by

prudent persons in the conduct of their affairs." I.C. § 67-5251(1); IDAPA 37.01.01.600.

Contrary to the Districts' argument, such evidence and testimony is provided pursuant to the criteria used to evaluate the OTR Plan under the CM Rules and is relevant to this proceeding. Although the Districts would prefer to "bar the door shut" on any additional technical or scientific improvements in evaluating the hydrology in this matter, that position is not supported by the law or IDWR's continuing obligation to administer water rights pursuant to the best available information.

C. Testimony Regarding Proposed Transfer Applications

The Districts have yet to file any transfer applications with IDWR in order to obtain a waters supply to implement the OTR Plan. *See generally, Clear Springs' Motion to Dismiss* filed November 25, 2009. There is no dispute that if IDWR approved the OTR Plan today the Districts would have no water to fill their pipeline. Nonetheless, the Districts have attempted to introduce their "draft" transfers for purposes of the December 7th hearing in an attempt to obtain some "pre-approval" by IDWR. Specifically, the Districts have offered the testimony of Charles Brendecke in support of their proposed transfers. Ironically, the Districts take issue with Dr. Brockway's rebuttal of this testimony even though the OTR Plan admittedly relies upon the admitted requirement to change the nature and period of use of the existing irrigation ground water rights. Clearly, if the Hearing Officer considers any evidence about transfer applications that have yet to be filed by the Districts, Dr. Brockway's testimony and evidence on this issue is relevant.

Moreover, Dr. Bockway's testimony addresses the issue of injury to Clear Springs' senior water rights from the proposed mitigation plan and transfer applications. The Districts now through the rebuttal testimony of Charles Brendecke offer another possibility, a proposed water

bank application and lease. Such testimony, offered for the first time but styled as "rebuttal" testimony, will necessitate further rebuttal testimony from Clear Springs at hearing. Notwithstanding that fact, the proposed use of the water bank lease doesn't change the fundamental standard for review, which is whether the change will cause injury to existing water rights.[2] *See* I.C. § 42-222(1); I.C. § 42-1763; *see also, Attachment #1* Luke Depo. Tr. pp. 21-22. Hence, despite the Districts attempt to avoid the injury determination in this case, the Hearing Officer and IDWR are obligated to consider injury and Dr. Brockway's testimony and data utilized to analyze that injury are clearly relevant. The testimony and evidence should not be stricken or excluded.

Alternatively, if the Hearing Officer declines to take evidence about the required transfer applications or a water bank lease at the December 7th hearing, then all evidence and testimony offered by the Districts on these subjects should be stricken or excluded as well. In other words, the Districts cannot simply have a "one-sided" proceeding on this issue. If the Hearing Officer grants the Districts' Motion on this issue, then all testimony and exhibits related to the transfers, water bank leases, and other testimony relying upon that testimony or documents necessary to implement the OTR Plan should be stricken or excluded. Specifically, this would necessarily require exclusion of the following testimony and exhibits offered by the Districts:

Direct Testimony of Charles M. Brendecke and Exhibits 2401 - 2404

- Page 4, lns. 18-21 (purposes (2) and (3)
- Page 11, lns. 16-24
- Pages 12, 13
- Page 14, lns. 1-14

Rebuttal Testimony of Charles M. Brendecke and Exhibits 2408 - 2413

- Pages 2-4

[2] There are some differences between the analysis in the transfer statute and the water bank statute. For example, the Director may reject a water bank lease if the "rental would cause the use of water to be enlarged beyond that authorized under the right to be rented". I.C. § 42-1763.

Furthermore, the Districts have made a concerted effort to "intertwine" the testimony of their witnesses. *See generally*, Direct Testimony of Brendecke, Schuur, Eldridge, and Scanlan. If the Hearing Officer decides that Dr. Brendecke's testimony regarding any proposed transfer or water bank lease must be stricken or excluded, a complete review of all testimony filed by the Districts will be necessary in order to ensure that all testimony on those issues is excluded or stricken as well. The Districts cannot have it both ways for purposes of their motion to strike any testimony related to the "draft" transfer applications offered by Clear Springs' witnesses. Either the testimony is relevant and the Hearing Officer should consider the rebuttal offered by Dr. Brockway, or all testimony offered by both parties on this issue should be stricken or excluded on an equal basis.

D. Dr. Brockway's Conclusions and Appendices

Finally, the Districts ask the Hearing Officer to strike or exclude certain summaries and conclusions provided in Dr. Brockway's testimony. *See Motion* at 7-8. For the reasons explained above, the testimony summarized and the conclusions stated are relevant for the same reason as the underlying testimony offered in the report. Specifically, conclusions 9 – 14 and 16-17, and appendices 2 and 5, all address criteria in CM Rule 43 and are relevant to the "acceptability" of the OTR Plan.

The Districts' witnesses have offered opinions on the hydrogeology, the relationship between ground water and springs flows, and the estimated impacts of changing the nature and purpose of use of the irrigation ground water rights. Dr. Brockway's testimony is provided in rebuttal to these opinions and is clearly relevant in this proceeding since it addresses issues raised on those subjects. Therefore, the Districts' motion should be denied.

II. The Testimony and Evidence Offered by Mr. Larry Cope and Dr. Randy MacMillan is Relevant to the Acceptability of the OTR Plan.

As explained earlier, this is the second time in three weeks the Districts have sought to strike the testimony of Clear Springs' witnesses. The first time the Districts complained that they had not been provided with any documents related to testimony of Clear Springs' witnesses. After receiving that information and evidence the Districts now claims it is irrelevant. Similar to the first motion, the Hearing Officer should deny this effort to frustrate the record and should not preclude Clear Springs from providing evidence and testimony in support of its objections to the OTR Plan.

The Districts unsuccessfully argue that the sole issue for the December 7th hearing is whether the OTR Plan "can produce the quality and quantity of water necessary for use" at the Snake River Farms facility.[3] *See Motion* at 8. The Districts further argue that testimony provided by Larry Cope and Randy MacMillan as to the importance of Clear Springs' brand image and business and marketing practices is not relevant and is somehow prohibited under CM Rule 43. Although the Districts previously argued that documents supporting this testimony were "relevant" for purposes of their first motion to compel, they now claim the opposite. Since they apparently have no rebuttal to this testimony the Districts seek as a "last resort" to exclude it from the hearing.

Interestingly, exhibit no. 29 to the deposition transcript of Dr. MacMillan (introduced by the Districts) further supports the relevance of the Cope and MacMillan testimony. *See Attachment* #4, Deposition Transcript of Randy MacMillan, including ex. 29. This exhibit

[3] The Districts also state that the OTR Plan was "previously approved by the Director as a replacement water plan on March 26, 2009" as if that gives the plan some credibility. The former Director's action in approving a "replacement water plan" was declared illegal by Judge Melanson in his June 19, 2009 *Order on Petition for Judicial Review* (*Clear Springs Foods et al. v. David R. Tuthill, Jr. et al.*, Gooding County, 5th Jud. Dist., Case No. 08-444). Accordingly, the Districts' claimed "approval" by IDWR did not comply with Idaho law.

offered by the Districts, which will now be offered at hearing by Clear Springs, identifies product perception and image in marketing of the commercial trout industry and product differentiation. Clearly, by the Districts' own document the relevance of the issue has been established.

Notwithstanding the admitted relevance of these matters, the Districts request the Hearing Officer to artificially bifurcate questions about the "source" of water under the OTR Plan from Clear Springs' present diversion and use of spring water under its decreed water rights. This argument is not supported by the facts or the law since whether the replacement water is of "equal utility" to Clear Springs is relevant to the acceptability of a mitigation plan and should be evaluated in this proceeding.

Contrary to these arguments, the testimony provided by Mr. Cope and Dr. MacMillan clearly falls within the scope of the December 7th hearing and is relevant to the acceptability of the OTR Plan, most importantly, the source of the proposed replacement water. Moreover, the CM Rules and IDWR's policy requiring mitigation to be provided "in kind, in time, and in place" further provide support for the testimony related to Clear Springs' objections to the OTR Plan and the fact pumped "ground water" is not naturally discharging spring water upon which Clear Springs' relies for use under its decreed senior water rights.

First, the CM Rules required the Districts to submit a "description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies". Rule 43.01.c. The source of the water supply for the OTR plan is "ground water". Whether pumped "ground water" is an appropriate replacement water supply for water rights relying upon natural springs is clearly at issue in this proceeding. Therefore, any testimony provided that describes the importance of the source for Clear Springs'

water rights is relevant to the objections to the OTR Plan. The importance of spring water to Clear Springs is evidenced in its brand image, marketing, and advertising practices.[4]

Both Mr. Cope and Dr. MacMillan have extensive experience with Clear Springs' operations and the relevant markets upon which the company relies. The testimony and evidence provided by Mr. Cope and Dr. MacMillan as to Clear Springs' objection to the Districts' water supply plainly falls within the type of evidence allowed under the Idaho APA and IDWR's procedural rules and therefore should be considered by the Hearing Officer. *See* I.C. § 67-5251(1); IDAPA 37.01.01.600.

CM Rule 43 also lists factors the Director is to consider in ruling on the acceptability of a mitigation plan. *See* Rule 43.03. Again, similar to Rule 43.01, factors (b) and (c) in Rule 43.03 specifically address IDWR's evaluation of the Districts' "replacement water supplies" which by necessity includes an inquiry into the source of that water supply. Again, since the source of water for the OTR Plan is "ground water", not the springs that Clear Springs' water rights rely upon, testimony and evidence as to the utility of the replacement water and the effect of that water compared to Clear Springs' existing diversion and use of water under the existing spring source is plainly within the scope of what is contemplated by the CM Rules.

The Districts unpersuasively argue that this evidence is not "relevant" to the acceptability

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[4] Contrary to the Districts' characterization of their deposition testimony, both Dr. MacMillan and Mr. Cope testified that the source of water for their Box Canyon facility is "spring flow" that emanates in Box Canyon:

Q. Okay. So the water source for that Box Canyon facility, which is Box Canyon Creek shown on the right, is not a spring emanating from the Eastern Snake Plain Aquifer --.

A. [MR. COPE]: ***No, it is.***"

See Attachment #3; *Deposition of Larry Cope* Tr. p. 90, lns. 7-11 (emphasis added).

Dr. MacMillan also confirmed that the source of water is spring flow:

A.[Dr. MACMILLAN] . . . So we don't have any evidence that there's contamination of there's ag runoff into that Box Canyon Creek, ***which again, we believe is spring flow.***"

See Attachment #4; *Deposition of John R. MacMillan* Tr. p. 176-77, lns. 24-2.

Given the selected deposition excerpts the Districts have submitted, Clear Springs has attached the entire transcript for the Hearing Officer for a complete reference and to ensure any citations are properly placed in context with the testimony that was given.

of the OTR Plan. Through their arguments the Districts are essentially asking the Hearing Officer to wholly ignore the importance of the existing water supply upon which Clear Springs' appropriated its water rights and relies upon for its operations. Given the unique resource and importance of spring water to Clear Springs' operations, the source of replacement water provided by the OTR Plan is a central issue to this proceeding. Consequently, there is no basis to limit or strike the testimony offered in support of Clear Springs' objection.

Finally, Rule 43.03 states that the list of factors is not exhaustive: "factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following . . .". *Id.* (emphasis added). Therefore, unique aspects and the importance of the existing water supply appropriated under Clear Springs' senior surface water rights is an appropriate consideration in evaluating the Districts' proposed replacement water sources.

For example, Dr. MacMillan's testimony, at pages 7 – 18, describes the seafood industry within which Clear Springs' operates and how the company has marketed its product and its brand image over time based upon the water source which supplies its water rights. The source of the water and the role it plays in Clear Springs' marketing and product success is relevant to its objection to the OTR Plan which proposes to exchange spring water with pumped "ground water". Moreover, the exhibits and background information in Dr. MacMillan's testimony is foundation for his opinions about the acceptability of the OTR Plan.

Exhibit 2, which is Dr. MacMillan's report relative to the Districts' first mitigation plan provides additional background information that supports Clear Springs' present objection. The testimony provides further support as to the importance of the existing spring water supply that Clear Springs relies upon in its operations. In addition, since the Districts have included parts of

their former mitigation plans as part of the OTR Plan filed on March 12, 2009, there is no basis to strike or exclude the exhibit at this time.

Similar to the testimony provided by Dr. MacMillan, Larry Cope's testimony, as CEO and Chairman of Clear Springs Foods is plainly relevant to this proceeding. Mr. Cope's experience with the company and the seafood industry and the aspects of Clear Springs' marketing based upon its spring water source are relevant to the acceptability of the OTR Plan. Again, the source of the water supply for the OTR Plan is central to this matter and Mr. Cope's opinion on the effect of that source of water on Clear Springs' operations is relevant and should be considered. The testimony and evidence is of a "type commonly relied upon by prudent persons in the conduct of their affairs" and as such is admissible under Idaho law in this proceeding. *See* I.C. § 67-5251(1); IDAPA 37.01.01.600.

The Districts' efforts to frustrate the record and preclude Clear Springs' from presenting evidence and testimony to support its objection to the OTR Plan should be denied. The water source for the OTR Plan is relevant and Clear Springs' reliance upon and the importance of its existing supply are central to this proceeding. The two concepts cannot be separated and ignored as the Districts would have it. Accordingly, their motion to strike or exclude this testimony should be denied.

The Districts' final complaint about Clear Springs' timing in providing documents and supplemental testimony to explain that evidence should be disregarded as well. The documents and supplemental testimony provided on November 20, 2009 were produced in response to the Districts' motion to compel and were intended to assist the Hearing Officer as they provide foundation for the testimony of Mr. Cope and Dr. MacMillan filed on October 30, 2009. Moreover, while this information is second nature to Clear Springs' officers with extensive

experience in the company's operations and markets, the Districts insisted upon receiving documents that provided foundation for the testimony. Accordingly, there is no basis to strike or exclude that information.

In addition, although the Districts filed supplemental testimony for Terry Scanlan on October 21, 2009 (40 days after the direct testimony deadline) and for Ray Eldridge on November 6, 2009 (56 days late), the hearing schedule for filing direct testimony apparently only applies to Clear Springs under the Districts' argument. If "supplemental testimony" and additional documents and exhibits to support that testimony is to be allowed under the Scheduling Order for the Districts, there is no prejudice to the Districts in admitting the documents and testimony filed by Clear Springs on November 20, 2009.

Further, the Districts through "rebuttal testimony" filed on November 25, 2009 have now offered "new" or additional direct testimony in an attempt to refute the supplemental testimony filed by Clear Springs. As such, Clear Springs reserves its right to offer rebuttal testimony to those points at hearing. Given the compressed and staged hearing schedule, as requested by the Districts, the continual development of the record by both parties is not "unfair" as suggested, and is of no surprise to the Districts.

CONCLUSION

Despite the Districts repeated efforts to frustrate the record in this case by having testimony and evidence excluded from consideration, it is clear their arguments are without merit based upon the standard in Idaho law. The testimony and evidence provided by Dr. Brockway, Dr. MacMillan, and Mr. Cope fully supports Clear Springs' objections to the OTR Plan and is relevant for consideration in this proceeding. The testimony and evidence meets the standard set forth in Idaho's APA and IDWR's procedural rules and therefore should be admitted. Therefore,

the Hearing Officer should deny the Districts' motion.

DATED this 4th day of December, 2009.

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CERTIFICATE OF MAILING

I hereby certify that on December 4, 2009, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email:

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