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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS.
36-0413A, 36-04013B AND 36-7148

(Snake River Farm)

**GROUND WATER DISTRICTS'
RESPONSE TO CLEAR SPRINGS'
SUPPLEMENTAL AUTHORITY**

COME NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively "Ground Water Districts"), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby submit this Ground Water Districts' Response to Clear Springs Foods, Inc.'s ("Clear Springs") Supplemental Authority filed March 5, 2009.

Clear Springs argues that the Ground Water Districts' Second Mitigation Plan should be dismissed under the doctrine of "judicial estoppel" and quotes legal argument made in a brief relating to the facial constitutionality of the CM Rules then pending before the District Court in Gooding County.¹ However, the elements of judicial estoppel do not apply and are not met. In

¹ The *Final Order Accepting the Ground Water Districts' Withdrawal of Amended Mitigation Plan* dated March 5, 2009 at p. 10 fn. 7 makes a reference to the AFRD2 case filings; it is unclear what the relevance of this footnote is to the order. This response is being provided for the record in order to clarify the elements of judicial estoppel.

fact, the legal authority that Clear Springs cites in its Supplemental Authority shows that the elements are not met. Clear Springs cites *Heinze v. Bauer*, 178 P.3d 597 (Idaho 2008) to support its argument:

This Court adopted the doctrine of judicial estoppel in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954). In *Loomis*, this Court held that a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. *Id.* at 9394,277 P.2d at 565. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." ... Judicial estoppel is intended to prevent a litigation from playing fast and loose with the courts.

Id. at 600 (emphasis added). However, the elements of judicial estoppel are simply not present here. The elements of judicial estoppel in Idaho are clear. When the elements are broken down and compared to the facts of this case it is obvious that Clear Springs' argument is without merit.

The following table compares the elements of judicial estoppel with the facts involved here.

Judicial Estoppel Elements

Litigant obtains a judgment, advantage or consideration

Through sworn statements

Estopped from adopting inconsistent or contrary allegations or testimony

Facts

IGWA obtained no judgment, advantage or consideration from Judge Wood on the issue of CM Rule 43. In fact, Judge Wood's decision on summary judgment did not speak to Rule 43 and found the rules to be facially unconstitutional. While the Supreme Court found the rules facially constitutional, the issue of the interpretation and application of Rule 43 was not decided in that case.

IGWA's assertion was not a sworn statement or allegation. Rather, IGWA's attorneys made legal argument in response to an argument and to distinguish the "Facility Volume" decision in the SRBA.

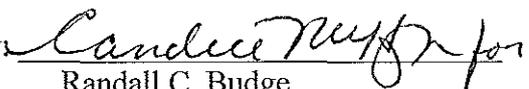
Because the prior to elements are not met, IGWA is not estopped from making a contrary legal argument regarding the Director's authority and application of Rule 43 as it relates to Second Mitigation Plan.

“Judicial estoppel applies when a ‘litigant, by means of such sworn statements, obtains a judgment, advantage or consideration from one party.’” *Cardova v. Bonneville County Joint Sch. Dist. No.93*, 144, Idaho 637, 641 fn. 2 (2007) (emphasis added). In that case the School District claimed that Cordova after receiving worker’s compensation benefits from District 91 would be judicially estopped from claiming she was not an employee of District 93. The court found that nothing in the record showed that “by means of making a sworn statement [that Cordova] obtained a judgment, advantage or consideration from one party.” *Id.* In *Smith v. U.S.R.V. Properties, L.C.* the Supreme Court held that judicial estoppel does not apply because “in the first lawsuit, the Smiths never obtained a judgment, advantage or consideration from *U.S.R.V.*” *Smith v. U.S.R.V. Properties, L.C.*, 114 Idaho 795, 800 (2005) (in the first lawsuit Smith took the position that the restrictive covenants were invalid; in the second lawsuit Smith took the position that the restrictive covenants were valid. The District Court in the first lawsuit found the covenants valid.)

Because the elements of judicial estoppel are clear, and because they are in no way met in this case, the argument made by Clear Springs is without basis. Furthermore, any implication that IGWA or IGWA’s attorneys are somehow abusing the administration or judicial process is unfounded.

Submitted this 6th day of March, 2009.

RACINE OLSON NYE BUDGE &
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By:  for
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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of March, 2009, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

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