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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 THE MITIGATION PLAN O FTHE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS IMPLEMENTED BY APPLICATIONS FOR PERMIT NOS. 02-10405 AND 36-16645 AND APPLICATION FOR TRANSFER NO. 74904 TO PROVIDE REPLACEMENT WATER FOR CLEAR SPRINGS SNAKE RIVER FARM (Water District Nos. 130 and 140)	**CLEAR SPRINGS' MOTION TO DISMISS AND/OR FOR PROTECTIVE ORDER**

COMES NOW, Clear Springs Foods, Inc. ("Clear Springs"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLP, and respectfully moves the Hearing Officer for an order dismissing those portions of the *Amended Mitigation Plan of North Snake Ground Water District & Magic Valley Ground Water District* ("*Amended Plan*"), filed by the North Snake and Magic Valley Ground Water Districts (hereinafter referred to as "IGWA"), proposing a "direct pump-back of water from the end of Snake River Farm's raceway to the head of Snake River Farm's raceway" (hereinafter referred to as the "pump back") In the alternative, Clear Springs

respectfully moves the Hearing Officer for a protective order that discovery not be had on information and documents related to the "pump-back" proposal. This motion is made pursuant to Department Procedural Rule 260 (IDAPA 37.01.01.260), and Idaho Rule of Civil Procedure 26(c).

INTRODUCTION

IGWA's pump-back proposal has already been rejected by the Director. In the Spring Users Case, the Director rejected IGWA's assertion that the senior water right holders must re-pump and reuse their water *before* administration could be requested.[1] In rejecting this proposal, the Director specifically recognized that a pump-back system was not feasible for a number of reasons. In particular, the Director held that the *characteristics* of the water used for fish propagation creates the basis for the beneficial use. Characteristics such as the temperature, purity and oxygen content of spring water are essential for trout farming. As such, mitigation water must be of "suitable water quality."

IGWA, as a party to the Spring Users Case, is bound by that decision. IGWA's attempt to circumvent the Director's prior decision – in a related matter involving the same water rights and the same parties – must be rejected.

Furthermore, the Director's final decision in the Spring Users Case is currently on appeal in the Gooding County District Court. Not only is IGWA bound by the Director's final decision, but the Director (Hearing Officer) does not have jurisdiction to overturn or contradict his prior final order during the pendency of the appeal.

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[1] The "Springs Users Case" refers to the consolidated proceeding *In the Matter of Distribution of Water to Water Rights Nos. 36-02356A et al (Blue Lakes Delivery Call) and In the Matter of Distribution of Water to Water Rights Nos. 36-04013A et al. (Clear Springs Delivery Call)*. Both Clear Springs and IGWA were parties to the proceeding. A hearing was held in this matter in late 2007 and the Director issued a final order on July 11, 2008.

IGWA attempts to recycle its previously rejected notion of a pump-back, apparently hoping that the Director will ignore his own prior ruling. As such, any portion of the *Amended Plan* addressing the "pump-back" should be dismissed.

In the alternative, the Hearing Officer should enter a protective order against discovery on this issue.

IGWA'S PUMP-BACK PROPOSAL

IGWA's *Amended Plan* seeks approval of the "construction of a direct pump back system." *Amended Plan* at 8. According to IGWA, "it is assumed that water would be diverted from the lake on the southeast shore and pumped to the inlet of the SRF raceway." *Id.* Ex. 1 at 2. Water is discharged into that lake from the SRF raceways. *See id.* IGWA fails to address the prior holdings by the Director and the Hearing Officer in the Spring Users Case. Noticeably, IGWA fails to address the prior decisions from the Spring Users' Case or the impact to the quality of water that would be provided under its proposed pump-back alternative.

STANDARD OF REVIEW

I. Motion to Dismiss

The standard of review for a motion to dismiss is the same as that for a motion for summary judgment. *See Garcia v. Pinkham*, 144 Idaho 898, 174 P.3d 868, 870 (2007). "After viewing all facts and inferences from the record in favor of the non-moving party, we will ask whether a claim for relief has been stated." *Id.* Here, even viewing the facts in favor of the non-moving party, IGWA, dismissal is appropriate. As discussed below, IGWA is barred, by *res judicata*, from asserting a pump-back mitigation proposal due to its party status and full participation in the Spring Users Case. In addition, the Director is without authority to approve the pump-back proposal, since the final order from the Spring Users Case is currently on appeal

to the Gooding County District Court.

II. Motion for Protective Order

The Idaho Rules of Civil Procedure provide for the entry of a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." I.R.C.P. 26(c). Authorizing discovery on an issue that was directly denied in the prior case and final order by the Director should not be allowed as it will lead to annoyance and undue burden and expense.

ARGUMENT

I. IGWA is Bound by the Director's Prior Decision Rejecting the Pump-Back Proposal; As such, the *Amended Plan* Should be Dismissed.

In the Spring Users Case (involving the same water right subject to this matter), the Director rejected IGWA's pump-back argument. There, IGWA asserted that the burden of constructing and implementing a pump-back facility was on the senior water users. Now, IGWA recognizes that the burden of mitigating for material injury to Clear Springs' senior surface water rights rests with the junior ground water right holders causing that material injury. Aside from this distinction, IGWA's re-pumping proposal and pump-back proposal are virtually identical – both fail to consider the quality of the water being used for mitigation as well as the inherent and unacceptable risks to Clear Springs' aquaculture operations. As such, the pump-back proposal should be dismissed.

This failure to recognize that the quality of the water from the springs forms the basis for the beneficial use is the basis for Clear Springs' objection to the pump-back proposal. Moreover, the unacceptable risks and unreliability of such a system has already been considered and determined. In the Spring Users Case, the Hearing Officer found that the quality of water is vital to the fish propagation process:

> **5. The quality of water is important for the propagation of trout.** The use of spring water from the aquifer is important to the maintenance of the trout farms. The temperature, purity and oxygen content of the water from the springs makes it desirable for trout farming.

Opinion Constituting Findings of Fact, Conclusions of Law & Recommendation ("*Recommended Order*") at 5 (underline added).[2] In fact, in the *Recommended Order*, the Hearing Officer, specifically recognized that failure to account for these vital characteristics "prevent[ed] acceptance" of the pump-back alternative:

> **1. The Spring Users are not obligated to pursue repumping of water beyond the current practices.** IGWA maintains that the Spring Users should be required to institute systems for reuse of the water they receive before calling for the curtailment of junior rights. At the present time water is reused in the trout farms as it moves from one set of raceways in a pond to a lower set of raceways. The process works by gravity and utilizes a settling system between the ponds. IGWA maintains that this process can be replicated by repumping the water through the raceways. This is a theory. The burden of proof is upon IGWA to show that it is a realistic method.
>
> Several problems prevent acceptance of this alternative: a) There is no showing that it is financially feasible to run pumps twenty-four hours. a day, three hundred six-five days a year. b) There is evidence that there would be risks that make this process unacceptable. Any breakdown for even a brief time could be catastrophic to fish deprived of water containing adequate oxygen. c) While water is presently reused in a process of settling waste that works, there is no evidence that a similar quality of water could be maintained with repumping.

Id. at 12 (underline added).[3]

Recognition that the quality of spring water is vital to the spring users' operations was

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[2] Importantly, in the *Final Order Regarding Blue Lakes & Clear Springs Delivery Calls*, the Director specifically affirmed the requirement that replacement water supply must be of suitable water quality. *Id.* at 2 ¶ 6-7 (stating that, unless specifically addressed in the *Final Order*, the "Findings of Fact entered previously by the Director and recommendations of the hearing officer govern").

[3] IGWA has failed to address any of the three fatal problems with the pump-back, as identified in the *Recommended Order*.

recognized throughout the Spring Users Case from the time the first orders were issued in 2005. In the *Order in the Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-07210 & 36-07427* (the Blue Lakes *Order*), the Director of the Department, Karl J. Dreher, recognized that interfering junior appropriators had an obligation to provide replacement water of "suitable quality."

> 31. Unless a replacement water supply of ***suitable water quality*** for use by Blue Lakes Trout is provided by the holders of junior priority ground water rights causing material injury ... the Director should order the curtailment of such rights.

Blue Lakes *Order* at 27 (emphasis added). The Director concluded by ordering that junior water users "causing material injury ... must submit a plan or plans to the Director to provide mitigation by offsetting the entirety of the depletion to the ESPA under such rights or to provide Blue Lakes Trout with a replacement water supply of ***suitable water quality*** of 10 cfs. *Id.* at 28 (emphasis added).[4]

The Hearing Officer in the Spring Users Case recognized that the failure to consider the quality of the water being supplied for mitigation would defeat the very purpose of the spring users' water rights:

> **1. The quality of water is not an element of a water right but may be considered.** IGWA maintains correctly that quality of water is not one of the elements of a water right. However, the quality of water may be considered in alternative proposals to curtailment. The Spring Users businesses are dependent upon a certain quality of water in order to operate their business. The purpose of the water rights enumerated in their partial decrees is fish propagation. If something happens in nature that prevents the quality of water necessary for fish propagation from coming to them from the springs they are out of luck and most likely out of business. There

[4] The requirement that "replacement water supply of ***suitable water quality***" be provided was added to the *Order in the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B & 36-07148 (Snake River Farm); and to Water Rights Nos. 36-07083 & 36-07568 (Crystal Springs Farm)* (the Clear Springs *Order*) through the Director's *Final Order Regarding Blue Lakes & Clear Springs Delivery Calls* at 3-4.

> are no guarantees against natural processes that might alter either the quantity or quality of the water they receive. However, in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered. They are adjudicated to have water rights for the purpose of fish propagation. If their rights are met through curtailment they will receive the quality of water that nature provides and that will most likely be suitable for fish propagation. Any alternative to curtailment must accomplish the same result as curtailment. Otherwise the purpose of the water right is defeated.

Id. at 22 (underline added). Importantly, the Director affirmed this finding. *See Final Order* at 2 ¶ 6-7 (stating that, unless specifically addressed in the *Final Order*, the "Findings of Fact entered previously by the Director and recommendations of the hearing officer govern").

In addition to failing to address the quality of the water provided by the pump-back proposal, IGWA fails to address either the economic feasibility of such a plan,[5] or the catastrophic impacts to the fish should the pump-back system breakdown – all factors that doomed the proposal in the first place. Accordingly, the proposal was considered and rejected by the Hearing Officer.

According to the plain terms of these prior decisions, IGWA's pump-back proposal cannot be accepted. Indeed, IGWA, as a party to the prior case, is bound by these decisions and is barred, by *res judicata*, from raising the issue here. *Res judicata* bars litigation where:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

[5] It is assumed that IGWA would bear the costs of operating the proposed pump-back system, including all operation, maintenance and repair costs in perpetuity. As recognized in by the Hearing Officer in the Spring Users' Case, attempting to force such burdens on the senior water users must be rejected due to the "several problems" that persist. *See Recommended Order, supra.*

Waller v. State, Dept. of Health and Welfare, 192 P.3d 1058 (2008). *Res Judicata* applies to administrative decisions. *See J&J Contractors/O.T. Davis Const. v. Idaho*, 118 Idaho 535, 537, 797 P.2d 1383, 1385 (1990). The Idaho Supreme succinctly explained the "fundamental purposes" for the rule in *Ticor Title Co. v. Stanion, II*, 144 Idaho 119, 157 P.3d 613, 617 (2007):

> The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel) ... Separate tests are used to determine whether claim preclusion or issue preclusion applies. *Res judicata* serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims.

157 P.3d at 617 (2007) (internal citations omitted); *see also D.A.R, Inc. v. Sheffer*, 134 Idaho 141, 144-45 (2000).

Res judicata bars IGWA's pump-back proposal from being accepted. IGWA was a party to the Spring Users Case and made a virtually identical pump-back claim (with the only distinction being in the entity paying for the pump back). Moreover, IGWA has provided no new facts or law to warrant acceptance of the proposal that was rejected in the Springs Users Case. The pump-back issue was addressed by the parties and rejected by the Hearing Officer and ultimately by the Director in the *Final Order*. Any mitigation plan proposed by IGWA must be consistent with the clear guidance from these orders.

Finally, IGWA's attempt to take a "second bite of the apple" or re-litigate a previously decided issue here should not go unnoticed. As stated above, this issue has already been squarely addressed and rejected by the Director, in the *Final Order* in the

Spring Users Case. That *Final Order* has been appealed to the District Court by both Clear Springs and IGWA (Gooding County Case No. 2008-444). IGWA failed to raise this issue in its *Cross Petition for Judicial Review* (attached hereto as Exhibit A). IGWA cannot simply ignore the Director's prior decisions and seek to present the same rejected mitigation plan in subsequent proceedings. Finally, any consideration of the proposal now is prejudical to Clear Springs. Whereas the issue was previously litigated and decided, and there is nothing new to address now, it would be a waste of the parties' and Department's time and resources to continually re-litigate the "pump-back" proposal. As such, the *Amended Plan* should be dismissed.

II. The Director Cannot Overturn His July 11, 2008 Final Order issued in the Spring Users Case While That Order is on Appeal to the District Court.

The *Final Order* in the Spring Users Case is currently on appeal to the District Court. As stated above, that decision specifically rejected IGWA's pump back proposal – recognizing that the necessary characteristics and quality of the spring water was not protected by such a mitigation plan, and the inherent risks with such a plan were determined to be unacceptable. The effectiveness of the *Final Order* has not been stayed by the District Court or the Director. *See* Idaho Rule Civ. P. 84(m) (stay of decision on appeal is not automatic but must be entered by agency or "reviewing court"). Furthermore, while the Director retains jurisdiction to enforce the "action of an agency that is subject to the" appeal, *id.*, the Director is specifically prohibited from modifying or amending the *Final Order*, IDAPA 37.01.01.760 ("The agency head may modify or amend a final order ... at any time before notice of appeal to District Court has been filed").

The SRF water rights to which the *Amended Plan* applies are the same SRF water

rights implicated in the *Final Order*. In other words, as to the SRF water rights, the Director's *Final Order* specifically rejects the pump-back proposal. The Director, acting as Hearing Officer in this matter, cannot circumvent the rule by now approving the pump-back proposal while the *Final Order* is on appeal. As such, the *Amended Plan* should be dismissed.

III. In the Alternative, a Protective Order is Necessary

Should the Hearing Officer deny the *Motion to Dismiss*, then a protective order is warranted. On October 1, 2008, IGWA served discovery on Clear Springs, seeking further information relative to the *Amended Plan's* pump-back proposal. In particular, IGWA sought:

> **INTERROGATORY NO. 4**: What are the constraints preventing implementation of a recirculation project? Do you use recirculation, in any form at any of your facilities and if so, to what extent? If you do not use recirculation, why not?

Ground Water District's First Discovery Requests (attached hereto as Exhibit B).

Civil Rule 26(c) provides that a protective order may be issued "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." IGWA's attempt to discover information on an issue previously rejected by the Director creates annoyance, undue burden and undue expense. This is especially the case here, where IGWA has completely ignored the prior orders of the Director in recycling its pump-back proposal. As such, a protective order is appropriate.

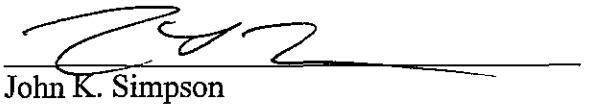
CONCLUSION

IGWA's pump-back proposal has already been rejected by the Director. Since IGWA was a party to the Spring Users Case, it is bound by the *Final Order* that rejected the pump-back proposal. Furthermore, the Director (the Hearing Officer in this case), cannot circumvent the

rule by changing aspects of his prior *Final Order* while it is on appeal to the District Court. As such, the *Amended Order* should be dismissed. In the alternative, the Hearing Officer should enter a protective order preventing discovery on this previously rejected issue.

DATED this 24th day of October, 2008.

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 24th day of October, 2008, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

David R. Tuthill, Director Idaho Department of Water Resources 322 E. Front Street PO Box 83720 Boise, ID 83720-0098 Dave.tuthill@idwr.idaho.gov	(X) U.S. Mail, Postage Prepaid ( ) Facsimile (X) E-mail
Randall C. Budge Candice M. McHugh Racine Olson 201 E. Center St. PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	(X) U.S. Mail, Postage Prepaid ( ) Facsimile (X) E-mail
Daniel V. Steenson Charles L. Honsinger S. Bryce Farris Ringert Clark PO Box 2773 Boise, ID 83701-2773 dvs@ringertclark.com clh@ringertclark.com	(X) U.S. Mail, Postage Prepaid ( ) Facsimile (X) E-mail
Tracy Harr, President Clear Lake Country Club 403 Clear Lake Lane Buhl, ID 83316	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
Stephen P. Kaatz, V.P. Clear Lake Homeowners Assoc. 223 Clear Lake Lane Buhl, ID 83316	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail

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Jessica Nielsen

Exhibit
A

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC.,

Petitioner,

-vs-

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioners,

-vs-

DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

Case No. CV-2008-444

CROSS-PETITION FOR JUDICIAL REVIEW

Fee Category: R-2
Fee Amount: $78.00

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT, acting for and on behalf of their members, through counsel, respectfully submit this Cross-Petition for Judicial Review pursuant to Idaho Code § 67-5270 and Rule 84 of the Idaho Rules of Civil Procedure.

CROSS-PETITION FOR JUDICIAL REVIEW

1. This Petition requests judicial review of actions taken by the Idaho Department of Water Resources.

2. This Petition is taken to the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Gooding. Venue is proper pursuant to Idaho Code § 67-5272.

3. This Petition seeks judicial review of the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* issued by the Director of the Idaho Department of Water Resources ("IDWR") on July 11, 2008, including prior agency action incorporated therein.

4. A hearing was held before IDWR from November 28 through December 13, 2007. Hearing proceedings were recorded by tape recording which is in the custody of IDWR.

5. The Petitioners request judicial review of the following issues:

   a. Whether the laws of optimum beneficial use of water, full economic development of ground water resources, reasonable use of water, or futile call preclude the curtailment of junior-priority water use where less than 1-2% of the quantity curtailed will be made available to the calling senior water user.

   b. Whether the Director erred in ruling that the amount of time required for the effect of curtailment to be realized has no bearing on whether a delivery call for the curtailment of ground water is deemed futile.

   c. Whether the Director erred in failing to account for uncertainty in the East Snake Plain Aquifer Model attributable to factors other than stream gauge error.

d. Whether the Director erred in ruling that the ordered curtailment does not result in an unreasonable waste of water resources.

e. Whether the Director erred in failing to constrict the location of the "trim line" to insure that a significant portion of the curtailed water use will be made available to Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively the "Spring Users") within a reasonable time.

f. Whether the Director erred in finding material injury to Blue Lakes and Clear Springs without supporting evidence that more water would produce more or larger or healthier fish.

g. Whether the Director erred in finding that the ordered curtailment will result in a usable quantity to Blue Lakes and Clear Springs that will be applied to beneficial use.

h. Whether the Director erred in failing to implement the protections of ground water development provided for in the 1986 Idaho State Water Plan.

i. Whether the Director erred in failing to implement the protections of ground water development provided for in the Swan Falls Settlement.

j. Whether the Director erred in ruling that the Spring Users' are absolutely protected in their means of diversion and appropriation which rely upon inflated overflows from the ESPA.

k. Whether the Director erred in failing to consider his authority under CM Rule 42.01. h. to compel a decreed surface water right to convert to a ground water source.

l. Whether the Director has authority to require the Spring Users' to comply with the reasonable pumping level mandate of Idaho Code § 42-226.

m. Whether the Director exceeded his authority in issuing the curtailment orders on an emergency basis without a prior hearing.

n. Whether the Director exceeded his authority in issuing the curtailment orders without written statements from Blue Lakes and Clear Springs made under oath as required by Idaho Code § 42-237b.

The Petitioners reserve the right to assert other issues as allowed by Rule 84 of the Idaho Rules of Civil Procedure.

6. The Petitioners request that a transcript of the hearing be made a part of the agency record for judicial review. The undersigned certifies that a transcript of the hearing has been paid for by the Petitioners and other parties seeking judicial review. A copy of the transcript may be obtained from Victoria Wigle, Administrative Assistant to the Director, Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803; Facsimile: (208) 287-6700; Email: victoria.wigle@idwr.idaho.gov.

7. The undersigned certifies that the Petitioners have contacted IDWR and agreed to pay their share of the cost of preparing the agency record for judicial review. IDWR has not at this time estimated the cost of preparing the agency record for judicial review.

DATED this 7th day of August, 2008.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: Randall C. Budge
Randall C. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 2008, the above and foregoing document was served in the following manner:

Deputy Clerk Jerome County District Court 233 W. Main Jerome, Idaho 83338	[ ] U.S. Mail/Postage Prepaid [ ] Facsimile [✓] Overnight Mail [ ] Hand Delivery
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Randall C. Budge

RANDALL C. BUDGE

Exhibit
B

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Attorneys for North Snake and Magic Valley Ground Water Districts

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE MITIGATION PLAN OF THE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS IMPLEMENTED BY APPLICATIONS FOR PERMIT NOS. 02-10405 AND 36-16645 AND APPLICATION FOR TRANSFER NO. 74904 TO PROVIDE REPLACEMENT WATER FOR CLEAR SPRINGS SNAKE RIVER FARM (Water District Nos. 130 and 140)	**GROUND WATER DISTRICT'S FIRST DISCOVERY REQUESTS**

TO: CLEAR SPRINGS FOODS, INC., SNAKE RIVER FARMS.

COME NOW Magic Valley Ground Water District, and North Snake Ground Water District (collectively "Ground Water Users"), by and through counsel, pursuant IDAPA 37.01.01 Rules 521 and 522 of the Rules of Practice and Procedure of IDWR, and the *Scheduling Order* authorizing discovery dated September 25, 2008 and hereby submit the following Discovery Requests to Clear Springs Foods, Inc., Snake River Farms. These discovery requests are continuing so as to require supplemental answers as additional information becomes known.

INSTRUCTIONS

Request Nos. 2-9 below include all available documentation and data since completion of the new facility in March of 1987 to the present.

INTERROGATORIES

INTERROGATORY NO. 1: For each person answering these interrogatories, state:

a. the person's complete name and age;

b. the person's residence;

c. the person's business address;

d. whether the person is an employee or agent for defendant; and

e. any position held by the person with defendant.

INTERROGATORY NO. 2: State whether the person answering these interrogatories is using firsthand information to answer, and, if not, state:

a. the name of every person who supplied information for answers to these interrogatories; and

b. specify for which interrogatories that person has supplied information.

INTERROGATORY NO. 3 Please explain the basis of your objection to the mitigation plan and related applications.

INTERROGATORY NO. 4 What are the constraints preventing implementation of a recirculation project? Do you use recirculation, in any form at any of your facilities and if so, to what extent? If you do not use recirculation, why not?

INTERROGATORY NO. 5 Please list each instance of a raceway taken out of use for a period longer than one day since March 1987 and explain the reason why the

raceway(s) was taken out of use, when this occurred, and the duration of time the raceway(s) was out of use.

INTERROGATORY NO. 6 Please describe all locations of flow and water quality sampling and measurement, the parameters sampled and measured, and the methods used for such sampling and measurement. Indicated which measurements and water quality samples were taken for purposes of reporting to the Idaho Department of Environmental Quality. All locations should be identified on a map and the years in which these locations have been used should also be provided.

INTERROGATORY NO. 7 Please describe all water treatment you or your agents perform, the location of the water treatment, frequency and reason for the treatment.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1 Please produce all as-built drawings of the SRF facility including all civil, architectural, mechanical, structural, electrical, fish rearing and water conveyance systems since completion of the new facility in March of 1987 and any subsequent improvements. This includes, but is not limited to the following: intake structures at the spring source, water division and measurement structures in the research buildings, visitor center pond, off-line settling ponds, the hatchery building, and the raceways; pipelines conveying discharge, reuse water, and spring water for fish production and research purposes; and pipeline connections to irrigation systems and to the neighboring golf course and housing development. As-built drawings of the electrical power delivery lines on the facility should also be provided.

REQUEST FOR PRODUCTION NO. 2 Please produce all documents and data containing information on sales, profits, revenue, income, annual fish production records, and records of disposal of fish from sale or other means, including destruction of fish. This should also include all recorded fish production data for each individual raceway.

REQUEST FOR PRODUCTION NO. 3 Please produce records of raceways taken out of use for a period longer than one day. This should include the reason why the raceway(s) was taken out of use, when this occurred, and the duration of time the raceway(s) was out of use.

REQUEST FOR PRODUCTION NO. 4 Please produce documentation of all water quality permits issued to Snake River Farm by a regulatory agency and of all inspections and infractions under each permit since March of 1987.

REQUEST FOR PRODUCTION NO. 5 Please produce all documents and data related to measured flows on the Snake River Farm facility. This information should include the timing of when the measurements were taken, location of measurements, and recorded flows.

REQUEST FOR PRODUCTION NO. 6 Please produce all documents and water quality data taken on the Snake River Farm facility. This information should include all water quality data obtained and the location and date of when the samples and/or measurements were taken. Please clearly label all sampling locations on a map. Specific water quality data should include, but are not limited to, records of sampling and measurement of temperature, dissolved oxygen, pH, total ammonia, un-ionized ammonia,

nitrite, nitrate, carbon dioxide, Kjeldahl Nitrogen, total alkalinity, suspended solids, total dissolved solids, and all additional water quality data recorded.

REQUEST FOR PRODUCTION NO. 7 Please produce all documentation of treatment processes, chemicals, and antibiotics used to treat the water prior to during conveyance through the research facilities, hatchery, and raceways or used and/or applied within the facility. All available records of chemicals and antibiotics (specific type and quantity) applied with the associated date(s) of use should be provided.

REQUEST FOR PRODUCTION NO. 8 Please produce all documentation of treatment processes and chemicals used to treat water discharged from the research facilities, hatchery, and raceways. All available records of chemicals (specific type and quantity) with the associated date(s) of use should be provided.

REQUEST FOR PRODUCTION NO. 9 Please produce records of all fish disease incidents and pathology records for the facility including date of incident, cause of incident, incident response, treatment methods used, numbers of fish lost or destroyed and future corrective actions developed as a result of the incident.

REQUEST FOR PRODUCTION NO. 10 Please produce all records of fish production from the SRF facility including pounds of fish produced (on an annual and monthly basis) and the corresponding amounts of food fed on a daily basis to achieve the production. Please include type and manufacturer of all feed.

REQUEST FOR PRODUCTION NO. 11 Please produce all records and documents you have associated with any wells, well pumps, groundwater production, and groundwater quality located within one mile of Snake River Farms.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October, 2008, the above and foregoing document was served in the following manner:

JOHN SIMPSON TRAVIS L. THOMPSON BARKER ROSHOLT P.O. BOX 2139 BOISE, IDAHO 83701-2139 jks@idahowaters.com tlt@idahowaters.com	[✓] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [✓] E-Mail

Candice McHugh

REQUEST FOR PRODUCTION NO. 12 Please produce all documents and records you have associated with hydrogeologic investigations in the vicinity of Snake River Farms.

REQUEST FOR PRODUCTION NO. 13 Please produce all documents and records you have associated with geologic and hydrologic investigations of springs located within one mile of Snake River Farms.

REQUEST FOR PRODUCTION NO. 14 Please produce all documents reviewed or relied upon in answering any of the interrogatories or requests above.

REQUEST FOR PRODUCTION NO. 15 Please produce all documents you believe support your objection to the mitigation plan and related applications.

DATED this 1st day of October, 2008.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

CANDICE M. MCHUGH
Attorneys for Idaho Ground Water Appropriators