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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 FOODS, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR ORDER COMPELLING ALTERNATIVE DISPUTE RESOLUTION**

COMES NOW, Clear Springs Foods, Inc. ("Clear Springs"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLP, and submits this response in opposition to the North Snake and Magic Valley Ground Water Districts' ("IGWA's") *Motion for Order Compelling Alternative Dispute Resolution.* As discussed below, IGWA's motion should be denied.

INTRODUCTION

IGWA's last minute attempt to force alternative dispute resolution ("ADR") should be denied. Over the last five months, Clear Springs has been engaged in discovery, prepared expert reports, and briefed and argued its *Motion to Dismiss*. A hearing on this matter is set for February 3, 2009 – just 5 weeks from now. Clear Springs is engaged in the final process of reviewing IGWA's expert reports, preparing its rebuttal experts reports and otherwise preparing for the hearing. Despite the hearing schedule and the necessary preparation, IGWA has now filed an eleventh hour motion seeking to force Clear Springs into ADR. Had IGWA truly believed mediation would be beneficial it could have requested the same when protests to the mitigation plans were first filed back in August – thus reducing the time and expense already dedicated to this matter by the Department, Hearing Officer, Clear Springs and other parties. Instead, IGWA has waited until the last moment, after considerable effort and expense has been expended, to seek to force mediation upon Clear Springs.

Relying on Rule 500, IDAPA 37.01.01, IGWA seeks an order forcing Clear Springs into "settlement negotiations and or mediation." In seeking to force ADR, IGWA fails to recognize that, while "encourage[d]" by Rule 500, ADR is "not appropriate" for matters that require "authoritative resolution" or for matters that stand to impact other "persons who are not parties to the proceeding." Here, IGWA has proposed a number of mitigation alternatives that, in their present form, are unacceptable to Clear Springs and do not mitigate the continuing injury to Clear Springs' senior surface water rights. In short, the proposed measures do not mitigate the out-of-priority ground water diversions that continue to deplete the aquifer and hydraulically connected springs that supply Clear Springs' water rights.

In addition, some of these mitigation proposals, such as the new well, will have significant impacts on other water right holders that rely upon springs and/or wells in the area of the proposed mitigation. Furthermore, resolution of this matter stands to have far reaching impacts on conjunctive administration and mitigation in relation to aquaculture water rights – reaching far beyond the parties to this contested case. Accordingly, IGWA's motion should be denied.

DEPARTMENT ADR STANDARD

Rule 500 provides the standard for ADR in contested cases. In their motion, IGWA fails to address the highlighted section below:

> The Idaho Legislature encourages informal means of alternative dispute resolution (ADR). For contested cases, the means of ADR include, but are not limited to, settlement negotiations, mediation, fact finding, minitrials, and arbitration, or any combination of them. These alternatives can frequently lead to more creative, efficient and sensible outcomes than may be attained under formal contested case procedures. ***An agency may use ADR for the resolution of issues in controversy in a contested case if the agency finds that such a proceeding is appropriate. An agency may, for example, find that using ADR is not appropriate if it determines that an authoritative resolution of the matter is needed for precedential value, that formal resolution of the matter is of special importance to avoid variation in individual decisions, that the matter significantly affects persons who are not parties to the proceeding, or that a formal proceeding is in the public interest.***

(Emphasis added).

ARGUMENT

IGWA's attempt to force Clear Springs into ADR should fail for the following reasons: (1) while mediation is encouraged by Rule 500, it is not mandatory and Clear Springs should not be forced into negotiations over mitigation plans that will not adequately address the material injury caused by diversions under junior priority ground water rights ; (2) "formal resolution" to

these proceedings is in the "public interest;" and (3) the issues presented in these proceedings stand to "affect persons who are not parties to the proceeding."

I. Clear Springs Should Not be Forced Into "Settlement Negotiations" to Discuss Plans that Will Not Mitigate the Continued Material Injury to Its Senior Surface Water Rights.

IGWA would have the Hearing Officer force Clear Springs into ADR. However, the Department's rules do not give the Hearing Officer that authority – especially when, as here, the proposed mitigation plans, the subject of the proposed negotiations, will not adequately mitigate the material injury being caused by out of priority ground water diversions. Rule 500 encourages, but does not mandate ADR. Indeed, the Department "***may*** use ADR for the resolution of issues in controversy in a contested case if the agency finds that such a proceeding is appropriate." (Emphasis added).

Clear Springs has reviewed IGWA's proposed mitigation plans – including the development of springs and/or the drilling of a new well[1] – and has reviewed the proposed ADR stipulation. Clear Springs continues to believe that the level of responsibility – and, hence, the level of required mitigation – assigned to the Groundwater Districts is underestimated and not accurately depicted. Continued analysis was anticipated in the prior administrative orders. Moreover, IDWR personnel have observed the necessity to review not only the level of mitigation owed, but the measures utilized in addressing the injury. *See Generally Deposition of Allan Wylie.* Since the mitigation plans do not mitigate for ongoing material injury and fail to

[1] On December 18, 2008, IGWA submitted its *Second Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District Providing for Monetary Compensation.* This plan, which was not submitted with the prior mitigation plans, has not been published for public review and comment and, therefore, is not part of the ongoing proceedings related to IGWA's prior plans. Likewise, any further plans that may be submitted are not a part of these proceedings. *See IGWA Br.* at 3, ¶ 6 (indicating that IGWA "contemplate[s] filing one ***or more*** additional mitigation plans presenting other alternatives") (emphasis added).

address the continued depletions to the aquifer and hydraulically connected spring sources, Clear Springs respectfully declined IGWA's offer to engage in settlement negotiations. Furthermore, for the reasons discussed below, ADR is not appropriate in this case.

II. "Formal Resolution" To these Proceedings is in the "Public Interest."

Rule 500 provides that ADR is not appropriate in cases where "formal resolution of the matter is of special importance to avoid variation in individual decisions" or where "formal proceeding is in the public interest."

Currently pending before the Department are numerous calls for priority administration involving aquaculture facilities – multiple Clear Springs calls, the Blue Lakes call, and numerous "Hagerman Valley" calls. The decisions or resolutions in any one of these proceedings stands to impact the manner and method of administration and mitigation in future proceedings. In order to prevent inconsistencies or "variation[s] in individual decisions," "formal resolution" is necessary. Furthermore, there is a strong public interest in ensuring that the Department addresses any similar issues in the numerous call proceedings consistently. As such, ADR is not appropriate.

III. Since the Mitigation Proposals Stand to "Significantly Affect Persons Who Are Not Parties to the Proceedings," ADR is Not Appropriate.

Finally, ADR is not appropriate here because the issues raised in IGWA's proposed mitigation plans will "significantly affects persons who are not parties to the proceeding." As part of IGWA's proposed mitigation plans, IGWA plans to develop springs or drill new wells. As to the development of springs, IGWA plans to excavate the spring source.

Importantly, many water users who stand to be impacted by IGWA's proposed mitigation plans are not involved in these proceedings, including water right holders in the vicinity of Clear

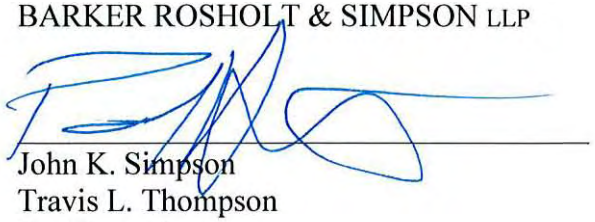
Springs' Snake River Farms facility. IGWA's mitigation plans will have impacts ranging far beyond this case. The development of springs and drilling of new wells stands to further deplete the aquifer and connected springs sources and lower ground water levels even more. IGWA's plan does not even address these impacts or the potential injuries to other water right holders. As such, ADR is not appropriate.

CONCLUSION

The Department's rules do not authorize "forced" ADR. Furthermore, ADR is not appropriate here, where a formal resolution to vital issues impacting numerous pending calls for administration is in the public interest. Likewise, the potential for IGWA's mitigation proposals to impact water right holders who are not party to these proceedings preventthe use of ADR. Accordingly, IGWA's motion should be denied.

DATED this 29th day of December, 2008.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF MAILING

I hereby certify that on this 29th day of December, 2008, the foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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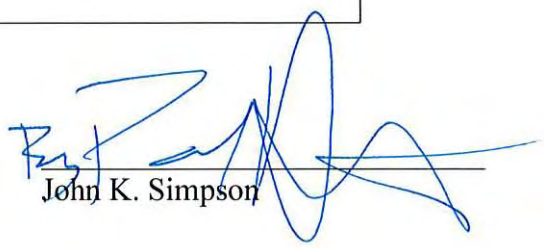

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