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 DEPT. OF WATER RESOURCES
 SOUTHERN REGION

Attorneys for Clear Springs Foods, Inc

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

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)	
IN THE MATTER OF THE SECOND)	
MITIGATION PLAN OF THE NORTH)	CLEAR SPRINGS FOODS, INC.'S
SNAKE AND MAGIC VALLEY GROUND)	PROTEST TO THE GROUND
WATER DISTRICTS TO COMPENSATE)	WATER DISTRICTS' SECOND
SNAKE RIVER FARMS)	MITIGATION PLAN
)	
(Water District Nos. 130 and 140))	
)	
)	
)	

COMES NOW, CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through its undersigned counsel of record, and hereby submits this *Protest* to the second mitigation plan seeking to monetarily compensate Snake River Farms for injuries to Clear Springs' senior water rights (the "Money Plan"), filed by the Magic Valley and North Snake Ground Water Districts ("Ground Water Districts" or "GWD") on December 18, 2008.

INITIAL BASES FOR PROTEST

The initial bases for this *Protest* are as follows:

1. Clear Springs does not accept a mitigation plan that refuses to provide water, but seeks to provide a nominal monetary payment to "compensate" for all material injury. As such,

IDWR is without authority to approve the Ground Water District's Money Plan. This fact was recognized by the Department, and confirmed by the SRBA Court, in the *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issues* (Dec. 29, 1999) ("*Order*"). There, the SRBA Court affirmed that, "while mitigation may be voluntarily exercised between private parties, IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call." *Order* at 13-14. This includes offering "mitigation in the form of money instead of ceasing their use of the called water." *Id.* at 14. The Money Plan, which has been filed by the one of the parties to that SRBA action – for which said judgment is *res judicata* – amounts to a mitigation plan without foundation.

2. The GWD's Money Plan seeks to provide monetary "compensation" for injuries caused to Clear Springs' senior **surface water rights** used at its Snake River Farms facility as a substitute for curtailment or mitigation that supplies actual water. However, neither the Constitution, applicable statutes, nor the CM Rules allow IDWR to impose a mitigation plan that does not provide water but instead only monetary "compensation" to the injured senior water right – a fact recognized by IDWR in the SRBA's *Facility Volume* case, *see supra*.

3. In addition, the GWD's Money Plan is inadequate. By proposing to compensate Clear Springs' Snake River Farms with a nominal amount of money, the Money Plan fails to account for the total injury resulting to Clear Springs due to the out-of-priority ground water diversions that are depleting the aquifer and spring flows. This injury includes, but is not limited to, impacts on research and development, a loss of production, sales and market share, lost business opportunities and increased costs associated with operating an aquaculture facility with inadequate water supplies.

4. Any attempt by IDWR to force Clear Springs to accept a mitigation plan that fails to provide adequate compensation would constitute an unlawful taking of Clear Springs' property rights.

5. By merely seeking to provide a nominal monetary payment for depletions to the aquifer and spring flows, the Money Plan fails to "prevent injury" to Clear Springs' senior water rights and therefore does not comply with CM Rule 43.

6. The Money Plan imposes an unconstitutional preference for a junior irrigation groundwater right over a duly decreed senior surface aquaculture water right, wherein both uses are for an agricultural purpose.

7. The Money Plan, if imposed upon the Clear Springs, would violate the SRBA Court's Order allowing for interim administration due to senior water rights not being fulfilled.

8. The Money Plan amounts to an award for damages and IDWR does not have any authority to issue such an award.

9. Pursuant to procedures in Idaho Code 42-222, which are incorporated through CM Rules 43.02, the Director cannot approve a mitigation plan that will result in injury to other water rights, including Clear Springs' senior water rights. The Money Plan injures Clear Springs' senior water rights by failing to mitigate for the loss of spring flows resulting from ground water depletions.

10. Clear Springs reserves the right to supplement this *Protest* for such other and further reasons as may be discovered or set forth at the hearing on this matter. Further, Clear Springs, in filing this *Protest*, hereby adopts and incorporates its filings, including expert reports and rebuttals filed in the *First Amended Mitigation Plan* proceedings.

REQUEST FOR RELIEF

A. Clear Springs submits that the GWD Money Plan presents an improper form of mitigation that is not authorized under the Constitution, applicable statutes, or CM Rules and therefore the Money Plan should be summarily dismissed or denied.

B. The Money Plan is inadequate in that it fails to account for the injury to Clear Springs' senior surface water rights as a result of depletions to the spring flows caused by pumping under junior priority ground water rights and therefore the plan should be summarily dismissed or denied.

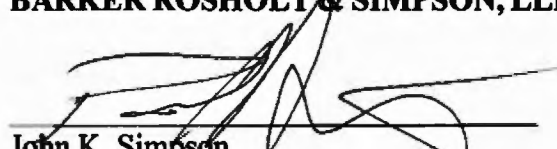
C. Clear Springs requests that the Director appoint an independent hearing officer who is not an employee of the Department to preside over these proceedings pursuant to Idaho Code § 42-1701A(2) and Rule 410 of the Department's Rules of Procedure.

D. Clear Springs requests an award of costs and attorneys' fees incurred as a result of being burdened by responding to the *First Amended Mitigation Plan*, which was subsequently withdrawn without merit, and having to defend its water rights against a Money Plan that has been submitted without foundation.

E. For such other relief as may be determined by the Department.

DATED this 23rd day of February, 2009.

BARKER ROSHOLT & SIMPSON, LLP



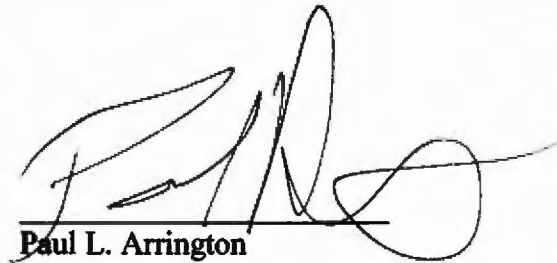
John K. Simpson
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Paul L. Arrington

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2009, I served a true and correct copy of the foregoing *Clear Springs Foods, Inc.'s Protest to the Ground Water Districts' Second Mitigation Plan*, by depositing same in the United States mail, postage prepaid, addressed to the following:

Randall C. Budge
RACINE OLSON NYE BUDGE & BAILEY
P.O. Box 1391
Pocatello, Idaho 83204-1391



Paul L. Arrington

FOR OFFICE USE ONLY

Fee: \$25.00

Receipt No. 50 30706

Receipt by: Paul

Date Received: 2/23/09