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*ATTORNEYS FOR THE GROUND WATER DISTRICTS*

**BEFORE DEPARTMENT OF WATER RESOURCES**

**STATE OF IDAHO**

IN THE MATTER OF  
DISTRIBUTION OF WATER TO  
WATER RIGHT NOS. 36-4103A, 36-  
4103B and 36-7148 (Snake River  
Farm)

IN THE MATTER OF THE THIRD  
MITIGATION PLAN (OVER-THE-  
RIM) OF THE NORTH SNAKE AND  
MAGIC VALLEY GROUND WATER  
DISTRICTS TO PROVIDE  
REPLACEMENT WATER FOR  
CLEAR SPRINGS SNAKE RIVER  
FARM

(Water District Nos. 130 and 140)

Docket No. CM-MP-2009-004

**MOTION TO COMPEL  
DISCOVERY and MOTION TO  
STRIKE**

**(Over-the-Rim Mitigation Plan)**

**COME NOW**, that North Snake Ground Water District, Magic Valley Ground Water District, ("Ground Water Districts") for and on behalf of their respective members, through counsel, hereby move the Hearing Officer pursuant to Rule 37(a) and (d) of the Idaho Rules of Civil Procedure for an order compelling Clear Springs Foods, Inc. ("Clear Springs") to produce to the Ground Water Districts the documents requested via First Set of Discovery and Notices of

Taking Deposition *Duces Tecum* ("Notices of Deposition"). (Exhibits A, C and D to McHugh Aff.) Additionally, the Ground Water District's request that the require that Clear Springs provide the requested documents and information by November 20, 2009.

This motion is made upon the grounds and for the reasons that Clear Springs failed and refused to produce documents requested in the Notices of Deposition and failed and refused to produce all documents that support their objection to the mitigation plan as previously requested in the First Discovery Requests, Production Request No. 14. (Ex. A to McHugh Aff.)

Clear Springs expert reports and testimony make clear that Clear Springs' primary objection to the Ground Water Districts' over the rim mitigation plan is that it will deliver well water rather than "spring" water which will devalue Clear Springs company by negatively impacting its CLEAR SPRINGS brand, reduce sales, revenues, profits and value of the Company. Thus, the Ground Water Districts have requested documents relating to the value of Clear Springs' company, its production, sales, expenses, profitability, including marketing records, financial statements, tax returns and other documents that may relate to or to support these contentions and claims.

As set forth below the documents are relevant and discoverable and may lead to admissible information at the hearing, were used and relied upon by Clear Springs witnesses, Dr. MacMillan and Larry Cope and exist and are available at Clear Springs.

Finally if the documents are not produced, the Ground Water Districts request that all testimony and evidence that relates the Company's revenue, sales, value, impacts on marketing, profitability, CLEAR SPRINGS brand and image be stricken and that any further evidence and testimony not be allowed.

The facts and grounds for this motion are as follows: . . . . .

1) By an oral order at the August 26, 2009 Scheduling Conference, the Hearing Officer authorized discovery.

2) On September 18, 2009 the Ground Water Districts filed its First Discovery Requests.

3) On October 19, 2009, Clear Springs provided its response to the Ground Water Districts' First Discovery Requests (Exhibit B to McHugh Aff.) and stated for some of the responses that additional documents would be provided as they become available or that additional answers would be contained in their expert reports and testimony that would be filed on October 30, 2009.

4) On October 30, 2009, Clear Springs filed its expert reports and testimony in the above captioned matter.

5) A primary objection of Clear Springs' to the Ground Water Districts proposed mitigation via an over the rim pipeline is that it will negatively impact their business value, marketing, sales, profitability and the CLEAR SPRINGS brand. Some of the testimony is summarized below:

- Cope Testimony p. 3 –
  - “From inception through heavy investment and time the Company has built its brand name CLEAR SPRINGS, and image around our claim of only growing Idaho Rainbow Trout in spring water.”
  - The name of the Company, supports the brand image around the “pristine spring water source.”
  - Advertising shows “the springs and the association of the spring water and our products.”
- Cope Testimony p. 4 –
  - Customers are astounded by the “fresh pristine water that flows from the Snake River Canyon.”
  - “The CLEAR SPRINGS brand was built around this unique resource....”

- Cope Testimony p. 5 –
  - The water delivered by the over the rim plan “would not be natural spring water, thereby diminishing the image of the CLEAR SPRINGS brand and products and reducing the value of the CLEAR SPRINGS brand and company.”
  - “The Company could no longer represent that our Idaho grown Rainbow Trout are only grown in pure pristine spring water.”
- Cope Testimony p. 7 –
  - “The total market value of Clear Springs Foods, Inc. will be diminished unless appropriate solutions to the health of the aquifer are implemented. Sustainability of the business is a major issue for Clear Springs.”
- MacMillan Report p. 5 and 6 –
  - The mitigation plan would “damage the marketability of rainbow trout produced by Clear Springs Foods.”
- MacMillan Report p. 6 –
  - The mitigation plan does not “recognize the importance of spring water... to its business.”
  - “This report presents information relative to how Clear Springs Foods has used its spring flow, as the source of water, to gain market share and to position itself for future business growth.”
- MacMillan Report p. 15 –
  - Clear Springs Foods must compete globally and relies significantly on its spring flow and water purity for its competitive advantage.”

5) On November 3, 2009, the Ground Water Districts Notices of Depositions of Clear Springs’ witnesses, Larry Cope and J. Randy MacMillan. (Ex. C, D to McHugh Aff.) The Notices of Depositions specifically identified documents to be produced at the commencement of the depositions. Mr. Cope and Dr. MacMillan brought no documents in response to the Notices of Deposition.

6) The Ground Water Districts first learned that the documents were not being produced by Clear Springs at the deposition of Larry W. Cope on Tuesday, November 10, 2009.

7) As a result of the lack of production and compliance with the Notices of Depositions, the Ground Water Districts have been forced to request the production of documents via Second Discovery Requests and to file this Motion to Compel.

8) The Ground Water Districts' ability to fully question the witnesses at the depositions was hindered by this lack of cooperation and disclosure of documents by Clear Springs. Further, the Ground Water Districts are severely prejudiced and impaired in their ability to prepare for the hearing which is to begin on December 7, 2009.

9) Clear Springs has made objection specifically stating that the water from the over the rim wells will devalue its company, brand name, image, reduce its profitability, negatively impact its sales and compromise years worth of marketing. In order to test these claims, the Ground Water Districts must be allowed to examine documents and information relating to the company's value, sales, profitability, marketing and brand image. However, if the Ground Water Districts are not allowed to examine these documents and information, then all objections relating to the company's value, brand name, image, profitability and sales, must be stricken and any further evidence and testimony prohibited.


WHEREFORE, the Ground Water Districts request that the Hearing Officer enter an order as follows:

a) Compelling Clear Springs Food, Inc. to fully produce the requested documents in the Notices of Deposition and in Request for Production No. 14 no later than Friday November 20, 2009; or alternatively

b) an Order prohibiting Clear Springs from presenting any testimony or evidence at the upcoming hearing and striking all testimony and evidence previously filed relating to the company's value, sales, profitability, marketing, brand, imaging and marketing that is supported by or relates to any and all documents which have not been fully disclosed to the Ground Water Districts and any other sanctions deemed appropriate.

DATED this 12th day of November, 2009.

RACINE, OLSON, NYE, BUDGE  
BAILEY, CHARTERED

By:   
CANDICE M. McHUGH  
*Attorneys for Ground Water Districts*

**CERTIFICATE OF MAILING**

I hereby certify that on this 12<sup>th</sup> day of November, 2009, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:

  
Signature of person mailing form

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