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

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-)
04013a, 36-04013b AND 36-07148) **CLEAR SPRINGS' PETITION FOR**
(SNAKE RIVER FARM); AND TO) **RECONSIDERATION AND HEARING**
WATER RIGHTS NOS. 36-07083 AND 36-) **ON DIRECTOR'S *ORDER CURTAILING***
07568 (CRYSTAL SPRINGS FARM)) ***JUNIOR PRIORITY GROUND WATER***
_____) ***RIGHTS (June 15, 2007)***

Clear Springs Foods, Inc. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson, LLP, respectfully submits this Petition for Hearing on the Order Curtailing Junior Groundwater Rights ("*Curtailment Order*"), issued by the Director of the Idaho Department of Water Resources, on June 15, 2007, pursuant to Idaho Code § 42-1701A(3), and Idaho Department of Water Resources ("IDWR") Rules of Procedure (IDAPA 37.01.01). Additionally, Clear Springs requests the appointment of an independent hearing officer pursuant to Idaho Code § 42-1701A(2).

INTRODUCTION

On May 2, 2005, Clear Springs requested administration of hydraulically connected junior priority ground water rights in Water District No. 130 pursuant to Idaho Code § 42-607, in

order to satisfy its senior surface water rights at the Snake River Farm and Crystal Springs facilities.¹ The Director responded by issuing an order, on July 8, 2005 (“*July 8 Order*”), which, among other things, implemented a five-year phased-in curtailment plan. The plan calls for “involuntary or substitute curtailment ... in 2005, 2006, 2007, 2008 and 2009, such that ... phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach.” *July 8 Order* at 37. Such “involuntary or substitute curtailment” was required to result in an increase of “steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.” *Id.*

According to the *July 8 Order*, junior priority ground water right holders, who were found to be depleting the aquifer by their out-of-priority diversions, could avoid mandatory curtailment by providing a replacement water plan, which would result in “cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach.” *Id.* For the 2007 irrigation season, the third year of the phased curtailment plan, groundwater users were required to provide 23 cfs.

In 2005 and 2006, Idaho Ground Water Appropriators, Inc. (“IGWA”) filed replacement water plans (albeit deficient) and avoided mandatory curtailment. The final resolution of IGWA’s actions in 2005 and 2006 is subject to challenge, including through the filing of this petition. IGWA also filed a replacement water plan for the 2007 irrigation season on April 9, 2007. This plan, however, failed to provide the required 23 cfs “increase to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach ... at steady state conditions,” as required by the *July 8 Order*. Accordingly, on April 30, 2007, the Director

¹ The requests for administration were made in two separate letters to IDWR. An initial letter requested administration for water rights delivered to the Snake River Farm, water right nos. 36-04013A, 36-04013B and 36-07148. A second letter requested the delivery of water to water rights for the Crystal Springs Farm, 36-07083 and 36-07568.

issued a *Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area* (the “*Notice*”), notifying groundwater users that they would be curtailed on May 14, 2007, unless the groundwater users amended their 2007 replacement water plan to comply with the *July 8 Order* and provide the mitigation that was required by that order.

Rather than comply with the Director’s *July 8 Order* and *Notice*, IGWA sidestepped the administrative process and filed a complaint against the Director and Department in the Jerome County District Court. The action was filed on May 7, 2007, just one week prior to the issuance of curtailment order, pursuant to the *Notice*. On May 8, 2007, the District Court issued a temporary restraining order (“TRO”), which effectively prevented the Director from implementing the prior orders and carrying out water right administration. Subsequently, on June 6, 2007, 23-days after the curtailment orders were supposed to be issued by the Director’s own *Notice*, the TRO was dissolved and IGWA’s case was dismissed. Accordingly, as of June 6, 2007, it was expected that the Director would implement his prior orders as directed in the April 30th *Notice* and proceed with water right administration for 2007.

Instead, the Director did not issue any orders immediately and waited almost an additional 10 days before issuing the *Order Curtailing Junior Priority Ground Water Rights* on June 15, 2007. In this order the Director proposed to curtail junior priority groundwater users beginning on July 6, 2007 – nearly 60 days after the original curtailment order was scheduled to be issued by the Director’s *Notice* and exactly 30 days after the Court dissolved the TRO – unless groundwater users provided sufficient mitigation by June 29, 2007.

Accordingly, Clear Springs requests reconsideration of the Director’s *Curtailment Order* to provide a proper accounting of the mitigation to be required for 2007. Clear Springs further requests a hearing on the Director’s *Curtailment Order* on the issues identified below.

ARGUMENT

Clear Springs requests a hearing on the Director's June 15, 2007 *Curtailment Order* on the following initial bases, including but not limited to:

1. The order perpetuates the legal and factual errors in the Director's *July 8 Order*. Clear Springs readopts its *July 25, 2005 Petition for Rehearing* on the *July 8 Order* and incorporates that petition herein by reference.

2. The order fails to take into account depletions to Clear Springs' water supplies caused by junior priority ground water rights across the ESPA, including rights in Water Districts 120 and 140. The fact that Water District 140 "is not yet in operation" does not justify the Director's failure to properly administer water rights, including those that have been decreed in Basins included in Water District 140.

3. The order fails to resolve the outstanding issues relative to IGWA's replacement plans that were submitted in 2005 and 2006. A hearing on IGWA's 2005 plan was held on June 5, 2006. The hearing and the Director's prior orders identified deficiencies in IGWA's plan. The parties submitted additional briefing, but the Director has yet to issue an order on those matters.

4. The order fails to account for IGWA's lack of mitigation in 2006 and why no administration occurred in 2006. Although IGWA submitted a replacement plan on May 30, 2006, the Director recognizes that it was 6.5 cfs deficient and no curtailment occurred. *See Curtailment Order* at 10, ¶ 14, at 14, ¶ 6. The Director sought a stay of Judge Wood's decision in the *AFRD #2* litigation, both from the District Court and the Idaho Supreme Court, arguing that the conjunctive management rules were necessary for water right administration. The motions for stay were denied by both the District Court and the Supreme Court. However, no administration took place. Nonetheless, the Director unlawfully permitted junior ground water rights to continue to deplete the water supplies necessary for Clear Springs' senior surface water rights throughout 2006. A final accounting for 2006, and the mitigation owed by IGWA is necessary.

5. The order fails to reconcile the Director's findings and conclusions with respect to IGWA's replacement water plan offered in 2005 (*See Order Approving IGWA's 2005 Substitute Curtailments* issued on April 29, 2006) with the criteria used to evaluate IGWA's 2006 and 2007 replacement water plans. To the extent the Director is continuing to change the evaluation criteria regarding these plans such actions are arbitrary and capricious.

6. The order fails to properly account for the mitigation agreements entered into between Clear Springs and the Idaho Dairyman's Association ("IDA") and the Water Mitigation Coalition ("WMC"). The Director's use of the IDA agreement to reduce the obligation of other junior priority ground water right holders is improper since those users are not parties to the agreement or have not received Clear Springs consent to enjoy the benefits of the mitigation provided. The IDA agreement covers all commercial water rights for participating dairyman,

including water rights senior to February 13, 1977. Accordingly, the Director does not have authority to unilaterally transfer the benefits of that agreement from IDA's members to IGWA. If the Director wants to calculate the injury caused by IDA's members with water rights junior to February 13, 1977 and reduce that obligation from the required mitigation to be provided by IGWA that can be done. As it stands now, IGWA is receiving a benefit for mitigation being provided for water rights held by IDA's members that are senior to the curtailment date. Clear Springs and IDA reached the agreement through good faith negotiations to preclude future litigation over the matter. The Director has no authority to frustrate the purpose of that agreement and the mitigation to be provided.

7. The Director has no authority to curtail water right 36-8471 held by the J.R. Simplot Company. Clear Springs and Simplot are parties to the WMC agreement and is providing mitigation to be delivered for Clear Springs' benefit through that agreement this year. The mitigation provided by WMC is for its members operations in both Water District 120 and 130. The Director has failed to recognize the effect of the agreement and the mitigation to be supplied to Clear Springs by WMC in 2007.

8. The order does not provide for timely water right administration in that it gives groundwater users until June 29, 2007 to provide substitute curtailment for the 2007 irrigation season, and allows out-of-priority depletions caused by groundwater diversions to continue until at least July 6, 2007. Even though the TRO in IGWA's lawsuit was dissolved on June 6, the Director has, *de facto*, extended the TRO for an additional month without any authority and contrary to the Idaho Constitution and water distribution statutes. The Director and Department opposed IGWA's *Motion for Preliminary Injunction* in the Jerome County lawsuit yet it by its inaction it has effectively granted it for this additional 30 day timeframe. Such actions are contrary to law and have resulted in an unconstitutional taking of Clear Springs' property rights.

9. The order fails to explain or reconcile how a curtailment order was ready to be filed on May 14, 2007, two weeks after the Director issued the *Notice* to affected junior ground water right holders, but after the TRO was dissolved on June 6, 2007, it took an additional 9 days to issue the order. The Director should have been prepared to issue the curtailment order on June 7, 2007, over a month after the *Notice* was issued.

10. Since the Director's *Notice* was provided on April 30, groundwater users have had time to find ways to mitigate for their unauthorized depletions of the aquifer. In essence, the Director has now given the groundwater users another reprieve, without any authority or justification and contrary to Idaho's prior appropriation doctrine. The action or inaction of the Director and the Department violates the clear directive for timely administration without undue delay as directed by the Idaho Supreme Court in *American Falls Reservoir District #2 v. IDWR*, 154 P.3d 433 (Idaho 2007).

12. The junior priority ground water rights identified to be curtailed in the *Notice* to satisfy the Director's ordered mitigation for 2007 (23 cfs) was based upon the presumption that those water rights would be curtailed the entire year. However, since the Director has failed to provide for timely water right administration, those junior priority ground water rights have been pumping presumably since the beginning of the irrigation season until now, from March 15 to

July 6 (approximately 114 days). Accordingly, the Director must re-evaluate and determine which ground water rights need to be curtailed from July 6 forward that would supply 23 cfs to the Buhl to Thousand Springs reach in 2007 in order to comply with the required mitigation ordered in the *July 8 Order*.

13. The order provides credit to IGWA for seepage loss of 30% for waters diverted through the North Side Canal Company system. The Director has failed to provide any justification or information to support such a credit. The Director has not show that the credit water was not lost to delivery to other users, spilled back into the Snake River, lost to evaporation or pumped out by other out-of-priority ground water rights. To the extent that any water has been lost to seepage, that water should be distinguished from the water delivered for irrigation purposes.

Finally, Clear Springs specifically incorporates the challenges raised in prior filings in this matter, including, but not limited to its June 26, 2006, *Response to IGWA's Post-Hearing Memorandum*. Furthermore, Clear Springs expressly reserves the right to raise additional issues as they are discovered through the discovery and hearing process.

REQUESTS FOR RELIEF

1. That the Director reconsider the June 15, 2007 *Curtailement Order* to properly account for the stipulated mitigation agreements between Clear Springs and the Idaho Dairyman's Association and the Water Mitigation Coalition (including reconsidering the improper credit the Director is giving IGWA based upon mitigation being paid for and provided by IDA and the erroneous decision that the water right 36-8471 held by J.R. Simplot Company is still subject to curtailment).
2. That the Director reconsider the June 15, 2007 *Curtailement Order* to recalculate the required curtailment based upon the fact that junior priority ground water rights have been pumping for approximately 3-4 months and the Director's required mitigation for 2007 was based upon curtailment for the entire year.
3. That the Director appoint an independent hearing officer.

4. That the Director grant a hearing on the June 15, 2007 *Curtailmment Order* for the reasons and on the issues identified above.

5. For such other relief as may be necessary.

DATED this 20th day of June, 2007.



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Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2007, I caused to be served a true and correct copy of the foregoing PETITION FOR RECONSIDERATION AND REQUEST FOR HEARING ON DIRECTOR'S JUNE 15, 2007 CURTAILMENT ORDER by the method indicated below, and addressed to each of the following:

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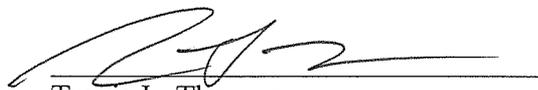
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