BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-4013A, 36-04013B, AND 36-07148 IN THE NAME OF CLEAR SPRINGS FOODS, INC.	)	**ORDER APPROVING IGWA'S 2005 SUBSTITUTE CURTAILMENTS (Clear Springs Delivery Call, Snake River Farm)**

BACKGROUND

On July 8, 2005, the Director issued his order ("July 8 Order") in the above-captioned matter. The July 8 Order determined that diversions of ground water are causing material injury to water rights held by Clear Springs Foods, Inc. ("Clear Springs") for use at its Snake River Farm.

The July 8 Order determined that Clear Springs' diversion of water was not entirely reasonable. Conclusion of Law No. 26 stated:

> Because of the estimated 2 cfs of collected spring discharge observed to be escaping the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, which was found to be in disrepair during the field inspections conducted on May 5, 2005, Clear Springs has not gone to reasonable effort or expense to divert water from the source . . ..

The July 8 Order also determined that Clear Springs was not diverting some water within its water rights. Conclusion of Law No. 27 stated:

> Because of the approximately 6 or 7 irrigated acres of grass and landscaping around the facilities at the Snake River Farm observed during the field inspections conducted on May 5, 2005, in excess of the 1 acre authorized under water rights held for the Snake River Farm, Clear Springs is not diverting and using water consistent with the water rights as required by Rule 42.01.c. of the Conjunctive Management Rules.

Finally, the July 8 Order determined that the Clear Lake Ranch P.U.D. Master Association, Inc. was diverting water out of priority under water right no. 36-8329 from a spring supplying water to the Snake River Farm.

After identifying the three problems with diversion and use of water under water rights held by Clear Springs for use at its Snake River Farm, Conclusion of Law No. 30 of the July 8 Order stated the following:

> Notwithstanding the disrepair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, the out-of-priority diversion of up to 0.9 cfs by the Clear Lake Ranch P.U.D. Master Association under water right no. 36-8329, and the unauthorized irrigation of 6 to 7 acres of grass and landscaping at the Snake River Farm, when superimposed on the effects of changes in surface water irrigation, described in Finding 6, and drought, the diversion and consumptive use of ground water under water rights junior in priority to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm are reducing the quantity of water available to water rights nos. 36-04013B and 36-07148, thereby causing material injury.

The July 8 Order required that Clear Springs repair the leak at its western spring collection box as a condition precedent to any curtailment of ground water diversions. On July 12, 2006, the watermaster for Water District No. 130 inspected the collection box and determined Clear Springs had made adequate repairs.

The July 8 Order also stated that "by July 22, 2005, Clear Springs must present evidence acceptable to the Director of a legal basis to continue irrigation of the grass and landscaping at its Snake River Farm facilities." *July 8 Order* at p. 36. Failure to provide a legal basis for the irrigation would result in the watermaster for Water District No. 130 limiting the irrigation to 1.0 acre of irrigation.

The July 8 Order also instructed the Clear Lake P.U.D. Master Association ("Association") to acquire a water right by June 1, 2006, bearing a priority date earlier than Clear Springs' water right No. 36-4013C (priority date of February 4, 1964). The July 8 Order stated that if the Association did not acquire a water right, and if "the water supply available at the source for water rights held by Clear Springs for diversion and use at its Snake River Farm is less than the total amount of 117.67 cfs," the watermaster for Water District No. 130 would curtail the diversion of water by the Association.

On July 20, 2005, Clear Springs and the Association executed an agreement to provide for the legal diversion and use of water by both entities. Clear Springs agreed to subordinate 0.9 cfs of its water right no. 36-2703 (priority date of November 23, 1933) to the Association's water right no. 36-8329 (priority date of June 2, 1987). In return, the Association agreed to rent 0.16 cfs of water right no. 36-4148A (priority date of September 9, 1912) to Clear Springs. Clear Springs subsequently rented the 0.16 cfs from the Association through the Water Supply Bank, which also authorized the change to the Clear Springs point of diversion and place of use.

Previous Mitigation Provided for Blue Lakes Trout

The July 8 Order acknowledged actions taken by the Idaho Ground Water Appropriators, Inc. ("IGWA") and its member ground water districts to satisfy an earlier order, dated May 19, 2005 ("May 19 Blue Lakes Order"), addressing another petition for delivery call filed by Blue Lakes Trout Farm, Inc. The July 8 Order recognized that the actions taken by IGWA and its

member ground water districts resulted in collateral reach gains to the Buhl Gage to Thousand Springs spring reach. The July 8 Order will hereafter be referred to as the "July 8 Snake River Farm Order."

The actions of IGWA and its member ground water districts are described in *Order Approving IGWA Substitute Curtailment Plan (Blue Lakes)* dated July 6, 2005 ("July 6 Blue Lakes Order"). The following paragraphs summarize those actions.

On May 27, 2005, IGWA submitted *Ground Water Districts' Plan for Providing Replacement Water (Blue Lakes)* ("IGWA Blue Lakes Plan") to the Director for his review. The IGWA Blue Lakes Plan proposed substitute curtailment, although termed as replacement water, for 2005 as required by the May 19 Blue Lakes Order. The IGWA Blue Lakes Plan proposed acquisition and use of surface water for irrigation of certain lands in lieu of irrigation using ground water ("conversions") in the North Snake Ground Water District and voluntary curtailment of ground water irrigation ("voluntary curtailment" or "reductions") of lands in the North Snake Ground Water District and the Magic Valley Ground Water District.

On June 7, 2005, the Director issued *Order Regarding IGWA Replacement Water Plan (Blue Lakes)* ("June 7 Blue Lakes Order"). The June 7 Blue Lakes Order concluded that the IGWA Blue Lakes Plan did not provide "sufficient replacement water to satisfy the 2005 requirement of 10.0 cfs flow in the Devil's Washbowl to Buhl Gage Reach at steady state conditions." *June 7 Blue Lakes Order* at p. 14.

On June 14, 2005, IGWA submitted *IGWA's Response to Director's June 7, 2005 Order Regarding Replacement Water Plan (Blue Lakes Delivery Call)*, and on June 17, 2005, IGWA submitted *IGWA's First Supplemental Response to Director's June 7, 2005 Order Regarding Replacement Water Plan (Blue Lakes Delivery Call)*, collectively referred to herein as "IGWA's Blue Lakes Responses." IGWA's Blue Lakes Responses proposed additional conversions from ground water irrigation to surface water irrigation within the North Snake Ground Water District and additional voluntary curtailments of ground water irrigation within the Magic Valley Ground Water District and the North Snake Ground Water District.

On July 6, 2005, the Director issued *Order Approving IGWA Substitute Curtailment Plan (Blue Lakes Delivery Call)* ("July 6 Blue Lakes Order"). The July 6 Blue Lakes Order required water users proposing conversion from ground water irrigation to surface water irrigation to either: (1) insure use of only surface water by (a) disabling the power supplies to ground water diversions or (b) locking valves to delivery systems serving conversion acres; or (2) adequately measure and record both surface water deliveries and ground water diversions. The North Snake Ground Water District was required to report surface water deliveries and ground water diversions to the Department.

The July 6 Blue Lakes Order stated that the Department would conduct post-irrigation season reanalysis of reach gains resulting from surface water conversions after final data was submitted by the North Snake Ground Water District:

> Post-season reach gain credits will be recomputed to account for the additional ground water diversion. Failure by the ground water district to accurately measure and report the

surface water and ground water diversions will result in total disqualification of the conversion acres for replacement credits.

July 6 Blue Lakes Order at p. 9-10, ¶ (2).

Recognition of the Previous Mitigation Action

The order portion of the July 8 Snake River Farm Order stated the following:

> (2) Involuntary curtailment will be phased-in over a five-year period, offset by substitute curtailment (conversions and voluntary curtailment) provided through the ground water district(s) or irrigation district through which mitigation can be provided and verified by the Department. Involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008, and 2009, such that based on simulations using the Department's ground water model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs that provide the source of water for the water rights held by Clear Springs for its Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.
>
> (3) The actions taken by the Idaho Ground Water Appropriators in 2005 on behalf of its members, consisting of acquisition and use of surface water for irrigation of certain lands in lieu of irrigation using ground water ("conversions") in the North Snake Ground Water District and voluntary curtailment of ground water irrigation of certain lands in the Magic Valley Ground Water District, and thus far approved by Director as ongoing, are recognized as increasing spring discharge in the Devil's Washbowl to Buhl Gage spring reach by an average of 7.8 cfs at steady state conditions based on simulations using the Department's ground water model for the ESPA. Once Clear Springs has completed repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, additional ongoing voluntary curtailment within the North Snake and Magic Valley ground water districts must be identified to increase the simulated spring discharge in the Devil's Washbowl to Buhl Gage spring reach to at least 8 cfs, or a corresponding amount of involuntary curtailment in 2005 by priority date will be ordered by the Director.

July 8 Snake River Farm Order at p. 37.

Paragraphs (2) and (3) both refer to the simulated incremental steady state spring discharge of 8 cfs. The paragraphs are ambiguous, however, because the two paragraphs require the increased simulated discharge to be provided in different spring reaches. The intent of the order was to require at least 8 cfs of simulated reach gains in the Buhl Gage to Thousand Springs spring reach as a result of the "ongoing voluntary curtailment within the North Snake and Magic Valley ground water districts." Processes for evaluation of the conversion acres and voluntary curtailments were described in the July 6 Blue Lakes Order, and the identical processes were contemplated by the July 8 Snake River Farm Order.

In December 2005, the North Snake Ground Water District submitted surface water delivery and ground water diversion data to the Department for the conversion acres recognized

by the July 6 Blue Lakes Order. The watermaster for Water District No. 130 and Department staff compared the information submitted with other information in the files of the Department. During the summer and fall of 2005, the watermaster for Water District No. 130 and Department staff examined many of the conversion acres on site to determine from what source the lands had been irrigated. Following Department analysis of the information, the Department determined the volume of surface water that had been delivered to the conversion acres.

The July 6 Blue Lakes Order also required water users proposing voluntary curtailment of irrigation to provide maps to the Department depicting the acres on which irrigation had been curtailed and other information related to the water rights appurtenant to the land and historical use of water on the acres. The July 6 Blue Lakes Order discussed reanalysis of reach gains resulting from voluntary curtailment of ground water irrigation after the North Snake Ground Water District and the Magic Valley Ground Water District submitted final data to the Department:

> After receiving the above information, the Department will review the voluntary curtailment acreage recognized by this order and will readjust the idled acreage and the associated reach gains.

July 6 Blue Lakes Order at p. 10, ¶ (3).

The Magic Valley Ground Water District provided additional information to the Department regarding the voluntary curtailment acres identified in the initial responses to the Director's May 19 Blue Lakes Order and also identified additional acreage that would not be irrigated. The watermaster for Water District No. 130 and Department staff compared the information submitted with other information in the files of the Department. In addition, the watermaster for Water District No. 130 and Department staff examined many of the voluntary curtailment acres on site to determine whether the lands had been irrigated. Following Department analysis of the information, the Department determined the location and number of the voluntary curtailment acres.

The previously explained submittals and processes were also employed to evaluate the actions of IGWA and its member ground water districts in satisfying the requirement to provide at least 8 cfs of simulated steady state gain to the Buhl Gage to Thousand Spring spring reach.

Based upon the Director's consideration of this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department uses a calibrated ground water model to determine the effects on the Eastern Snake Plain Aquifer ("ESPA") and hydraulically connected reaches of the Snake River and its tributaries from ground water depletions and from surface water uses on lands overlying the ESPA.

2. The ground water model for the ESPA divides the Thousand Springs area into six adjacent groupings of spring complexes, or spring reaches. Water right nos. 36-4013A, 36-4013B, and 36-7148 authorize diversion from springs tributary to Clear Lakes. These springs are locally known as "Clear Springs." The individual springs are located in the spring reach from the USGS stream gage located near Buhl, Idaho, to Thousand Springs.

3. The ground water model for the ESPA was calibrated to measured ground water levels in the ESPA, spring discharge in the spring reaches, and reach gains or losses to Snake River flows, determined from stream gages together with other stream flow measurements, for the period May 1, 1980, to April 30, 2002. The calibration targets, consisting of measured ground water levels, reach gains/losses, and discharges from springs, have some inherent uncertainty resulting from limitations on the accuracy of the measurements. The uncertainty in results predicted by the ESPA ground water model cannot be less than the uncertainty of the calibration targets. The calibration targets having the maximum uncertainty are the reach gains or losses determined from stream gages, which although rated "good" by the USGS, have uncertainties of up to 10 percent.

4. The results from simulations using the Department's ESPA ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and its tributaries and ground water rights diverted from the ESPA.

5. The Department's ESPA ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically connected reaches of the Snake River and its tributaries.

Ground Water to Surface Water Conversions

6. In its review of the conversions from ground water to surface water, the Department determined for each holder of ground water right(s) for irrigation converting to surface water irrigation: (a) the volume of surface water per acre delivered in 2005, and (b) the volume of ground water per acre diverted in 2005.

7. The Department recognizes a maximum annual field headgate diversion volume of 4.0 acre-feet per acre for irrigation of lands in the area overlying the ESPA where irrigation was converted from ground water to surface water.

8. The North Side Canal Company delivered all the surface water for the ground water to surface water conversions.

9. Irrigation of the conversion acres was evaluated in two categories: (a) delivery of surface water without diversion of ground water, and (b) delivery of surface water combined with diversion of ground water.

Delivery of Surface Water Without Diversion of Ground Water

10. If North Side Canal Company's records showed delivery of surface water to the conversion participant in excess of 4.0 acre-feet per acre of land irrigated, the Department only recognized 4.0 acre-feet per acre delivered for irrigation of the conversion lands. The Department assumed that the volume of surface water exceeding 4.0 acre-feet per acre percolated into the ground (recharge to the ESPA) within the boundaries of the North Side Canal Company.

11. If North Side Canal Company records showed delivery of surface water to the conversion participant of less than 4.0 acre-feet per acre of land irrigated, the Department recognized the entire volume of surface water as having been delivered for irrigation of the conversion lands.

Delivery of Surface Water Combined with Diversion of Ground Water

12. If the combined volume of surface water shown by North Side Canal Company's records to have been delivered to conversion acres and ground water diverted by a conversion participant exceeded 4.0 acre-feet per acre, the Department assumed all of the ground water diverted was used for irrigation on the conversion acres. The volume per acre of ground water diverted was subtracted from 4.0 acre-feet per acre, and the Department assumed that any remainder of surface water delivered by the North Side Canal Company percolated into the ground (recharge to the ESPA) within the boundaries of the North Side Canal Company.

13. If the combination of surface water shown by North Side Canal Company's records to have been delivered to conversion acres and the ground water diverted by the conversion participant was less that 4.0 acre-feet per acre, the Department recognized the entire volume of surface water delivered and ground water diverted as having been used to irrigate the conversion acres.

Summary of Ground Water to Surface Water Conversions

14. During 2005, the North Side Canal Company recorded delivery of 20,319.5 acre-feet of surface water to conversion projects. Of this total, the Department recognized a surface water volume of 18,939.5 acre-feet of surface water having been used to irrigate the conversion acres. The volume of surface water exceeding the volume needed to irrigate the conversion acres was 1,380 acre-feet. The 18,939.5 acre-feet of water was assumed to be delivered at the points of ground water diversion for the conversion participants as input to the ESPA ground water model. The remaining 1,380 acre-feet of surface water was spread throughout the service area of the North Side Canal Company and input to the ESPA ground water model as recharge.

15. Of the 18,939.5 acre-feet of surface water the Department recognized as having been used to irrigate conversion acreage, 368 acre-feet of surface water was delivered to irrigate lands located where the simulated steady state gain to the Buhl Gage to Thousand Springs reach was less than 10 percent of the total simulated steady state gain to all the hydraulically connected reaches along the Snake River receiving gain from the conversions in model simulations. The 368 acre-feet of surface water delivered to these acres was not recognized as surface water

benefiting reach gains in the Buhl Gage to Thousand Springs reach. A net surface water volume of 18,571.5 acre-feet was used as input to the ESPA ground water model to determine the net reach gain to the Buhl Gage to Thousand Springs reach resulting from surface water irrigation of the acres converted from ground water irrigation.

16. Of the 1,380 acre-feet of surface water the Department recognized as additional water spread across the North Side Canal Company service area for recharge, 104.7 acre-feet was spread on lands within the North Side Canal Company's service area where the simulated steady state gain to the Buhl Gage to Thousand Springs reach was less than 10 percent of the total simulated steady state gain to all the hydraulically connected reaches along the Snake River receiving gain in model simulations. The 104.7 acre-feet of surface water distributed on these acres was not recognized as surface water benefiting reach gains in the Buhl Gage to Thousand Springs reach. A net surface water volume of 1,275.3 acre-feet was used as input to the ESPA ground water model to determine the net reach gain to the Buhl Gage to Thousand Springs reach resulting from surface water recharge to the ESPA through spreading within the North Side Canal Company's service area.

Voluntary Curtailment of Irrigated Acreage

17. IGWA, North Snake Ground Water District, and Magic Valley Ground Water District were required to submit the following information about voluntary curtailment acres: (a) maps precisely depicting the boundaries around previously irrigated lands that would be idled during 2005; (b) water rights authorizing irrigation of the lands and whether there are surface water rights appurtenant to the lands; (c) when the lands were last irrigated; (d) whether the lands were not irrigated in previous years because of ongoing mitigation plans; and (e) whether the lands would continue to be irrigated with surface water.

Magic Valley Ground Water District Voluntary Curtailments

18. The Department reviewed the information submitted and compared it to 2005 satellite imagery and water right information. In addition, Department staff field verified the eligibility of acres offered for voluntary curtailment. The Department found a number of problems associated with the proposed voluntary curtailments, including but not limited to identification of pivot corners not authorized as a place of use under any ground water rights, lands not irrigated in 2004 and not identified as being included in an existing mitigation plan, and lack of definition of the specific location of both 2004 reductions and proposed 2005 reductions. After reviewing all of the available information, the Department determined the following acres were not irrigated in 2005 and eligible for mitigation credit:

	Acres Submitted	**Acres Recognized**
North Snake Ground Water District	8,562	2,144
Magic Valley Ground Water District	7,053	4,741
Total Acres Recognized as Voluntary Curtailment Acres		6,885

19. The 6,885 acres recognized as voluntary curtailment acres were used as input to the ESPA ground water model to simulate the effects of the acres no longer being irrigated with ground water diverted from the points of diversion from which ground water was once diverted to irrigate those acres.

20. Of the 6,885 voluntary curtailment acres, 4,011.3 acres were located where the simulated steady state gain to the Buhl Gage to Thousand Springs reach from non-diversion and use of ground water using the ESPA ground water model was less than 10 percent of the total simulated steady state gain to all the hydraulically connected reaches along the Snake River receiving gain from the voluntary curtailment in model simulations. The 4,011.3 acres were not recognized as voluntary curtailments benefiting reach gains in the Buhl Gage to Thousand Springs reach. A net total of 2,873.7 acres was used as input in the ESPA ground water model to determine the net reach gain to the Buhl Gage to Thousand Springs reach resulting from voluntary curtailment of irrigation with ground water.

Total Buhl Gage to Thousand Springs Reach Gain

21. The total steady state reach gain for the Buhl Gage to Thousand Springs reach simulated using the ESPA ground water model from conversions of using ground water for irrigation to surface water irrigation and voluntary curtailment of ground water diversions for irrigation in 2005 is 8.2 cfs.

CONCLUSIONS OF LAW

1. The Director recognizes the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. *See* Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607.

2. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in the water districts in accordance with the prior appropriation doctrine.

3. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and

> other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

4. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

5. Pursuant to Idaho Code § 67-5291, the Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session). During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

6. A change in the source of irrigation supply from ground water to surface water will reduce the depletions to the ESPA.

7. Voluntary curtailment of irrigation with ground water will reduce depletions to the ESPA.

8. The best tool for determining reductions in depletions resulting from conversions and voluntary curtailment is the ESPA ground water model.

9. For 2005, IGWA and its member ground water districts should receive credit for steady state reach gains of 8.2 cfs to the Buhl Gage to Thousand Springs spring reach as a result of its substitute curtailments, comprised of conversions from ground water irrigation to surface water irrigation and voluntary curtailments.

ORDER

The Director enters the following Order for the reasons stated in the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that IGWA and its member ground water districts receive credit for 8.2 cfs steady state gain to the Buhl Gage to Thousand Springs spring reach for conversions from ground water irrigation to surface water irrigation and voluntary curtailments in irrigation ground water diversions.

IT IS FURTHER ORDERED that, on or before May 30, 2006, the North Snake Ground Water District and the Magic Valley Ground Water District must submit plans for substitute curtailment to the Director that will provide 16 cfs of steady state gain to the Buhl Gage to Thousand Springs spring reach of the Snake River, or otherwise provide replacement water as provided in the Director's Order dated July 8, 2005. Failure to submit sufficient replacement water or an acceptable substitute curtailment plan(s) will result in curtailment of ground water diversions as described in the Director's Order dated July 8, 2005.

DATED this 24th day of April, 2006.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2006, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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