RECEIVED
JUN 26 2006
DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th St., Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427 and IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHT NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	)	**CLEAR SPRINGS FOODS, INC.'S RESPONSE TO IGWA'S POST-HEARING MEMORANDUM**

Clear Springs Foods, Inc. ("Clear Springs"), by and through its counsel of record Barker Rosholt & Simpson LLP, hereby submits this *Response* to *IGWA's Post-Hearing Memorandum Regarding Director's Order Approving IGWA's 2005 Substitute Curtailments* ("*IGWA Br.*") that was filed with the Hearing Officer on June 19, 2006.

INTRODUCTION

The Hearing Officer's original order approving IGWA's 2005 Substitute Curtailments in response to the Blue Lakes call was issued over a month prior to the order in response to Clear Springs' delivery calls. Clear Springs was therefore denied any opportunity to comment on the

plan, the procedure in approving the plan, and accordingly continues to reserve such arguments for hearing on its petition requesting a hearing on the Director's July 8, 2005 Order. In addition, Clear Springs reserves all objections regarding the Director's process in approving "replacement water" or "substitute curtailment" plans to the extent it does not comply with Idaho law or satisfy the ongoing injury to Clear Springs' senior water rights. Further, at the June 5, 2006 hearing Clear Springs and other injured parties raised numerous concerns regarding procedurally how the Hearing Officer would receive testimony and information regarding this very narrow issue, the recognition and credit of various mitigation actions, while at the same time preserving a party's ability to pursue any and all issues identified in their respective petitions for hearing. Those issues still persist, however, given the Hearing Officer's decision to move forward in spite of the procedural record and Judge Wood's June 2, 2006 decision in *AFRD #2 et al. v. IDWR et al.* (Fifth Jud. Dist., Gooding County District Court, Case No. CV-2005-600). Clear Springs submits the following general comments and later specifically responds to issues raised in *IGWA's Post-hearing Memorandum*, dated June 19, 2006.

Initially, Clear Springs would note that in response to the Curtailment Orders issued in the spring and summer of 2005, the GWDs and/or IGWA on behalf of the GWDs submitted mitigation plans which by their submittal allegedly satisfied those Orders. There was no reference that those submittals were intended to respond to other Orders or for subsequent years. Therefore, the Hearing Officer responded accordingly. The "replacement water" or "substitute curtailment" plan pertinent to this hearing was reviewed by IDWR employees and the Hearing Officer and resulted in the Director's Orders Approving IGWA's 2005 Substitute Curtailments, dated April 29, 2006. Now, IGWA attempts to expand the intent of their submittal beyond their own record, including requesting credit for acres not originally identified in their own plan.

Clear Springs continues to be concerned about the costs associated with verification of any proposed mitigation plan and the responsibility for those costs. Such costs should be solely the responsibility of the party seeking approval of such a plan. It would be inequitable to apportion those costs amongst either a broader group of water users, other water right holders in a water district, or the citizens of the State of Idaho. Additionally, as described by the Hearing Officer at the June 5, 2006 hearing on this matter, any mitigation must equal what would be achieved by curtailment of junior rights. Therefore, confirmation of such benefits actually reaching the injured party and the associated costs of such confirmation should be borne by the mitigating party, not the Department or other water users in Water District 130.

Finally, the Hearing Officer recognized that mitigation must be timely and it must be useable water. The standard stated at the hearing was that verification of mitigation actions must be as certain as curtailment. Hearing Officer Statement, p. 224 Ls. 6 -14 ("when the Department provides an opportunity for you to submit – or to provide something in lieu of involuntary curtailment, it has to be just as real as involuntary curtailment."). To now have 2005 mitigation issues dragging at least into the mid-2006 irrigation season does not in Clear Springs' view constitute timely administration. While recognizing the right to due process, IGWA can not be allowed to avoid obligations while spring flows continue to decline and senior surface water rights remain unfulfilled.

RESPONSE

I. Seepage Losses

The Ground Water Districts claim to have acquired 40,925 acre-feet of storage water for "mitigation" purposes in Water District 130 in 2005. This water was acquired in order to deliver "replacement water" to acres in the NSGWD that were formally irrigated with groundwater

("conversion acres") and to the Sandy Pipeline Ponds. *IGWA Br.* at 4. IGWA asserts that it caused to be delivered 31,481 acre-feet to the conversion acres and Sandy Pipeline Ponds leaving 9,444 acre-feet to seep into the aquifer in the NSCC canal system. *See id.* at 5.

IGWA claims that "none of the information available to the Department suggests that the unaccounted for 9,444 acre-feet . . . was delivered to other users on the NSCC system or spilled back to the Snake River." *IGWA Br.* at 6. While such information may be lacking the same is true of the mitigation credit IGWA seeks. In other words, IGWA has failed to provide any information to the Department that demonstrates the unaccounted for 9,444 acre-feet, or some portion thereof, actually recharged the aquifer at specific locations and was not lost to delivery to other users, spilled back to the Snake River, lost to evaporation, or pumped out by other out-of-priority ground water rights. IGWA's response that such information is "infeasible" to obtain admittedly reflects the deficiency in its approach to mitigation, i.e. the lack of verification that the water actually recharged the aquifer and benefited Clear Springs or Blue Lakes.

If IGWA is entitled to any credit for the 9,444 acre-feet that was diverted by NSCC and not delivered to the conversion acres or Sandy Pipeline Ponds, credit should be given in the form of "recharge." In other words, any water lost to seepage in the aquifer by reason of "replacement water" diversions must be distinguished from the water delivered for irrigation purposes. IGWA had requirements to deliver specific amounts of replacement water to the conversion acres and Sandy Pipeline Projects, the water delivered replaced water that was not pumped from the ground. Since the underlying groundwater rights on the conversion acres did not include provisions for "conveyance loss" or seepage, there is no legal basis to credit to those acres with more water than that which is not being pumped and consumed. Additionally, if storage water is

going to be used for recharge, it should be credited only after formal authorization from the local rental pool and the Bureau of Reclamation.

IGWA's lack of sufficient information to judge and verify its claimed credit continues to support the Department's initial determination to deny credit.

II. Voluntary Curtailment Acres That Were Not Irrigated in 2004

Blue Lakes and Clear Springs requested administration of ground water rights in 2005 based upon spring flow conditions existing as of 2005. Those conditions reflected the fact that groundwater was not being pumped out by certain rights, namely those rights and associated acres that were not irrigated by IGWA in 2004, for whatever reason.

In support of its claim of credit for these acres IGWA wrongly asserts that "ground water wells left unpumped for multiple consecutive years produce significantly greater reach gain benefits to springs tributary to the ESPA than wells that have been curtailed for only a single irrigation season." *IGWA Br.* at 8. This vague and general statement is not "undisputed" and does not accurately reflect all conditions in the ESPA and associated spring flows when wells are curtailed. Depending upon the location of a well, the benefits of curtailment do not necessarily increase over time in all circumstances. IGWA's general statements, like its overall plan, fails for lack of verification and factual support.

Moreover, IGWA fails to recognize that flow conditions in 2005, predicated upon the unpumped wells and groundwater rights in 2004, were not "benefited" in any sense, other than to reduce the level of injury by some percentage. IGWA warns that these wells could "potentially be turned back on in this year or in coming years" if "this is the only way to bring these acres back into consideration for mitigation." *IGWA Br.* at 8. Stated another way, although Clear Springs and other senior surface water rights are suffering injury, IGWA plans to further reduce

spring flows and exacerbate that injury in order to have that well qualify for mitigation at a later date. The absurdity of such a proposal is obvious. Contrary to IGWA's claim, there is nothing arbitrary and capricious about denying "mitigation credit" when the effect of pumping under the rights stood to exacerbate injury or further reduce spring flows. If those idled rights can be exercised in priority in 2006 or future years, that action is the individual right holder's decision. That being said, out-of-priority ground water right holders have no authority to pump water to the detriment of senior surface water rights just so those rights can be recognized for "mitigation purposes" or otherwise in some future year.

In addition, measuring the water use and verifying what was actually pumped or not pumped on a particular parcel should be the standard. Unless individual right holders can provide evidence of non-irrigation by way of a totalizing flow meter that would plainly demonstrate no ground water was used for irrigation, IGWA's documentation and verification of the conversion acres is insufficient.[1]

Accordingly, the Director should deny IGWA's request to include "mitigation credits" for acres that were not irrigated in 2004.

III. Crops grown without irrigation in 2005

IGWA claims various farmers were able to grow crops in 2005 without irrigation from their ground water rights. *IGWA Br.* at 9. The Department evaluated these acres during field inspections in 2005 which acres admittedly posed problems for its evaluation. Yenter testimony, tr. P. 41 L. 11-18. IGWA now implies that it was the Department's job to contact those "individual parcel owners" to determine the irrigation practices that occurred on those acres.

[1] IGWA's Post-Hearing Memorandum does not dispute the Department's use of the "10% clip" as a basis for reducing potential mitigation credits. Therefore, for purposes of responding to IGWA's assertions, it is assumed that IGWA submits to that decision and no response is required. Clear Springs would preserve its opportunity to respond to this issue at subsequent hearing on its petition.

IGWA Br. at 10. Again, IGWA cannot excuse its non-compliance with the verification standard set forth by the Director. If IGWA cannot verify which acres were not irrigated, but nonetheless produced a crop in 2005, there is no basis for a mitigation credit for the same.

IV. Acres Using Surface Water, But Not in a Formal Conversion Project

IGWA claims that it should receive credit for acres irrigated with surface water but that were not part of an identified conversion project. *IGWA Br.* at 10. These so-called "independent conversions" that occurred in 2005 have yet be verified even as of June 2006. *Id.* IGWA admits that it is "currently attempting to gather information from its members to document prior ground water use on these acres." *Id.* Again, IGWA should not be granted mitigation credit without any verification of these acres and conversions. Waiting for some indefinite time for verification from IGWA is insufficient, flies in the face of timely water right administration, and should be rejected. The purpose for a deadline to submit a mitigation plan is to allow sufficient time for the Department to judge such a plan. If actions are not timely submitted as a part of a plan, the burden of including those actions in the plan should not fall upon the Department.

In addition, measuring the water use and verifying what was actually pumped or not pumped on a particular parcel should be the standard. Unless individual right holders can provide evidence of non-irrigation by way of a totalizing flow meter that would plainly demonstrate no ground water was used for irrigation, IGWA's documentation and verification of the conversion acres is insufficient.

V. Pivot corners / Endguns / Small Acreages

IGWA requests credit for various pivot corners, endguns that were shut off in 2005, and other small parcels under one acre in size. *IGWA Br.* at 11. The testimony of Cindy Yenter details the problems the Department encountered in documenting these submitted acres or

portions thereof. Yenter testimony, tr. 61 L. 7 – p. 64 L. 10. Again, proper verification and documentation is obviously lacking with respect to these acres. IGWA claims the aquifer benefited yet does not provide the necessary information to support that assertion. Unless IGWA can meet the verification standard set forth by the Director, the acres should not be recognized. As demonstrated at the June 5th hearing, IGWA has failed to meet the requisite standard.

In addition, measuring the water use and verifying what was actually pumped or not pumped on a particular parcel should be the standard. Unless individual right holders can provide evidence of non-irrigation by way of a totalizing flow meter that would plainly demonstrate no ground water was used for irrigation, IGWA's documentation and verification of the conversion acres is insufficient.

VI. Excess Deliveries

Similar to the "seepage" credit argument, IGWA asserts it should receive credit for "excess deliveries" on its conversion project acres. *IGWA Br.* at 13. If any credit is recognized and that answer is not without debate, the Director should distinguish between the "replacement water" provided for irrigation and the "recharge" or "excess delivery water" that receives credit. "Excess delivery water" amounts to waste under the Department's analysis on this issue and how that water can be counted as recharge water on a particular parcel brings forward water quality issues which have not been considered by the Department. Provided IGWA in the future can document and verify the specific parcels and places where "excess delivery water" recharged the aquifer and the other issues identified have been addressed, a credit <u>may be</u> justified. However, this year numerous issues still persist.

CONCLUSION

IGWA's post-hearing brief, as well as the testimony at the June 5th hearing, does not cure the deficiencies and lack of verification and documentation in its 2005 "replacement water" or "substitute curtailment" plan. Given the lack of verification for these various "mitigation credits" IGWA seeks, the Director cannot recognize those acres or projects particularly where no corresponding benefit is experienced.

DATED this 26th day of June, 2006.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2006, I served a true and correct copy of the foregoing *Clear Springs Foods, Inc.'s Response to IGWA's Post-Hearing Brief* on the following by the method indicated:

Hand Delivery

Via ~~Email~~ and ~~U.S. Mail~~

Director Karl Dreher
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov

Cindy Yenter
IDWR – Southern Region
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380

Via U.S. Mail

Jeffrey C. Fereday
Michael C. Creamer
Givens Pursley LLP
601 Bannock St., Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720

James C. Tucker
Idaho Power Company
1221 West Idaho St.
Boise, Idaho 83702

James S. Lochhead
Adam T. DeVoe
Brownstein, Hyatt & Farber P.C.
410 17th St., 22nd Floor
Denver, Colorado 80202

Scott L. Campbell
Moffatt Thomas Chtd.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701

Dan Steenson
Ringert Clark, Chtd.
P.O. Box 2773
Boise, Idaho 83701-2773

Roger Ling
Ling Robinson & Walker
P.O. Box 396
Rupert, Idaho 83350-0396

Michael Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

Frank Erwin
Watermaster – WD 36
2628 South 975 East
Hagerman, Idaho 83332

Travis L. Thompson