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July 21, 2006

VIA EMAIL & U.S. MAIL

Director Karl J. Dreher
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: ***In the Matter of Distribution of Water to Water Rights Nos. 36-04013A et al. (Snake River Farm and Crystal Springs Farm)*** **/ NSGWD and MVGWD May 30, 2006 Joint Plan for Providing Replacement Water for 2006 / IGWA's July 10, 2006 Letter Filed** ***In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation Dist. et al***

Dear Director Dreher:

We are writing on behalf of our client Clear Springs Foods, Inc. ("Clear Springs").[1] This letter addresses inconsistencies in submittals filed by the Ground Water Districts and IGWA in this and other water right administration proceedings. Moreover, this letter addresses the Department's complete disregard to date, to provide any timely and meaningful relief to senior surface water right holders in 2006.

At the outset Clear Springs would note that the Director's prior actions in this matter, including orders responding to Clear Springs' request for water right administration, are void as a matter of law and must be revisited since the Department's conjunctive management rules have been declared unconstitutional. *See American Falls Reservoir District #2 et al. v. IDWR et al.* (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2005-600). The Gooding County District Court invalidated the Department's conjunctive management rules by order on June 2, 2006. A judgment was issued on June 30, 2006 and certified as final on July 11, 2006. At a hearing on the defendants' motion to certify the judgment, counsel represented that the

[1] Clear Springs requests this letter be filed in and made part of the record *In the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B and 36-07148 (Snake River Farm); and to Water Rights Nos. 36-07083 and 36-07568 (Crystal Springs Farm).*

Department and Director were subject to the Court's jurisdiction and would honor and follow the Court's judgment. Whereas junior priority ground water right holders continue to receive the benefit of the Department's inaction, the lack of timely administration continues to result in injury to Clear Springs' senior water rights. This continuing injury is unacceptable and violates the Idaho Constitution as well as the Director's legal duties in Title 42, Chapter 6, Idaho Code.

Despite the final judgment in the Gooding County litigation, and its legal effect on the Director's prior actions and orders, Clear Springs is filing this letter for purposes of the administrative record in response to previous filings by the Ground Water Districts and a recent submittal by IGWA in a separate case.

Clear Springs requested administration of hydraulically connected junior ground water rights in order to satisfy senior surface water rights at its Crystal Springs and Snake River Farm facilities on May 2, 2005. The Director responded with an order on July 8, 2005.[2] That order, issued over a year ago, recognized that Clear Springs' maximum diversion at its Snake River Farm in October 2004 was approximately 21% less than its decreed water rights. *See July 8, 2005 Order* at 14, ¶ 60. Likewise, the order recognized that Clear Springs' maximum diversion at its Crystal Springs Farm in October 2004 was approximately 22% less than its decreed water rights. *See id.* at 19, ¶ 81. Similar declines in spring flows and resulting injuries to Clear Springs' water rights was witnessed throughout 2005, and Clear Springs continues to suffer those injuries today in July 2006.

Despite the immediate injury to Clear Springs' water rights, the July 8, 2005 Order implemented a "phased-in" curtailment plan over five years that was described as follows:

> (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 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.

July 8, 2005 Order at 37.

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[2] Clear Springs filed a timely petition requesting a hearing on that order that questioned the validity of the Director's actions and the Department's conjunctive management rules.

Before the Clear Springs' order was issued in July 2005, another water right administration case involving Blue Lakes Trout Farm ("Blue Lakes") was proceeding before the Department. The Director issued an order in that case on May 19, 2005, and IGWA submitted a "replacement water plan" on May 27, 2005. The Director then issued an *Order Approving IGWA Substitute Curtailment Plan (Blue Lakes Delivery Call)* on July 6, 2005, two days before the Clear Springs' order was released.

The Director acknowledged the actions to satisfy Blue Lakes' call as being responsive to Clear Springs' call as well, and noted that IGWA's actions submitted and "approved" in response to the Blue Lakes call would be "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." *July 8, 2005 Order* at 37-38.

On April 29, 2006 the Director issued an *Order Approving IGWA's 2005 Substitute Curtailments (Clear Springs Delivery Call, Snake River Farm)*. In that order the Director concluded that 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" and that the Ground Water Districts should receive credit for the same. *April 29, 2006 Order* at 9, 11. The Director ordered the Ground Water Districts to submit plans for "substitute curtailment" by May 30, 2006 so as to "provide 16 cfs of steady state reach gain to the Buhl Gage to Thousand Springs reach of the Snake River, or otherwise provide replacement water as provided in the Director's Order dated July 8, 2005." *Id.* at 11. The Director further ordered that "[f]ailure 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." *Id.*

The Director then issued another order on May 19, 2006 denying IGWA's request to "stay" the April 29, 2006 Order, reaffirming the May 30, 2006 deadline for the Ground Water Districts to submit plans for "substitute curtailment", and scheduling a hearing on IGWA's petition for reconsideration. *See* May 19, 2006 *Order Denying Request for Stay and Scheduling Hearing etc.* at 2. The North Snake Ground Water District and Magic Valley Ground Water District responded to the order and submitted a *Joint Plan for Providing Replacement Water for 2006* ("130 Plan") on May 30, 2006. The 130 Plan offered the following in an attempt to comply with the Director's April 29, 2006 Order:

> On behalf of its member ground water districts, IGWA has obtained surface water supplies in excess of 67,000 acre-feet ("AF") to be available in 2006 for direct delivery into the NSCC's point of diversion at Milner Dam. The quantities and sources of this water are as follows:
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> | | |
> |---|---|
> | Mitigation, Inc. Carryover | 37,140 AF |
> | FMC Lease Renewal (Palisades storage) | 5,000 AF |
> | Aberdeen Springfield Storage Lease | 20,000 AF |

> 2006 Rental Pool Storage Lease 5,000 AF
>
> During the 2006 irrigation season, the Districts propose to have 27,000 AF of surface water available for delivery through the NSCC system to be used to irrigate those lands within the North Snake Ground Water District whose supply source has been converted from ground water to surface water.
>
> * * *
>
> In addition to the above activities, the Districts propose to cooperate with NSCC to deliver up to 40,000 AF of storage water acquired through the WD 01 Rental Pool, private leases and other means to augment ground water sources supplying the Devils Washbowl and Buhl Subreaches as a result of induced losses of the storage water from Wilson Lake and other NSCC facilities.

130 Plan at 3, 5.

The Director never issued an order either rejecting or approving the 130 Plan. Despite the lack of approval, members of the respective ground water districts have presumably continued to divert hydraulically connected ground water in 2006, out of priority, to the injury of Clear Springs' senior surface water rights. The violations of Idaho's constitution and water distribution statutes are obvious.

Parallel to the 130 Plan and the Clear Springs' and Blue Lakes' proceedings, IGWA and its various member Ground Water Districts have been subject to water right administration to satisfy senior surface water rights above Milner ("Surface Water Coalition Case"). After reviewing a recent letter submitted by IGWA in that proceeding, it is now clear that the 130 Plan does not represent the actions the Ground Water Districts will actually undertake in 2006 to comply with the Director's previous orders in the Blue Lakes and Clear Springs matters.

Clear Springs recently reviewed a copy of IGWA's July 10, 2006 letter ("120 Plan") (Ex. A) which claims to comply with the June 29, 2006 *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* in the Surface Water Coalition Case. Clear Springs has also reviewed the July 17, 2006 *Fourth Supplemental Order on Replacement Water Requirements for 2005* issued this week. After reviewing these filings and orders, it is obvious that IGWA is attempting to remove water offered as "substitute curtailment" in the 130 Plan and transfer it to satisfy mitigation obligations in the Surface Water Coalition Case. As explained above, the Districts represented just over a month ago in filing the 130 Plan that 27,000 acre-feet would be delivered to "conversion acres" and that the remaining 40,000 acre-feet would be used for "ground water supply augmentation." *See 130 Plan* at 3, 5. The Districts represented that these activities, using all 67,000 acre-feet, would result in estimated steady state reach gains increases to the Devils Washbowl Subreach (31.7 cfs) and the Buhl Subreach (19.2 cfs).

Despite the prior representations and commitments made by the Ground Water Districts, IGWA now claims that it has the referenced storage water available to meet the obligation to the Surface Water Coalition as set forth in the Director's June 29, 2006 Order. Since the leases submitted with the 120 Plan are identical to those submitted with the 130 Plan, no additional water has been acquired. There is no question that IGWA is attempting to use the same water to satisfy obligations to three different senior surface water users (Clear Springs, Blue Lakes, Twin Falls Canal Company) by different means at different locations.

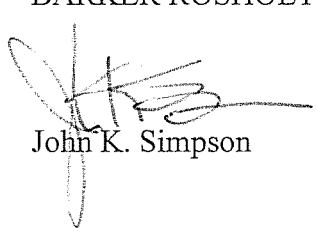
The Department acknowledged the problems with IGWA's scheme over a month ago. *See Gary Spackman June 9, 2006 Letter to Michael Creamer* at 4 ("The 2006 Replacement Water Plan identifies 67,000 acre-feet of storage water that can be dedicated for conversion projects and for recharge. . . . Some of the storage water identified may not be available for recharge because it may also be dedicated to provide the ground water districts' 2005 unsatisfied obligation to the Surface Water Coalition."). Mr. Spackman identified other deficiencies in the 130 Plan and noted that failure to provide the requested information "could result in rejection of the augmentation component of the plan and possible forced curtailment of water rights." *Spackman Letter* at 4. Due to lack of information and notice from the Department, Clear Springs presumes the deficiencies in the 130 Plan were not cured by June 19th, and given IGWA's recent submittal in the Surface Water Coalition Case, it is evident those same deficiencies will not be addressed in 2006.

It is Clear Springs' understanding that the July 17, 2006 Order in the Surface Water Coalition directs IGWA to make 25,873 acre-feet available to TFCC by placing it in the Water District 01 rental pool on or before July 21, 2006. In other words, of the 67,140 acre-feet that the Ground Water Districts represented was part of their 130 Plan submitted in May, only 41,267 acre-feet remains. IGWA and the Ground Water Districts cannot have it both ways. Therefore, the "revised" 130 Plan is insufficient on its face, as recognized by the Department as early as June 9th.

Clear Springs has yet to receive any indication or notice that water right administration will proceed in Water District No. 130 in order to supply its senior water rights in 2006. However, declining spring flows and resulting injuries to senior surface water rights continue in the face of depletions caused by junior priority ground water rights. The Department's failure to administer water rights pursuant to existing law demonstrates a complete disregard for the Idaho Constitution, water distribution statutes, and Clear Springs' senior water rights.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP



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Enc.

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