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**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF	)	
WATER TO WATER RIGHT NOS. 36-	)	<b>Docket Nos. CM-DC-2010-002</b>
02356A, 36-07210, AND 36-07427.	)	<b>CM-DC-2010-003</b>
	)	
<b>(Blue Lakes Delivery Call)</b>	)	<b>PETITION REQUESTING HEARING</b>
	)	<b>ON JANUARY 10, 2011 AMENDED</b>
IN THE MATTER OF DISTRIBUTION OF	)	<b>FINAL ORDER REGARDING</b>
WATER TO WATER RIGHTS NOS. 36-	)	<b>SEASONAL VARIABILITY</b>
0413A, 36-04013B, AND 36-07148.	)	
	)	
<b>(Clear Springs Delivery Call)</b>	)	
_____	)	

COMES NOW, Clear Springs Foods, Inc. (“Clear Springs”), by and through its attorneys of record, and files this *Petition Requesting Hearing on January 10, 2011 Amended Final Order Regarding Seasonal Variability* (“*Amended Order*”) pursuant to Idaho Code § 42-1701A(3) and the Department’s Rules of Procedure (37.01.01 *et seq.*).

As part of this petition, Clear Springs hereby incorporates by reference its previously filed petition requesting hearing on the Director’s *July 19, 2010 Final Order* (“*2010 Order*”) filed on July 30, 2010. Clear Springs requests a hearing on the *Amended Order* and any

additional issues raised, and requests the hearing be consolidated and heard at the same time as the hearing on the *2010 Order*. The hearing on the *2010 Order* is currently stayed pending a decision from the Idaho Supreme Court (Docket No. 37308-2010).

Clear Springs further reserves the right to amend these grounds, and present additional grounds and to submit briefing and present argument on all issues that are raised during hearing. Finally, Clear Springs reserves the right to file with a district court an original action or actions to contest the *2010 Order* and *Amended Order*.

### **INITIAL GROUNDS FOR CONTESTING THE *AMENDED ORDER***

The initial grounds for contesting the *Amended Order* are the same as those previously set forth by Clear Springs in its petition requesting hearing on the *2010 Order* and in order to preserve such grounds as they may relate to the *Amended Order* are set forth as follows:

1. The *Amended Order* ignores the best scientific evidence, inappropriately calculates and applies a plus or minus 10% margin of error, or “trim line,” to exclude hydraulically-connected junior ground water rights causing injury to Clear Springs’ senior water right from priority administration and fails to accurately consider the impact of ground water depletions on Clear Springs’ senior water rights.
2. Contrary to the CM Rules and Snake River Basin Adjudication (“SRBA”) Orders, the *Amended Order* fails to administer those hydraulically connected ground water rights that lie outside the “trim line” even though they were found to contribute to the material injury to Clear Springs’ senior water rights.
3. The *Amended Order* violates the established burdens of proof, *e.g. American Falls Reservoir Dist. #2 v. Idaho Dept. of Water Resources*, 143 Idaho 8621 (2007), by failing to shift the burden to the holders of the junior ground water rights to establish a defense to the call

by clear and convincing evidence and thereby forcing Clear Springs to prove that the junior ground water rights outside the 10% trim line should be subject to administration.

4. Contrary to the CM Rules and the SRBA Orders, the *Amended Order* failed to require curtailment or a CM Rule 43 mitigation plan during the 2010 irrigation season.

5. The *Amended Order* is not supported by substantial evidence when it concluded that “[c]urtailment in 2010 would not provide any significant water to the senior water right holders, and it would not be reasonable to order curtailment this year.”

6. The *Amended Order* fails to use current available data/information to determine hydraulically-connected junior ground water diversions causing injury to Clear Springs, and inappropriately relies on insufficient and outdated data/information contained in CM Rule 50; thus resulting in a failure to require all junior ground water rights that are contributing to the material injury of Clear Springs’ senior water right to provide mitigation for their depletions to the aquifer.

#### **REQUEST FOR INDEPENDENT HEARING OFFICER**

Clear Springs requests the Director to appoint an independent hearing officer, not an employee of IDWR, to preside over these proceedings as provided in I.C. § 42-1701A(2).

Dated this 21<sup>st</sup> day of January, 2011.

**BARKER ROSHOLT & SIMPSON LLP**



John K. Simpson  
Travis L. Thompson  
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*Attorneys for Clear Springs Foods, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of January, 2011, I served a true and correct copy of the foregoing **PETITION REQUESTING HEARING ON JANUARY 10, 2011 AMENDED FINAL ORDER REGARDING SEASONAL VARIABILITY** by delivering it to the following individuals by the method indicated below, addressed as stated.

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