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

IN THE MATTER OF THE MITIGATION
PLAN OF THE NORTH SNAKE AND MAGIC
VALLEY GROUND WATER DISTRICTS
IMPLEMENTED BY APPLICATIONS FOR
PERMIT NOS. 02-10405 AND 36-16645 AND
APPLICATION FOR TRANSFER NO. 74904
TO PROVIDE REPLACEMENT WATER FOR
CLEAR SPRINGS SNAKE RIVER FARM

(Water District Nos. 130 and 140)

**GROUND WATER DISTRICTS'
MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL
DISCOVERY RESPONSES**

TO: CLEAR SPRINGS FOODS, INC.

COME NOW Magic Valley Ground Water District and North Snake Ground Water District (collectively "GWD"), by and through counsel, pursuant to IDAPA 37.01.01 Rules 520 - 528 of the Rules of Practice and Procedure of IDWR, and the *Scheduling Order* authorizing discovery dated September 25, 2008 and hereby submit this Memorandum in Support of their Motion to Compel Discovery Responses. GWD respectfully request that the Director to issue an Order compelling Clear Springs Foods, Inc. ("Clear Springs") to answer and respond fully and fairly to the GWD's First Discovery Requests.¹

¹ See Exhibit "A" attached to the Affidavit of Joshua D. Johnson filed concurrently.
GROUND WATER DISTRICTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES
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I. BACKGROUND

On July 11, 2008, Director Tuthill, issued his Final Order Regarding Blue Lakes and Clear Springs Delivery Calls (“Final Order”). The Final Order pertained to the issue of whether Blue Lakes and Clear Springs had been injured by diversions of junior priority ground water users. The Director found that certain water rights held by Blue Lakes and Clear Springs had been injured. The Director also specifically stated that the ground water users could file a plan to supply replacement water. GWD then filed a Mitigation Plan in response to the Clear Springs Delivery Call and that portion of the Final Order relating thereto. The mitigation plan included, *inter alia*, a plan to use a pump-back system to mitigate the injury and, in the alternative, a well to mitigate the claimed injury. Clear Spring then filed an objection to the mitigation plan. On September 25, 2008, Director Tuthill issued a Scheduling Order which specifically allowed the parties to engage in written discovery.

On October 2, 2008, GWD served Clear Springs with its Discovery Requests, which included both interrogatories and requests for documents. As part of its discovery requests, GWD sought information specific to a pump back system and the operation of a well.

On October 24, 2008, Clear Springs filed a Motion to Dismiss and/or for Protective Order requesting, among other things, that the Director issue a protective order restricting discovery; particularly, excluding discovery of any information and documents related to the “pump back” proposal. Clear Springs claims that the issue of whether a pump back can be implemented was already determined by hearing officer Schroeder. As more fully discussed in the GWD’s Objection to Motion to Dismiss filed on November 7, 2008, the issue of whether the GWD can present a pump back system as part of its mitigation plan was not ruled upon and the GWD fully intends to present evidence of a pump back system.

On October 30, 2008, Clear Springs served its answers to GWD's interrogatories and requests for documents. Clear Springs refused to produce certain information that is highly relevant to the design and implementation of a pump back system and well. GWD is significantly prejudiced and impaired in their ability to prepare timely-filed expert reports addressing water quality and quantity issues without the requested information. Such a lack of cooperation and restriction on discoverable information concerning the operations, fish production and water quality does not comply with the rules of discovery in the State of Idaho. GWD now seeks an Order compelling Clear Springs to fully answer the discovery requests.

II. DISCOVERY RULES

The Department Rules of Procedure, IDAPA 37.01.01.520 – 528 permit discovery in administrative proceedings. The Scheduling Order issued by Director Tuthill on September 25, 2008, authorizes the parties to commence discovery effective September 17, 2008.

The Idaho Rules governing discovery permits the identification and production of documents which are relevant to the subject matter of a pending action, unless protected by privilege. IRCP 26(b)(1) states as follows:

“Scope of discovery in general.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action, whether it relates to the claim or defense** of the party seeking discovery or to the **claim or defense** of any other party, including the existence, **description, nature**, custody, condition and location of any books, documents, or other tangible things and **the identity and location of persons having knowledge of any discoverable matter**. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears **reasonably calculated to lead to the discovery of admissible evidence.**” (Emphasis added)

These rules are intended to encourage the full and fair disclosure of applicable information which will facilitate the pre-trial (or in this instance, the pre-hearing) fact gathering process.

III. CLEAR SPRINGS SHOULD BE COMPELLED TO FULLY ANSWER DISCOVERY REQUESTS OR BE BARRED FROM CONTESTING THE PUMP BACK PROPOSAL AND THE WELL PROPOSAL

A. Clear Spring Objections to Pump Back System

In its responses to GWD's discovery requests, Clear Springs stated its objections to the mitigation plan are that, "the proposals would deliver water adverse to the survival and optimum performance of intensively reared rainbow trout, water flows would be inconsistent, unreliable and would reduce the production capacity of Clear Springs' Snake River Farm." (Clear Springs Answer to Interrogatory No. 3). Clear Spring further claims that recirculation is cost prohibitive, subject to catastrophic failure, a cause of bioamplification of drugs and pathogens (Clear Springs Answer to Interrogatory No. 3). Clear Springs does not expand on its objections or provide any hard data to support its objections, but rather seeks to have GWD and this Administrative Agency accept its conclusions as true.

B. Clear Springs Response to Information Concerning Mitigation Plan

Although it claims to object to GWD's mitigation plan because the plan would reduce its production capacity and would be a cause of pathogens, when asked to produce documentation to support these conclusions, Clear Springs refuses to produce the documentation. Specifically, Clear Springs answered Request for Documents Numbers 2, 9, 10, 12 and 13 as follows:

REQUEST FOR PRODUCTION NO. 2: Please produce all documents and data containing information on sales, profits, revenue, income, annual fish production records, and records of disposal of fish from sale or other means, including destruction of fish.

This should also include all recorded fish production data for each individual raceway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Objection. The request is barred by the Hearing Officer's *Order Re: Discovery* issued on September 11, 2007 in the Spring Users Case. This decision has been affirmed by the Director. *See also, July 11, 2008 Final Order* at 10.

REQUEST FOR PRODUCTION NO. 9: Please produce records of all fish disease incidents and pathology records for the facility including date of incident, cause of incident, incident response, treatment methods used, numbers of fish lost or destroyed and future corrective actions developed as a result of the incident.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: Objection. The information requested is proprietary to Clear Springs. In addition, the request is overly broad and unduly burdensome.²

REQUEST FOR PRODUCTION NO. 10: Please produce all records of fish production from SRF facility including pounds of fish produced (on an annual and monthly basis) and the corresponding amounts of food fed on a daily basis to achieve the production. Please include type and manufacturer of all feed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: Objection. The request is barred by the Hearing Officer's *Order Re: Discovery* issued on September 11, 2007 in the Spring Users Case. *See also, July 11, 2008 Final Order* at 10.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents and records you have associated with hydrogeologic investigations in the vicinity of Snake River Farms.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: Clear Springs will produce any documents and records as they become available.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents and records you have associated with geologic and hydrologic investigations of springs located within one mile of Snake River Farms.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: *See* Response to Request for Production No. 12.

C. **Relevancy of Information Sought for Pump Back System and Well**

As stated above, the rules of discovery allow parties to obtain information that is “relevant to the subject matter involved in the pending action” or “reasonably calculated to lead to the discovery of admissible evidence.” IRCP 26(b)(1). In this particular matter, the relevancy of the material sought from Clear Springs is shown by Clear Springs’ own answers to interrogatories. Clear Springs claims it objects to the entire mitigation plan because it believes the plan will reduce its production capacity and the pump back portion of the plan could cause a

² Clear Springs did produce “pathology records.” However, Clear Springs did not produce “date of incident, cause of incident, incident response, treatment methods used, number of fish lost or destroyed or future corrective actions developed as a result of the incident.”

bioamplification of drugs and pathogens (Clear Springs' Answers to Interrogatories No. 2 & 3). Clear Springs' "objections" to the mitigation plan make the current production and sales of fish records (Request No.2), fish disease incidents and pathology records (Request No. 9), and food fed to the fish and fish production records (Request No. 10) , highly relevant.³

Furthermore, the information sought is also made relevant by GWD's mitigation plan. As set forth in the mitigation plan, GWD seeks to design, build and implement a pump back system to be used by Clear Springs in its fish farm. Alternatively, GWD seeks to design, build and implement a well to provide Clear Spring with additional water. In order for GWD's experts to be able to design and implement such systems, they must have information that would only be possessed by Clear Springs. Accordingly, the information sought is highly relevant to the issues at hand and is only obtainable from Clear Springs.

D. Protective Order

In response to request No. 9, Clear Springs objects because it claims the information sought is proprietary to Clear Springs. In anticipation of an objection from Clear Springs about information sought, GWD served a proposed protective agreement/order that has been used in prior administrative litigation (*See* affidavit of counsel) that would thoroughly protect any proprietary information produced. Accordingly, Clear Springs' objection on the grounds of proprietary information is not valid.

E. Prior Discovery Order

In response to Requests for Production numbers 2 and 10, Clear Springs also objects claiming Hearing Officer Schroeder's prior discovery ruling in the Spring User's case does not

³ Idaho Rule of Civil Procedure 26(6)(1) allows parties to obtain "discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action, whether it relates to the claim or defense** of the party seeking discovery or to the **claim or defense** of any other party" ("Emphasis Added.). The discovery sought here is relevant to both claims and defenses of each party.

require them to produce the requested information regarding fish production. The order entered by Hearing Officer Schroeder does allow Clear Spring the option to produce the documents. However, the order further provided that if the requested information was not produced, Clear Springs would be barred from asserting its position that “more water equals more fish.” Specifically, the *Order Re Discovery* (“Discovery Order”)⁴ dated September 11, 2007, states as follows:

“2. The ultimate question of whether production records must be produced remained open following the hearing. Prior authority from the SRBA District Court indicates that such information is not discoverable. That determination is binding on these proceedings. However, if that information is **not produced in discovery** Blue Lakes and Blue [sic] Springs **may not introduce information from the records to support any position they assert, e.g. more water allows the production of more or larger healthy fish.**” (Emphasis added) Discovery Order at 2, ¶2.

Should Clear Springs continue to object to providing relevant information in this matter, then Clear Springs should be barred from presenting evidence and/or making any assertions or claims regarding the feasibility of a pump back system or well since GWD will be greatly prejudiced by Clear Springs’ refusal to provide relevant information.

F. Requests 12 & 13

In response to requests 12 & 13 (seeking information of hydrologic investigations), Clear Springs response that it will produce the records when they become available (*See* Response to Requests 12 & 13). These answers are ambiguous as to whether such documents exist. If such documents do not exist, Clear Springs should state they do not exist. Or, if the documents exist, then GWA has a right to know they exist and where they are located. If the documents are in the possession of Clear Springs, then they should be produced.

⁴ See Exhibit “B” attached to the Affidavit of Joshua D. Johnson.

Wherefore, the Ground Water Districts request an Order Compelling Clear Springs to fully answer request for documents numbers: 2, 9, 10, 12 and 13 or, in the alternative, an order barring Clear Spring from presenting evidence and/or making any assertions or claims regarding the feasibility of a pump back system and/or well.

DATED this 18th day of November, 2008.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

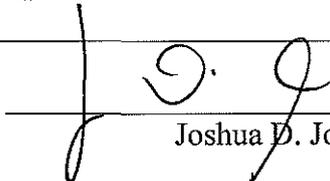


JOSHUA D. JOHNSON
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CERTIFICATE OF MAILING

I hereby certify that on this 21st day of November, 2008, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

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