

RECEIVED

AUG 27 2008

DEPARTMENT OF WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Suite 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Daniel V. Steenson, ISB #4332
Charles L. Honsinger, ISB #5240
S. Bryce Farris, ISB #5636
Jon Gould, ISB #6709
RINGERT LAW, CHTD.
455 S. Third St.
P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Clear Springs Foods, Inc.

Attorneys for Clear Lakes Trout Company, Inc.

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

IN THE MATTER OF 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))
_____)

**SPRING USERS' JOINT PETITION
FOR DISQUALIFICATION OF THE
DIRECTOR AS PRESIDING OFFICER**

COME NOW, Clear Springs Foods, Inc. ("Clear Springs") and Clear Lakes Trout Company, Inc. ("Clear Lakes") (collectively referred to as the "Spring Users"), by and through their respective counsel of record, and file this *Joint Petition for Disqualification of the Director as the Presiding Officer (Petition)* in the above-captioned matter.

On August 13, 2008 the Director of the Idaho Department of Water Resources (IDWR) issued a *Notice of Hearing and Order Granting Intervention*, in which he designated himself as the presiding officer at the hearing on the *North Snake Ground Water District and Magic Valley Ground Water District Joint Replacement Water Plan for 2008 (2008 Plan)*. The Director's

ORIGINAL

August 21, 2008 *Order Vacating Hearing Date and Consolidating Proceedings; and Notice of Prehearing Conference* did not alter his designation of himself as presiding officer.

Idaho Code § 67-5252(2) provides that: “Any party may petition for the disqualification of a person serving or designated to serve as presiding officer; (a) within fourteen (14) days after receipt of notice indicating that the person will preside at the contested case.” This *Petition* is timely filed in accordance with the statute.

DISQUALIFICATION WITHOUT CAUSE

The Spring Users hereby petition for the disqualification of the Director as the presiding officer as a matter of right (“without cause”) pursuant to I.C. § 67-5252(1).

DISQUALIFICATION FOR CAUSE

Alternatively, the Spring Users’ petition for the disqualification of the Director as the presiding officer for cause pursuant to I.C. § 67-5252(1), based on: (1) the Director’s “substantial prior involvement in this matter other than as a presiding officer,” (2) the Director’s apparent bias in favor of the *2008 Plan* and his acceptance of the *2008 Plan* as a means of allowing out-of-priority ground water diversions during the 2008 irrigation season, and (3) the likelihood that the Director may be a necessary fact witness as one or the only IDWR employee with knowledge pertaining to the Director’s procedure for submission and consideration of the *2008 Plan*, and/or the Director’s actions and responses to the parties in this matter.

In addition, pursuant to I.C. § 67-5252(1) and (2), the Spring Users petition for the disqualification of all employees of IDWR who have participated in IDWR’s procedure and review of the *2008 Plan*.

The appointment of Justice Schroeder as the hearing officer for the hearing related to the Clear Springs’ and Blue Lakes’ water delivery calls last year demonstrates that disqualification

of the Director as the presiding officer will not result in an inability to decide this matter. *See* I.C. § 67-5252(4).

GROUND FOR DISQUALIFICATION FOR CAUSE

The Director's substantial prior involvement in this matter is self-evident. The Director is responsible for establishing the procedure for submission, review and approval of the Ground Water Districts' *2008 Plan*. The adequacy of that procedure is at issue in this proceeding. The Director has been personally involved since Clear Springs submitted its March 28, 2008 inquiry about the status of the administration of junior priority ground water rights for 2008. *See* Ex. A to *Clear Springs' Protest* (filed August 4, 2008).

The Director's bias in favor of the *2008 Plan* is demonstrated by his reluctance to curtail out-of-priority ground water diversions and his acceptance of the unapproved, incomplete, and unimplemented *2008 Plan* as a means of allowing junior ground water users to continue to deplete the water supply for Clear Springs' senior rights and Clear Lakes' senior rights. *Clear Springs' Protest to Ground Water Districts' Mitigation Plan* details the history of the Ground Water Districts' various "mitigation or replacement plan" filings and the Director's failure to require the Ground Water Districts to have an approved plan in place before allowing junior priority ground water rights to divert water in lawful priority during the 2008 irrigation season. *See Clear Springs' Protest* at 1, 2 (and exhibits).

On March 28, 2008 Clear Springs specifically inquired about timely administration for the 2008 irrigation season. The Director responded with a March 31, 2008 letter wherein he stated:

Consistent with the July 8, 2005 Order, either acceptable mitigation or replacement plan is required prior to the diversion from ground water of junior water rights in an area computed by the ground water model in this area.

In accordance with the provisions of the July 8, 2005 Order, involuntary curtailment will be ordered if ground water users fail to provide to this office an acceptable mitigation or replacement plan by 5:00 p.m. on Monday April 7, 2008 for the consideration and approval of the Director.

March 31, 2008 Letter (emphasis added). See **Exhibit A**.

The Ground Water Districts filed a “joint replacement water plan for 2008” on April 1, 2008 proposing, among other things, a “pump-back” project using the IDFG water right 36-4076. See **Exhibit B**. This “replacement water plan” was not filed pursuant to any statute or IDWR’s Conjunctive Management Rules (CMRs), and was contingent upon a number of actions that had yet to be studied, completed, or approved. Consequently, when the April 7th deadline arrived, no “acceptable mitigation or replacement plan” had been provided. Nonetheless, the Director permitted junior priority ground water right holders to turn on their pumps, thereby effectively approving the Ground Water Districts’ “replacement water plan” to the detriment of Clear Springs’ senior surface water rights.

Clear Springs raised this issue again at the May 7, 2008 status conference. See *Clear Springs’ Protest* at 2 (reference to audio file of status conference). The Director sent another letter on May 13, 2008 which noted that the Ground Water Districts were prepared to file an “Amended Plan” pursuant to the CMRs. See **Exhibit C**. Under that letter the Ground Water Districts were going to file their plan by May 28, 2008. No such plan was filed by that deadline. Instead, the Ground Water Districts’ counsel sent the Director a letter identifying various new proposals and additional undefined mitigation actions. See **Exhibit D**. Again Clear Springs identified its concerns about continued out-of-priority ground water diversions with no approved mitigation plan by letter of June 4, 2008. See *Clear Springs’ Protest* (Ex. C). Finally, the Ground Water Districts filed their current, unapproved *2008 Plan* on June 13, 2008, near the mid-way mark of the irrigation season.

Throughout the 2008 irrigation season the Director has permitted out-of-priority junior ground water diversions while Clear Springs' senior surface water rights have been injured. In so doing, the Director has provided the Ground Water Districts the relief they sought through their *2008 Plan*, without the process required by the CMRs. It is obvious that, at this late date (August 27th) the Director will not and cannot either require the Ground Water Districts to provide the required mitigation or curtail junior ground water rights.

Also at issue in this proceeding is the failure of *2008 Plan* to provide mitigation for the Ground Water Users' unmet mitigation obligations during 2007. The Director had substantial prior involvement in reviewing and approving the Ground Water Districts' 2007 mitigation and, as indicated by testimony during the hearing on the Clear Springs' and Blue Lakes' water delivery calls last year, may be the only IDWR employee with knowledge of the basis for the Director's approval of the 2007 mitigation plan.

The Director's apparent bias in favor of continued out-of-priority diversions by junior priority ground water rights, and his reluctance to curtail such diversions, raises the concern that he will not objectively evaluate the depletive effects of the Ground Water Districts' three applications on the senior water rights of the Spring Water Users. It appears that the proposed mitigation plan will compound rather than mitigate for junior ground water depletions. This circumstance heightens the need for an independent hearing officer in this matter.

Dated this 27th day of August, 2008.

BARKER ROSOHLT & SIMPSON LLP

RINGERT LAW, CHTD.



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



Daniel V. Steenson
Attorneys for Clear Lakes Trout Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2008, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

Director David K. Tuthill, Jr.
c/o Victoria Wigle
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

_____ U.S. Mail
_____ Facsimile
_____ Overnight Mail
 _____ Hand Delivery
_____ E-Mail

Randy Budge
Candice M. McHugh
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

US Mail, Postage Prepaid
 Facsimile
 E-mail

Tracy Harr, President
Clear Lake Country Club
403 Clear Lake Lane
Buhl, Idaho 83316

US Mail, Postage Prepaid
 Facsimile
 E-mail

Stephen P. Kaatz, Vice President
Clear Lake Homeowners Association
223 Clear Lake Lane
Buhl, Idaho 83316

US Mail, Postage Prepaid
 Facsimile
 E-mail

Allen Merritt
Cindy Yenter
Watermaster - WD 130
IDWR- Southern Region
1241 Fillmore Street, Suite 200
Twin Falls, Idaho 83301-3380
allen.meritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

US Mail, Postage Prepaid
 Facsimile
 E-mail



Daniel V. Steenson

EXHIBIT "A"



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

March 31, 2008

Sent Electronically and via U.S. Mail

John R. MacMillan
Vice President
Clear Springs Foods, Inc.
P.O. Box 712
Buhl, Idaho 83316

Randall C. Budge, Esq.
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391

Re: Clear Springs Foods, Inc.'s Snake River Farm Request for 2008 Conjunctive Administration

Gentlemen:

This letter is prepared in response to the letter from Dr. MacMillan dated March 28, 2008 (copy enclosed). The letter outlines the expectation by Clear Springs Foods, Inc. for timely and lawful action by the Water District 130 Watermaster to implement the requirements of the July 8, 2005 Order in this matter so as to protect Clear Springs' senior water rights in 2008.

The Clear Springs request is based on the failure of the ground water users to submit an acceptable mitigation or replacement plan for 2008. Consistent with the July 8, 2005 Order, either acceptable mitigation or a replacement plan is required prior to the diversion from ground water of junior water rights in an area computed by the ground water model in this area.

In accordance with the provisions of the July 8, 2005 Order, involuntary curtailment will be ordered if ground water users fail to provide to this office an acceptable mitigation or replacement plan by 5:00 pm on Monday, April 7, 2008 for the consideration and approval of the Director.

Sincerely,

David R. Tuthill, Jr.
Director

Enclosure: Letter from John R. MacMillan dated March 28, 2008

EXHIBIT "B"

Randall C. Budge (ISB # 1949)
 Candice M. McHugh (ISB #5908)
 Thomas J. Budge (ISB #7465)
**RACINE OLSON NYE BUDGE &
 BAILEY, CHARTERED**
 PO Box 1391
 Pocatello, ID 83204-1391
 Telephone: (208) 232-6101
 Facsimile: (208) 232-6109

Attorneys for North Snake and Magic Valley Ground Water Districts

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

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS.)	NORTH SNAKE GROUND WATER
36-04013A, 36-04013B AND 36-07148)	DISTRICT AND MAGIC VALLEY
(Snake River Farm))	GROUND WATER DISTRICT
)	JOINT REPLACEMENT WATER
)	PLAN FOR 2008
)	
)	

COMES NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively "Ground Water Districts"), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby provide this Joint Replacement Water Plan for 2008 (2008 Replacement Water Plan) to mitigate any injury to the water rights listed above for use by Snake River Farm.. This 2008 Replacement Water Plan is provided in response to the Idaho Department of Water Resources (IDWR or Department) Director's July 8, 2005, Order in the Matter of Distribution of Water to Water Rights Nos. 36-

NORTH SNAKE GROUND WATER DISTRICT AND MAGIC VALLEY GROUND WATER DISTRICT JOINT REPLACEMENT WATER PLAN FOR 2007 - Page 1

04013A, 36-04013B, and 36-07148 (Snake River Farm); and subsequent Orders relating thereto.

These orders are referred to herein collectively as the Director's Orders.

I. RESERVATION OF DEFENSES

By submitting this 2008 Replacement Water Plan, the Ground Water Districts do not waive and expressly reserve any and all objections and defenses they have made to the Director's Orders.

II. INTRODUCTION

The Director's July 8, 2005 and subsequent Orders require that the Ground Water Districts provide mitigation in lieu of involuntary curtailment of ground water rights located in Water District 130. The Director's Orders provided for an accelerated schedule of curtailment or mitigation over a five year period.¹ The Director's Order further provided that Snake River Farm gets 7 percent of the Buhl Gauge to Thousand Springs reach gain.² Accordingly, the 2008 delivery requirement to Snake River Farms to comply with the Director's Order is 2.17 cfs.³

III. 2005, 2006 AND 2007 REPLACEMENT WATER PLANS

The Ground Water Districts previously submitted Replacement Water Plans for 2005, 2006 and 2007. Orders were entered approving the 2005 and 2007 Replacement Water Plans. Because of litigation and appeal relating to the constitutionality of the Conjunctive Management Rules, in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, the Director did not issue any order approving or disapproving the Ground Water Districts' 2006 Replacement Water Plan.

¹ The July 8, 2005 Order at page 37 provided that "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 Gauge to Thousand Springs Reach . . . for the water rights held by Clear Springs for 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."

² Finding of Fact 15 at page 5 of the July 8, 2005 Order provided that "the maximum authorized amount of water diverted by Clear Springs for its Snake River Farm . . . accounted for 7 percent of the measured reach gains in the Buhl Gauge to Thousand Springs reach."

³ The 2008 reach gain requirement for the Buhl to Thousand Springs Reach of 31 cfs multiplied by 7% equals 2.17 cfs.

The Ground Water Districts nevertheless continued to implement portions of their proposed 2006 Replacement Water Plan.⁴

The Ground Water Districts' 2005 and 2007 Replacement Water Plans were fully implemented. The Ground Water Districts have provided delivery and diversion data regarding their Replacement Water Plan efforts in each of these previous years to the Department and Ms. Cindy Yenter, watermaster for Water District 130.

IV. 2008 REPLACEMENT WATER PLAN ACTIVITIES

This 2008 Replacement Water Plan and the supporting data and documents previously filed in support of the 2005 and 2006 Replacement Water Plans demonstrate how the Ground Water Districts located within Water District 130 will respond to the Director's Orders and increase aggregate aquifer discharge in the Devil's Washbowl to Buhl and the Buhl to Thousand Springs subreaches.

This 2008 Replacement Water Plan addresses alleged material injury to Clear Springs Foods Snake River Farm spring-dependent water supplies located in the Buhl to Thousand Springs subreach in two ways. First, this 2008 Replacement Water Plan will increase gains to the subreach by the delivery of 35,000 acre-feet via the North Side Canal Company's delivery system to approximately 9,300 acres that have been converted from ground water irrigation to surface water irrigation within the North Snake Ground Water District (conversion deliveries). Second, mitigation will be provided through the direct delivery to Snake River Farm of an estimated 2.0 cfs

⁴ The entire proposal in the Ground Water Districts' 2006 Replacement Water Plan, specifically, late-season recharge, was not implemented because the Department could not guarantee any mitigation credit for that effort in light of the pending appeal to the Supreme Court. Therefore, the Ground Water Districts could not afford to pursue that program last fall. This also resulted in no early-season recharge program in 2007.

of spring flow from Clear Lake Spring under Water Right No. 36-4076 owned by the Idaho Department of Fish and Game (IDFG).

1. Conversion Deliveries

Approximately 9,300 acres within the NSGWD have been converted from ground water irrigation to surface water irrigation to increase incidental recharge to the aquifer and spring discharge. Surface water deliveries to these lands in 2006 and 2007 through the efforts of the Ground Water Districts consisted of a total of approximately 35,000 acre feet each year of actual deliveries to converted acres with charged conveyance losses through the North Side Canal Company delivery system. Under the agreement with North Side Canal Company, a conveyance charge of 30% was added to the delivery amounts.

Projected deliveries for 2008 are 35,000 acre-feet at the North Side Canal Company's point of diversion at Milner Dam, with conveyance losses of approximately 10,000 acre-feet and headgate delivery to converted acres approximately 25,000 acre-feet. For purposes of the Department's analysis, the pattern of deliveries in 2008 should be assumed to be the same as the actual deliveries in 2006 and 2007. All water delivered to the conversion acres should also be assumed to offset consumption of ground water, with any excess water percolating to the aquifer at the location of the converted acres. In addition, North Side Canal Company conveyance charges should be assumed to percolate to the aquifer beneath the pertinent portions of the main canal and laterals used to make the conversion deliveries.

The Ground Water Districts will secure 35,000 acre-feet of water for delivery to the North Side Canal Company's point of diversion at Milner Dam for delivery to the conversion acres in 2008 in the same manner as prior years.⁵

2. Snake River Farm Mitigation Project

An estimated 2 cfs of spring flow under Water Right No. 36-4076 will deliver spring flows directly to Snake River Farm. This water is made available pursuant to agreement with IDFG, which is the owner of Water Right No. 36-4076. IDFG has provided verbal consent for the use of this water right for mitigation purposes. This water right's source is "springs tributary to Clear Lakes." Water Right No. 36-4076 captures a this spring and presently supplies approximately 2 cfs of spring water to IDFG constructed wetlands as mitigation for the construction of the Clear Lakes Grade by the Idaho Department of Transportation. The flow is currently routed through the golf course and under the highway grade to the constructed wetlands. The flow is then discharged into the Snake River.

As part of this 2008 Replacement Water Plan, the spring flow available under Water Right No. 36-4076 will be re-routed to the head of the Snake River Farm raceways. At the bottom of the raceways the flow will be recaptured and pumped back up into the ditch that currently conveys it to the constructed wetlands. Two relatively small pumping plants and two pipelines will be required. These facilities will be designed, installed, operated and maintained at the expense of the Ground Water Districts. The facilities will be located on Clear Springs Food property at such reasonable location as they may direct. The pump stations and pipelines are depicted on the attached

⁵ The Ground Water Districts have contacted Upper Snake River storage contract holders who have leased water in 2007 and prior years to the Ground Water Districts for mitigation purposes and have received verbal commitments to lease sufficient water again in 2008 for in excess of the 35,000 AF needed for conversions. It is anticipated that existing lease agreements with these storage right holders will be extended or new lease agreements entered into with each Lessor within the next several weeks. As in the past, copies of these lease agreements will be provided to the Department along with the necessary Rental Pool and Water Bank Agreements.

preliminary layout. The pump lift for pump station number 1 is about 10 feet, while the pump lift for pump station number 2 is about 20 feet.

Because the proposed pump stations and pipeline will be located in part upon Clear Springs Foods property and will supply spring water directly to Snake River Farm, the Ground Water Districts would propose that: (1) Clear Springs Foods and the Ground Water Districts collaborate and cooperate in the design, installation, operation and maintenance of the facilities; or (2) that Clear Springs Foods design the facilities and upon approval of the estimated costs by the Ground Water Districts, proceed with the prompt installation; or (3) if Clear Springs Foods rejects both of the previous options, then the Ground Water Districts will proceed to design and install the facilities providing the design and specifications to Clear Springs for advance review.

3. Ground Water Districts' Accounting and Monitoring.

The Ground Water Districts will continue to maintain documentation and accounting of its Replacement Water Plan activities and will monitor its activities in cooperation with the Department and the Water District 130 watermaster to verify and monitor compliance with the 2008 Replacement Water Plan.

V. 2008 REPLACEMENT WATER PLAN EFFECTS

The above 2008 Replacement Water Plan Activities are expected to have positive effects on reach gains in the Buhl to Thousand Springs subreach. Based upon the 2008 reach gain requirements for the Buhl to Thousand Springs Reach of 31 cfs and the 7 percent of the subreach gain that inures to the benefit of Snake River Farm, the Ground Water Districts' delivery requirement to Snake River Farm is 2.17 cfs.

Based on the previous analysis of the reach gains benefits of irrigation conversions in Water District 31 and the 35,000 AF of water delivered through the North Side Canal Company system, a

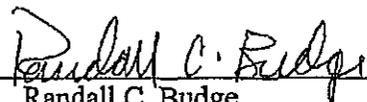
steady state reach gain of 10 cfs will result to the Buhl to Thousand Springs reach.. Of this amount, 0.7 cfs will accrue to Snake River Farm. The estimated 2.0 cfs of water right delivered directly from the IDFG Water Right will make up any shortfall and exceed the delivery requirement of 2.17 cfs to Snake River Farm. To aid in the Department's analysis and approval process, the Ground Water Districts rely upon the same data that was submitted in support of the 2007 Replacement Water Plan and the 2007 actual delivery information for the North Snake Ground Water District conversion acres previously submitted to Cindy Yenter.

CONCLUSION

The Ground Water Districts request that the 2008 Replacement Water Plan be approved and that the Director make a determination that the 2008 Replacement Water Plan alleviates any need for additional mitigation or curtailment. The Ground Water Districts reserve the right to modify or withdraw the 2008 Replacement Water Plan if not approved by the Director.

DATED this 1st day of April, 2008.

RACINE OLSON NYE BUDGE & BAILEY
CHARTERED

By: 
Randall C. Budge
Attorneys for
North Snake and Magic Valley Ground
Water Districts

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that on this 1st day of April, 2008, the above and foregoing document was served in the following manner:

David R. Tuthill, Director Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Dave.tuthill@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Magic Valley Water District Orlo H. Maughan, Chairman P.O. Box 430 Paul, Idaho 83347 mvgwd@hotmail.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
North Snake Ground Water District Lynn Carlquist, Chairman 1092 South 2500 East Hazelton, Idaho 83335 carlquil@yahoo.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Phillip J. Rassier John Homan Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Phil.rassier@idwr.idaho.gov John.homan@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Michael S. Gilmore Attorney General's Office P.O. Box 83720 Boise, Idaho 83720-0010 Mike.gilmore@ag.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
Jeff Fereday Mike Creamer Givens, Pursley P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail
J. Justin May May, Sudweeks & Browning P.O. Box 6091 Boise, Idaho 83707	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery

<u>imay@may-law.com</u>	<input checked="" type="checkbox"/> E-Mail
John Simpson	<input type="checkbox"/> U.S. Mail/Postage Prepaid
Travis L. Thompson	<input type="checkbox"/> Facsimile
Barker Rosholt	<input type="checkbox"/> Overnight Mail
P.O. Box 2139	<input type="checkbox"/> Hand Delivery
Boise, Idaho 83701-2139	<input checked="" type="checkbox"/> E-Mail
<u>jks@idahowaters.com</u>	
<u>flt@idahowaters.com</u>	
Josephine P. Beeman	<input type="checkbox"/> U.S. Mail/Postage Prepaid
Beeman & Associates	<input type="checkbox"/> Facsimile
409 W. Jefferson	<input type="checkbox"/> Overnight Mail
Boise, Idaho 83702	<input type="checkbox"/> Hand Delivery
<u>Jo.beeman@beemanlaw.com</u>	<input checked="" type="checkbox"/> E-Mail
Robert E. Williams	<input type="checkbox"/> U.S. Mail/Postage Prepaid
Fredricksen Williams Meservy	<input type="checkbox"/> Facsimile
P.O. Box 168	<input type="checkbox"/> Overnight Mail
153 E. Main Street	<input type="checkbox"/> Hand Delivery
Jerome, Idaho 83338-0168	<input checked="" type="checkbox"/> E-mail
<u>rewilliams@cableone.net</u>	

Darrell C. Beeman

Preliminary Layout for Snake River Farm Mitigation Project

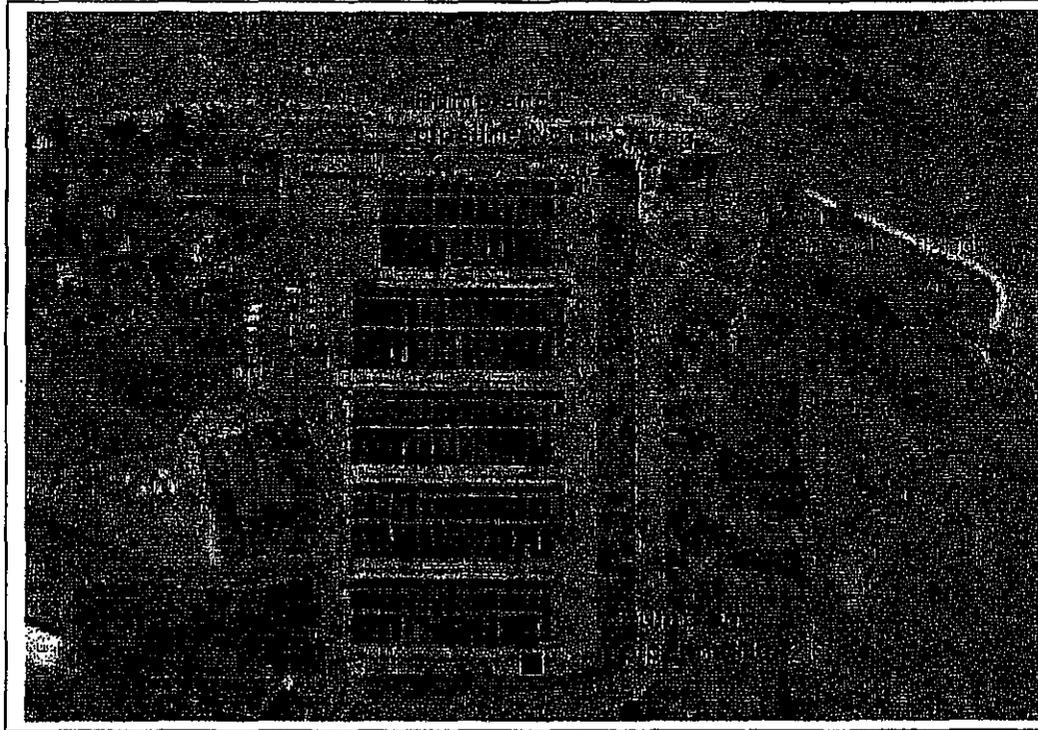


EXHIBIT "C"



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

May 13, 2008

Sent Electronically and via U.S. Mail

John R. MacMillan
Vice President
Clear Springs Foods, Inc.
P.O. Box 712
Buhl, Idaho 83316

Randall C. Budge, Esq.
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391

Re: Clear Springs Foods, Inc.'s Snake River Farm Request for 2008 Conjunctive Administration

Gentlemen:

This letter is prepared as follow-up to (1) my letter dated March 31, 2008 in this matter, and (2) the status conference held on Wednesday, May 7, 2008. This letter and the documents referenced herein are posted to the IDWR website at <http://www.idwr.idaho.gov/>.

My letter dated March 31, 2008 warned that "in accordance with the provisions of the July 8, 2005 Order, involuntary curtailment will be ordered if ground water users fail to provide to this office an acceptable mitigation or replacement plan by **5:00 pm on Monday, April 7, 2008** for the consideration and approval of the Director." Subsequently, on April 1, 2008, North Snake Ground Water District and Magic Valley Ground Water District (Ground Water Districts) filed a "Joint Replacement Water Plan for 2008." A response to this plan was subsequently filed on April 7, 2008 by Clear Springs Food, Inc. (Clear Springs). The response requested denial of the plan or a hearing on the plan prior to action by the Director.

On April 17, 2008, Ms. Cindy Yenter, Watermaster of Water District 130, conducted a field examination to measure springs located to the east of Snake River Farm. The results of this field examination, and a discussion of certain water rights in the area of Snake River Farm, are discussed in the enclosed memorandum dated May 12, 2008, entitled "Summary of IDFG and Clear Lakes County Club Water Rights near Clear Lakes."

On May 1, 2008, I issued a Notice of Status and Scheduling Conference. The conference was conducted on May 7, 2008, as noticed, and the website contains the recording of this conference in .mp3 format, for ease of remote review. As discussed at this status conference, it is my understanding that the following steps will occur:

1. Representatives from the Ground Water Districts will be meeting with the Board of Clear Lakes Country Club on May 14th to discuss a proposal to use an alternative supply for irrigation of the golf course, to allow clean spring water to be used at Snake River Farm.
2. Clear Springs will allow the Ground Water Districts to visit their lands, after making arrangements with Dr. MacMillan, for the purpose of preparing engineering estimates for conveyance of additional water to Clear Springs.
3. The Ground Water Districts will file an Amended Plan, which might be in the form of a formal mitigation proposal as defined in the Conjunctive Management Rules.

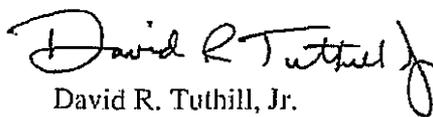
As you are aware, the "Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation" submitted by Hearing Office Gerald F. Schroeder in this matter was considered as of April 24, 2008 to be fully submitted for review by the Director. Consistent with my statements in a variety of forums, as the review of the July 8, 2005 Order (Order) proceeds through the post-hearing process, we will continue to use the Order in the administration of the water rights for 2008. According to the Order, the Buhl to Thousand Springs reach, which includes Snake River Farm, is due 31 cfs in 2008 and 38 cfs in 2009. The 2008 Conservation Reserve Enhancement Program (CREP) lands and conversions are anticipated to provide 9.7cfs to the Buhl to Thousand Springs reach, if the conversions remain the same as in past years. The Order indicates that Snake River Farm is computed to receive seven percent of the flow in the Buhl to Thousand Springs reach. Taking into account the 9.7 cfs of benefit to the Buhl to Thousand Springs reach, which reduces the Ground Water Districts' replacement obligation for 2008 from 31 cfs in 2008 to 21.3 cfs, and from 38 cfs to 28.3 cfs for 2009, the computed shortfall of direct replacement water owed to Snake River Farm in 2008 is 1.5 cfs ($21.3 \times .07$) and 2 cfs ($28.3 \text{ cfs} \times .07$) in 2009.

Clear Springs has appropriately pointed out that we are now well into the irrigation season, the junior ground water rights are being diverted, and the Snake River Farm has not yet been provided sufficient mitigation or replacement water. That is a problem. On the other hand, the Ground Water Districts are diligently taking actions to remedy the shortfall – to provide additional water directly to Clear Springs. If successful, these efforts could provide water to Clear Springs much faster than curtailment of junior ground water users. Thus, for now, curtailment is not ordered. The Ground Water

Clear Springs Foods, Inc.'s Snake River Farm Request for 2008 Conjunctive Administration
May 13, 2008
Page 3 of 3

Districts are reminded that the need to provide additional water to Clear Springs is urgent, and this agency will continue to maintain a close watch on progress in this regard. The Ground Water Districts have committed to provide the amended plan within two weeks after the May 14, 2008 meeting with the Board of Clear Lakes County Club. Significant progress needs to be made in this regard by May 28, 2008, to prevent a curtailment order.

Sincerely,

A handwritten signature in black ink that reads "David R. Tuthill, Jr." with a stylized flourish at the end.

David R. Tuthill, Jr.
Director

Enclosure: Memorandum entitled "Summary of IDFG and Clear lakes County Club Water Rights near Clear Lakes", prepared by Cindy Yenter

Electronic cc: Participants in the Status Conference conducted on May 7, 2008

MEMORANDUM

May 12, 2008

TO: Parties to Snake River Farms Mitigation Plan Status Conference

FROM: Cindy Yenter, Water District 130 Watermaster

RE: Summary of IDFG and Clear Lakes Country Club Water Rights near Clear Lakes

IDFG Right No. 36-4076

On April 17 Michelle Richman and I measured a portion of the spring discharges available under the IDFG right 36-4076, which the North Snake and Magic Valley Ground Water Districts have proposed to use for 2008 mitigation of the Snake River Farm (SRF) call. We measured the upper end of the spring system, just north of the SRF facility, where flows are most likely to be captured for re-diversion to SRF. We found that the small spring (spring 1, see attached map) which emerges south of the road at the east end of the SRF facility is flowing at 0.48 cfs. This stream meanders through the golf course for approximately 300 yards before crossing under Clear Lake Road and spilling into a ditch flowing along the north side of Clear Lake Road carrying flow from a second spring (spring 2). The two springs together measured 1.14 cfs, at a point just downstream from their confluence.

The ditch north of Clear Lake Road continues to the north and east, flowing through thick brush and becoming wide, slow, and full of silt. The ditch appears to pick up small additional flows from 2 other springs located to the west of Clear Lake Grade. A portion of one of these springs is diverted away from the main ditch to a small wetlands area west of Clear Lake Grade, where it sinks. The diverted flow is measured through a small trapezoidal flume. The balance of the water in the ditch flows under the grade to the larger wetlands and ponds on the east side. There is not another good measurement location in the main ditch east of spring 2, until just before the ditch is piped under the Clear Lake Grade. We did not measure near the grade crossing, although when I was there a week earlier the flow at that point did not appear to be much more than 1.0 cfs.

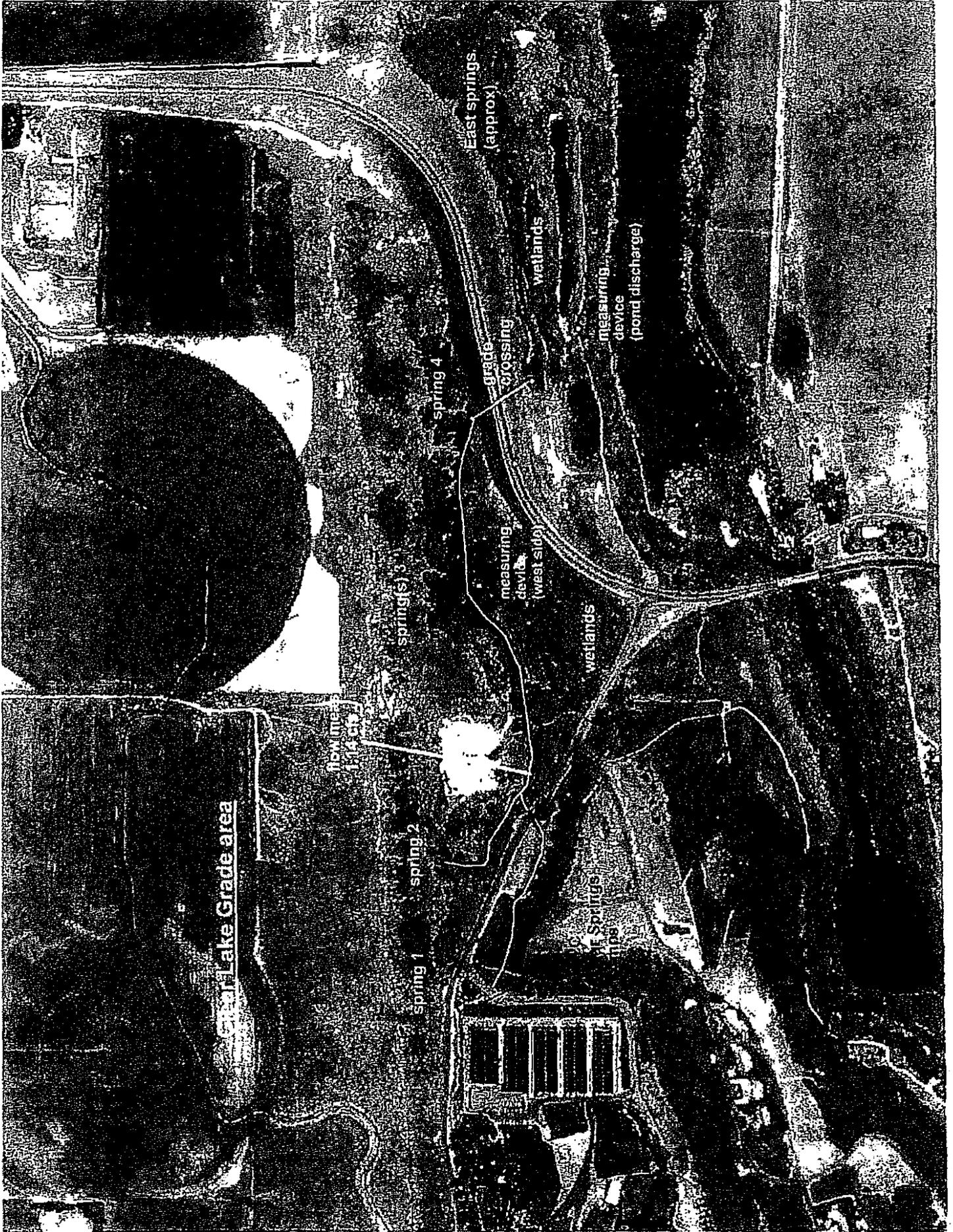
East of Clear Lake Grade, a series of ponds collects the spring flow from west of the grade, along with flow from a separate spring arising to the east of the ponds (East spring). All flows collected in the ponds discharge to the Snake River at a single point, and are measured through a second trapezoidal flume. IDFG makes annual reports of the additive flows as measured through the two flumes. Total diversions under this right generally range from 1.5 to 4.0 cfs, although the amount reasonably available near SRF appears to be just over 1.0 cfs.

Clear Lakes Country Club Right Nos. 36-4148B and 36-16237

These rights divert from Clear Springs and share a common point of diversion with the SRF rights. The Clear Lakes Country Club (CLCC) rights have historically been diverted directly from the fresh water pipeline serving the lower SRF raceways, and pumped to the golf course grounds for irrigation. In combination with right nos. 36-4074 and 36-10154 which are diverted from Clear Lakes Creek (lower part of Clear Lake), the rights may irrigate 90 acres at a total combined diversion rate of 3.5 cfs. The Clear Springs pumps, 60 HP and 20 HP, were measured in 2006 at 2.2 cfs when operated together and 0.31 cfs with the smaller pump operating alone. Both pumps are used to irrigate large areas and the small pump is used to irrigate the driving range; these operating conditions are exclusive of one another so the capacity of the pumping plant is limited to approximately 2.2 cfs.

Two flow meters measure the cumulative volume diverted by CLCC from Clear Springs. For years 2005 and 2006, the total average adjusted volume diverted is 269 acre-feet.

The attached map shows the approximate locations of all the IDFG springs and measuring devices, and the CLCC Clear Springs pumps.



Clear Lake Grade area

flow meter
14 cfs

spring 1 spring 2

spring 3

spring 4

East Springs
(approx)

measuring
device
(west side)

wetlands

grate
crossing

wetlands

measuring
device
(pond discharge)

Wetlands

EXHIBIT “D”

LAW OFFICES OF

**RACINE OLSON NYE BUDGE & BAILEY
CHARTERED**

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-8101
FACSIMILE (208) 232-8109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
MITCHELL W. BROWN
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
DAVID E. ALEXANDER
LANE V. ERICKSON
PATRICK N. GEORGE
SCOTT J. SMITH
STEPHEN J. MUHONEN
BRENT L. WHITING
JUSTIN R. ELLIS
JOSHUA D. JOHNSON
JONATHAN S. BYINGTON
DAVE BAGLEY
CAROL TIPPI VOLYN
THOMAS J. BUDGE
CANDICE M. MCHUGH

BOISE OFFICE
101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 388-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE
477 SHoup AVENUE
SUITE 203A
IDAHO FALLS, ID 83402
TELEPHONE: (208) 526-8101
FACSIMILE: (208) 526-8109

COEUR D'ALENE OFFICE
250 NORTHWEST
BOULEVARD, SUITE 108A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 785-8888

ALL OFFICES TOLL FREE
(877) 232-8101

LOUIS F. RACINE (1917-2008)
WILLIAM D. DLBON, OF COUNSEL

May 28, 2008

David R. Tuthill, Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Re: *Clear Springs Foods, Inc.'s Snake River Farm Request for
2008 Conjunctive Management*

Dear Director Tuthill:

This letter is submitted on behalf of North Snake and Magic Valley Ground Water Districts in response to your May 13, 2008 letter which concluded as follows:

"The Ground Water Districts have committed to provide the amended plan within two weeks after the May 14, 2008 meeting with the Board of Clear Lake Country Club. Significant progress needs to be made in this regard by May 28, 2008, to prevent a curtailment order."

As discussed below, the Ground Water Districts have indeed made significant progress since the May 7, 2008 status conference as follows:

1. A Water Conveyance Agreement has been entered into between the North Snake and Magic Valley Ground Water Districts and the North Side Canal Company to provide for the conveyance of up to 35,000 AF of storage water obtained by the Districts necessary to deliver water to approximately 9300 acres converted from ground water to surface water as described in the Districts' Joint Replacement Water Plan for 2008. The water to supply these conversions has been leased and the initial 10,000 AF

leased from Aberdeen-Springfield Canal Company has been transferred into the account of North Side Canal Company with the associated administrative fees paid.

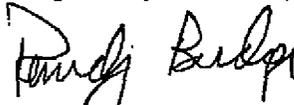
2. A proposed Water Lease Agreement has been submitted by the Ground Water Districts to Clear Lake Country Club. Representatives from the Districts with counsel met with the manager, officers and board of directors of Clear Lake Country Club on May 14, 2008, to discuss the proposed Lease Agreement. The proposal was tabled pending further investigation by the Country Club's Board, with a decision expected at the next meeting of the Board scheduled for June 9, 2008. If the Lease Agreement is approved, the Country Club's Water Right Nos. 36-4148B, 36-16237 and 36-4074 totaling 3.5 cfs will be utilized as a part of the Amended Mitigation Plan. Following the May 14 meeting, an on-site inspection of the Country Club's facility occurred. The Country Club has provided engineering schematics of its water delivery system based upon which preliminary engineering work has been undertaken by the Ground Water Districts' engineer, Charles M. Brendecke. The Country Club's spring water rights are delivered from the same source and use the same pipes a Snake River Farm's water. Accordingly, no new infrastructure is needed to deliver the Country Club's water to Snake River Farm.
3. A Water Lease Agreement has been under negotiation with the Idaho Department of Fish and Game with respect to Water Right No. 36-4076. Attached is a copy of the Water Lease which was executed by the Idaho Department of Fish and Game on May 28, 2008, and is being circulated for signatures by the lessee Ground Water Districts. An on-site inspection of the Fish and Game property and water rights was also conducted on May 14, 2008. It is anticipated this water right may be used to supplement the Country Club water right if necessary. If the Country Club water right is not secured under lease, the Fish and Game water right will be the primary source of mitigation. Conceptual site plan and engineering work have been commenced and is in progress by the Ground Water Districts' engineer Charles M. Brendecke with respect to the Fish and Game water right as well.
4. An alternative for the delivery of the Fish and Game water right is to improve the point of diversion of Spring 1 near the Country Club spring pump station which would enable the required amount of mitigation water, 1.5 cfs in 2008 and 2.0 cfs thereafter, to be captured and delivered directly to the raceway at that location. For this purpose a proposal has been obtained from Eaton Drilling and Pump Service, copy of which is attached. If the improvement of Spring 1 does not generate the necessary quantities, additional collection and pump-back facilities will be added at downstream locations as needed.
5. Attached is a map reflecting the proposed mitigation alternatives. The map reflects the Country Club spring and Clear Lake pump stations with a portion of their existing

looped water line. It also reflects the alternative collection sites and proposed pipeline to deliver water from the Fish and Game springs to the Snake River Farm raceway.

At this point it is anticipated that no infrastructure will be needed at the outlet of the Snake River Farm raceway to replace leased water to the lessor(s). Under the Fish and Game right, replacement would occur from the Snake River to the wetlands and under the Country Club right the replacement into the golf course irrigation system would occur at the Country Club's Clear Lake pump station.

In view of the Hearing Officer's Opinion, it remains the commitment of the Ground Water Users to file an Amended Mitigation Plan as soon as possible to comply with the procedural requirements set forth in CM Rule 43 and serve as a permanent plan and solution for Snake River Farm. However, because some of the details are still being worked out as above-described, including the Country Club lease, it is premature to file a detailed mitigation plan at this point. The Ground Water Districts are remain committed to the task at hand and are proceeding with due diligence and in good faith as quickly as possible.

Respectfully submitted,



RANDALL C. BUDGE

RCB:rr

Enclosures

cc: Those Participating in the May 7, 2008 Status Conference by e-mail:

John K. Simpson

Randy R. McMillan

Lynn Carlquist, Chairman, North Snake GWD

Orlo Maughan, Chairman, Magic Valley GWD

Cindy Yenter, Water Master, WD 130