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

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS NOS.
36-0413A, 36-04013B, AND 36-07148
(SNAKE RIVER FARM)

**MOTION TO STRIKE PROTESTS
FILED BY ENTITIES OTHER THAN
CLEAR SPRINGS FOODS, INC.**

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)

COME 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 submit this Motion to Strike the Protests of the Surface Water Coalition, Thousand Springs Water Users Association, Blue Lakes Trout Farm, Inc. and Rangen Inc. for lack of standing.

INTRODUCTION

On December 18, 2008, North Snake Ground Water District and Magic Valley Ground Water District filed a Second Mitigation Plan for Monetary Compensation (“Second Mitigation Plan”) providing for monetary compensation to compensate Clear Springs Food, Inc. for injury to its senior water rights at Snake River Farm by providing an annual cash payment in the amount equal to the actual lost net profit incurred due to decreased trout production associated with the 2.0 cfs of reduced flow to Snake River Farm. The Second Mitigation Plan also proposed to continue the CREP acres and the 3,900 conversion acres as has been done in the past. The Second Mitigation Plan was amended on February 23, 2009 to include the delivery of fish as an alternative to monetary compensation. The Department advertised the Second Mitigation Plan and protests to the Second Mitigation Plan were due February 23, 2009.

On February 23, 2009, Clear Springs Foods, Inc. filed its protest to the Second Mitigation Plan. In addition to Clear Springs Foods, Inc., four other entities filed protests. Those entities are Surface Water Coalition, Thousand Springs Water Users’ Association, Inc., Blue Lakes Trout Farms, Inc. and, Rangen, Inc. This Motion requests that these four protests be struck and the entities denied participation in this matter for lack of any interest or standing.

The grounds for this motion are as follows:

1. The Second Mitigation Plan only applies to and impacts Clear Springs Foods, Inc. and has no effect or any impact on any water right or other right or interest of these four entities. The Second Mitigation Plan simply provides for “other compensation” provided directly to Clear Springs in the form of monetary compensation or fish, in addition to the reach gains realized from the conversion and CREP acres.

2. These entities do not meet the definition of “Protestant” under IDAPA 37.01.01.155 (“Rule 155”). The definition of “Protestant” under the Department’s Rule of

Procedure 155 defines protestant as “Persons who oppose an application or claim or appeal and who have a statutory right to contest the right, license, award or authority sought by an applicant or claimant or appellant are called ‘Protestants.’” The only authority the Ground Water Districts are seeking is the approval of their Second Mitigation Plan which will provide other compensation to Clear Springs Foods, Inc. associated with the 2.0 cfs of water that the Director has determined the Ground Water Districts’ must mitigate for in the form of a direct payment of lost profit or direct delivery of replacement fish. The issue of whether payment of money or delivery of replacement fish, in addition to CREP acres and conversions, adequately compensates Clear Springs Foods, Inc. is a matter solely between the Ground Water Districts and Clear Springs Foods, Inc.. It does not involve any statutory right, claim or interest by the Surface Water Coalition, the Thousand Springs Water Users’ Association, Inc., Blue Lakes Trout Farms, Inc. or Rangen, Inc.

3. Close examination of the substance of the entities’ protests, renders it clear that they have no substantial right, claim or interest in this proceeding.

- a. The Surface Water Coalition claims that the approval of the plan would constitute an unconstitutional taking and would set an unlawful precedent. Surface Water Coalition’s Protest at 2.
- b. The Thousand Springs Water Users Association, Inc. claims that approval of the plan would “further injure our property rights and would set precedence for all water users.” Thousand Springs Water Users Association, Inc. letter, paragraph 2.
- c. Rangen’s Protest does not really assert any interest that Rangen may have but simply states that the Second Mitigation plan does not comply with CM Rule 43, that the monetary compensation plan as proposed does not compensate for cumulative and

ongoing effect of pumping and that the Director does not have the authority to approve such a plan. Rangen's Protest at 4.

- d. Blue Lakes Trout Farm, Inc. does not assert any interest and merely states it is filing a protest "in order to submit briefing". Blue Lakes Protest at 2.

These generalized interests are not enough to qualify as protestants and are nearly identical to the issues raised by Clear Springs Foods, Inc. in its protest. Furthermore, these generalized or non-existent interests show that these entities do not have legal standing to participate in this matter either.

4. Any party who seeks to participate in a legal proceeding must demonstrate legal standing in the proceeding before the party's participation may be granted. *Van Valkenberg v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). "To satisfy the case or controversy requirement of standing, a litigant must 'allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.'" *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996). "This requires a showing of a 'distinct palpable injury' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" *Id.* The Surface Water Coalition, the Thousand Springs Water Users' Association, Inc., Blue Lakes Trout Farms, Inc. or Rangen, Inc. do not have a "distinct, palpable injury" to allow them to participate in this proceeding. Hence, they do not have standing to participate in this matter. In order to participate in the matter, the parties are required to "demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157, 1159 (2002). None of these entities' claimed interests demonstrate injury that would be redressed by the outcome of the proceeding. In fact, because mitigation plans are fact specific, it is unlikely that any precedent will be set by the Director's consideration and ruling in this case.

5. Not only should the protests be dismissed with prejudice, the protests should not be considered petitions to intervene because the entities do not meet the standard set forth in Rule 353. The Department's Procedural Rule 353 governs petitions to intervene and states:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

(emphasis added.) In this case, as stated previously, the only interest asserted by the Surface Water Coalition, the Thousand Springs Water Users' Association, Inc., Blue Lakes Trout Farms, Inc. and Rangen, Inc. is that the approval of the Second Mitigation Plan may set "unlawful" or "dangerous" precedent. This is not a direct and substantial interest. Furthermore, allowing these entities to join the proceeding will unduly broaden the issue because any method to determine adequate monetary compensation will be fact specific and these entities simply have no interest in what might be adequate compensation to Clear Springs Foods, Inc. In addition, Clear Springs Foods Inc. is represented by competent and experienced counsel who also represent all of the Surface Water Coalition entities. The interest of Clear Springs Foods, Inc. in objecting to the Second Mitigation Plan is nearly identical to the issues and interests raised by the other protestants who actually listed issues. Hence, Clear Springs Foods, Inc. will be able to adequately represent the interest of all existing protestants. Thus, neither the Surface Water Coalition, the Thousand Springs Water Users' Association, Inc., Blue Lakes Trout Farms, Inc. nor Rangen, Inc. can meet the standard for intervention set forth in Rule 353 and therefore they should be dismissed from this case.

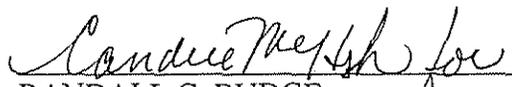
CONCLUSION

With the exception of Clear Springs Foods, Inc, all protests should be stricken and dismissed with prejudice. The Surface Water Coalition, the Thousand Springs Water Users' Association, Inc., Blue Lakes Trout Farms, Inc. and Rangen, Inc. should not be permitted to participate in any manner in this proceeding. The issues related to the Ground Water Districts Second Mitigation Plan proposing "other compensation" under CM Rule 43 to Clear Springs Foods, Inc. in the form of monetary compensation or the delivery of replacement fish is fact specific and relevant only to Clear Springs' Snake River Farm facility and its associated water rights. Allowing the other four protestants to participate would clearly violate the Department's Rules 155 and 353, unduly burden the record, and unnecessarily broaden the narrow issues presented.

RESPECTFULLY SUBMITTED

DATED this 2th day of March, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


RANDALL C. BUDGE
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CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of March, 2009, 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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