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ATTORNEYS FOR THE GROUND WATER DISTRICTS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-4103A, 36-4103B and 36-7148 (Snake River Farm)	Docket No. CM-MP-2009-004 **GROUND WATER DISTRICTS' MOTION TO STRIKE TESTIMONY AND EVIDENCE AND MOTION IN LIMINE**
IN THE MATTER OF THE THIRD MITIGATION PLAN (OVER-THE-RIM) OF THE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS TO PROVIDE REPLACEMENT WATER FOR CLEAR SPRINGS SNAKE RIVER FARM (Water District Nos. 130 and 140)	**(Over-the-Rim Mitigation Plan)**

North Snake Ground Water District and Magic Valley Ground Water District ("Ground Water Districts") by the through counsel and on behalf of their respective members hereby move the Hearing Officer to strike certain Rebuttal Testimony, Reports and exhibits submitted by Clear Springs Foods, Inc. ("Clear Springs") witnesses Larry W. Cope, John R. MacMillian and Charles Brockway as irrelevant and outside of the ordered scope of the hearing as set forth in the *Scheduling Order dated August 2009* ("Scheduling Order") pertaining to approval of the *Third*

Mitigation Plan ("Over-the-Rim") of North Snake Ground Water District and Magic Valley Ground Water District ("OTR Plan"). This Motion also requests that the Supplemental Testimony of Randy MacMillan and Larry Cope and Exhibits filed on November 20, 2009 be struck for the same reasons and because it was untimely and in violation of the Scheduling Order.

Additionally, the Ground Water Districts by this Motion in Limine request that Clear Springs be limited at the hearing to presenting only testimony and evidence that is relevant and within the scope of the Scheduling Order based on the same grounds as the Motion to Strike as set forth below.

The Ground Water Districts respectfully request a ruling on these important evidentiary matters prior to the commencement of the December 7, 2009 Hearing. Because of the unexpected testimony from Clear Springs' witnesses in their rebuttal testimony it became necessary for the Ground Water Districts to address many of the issues raised by Clear Springs which are considered beyond the scope of this proceeding and/or irrelevant. To the extent this Motion is granted the Ground Water Districts' rebuttal testimony on those issues can also be disregarded and redacted from the record.

I. BACKGROUND

At the August 26, 2009 Status and Scheduling Conference on the OTR Plan, the parties discussed the scope of the hearing that is currently set to begin December 7, 2009. At first, Clear Springs requested that a hearing be set on all issues contained in its protest and in its March 17, 2009 letter submitted in response to the OTR Plan, including issues previously decided by the Director which still remain pending on appeal to the District Court such as the "trim-line," determinations of material injury, use of the Eastern Snake Plain Aquifer Model ("ESPAM"), seasonal impacts of pumping and injury to other rights. The Ground Water Districts objected and asserted the hearing must be limited to the pending OTR Plan, not matters previously decided and pending on appeal.

After much discussion the decision was made that there would be two phases for the hearing. This decision was set forth in the Hearing Officer's Scheduling Order as follows:

> Hearing on the mitigation plan and the objections will be staged, determining first whether the proposal for over the rim delivery is an acceptable method to mitigate the obligations of the junior ground water users. The remaining issues raised by the objections shall be addressed as and if they become relevant to a final determination. Hearing on the proposal for over the rim delivery shall be held from December 7, 2009, through December 11, 2009 commencing at 8:00 a.m. And proceeding at such hours as necessary to complete the presentation of evidence on this phase of the case within the time allocated.

The parties proceeded to set the remaining schedule with the scope of the hearing limited to whether the OTR Plan was an acceptable approach, could be engineered to provide the quantity of water in a sufficiently reliable manner and could produce the quality of water needed in order to satisfy the current mitigation obligation of the Ground Water Districts. For efficiency, the Scheduling Order in Paragraph 5 did allow expanded discovery of Department employees on the remaining issues which Clear Springs pursued through depositions, to wit: "[d]iscovery may

proceed as to the Idaho Department of Water Resources' employees on remaining issues beyond those to be addressed at the hearing commencing December 7, 2009." In addition to the Scheduling Order, the limited scope of the December 7, 2009 hearing was confirmed by Counsel for Clear Springs in an email dated September 1, 2009, Mr. Simpson states: "I wanted to confirm that the limited scope of the December 7, 2009 hearing is to determine viability of Part (b)(the over-the-rim pipeline) of the GWDs' March 2009 Replacement Water/Mitigation Plan. Parts (a) and (c) may be the subject of a future hearing along with the other issues raised by Clear Springs." Counsel for the Ground Water Districts responded "Yes" . A copy of this email exchange is attached.

On September 11, 2009, the Ground Water Districts timely pre-filed direct opening testimony from five expert witnesses: Dr. Charles Brendecke, Terry Scanlan, Robert Hardgrove, Ray Eldridge, and Anthonie Schuur. The Ground Water Districts' direct testimony dealt with general hydrogeology of the area around Snake River Farm, the source of water proposed to be used for the OTR Plan, the viability of the OTR Plan to be able to be engineered and constructed, the quality of water found in the wells and the spring source and the ability to deliver the proper quantity and quality of water to Clear Springs Snake River Farm facility that would satisfy Clear Springs under the current Orders.

On October 30, 2009, Clear Springs filed its pre-filed rebuttal testimony, reports and exhibits of Dr. Charles Brockway, Dr. John R. MacMillan, and Mr. Larry Cope attempting to present substantial evidence that clearly violated the limited scope set forth in the Scheduling Order, purports to improperly re-litigate issues pending on appeal and presented considerable evidence that is clearly irrelevant and immaterial.

II. MOTION TO STRIKE

This Motion to Strike seeks to strike all Prefiled Testimony, Reports and Exhibits of Clear Springs' witnesses that is beyond the scope of this hearing and/or irrelevant to the approval of the Ground Water Districts' OTR Plan and to limit Clear Springs testimony at the hearing accordingly. The pre-filed testimony, reports and exhibits of Clear Springs' witnesses is replete with irrelevant and immaterial evidence which is too extensive to ferret out for purposes of this motion. Accordingly the improper evidence which the Motion seeks to strike and preclude at hearing can be generally categorized in the following areas:

1. prior mitigation plans submitted by the Ground Water Districts that are not at issue in this case;
2. use of the Eastern Snake Plain Aquifer Model ("ESPAM");
3. determination of spring percentages;
4. ESPAM uncertainty;
5. use of a trimline;
6. calculation of the mitigation requirement;
7. Clear Springs' marketing plans, brand image and advertising campaigns; and
8. Clear Springs' unsubstantiated revenues, profitability, business and asset values.

Any and all Clear Springs' testimony, reports and exhibits relating to Items 1-6 are in regards to issues previously decided by the Director which remain pending on appeal to the District Court and are beyond the defined scope of the hearing as set forth in the Scheduling Order. Testimony, reports and exhibits pertaining to items 7-8 are clearly irrelevant and

immaterial to approval of the OTR Plan under the Conjunctive Management Rules ("CM Rules") as a matter of law.

A. TESTIMONY AND EVIDENCE PRESENTED BY DR. BROCKWAY THAT IS IRRELEVANT, OUTSIDE THE SCOPE OF THE DECEMBER 7, 2009 HEARING SHOULD BE STRUCK

On page 3 of his Rebuttal Report, Dr. Brockway incorporates his November 21, 2008 Report which was submitted in response to a prior mitigation proceeding wherein the Ground Water Districts proposed to satisfy Clear Springs with a direct pump back of its effluent water or through the development of nearby springs or a well with direct delivery to Clear Springs at Snake River Farm. That mitigation plan has since been withdrawn and is not part of this proceeding. Furthermore, an appeal of questions relating to that mitigation plan is before the District Court. As acknowledged by counsel for Clear Springs at the August 26, 2008 Status and Scheduling Conference that prior plan submitted by the Ground Water Districts did not propose to deliver the water over-the-rim. As such, information in Mr. Brockway's November 21, 2008 report is irrelevant and should not be considered as part of this hearing.

On page 10 of his Rebuttal Report, Dr. Brockway raises the question as to whether or not the ESPAM is the best tool for estimating the percentage of spring flow. However, as this Hearing Officer is aware, the percentage of spring flow and the use of the ESPAM is currently on appeal and has already been discussed and determined to be the best available science in the previous delivery call hearing. Furthermore, Dr. Brockway also proposes that a new methodology be used to simulate spring flow relationships with the groundwater levels. However, both of these areas of testimony and evidence are outside the scope of the December 7, 2009 hearing and therefore should be struck as irrelevant and outside the scope of the hearing. Thus, the Ground Water Districts request that starting on page 10, at the paragraph beginning

with the 043.03.E and continuing on to page 11 through the first full paragraph on that page, ending at 043.03.H, be struck.

Dr. Brockway on page 16 of his Rebuttal Report also discusses in Item J, "Method of Calculation of Mitigation Requirement." The Mitigation Requirement has already been determined under prior orders and until the conclusions in those prior orders are revisited, it is not proper to consider this testimony and evidence. Thus, the paragraphs that follow on page 16 should be struck as outside the scope of this hearing and irrelevant.

Beginning on page 17 of his Rebuttal Report, Dr. Brockway includes an evaluation of the proposed water right transfer. While the information is arguably relevant to a water right transfer proceeding, the information is not relevant to the inquiry about whether or not the OTR Plan is a practical, acceptable, and appropriate method of mitigation for Clear Springs. Therefore, this testimony should be excluded or should be considered only to provide general background information relating the need to secure an approved transfer as a part of the implementation process once the OTR Plan is approved. An entire evaluation of the proposed water right transfer is not a requirement under CM Rule 43, is beyond the subject of the December 7, 2009 hearing and a matter for a separate administrative proceeding

On page 19 and continuing through page 21, of his Rebuttal Report, Dr. Brockway provides in subsection O "Summary and Conclusions."; however, many of these summaries and conclusions are on matters outside the scope of the December 7, 2009 hearing and should be struck: conclusions no. 9 (amount of mitigation owed), 10 (spring percentage), 11 (ESPAM calibration), 12 (spring percentage), 13 (relationship between groundwater levels and spring discharge), 14 (ESPAM model calibration), 16 (ESPAM uncertainty), and 17 (seasonal impacts and injury). Dr. Brockway's appendices relating to these matters should also be struck:

Appendix 2 (Alternate Procedure for Spring Impact Analysis Regression Analyses); Appendix 5 (IDWR Transfer Guideline Memo).

B. TESTIMONY AND EVIDENCE PRESENTED BY DR. MACMILLAN AND MR. COPE IS IRRELEVANT AND SHOULD BE STRUCK

The question of whether or not the OTR Plan is a practical, acceptable and viable means of mitigation for Clear Springs centers around the question of whether it can produce the quality and quantity of water necessary for use at Clear Springs' Snake River Farm facility. However, in the *Expert Report of John R. MacMillan, Ph.D., Vice President of Research and Environmental Affairs, Clear Springs, Foods, Inc.* dated October 30, 2009 ("Expert Report") and in the Larry W. Cope Testimony ("Cope Testimony"), Clear Springs has gone far beyond the scope of this proceeding as defined in the Scheduling Order, ignored the criteria under CM Rule 43 and attempted to burden and tarnish the record by filing testimony, reports and evidence that are irrelevant to the questions involved in this water rights mitigation plan hearing. Apparently recognizing the validity of the OTR Plan and the inherent weakness in their objections based on water quantity, quality or temperature (since the well water is admittedly the same as the spring water), Clear Springs purports to create a new and previously undisclosed defense based upon an unknown alleged future impact on their brand name, image and business marketing and advertising practices which they speculate will cause some unknown future problem. In sum, Clear Springs' witnesses somehow claim that the "well water" from the same source that is the same chemically and of the same temperature as the "spring water" which Clear Springs' witnesses admit will raise trout of the same size and quality somehow will impair their brand name and image. This argument -- that only spring water can maintain their brand and image -- is undermined by their own admissions that the water right source of water for Clear Springs' Box Canyon facility, their largest production facility which produces 43% of their fresh fish, is

Box Canyon Creek. Further, trout imported from Clear Springs' Chilean and Argentine partners are raised from river water and some products may be imported from the Mekong River. Cope Deposition p.46:11-47:18; p. 48:4-49:12, MacMillian Deposition p.137:10-20. Nothing in the criteria under CM Rule 43 renders Clear Springs' image, advertising, marketing and business plans relevant to the approval of the OTR Plan and therefore must be stricken from the record.

1. Dr. MacMillan's Expert Report

On page 5 of his Expert Report, Dr. MacMillan specifically objects to the OTR Plan because it would "damage the marketability of Rainbow Trout produced at Clear Springs Foods." The details of his testimony in support of that objection is then set forth on pages 7 through 18, and discusses such matters as Clear Springs' historic marketing that he claims requires that Clear Springs only use "spring" water that is "natural;" and, that the OTR Plan should be rejected because it does not deliver natural, spring water. Because inquiries as to how Clear Springs chooses to market its fish are not relevant to this hearing and the fact that Clear Springs may choose to not use the water because it may impact their image is simply not relevant, the Ground Water Districts request that references in Dr. MacMillan's testimony from pages 7 through 18, beginning at page 7 at line 155, ending at page 18, line 484 be struck as irrelevant. Further, the exhibits provided by Dr. MacMillan relating to Clear Springs' marketing efforts and image should likewise be struck; these exhibits include: Exhibit 3 (marketing postcard from Clear Springs via a DVD), Exhibit 4 (marketing presentation), Exhibit 5 (marketing brochure), Exhibit 6 (marketing brochure), and Exhibit 7 (marketing brochure).

In addition, Dr. MacMillan attached to his Expert Report as Exhibit 2 a report previously filed in response to a mitigation plan submitted by the Ground Water Districts wherein the Ground Water Districts proposed to satisfy Clear Springs with a direct pump back of its effluent

water or through the development of nearby springs or a well with direct delivery to Snake River Farm. This mitigation plan has since been withdrawn. The prior mitigation plan did not provide for an over-the-rim delivery of groundwater to Clear Springs.

On page 21 of Exhibit 2, Dr. MacMillan begins to discuss recirculation which is not a proposal under this OTR Plan. Therefore, pages 21, line 625 through page 36, line 1075 should be struck as irrelevant. Further, Dr. MacMillan in Exhibit 2 discusses water owned by Clear Lake Country Club on pages 36 and 37 which is not an issue or even mentioned in the Plan and thus pages 36 and 37 should be struck as irrelevant. Dr. MacMillan also discusses on page 38, lines 1151-1157, that any water where excessive plant and algae growth occurs cannot be used to mitigate for Clear Springs, yet, the wells proposed to be used in this OTR Plan have no such issues and Dr. MacMillan's discussion on that point should be struck. Dr. MacMillan's testimony relating to recirculation of waste water in Exhibit 2 on pages 39, line 1158 through page 40 line 1200 should be struck as irrelevant as the groundwater wells are not "recirculated" water and there is no proposal in the Plan to re-circulate water.

On page 41 of Exhibit 2, Dr. MacMillan again discusses recirculation of waste water as being a problem and continues to discuss that topic through page 57. Because the OTR Plan does not propose to recirculate any waste water that information should be struck as irrelevant. Beginning on page 57, line 1722 and continuing through page 60, line 1810, Dr. MacMillan provides testimony that discusses specifically the waste water and the development of groundwater from a well *below* the rim; because neither of these options are currently presented in the Over the Rim Plan this testimony should be struck as irrelevant.

Starting on page 62, line 1866, of Exhibit 2, Dr. MacMillan discusses the process of drilling a new well *below* the rim as a disruption and compromising fish growth and health.

However, the OTR Plan does not propose to drill a new well below the rim and therefore this portion on page 62 should be struck as irrelevant.

Finally on page 63 under paragraph IX, starting on line 1903, of Exhibit 2, Dr. MacMillan again discusses recirculation which is not a part of the OTR Plan and thus should be struck as irrelevant.

There are simply too many references to Clear Springs' business and business practices interspersed throughout Dr. MacMillan's Expert Report to clearly identify them all, but any testimony and exhibits relating thereto should be struck as irrelevant.

2. Larry W. Cope Testimony

Mr. Cope is the president, CEO and Chairman of Clear Springs Food, Inc. His testimony provides information relating to Clear Springs Foods, its history and corporate value. His testimony focuses primarily on the company's value, image, and brand name. Starting on page 3, under subparagraph IV, line 104 of his testimony, and going through to page 8, Mr. Cope details that the OTR Plan is not acceptable to Clear Springs because it would compromise Clear Springs' brand image, value of the company, production, sales, profitability, and would not be natural spring water as required by Clear Springs' business and marketing decisions. However, these internal business decisions are not a relevant inquiry at the hearing to determine whether the OTR Plan is an acceptable method of mitigation; as such, Mr. Cope's testimony from page 3 line 104 through page 8, line 294 should be struck as irrelevant.

C. THE SUPPLEMENTAL TESTIMONY OF RANDY MACMILLAN AND LARRY COPE IS UNTIMELY AND IRRELEVANT AND SHOULD BE STRUCK.

The Scheduling Order requires that Clear Springs "shall pre-file expert and lay testimony by October 30, 2009." However, late afternoon on Friday, November 20, 2009, some 20 days after

the deadline and after their witnesses had been deposed, Clear Springs filed *Supplemental Testimony of Randy MacMillan and Larry Cope* and attached 15 additional exhibits that were not previously disclosed. The first basis for striking this testimony is that it is untimely and violates the Scheduling Order. Clear Springs had adequate time to provide its testimony and should not now be allowed to slip in additional testimony at this late date. The opportunity for depositions of Dr. MacMillan and Mr. Cope has past and providing this additional testimony is not proper and is unfair to the Ground Water Districts. Further, the testimony and exhibits further expound upon the Clear Springs' reputation, brand image and marketing and as discussed above, are irrelevant to the matters that are set for hearing and should be struck on that basis as well.

III. ARGUMENT

The December 7, 2009 hearing is limited in scope and only to determine whether the OTR Plan of the Ground Water Districts as previously approved by the Director as a replacement water plan on March 26, 2009, is an acceptable method to permanently provide mitigation water directly to Clear Springs at its Snake River Farms facility to comply with the Director's prior Orders to prevent material injury and thus avoid curtailment. That inquiry is to be evaluated under CM Rule 43 and other relevant Idaho law.

Pursuant to the Scheduling Order, the December 7, 2009, hearing was intentionally limited to determine if the Plan is an acceptable method of mitigation and would provide a sufficient quantity and quality of water to allow Clear Springs to use the water for fish propagation. Any testimony and evidence that falls outside of that inquiry should be struck as irrelevant and/or outside the scope of the hearing. The Scheduling Order clearly contemplated that other issues would be addressed "if they become relevant to a final determination," meaning

once the current appeals have been concluded. Accordingly, the evidence submitted by Dr. Brockway that relates to matters outside that scope but may be appropriate at some future hearing, but not now and therefore must be struck for purposes of the December 7, 2009 hearing.

Likewise, any evidence that is not relevant and does not sufficiently relate to the inquiry regarding the viability of the OTR Plan to provide water to Clear Springs at its Snake River Farms facility should be excluded. While the Idaho Rules of Evidence do not specifically apply in this proceeding, they are instructive on what may be considered relevant evidence.

Idaho Rule of Evidence 401 defines relevant evidence to mean "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable, than it would be without the evidence." In this case Clear Springs has offered considerable evidence and testimony relating to Clear Springs' internal business decisions and marketing strategies as a basis to object to the delivery of any water other than "spring" water. These objections are without any basis and should be stricken from the record. Junior groundwater users are not required under the CM Rule 43 to mitigate for the impairment or perceived harm to an advertising or marketing campaign which may theoretically affect Clear Springs' value, productivity, profitability, or sales. From even a cursory review of the "Factors to be Considered" under the governing CM Rule 43 it is abundantly clear that the factors all address various water and hydrologic issues and say nothing at all about business and marketing plans that might derive out of the use of the water. The key inquiry in this matter is whether the OTR Plan provides suitable water for Clear Springs to beneficially use for fish propagation.

If a senior user is allowed to dictate a source of water for reasons other than beneficial use, the senior user would be given the right to ignore Idaho water law and veto the

Department's authority to administer water rights in the public interest and in a manner that is in keeping with the maximum and optimum beneficial use of the water resources of the state. It is important to see Clear Springs' argument for what it is: a simple attempt to thwart every mitigation plan provided by the Ground Water Districts to comply with the Director's Order leaving massive curtailment as the only remedy thus granting Clear Springs its desired monopolization of the resource for aquaculture purposes. In fact, Dr. Brockway in his Expert Report says as much. On page 12 of his Report, Dr. Brockway believes that in order to conserve the resource that the unique characteristics of the resource should be considered and in fact states that "[w]here the resource has a unique attribute which makes it most suitable for particular uses, the resource should be required to be used for that purpose before being used for another purpose." Clear Springs' arguments that it cannot ever use anything other than ESPA "spring" water are simply self-serving arguments that the junior ground water users could never refute. By so doing Clear Springs could effectuate an end-run around the prior orders of this Hearing Officer, the Director and the District Court in applying the CM Rules to Clear Springs delivery call.

Clear Springs' witnesses speculate that using well water would compromise its image although Clear Springs claims what it needs is more water and acknowledges that the extra water could be used to raise more of the same fish, some 30,000 lbs per cfs. [1] Cope Depo. p. 98:14-19 However, Mr. Cope and Dr. MacMillan both admitted in their depositions that even if the OTR

1 The Ground Water Districts dispute that the quantity of water that Clear Springs will get is actually through curtailment of junior groundwater users is a "usable" quantity as is required under the prior appropriation doctrine in Idaho and further disputes the unsubstantiated testimony of Dr. MacMillan and Mr. Cope that Clear Springs could use the water to raise more fish as that evidence was not presented at the delivery call hearing. Further, the Ground Water Users object to the use of this "evidence" in any other future hearing relating to the usability of the water by Clear Springs. However, because the current orders have found that 2-3 cfs is "usable" by Clear Springs, the Ground Water Districts have devised their OTR Plan to comply with those orders and under that presumption without waiving its arguments relating to futile call, monopolization of the resource, beneficial use and full economic development that are pending on appeal.

Plan was approved and the facilities constructed, Clear Springs may not accept the water apparently out of concerns the additional production may be offset by a "tarnished brand image." Cope Depo. p.137:10-20, MacMillan Depo. p.136:13-137:5. Thus, it has become rather obvious that Clear Springs will go to great lengths to defeat the OTR Plan as they have with all prior mitigation plans proposed by the Ground Water Districts. The end result would leave curtailment as the only remedy and the upper hand to Clear Springs, regardless of the outcome of the current appeals. Since Clear Springs does not commit to take any water from the OTR Plan, this proceeding is really about giving Clear Springs the weapon of curtailment to gain control and bargaining position, something it has been unable to achieve in the delivery call proceedings to date.

The OTR Plan provides Clear Springs with water in sufficient quantity and quality to accomplish the beneficial use of raising fish. Any advertising strategy or marketing campaign that Clear Springs determines to make is purely a business decision and cannot define whether the OTR Plan provides suitable water for them to use. Therefore, any testimony and evidence relating to such advertising and marketing strategy and how it may affect Clear Springs' brand image, reputation, profitability, sales, production, and company value is irrelevant and should be struck. Simply stated, these marketing strategies are not closely enough related to the inquiry in this matter and will not assist the trier of fact to determine whether or not the OTR Plan will provide Clear Springs with the quantity (as previously determined to be needed and usable) and quality of water necessary to produce fish. While the question of whether Clear Springs decides to actually take or use the water may be relevant on whether or not a transfer proceeding must occur in order to deliver the water under an approved OTR Plan or before construction of the actual pipeline system is required, its objection to the water based on business and marketing

decisions is not relevant to the issues presented. The hearing in this matter should rely on evidence that is pertinent to whether the OTR Plan can be engineered and constructed in a manner that provides the quantity and quality of water to Clear Springs to raise fish in compliance with the current orders

IV. MOTION IN LIMINE

Any additional evidence or testimony Clear Springs may attempt to present at the Hearing should be limited consistent with the Hearing Officers rulings on the Motion to Strike,

V. CONCLUSION

Based on the foregoing the Ground Water Districts request that the evidence and testimony presented at the December 7, 2009 hearing on this matter be limited to that evidence and testimony that is related to whether the OTR Plan is an acceptable and proper method of mitigation and can deliver the quantity of water within suitable water quality parameters for use by Clear Springs at its Snake River Farms facility. As such, the testimony and evidence presented by Dr. Brockway, Dr. MacMillan and Mr. Cope that falls outside of that scope should be struck as irrelevant and outside the scope of the hearing. Further, evidence and testimony relating to Clear Springs' reputation, brand image, company value and marketing as set forth above be struck as irrelevant. Finally, the Supplemental Testimony be struck not only as irrelevant but as untimely.

DATED this 30th day of November, 2009.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of November, 2009, the foregoing, was served by email to those with emails and by U.S. Mail postage prepaid to the following:

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From: Randy Budge
Sent: Wednesday, September 02, 2009 8:50 AM
To: John Simpson; Travis Thompson
Cc: Randy Budge; Candice M. McHugh
Subject: RE: Snake River Farms Mitigation Hearing

John,

We agree.

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From: John Simpson [mailto:jks@idahowaters.com]
Sent: Tuesday, September 01, 2009 10:56 AM
To: Randy Budge; Candice M. McHugh
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Counsel:

In reviewing the GWDs filings in March, I wanted to confirm that the limited scope of the December 7, 2009 hearing is to determine viability of Part (b)(the over-the-rim pipeline) of the GWDs' March 2009 Replacement Water/Mitigation Plan. Parts (a) and (c) may be the subject of a future hearing along with the other issues raised by Clear Springs.

Thank you for your attention to this matter.

John