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

Attorneys for Blue Lakes Trout Farm, Inc.

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

Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-07210, 36-07427, AND 36-02356A **Blue Lakes Delivery Call**	**SPRING USERS' JOINT RESPONSE TO IGWA'S MOTION IN LIMINE**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM) **Clear Springs, Snake River Farm Delivery Call**	

COME NOW, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively referred to as "Spring Users"), by and through counsel of record, and hereby respond to the Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Motion In Limine*, filed in this matter on November 20, 2007. For the following reasons, IGWA's Motion should be denied.

INTRODUCTION

IGWA's *Motion in Limine* seeks to prevent representatives of Blue Lakes and Clear Springs from explaining their fish rearing operations, their water use and their water shortages. IGWA appears particularly intent on precluding Spring Users testimony verifying that they will put additional water to beneficial use and will be able to increase their production of fish. IGWA also seeks to preclude general, background testimony regarding the development of the aquaculture industry in the Thousand Springs area and markets for aquaculture products. IGWA argues that such testimony and evidence are precluded: (1) as expert testimony under IRE 701(c), (2) by the Hearing Officer's *Order Re Discovery*, and (3) by the Spring Users' failure to disclose such information as required by the *Order Approving Stipulation and Joint Motion for Rescheduling Hearing* ("*Scheduling Order*"). Each of these arguments is addressed below.

The heat of this evidentiary dispute should not dim the light upon the issues before the Hearing Officer in this proceeding. The SRBA has provided the foundation for administration by decreeing the water rights and establishing the hydraulic connection between the ESPA and the Spring Users' water rights. The Director has employed the best available technical tools and information available to IDWR to determine the extent of the connection, and find that ground water pumping reduces the Spring Users' water supplies. The Director applied the Conjunctive Management Rules (CMRs) to find material injury, he ordered the regulation of junior ground water rights as required by the CMRs, and he provided the ground water users with three mitigation alternatives.

To avoid administration, IGWA has the burden to produce clear and convincing evidence to rebut the Director's determination that junior ground water pumping injures the Spring Users' water rights. The pre-filed testimony and depositions of IGWA's witnesses shows that IGWA

will not meet this burden. IGWA's testimony and evidence do not show that administration of junior ground water rights would be futile. To the extent that IGWA turns its attention to the status of the Spring Users' water rights and needs to avoid administration of junior ground water rights, the focus must be "post-adjudication" factors demonstrating forfeiture, waste, or that the Spring Users will not put the water to beneficial use. IGWA does not present any evidence to support such attacks, or any basis to modify the Director's findings and conclusions that the Spring Users' are employing reasonable means of diversion. Just as the ground water users were precluded from attempting in the SRBA introduce post-trial evidence of "seasonal variations" to reduce the Spring Users' water rights, IGWA is precluded in this proceeding from attempting use the same evidence to reduce the Spring Users' water rights for purposes of administration. *See Steenson Third Aff*, Ex. H, p. 23-25. The Spring Users' exercise of their decreed senior water rights by calling for the delivery of water does not provide a new forum for IGWA or the Director to redetermine the nature and extent of the Spring Users' water rights.

1. **IRE 701(c) does not preclude the Spring Users From Presenting Testimony and Evidence regarding their operations, water use, or their industry**

IGWA asserts that descriptions of the Spring Users' water rights, water measurement methods, diversion and conveyance structures, facility operations, use of water and fish rearing methods and requirements, constitute "testimony and exhibits based on scientific, technical, and specialized knowledge, skill experience, training or education." *Motion in Limine*, p. 6. IGWA asserts that Spring Users' officers and employees are precluded from providing such testimony and exhibits by IRE 701(c), which provides that lay witness "testimony in the form of *opinions or inferences* is limited to those *opinions and inferences* which are . . . (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." There are

several flaws in IGWA's reliance upon IRE 701(c) to preclude the Spring Users' lay witnesses from testifying about their operations.

First, IDWR's Rules of Procedure specifically provide for the receipt of evidence "commonly relied upon by prudent persons in the conduct of their affairs," notwithstanding objections such as IGWA's based on the Idaho Rules of Evidence:

> **600. RULES OF EVIDENCE -- EVALUATION OF EVIDENCE.**
> Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600.

Second, explanations of how Blue Lakes and Clear Springs use water to raise fish, and about the aquaculture industry and aquaculture market do not constitute "opinions or inferences" under IRE 701. The Spring Users included information on aquaculture in Idaho and Clear Springs' operations (Ex. A) to provide the Hearing Officer with some historical background on the industry and Clear Springs' operations. General information about the global seafood market and aquaculture's role in that market (Ex. B) was also provided as basic background information to assist the Hearing Officer. Exhibit D provides a general overview of the importance of water quality to rainbow trout aquaculture, as well as Clear Springs' investigations into alternatives to "flow through" aquaculture, and how the use of a recirculating aquaculture system, a pump-back system, and the use of irrigation return flows are not feasible. The information in these exhibits is not submitted as an "opinion or inference" by a lay witness under IRE 701, and is not

presented as "facts or data underlying expert opinion" in this matter. It is simply factual background information to assist the Hearing Officer.

Exhibit C to the Spring Users' Pre-hearing Memorandum, providing an "overview and description of water collection and water distribution at [Clear Springs'] Snake River Farm" is not lay witness "opinion or inference", it represents a written description of the facts about how water is diverted and used at the Snake River Farm facility. Factual testimony from Randy MacMillan about this facility and how water is diverted and used is based upon his personal knowledge and experience with the company. The document, including the map, is part of the Department's agency record on the July 8, 2005 Order regarding Clear Springs' water delivery call. SRF 695-699.

Similarly, the description of Clear Springs' "vertical integration" is not "lay witness opinion or inference", it is fact. Clear Springs' witnesses, Larry Cope and Randy MacMillan, officers of the company with personal knowledge and experience about these matters, will provide testimony about Clear Springs' operations which includes the "vertical integration" of the company. How fish are raised at the Snake River Farms facility, harvested, processed, and delivered is fact testimony to assist the Hearing Officer in understanding Clear Springs' operations, not lay witness "opinion or inference".

Third, subsection c of IRE 701 was added in 2002, conforming to the addition of the same subsection to Federal Rule of Evidence 701 in 2000. Regarding a similar motion in limine to preclude testimony of company officers and employees, the Eleventh Circuit Court of Appeals referenced the Advisory Committee Notes to amended IRE 701 :

> 'most courts have permitted [owners and officers] to testify . . . without the necessity of qualifying the witness as an . . . expert . Such opinion testimony is admitted not because of experience, training or specialized knowledge within the

> realm of an expert, but because of *the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.'*

Tampa Bay Shipbuilding & Repair v. Cedar Shipping, 320 F.3d 1213, 1222 (11th Cir., 2003).

The Blue Lakes' and Clear Springs' officers who will testify at hearing have "particularized knowledge . . . by virtue of their positions in the business[es]" regarding their respective facility's diversion, measurement and use of water, fish rearing methods, and the markets for their products. These are among the fundamental aspects of what they do for a living.

Finally, IDWR regularly requires or receives sworn information from non-expert water right applicants, claimants and owners regarding their proposed or existing diversion and use of water in the form of narrative explanations, plans, and maps. Water right applicants are required to describe the "proposed method of diversion, conveyance system and system for distributing and using the water." IDWR's *Water Appropriation Rules*, IDAPA 37.03.08.035.03.ix; I.C. § 42-202(4). When submitting proof of beneficial use in order to obtain a water right license, the permit holder is required to "submit a statement that he has used such water for the beneficial purpose allowed by the permit," including "the extent of the use." I.C. § 42-217. Similarly "[a]ny person, entitled to the use of water" who wishes to change an element of the water right is required to submit a transfer application describing the proposed change[s]. I.C. § 42-222(1).

Testimony of non-expert water right owners and their officers/employees regarding their diversion and use of water is regularly received by IDWR in contested case proceedings and by the SRBA District Court subcases. IGWA knows this, judging by the following pre-filed testimony of IGWA's lay, farmer witnesses. They testify, for example that they are " familiar with all aspects of farming, including the methods of irrigation and the value of different

agricultural land and crops in the area of the Ground Water Districts. *Stevenson*, p. 4, lns. 8-10; *Carlquist*, p. 4, lns. 9-12. They then give opinion testimony that is clearly beyond the scope of their own farming practices and experience, opining that the "proposed curtailments would result in immediate and irreparable harm and injury to the farms whose water rights are subject to curtailment as well as to dairy farmers, food processors, warehouses, cities, commercial business and the economy of the area in general." *Stevenson*, p. 11; *Carlquist*, p. 11. They estimate the loss of gross revenue to ESPA farmers, and speculate about losses that will be incurred by "lenders, suppliers and other businesses and employees." *Id.* They then opine that it is not "reasonable" to impose such hardships on ESPA ground water users. *Stevenson*, p. 12; *Carlquist*, p. 12. In light of this testimony, IGWA's objections to Spring Users' testimony regarding their own aquaculture markets is, at best, anomalous.

2. **The "Facility Volume" Subcases in the SRBA**

Examples of lay witness testimony regarding the use of water by fish hatcheries of particular significance to these proceedings occurred in the various SRBA subcases on IDWR's recommendations that decrees of Blue Lakes', Clear Springs' and other aquaculture water rights include a quantification of "facility volume." There were several trials on objections to the Director's proposed inclusion of facility volume. In each subcase, IDWR filed a report to explain its reasons for including facility volume in the water rights. *Steenson Third Aff.*, Ex. C. Further defining the quantity element and limiting the mitigation junior water right holders might be required to provide in the event of a water delivery call were among IDWR's reasons. *Id.*, Reports in Blue Lakes' and Clear Springs' subcases, p. 4. At trial in their respective subcases, Blue Lakes and Clear Springs each presented testimony of their managers/employees to explain the diversion and use of water. *Id.*, Ex. D, *NSGWD Reply Brief in Support of Motion*

to Alter or Amend, p. 2, Ex. A; Ex. E, *NSGWD Brief in Support of Notice of Challenge (Consolidated Issues)*, p. 6. Each of the three SRBA Special Masters in the facility volume subcases rejected IDWR's proposed inclusion of facility volume.

The North Snake Ground Water District (NSGWD, a party to this proceeding and one of the ground water districts IGWA represents in this proceeding) did not attempt to participate in any of the facility volume subcases until after the Special Masters' issued their decisions. NSGWD filed motions to alter or amend, supported by the affidavit of a Texas fish propagator to explain the relationship between increased facility size, water volumes and production. *Id.*, Ex. E, p. 14, Ex. F. IGWA argued that diversion rate and volume are not adequate to define the quantities of the water rights, and that facility volume, a subordination provision, or some other legal means was necessary to protect junior ground water users from increased mitigation obligations, principally the payment of compensation, in the event Blue Lakes, Clear Springs and the other aquaculture water right holders made water delivery calls. *Id.*, Ex. E, p. 4.

NSGWD's briefing in support of its *Motion to Alter and Amend* in the Blue Lakes' facility volume subcase relies upon the trial testimony of Blue Lakes' lay witness to explain the obvious relationship between water supplies and production under the heading **"Larger Facilities Use More Water and Produce More Fish."**

> Blue Lakes further refers to the testimony of its witness James E. Parsons as confirming that, 'Blue Lakes' production is dependent upon the rate of flow, not the size of the facility.' *Blue Lakes' June 5, 1998 Brief*, at 9. In all of Mr. Parsons' testimony, there is actually only one question concerning the relationship between facility volume and production:
>
> > Q. We talked about this morning with Mr. Tuthill, you were present, asked him whether production was based on the amount of water available as a diversion rate and diversion volume or the size of the facilities. And the memo that we

> looked at seems to suggest that it is in fact based on the amount of water and not the size of the facilities.
>
> Would you agree with that conclusion?
>
> A. I would. Typically we estimate production based on pounds that we can rear per cubic feet per second of water. So on a flow-rate basis.

September 4, 1997 Trial Transcript, pp. 205-206, LL. 21-6 (attached hereto as Exhibit A). Here, Mr. Parsons states that fish production is usually described in terms of pounds per cubic feet per second of water. However, his response does not specifically exclude a relationship between production and facility size.

One would expect a relationship among facility size, the amount of water used, and the rate of production. It only makes sense that a larger facility would require the use of more water and be able to produce more fish. Thus, fish production is not necessarily limited by the quantity of water rather than the size of the facilities. There is a relationship between the size of the facility and the amount of water used. One would expect that larger facilities would require more water and be able to produce more fish.

Id., Ex. D, p. 2-3 (emphasis added).

Each of the Special Masters denied NSGWD's motions to alter or amend. See *id.*, Ex. E, p. 16, 21, 29. The facility volume subcases were consolidated for purposes of NSGWD's *Notice of Challenge* of the Special Masters' decisions before the SRBA Presiding Judge Wood. In its briefing in support of its *Notice of Challenge* NSGWD, again relied upon the "Affidavit of Brett Rowley, a fish propagation operator in Texas" to explain

> that an increase in fish propagation facility size 'generally is associated with the use of additional water to operate additional facility volume.' *Affidavit of Brett Rowley*, at 2. Mr. Rowley's affidavit further noted that: 'Increases in facility volume size generally are associated with water flow increases because it takes additional water to fill up the additional volume and maintain water velocities, and also because increases in facility volume generally are undertaken to increase fish production. Increase water flows are necessary to provide adequate dissolved oxygen and flush out the additional quantity of fish wastes that are typically associated with increases in fish production.' *Id.*, at 2-3. Mr. Rowley's affidavit confirmed the connection between facility volume increases and water usage described in David Tuthill's affidavit and testimony. 'With increased facility

> volume and the generally increased levels of fish production associated with enlarged facilities, greater flow rates are required on average to maintain acceptable conditions in the raceways and ponds.' *Id.*, at 3.

Id., Ex. E, p. 14.

> The Affidavit of Brett Rowley provided the testimony of a Texas fish propagator unassociated with the subject fish propagation facilities. His testimony established the simple proposition that a large fish tank typically requires more water than a small fish tank.

Id., Ex. F, p. 4.

> Common sense indicates that a large fish tank requires more water for successful operation than a small fish bowl.

Id., p. 7.

Presiding Judge Wood denied NSGWD's *Notice of Challenge* on substantive and procedural grounds in his *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*. *Id.*, Ex. H.

NSGWD's *Motion to Alter or Amend* and *Notice Challenge*, demonstrate that fish hatchery officers, managers, employees need not be identified or qualified as experts to present testimony and evidence regarding their facility operations, water use, and, particularly, the common sense recognition that, with more water, fish hatcheries are able to raise more fish.

3. **The Scope of the Protective Order**

IGWA mischaracterizes the Hearing Officer's *Order Re Discovery* as precluding "all discovery relating to the Spring Users' facilities, measuring devices, maps, plants and the like." *IGWA Motion in Limine*, p. 4. IGWA suggests that the Order precludes all "'production records', 'spring construction and improvements', 'collection systems', 'diversion facilities', 'measuring devices', ' maps'". *Id.*, p. 9. The scope of the Order is clear: "Discovery [into these

matters] is limited to information at the time of and following adjudication." The Order allows discovery of pre-decree "spring discharge records."

The *Order Re Discovery* is based on the permissible scope of inquiry in this proceeding. SRBA decrees are "conclusive as to the nature and extent of all water rights." I.C. § 42-1420. The SRBA provides IDWR and water right owners with the opportunity to present facts and issues concerning the pre-adjudication development and use of water rights claimed in the SRBA. Water rights that have been decreed by the SRBA district court have been investigated and recommended by IDWR. I.C. §§ 42-1410, -1411. Any party to the SRBA has the opportunity to object to IDWR's recommendations, and to have their objection(s) resolved through a hearing. I.C. § 42-1412. IDWR's recommendations and the SRBA district court's decrees are required by statute to set forth the elements of the water rights and "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(j); I.C. 42–1412(6).

SRBA decrees establish the basis or starting point for IDWR's administration of water rights pursuant to chapter 6, Title 42 of the Idaho Code and IDWR's *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11). When IDWR administers water rights, the burden is not on the senior to re-prove its adjudicated right(s). *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 154 P.3d 433 at 448-449 (2007). "The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* The burden is on the junior to prove that the senior will not put the water to beneficial use, does not need the water, or will waste it.

Reconsideration of information relating to the pre-decree development and use of decreed water rights is not within the scope of IDWR's administrative authority. As indicated by the Idaho Supreme Court in *Am. Falls Reservoir Dist. No. 2*, post-decree information related to a water user's diversion and use information may be relevant to determine whether the senior will put the water he seeks to have delivered to beneficial use without waste.

4. **Blue Lakes and Clear Springs Disclosures and Discovery Responses**

As IGWA explains, IGWA chose not to pursue the 30b(6) depositions for which it provided notice prior to the Hearing Officer's *Order Re Discovery*. Additionally, IGWA does "not consider depositions of lay witnesses to be within the scheduling stipulation and order, only expert depositions." *Steenson Third Aff.*, Ex. I, November 5, 2007 email from Randy Budge.

IGWA argues as if the Spring Users have disclosed no facts pertaining to their diversion and use of water, have given no indication of the subject matter for lay witness testimony, and have prevented IGWA from learning such facts. To the contrary, the Spring Users have provided the following disclosures and discovery responses.

1. On August 27, 2007, IGWA's counsel and its expert, Ronald Carlson, visited the Blue Lakes' and Clear Springs facilities, accompanied by Blue Lakes' and Clear Springs' representatives. During those site visits, the diversion and use of water at both facilities was shown and explained to IGWA's counsel and Mr. Carlson. During the Clear Springs' site visit, Clear Springs provided Exhibit C (Snake River Farms Memo and Schematic Map) attached to the Spring Users' Pre-Hearing Memorandum, to IGWA's counsel. Exhibit C was further identified in Clear Springs' October 17, 2007 *Disclosure of Lay Witnesses and Exhibit List*. Dr. Randy MacMillan, an employee of Clear Springs, provided the tour at the site visit and explained how the water was diverted and used at that facility.

2. On September 28, 2007, Blue Lakes and Clear Springs submitted their answers to IGWA's written discovery requests (attached as Exhibit D to IGWA's *Motion In Limine*), in which, among other things, they:

(a) identified the officers/employees who provided information relating to their discovery responses (Answers to Interrogatory No. 1);
(b) identified the officers/employees they expected to call as fact witnesses at hearing (Answers to Interrogatory No. 5);
(c) provided the following responses to Interrogatories Nos. 7 and 8 relating to their use of water and water shortages:

Clear Springs' Answers:

Answer to Interrogatory No. 7: Please refer to the document provided to IGWA counsel at the site inspection and the responses to questions raised at the site visit. The water rights identified in the above-caption related to the Snake River Farms facility are utilized pursuant to the water right decrees in the manner described schematically on the documents provided to counsel and Ron Carlson, expert for IGWA. To the extent documents have been determined discoverable pursuant to the hearing officer's discovery order dated September 10, 2007 said documents shall be made available for inspection upon request at the offices of Barker Rosholt & Simpson. 1010 Jefferson, Suite 102, Boise, Idaho or through the IDWR files and web site.

Answer to Interrogatory No. 7: Yes. Please see the flow documents made available for inspection or otherwise available at IDWR as compared to the water rights for the Snake River Farms facility and available as part of the record or at IDWR pursuant to the hearing officer's discovery order dated September 10, 2007. Said documents identify the ability of the right holder to put the water to beneficial use pursuant to the water right decrees. To the extent that the water right has not been delivered, a fat verified by the measurements, aid reductions have resulted in reductions in production.

Blue Lakes' Answers:

Answer to Interrogatory No. 7: Regarding the "history and development"of Blue Lakes' water rights, and "changes and improvements [to diversion facilities] over time," please see the Hearing Officer's September 10, 2007 *Order Re Discovery*.

Blue Lakes' use of water to raise fish, and its diversion works, were shown and explained to IGWA's counsel and Ron Carlson, during the requested site visit on August 27, 2007.

Blue Lakes diverts water from Alpheus Creek into concrete-lined raceways in which mature fish are reared, and into a hatch building in which fish are reared from eggs to the early or "fingerling" stage of development. Blue Lakes has no fish processing facilities.

Blue Lakes' diversion works are located in Alpheus Creek, and consist of concrete headworks that capture and direct the flow of Alpheus Creek into a pipeline that conveys the water to the aforementioned raceways and hatch building.

Blue Lakes constructed or reconstructed its current headworks in Alpheus Creek and pipeline from the headworks to its fish rearing facilities in 1999-2000. Some of this work may have occurred after the date of Blue Lakes' water right decrees (April 10, 2000).

Answer to Interrogatory No. 8: The flow of Alpheus Creek is inadequate to supply Blue Lakes' water rights. a., b. and d.: Please see water flow records that are available for inspection and copying at the office of Blue Lakes' counsel. c.: Please see the Hearing Officer's September 10, 2007 *Order Re Discovery*. Blue Lakes' fish rearing facilities have sufficient capacity to utilize the 197.06 cfs of water to which Blue Lakes is entitled pursuant to its water rights. Because the fish reared by Blue Lakes require constant water flows for survival, proper growth and health, Blue Lakes' production is limited by the minimum flows it receives. At low flows during the last several years, Blue Lakes' water shortages have been up to 86 cfs or up to 44%. Consequently, the lost production resulting from such water shortages has been up to 44%, more or less.

3. On October 17 2007 Blue Lakes and Clear Springs filed their disclosures of lay witnesses (attached as Exhibit B to IGWA's *Motion In Limine*). On October 18, 2007 Blue Lakes filed its amended lay witness disclosure (not attached to IGWA's *Motion In Limine*, attached hereto as Attachment A). In these disclosures, the Spring Users identified certain officers/employees as potential witnesses, including those persons identified in response to IGWA's discovery requests. Clear Springs identified as potential exhibits documents in the agency record and the schematic map provided to IGWA's counsel during the August 27th site visit. *See Partial Agency Record on July 8, 2005 Order* SRF at 695-699. Blue Lakes identified documents in the agency record, and exhibits to the depositions of witnesses taken in this proceeding.

4. IGWA's counsel inspected flow records and discharge records made available by Blue Lakes and Clear Springs.

5. The partial agency record contains various documents describing Blue Lakes and Clear Springs facilities and water flows, including water measurements.

6. IGWA has had access to all exhibits (over 80) that the Spring Users have used and had marked in the depositions of the witnesses in this case that have been taken during October and November.

7. On November 15, 2007, the Spring Users filed a *Pre-Hearing Memorandum* which described expected testimony of fact and expert witnesses. On the same date, IGWA filed the direct testimonies of three lay witnesses, including previously undisclosed documents.

8. On November 21, 2007 the Spring Users filed their consolidated exhibit list.

9. On November 21, 2007, Clear Springs filed its supplemental answers to IGWA's written discovery requests.

5. **Scheduling Order Deadlines, Discovery & Disclosures**

On April 16, 2007, IGWA submitted a "mitigation plan" to IDWR which IGWA knew would not meet the 2007 mitigation requirements of the Director's 2005 Orders on the Blue Lakes' and Clear Springs' water delivery calls. On April 30, 2007, the IDWR sent a letter to junior ground water users warning of the likelihood that their diversions from the ESPA would be curtailed. *Steenson Third Aff.* Ex. J. On May 7, 2007, IGWA filed a complaint in district court seeking to enjoin the Director from curtailing the ground water rights of IGWA's members pursuant the Director's 2005 Orders. *Steenson Third Aff.* Ex. K. In its argument to the district court, IGWA asserted that it had requested, and been denied, a hearing. The district court

dismissed IGWA's complaint on June 12, 2007. *Steenson Third Aff.* Ex. L. The District Court encouraged IDWR to act expeditiously, and to conduct a hearing as soon as possible.

On June 15, 2007, the Director issued curtailment orders to address the shortfalls in IGWA's mitigation plan. On June 18, 2007, IGWA filed requests for expedited hearing, for stay of the curtailment order, and that all water delivery calls by spring users be consolidated. IGWA also filed a motion for summary judgment. On June 29, 2007, the ground water districts submitted a plan for additional mitigation. On July 5, 2007 the Director approved the additional mitigation, rescinded the curtailment order, consolidated the Blue Lakes' and Clear Springs' water delivery calls, and scheduled the consolidated case for hearing on October 10, 2007.

IGWA and counsel for Clear Springs are also engaged in discovery and preparation for the January, 2008 hearing on the water delivery calls of various irrigation organizations located in Water District 120 ("SWC Case"). In an effort to better coordinate the overlapping schedules for discovery and pre-hearing preparation, IGWA, Blue Lakes and Clear Springs agreed to move the hearing date to November 28 and to a pre-hearing schedule for discovery and disclosures, and submitted the proposal to the Director on July 17, 2007.

The Director approved the schedule in his August 1, 2007 *Order Approving Stipulation and Joint motion for Rescheduled Hearing* ("Scheduling Order"). The compressed pre-hearing schedule of less than three months set by the Scheduling Order has been challenging for all parties to meet, particularly given the concurrent deposition schedule established for the SWC Case. Depositions in the SWC Case were set for most available days in October, leaving little time for depositions during October in this proceeding. *See Steenson Aff.*, Ex. I, October 1, 2007 email from Candice McHugh and attached deposition schedule. The short time for discovery has necessitated extending discovery past the previously-agreed November 1, 2007 deadline, with

the last deposition taking place on November 15th. The deadline for the optional pre-filing of direct lay witness testimony was also extended to November 15th.

Under these unique and challenging circumstances, neither party is in a position to seek to preclude testimony or evidence based on alleged schedule infractions. The Spring Users' pre-hearing memorandum, with what IGWA characterizes as "new," and previously "undisclosed" testimony and exhibits, was submitted on November 15th, the same day that IGWA submitted extensive direct testimony and previously unidentified exhibits, nearly a month after the deadline for such testimony in the Scheduling Order. If there is prejudice, it goes both ways and is a consequence of the ambitious and overlapping hearing schedules.

The following timeline shows the deadlines in the Scheduling Order and the dates on which discovery and disclosures occurred.

8-1 Order Approving Stipulation and Joint Motion for Rescheduled Hearing

8-10 IGWA's served its Notices of Taking Rule 30(b)(6) Deposition Duces Tecum of Blue Lakes ad Clear Springs

8-22 Spring Users filed their Joint Motion for Protective Order

8-27 IGWA's counsel and expert Ronald Carlson visited Blue Lakes' and Clear Springs' facilities
- Clear Springs provided IGWA's counsel with a copy of Terry Huddleston's March 16, 2005 memo. and a schematic map of the facility, attached to the Spring Users' Pre-hearing Memorandum as Exhibit C

8-28 Hearing on Spring Users' Joint Motion for Protective Order

9-10 Order re Discovery

9-12 deadline for expert reports, pre-filed direct expert testimony and exhibits

9-28 Blue Lakes and Clear Springs submitted answers to IGWA's written discovery

10-1 IGWA circulated proposed deposition schedule, with dates extending into November

10-5 status conference

10-10 deadline for rebuttal reports, pre-filed rebuttal testimony and exhibits

10-11 deposition of IDWR employee Tim Luke

10-12 deposition of IGWA's expert Ronald Carlson

10-15 IGWA requested stipulation to extend deadline to file lay witness direct testimony to 11/15

10-17 deposition of Blue Lakes' expert Larry Land

10-17 deadline to disclose all lay witnesses, identify exhibits for lay witnesses, and file pre-filed direct testimony *if desired*

10-17 IGWA filed its disclosure of lay witnesses and exhibits:
- listed 13 named witnesses, with general, single-sentence summaries of expected testimonies
- reserved the right to call witnesses of other parties and current and former IDWR employees
- listed 9 possible exhibits, nos. 444-452
- referenced potential use of any information possessed or used by IDWR and current or former IDWR employees
- reserved the right to use unidentified "illustrative exhibits"

10-17 Clear Springs filed its disclosure of lay witnesses and exhibits
- listed 2 witnesses representing Clear Springs
- listed 1 IDWR employee
- identified documents in the agency record and a schematic map provided to IGWA during its site visit as potential exhibits

10-17 & 10-18 Blue Lakes filed its disclosure and amended disclosure of lay witnesses and exhibits
- listed 2 witnesses representing Blue lakes, with references to Blue Lakes' responses to IGWA's written discovery requests
- listed 2 IDWR employees
- identified documents in the agency record, and exhibits to the depositions of witnesses in this proceeding as potential exhibits

10-18 counsel for IGWA, Blue Lakes, and Clear Springs agreed to extend deadline for pre-filing direct testimony of lay witnesses, that IGWA's counsel will provide available dates for depositions of the disclosed lay witnesses, and that lay witness disclosure deadline does not apply to IDWR witnesses

10-19 deposition of IDWR employee Allan Wylie

10-23 continued deposition of IGWA's expert Ronald Carlson

10-29 deposition of Clear Springs' expert Charles Brockway

10-30 Deposition of Clear Springs' expert Eric Harmon

10-31 & 11-1 deposition of Karl Dreher

11-1 deposition deadline / discovery completed deadline

11-5 & 11-6 IGWA's counsel objected to depositions of lay witnesses as not within the scheduling order

11-9 IDWR filed its exhibit lists

11-12 & 13 deposition of IGWA's expert Charles Brendecke

11-15 deadline for filing pre-hearing memoranda

11-15 Spring Users filed their pre-hearing memorandum

11-15 IGWA filed the direct testimonies of: Kenneth Dunn (with 6 exhibits, 436-451), Dean F. Stevenson (with 3 exhibits, 452-453), and R. Lynn Carlquist (with 3 exhibits 455-457)

11-15 IGWA advised the hearing officer that it will not meet the deadline for filing its pre-hearing brief

11-15 deposition of IGWA expert John Church

11-16 pre-hearing conference

11-20 IGWA filed its pre-hearing brief, proposed findings of fact and conclusions of law, motion for reconsideration, and motion in limine

11-21 Spring Users filed their consolidated exhibit list

11-21 Clear Springs submitted supplemental discovery responses

CONCLUSION

For the foregoing reasons, IGWA's *Motion in Limine* should be denied.

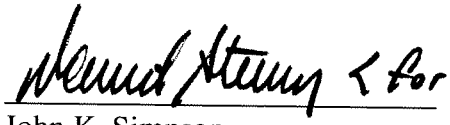
Dated this 27th day of November, 2007.

RINGERT CLARK, CHTD.

Daniel V. Steenson

Attorneys for Blue Lakes Trout Farm, Inc.

BARKER ROSHOLT & SIMPSON LLP



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

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Randall Budge Candice McHugh Racine, Olson, Nye, Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, ID 83204 (208) 232-6109 rcb@racinelaw.net cmm@rainelaw.net	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (✓) E-mail
Michael Gilmore ATTORNEY GENERAL'S OFFICE P.O. Box 83720 Boise, Idaho 83720-0010 (208) 334-2830 mike.gilmore@ag.idaho.gov	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (✓) E-mail
Mike Creamer Jeff Fereday GIVENS PURSLEY P.O. Box 2720 Boise, ID 83701-2720 (208) 388-1300 mcc@givenspursley.com jeffferedayy@givenspursley.com	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (✓) E-mail
John K. Simpson Travis L. Thompson Barker, Rosholt & Simpson P.O. Box 2139 Boise, ID 83701-2139 jks@idahowaters.com tlt@idahowaters.com	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (✓) E-mail
David R. Tuthill, Director Idaho Department of Water Resources 322 E. Front Street Boise, Idaho 83720-0098 dave.tuthill@idwr.idaho.gov	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (✓) E-mail

Justin May
May, Sudweeks & Browning LLP
P.O. Box 6091
Boise, ID 83707
jmay@may-law.com

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(✓) E-mail

Honorable Gerald F. Schroeder
Hearing Officer
3216 N. Mountain View Dr.
Boise, ID 83704
fcjschroeder@gmail.com
victoria.wigle@idwr.idaho.gov

( ) U.S. Mail, Postage Prepaid
(✓) E-mail
(✓) Hand Delivery

Robert E. Williams
Fredericksen, Williams, Meservy & Lothspeich
P.O. Box 168
Jerome, ID 83338
rewilliams@cableone.net

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(✓) E-mail

Daniel V. Steenson

ATTACHMENT A

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
JON GOULD (ISB # 6709)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Blue Lakes Trout Farm, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-07210, 36-07427, AND 36-02356A **Blue Lakes Delivery Call**	**BLUE LAKES' AMENDED LAY WITNESS DISCLOSURES**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM) **Clear Springs, Snake River Farm Delivery Call**	

COMES NOW Blue Lakes Trout Company, by and through their attorneys of record, Daniel V. Steenson of Ringert Clark Chartered, and submit the following lay witness disclosures in accordance with and pursuant to the Order Approving Stipulation and Joint Motion for Rescheduled Hearing entered August 1, 2007.

COPY

WITNESSES:

a. Timothy Luke; and

b. Cindy Yenter; and

c. Gregory Kaslo; and

d. Harold Johnson.

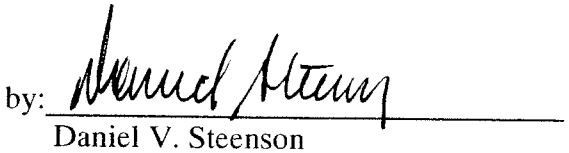
EXHIBITS:

1) Blue Lakes may use as exhibits any records or documents in the Department's Partial Agency Record in this proceeding.

2) Blue Lakes may also use any exhibits to the depositions of witnesses taken in this proceeding.

DATED this 18th day of October, 2007.

RINGERT CLARK CHARTERED

by: 

Daniel V. Steenson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 18th day of October, 2007 by the following method:

Randall Budge Candice McHugh Racine, Olson, Nye, Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, ID 83204 (208) 232-6109 rcb@racinelaw.net cmm@rainelaw.net	( ) U.S. Mail, Postage Prepaid ( ) Facsimile (✓) E-mail
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David R. Tuthill, Director
Idaho Department of Water Resources
322 E. Front Street
Boise, Idaho 83720-0098
dave.tuthill@idwr.idaho.gov

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(✓) E-mail

Justin May
May, Sudweeks & Browning LLP
P.O. Box 6091
Boise, ID 83707
jmay@may-law.com

( ) U.S. Mail, Postage Prepaid
( ) Facsimile
(✓) E-mail

Honorable Gerald F. Schroeder
Hearing Officer
3216 N. Mountain View Dr.
Boise, ID 83704
fcjschroeder@gmail.com

( ) U.S. Mail, Postage Prepaid
(✓) E-mail

Daniel V. Steenson