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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. )  
 36-07210, 36-07427, AND 36-02356A )

**Blue Lakes Delivery Call** )

\_\_\_\_\_  
 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** )

**SPRING USERS' JOINT  
 RESPONSE TO IGWA'S  
 MEMORANDUM OF EXCEPTIONS  
 TO HEARING OFFICER'S ORDERS**

COME NOW, BLUE LAKES TROUT FARM, INC. ("Blue Lakes"), and CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through counsel of record, and pursuant to Rule 720 of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), and hereby file the following *Response to IGWA's Memorandum of Exceptions to Hearing Officer's Orders*. As

described below, there is no basis to grant the exceptions that IGWA seeks. The parts of the Hearing Officer's Orders that IGWA takes issue with have been fully addressed in this proceeding (some on multiple occasions) and there is no basis to grant the relief requested by IGWA. Accordingly, the Director should adopt the Hearing Officer's Recommended Orders (as modified by the Spring Users' exceptions) for purposes of a final order in this matter.

### **RESPONSE**

IGWA's *Exceptions Brief* is riddled with an extremely narrow, and largely misrepresented view of the evidence offered and considered by the Hearing Officer in this matter (e.g. "No evidence was offered that 10% is the most accurate estimation of Model certainty"; "The unchallenged testimony of Dr. Brendecke that Model uncertainty is realistically 20-30% provides the only conclusion substantially supported by the record.", *IGWA Br.* at 11-12). The Hearing Officer's Recommended Orders speak for themselves on these points. For example, *see Response Order* at 3 ("The former Director utilized the only factor with a known scientific basis to calculate a percentage. It is not fully defensible, but it is more defensible than any other amount produced in the hearing. The alternative to acceptance of a percentage utilized by the former Director is not to arbitrarily jump to a higher percentage somewhere between 20% and 50% with no supportable basis.").

While IGWA further seeks to dismiss the Springs Users' calls on various other grounds, it is clear that these alleged defenses were considered and properly rejected by the Hearing Officer. The Spring Users have fully addressed IGWA arguments, both through prior briefing, as well as the testimony and evidence offered at hearing. Accordingly, the Spring Users readopt all prior briefing in this matter, specifically including the following briefing previously submitted and considered by the Hearing Officer:

*Spring Users' Joint Motion for Summary Judgment (9/28/07)*

*Spring Users' Memorandum in Support of Joint Motion for Summary Judgment (10/5/07)*

*Spring Users' Response to IGWA's Motion for Partial Summary Judgment (10/31/07)*

*Spring Users' Pre-Hearing Memorandum (11/15/07)*

*Spring Users' Joint Response to IGWA's Motion in Limine (11/27/07)*

*Spring Users' Joint Response to IGWA's Motion for Partial Reconsideration and Offer of Proof (11/27/07)*

*Spring Users' Joint Petition for Partial Reconsideration (1/25/08)*

*Spring Users' Joint Response to IGWA's Petition for Reconsideration and Clarification of Recommended Order (2/11/08)*

*Spring Users' Joint Petition for Clarification (3/12/08)*

In addition to this briefing, the testimony and evidence offered at hearing (including pre-filed expert testimony) by the Spring Users support the Hearing Officer's decisions rejecting IGWA's alleged defenses to conjunctive administration. Accordingly, the Director should deny IGWA's offered exceptions to the Recommended Orders.

With respect to the new focus of IGWA's efforts to avoid administration, attacking the Director's assigned margin of error (10%) for the Model, it is obvious that a review of the record reveals that "model uncertainty" was not a technical issue to which IGWA objected or raised through supporting pre-filed direct testimony. In fact, the *Direct Testimony of Charles M. Brendecke* and its related exhibits fail to offer any opinions about the "model uncertainty" percentage or questions about the "trim line" as an issue at hearing. Dr. Brendecke readily admitted at the hearing that he did not perform any analysis or calculations regarding uncertainty associated with the Model. See *Brendecke Hearing Testimony* at 1853, Ins. 7-17; at 1900, Ins. 18-23. IGWA therefore has no basis to attack the Director's margin of error now. Although he

recognized the complexity of determining uncertainty, Dr. Brendecke was unwilling on re-direct examination to estimate a percentage. Finally, the Hearing Officer's decision plainly rejected IGWA's claim on the Model's uncertainty. *See Response Order* at 2-3.

Finally, IGWA's misinterpretation of the testimony of Larry Cope, Mr. Harmon, and Dr. Brockway should be rejected. Importantly, Mr. Harmon's analysis did not, as IGWA claims, create a limited area for purposes of ground water administration. Again, all hydraulically connected ground water rights are subject to administration and IGWA's continued efforts to sever the aquifer from connected spring sources must be rejected. The record and testimony considered by the Hearing Officer plainly refutes IGWA's claims in this regard.

### CONCLUSION

IGWA's never-ending effort to halt all administration of hydraulically connected junior priority ground water rights must come to an end. As succinctly identified in the Hearing Officer's Response Order, "IGWA does not address a core issue – the effect of the doctrine of 'first in time, first in right' in water rights". *Response Order* at 6. IGWA's alleged defenses, which it offers yet again in its *Exceptions Brief*, were properly rejected by the Hearing Officer in this matter. For the reasons identified above, including the Spring Users' prior briefing and testimony offered and considered by the Hearing Officer in this proceeding, IGWA's exceptions should be denied.

Dated this 24<sup>th</sup> day of April, 2008.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of April, 2008, I served a true and correct copy of the foregoing **SPRING USERS' JOINT RESPONSE TO IGWA'S MEMORANDUM OF EXCEPTIONS TO THE HEARING OFFICER'S ORDERS** by delivering it to the following individuals by the method indicated below, addressed as stated.

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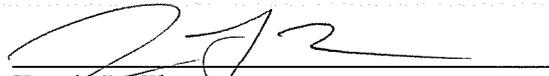
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