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DEPARTMENT OF
WATER RESOURCES

John K. Simpson
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th Street, Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Fax: (208) 344-6034
ISB # 4242

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	)	CLEAR SPRINGS FOODS, INC PETITION FOR REHEARING ON THE JULY 8, 2005 ORDER AND REQUEST FOR AN INDEPENDENT HEARING OFFICER

Clear Springs Foods, Inc. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, respectfully submits this Petition for Hearing on the Order issued by the Director of the Idaho Department of Water Resources on July 8, 2005 pursuant to Idaho Code §42-1701A(3), and Idaho Department of Water Resources ("IDWR") Procedural Rule 740.02.b. IDAPA 37.01.01.740.02.b. Additionally, Clear Springs also requests the appointment of an independent hearing officer pursuant to Idaho Code §42-1701A(2).

INTRODUCTION

On May 2, 2005 Clear Springs requested water rights administration in Water District No. 130 pursuant to Idaho Code §42-607 in order to satisfy the water rights identified in the

above caption. The requests for administration were made in two separate letters to IDWR. An initial letter requested administration for water rights delivered to the Snake River Farm, water rights nos. 36-04013A, 36-04013B, and 36-07148. A second letter requested the delivery of water to water rights for the Crystal Springs Farm, 36-07083 and 36-07568. While these letters were filed separately, the Director considered the requests in a consolidated fashion. Clear Springs does not object to a consolidated hearing on the administration of the water rights identified. However, it does request that orders be issued separately for these facilities in order that the effect of such orders be independently analyzed. Further, these facilities are not connected geographically as they derive water from separate spring sources and are a number of miles apart in the Thousand Springs Reach.

In the July 8, 2005 order ("Order"), the Director determined because of seasonal fluctuations in spring flows, Clear Springs water rights are not materially injured if the water right is satisfied at one instant point during the period of use. The Director ignored the historical intra-seasonal supply available to the facilities. The Director also failed to recognize the downward trend in spring flows from year to year, a substantial part of which is the direct responsibility of groundwater pumping. Water right holders who rely upon the springs as the source of water to fill those rights are threatened by the Director's refusal to recognize declining spring flows and the elements of water rights decreed in the SRBA representing beneficial use of the water.

The Order also utilizes the ground water model and its results in ways not contemplated by the water users and not previously subjected to review. The Director improperly utilizes the modeling results from the ground water model for the ESPA to limit the Director's jurisdiction and administration of ground water rights within the ESPA as contemplated by state law.

With respect to the Crystal Springs Farm facility, the Director's requirement that Clear Springs expand its diversion and conveyance facility across State lands for which no authorized easement is provided, and beyond the decreed point of diversion is not contemplated by law; nor by Clear Springs' historical diversions. Such a requirement threatens historical uses and diversions throughout the ESPA and river reaches. Further, it violates the partial decrees issued by the SRBA Court and go beyond administration contemplated by the prior appropriation doctrine.

ARGUMENT

The ESPA is hydraulically connected to the Snake River as technically described by the ESPA modeling and legally depicted in decisions by the SRBA Court in Basin-Wide Issue 5 Order on Cross Motion for Summary Judgment. Technically, modeling scenarios have clearly shown ground water pumping has depletionary effects on spring discharges and reach gains of the Snake River. The Director has erroneously concluded that junior priority ground water rights in Water District No. 120 will not have a significant affect on the spring discharges and reach gains in the Thousand Springs Reach and specifically in the Buhl gage to Thousand Springs spring reach. The Director erroneously attempts to provide safe harbor for those junior priority ground water rights which affect the Buhl to Thousand Springs Reach by less than an arbitrary 10%, which allegedly is the uncertainty associated with the model results. The injury associated with those depletions is ongoing.

Instead, the Order attempts to reduce the legitimacy of the water rights claiming injury and accordingly, reduce the obligation of junior ground water pumping to mitigate the defined material injuries being suffered. Specifically, Clear Springs challenges the Order on questions of law and fact, including but not limited to the following:

1. The Order violates the principles of the prior appropriation doctrine as set forth in Idaho law and Idaho Constitution. *See* Idaho Constitution Art. XV, Sec 3 and Idaho Code Title 42.

2. The Order fails to respect the previous decrees issued in the SRBA and the elements of the water rights decreed. Nothing in the law supports such re-adjudication of water rights.

3. The Director erred in utilizing average USGS spring flow data as a percent of measured reach gains in the Buhl to Thousand Springs Reach to determine the impact on Clear Springs' water rights identified above. Further, the assumption that the percentage of reach gain accounted for by specific springs supplying water under Clear Springs' water rights is constant over intra-year and inter-year periods is incorrect.

4. The Director erred in the utilizing average USGS spring flow data as a percentage of measured reach gains in the Devils Wash Bowl to Buhl gage reach to determine the impact on Clear Springs' water rights identified above. Further, the assumption that the percentage of reach gain accounted for by specific springs supplying water under Clear Springs' water rights is constant over intra-year and inter-year periods is incorrect.

5. The Director erred in relying upon the computer model and output and arbitrary perceived uncertainties in limiting the scope of the water rights administration in the Snake River and the Eastern Snake Plain Aquifer. The adequacy and accuracy of the model as asserted in the Order is a subject, which will be determined through discovery and a hearing.

6. The Director erred in determining that spring discharges have diminished primarily because of reductions of incidental recharge from surface water irrigation and application practices. Further, the Director erred in asserting that changes in places of use for surface water irrigation has had primary effect on the diminishment of spring flows and provided no justification for the assertion.

7. The Director erred in failing to recognize that intra-year variations in the discharges from springs, which may have existed at the time of appropriation have been exacerbated by junior ground water pumping. Further, in ignoring the year-round period of use associated with the water rights, the Director failed to recognize Clear Springs' ability to beneficially use the water decreed.

8. The Director erred by failing to require curtailment in a magnitude sufficient to mitigate the reduction in the source of water for the Snake River Farm and the source for the Crystal Springs Farm.

9. The Director erred in determining that the Snake River Farm water right no. 36-04013A with a priority date of September 15, 1955 has been filled.

10. The Director erred in requiring mitigation relative to steady state conditions as opposed to the shortages presently being observed in the decreed water rights.

11. The Director erred in finding that there were "no factors" that would preclude Clear Springs from extending the collection canal for the Crystal Springs Farm. Further, the Director was ambiguous in using the term "factors" without identifying what analysis was performed. The Director failed to determine what constitutes reasonable efforts or expense in analyzing the collection opportunities of the canal. In making these findings the Director fails to properly conjunctively manage ground and surface water.

12. The Director erred in finding Clear Springs may not be employing reasonable diversion and conveyance efficiencies at the Crystal Springs Farm facility. Further, the Director erred in finding that Clear Springs should line the collection canal to the Crystal Springs Farm and provided no analysis to confirm that lining or extending the collector canal would, in fact, provide adequate additional diversion capacity.

13. The Director erred in his findings regarding the amount of water that would result in an increase in the source for the Crystal Springs Farm diversions and the Snake River Farm diversions.

14. The Director erred in finding that the drought experienced in the late 1900's and early 2000's was one of unprecedented nature and affect.

15. The Director erred in his use of the conjunctive management rules and the definition of the term "material injury" as it is applied in the Order and fails to recognize the Rules conflict with the prior appropriation doctrine and the laws of the State of Idaho.

16. The Director erred in providing a five year period for junior ground water right holders to provide mitigation and/or replacement water through voluntary or involuntary curtailment after recognizing that material injury is currently being suffered by Clear Springs. In providing this five year period, the Director fails to adequately order mitigation.

17. The Director erred in attempting to utilize the ground water act as overriding the prior appropriation doctrine and Idaho Code §42-106.

18. The Director's application of the Conjunctive Management Rules and specifically Rule 42 is unconstitutional and violates Idaho law.

Clear Springs expressly reserves the right to raise additional issues as they are discovered through the discovery and hearing process. Further, Clear Springs reserves the right to file or participate in any action commenced raising issues directly or indirectly identified as a consequence of the orders issued where immediate resolution by the District Court is warranted.

As previously identified, Clear Springs requests the Director appoint an independent hearing officer, other than an employee of IDWR, in this matter. Idaho Code §42-701A(2) provides that the Director, in his discretion, may appoint a hearing officer. IDWR's own rules, IDAPA 37.01.01.410 provide an independent hearing officer may be appointed to hear contested cases. The Director made his informal decision in response to the request for administration filed by Clear Springs for its Crystal Springs facility and the Snake River facility. This consolidated Order issued on July 8, represents the Director's views regarding the validity on that call and the extent to which material injury is being suffered. Clear Springs has and should have the right to an independent review of the Director's decision, and not to simply have the Director review his own decision in a contested case. The Director's involvement in various discussions over the last number of years involving conjunctive administration, negotiations, and ground water modeling precludes his objective evaluation and review.

Additionally, there are a number of overriding legal issues which should be addressed preliminarily which affect pending delivery calls throughout the ESPA.

CONCLUSION

For the previously stated reasons, Clear Springs respectfully requests a de novo hearing and record on all issues pertaining to administration of the water rights identified above pursuant to I.C. Section 42-1701A(3) and the appointment of an independent hearing officer.

DATED this 25th day of July, 2005.

BARKER ROSHOLT & SIMPSON

By: _____
John K. Simpson

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of July, 2005, I served a copy of the foregoing *Clear Springs Foods, Inc. Petition for Rehearing on the July 8, 2005 Order and Request for an Independent Hearing Officer*, by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Hand Delivered: Karl Dreher
Idaho Department of Water Resources
322 E. Front Street
Boise, Idaho 83720-0098

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl, Idaho 83316-0712

North Snake Ground Water District
152 E Main Street
Jerome, Idaho 83338

Magic Valley Ground Water District
809 E 1000 N
Rupert, Idaho 83350-9537

Mike Creamer
Jeff Fereday
Givens Pursley
PO Box 2720
Boise, Idaho 83701-2720

Cindy Yenter
Watermaster
Water District No. 130
1341 Fillmore Street, Suite 200
Twin Falls, Idaho 83301-3380

Frank Erwin
Watermaster
Water District No. 36
2628 S 975 E
Hagerman, Idaho 83332

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John K. Simpson