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Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 36-16645 (in the name of)
MVGWD/NSGWD)) **CLEAR SPRINGS FOODS’**
) **MOTION TO AUTHORIZE**
) **DISCOVERY**
)
) **MOTION TO VACATE HEARING**
) **DATES**
)
) **REQUEST FOR PRE-HEARING**
) **CONFERENCE**
)
_____)

CLEAR SPRINGS FOODS, INC. (“Clear Springs”), by and through its counsel of record, hereby files this *Motion to Authorize Discovery / Motion to Vacate Hearing Dates / Request for Status Conference* in the above captioned matter.

NO CONSOLIDATION OF PROCEEDINGS

On July 2, 2008, the Ground Water Districts filed a mitigation plan, two applications for permit, and an application for transfer. Clear Springs timely protested all four applications on August 4, 2008, thus creating four separate formal contested cases before the Department. *See* Rules 5.7 and 104 (IDAPA 37.01.01). Other parties filed protests as well. A little over a week

later Clear Springs received a *Notice of Hearing and Order Granting Intervention* on August 13, 2008, setting a hearing in all four matters referenced above and notifying the parties that the Director intended to serve as the presiding officer. Although the Ground Water Districts' mitigation plan is wholly based upon the Department approving the applications for permit and transfer, no formal order has been issued consolidating the four separate contested cases before the Department.

The Department's own rules provide for consolidation of two or more proceedings only "upon finding that they present issues that are related and that the rights of the parties will not be prejudiced". Rule 556 (IDAPA 37.01.01.556). As explained below, setting a hearing three weeks out without notice to counsel or the parties, without an opportunity for discovery, and without an opportunity to engage expert witnesses to fully review and provide opinions on the applications and proposed mitigation plan, clearly prejudices Clear Springs and the other protestants. Moreover, the mitigation plan and the various applications involve separate statutory criteria and standards of review. *See* Idaho Code §§ 42-203A; 42-222; and Rule 43 of the Conjunctive Management Rules (IDAPA 37.03.11). Accordingly, the *Notice* plainly violates the Department's procedures and should be withdrawn immediately.

Finally, Clear Springs is entitled to present and complete a full record in each proceeding in order for the Department to evaluate the applications under Idaho law. As such, unilaterally combining all proceedings into one truncated hearing does not afford Clear Springs and the other protestants adequate time to review the matters and determine if some consolidation of one or more of the cases may be warranted. As the schedule now stands, Clear Springs does not even have the time allowed by the Idaho Rules of Civil Procedure to conduct any discovery.

MOTION TO AUTHORIZE DISCOVERY

Clear Springs hereby moves for an order authorizing discovery in this matter pursuant to Rule 521 of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*). Clear Springs seeks to have a meaningful opportunity to discover facts related to the above-captioned application in preparation for the hearing in this matter. A discovery schedule should be discussed and developed at the pre-hearing conference.

MOTION TO VACATE HEARING DATES

As explained above, the Director set a hearing in this matter to be held only three weeks from the date of the *Notice*. The hearing dates for these four contested cases must be vacated for the reasons explained below.

I. Due Process / Right to Discovery and Meaningful Hearing

First, the limited three-week window provides no meaningful opportunity for Clear Springs to conduct discovery and obtain information and adequately evaluate the applications. The Idaho Rules of Civil Procedure, which typically govern discovery in these types of cases before the Department (Rule 520.20), allow a party thirty (30) days to respond to discovery requests. *See* I.R.C.P. 33(a), 36(a). Counting today, there are only twenty days before hearing is set to begin, including non-business days and a holiday weekend. Consequently, if the hearing schedule is not vacated there is insufficient time under the civil rules to conduct any meaningful discovery.

Clear Springs, through this motion, seeks authorization to conduct discovery so that this information may be timely gathered and a complete record can be created and presented in this matter. The United States and Idaho constitutions provide Clear Springs with the right to due process in each of these cases.

The essence of due process is the right to be heard at a meaningful time and in a meaningful manner. See *State Bureau of Child Support Services v. Garcia*, 132 Idaho 505, 510 (Ct. App. 1999); see also, *Curr v. Curr*, 124 Idaho 686, 693 (1993) (“The ‘meaningful hearing’ component of the due process requirement insures the attorney the opportunity to influence the discretion of the decision-maker by presenting his or her reasons.”). Given these applications involve new groundwater withdrawals, the transfer of existing rights, and other matters, Clear Springs must have adequate time to review and evaluate the applications in order to prepare for the hearing. Moreover, due process “includes the right to be fairly notified of the issues to be considered”. *Haw v. Idaho State Bd. of Medicine*, 140 Idaho 152, 159 (2004).

Here, Clear Springs has not been provided with an opportunity to conduct discovery and be “fairly notified” of the issues to be considered and resolved at hearing in the four separate contested cases. At a minimum, the hearings must be vacated and reset, in order to provide Clear Springs and the other protestants with an opportunity for discovery and a pre-hearing conference to determine issues, witnesses, and exhibits for hearing. In sum, there is no basis to hold a hearing on an inadequate and incomplete record which plainly prejudices the protestants at this point.

II. Consideration of Parties’ and Counsels’ Schedules

Next, the present hearing schedule makes no provision for the parties’ or counsels’ schedules. Counsel for Clear Springs already has a hearing set for the first week of September in a separate matter and is therefore unable to attend any hearings set on September 3rd and 5th. It is prejudicial to Clear Springs to unilaterally set a hearing that plainly conflicts with its counsel’s schedule, particularly where no notice was given by the Department. Accordingly, the parties and the hearing officer should develop an appropriate hearing schedule that will provide Clear

Springs with an opportunity to have counsel present and present any witnesses it deems necessary.

III. Failure to Follow Normal Department Procedure in Contested Cases

Finally, the present hearing schedule fails to follow the Department's typical procedure for contested cases. Clear Springs is unaware of any contested applications before the Department where a hearing has been scheduled unilaterally without (1) conferring with the parties and their counsel, (2) holding a pre-hearing conference, and (3) a meaningful opportunity to develop necessary legal and factual issues in the case. For example, Clear Springs is involved in two other contested cases concerning applications for permit, where protests were filed and the Department identified the procedure that is typically followed, i.e. holding a pre-hearing conference. *See Exhibits A, B.*

In the case of application for permit #36-16406 filed by the North Rim Fairways' Association, the Department sent Clear Springs' counsel a letter noting that "the application is considered a contested case and subject to the Rules of Procedure adopted by the Department" and that "the attachment to this letter . . . gives a brief description of the conference and hearing procedure followed by the Department in resolving protested applications". *See Exhibit A.* In the case of application for permit #36-16592 filed by the City of Twin Falls, the Department similarly sent Clear Springs' counsel a letter noting that "If the protest cannot be resolved informally, the matter will be scheduled for conference and/or hearing" and that "You will be notified at a later date of the time and place of the conference and/or hearing". *See Exhibit B.* Both of those cases remain pending before the Department awaiting pre-hearing conferences despite the protests being filed on May 22, 2006 and May 30, 2008 respectively.

In this case, no such letter was provided to Clear Springs' counsel identifying the procedures the Department follows and the notice and time for a pre-hearing conference. Setting hearings on contested applications without notice prejudices Clear Springs, particularly where the hearing is set to begin in less than three weeks and conflicts with its counsel's schedule. The Department should follow its normal procedure and afford the protestants the opportunity for discovery and input on a proposed hearing schedule. Accordingly the August 13, 2008 *Notice* should be withdrawn and the hearing scheduled for September 3rd and 5th should be vacated.

REQUEST FOR PRE-HEARING CONFERENCE

Consistent with Department practice and the procedures provided by the Department's rules (Rules 510-513), Clear Springs requests the Director to set a pre-hearing conference in the above-captioned matter. Clear Springs' counsel provides the following available dates for the pre-hearing conference:

September 2, 8 – 12, 15 – 19

CONCLUSION

For the reasons set forth above, Clear Springs moves for an order: 1) authorizing discovery; 2) withdrawing the August 13, 2008 *Notice*; 3) vacating the hearings scheduled for September 3rd and 5th; and 4) setting a pre-hearing conference.

DATED this 14th day of August, 2008.

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2008, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

Director David K. Tuthill, Jr.
c/o Victoria Wigle
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
victoria.wigle@idwr.idaho.gov

U.S. Mail
 Facsimile
 Overnight Mail
 Hand Delivery
 E-Mail

Randy Budge
Candice M. McHugh
RACINE OLSON
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Pocatello, Idaho 83204-1391

US Mail, Postage Prepaid
 Facsimile
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Daniel V. Steenson
Charles L. Honsinger
RINGERT CLARK
P.O. Box 2773
Boise, Idaho 83701-2773

US Mail, Postage Prepaid
 Facsimile
 E-mail

Tracy Harr, President
Clear Lakes Country Club
403 Clear Lake Lane
Buhl, Idaho 83316

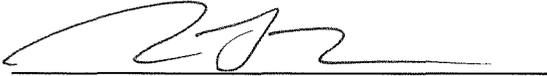
US Mail, Postage Prepaid
 Facsimile
 E-mail

Stephen P. Kaatz, Vice President
Clear Lake Homeowners Assn.
223 Clear Lake Lane
Buhl, Idaho 83316

US Mail, Postage Prepaid
 Facsimile
 E-mail

Allen Merritt
Cindy Yenter
Watermaster - Water District 130
IDWR – Southern Region
1341 Fillmore St., Ste 200
Twin Falls, Idaho 83301-3380

US Mail, Postage Prepaid
 Facsimile
 E-mail


Travis L. Thompson

Exhibit

A



State of Idaho

DEPARTMENT OF WATER RESOURCES

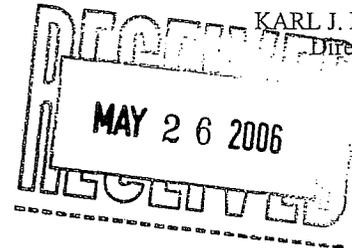
1341 Fillmore Street, Suite 200, Twin Falls ID 83301-3380
Phone: (208) 736-3033 FAX: (208) 736-3037

SOUTHERN REGION

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

May 24, 2006



TRAVIS L. THOMPSON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 485
TWIN FALLS ID 83303--485

RE: Application for Permit No. 36-16406 (North Rim Fairways' Assn.)

Dear Mr. Thompson:

The protest on behalf of Clear Springs Foods, Inc. against the approval of the above referenced application has been received and a copy has been sent to the applicant with the suggestion that he contact you directly to determine the exact nature of the protest and, if possible, to resolve the matter without action by the Department.

Please note that the application is considered a contested case and subject to the Rules of Procedure adopted by the Department.

If you need a copy of these rules, please contact this office. The Rules of Procedure are also available on the Internet by using the IDWR Homepage at the following electronic address:

<http://www.idwr.state.id.us/apa/idapa37/0101.htm>

The attachment to this letter describes the criteria the Department must consider in either approving or denying the application (Section 42-203A, Idaho Code). It also gives a brief description of the conference and hearing procedure followed by the Department in resolving protested applications.

If you have any questions or if this office can be of further assistance, please feel free to contact us.

Very truly yours,

Allen D. Merritt, P.E.
Southern Region Manager

AM:MB
Enclosure(s)

CONFERENCE AND HEARING PROCEDURE

APPLICATION FOR PERMIT ISSUES

Section 42-203A, Idaho Code, requires the department to consider the following issues in connection with an application for permit:

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use conflict with the local public interest?
6. Will the proposed use be contrary to the conservation of water resources within the State of Idaho?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 4, and 6 above and must provide evidence for the department to evaluate these criteria. The initial burden of proof on issue 5 above lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for this issue.

PROCEDURE

The department generally conducts an informal conference with the parties to determine the issues and to try to settle a protested matter before a hearing is scheduled. If a hearing is held the department will issue a written decision based on the hearing record.

CONFERENCE

The purpose of a pre-hearing conference is to provide the opportunity for the parties and the department to familiarize themselves with a contested matter and to attempt to resolve the matter. At the conference, the department may also formulate and simplify the issues, identify documents to avoid unnecessary proof, exchange proposed exhibits or prepared testimony, limit witnesses, discuss settlement or make settlement offers, schedule hearings, establish procedure at hearing and address other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. The department may issue a "pre-conference statement order" which requires response to the inquiries.

HEARING

The department will tape record the hearing. Copies of a hearing tape are available upon request and the payment of the cost of reproducing the tape. The hearing likely will be conducted by a hearing officer appointed by the Director rather than by the Director himself. If so, the hearing officer will prepare a recommended order for the Director's consideration. Parties can file exceptions to a recommended order, briefs in support of the exceptions or may request oral argument. Parties may seek judicial review of any final order issued by the Director. Parties may by written stipulation waive the right to a recommended order, particularly when a shortened decision process is desirable or necessary. Such a waiver does not eliminate any rights of the parties in connection with the final order of the Director and judicial review of the order.

EXHIBITS

A party who plans to offer an exhibit as part of the hearing record must provide a copy of the proposed exhibit to the parties and to the hearing officer. As part of the conference a date may be set by which exchange of exhibits and witness lists must occur.

EFFECT OF FAILURE TO APPEAR AT A CONFERENCE OR HEARING

Failure to appear at the time and place set for a conference or hearing by the applicant or protestant(s) may allow the department to dismiss without prejudice the protest(s) or the application. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing party.

AMERICANS WITH DISABILITIES ACT

Any hearing scheduled will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the department within (10) days prior to the hearing.

Exhibit B



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 1341 Fillmore Street, Suite 200 • Twin Falls, Idaho 83301-3380

Phone: (208) 736-3033 • Fax: (208) 736-3037 • Web Site: www.idwr.idaho.gov

RECORDED
10 2008

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

June 9, 2008

ATTN TRAVIS L. THOMPSON
BARKER ROSHOLT & SIMPSON
PO BOX 485
TWIN FALLS ID 83303-485

RE: Application for Permit No. 36-16592 (City of Twin Falls)

Dear Mr. Thompson:

The Department acknowledges receipt of the protest on behalf of Clear Springs Foods Inc against the approval of the above referenced application. A copy of your protest has been sent to the applicant. The Department suggests that you contact the applicant directly for details regarding the application and, if possible, to resolve the matter without action by the Department. In our experience, informal discussion between the parties prior to initiation of formal proceedings often leads to resolution of the protest.

If the protest cannot be resolved informally, the matter will be scheduled for conference and/or hearing. The following are criteria the Department must consider in either approving or denying the application. (Section 42-203A, Idaho Code).

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use conflict with the local public interest in the public water resource?
6. Will the proposed use be contrary to the conservation of water resources within the State of Idaho?
7. For applications proposing to divert water from one watershed or local area into another, will the proposed use adversely affect the local economy of the watershed or local area where the source of water originates?

You will be notified at a later date of the time and place of the conference and/or hearing. Please contact this office if you have any questions regarding this procedure.

Very truly yours,

A handwritten signature in black ink, appearing to read "Allen D. Merritt".

Allen D. Merritt, P.E.
Southern Region Manager