

**BEFORE THE DEPARTMENT WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF PETITION TO
AMEND RULE 50**

FINAL ORDER

This matter is before the Director (“Director”) of the Idaho Department of Water Resources (“Department”) in the form of *Clear Springs Foods, Inc.’s Petition to Amend Rule 50* (“Petition”). The Director finds, concludes and orders as follows:

PROCEDURAL HISTORY

On November 10, 2010, Clear Springs Foods, Inc. (“Clear Springs”) filed its Petition to Amend Rule 50 of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”) to expand the Area of Common Ground Water Supply (“ACGWS”) consistent with the ground water model boundary referenced in the *Enhanced Snake Plain Aquifer Model Final Report dated July 2006, Idaho Water Resources Research Institute Technical Report 06-002*.

In response to the petition, the Director initiated negotiated rulemaking. Meetings were held in Arco, Boise, Burley, and Chubbuck during the period March 9 to April 20, 2011. On August 9, 2011, the Director issued a letter to participants in the process temporarily suspending further action on the Petition pending availability of the next generation of the Eastern Snake Plain Aquifer (“ESPA”) ground water model. In the letter, the Director explained that “[i]t makes sense to analyze the proposed rule change under version 2.0 of the model which will be used for administration of rights under any new rule adopted in the future.”

Action on the petition was further delayed after Rangen Inc. (“Rangen”), a fish hatchery operation in the Hagerman area, filed a delivery call in December of 2011. In his letter dated September 26, 2013, to Paul Arrington, attorney for five of the seven irrigation districts and canal companies known as the Surface Water Coalition (“SWC”),¹ the Director explained that the information developed in the Rangen administrative process would be important in evaluating the Petition: “The information being generated and analyzed in the Rangen call is a necessary prerequisite to addressing the broader issues of the boundary for the area of common ground water supply.”

A final order on the Rangen delivery call was issued on January 29, 2014. Proceedings for Clear Springs’ Petition resumed on April 11, 2014. Further meetings were held in Arco, Boise, Burley, Pocatello and Rexburg between May 29 and June 2, 2014. The Department accepted comments on the Petition through June 24, 2014.

¹ A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

FINDINGS OF FACT

1. The current ACGWS is based primarily on a 1992 determination by the U.S. Geological Survey (“USGS”) of the extent of the underlying basalt bedrock that comprises the ESPA. The USGS report is referenced in CM Rule 50, which currently provides in relevant part:

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

2. Clear Springs’ Petition seeks to replace the reference to the USGS report:

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, ~~Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian~~ Enhanced Snake Plain Aquifer Model Final Report dated July 2006, Idaho Water Resources Research Institute Technical Report 06-002.

3. The Enhanced Snake Plain Aquifer Model Final Report, dated July 2006, documents what is commonly known as ESPA model version 1.1 (“ESPAM 1.1”). The ESPA model has been updated twice since Clear Springs filed its petition in 2011. The most recent version is referred to as “ESPAM 2.1.” See Enhanced Snake Plain Aquifer Model Version 2.1 Final Report dated January 2013.

4. The ESPAM 2.1 boundary was developed to simulate how ground water flows in the aquifer based on available data. Sometimes artificial boundaries were drawn because of the lack of scientific data for some tributary basins. A. Wylie, *Model Boundary Revision 2* (May 8, 2009). Given the artificial boundaries, the model boundary does not include all tributary ground water areas that supply water to a surface water source, nor does it include all areas where ground water "affects" the flow of surface water. USGS Professional Paper 1408-F, *Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho*, (1992); B. Sutter, Memorandum to the Idaho Committee on Hydrology (March 9, 1995); IWRI Technical Completion Report 20 II 03 (March 2011).² Ground water diversions in tributary basins deplete the volume of recharge to the ESPA and reduce tributary stream flow and ultimately the flow in certain reaches of the Snake River.

5. IDWR received verbal comments at public meetings and over 200 written comments in response to the proposed rule change. The parties that participated in the negotiated rulemaking have strongly held views with no material overlap between those who support and

² These documents are all on the Department’s web page for the Petition.

those who oppose the petition. Those potentially subject to and those who would benefit from additional regulation both believe their approach is the only fair and reasonable one.

6. The vast majority of the testimony and comments received oppose the change. The following is a broad overview of the comments received but it does not reflect each and every comment received:

a. Comments in favor of the petition:

- The current model boundary is a better representation of the ACGWS than what is identified in the current rule.
- Failing to include all contributing areas within the ACGWS negatively impacts the rights of calling parties.

b. Comments opposing the petition:

- No change should be made because the ACGWS was defined on the basis of geology. The geology has not changed.
- There is insufficient hydraulic connection between the areas being proposed for inclusion and the ESPA to justify a change. Ground water in specific areas does not intermingle with waters of the ESPA and are consequently not part of a "common" supply. The low transmissivity of certain areas should be considered.
- The model does not adequately represent conditions in the areas proposed for inclusion in the ACGWS and should not be used for administration of those rights.
- The model was not developed to establish the ACGWS and it is inappropriate to use it for that purpose.
- Pumping in areas proposed for inclusion has a very small impact on the ESPA. Furthermore, ground water pumping impacts the diversions of calling parties long after the depletions of ground water occur. Some areas proposed for inclusion are outside the "trim line" and should not be included.
- It is not fair to only include some tributary basins. Other areas that are not proposed for inclusion also impact the ESPA. The proposed rule change treats different areas disparately.

7. Adoption of the ACGWS as proposed in the petition would result in treating similarly situated ground water rights disparately. For example, ground water depletions within the upper Big Wood River basin and in the Big Lost River basin below Mackay Dam both reduce tributary underflow and recharge to the ESPA. The area below Mackay Dam is within the ESPAM 2.1 model boundary, and the upper Big Wood River basin is not. In another

example, ground water use within the Big Lost River basin above Mackay Dam and outside the model boundary has essentially the same impact on recharge to the ESPA as ground water depletions associated with lands below the dam and within the boundary.

8. Additionally, there is a disparity in the administration of surface water rights in the tributary basins outside the model boundary. Surface water rights within different tributary basins would not be administered by a change to the ACGWS. Surface water rights that authorize diversions from the Snake River and some of its tributaries are administered by Water District 01 (“WD01”). However, there are surface water rights outside WD01 that authorize diversions from tributaries of the Snake River and are junior to some of the rights held by members of the SWC.³ The depletions associated with junior priority surface water rights outside WD01 may have a more immediate impact on the water supply (reach gains and storage accumulation) of the Snake River than some ground water rights within the model boundary.

9. Department staff recognized from the onset of negotiated rulemaking that the proposed change would result in disparate administration of similarly situated rights. The most prevalent comment in the recent round of public meetings was that ground water users would be willing or at least more willing to submit to regulation if all similarly situated lands were treated the same.

10. The rationale for establishing a fixed boundary for the ESPA ACGWS is not stated in the rules. Through the development of the ESPA ground water model, additional and better information is available and technical tools have been developed since the Conjunctive Management Rules were promulgated in 1994. The Department can analyze contributing water supplies both inside and outside the current ACGWS. As the Director recognized in recent delivery calls, the ESPA model is the “best technical scientific tool currently available” to predict the effect of ground water pumping. *Final Order Regarding Rangen, Inc.’s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* at 22 (Jan. 29, 2014).

11. Furthermore, in practice, the administrative proceedings for each water delivery call have identified a trim line, an area within which ground water rights have been determined to impact the rights of the calling party and are, therefore, subject to curtailment. In every case, areas within the ESPA ACGWS have been excluded from consideration by application of the trim line so that each call has a specific area subject to administration. The area determined to contribute to the supply of a water right holder making a delivery call can be determined on a case-by-case basis in each delivery call proceeding. Therefore, a fixed ACGWS for the entire ESPA is no longer necessary.

12. The Director is able to administer a delivery call under the Conjunctive Management Rules without having a fixed ACGWS defined for the ESPA. Eliminating Rule 50 addresses the disparate treatment concern discussed in Finding of Fact 7 above. The administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water rights should be subject to administration.

³ The SWC has filed a delivery call under the CM Rules.

13. The issue of disparity in the administration of surface water and ground water rights in the tributary basins outside the model boundary discussed in Findings of Fact 7 and 8 still remains and should be addressed. In recognition of these concerns, separate from this order, Department Staff will undertake the following:

- a. Complete a review of surface water rights in tributary basins adjacent to WD01 that are not regulated to meet rights within WD01.
- b. Make recommendations to the Director regarding steps that should be taken to assure that water rights within tributary basins adjacent to WD01 are administered in a manner that protects senior water rights within WD01.
- c. With input from the Eastern Snake Hydrologic Modeling Committee, Department staff will develop model protocols or appropriate criteria and methods to administer ground water rights in the hydrologic basins where water is tributary to the Eastern Snake Plain Aquifer.

CONCLUSIONS OF LAW

1. The Director's decision to adopt rules governing water distribution is discretionary. *See* Idaho Code § 42-603 ("The director of the department of water resources is authorized to adopt rules ... as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.").

2. The Idaho legislature has granted the Director broad discretion in implementing his administrative responsibilities. In a recent case, the Idaho Supreme Court outlined the scope of the Director discretion:

Idaho Code section 42-602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a "clear legal duty" to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

In re SRBA, 40974, 2014 WL 3810591 (Idaho Aug. 4, 2014)(citations and quotations omitted).

3. The prior appropriation doctrine as established by Idaho law "is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use." *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013). These two bedrock principles typically are in tension in the context of resolving delivery calls under the Conjunctive Management Rules, and "the critical role of the Director in managing the water resource" in such proceedings is "to accommodate both the first in time and beneficial use aspects." *Id.* at 650-51, 315 P.3d at 838-39.

3. An area having a common ground water supply is defined in IDAPA 37.03.11.010.01 as:

01. Area Having a Common Ground Water Supply. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

4. IDAPA 37.03.11.031 lists the criteria the Director may consider in establishing an ACGWS :

01. Director to Consider Information. The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply.

02. Kinds of Information. The information considered may include, but is not limited to, any or all of the following:

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydro graphs of stream flow and ground water levels and other such data; and

b. The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area.

03. Criteria for Findings. A ground water source will be determined to be an area having a common ground water supply if:

a. The ground water source supplies water to or receives water from a surface water source; or

b. Diversion and use of water from the ground water source will cause water to move from the surface water source to the ground water source.

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source.

5. The Director is able to administer a delivery call under the Conjunctive Management Rules without having a fixed ACGWS defined for the ESPA. The above general definition and the case law developed in previous delivery call proceedings provide the appropriate framework for consideration of ground water impacts. The Director concludes that Rule 50 should be repealed because the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water rights should be subject to administration under a delivery call. As a result, Clear Spring's request to amend Rule

50 by including reference to the *Enhanced Snake Plain Aquifer Model Final Report dated July 2006, Idaho Water Resources Research Institute Technical Report 06-002* should be granted in part and denied in part. The Director agrees with Clear Springs that CM Rule 50 must be changed because the current rule “is nearly 20 years old and is not based upon the most recent data information regarding the proper hydrologic boundary of the ESPA.” *Petition* at 1. However, instead of amending the rule, the rule should be repealed.

ORDER

IT IS HEREBY ORDERED that Clear Springs’s request to amend Rule 50 is granted in part and denied in part. The Petition to enter rulemaking is GRANTED, but the request to include a reference to the *Enhanced Snake Plain Aquifer Model Final Report dated July 2006, Idaho Water Resources Research Institute Technical Report 06-002* is **DENIED**. The Department will take administrative steps to repeal CM Rule 50.

Dated this 29th day of August, 2014.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of August, 2014, I mailed a true and correct copy of the foregoing document, postage pre-paid, to the following:

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A handwritten signature in black ink, appearing to read "Kimi White", written over a horizontal line.

Kimi White