

INTRODUCTION

The issue before the Court is simple: Can the Director of the Idaho Department of Water Resources (“IDWR”) prevent a party from presenting new scientific and technical evidence in support of a party’s claim challenging a final agency order? In this case, the Director is wrongly precluding Clear Springs and Blue Lake Trout Farm, Inc. (“Blue Lakes”) from presenting evidence to support their claims challenging the material injury finding in the July 19, 2010 *Final Order*. Although the Director found that Blue Lakes’ and Clear Springs’ senior surface water rights are materially injured by hydraulically connected junior ground water rights, he has arbitrarily precluded Blue Lakes and Clear Springs from presenting updated scientific and technical information in support of their challenges to that finding.

The Director seeks to justify his actions by asserting that, since certain issues are on appeal to the Idaho Supreme Court, his hands are tied and he is unable to consider advancements in the state of the science regarding conjunctive administration of Blue Lakes’ and Clear Springs’ water rights absent some authorization from the Supreme Court. As a result of his refusal to consider valid information, the Director is wrongfully preventing Clear Springs from presenting evidence to support its claims in the ongoing administrative proceeding, which, pursuant to the timing in the administrative matter means Clear Springs will continue to suffer injury to its water rights in 2011, and as such has no adequate remedy at law.

Accordingly, Clear Springs has a substantial interest in this case and meets the criteria for intervention as of right under I.R.C.P. 24(a). Alternatively, Clear Springs requests the Court grant its motion for permissive intervention under I.R.C.P. 24(b).

STATEMENT OF FACTS

Clear Springs owns senior surface water rights to spring sources in the Thousand Springs area north of Buhl, Idaho. In 2005 Clear Springs requested conjunctive administration of hydraulically connected junior ground water rights that were injuring Clear Springs' senior rights. The Director issued an order on July 8, 2005, and the parties challenged that decision and requested an administrative hearing. The procedural and factual history of the underlying administrative proceedings and appeal is set forth in this Court's *Order on Petition for Judicial Review*, Case No. 2008-444 (June 19, 2009) and *Order on Petitions for Rehearing*, Case No. 2008-444 (Dec. 8, 2009). In its *Order on Petition for Judicial Review*, this Court remanded the case to the Director to "apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination." *Id.* at 58.¹

On remand, the Director issued a *Final Order* on July 19, 2010 finding material injury to Clear Springs' water right no. 36-4013A and Blue Lakes' water right 36-7210. Clear Springs challenged the Director's finding and requested an administrative hearing on the *Final Order* pursuant to Idaho Code § 42-1701A(3) ("any person aggrieved by any action of the director, including any . . . order . . . shall be entitled to a hearing before the director to contest the action.")). In its request for hearing, Clear Springs identified the following issues:

1. The *2010 Order* ignores the best scientific evidence . . .

...

6. The *2010 Order* fails to use current available data/information to determine hydraulically-connected junior ground water diversions causing injury to Clear Springs, and inappropriately relies on insufficient and outdated data/information contained in CM Rules 50.

Ex. A (Clear Springs *Petition Requesting Hearing on July 19, 2010 Final Order* at 3-4).

¹ Blue Lakes also filed a water right delivery call in 2005. Although the Blue Lakes and Clear Springs calls are separate administrative proceedings, with separate material injury determinations and separate mitigation obligations, hearings on the Director's order have been consolidated.

Notwithstanding the fact that Clear Springs protested the Director's failure to use "current available data/information," the Director issued an *Order Setting Hearing & Schedule & Order Limiting Scope of Hearing*, forbidding Clear Springs from presenting updated scientific and technical evidence at the administrative hearing related "to the 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model." *Order Limiting Scope* at 4. Remarkably, however, the Director also concluded that the junior ground water users "should *not* be precluded from arguing" issues related to "new facts." *Id.* at 3 (emphasis added).

ARGUMENT

I. Clear Springs is Entitled to Intervene as a Matter of Right Pursuant to Rule 24(a)

Rule 24 provides for intervention of right in a civil proceeding, as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

I.R.C.P. 24(a).

As discussed below, Clear Springs meets the requirements to intervene under Rule 24(a)(1) and (2). As such, Clear Springs' motion should be granted – especially in light of the Idaho Supreme Court's view that intervention should be liberally granted, and that the showing required for intervention is minimal. *See Herzog v. City of Pocatello*, 82 Idaho 505, 509 (1960); *Duff v. Draper*, 96 Idaho 299, 302 (1974).

A. Clear Springs' Motion is Timely.

Timeliness, for purposes of a motion to intervene, is “determined from all the circumstances.” *State v. United States*, 134 Idaho 106, 109 (2000). Although “the point to which the suit has progressed is not solely dispositive,” *id.*, the stage of the proceeding in this case weighs heavily in favor of granting Clear Springs’ motion for intervention. Blue Lakes filed its verified complaint and petition for writ of mandate with the Court less than a week ago on October 7, 2010. To date, no answer has been filed and no hearings or other proceedings before the Court have been held (other than Court’s *Order Denying Petition for Alternative Writ of Mandate*). Clear Springs will not disrupt the current hearing schedule, including the hearing set for October 28, 2010. Since this litigation is in the earliest stages, Clear Springs’ motion to intervene is timely.

B. Clear Springs Has an Interest in this Action and The Disposition of This Case May Impair or Impede Clear Springs’ Ability to Protect Its Interests.

Since the case concerns the Director’s refusal to consider new scientific and technical evidence regarding the validity of the Director’s material injury determination in the *Final Order*, Clear Springs has an interest in this action. An “interest,” for purposes of Rule 24(a), is defined as a “significant protectable interest.” *Donnelly v. Glickman*, 159 F.3d 409 (9th Cir. 1998). In this case, the Director has determined that Clear Springs’ senior water right no. 36-4013A is being materially injured. Clear Springs challenged the *Final Order* because, among other things, the Director failed to use the best available scientific and technical information in reaching his decision. *See supra*. By law, the Director is required to distribute water in water districts according to the prior appropriation doctrine. *See* I.C. §§ 42-602, 607; CM Rule 20. In carrying out this duty, the Director has a responsibility to review and utilize the best scientific information and data available. Stated another way, the Director cannot arbitrarily refuse to

consider information that further defines the interconnection of water sources for purposes of conjunctive administration or provides support for, or against, an injury determination.

The Director, however, has precluded Clear Springs from presenting certain information to support its claims in the upcoming administrative hearing. Clear Springs has an interest in presenting new scientific and technical evidence in support of its request for conjunctive administration and any refusal to consider that information prejudices Clear Springs' interests.

Furthermore, Clear Springs' ability to protect its right to present evidence to the Director may be significantly impacted by this action. Indeed, Clear Springs' ability to have a fair and complete administrative process is being "impaired or impeded," and any decision by this Court may affect how the Director determines what evidence may be presented the administrative proceeding. The Idaho Supreme Court has noted that:

The language of Rule 24(a)(2) indicates that the drafters did not contemplate that the petitioner in intervention be required to show ... that the petitioner in the intervention "is" bound by the judgment ... It was sufficient that ... the applicant "may" be bound by a judgment in the action.

Duff v. Draper, 96 Idaho 299, 302 (1974).

Since the *Final Order* and *Order Limiting Scope* were issued in the administrative proceedings relating to Clear Springs' senior water right, Clear Springs "will" be bound by the outcome of this action.

C. Clear Springs' Interests Are Not Adequately Represented By Existing Parties.

Finally, none of the other parties to this action adequately represent Clear Springs' interests. Similar to the above "may be bound" standard, the *Duff* Court noted that an applicant need only "show that the representation 'may' be inadequate." 96 Idaho at 302. The present parties are Blue Lakes and the Director and IDWR. The Director and IDWR do not represent the

interests of Clear Springs. Indeed, it is the Director's refusal to consider Blue Lakes' and Clear Springs' evidence that has prompted this action in the first place. Blue Lakes does not represent Clear Springs' interests either. Blue Lakes and Clear Springs operate distinct aquaculture facilities with separate water rights located in different locations in Water District 130. As such, Clear Springs is in a better position to address how the Director' actions will impact Clear Springs in relation to its separate request for administration. Clear Springs has a right to represent its interests in this proceeding.

As set forth above, Clear Springs meets all of the requirements under I.R.C.P. 24(a) to intervene in this proceeding as a matter of right.

II. Alternatively, Clear Springs Should Be Allowed to Intervene Under Rule 24(b).

In the event the Court denies intervention by right, Clear Springs requests permissive intervention under Rule 24(b). That rule provides the following:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24(b); *see also In re Doe*, 134 Idaho 760, 763 (Ct. App. 2000) (“A party may intervene: 1) where a statute confers a conditional right to intervene, or 2) where an applicant's claim or defense has a question of law or fact in common with the matter in which the applicant seeks intervention”).

Under I.R.C.P. 24(b) “there is no requirement that the intervener shall have a direct or personal pecuniary interest in the subject of the litigation.” *Herzog v. City of Pocatello*, 82 Idaho 505, 509 (1960). Despite this lower burden, Clear Springs does have a “direct or personal pecuniary interest” that is the subject of this action. Since Clear Springs' senior water right is

subject to the *Final Order* and *Order Limiting Scope*, and since the Director has prevented Clear Springs, in addition to Blue Lakes, from presenting current information, there is no question that Clear Springs has a common question of law and fact in this action.

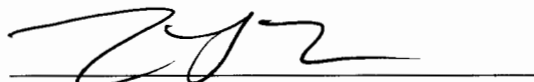
Finally, as discussed above, this motion is timely and Clear Springs will not disrupt the hearing scheduled for October 28, 2010. Accordingly, Clear Springs meets the standard for permissive intervention in this case.

CONCLUSION

Clear Springs, a party to the underlying administrative proceeding, has a significant interest in this case. As set forth above, Clear Springs' motion meets the standards of I.R.C.P. 24(a) and (b). Since the Director is wrongfully precluding Blue Lakes and Clear Springs from presenting scientific and technical information in support of their challenges to the July 19, 2010 *Final Order*, Clear Springs respectfully requests intervention in this proceeding to protect its interests.

DATED this 13th day of October, 2010.

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 the 13th of October, 2010, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF CLEAR SPRINGS FOODS, INC.'S MOTION TO INTERVENE PURSUANT TO I.R.C.P. 24** upon the following by U.S. Mail, postage prepaid:

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Travis L. Thompson

Exhibit

A

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Attorneys for Petitioner Clear Springs Foods, Inc.

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

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS. 36-)	
02356A, 36-07210, AND 36-07427.)	
)	
(Blue Lakes Delivery Call))	PETITION REQUESTING
)	HEARING ON JULY 19, 2010
)	FINAL ORDER
IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHTS NOS. 36-)	
0413A, 36-04013B, AND 36-07148.)	
)	
(Clear Springs Delivery Call))	
)	
)	

COMES NOW, Clear Springs Foods, Inc. ("Clear Springs"), by and through its attorneys of record, and files this *Petition Requesting Hearing on July 19, 2010 Final Order* ("Petition"), in the above-captioned matter.

This *Petition* states the initial grounds Clear Springs has identified to date for contesting the *July 19, 2010 Final Order* ("2010 Order"). Clear Springs reserves the rights to amend these grounds, and present additional grounds and to submit briefing and present argument on all issues that are raised during hearing. Clear Springs reserves the right to file with a district court an original action or actions to contest the *2010 Order*.

INTRODUCTION

This matter is before the Director on remand from the District Court. In his June 19, 2009 *Order on Petitions for Judicial Review* and December 4, 2009 *Order on Petitions for Rehearing*, the Honorable John M. Melanson held that the Director improperly shifted the burden of proof to Clear Springs when he determined, without any supporting information, that Clear Springs' water right 36-4013A was not historically filled due to seasonal variations. The matter was remanded to the Director to apply the proper burdens of proof in making a material injury determination. Although certain issues were subsequently appealed to the Idaho Supreme Court, the remand order, and the associated discussion regarding burdens of proof, was not appealed.

On July, 19, 2010, the Interim Director issued the *2010 Order* relating to the issues on remand. In that order, the Interim Director created an analysis that, he asserts, will determine the impact of seasonal variability on Clear Springs' water right. Using that analysis, the Interim Director found material injury to water right no. 36-4013A.

Notwithstanding a finding of material injury, the Interim Director applied a plus or minus 10% margin of error, or "trim line," to exclude certain hydraulically-connected junior ground water rights found to be contributing to the material injury. In addition, the Interim Director refuses to administer the water rights causing material injury or to require a mitigation plan as required by the Rules for the Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). Rather, he stated that "[c]urtailment in 2010 would not provide any significant water to the senior water right holders, and it would not be reasonable to order curtailment this year."

INITIAL GROUNDS FOR CONTESTING THE 2010 ORDER

1. The *2010 Order* ignores the best scientific evidence, inappropriately calculates and applies a plus or minus 10% margin of error, or “trim line,” to exclude hydraulically-connected junior ground water rights causing injury to Clear Springs’ senior water right from priority administration and fails to accurately consider the impact of ground water depletions on Clear Springs’ senior water rights.

2. Contrary to the CM Rules and Snake River Basin Adjudication (“SRBA”) Orders, the *2010 Order* fails to administer those hydraulically connected ground water rights that lie outside the “trim line” even though they were found to contribute to the material injury to Clear Springs’ senior water right.

3. The *2010 Order* violates the established burdens of proof, *e.g. American Falls Reservoir Dist. #2 v. Idaho Dept. of Water Resources*, 143 Idaho 8621 (2007), by failing to shift the burden to the holders of the junior ground water rights to establish a defense to the call by clear and convincing evidence and thereby forcing Clear Springs to prove that the junior ground water rights outside the 10% trim line should be subject to administration.

4. Contrary to the CM Rules and the SRBA Orders, the *2010 Order* fails to require curtailment or a CM Rule 43 mitigation plan during the 2010 irrigation season.

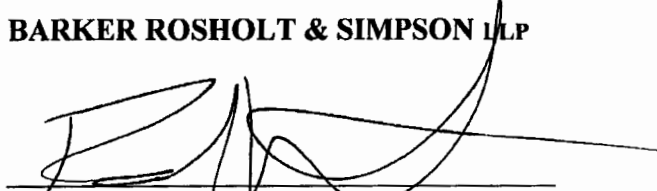
5. The *2010 Order* is not supported by substantial evidence when it concluded that “[c]urtailment in 2010 would not provide any significant water to the senior water right holders, and it would not be reasonable to order curtailment this year.”

6. The *2010 Order* fails to use current available data/information to determine hydraulically-connected junior ground water diversions causing injury to Clear Springs, and inappropriately relies on insufficient and outdated data/information contained in CM Rule 50;

thus resulting in a failure to require all junior ground water rights that are contributing to the material injury of Clear Springs' senior water right to provide mitigation for their depletions to the aquifer.

Dated this 30th day of July, 2010.

BARKER ROSHOLT & SIMPSON LLP



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Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2010, I served a true and correct copy of the foregoing **PETITION REQUESTING HEARING ON JULY 19, 2010 FINAL ORDER** by delivering it to the following individuals by the method indicated below, addressed as stated.

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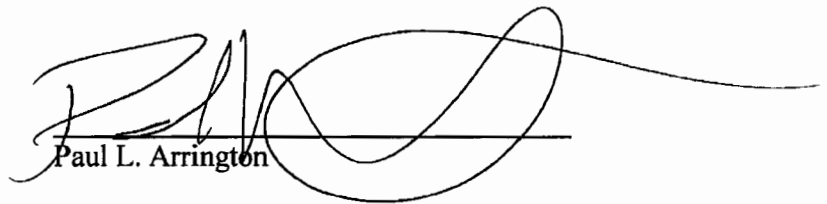
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