



## State of Idaho

# DEPARTMENT OF WATER RESOURCES

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August 9, 2011

C. L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Interim Director

Re: Petition to Amend Rule 50 filed by Clear Springs Foods, Inc.

Dear Water Users,

I wish to thank those who participated in the negotiated rulemaking process commenced by the Department in response to Clear Springs Food, Inc's ("Clear Springs") Petition to Amend Rule 50. The negotiated rulemaking process is an important and helpful tool in evaluating the implications that granting the petition may have on water administration in this state. The Department held five public meetings in four different locations: Boise, Arco, Chubbuck and Burley. About 180 comments were submitted in response to the Department's request for comments. The comments addressed a range of issues and offered the Department much to consider. The following is a broad overview highlighting the main points offered in the comments and at the public meetings. The summary does not capture each and every concept presented.

Comments in favor of Clear Springs' proposal: Comments in favor generally argued that the current area of common ground water supply does not include all areas that contribute ground water to the Eastern Snake Plain Aquifer ("ESPA"):

- The current model boundary is a better representation of the area of common ground water supply than that identified in the current rule. Failing to include all contributing areas within the area of common ground water supply negatively impacts the rights of calling parties.

Comments against Clear Springs' proposal: Comments against Clear Springs' proposal raised a number of different issues:

- No change should be made because the area of common ground water supply was defined on the basis of geology and aquifer transmissivity. Those same conditions apply today.
- 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 model does not adequately represent conditions in the areas proposed for inclusion in the area of common ground water supply and should not be used for administration of those rights.
- The model was not developed to establish the area of common ground water supply and it is inappropriate to use it for that purpose.
- There is insufficient legal authority to amend rule 50. The Department failed to follow the proper rulemaking procedures and failed to properly notify potentially impacted parties. People were told that they would never be included in the area of common ground water supply and the Department is legally precluded from adding them now.
- Pumping in areas proposed for addition has a very small impact on the ESPA. Additionally, effects of pumping ground water are exhibited at the diversion points of calling parties long after the depletions of ground water occur. Some areas proposed for inclusion are outside the “clip line” and should not be included.
- It is not fair to include only some tributary areas. Other areas that are not proposed for inclusion also impact the ESPA - the proposed rule change treats different areas disparately.

Director’s Conclusions:

An area with a common ground water supply shall be administered in accordance with the priorities of the rights. IDAPA 37.03.11.040.01. 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. (Section 42-237a.g., Idaho Code). (10-7-94)

This rule sets a very low bar: where the use of ground water “affects” the flow of surface water, it satisfies the definition of an area having a common ground water supply.

IDAPA 37.03.11.031 lists the criteria the Director may consider in establishing an area of common ground water supply:

**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. (10-7-94)

**02. Kinds of Information.** The information considered may include, but is not limited to, any or all of the following: (10-7-94)

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

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. (10-7-94)

**03. Criteria for Findings.** A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

a. The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

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. (10-7-94)

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. (10-7-94)

The current area of common ground water supply for the ESPA (formally known as IDAPA 37.03.11.050.01 but more commonly referred to as Rule 50) 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.<sup>1</sup> This standard for establishing an area of common ground water supply argues that Rule 50 should be amended to reflect the current understanding of hydrologic conditions.

I am sensitive to concerns that adopting Clear Springs’ proposal excludes large areas that contribute water to the ESPA and are hydrologically and hydrogeographically similar to areas within the outer edges of the model boundary that would be included under Clear Springs’ proposal. IDAPA 37.03.11.031 provides that the Director will determine the area of common ground water supply based on hydrologic evidence. Hydrologic evidence implicates a much larger area than that proposed. The petitioners argue that the current model boundary is a better representation of the area of common ground water supply than the boundary established by the existing rule. However, the model was never intended to incorporate all contributing areas; the extent of the area of common ground water supply was not part of the deliberations that accompanied model development. Some of the areas within the model boundary have been

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<sup>1</sup> See USGS Professional Paper 1408-F, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, 1992, Bob Sutter memorandum to the Idaho Committee on Hydrology of March 9, 1995, IWRRI Technical Completion Report 201103, of March, 2011. These documents are all on the Department’s web page for the boundary change petition.

subsequently determined to be not a part of the ESPA.<sup>2</sup> It is not appropriate to adopt the model boundary as a short cut surrogate for proper deliberation as contemplated in the rule.

The available hydrologic evidence indicates that impacts of tributary area ground water pumping on reach gains and spring discharge are complex and varied, although many tributary areas have considerably lower transmissivity than the ESPA. Consideration of expanding the area of common ground water supply to outlying areas warrants an analysis of the timing of impacts and perhaps other issues.

The area of common ground water supply on the ESPA is a matter of significant importance to parties on both sides of the issue, as reflected in the comments. It deserves a careful and thorough consideration. Given the weightiness of this matter and the wide disparity between the apparent hydrologic evidence and the current rule, the negotiated rulemaking process should be expanded to include notice and opportunity for all water users in potentially impacted tributary areas to participate.

The schedule for amending the rule needs to be considered. The Department intends to adopt a new version of the ESPA model (ESPAM version 2.0) as soon as necessary prerequisites are completed. ESPAM version 2.0 represents a significant upgrade from ESPAM version 1.1. Calibration is nearing completion and a predictive uncertainty analysis and a validation analysis should be completed by next spring. It 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.

Furthermore, it appears there is time to carefully consider this issue. Existing orders address mitigation to Petitioner Clear Springs Foods' rights of February 4, 1964 and September 15, 1955. Under existing orders ground water users are to provide full mitigation of 39 cfs to the Buhl to Thousand Springs reach to Clear Springs' 1964 right.<sup>3</sup> The gain of 39 cfs to the reach equates to 2.7 cfs (6.9% of the total reach gains) provided directly to the Clear Springs facility.<sup>4</sup> Mitigation to Clear Springs 1955 right is in the first of a five year buildup and adds 3.7 cfs to the reach or .25 cfs directly to Clear Springs in 2011.<sup>5</sup> In 2015 and beyond, full mitigation will be provided to both rights and will equal 57.0 cfs to the Buhl to Thousand Springs Reach or 4.0 cfs directly to Clear Springs.<sup>6</sup> Simulated curtailment under the model boundary as opposed to the current boundary, would provide a total of 57.4 cfs to the Buhl to Thousand Springs reach in 2015 and beyond, instead of 57.0.<sup>7</sup> The increase of 0.4 cfs to the reach would yield a difference of 0.0276 cfs to the Clear Springs facility. For at least the next few years the ground water users'

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<sup>2</sup> See Ralston, *Hydrogeology of the Thousand Springs to Malad Reach of the Enhanced Eastern Snake Plain Aquifer Model*, September, 2008 as well as the map of the boundary of model version 2.0 which incorporates a smaller geographic area than version 1.1

<sup>3</sup> Mitigation has been stayed in part at the request of the parties. February 7, 2011 Order Granting Requests for Hearing and Amended Order Continuing Proceeding, page 4.

<sup>4</sup> January 10, 2011 Amended Final Order Regarding Seasonal Variability (Blue Lakes and Clear Springs delivery calls), Finding of Fact 51

<sup>5</sup> January 10, 2011 Amended Final Order, page 24

<sup>6</sup> January 10, 2011 Amended Final Order, Finding of Fact 51 and page 24

<sup>7</sup> January 10, 2011 Amended Final Order, Exhibit B

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mitigation obligations would be the same under the existing rule as it would be under Clear Spring's proposed rule due to rounding.

Members of the Surface Water Coalition commented in support of Clear Springs' proposed rule change and would stand to gain from the proposed change in some years. The Coalition experiences material injury in years of low runoff. When material injury does occur, it may occur to reservoir carryover and/or to the combined supply of natural flows and reservoir storage available to individual members of the Surface Water Coalition. Reservoir storage is currently at or near record levels for this time of year and flows in the upper parts of the Snake River basin have been at or near record highs since before first of July. Reasonable carryover requirements at the end of the current water year will likely be satisfied in full and carryover storage into the fall should be very high. While the possibility the Surface Water Coalition might experience material injury in 2012 cannot be ruled out at this time, it is highly unlikely there will be material injury to reasonable carryover in 2011 and it is likely the Surface Water Coalition will experience little to no material injury of any kind in 2012.

Once ESPAM version 2.0 is finalized, I will instruct Department staff to restart the negotiated rulemaking process consistent with the guidance I have outlined in this letter. The Department will conduct additional hearings in those areas which might be impacted by any change in the rule.

Sincerely,

A handwritten signature in cursive script, reading "Gary Spackman". The signature is written in black ink and is positioned above the printed name and title.

Gary Spackman  
Interim Director