

Clear Springs Foods, Inc. Recommendations to the IDWR Board Regarding DEVELOPMENT AND CONTENTS OF AN EASTERN SNAKE RIVER PLAIN AQUIFER (ESPA) MANAGEMENT PLAN

Introduction

Clear Springs Foods, Inc., headquartered in Buhl, Idaho is the world's largest producer of aquacultured rainbow trout. Privately held by an employee owned trust, Clear Springs is a vertically integrated food company from brood stock through egg production, feed manufacturing, farm operations, processing and primary distribution in its own fleet of refrigerated trucks. Clear Springs currently employs approximately 400 individuals within the various operating groups and has a \$17 million annual payroll. Products are distributed and sold throughout the US, Canada and Mexico.

Clear Springs Foods, Inc. has 12 decreed ESPA dependent surface water rights with the oldest issued in 1933. Over the past 30 years, spring flows have progressively declined so that flows for some CSF springs are now 20-30 % below their decreed right. Over the past 10 years (since 1996) Clear Springs Foods, Inc. has accrued losses of at least \$15.4 million as a consequence of groundwater pumping diminished flows to two fish farms. Clear Springs Foods has two water delivery calls before IDWR and has appealed the Director's order regarding those calls. Clear Springs Foods supports use of the ESPA model as one of several tools for planning purposes but is opposed to its use for administration of water rights. Various assumptions made to ensure calibration with existing data and the lack of ESPA model precision or accuracy preclude its use for administrative purposes.

Clear Springs Foods, Inc. supports the planning process recognizing the statutory limitations of such a planning process. Given the uncertainties relative to timing and mitigation of decreed water rights, in order for the planning process to have an opportunity for success, the existing orders must be complied with and further administrative hearings stayed. Once the plan has developed to the point where the State and the participants can access the viability of the plan, further funding and relief from orders can be evaluated.

Recommendations

Clear Springs Foods, Inc. recommends to the Idaho Water Resources Board ("IWRB") the following goals, components and processes are included in any plan for management of the Eastern Snake River Plain Aquifer ("ESPA"):

1. The term and result of such planning (the "Plan") and its component parts must timely accomplish the goals and objectives as defined herein and be of sufficient duration to accomplish such goals and objectives into perpetuity.
2. The short (2 year) term goal should be to stabilize the ESPA at 2001 spring water

flows.

3. The long term goal (greater than 2 years) at a minimum should be to improve spring water flows throughout the ESPA to satisfy senior surface water rights.
3. An ESPA Trust Account should be established to fund actions that foster aquifer stabilization and replenishment. Part of the Trust Account could be a sub account to pool mitigation fees by junior groundwater right holders. In that regard, Clear Springs Foods supports the formation of three sub-accounts within the ESPA Trust Account as proposed by the Surface Water Coalition.

A. The Trust Account should consist of funds from the following sources for the identified purpose(s):

1. Annual Administrative Fee: Presently, there exists legislation which funds continued studying and monitoring of the ESPA and continued modeling improvements. This annual administrative fee *is intended to* continue to support adequate staffing of the I DWR to administer the Plan. All water users in the ESPA should be required to fund this program.
2. Annual Ground Water Mitigation Fee: A mitigation fee should be established through negotiated rulemaking for all ground water users within the ESPA or areas hydraulically connected to the ESPA to achieve a defined mitigation objective. The objective should be to mitigate for the accrued depletive effects of groundwater pumping by junior water right holders. The rulemaking to create the fee should consider the following:
 - i. The IWRB should take into account the relative priority, location and impact of a ground water use on the water supply of the senior surface water rights being mitigated.
 - ii. Expenditures from the fund supported by the annual ground water mitigation fee may be used for existing ongoing mitigation costs as well as new costs associated with meeting the mitigation objective(s) of the aquifer management Plan.
 - iii. Clear Springs Foods supports action that provides either cash or in-kind contributions to adequately address water demand on spring flows to meet mitigation objectives identified and/or to address observed declines in spring flows.
3. Annual Aquifer Enhancement Fee: An aquifer enhancement fee for all water users (surface and groundwater, consumptive and non-consumptive within the ESPA, or areas hydraulically connected to the ESPA) should be established by negotiated rulemaking to be used to fund enhancement objectives over and above the mitigation objective of the aquifer

management Plan. This specific rulemaking should consider the appropriate fee schedule and allocation of benefits. This fee should be expended only after the mitigation objective expenditures are commenced. There should be no increase in enhancement fees until the mitigation objectives are met.

- B. The IWRB should develop a fee schedule for each sub-account described in paragraphs 3.A.1, 2 and 3 above as part of a negotiated rulemaking to assure that funds are available to meet the objectives for each sub-account as set forth in the aquifer management Plan. An initial fee schedule should then be presented to the Idaho Legislature as part of the IWRB's aquifer management Plan. At 2-3 year intervals the IWRB should evaluate whether the fee schedules are providing sufficient funds to achieve the objectives of the aquifer management Plan for which each sub-account has been established. If a fee schedule is not sufficient to achieve the objective for which the sub-account has been established or is greater than necessary to achieve the objective, then the IWRB should initiate negotiated rulemaking to make an appropriate adjustment in the fee schedule. The fees collected for each sub-account should remain distinct and separate.

4. Monitoring and Evaluation:

- A. Benefits of the aquifer management Plan should be determined through use of appropriate, relevant standards, including but not limited to the ESPA model, actual measurements and other relevant data after the participants in the planning process (“parties”) are provided an opportunity to present their positions regarding the accuracy and capabilities of the model, measurements and data as described in paragraph 7. It should be noted that the ESPA model is disputed as to its usefulness for administering water rights.
- B. IDWR should establish an on-going water measurement and monitoring program for the ESPA under item A.1 above consisting of the following actions:
 - 1. Updating of the ESPA ground water model on a periodic basis, including the following:
 - i. Continue return flow and ground water levels at a frequency adequate to detect change and determine availability of natural flow;
 - ii. Identify or establish sentinel observation wells for annual measurements of ground water levels and conduct mass ground water level measurements as necessary.
 - iii. Collect continuous spring flow measurements on sentinel springs

within the following reaches:

Blackfoot to Neeley: Spring Creek or other indicator spring in Blackfoot/Neeley Reach (need to resolve access issues with Shoshone-Bannock Tribe on Spring Creek).

Devil's Washbowl to Buhl: Devil's Corral or Vineyard Creek; Blue Lakes; Crystal Springs.

Buhl to Thousand Springs: Briggs Springs, Box Canyon Springs, the Clear Lakes Complex.

Thousand Springs: White Springs and Big Springs, if feasible, Billingsley Creek and Riley Creek (NFH).

Malad: Malad, if feasible.

2. Update water budget;
 3. Review IDWR tributary underflow study and develop and implement a methodology to improve quantification of tributary underflow; and
 4. Develop and implement a methodology for updating evapotranspiration. (NASA is suspending the thermal band on spatial imagery used by IDWR for determining evapotranspiration.)
- C. Continuation of ESPA technical advisory committee review of ESPA modeling activities.
 - D. Completion of agreed upon ESPA modeling scenarios to implement settlement.
 - E. Update surface water accounting model to provide transparency, near real-time output, and an improved data bridge or link between the ESPA ground water model and surface water accounting model. Improvement in the model should be accomplished through a collaborative effort of the current technical committee, as well as participation by consultants engaged by the parties. Prior to employment of the model to determine the benefits of the aquifer management Plan as contemplated by paragraph 6(A), supra, each Party should have an opportunity for input on the model.
5. Water Right Enforcement Program. The Plan should provide that existing water rights administration programs be reviewed and, as deemed appropriate, modified: 1) to provide for adequate funding for the appointment and equipping

of a sufficient number of watermasters to ensure all authorized diversions are adequately measured and reported and all water rights are regulated in accordance with the prior appropriation doctrine; 2) to ensure all water district water masters meet minimum qualifications as established by rule; and 3) to ensure watermasters are fair and impartial. In addition, existing water rights administration programs should be reviewed and, as deemed appropriate, modified: 1) to empower water right holders to implement water management projects; 2) to hold water rights for recharge and mitigation; 3) to require the participation of all water right holders deriving the benefits described in the ESPA aquifer management Plan; and 4) to eliminate or consolidate duplicative programs. This effort will be undertaken and recommended during the next legislative session after adoption of the Plan.

6. ESPA Aquifer Management Plan. IWRB should develop an ESPA water management Plan in consultation with water right holders for submission to the Idaho Legislature. Clear Springs Foods will support provisions of the Plan that comport with and advance, and that do not contravene, the prior appropriation doctrine or water rights as established by Idaho law. The IWRB Plan should, as appropriate, rely upon objective standards, including, but not limited to the ESPA model, measurements and other relevant data in the manner set forth above, to develop the measures to implement the Plan. The use and method of implementation of the model should be established with the input of both the technical committee and the participation and advice of the Parties' independent consultants prior to use of the model and development of the aquifer management Plan such that the Parties and the IWRB have a fair and adequate opportunity to reach consensus on the operation and employment of the model. In formulating the Plan, the Board should ensure a fair and open process in which all persons consulted, and all comment, facts, opinions and advice provided to or relied upon by the IWRB, are identified and fully disclosed in a timely manner to all participants in the planning process. The IWRB should ensure that all participants have a meaningful opportunity to evaluate and respond to such persons or information. Hence, no individual involved in the legal analysis or technical determinations of the orders issued by the Idaho Department of Water Resources in response to the ESPA delivery calls, or any State employee involved in the decision-making process relative to the formal hearings before the IDWR shall have any input on the goals and objectives identified as a part of the planning process. The Plan should be developed and adopted under IWRB's water Planning authority as set forth in I.C. § 42-1734. This effort should include development of long-term goals and objectives, which should include mitigation goals and objectives to mitigate the effects of ground water pumping by junior appropriators upon senior surface and ground water rights, and measures to meet those goals and objectives, and measures to implement those goals and objectives, and a domestic ground water use policy. The Plan should be developed so as to direct expenditures from the respective sub-account funds provided for in 3.A above.

8. Nothing herein shall constitute a waiver of any Parties' rights, nor shall it estop any Party from challenging the ultimate determination of any Decision Maker through use of processes and upon any basis provided by law or equity.

9. **Changed Circumstances:** Clear Springs Foods, Inc. recommends the IWRB annually submit a report to ESPA water users on the status of Plan implementation and progress to stabilize and replenish the aquifer. Public notice of plan progress should be made and copies made electronically available. At five year intervals, the IWRB should review, and modify the aquifer management Plan as appropriate. Modification would be made after due deliberation with stakeholders. Any Party should be able to petition the IWRB to undertake an interim review if they feel that the aquifer management Plan is no longer adequate, or is not being implemented. If the IWRB fails through its rules or otherwise to develop the aquifer management Plan in accordance with the provisions of the prior appropriation doctrine or water rights as established by Idaho law or develops a Plan with provisions which contravene the prior appropriation doctrine as established by Idaho law; fails to implement measures which will timely achieve the goals of the Plan; fails to establish fees reasonably calculated to achieve the Plan; or, fails to implement the approved aquifer management Plan, the Parties shall have the right to initiate, prosecute or defend any actions they deem appropriate in asserting their legal rights and remedies with respect to water rights administration.