RECEIVED
AUG 1 2 2005
DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th Street, Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	)	CLEAR SPRINGS FOODS, INC DISQUALIFICATION OF THE DIRECTOR AS THE HEARING OFFICER AS A MATTER OF RIGHT; REQUEST FOR DISCOVERY

COMES NOW, Clear Springs Foods, Inc (hereby referred to as "Clear Springs") and hereby file this *Disqualification of the Director as the Hearing Officer as a Matter of Right* pursuant to the Idaho Administrative Procedure Act ("Idaho APA"), Idaho Code § 67-5252(1).

FACTS

Clear Springs initiated a request for administration of water rights within Water District 130 on May 2, 2005 by delivering said request to the Director of the Idaho Department of Water Resources ("IDWR"). Additionally, Clear Springs delivered extensive historical data supporting water right diversions and water availability. In response to the call for administration the Director issued, through an informal process, an Order on July 8, 2005. This Order identified that any aggrieved party to the informal order could file a petition requesting a formal hearing within the time prescribed. Clear Springs filed a Petition for Hearing on July 25, 2005 and

requested the Director appoint an independent hearing officer (a non-IDWR employee) to preside over the hearing. The filing of this petition created a contested case which necessitated the creation of a new, independent record by which Clear Springs' call for administration would be judged. The Director by his July 29, 2005 Order declined to appoint a non-IDWR employee as the hearing officer. Instead, the Director appointed himself as the hearing officer and set an August 16, 2005 status conference. This status conference order was the initial notification of the appointment of a hearing officer.

INTRODUCTION

The Status Conference Order set the Clear Springs Petition with the Rangen and Blue Lakes Petitions for a conference before the Director. The Order requested the parties come prepared to discuss whether or not there existed common legal or factual issues which presented an opportunity to consolidate the petitions. An initial review of the Orders and Petitions filed indicate there are a number of distinct legal and factual issues, which at this point make consolidation questionable in order to protect the Petitioners' individual rights to a hearing. Discovery of the groundwater model results, assumptions and impacts, which is requested, is necessary prior to addressing the issues raised in the Order setting the status conference. Furthermore, there are likely to be additional petitions filed, given the Director's recent orders on the Bill Jones and Billingsley Creek Ranches requests for administration.

Clear Springs files this instant motion in response to the Director's self-appointment as hearing officer and notification of said appointment on July 29, 2005.

ARGUMENT

I. THE IDAHO APA GRANTS A PARTY TO A CONTESTED CASE THE RIGHT TO DISQUALIFY A HEARING OFFICER AS A MATTER OF RIGHT.

Idaho Code § 67-5252(1) provides the following with respect to "presiding officers" in administrative "contested cases":

> (1) Except as provided in subsection (4) of this section, any party ***shall have the right to one (1) disqualification without cause of any person serving or designated to serve as presiding officer*** . . .

I.C. § 67-5252(1)(emphasis added).

Subsection (4) states the following:

> (4) Where disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of section 59-704, Idaho Code.

I.C. § 67-5252(4).

The instant request for disqualification as a matter of right does not seek disqualification of the Director as the ultimate review administratively, but simply seeks the disqualification of the Director and IDWR employees as the hearing officer in the instant contested case. The Director (Agency Head) would still sit in review of the hearing officer's Recommendations and Order as dictated by Rule IDAPA 37.01.01.720.

Previously, Clear Springs requested the Director to appoint an independent "hearing officer" pursuant to his authority granted under I.C. § 42-1701A(2). That statute allows the Director "to direct that a hearing be conducted by a hearing officer appointed by the Director." I.C. § 42-1701A(2). The Department's own rules distinguish between a "hearing officer" and a "presiding officer" for purposes of contested cases. *See* IDAPA 37.01.01.410 ("A hearing officer is a person other than an agency head appointed to hear contested cases on behalf of the agency."); IDAPA 37.01.01.411 ("Agency heads are not hearing officers, even if they are presiding at contested cases."). In addition, the Department's rules specifically address disqualification of "hearing officers." Rule 412 provides the following:

> Pursuant to Section 67-5252, Idaho Code ***hearing officers*** are subject to disqualification for bias, prejudice, interest, substantial prior involvement in the case other than as a presiding officer, status as an employee of the agency, lack of professional knowledge in the subject matter of the contested case, or any other reason provided by law or for any cause for which a judge is or may be disqualified. Any party may promptly petition for disqualification of a hearing officer after receiving notice that the officer will preside at a contested case or upon discovering facts establishing grounds for disqualification, whichever is later. Any party may assert a blanket disqualification for cause of all employees of the agency hearing the contested case, ***other than the agency head***, without awaiting the designation by a presiding officer. A hearing officer whose disqualification is requested shall determine in writing whether to grant the petition for disqualification, stating facts and reasons for the hearing officer's determination. ***Disqualifications of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.***

IDAPA 37.01.01.412 (emphasis added).

Under the Department's rules of procedure, a hearing officer and the Director are treated differently for purposes of disqualification. According to the rules, the Director is not a "hearing officer" since he is the "agency head." Although the rule is similar to the Idaho APA, the statute uses the same disqualification language but it applies to "presiding officers", not just "hearing officers." Although the term "presiding officer" is not defined in the Idaho APA, it plainly includes the concepts of a "hearing officer" and an "agency head." Consequently, the statute provides a party to a contested case the right to disqualify a "hearing officer" as a matter of right. I.C. § 67-5252(1). Whereas the Department's rules do not provide for disqualification "without cause," the rules cannot abrogate a party's right provided by statute.

As such, the Clear Springs' request is timely under the Idaho APA and the Department's rules. For these reasons the Clear Springs requests disqualification of the Director from presiding over the hearing in this matter. Resolution of this issue in a timely manner is necessary to ensure that the Department and the parties make the best use of time and resources prior to proceeding with the discovery requested herein and ultimately to a hearing.

DATED this 12th day of August 2005.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of August, 2005, I served a copy of the foregoing *Clear Springs Foods, Inc. Disqualification of the Director as the Hearing Officer as a Matter of Right,* by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Hand Delivered: Karl Dreher
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl, Idaho 83316-0712

North Snake Ground Water District
152 E Main Street
Jerome, Idaho 83338

Magic Valley Ground Water District
809 E 1000 N
Rupert, Idaho 83350-9537

Cindy Yenter
Watermaster
Water District No. 130
1341 Fillmore Street, Suite 200
Twin Falls, Idaho 83301-3380

Mike Creamer
Jeff Fereday
Givens Pursley
PO Box 2720
Boise, Idaho 83701-2720

Frank Erwin
Watermaster
Water District No. 36
2628 S 975 E
Hagerman, Idaho 83332

John K. Simpson