DANIEL V. STEENSON (ISB#4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB#5636)
RINGERT CLARK CHARTERED
P.O. Box 2773
Boise, ID 83702
(208)342-4591

Attorneys for Petitioners/Plaintiffs

2005 JUN 8 AM 9 15
GOODING COUNTY CLERK
BY: h
DEPUTY

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR LAKES TROUT COMPANY, INC., Petitioner/Plaintiff, vs. KARL J DREHER, in his official capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents/Defendants.	CASE NO.: CV-2005-426 COMPLAINT AND PETITION FOR WRIT OF MANDATE

COME NOW the Petitioner/Plaintiff, Clear Lakes Trout Company, Inc. (hereinafter referred to as "Plaintiff"), by and through its undersigned attorneys of record, Ringert Clark Chartered, and hereby files this *Complaint and Petition for Writ of Mandate* in the above-entitled Court. Plaintiff complains, alleges and petitions as follows:

COPY

GENERAL ALLEGATIONS

I.

Plaintiff is an Idaho corporation, with its primary facilities and operations located in Gooding County, Idaho.

II.

Defendant Karl J. Dreher is a resident of Ada County, Idaho, and is the Director of the Defendant Idaho Department of Water Resources ("IDWR").

III.

Defendant IDWR is an administrative agency of the State of Idaho, with its main offices located at 322 E. Front Street, Boise, Ada County, Idaho.

IV.

Plaintiff owns water rights which entitles it to use water for fish propagation purposes in Gooding County, Idaho. Plaintiff is the owner of the following water rights: 36–2659 and 36-7004. True and accurate copies of the partial decrees for the above-mentioned water rights are attached hereto as Exhibit A.

V.

The water source for Plaintiff's water rights are springs that are part of the spring complex commonly known as the "Thousand Springs," which are supplied by the Eastern Snake River Plain Aquifer (ESPA). The springs are tributary to the Snake River and are hydrologically interconnected to the ESPA.

VI.

Clear Springs Foods, Inc. ("Foods") owns and operates a trout production facility located

immediately adjacent to Clear Lakes' primary facilities in Gooding County, Idaho. Foods owns water right number 36-2708 that entitles it to use water for fish propagation purposes. Water right number 36-2708 is diverted from the same spring source as Plaintiff's water rights. A true and accurate copy of the partial decree for the above-mentioned water right attached hereto as Exhibit "B."

VII.

The joint spring source of Plaintiff's and Foods' water rights is located within Water District 130, said Water District having been created pursuant to Idaho Code § 42-604 on or about February 19, 2002. Water District 130 is presently being administered by the Defendant IDWR through watermaster, Cindy Yenter.

VIII.

Pursuant to Idaho Code § 42-602, et seq., it is the duty of Defendant Dreher, as Director of the Defendant IDWR, to direct and control the distribution of water from all natural water sources within a water district according to the prior appropriation doctrine. Pursuant to Idaho Code § 42-607, it is Defendants' duty through their watermaster to distribute the waters within Water District 130 according to the prior rights of water users within the Water District so that in times of scarcity of water, the diversion facilities for junior water rights are shut off or otherwise controlled as necessary to supply water for the prior rights of senior water right holders, including the water rights of Plaintiff and Foods.

IX.

Junior groundwater diversions from the ESPA reduce the quantity of water available to both Plaintiff and Foods from their joint spring source when Plaintiff and Foods need and have the right

to said water.

X.

On or about June 7, 2002, Foods made a "call" for delivery of water to IDWR. The Director responded to Foods' call by instructing the Watermaster to adjust Plaintiff's headgate such that the quantity of water Foods receives from the joint spring source was increased, and the quantity of water Plaintiff receives from the joint spring source was correspondingly decreased. The first adjustment of Plaintiff's headgate was accomplished on July 5, 2002, and additional adjustments further decreasing the quantity of water Plaintiff receives from the joint spring source have been and continue to be made since that time.

XI.

As a result of the adjustment of its headgate per Defendants' instructions, Plaintiff has not been receiving the quantity of water to which it is entitled under its water right numbers 36-02659 and 36-07004 since July 5, 2002. During all or parts of the periods of use for their water rights (January 1 to December 31), Plaintiff does not receive and has not been receiving, its full entitlement to water pursuant to its water rights, depriving it of a sufficient water supply for its fish propagation facilities, all to the proximate detriment of Plaintiff.

XII.

On or about May 16, 2005, through a letter from its counsel to Defendant Dreher, Plaintiff requested that Defendant advise Plaintiff how Defendants would administer Foods' "call" against junior water users in Water District 130. A true and accurate copy of Plaintiff's counsel's letter to Defendant Dreher is attached hereto as Exhibit "C."

XIII.

On or about May 19, 2005, Defendant Dreher responded to Plaintiff's request by informing Plaintiff in writing that Foods' June 7, 2002 "call" would not be administered against any junior priority water right holder other than Plaintiff because Foods did not seek the administration of junior priority ground water rights. A true and accurate copy of Defendant Dreher's May 19, 2005 correspondence to Plaintiff's counsel is attached hereto as Exhibit "D."

COUNT ONE (WRIT OF MANDATE)

XIV.

Plaintiffs repeat and reallege the allegations set forth in I - XIII of Plaintiff's *Petition for Writ of Mandate*.

XV.

Per his May 19, 2005 letter to Plaintiff's counsel, Defendant Dreher has failed and refused to perform his statutory duties to supply the prior water rights of Plaintiff and Foods by administering Foods' delivery call against junior priority ground water users.

XVI.

As a direct and proximate result of Defendants' failure and refusal to administer water rights according to Defendants' statutory duties to supply the prior water rights of Plaintiff and Foods during times of water scarcity, Plaintiff has been damaged, and presently continues to be damaged, in that it is unable to use all of its fish propagation facilities, and those fish propagation facilities that are presently being used have been damaged and continue to be damaged on a daily basis in that Plaintiff has inadequate water pursuant to its senior water rights. As a direct and proximate result of Defendants' failure and refusal to fulfill their statutory duties and responsibilities pursuant to

Idaho Code § 42-602, et seq., Plaintiff is being irreparably damaged, and has no plain, adequate nor speedy remedy at law.

XVII.

Defendants' failure and refusal to perform their statutory duties of controlling the distribution of water within Water District 130 to distribute water to Plaintiff's and Foods' prior rights deprives Plaintiff of the use and enjoyment of its property and is causing Plaintiff irreparable harm, which damage can only be remedied by an order of this Court compelling Defendants to perform their statutory duties pursuant to Idaho Code § 42-602, et seq., thereby enabling Plaintiff to use and enjoy its senior water rights and the property to which those rights are appurtenant.

XVIII.

Defendants' failure and refusal to distribute water to Foods' and Plaintiff's prior rights violates, interferes with and impairs the constitutionally-protected priorities of Plaintiff's water rights, Plaintiff's constitutional rights to equal protection of the law, and is contrary to the public policies of this state. If the Defendants' actions and/or inactions are allowed to stand, the constitutional rights of other water users of this state will be threatened and diminished.

XIX.

Plaintiff is entitled to issuance of a writ of mandate pursuant to Idaho Code § 7-302 in order to compel Defendants to perform their duties under Idaho Code §42-602 et seq. to distribute the waters within Water District 130 to supply Plaintiff's and Foods' prior rights.

REQUEST FOR ATTORNEY FEES

XX.

As a direct and proximate result of the Defendants' failure and refusal and continued failure

and refusal to perfom their statutory duties and their failure and refusal to distribute water during times of scarcity to senior water rights holders, including Plaintiff herein, Plaintiff has been required to employ the services of the law firm of Ringert Clark Chartered, and has also incurred various costs and will in the future continue to incur various future court costs and attorney fees. Therefore, under Idaho law, including, but not limited to Idaho Code §§ 12-117 and 12-121 and the Private Attorney General Doctrine, the Defendants should be required to pay to Plaintiff its reasonable costs and attorney fees.

WHEREFORE, Plaintiff prays for the issuance of a writ of mandate and/or order of the court directed to the Defendants as follows:

(1) a writ and/or order compelling Defendants to distribute water to Plaintiff's and Foods' senior water rights as required by Idaho Code § 42-602 et seq.;

(2) an order requiring Defendants to pay to Plaintiff a sum equal to the amount of costs and attorney fees it has expended to prepare, bring and prosecute this action;

(3) for such other relief as to the court shall seem just and equitable in the premises.

DATED this 7th day of June, 2005.

RINGERT CLARK CHARTERED

By: Charles L. Honsinger

Charles L. Honsinger
Attorneys for Petitioner/Plaintiff

Exhibit A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED

In Re SRBA Case No. 39576	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR Water Right 36-07004

2002 APR 22 PM 4: 12
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 75.00 CFS

PRIORITY DATE: 07/21/1967

POINT OF DIVERSION: T09S R14E S02 LOT 05 (SWSENE) Within Gooding County
LOT 05 (SESENE)

THIS WATER RIGHT IS DIVERTED THROUGH A SPRING-FED DIVERSION POOL KNOWN AS THE "EASTERN POOL," AND THROUGH PIPES WHICH DIVERT WATER FROM SPRINGS THAT ARE TRIBUTARY TO THE EASTERN POOL, ALL OF WHICH ARE LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. A PORTION OF WATER RIGHT NO. 36-2659 IS ALSO DIVERTED THROUGH THE EASTERN POOL. ALL WATER DIVERTED IS FROM THE SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	75.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No 39576	)	
	)	Water Right 36-02659

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within Gooding County
LOT 05 (SESENE)
LOT 05 (SWSENE)

THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S 1/2 SESWNE AND THE S 1/2 SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL" LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURSE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	100.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

Exhibit B

RECEIVED

APR 11 2000

Department of Water Resources

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2000 APR 10 AM 10: 19

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-02708

NAME & ADDRESS: CLEAR SPRINGS FOODS INC
THE PROSPECT CO
PO BOX 712
BUHL ID 83316

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

SOURCE IS ALSO KNOWN AS CLEAR SPRINGS.

QUANTITY: 200.00 CFS
144540.0 AFY

PRIORITY DATE: 09/28/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within GOODING County
LOT 5 (SWSENE)
NENWSE

MULTIPLE POINTS OF DIVERSION LOCATED IN T09S, R14E, S02, LOT 5 (SWSENE), SESWNE, NENWSE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	200.00 CFS 144540.0 AFY

PLACE OF USE: FISH PROPAGATION Within GOODING County
T09S R14E S02 NWSE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

BWood

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

MICROFILMED

OCT 02 2002

Exhibit C

RINGERT CLARK
CHARTERED LAWYERS

Laura E. Burri
Jeffrey G. Christensen
D. Blair Clark
Michael L. Doolittle
S. Bryce Farris
Patrick D. Forey
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Alvin L. Sweeney

Samuel Kaufman (1921-1986)

May 16, 2005

BY FACSIMILE (287-6700) AND MAIL

Karl Dreher, Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83710-0098

Re: IDWR Response to Clear Springs Foods' (Clear Springs) June 7, 2002 Water Delivery Call

Dear Mr. Dreher:

On March 16, 2005, immediately after the expiration of the Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004 (ESPA Agreement for 2004), the Water Master for Water District 130 curtailed Clear Lakes Trout Company's (Clear Lakes) diversion of water. Presumably, this was done as IDWR's continuing response to Clear Springs' June 7, 2002 water delivery call (copy enclosed).

There has been no indication that IDWR or the Water Master has issued any notice or order, or taken any other action, to curtail any other junior water rights in response to Clear Springs' water delivery call since the ESPA Agreement for 2004 expired. Clear Springs' call is not even listed on IDWR's website as one of the "Priority Calls Filed Thus Far." Why is Clear Springs' call not listed?

As you know, Clear Lakes' water rights are senior to a great many ESPA ground water rights that diminish the spring flows that supply the Clear Springs' facility as well as the Clear Lakes' facility. Neither IDWR nor the Water Master can selectively administer Clear Springs' call against Clear Lakes without first administering more junior water rights. This is the essence of the prior appropriation doctrine. You recognized this principle during your deposition in the Clear Lakes v. IDWR district court case (excerpt copy enclosed). You testified that when ground water users no longer have protection from administration (provided at the time by the Interim Stipulated Agreements) IDWR would have to curtail them under Clear Springs' call:

> Q. What are you going to do in response to Clear Springs? What are you going to do when others are not protected, when you have a call, your administering Clear Lakes right?

A. That's right.

Q. Your obligation is not to single out one water user to satisfy another?

A. Correct.

Q. Your obligation is to look to all juniors?

A. That's correct.

Q. When the interim agreement ceases to be in effect, if and when that happens, doesn't the Department have an obligation to look beyond the one that it has singled out, to the others, who are subject to curtailment?

A. Yes.

(Karl Dreher Deposition, p 253, ln. 17 - p. 254, ln. 6.)

Q. Okay. And when the pumpers that have received protection on longer have it, you're going to have to look at curtailing them under Clear Springs call, just like you looked at curtailing Clear Springs [sic]?

A. That is correct.

(Karl Dreher Deposition, p 255, lns. 12 - 16.)

Having curtailed Clear Lakes and received regular measurements of its diversions, IDWR and the Water Master are well aware of the gross shortage Clear Lakes continues to suffer while junior water right holders suffer minimal to no damage. The stipulated agreement has expired. Nevertheless, Clear Lakes - only Clear Lakes - suffers from Clear Springs' water delivery call.

Please advise me immediately when and how IDWR will administer Clear Springs' call against other water users in Water District 130 and Water District 120.

Sincerely,

Daniel V. Steenson

Enclosures
cc: Clear Lakes Trout Company

CLEAR SPRINGS FOODS®

CLEAR SPRINGS FOODS, INC.
General Office P.O. Box 712, Buhl, Idaho 83316
Phone 208 543-4316
Sales 800 635-8211
Fax 208 543-5608
www.clearsprings.com

June 7, 2002

Karl Dreher
Director, Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

RECEIVED
JUN - 7 2002
Department of Water Resources

Via Fax: 208-327-7866

RE: Water Delivery Call

Dear Director:

In response to the Department's issuance of Water District 130 Watermaster Instructions No. 02-01, Clear Springs hereby requests the distribution of water to water right no. 36-02708. This request is premised upon instructions nos. 2-6 regarding notification to and subsequent investigation by the watermaster.

The last flow measurements performed jointly by the Clear Lakes Trout Farm and Clear Springs personnel recorded on April 16, 2002 indicate that the total flow from the common source available to water rights 36-02659, 36-02708, 36-07004 and 36-02718 was 330 cfs at that time. The present adjustable weir setting is delivering approximately 173 cfs to Clear Springs. This quantity does not satisfy Clear Springs' 36-02708 right of 200 cfs. Clear Springs can and will put the additional water to beneficial use upon delivery. Documented measurements are available for review and Clear Springs is immediately available to answer any questions regarding either measurements or operations at the Clear Springs facility.

Additionally, Clear Springs would welcome the opportunity to discuss with the watermaster the schedule for flow documentation and distribution of water in question. If you have any further questions, please do not hesitate to call and thank you for your attention to this matter.

Sincerely,

Larry W. Cope

Larry W. Cope
President and CEO

cc: Cindy Yenter
Water District 130 Watermaster

L:\Admin\Water\IDWR Water Call 060702.doc

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR LAKES TROUT COMPANY, INC., Plaintiff, vs IDAHO DEPARTMENT OF WATER RESOURCES; KARL J. DREHER, Director of the Idaho Department of Water Resources; and CINDY YENTER, Watermaster for Water District 130, Defendants.	Case No. CV 0200377 VOLUME II

DEPOSITION OF KARL J. DREHER

NOVEMBER 1, 2002

BOISE, IDAHO

Q. Explain the difference?
A. When there's a single place of use, the issue is; is water being used within that place of use. The issue isn't whether -- in a permissible place of use typically water can only be used on a part --
Q. Exactly.
A. -- of the facility.
Q. Sure.
A. And that's what's different here.
Q. Okay. But it sounds to me like, it sounds to me that by extension of your thinking with regard to Clear Lakes and Clear Springs, junior makes a call against a senior irrigator, he's got ten inches --
A. Junior makes a call against a --
Q. Junior makes a call for water. And the situation is similar to this one where you can get that junior more water by changing the way a senior diverts water from two point of diversion; okay?
A. Uh-huh.
Q. And in so doing, the irrigator that has 20 acres, and irrigates -- has historically irrigated ten of those within a permissible place of use, so that another ten is still within the place of use, you can say to that irrigator we're going to change the way you divert water. Stop irrigating those ten acres and irrigate another ten.

A. It's not the same situation.
Q. The difference is what?
A. The difference is that the -- under the permissible place of use, the irrigator can only irrigate a portion.
Q. What difference does that make?
A. Well, it makes quite a bit of difference.
Q. How so?
A. Well, it would be a little difficult for an irrigator that had -- was irrigating under his water right, he's planned crops on 20 acres, however many acres you have to have in your analogy. It would be a little difficult in July, to say; oh, I've got to replant my crops and irrigate on a different 20.
Q. And how is that different than what you did the Clear Lakes here?
A. It's different in that Clear Lakes does not have such a permissible place of use. They have a place of use. And water can be used beneficially anywhere within that place of use.
Q. But you are, just as the analogy, calling the analogy, just as with the irrigator, you're saying to Clear Lakes mid July, coincidently, let those raceways go. Stop using those raceways. That part of your place of use, just

part of your place of use, authorized under the right, is no longer available to you and that you have to let that part of the investment in your company go.
How is that different than the effect that you just described of such a decision on an irrigator.
A. Under -- in the situation with the irrigator it would be difficult for that irrigator to make beneficial use. That's not the situation here. Water is being diverted, 100 cfs, to the fish facility and it's being utilized to raise fish.
Q. You're aware, aren't you, that Clear Lakes had to move and sell tens of thousands of fish in response to your action?
A. You know, I know they had to move a lot of fish. I don't know what they had to do, to do it. I mean, it was certainly not -- this was not an outcome driven decision. It was an application of the facts and the law.
Q. Okay. Now, when this interim agreement expires, as it will at the end of next year or thereabouts?
A. Yes.
Q. Two year term?
A. Yes.
Q. How will the Department administer Clear Springs call with respect to any ground water pumpers who no longer have protection under the interim agreement?

A. How will the Department administer Clear Springs call?
Q. Yes.
A. Clear Springs call will expire at the time, if spring fulls return to 375 cfs, I guess the call would expire at that point.
Q. Let's say that doesn't happen. Is the Department going to take action against other juniors similar, just as it has taken action against Clear Lakes?
A. What -- assuming the stipulated agreements expire and there's no other replacement stipulated agreement, no other in-kind, in-place, in-time, mitigation then the remedy available to Clear Lakes is for them to make a delivery call.
Q. You're, again, you're answering questions I'm not asking.
What are you going to do in response to Clear Springs? What are you going to do when others are not protected, when you have a call, your administering Clear Lakes right.
A. That' right.
Q. Your obligation is not to single out one water user to satisfy another?

A. That's correct.
Q. When the interim agreement ceases to be in effect, if and when that happens, doesn't the Department have an obligation to look beyond the one that it has singled out, to the others, who are subject to curtailment?
A. Yes.
Q. I assume that will happen when the interim agreement -- if and when the agreement expires if there is not sufficient flow; correct?
A. Well, I'd have to go back and look at the, what the specifically was in Clear Springs delivery call. And at that point we might, as a condition of administering the call, they might have to amend their call so that it was against junior priority rights.
Q. You call for distribution of water and they didn't say take water away from some?
A. No. But that's what I would have to go back and look and see what the call says.
Q. Let me ask you, does it make a difference?
A. Sure. Because the call may be narrowly constructed within the context that these stipulated agreements were in place.
Q. Do you mean that the interim agreements are no longer in place, this is the assumption we're making. It's very likely to happen in the future.

Can you look at first the certificate of service attached to the June 18th letter in Exhibit 38 and tell me the status of each of these diversions at this time?
A. I can't I'd have to go check with the water distribution section to see what the situation is.
Q. Does the Department have information as to which of these, which of these have joined a ground water district?
A. Yes, we do.
Q. And you just have to check your files to see?
A. Correct.
Q. Okay. Is your understanding that all of these have joined the ground water district, or some may have and some may not have?
A. I believe that some of these rights were not being used at the point in time. So, I mean, there's nothing to curtail. They weren't being used.
Q. And is Cindy checking these water rights on a frequent basis to make sure that they're not being used. Those that are not protected by --
A. She's checked each one of these rights. How often she's checked them I couldn't tell you today.
Q. And we will follow up on this information. But if, for example, Harry and Flora Bokma, if I'm saying

The call -- your administering water pursuant to the call. Are you telling me that the -- that the water right owner making the call has the, has the discretion to decide which water rights are going to be curtailed?
A. Of course not.
Q. That's up to you; is it not?
A. Well, it's not up to me, it's up to what the priorities are of the rights involved, and where we can determine the rights are causing injury.
Q. You make the decision; don't you?
A. That's correct.
Q. Okay. And when the pumpers that have received protection no longer have it, you're going to have to look at curtailing them under Clear Springs call, just like you looked at curtailing Clear Springs?
A. That is correct.
Q. Okay. Now, with regard to those June 18th and June 20th letters that you sent out to pumpers. And this I think is Exhibit No. 38. And attached to that is a list of several -- in certificates of service attached to the letter.
A. Okay.
Q. And there's a certificate of service attached to the June 18th letter and a certificate of service

that correctly, probably not, haven't joined the ground water district, but are pumping water today. Then pursuant to Clear Springs call, and your order creating the ground water -- the Water District 130, you need go out and curtail these folks, don't you?
A. Correct.
Q. So is there, do you know if Cindy's checking on a weekly basis, or a monthly basis as to these other water rights?
A. I don't.
MR. STEENSON: Off the record.
(Brief recess.)
BY MR. STEENSON:
Q. Now, in your watermaster, in the memorandum that accompanied your watermaster instructions in Exhibit 14, at page ten, the end of the second paragraph, second to the last sentence says, quote; if expenses are incurred by Clear Lakes in diverting water from the eastern pool under the senior right 36-02659, not the junior right 36-07004, then under Parker Clear Springs may be responsible for those costs, close quote.
Does the Department administer this issue if Clear Springs, Clear Lakes can show that it has incurred such costs, does Clear Lakes submit them to the Department

Exhibit D

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

May 19, 2005

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RINGERT CLARK

Daniel V. Steenson, Esq.
Ringert Clark, Chtd.
P.O. Box 2773
Boise, ID 83701

VIA FACIMILE TO (208) 342-4657 AND FIRST CLASS MAIL

Re: Response to Clear Springs Foods' (Clear Springs) Water Delivery Call of June 7, 2002

Dear Mr. Steenson:

This letter is in response to your letter dated May 16, 2005, inquiring why the Idaho Department of Water Resources ("Department") has not listed the water delivery call made by Clear Springs on June 7, 2002, on the Department's website under "Priority Calls Filed Thus Far." You also ask when and how the Department will begin administering Clear Springs' call against holders of junior priority water rights other than your client, Clear Lakes Trout Company ("Clear Lakes") in Water District No. 130 and Water District No. 120.

The water delivery call made by Clear Springs on June 7, 2002, sought watermaster administration of the surface water rights of Clear Lakes and Clear Springs to divert water from a common water source decreed as springs tributary to Clear Lakes. The Clear Springs delivery call does not constitute a delivery call under the Department's Conjunctive Management Rules because it does not seek the administration of junior priority ground water rights for the benefit of Clear Springs' senior priority surface water rights. Rules 40 and 42 of the Conjunctive Management Rules govern responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district. IDAPA 37.03.11.040--042.

Because of the added complexities in administering rights to the use of ground water, or conjunctively administering rights to the use of water from interconnected surface and ground water sources, as compared to administering multiple rights to the use of water from a surface water source, the Conjunctive Management Rules require the satisfaction of certain procedural and substantive steps not normally associated with the administration of water rights solely among surface water right holders. For that reason, the Department does not treat every water

call against all junior priority ground water rights within the interconnected Eastern Snake River Plain Aquifer (ESPA). Those senior priority surface water right holders desiring to make such a water delivery call pursuant to the Conjunctive Management Rules are entitled, but not required, to do so.

Clear Springs has not yet elected to make a water delivery call associated with its fish propagation facilities at Clear Springs against junior priority ground water rights diverting from the ESPA. Clear Springs has recently made water delivery calls under water rights held for its Snake River Farm and Crystal Springs Farm against the holders of junior priority ground water rights from the ESPA. These calls are pending action before me.

Your letter quotes statements from my deposition of November 1, 2002, which appear to be contrary to the position described above. Your letter, however, does not cite the prefatory discussion contained in the deposition which precedes the discussion of how the Department would treat the Clear Springs delivery call once the Interim Stipulated Agreement precluding delivery calls against the ground water users had expired. In that prefatory discussion, I stated that when the Interim Agreement expired, "I'd have to go back and look at .... what .... specifically was in [the] Clear Springs delivery call. And at that point we might, as a condition of administering the call, they might have to amend their call so that it was against junior priority [ground water] rights."

The Clear Springs delivery call of June 7, 2002, is not against junior priority ground water rights, and Clear Springs has not amended its delivery call. The Department will therefore not treat the delivery call as a call against junior priority ground water rights from the ESPA.

Sincerely,

Karl J. Dreher
Director

c: John K. Simpson, Esq.