

SEP 08 2009

DEPARTMENT OF
WATER RESOURCES

ORIGINAL

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

IN THE MATTER OF DISTRIBUTION
 OF WATER TO WATER RIGHTS NOS.
 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

**MOTION TO STRIKE CLEAR
 SPRINGS' PROTEST TO JOINT
 MITIGATION PLAN FOR 2009**

COME NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively "Ground Water Districts"), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby submit this Motion to Strike the Protests filed by Clear Springs Foods, Inc. ("Clear Springs") to the Joint Mitigation Plan for 2009 ("2009 Plan for Blue Lakes").

INTRODUCTION

On July 6, 2009, North Snake Ground Water District and Magic Valley Ground Water District filed a 2009 Plan for Blue Lakes providing for the direct delivery of Alpheus Creek water to Blue Lakes Trout, Co. ("Blue Lakes").

On August 12, 2009, Blue Lakes filed its protest to the 2009 Plan for Blue Lakes. On August 17, 2009 Clear Springs filed its protest to the 2009 Plan. This Motion requests that Clear Springs' Protest be struck and that Clear Springs be denied participation in this matter for lack of any interest in this matter, for lack of standing and because its participation in this matter will unduly broaden the issues and burden the record in this case. The Ground Water Districts' 2009 Plan for Blue Lakes is simple and straightforward and provides for direct replacement water to Blue Lakes under water right no. 36-2603C owned by the Ground Water Districts and diverted from the identical source already used by Blue Lakes.

The grounds for this motion are as follows:

1. The 2009 Plan for Blue Lakes only applies to and impacts Blue Lakes and has no effect or any impact on any water right or interest of Clear Springs. In fact, the water that is being delivered directly to Blue Lakes is from Alpheus Creek, the identical source as Blue Lakes' other water rights for its facility. Further, the water that is being delivered directly to Blue Lakes is under water right no. 36-2603C that is wholly owned by the Ground Water Districts. Ten (10) cfs of water under water right no. 36-2603C has been continuously supplied to Blue Lakes since April of 2008. Clear Springs can demonstrate no interest in meddling in the direct replacement water delivery under water right no. 36-2603C to Blue Lakes.

2. Clear Springs was not a party to the original delivery call filed by Blue Lakes and was only consolidated with Blue Lakes' delivery call for convenience of all parties, the hearing officer and the Department. Yet, Clear Springs proceeded separately under separate counsel and was never actually joined in any of the proceedings that directly affected Blue Lakes.

3. Further, Clear Springs does not meet the definition of "Protestant" under IDAPA 37.01.01.155 ("Rule 155"). The definition of "Protestant" under the Department's Rule of Procedure 155 defines protestant as "Persons who oppose an application or claim or appeal and

who have a statutory right to contest the right, license, award or authority sought by an applicant or claimant or appellant are called 'Protestants.'" There is no statutory right for Clear Springs to protest the use of the Ground Water Districts' own water right to offset material injury to Blue Lakes.

4. Any party who seeks to participate in a legal proceeding must demonstrate legal standing in the proceeding before the party's participation may be granted. *Van Valkenberg v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). "To satisfy the case or controversy requirement of standing, a litigant must 'allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.'" *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996). "This requires a showing of a 'distinct palpable injury' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" *Id.* Clear Springs cannot show a "distinct, palpable injury" to allow it to participate in this proceeding. Hence, Clear Springs does not have standing to participate in this matter. In order to participate in the matter, the parties are required to "demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157, 1159 (2002). Clear Springs' has no interest that could be injured or redressed by the outcome of this proceeding.

5. Not only should Clear Springs' protest be dismissed with prejudice, the protest should not be considered a petition to intervene because it does not meet the standard set forth in Rule 353. The Department's Procedural Rule 353 governs petitions to intervene and states:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has

no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

(emphasis added.) In this case, as stated previously, the only interest asserted by Clear Springs is that the mitigation activities are “flawed.” See Clear Springs’ Protest. This is not a direct and substantial interest. The Ground Water Districts 2009 Plan for Blue Lakes contains nothing “flawed” and is a simple direct delivery of water from the identical source to Blue Lakes under a senior water right. Blue Lakes is represented by competent and experienced counsel who can adequately respond to the Ground Water Districts’ proposal to deliver water directly to Blue Lakes. Including Clear Springs in this matter will broaden the issues and will introduce irrelevant material into the record. The Ground Water Districts have proposed a direct delivery of water to Clear Springs at its Snake River Farms facility and thus Clear Springs’ response to that mitigation proposal can address any issues Clear Springs may have relating to the direct delivery of water to offset material injury. The issues it has in that case should proceed in that proceeding and should not unduly broaden or cloud the matters in this case.

CONCLUSION

The issues related to the Ground Water Districts 2009 Plan for Blue Lakes are specific to Blue Lakes, limited in scope and should not be unduly broadened or complicated by adding additional parties. Clear Springs cannot meet the standard for intervention and is not a proper protestant and therefore it should be dismissed from this case.

RESPECTFULLY SUBMITTED dated this 3rd day of September, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of September, 2009, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

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