BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-07201, AND 36-7218 IN WATER DISTRICT NO. 130.	)	**RECOMMENDED ORDER**

On August 15, 2003, Clear Lakes Trout Company ("Clear Lakes") filed a Petition to Initiate Contested Case requesting a review of actions taken by the watermaster for Water District 130 to distribute water between Clear Lakes and Clear Springs Foods, Inc. ("Clear Springs"). A hearing was held on January 7, 2004, on pending motions. The motions presented included a motion to dismiss pursuant to I.R.C.P. 12(b)(6) and 12(b)(8) filed by Clear Springs and a motion to limit and delay the hearing officer's request for staff memorandum filed by Clear Lakes. Clear Lakes was represented by Charles L. Honsinger. Clear Springs was represented by Travis L. Thompson.

FACTS AND PROCEDURAL HISTORY

1. Clear Springs and Clear Lakes operate fish hatcheries on adjacent parcels below the rim of the Snake River canyon near Buhl, Idaho, and hold various water rights to the springs that flow from the canyon wall in the Thousand Springs reach of the Snake River. The Snake

River Basin Adjudication ("SRBA") District Court issued partial decrees for the parties' rights as follows: Clear Lakes with the first priority right to divert 100 cubic feet per second ("cfs") (36-02659); Clear Springs with the second priority right to divert 200 cfs (36-02708); Clear Lakes with the third priority right to divert 75 cfs (36-07004); and Clear Springs with a more junior right to divert 51.55 cfs, if available (36-07218).[1] Those decrees were adopted by the Idaho Supreme Court in Clear Springs Foods, Inc. v. Clear Lakes Trout Co., 136 Idaho 761, 40 P.3rd 119 (2002).

2. The water rights are administered together from a common source, but through two pools, known as the western and eastern pools, formed from discharges from numerous springs in the Snake River canyon. Clear Lakes' first priority right is diverted from both the western and eastern pools. Clear Springs' second priority right is diverted from the western pool. Clear Lakes' third priority right is diverted from the eastern pool.

3. In the SRBA proceedings and before the Idaho Supreme Court, Clear Lakes challenged the source and point of diversion elements claimed by Clear Springs, arguing that the western and eastern pools were different sources of water. Both the district court and the Idaho Supreme Court disagreed and held, *inter alia*, that the water rights of the parties delivered through the western and eastern pools derive from one source. Clear Springs Foods, Inc. v. Clear Lakes Trout Company, Inc., 136 Idaho at 76.

4. In February 2002, the Director of the Idaho Department of Water Resources ("Director") created Water District No. 130 for the purpose of administering all water rights located within the district, including Clear Lakes' and Clear Springs' rights. The *Final Order Creating Water District No. 130* authorizes the watermaster for the district to "[c]urtail

[1] Water right no. 36-07201 as decreed is administered as being from a source separate from the other four rights and is therefore not relevant to this proceeding.

out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director."

5. On June 5, 2002, the Director issued watermaster instructions for the distribution of Clear Lakes' and Clear Springs' water rights. In response to Clear Lakes' concerns, the Director temporarily suspended the instructions and after additional review, issued amended watermaster instructions in a memorandum dated June 13, 2002 ("Instructions"). That memorandum states, in relevant part:

> [W]hen the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. ... [A]djustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.
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> The full amount of water under the most senior right, Clear Lakes' right 36-02659, must be available for that right. When Clear Springs' water right 36-02708 is also in priority, this requires that more of the water diverted under Clear Lakes' right 36-02659 be diverted from the eastern diversion pool than has historically been the case when spring flows fell below 375 cfs. ... [A]bsent a basis for Clear Lakes being able to rely on diverting a specific portion of the water under its senior right 36-02659 from the western diversion pool, there is no injury to Clear Lakes' senior right 36-02659 so long as the right is fully satisfied and the extent of beneficial use made under right 36-02659 is not diminished. ...
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> ....
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> ... [T]here is no known legal basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004. ...

> ... [W]hen the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights in priority as being from a single source. ... For the purpose of administering these water rights, the eastern and western diversion pools are inextricably linked to the springs whose discharge is collected in the pools. [These water rights] must not be administered ... as though the rights were from separate sources.

The Instructions further state:

> 7. The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.
>
> ....
>
> 9. If the total flow is less than 375 cfs (± 5 cfs), then the watermaster is to adjust the 6-ft adjustable weir such that the first 100 cfs of spring flows goes to Clear Lakes, the next 200 cfs of spring flows or part thereof goes to Clear Springs, and any remaining flow goes to Clear Lakes.
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> 10. If an adjustment to the 6-ft adjustable weir is required, the watermaster should do the following (subject to further confirmation):
>
> (a) Determine the required increase or decrease in flows to Clear Lakes to provide the flows to Clear Lakes and Clear Springs set forth in 9. above.

(Footnotes omitted.)

6. On June 19, 2002, the watermaster of Water District 130 issued a notice of intent to redistribute flows to Clear Lakes and Clear Springs. By this notice, the watermaster advised the parties that, pursuant to the Instructions, she was going to adjust the 6-ft adjustable weir at the western pool to redistribute the flow of water between the two entities on July 3, 2002.

7. On June 20, 2002, Clear Lakes filed a lawsuit in the District Court of the Fifth Judicial District, in Gooding County, naming the Idaho Department of Water Resources ("IDWR"), the Director, and the watermaster as defendants and challenging the Instructions.

Clear Springs moved and was granted permission to intervene as a party defendant. IDWR filed a motion for summary judgment and Clear Springs filed a motion to dismiss. Before the motions were heard, Clear Lakes and IDWR entered into a stipulation for dismissal of the action, with prejudice.

8. Subsequently, Clear Lakes filed a petition for contested case with IDWR. Clear Springs filed a motion to dismiss on grounds that the action before the district court had been dismissed with prejudice and therefore, continued litigation on the Instructions by administrative proceeding was foreclosed by the district court order of dismissal with prejudice. The hearing officer recommended that the petition be dismissed, which recommendation the Director adopted by a final order issued on June 13, 2003. Clear Lakes then appealed the Director's decision and filed a petition for judicial review with the District Court in Ada County. The judicial review proceeding is still pending.

9. In addition to issuing a final order in the contested case proceeding, the Director ordered the watermaster to resume administration of Clear Springs' and Clear Lakes' water rights. In response to the watermaster's June 20, 2003, notice that she intended to resume administration of the parties' water rights, Clear Lakes filed a petition with the Department challenging the intended distribution. On July 3, 2003, the Director issued an order denying the petition, the request for expedited hearing, and request for stay. That order was based on the Director's conclusion that Clear Lakes' petition did not allege any factual or legal issues that had not previously been raised in prior proceedings.

10. Following the denial of Clear Lakes' petition, Clear Springs asked for redistribution of flows to distribute 200 cfs under water right 36-02708 and the watermaster notified both parties that she would make the necessary adjustments and redistribute flows on

July 23, 2003.

11. On June 20, 2003, the watermaster notified Clear Lakes and Clear Springs that the distribution of Clear Lakes' junior water right 36-07004 would be reduced by approximately 14 cfs to fill the more senior Clear Springs' right 36-02708 by adjusting the 6 ft weir to reduce Clear Lakes' diversion of water right 36-02659 from the western pool. Reducing Clear Lakes' diversion of its senior right 36-02659 from the western pool requires Clear Lakes to divert more water from the eastern pool under right 36-02659, thereby reducing the amount that can be diverted under Clear Lakes' right 36-07004. The watermaster also confirmed that Clear Springs could make beneficial use of the water.

12. In response to a report from the watermaster advising that raising the 6 ft weir as high as possible did not result in delivery of the full amount of water to Clear Springs' water right 36-02708, Tim Luke, IDWR Water Distribution Section Manager, sent the watermaster a memorandum on July 29, 2003. Mr. Luke's memorandum stated, in relevant part:

> The instructions that you were given for making adjustments to the 6-ft adjustable weir were "subject to further confirmation." (See instruction no. 10 on page 14 of Water Master Instructions 02-01). If the specific steps described in instruction no. 10 do not achieve the distribution of water among the water rights set forth in instruction no. 9, you are authorized, pursuant to Idaho Code § 42-607, to investigate alternative or additional steps necessary to "shut or fasten" the diversion for Clear Lakes water right no. 36-07004 in such manner as may be necessary to accomplish the distribution of water set forth in instruction no. 9.

13. On July 31, 2003, the watermaster sent a memorandum to Tim Luke confirming that raising the adjustable 6 ft weir only delivered about 192 cfs to Clear Springs. Full distribution of 200 cfs was not possible due to the 8 ft fixed weir at the western pool that also discharges into Clear Lakes' headrace. The watermaster stated:

> Watermaster Instructions dated June 13, 2002 state that the watermaster shall make adjustments to the flow distribution by moving the adjustable weir at the joint [western] diversion. The instructions provided a series of steps which

were subject to further confirmation (instruction no. 10, page 14). At this time I am confirming the additional steps required to redistribute flows at the Clear Lakes and Clear Springs joint diversion under the present spring flow conditions:

> If the total spring flows are less than 375 cfs and discharge at the joint diversion (west pool) falls to less than about 225 cfs, additional steps are required in order to distribute the full 200 cfs to the Clear Springs right no. 36-2708 [sic]. Those steps are:
>
> 1) Insert dam boards in the channel slots located immediately behind the Clear Lakes 8-ft fixed weir, to partly or completely block the flow of water over the 8-ft weir. Since this is not an official measuring point, dam boards do not have to completely seal.
>
> 2) Simultaneously, lower the adjustable weir until the staff gage in the joint diversion pool reads 1.53'.
>
> 3) Calculate head at the adjustable weir to estimate flow over the weir.
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> Note that the above additional steps **do not** require the physical alteration of any part of the joint diversion. The placement of dam boards is a temporary solution and the boards will be removed as flows increase.

14. Prior to the scheduled redistribution, Clear Lakes sent a letter to the watermaster on August 1, 2003, asserting that the watermaster was proposing to amend "final" watermaster instructions and that she did not have the authority to do so. Clear Lakes asked the watermaster to delay implementation of the additional steps so that Clear Lakes could evaluate the impact of the proposed steps and pursue administrative remedies.

15. On August 4, 2003, the Director sent a letter to Clear Lakes advising that he had reviewed the additional steps the watermaster believed to be necessary to implement instructions nos. 9 and 10 of the Instructions and believed the proposed steps were consistent with the Instructions; therefore, it was not necessary to issue further instructions to the watermaster. The letter also advised that the watermaster would not make further adjustments until August 6, 2003, to allow Clear Lakes time to evaluate the impacts of the additional steps identified.

16. Clear Lakes filed the present petition on August 15, 2003, seeking "review and recission [sic] of the modifications" to the Instructions proposed by the watermaster in her July 31, 2003, memorandum to Tim Luke. By agreement of the parties, a scheduling order was issued on October 17, 2003, setting forth a briefing schedule and oral argument on all pre-hearing motions. On January 7, 2004, a hearing was conducted on Clear Springs' motions to dismiss under I.R.C.P. 12(b)(6) and 12(b)(8) and on Clear Lakes' motion to limit and delay any request for an IDWR staff memorandum.

17. At the January 7, 2003, hearing, counsel for Clear Lakes and Clear Springs advised the hearing officer that the additional steps proposed by the watermaster had been implemented. Counsel did not know whether the additional board that was inserted at the 8 ft weir was in place on the date of hearing or had been removed.

ANALYSIS

Clear Lakes contends that it is necessary to conduct a contested case to clarify confusion on the part of IDWR staff regarding the administration of water rights as between Clear Lakes and Clear Springs. Clear Lakes also contends that because the watermaster's additional actions constituted modifications of the Instructions, it is entitled to an evidentiary hearing and the issuance of amended instructions.

Clear Springs takes the position that the petition should be dismissed under I.R.C.P. 12(b)(6) because the additional steps taken by the watermaster are consistent with the Instructions and Idaho law. In the alternative, Clear Springs argues that this case should be dismissed pursuant to I.R.C.P. 12(b)(8) because the judicial review proceeding currently pending in Ada County District Court involves the same issues and the same parties.

Although Clear Springs' motion was presented under I.R.C.P. 12(b)(6), and in the alternative I.R.C.P. 12(b)(8), Clear Springs submitted additional evidence by affidavit to which Clear Lakes did not object. By analogy to the I.R.C.P., the motion to dismiss should be treated as one for summary judgment disposition. In any event, the standard for reviewing a 12(b)(6) motion for dismissal of a complaint is the same as that applicable to motions for summary judgment in judicial proceedings. *See* Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The non-moving party is entitled to have all inferences from the record viewed in his favor, and only then may the question be asked whether a claim for relief has been stated." Id.

This petition comes before the Department pursuant to Idaho Code § 42-1701A(3), which provides that any person aggrieved by any action of the Director shall be entitled to a hearing to contest the action. Idaho Code § 67-5201(3) defines agency action to mean (1) the whole or part of rule or order; (2) the failure to issue rule or order; or (3) an agency's performance of, or failure to perform, any duty placed on it by law. *See also* IDAPA 37.01.01.005.03. Idaho Code § 67-5201(12) defines order as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons."

Whether a party is entitled to a contested case depends in part on the nature of the interest affected by an agency decision. A contested case must be conducted if a proceeding may result in the issuance of an order. Westway Construction Inc. v. Idaho Transp. Dep't, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003) ("Westway"). However, "[n]ot all decisions of particular applicability by an agency determine a person's legal rights, duties, privileges, immunities, or other legal interests." Westway, 73 P.3d 721, 727 (citing Maresh v. State, Dep't of Health and

Welfare, 132 Idaho 221, 970 P.2d 14 (1998)). Rather, "it is the legal effect of the decision—whether it affects an enumerated interest—that determines whether the agency must conduct a contested case." Id. (quoting Michael S. Gilmore & Dale D. Goble, The Idaho Administration Procedures' Act: A Primer for the Practitioner, 30 Idaho L. Rev. 273, 313 (1993)).

To determine whether Clear Lakes has stated a claim for relief, an examination of the alleged injuries and relief sought is required. In other words, it is necessary to determine the legal effect of the agency conduct on Clear Lakes' interests.

The first argument advanced is that Clear Lakes is entitled to a contested case proceeding because the watermaster's actions were unauthorized. Clear Lakes contends that Mr. Luke's July 29, 2003, memorandum only authorized the watermaster to shut or fasten the diversion for Clear Lakes' water right 36-07004. The watermaster did not propose to physically shut or fasten the diversion for Clear Lakes' water right 36-07004, which is delivered through the eastern pool. Instead, she proposed and implemented steps at the western diversion. Clear Lakes argues that the "Hearing Officer must not allow these unauthorized steps and actions to stand" and that Clear Lakes is entitled to have "those issues heard in this proceeding." Clear Lakes' *Brief in Response to Motion to Dismiss*, p. 4.

The central problem with this argument is the characterization of the watermaster's actions as unauthorized. This characterization fails to take into account the Director's subsequent approval of the watermaster's proposed steps at the western pool. Whether Mr. Luke's memorandum authorized the watermaster to take steps at the western pool or the eastern pool is not dispositive here because the Director subsequently approved the watermaster's proposed actions prior to implementation and concluded that it was not necessary to issue further instructions. The Director's August 4, 2003, letter states:

> Subsequent to receiving the memorandum from Mr. Tim Luke dated July 29, 2003, Ms. Yenter [the watermaster] has kept my office informed of the additional steps believed to be necessary to implement instructions nos. 9 and 10 of the amended watermaster instructions I issued on June 13, 2002.
>
> After reviewing the additional steps Ms. Yenter has identified as being necessary to implement instructions nos. 9 and 10 of the amended watermaster instructions, I believe that those steps are consistent with my prior instructions. Consequently, I do not find it necessary to issue further instructions to Ms. Yenter. However, Ms. Yenter will not make further adjustments until Wednesday, August 6 to allow Clear Lakes additional time to evaluate the impacts of the additional steps identified.

Even assuming that Mr. Luke's July 29, 2003, memorandum only authorized the investigation of alternative steps for water delivery at the eastern rather than the western pool, the Director subsequently determined that the watermaster's proposed actions were consistent with the Instructions. Accordingly, the watermaster's subsequent actions were authorized.

Clear Lakes' second claim is that IDWR cannot properly supervise or direct the watermaster pursuant to IDWR's statutory duties under Idaho Code §§ 42-602 and -607, because the agency is confused and/or unaware of the complexities involved in administering these rights. A corollary argument posits that an evidentiary hearing is required because the Instructions must be amended to include specific directives for circumstances that occur in water years like that of 2003.

Analysis of whether Clear Lakes has alleged or presented facts indicating that the agency will likely violate its duties begins with examination of the requirements of Idaho Code §§ 42-602 and -607. Section 42-602 gives the Director "direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom." Idaho Code § 42-602. The Director is required to "distribute water in water districts in accordance with the prior appropriation doctrine." Id.

Actual distribution is accomplished by watermasters as supervised by the Director. Id. Specifically, the duties of the watermaster are defined as follows:

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; . . . .

Idaho Code § 42-607.

In advancing the argument that agency confusion requires a contested case hearing and new order, Clear Lakes relies on two documents--Mr. Luke's memorandum and the Instructions. Clear Lakes directs attention to Mr. Luke's instruction to investigate steps to shut or fasten the diversion for water right 36-07004 in order to deliver more water to Clear Springs' right 36-02708. The Instructions provide for adjustments to the joint diversion works at the western pool to reduce the amount of water diverted under right 36-07004. With respect to Mr. Luke's directive, Clear Lakes points out that shutting or fastening the diversion at the eastern pool has no physical effect on the delivery of water from the western pool. Conversely, adjustments to the joint diversion works at the western pool have no physical effect on the amount of water available at the eastern pool. Clear Lakes contends that Mr. Luke's and the Director's statements demonstrate the agency's confusion and future inability to deliver water in accordance with Idaho Code §§ 42-602 and -607.

This argument fails for two reasons. First, there is no support for the contention that the agency cannot deliver water as between Clear Lakes and Clear Springs in a lawful manner. Clear Lakes has not asserted that its water rights were injured as a result of Mr. Luke's or the Director's statements or as a result of adding a board to the 8 ft weir. Nor has Clear Lakes

asserted that adding a board to the 8 ft weir in any way damaged the joint diversion works.

In times of scarcity, it is the Director's duty to "shut or fasten" the diversions of junior water right holders to satisfy senior water rights. *See* Musser v. Higgenson, 125 Idaho 392, 395 (1995) ("We conclude that the director's duty to distribute water pursuant to this statute [Idaho Code § 42-602] is a clear legal duty.") Accordingly, the *Final Order Creating Water District 130* directs the watermaster to "curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director." When Clear Lakes is required to take more delivery of water right 36-02659 at the eastern pool, its third priority water right 36-07004 is effectively "shut off" so that Clear Springs' second priority right 36-02708 can be delivered. The watermaster's July 31, 2003, memorandum clearly recognizes the complexities of administering these rights in accordance with Idaho Code §§ 42-602 and -607. It recognizes steps that need to be taken to deliver water according to priority. Finally, even assuming, *arguendo*, that there was some confusion about the physical characteristics of the water delivery system, there is no showing that any legal interest was affected by the alleged confusion.

Similarly, the assertion that Clear Lakes' legal interests will be adversely affected in the future if the Director does not issue an amended order with more specific instructions concerning the delivery of water in a severe drought year is pure speculation. First, the agency has considerable expertise in fulfilling its duty to deliver water according to priority. Second, the Instructions clearly provide for continued monitoring on the part of the watermaster and continued adjustment to the diversion works so that the requirements of Idaho Code §§ 42-602 or -607 are met. Paragraph seven of the Instructions states:

> The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified

> by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.

Clearly, the watermaster is authorized to adjust the distribution of water to Clear Lakes and Clear Springs so that each receives water in priority. In addition, the Instructions contemplate that additional steps at the joint diversion works that are not specified may be necessary. Although paragraph ten only references adjustments at the 6 ft weir, adjustments at the joint diversion works are subject to further confirmation so that, when the total flow is less than 375 cfs, the first 100 cfs goes to Clear Lakes, the second 200 cfs or part thereof goes to Clear Springs, and any remaining flow goes to Clear Lakes. Adding a board to the 8 ft fixed weir at the joint diversion accomplishes the distribution called for under the Instructions. Adding a board to the 8 ft fixed weir requires Clear Lakes' senior water right no. 36-02659 to be delivered from the eastern pool, effectively shutting off or reducing delivery of Clear Lakes' junior right no. 36-07004 so that Clear Springs' second priority right 36-02708 can be delivered. While this step is not specifically outlined in the instructions, it is consistent with the Instructions and results in the delivery of water from a single source according to priority.

CONCLUSIONS OF LAW

Based upon the foregoing analysis, I conclude that this petition should be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim. Even upon review of the argument and facts presented and legitimate inferences that can be drawn in favor of Clear Lakes, the petitioner has not framed a genuine issue requiring a contested case. There is no support for the allegation that the watermaster, in proposing and implementing additional steps to deliver water in priority, was unauthorized to do so. The Director's letter clearly authorizes the watermaster's actions. Nor is there any support for the allegation that agency confusion will likely result in the future

violation of Clear Lakes' water rights. To the contrary, the argument and facts presented show that the agency acted according to law; therefore, to conclude that the agency will likely violate the law in the future would be pure conjecture. None of the statutory schemes governing administrative proceedings before the agency require a contested case based on a petitioner's subjective fear that the agency could affect a party's legal interests in the future.

Because I have concluded that Clear Springs' motion to dismiss pursuant to I.R.C.P. 12(b)(6) should be granted, it is unnecessary to address Clear Springs' motion to dismiss under I.R.C.P. 12(b)(8) or Clear Lakes' motion to limit and delay the hearing officer's request for agency staff memorandum.

RECOMMENDATIONS FOR ORDER

I recommend that the Director enter an order granting Clear Springs' motion to dismiss pursuant to I.R.C.P. 12(b)(6). This recommendation makes any further consideration of Clear Springs' motion to dismiss under I.R.C.P. 12(b)(8) and Clear Lakes' motion to limit and delay request for staff memorandum unnecessary and I recommend that these motions be denied.

STATEMENT OF AVAILABLE PROCEDURES

This is the Recommended Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the

failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

ii. The service date of a denial of a petition for reconsideration by the hearing officer; or

iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Respectfully submitted this 25th day of February 2004.

Harriet A. Hensley

HARRIET A. HENSLEY
Hearing Officer