

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF THE AMENDED
WATERMASTER INSTRUCTIONS FOR
DISTRIBUTION OF WATER AMONG
WATER RIGHTS NOS 36-02659,
36-02708, 36-07004, 36-7201 AND
36-07218, AND NOTICE OF INTENT
TO REDISTRIBUTE FLOWS.

HEARING OFFICER'S DECISION,
RECOMMENDATION FOR ORDER
AND STATEMENT OF AVAILABLE
PROCEDURE

Introduction

This matter was brought on for hearing at the Department of Water Resources conference room in Boise pursuant to order of the Director and notice to all parties on Friday, March 14, 2003, on pending motions. Clear Lakes Trout Company ("Clear Lakes" or "Lakes") appeared by company representatives and Daniel V. Steenson and Charles L. Honsinger of the law firm Ringert Clark. Clear Springs Foods, Inc. ("Clear Springs" or "Springs") appeared by company representative and John K. Simpson and Travis L. Thompson of the law firm Barker Rosholt & Simpson. The Idaho Department of Water Resources ("IDWR") was present by counsel, Deputy Attorney General John W. Homan.

The motions presented consisted of the motion by Clear Lakes for summary judgment, the motion by Clear Lakes for a stay of enforcement of order, and the motion by Clear Springs for a dismissal of the petition.

I have been provided with thorough and well-reasoned briefs from counsel on all potential issues involving all of the motions. I am satisfied *from the materials submitted by the parties through their counsel* that there is no material fact in issue, and that the

matter is appropriate for resolution by summary proceedings on motion rather than evidentiary proceeding.

Summary

For the reasons stated herein, I recommend that the Director enter an order denying the motions advanced by Clear Lakes and grant the motion advanced by Clear Springs. I recommend that the Director conclude that the orders of the Director as contained in his instructions to the watermaster dated June 13, 2002, were and are consistent with his authority under statute, with the adjudicated water rights of the parties to this matter as determined by judicial decree of the SRBA court recently affirmed by the Idaho Supreme Court, and with the terms of the order of the Director adopting and interpreting the document referred to as the "Interim Stipulated Agreement." I recommend that the Director deny any interim stay of the instructions of the watermaster. Finally, I recommend that the Director grant the motion for dismissal advanced by Clear Springs, and enter an order dismissing the petition as to the issues challenging the Directors instructions to the watermaster.

I base these recommendations upon the following analysis and conclusions.

Undisputed Facts and Procedural History

Since I am concluding that there are not disputed issues of fact, and that the matter can be resolved on motion without evidentiary proceedings, I do not enter formal findings of fact detailing all of the circumstances giving rise to this dispute, nor do I intend the explanation here to be a complete recitation of every fact or detail included in the materials. The facts are contained in the record, and in the materials submitted by the

parties. I note here only those salient details necessary to understand the overall circumstances, and the rulings I am recommending in this decision.

A. Prior Litigation Between Clear Springs and Clear Lakes

Clear Lakes and Clear Springs operate fish hatcheries on adjacent parcels below the rim of the Snake River canyon near Buhl. As is material here, in the 1960s and 1970s, these parties began submitting applications for permits to withdraw water from springs flowing from the canyon walls above the Snake River. The parties soon became enmeshed in the Snake River Basin Adjudication (“SRBA”) and in litigation between themselves over the priority of water rights and the identification of sources.

While disputes over the adjudication churned on, the parties entered into a private interim agreement in 1980 that allocated the water between them in the event the supply fell below 375 cfs. The agreement provided that 53% of the water would be allocated to Clear Springs and 47% to Clear Lakes. This agreement was clearly an interim agreement pending final determination of the formal applications, and notwithstanding any priorities claims in these applications. The parties have been operating under this agreement until the current disputes.

Matters began to come to a head in 1992 when the IDWR filed its “Director’s Report for Reporting Area 3” with the SRBA court, recommending adjudication of priorities with respect to the three material water right applications as follows: as between the parties hereto, Clear Lakes was to hold the first priority right to draw 100 cubic feet per second (“cfs”) from the springs flowing across the property¹; Clear Springs was to hold the second priority right to draw 200 cfs²; and Clear Lakes was to hold the third

¹ IDWR no. 36-02659, priority date 06/23/1966.

² IDWR no. 36-02708, priority date 09/28/1966.

priority right to draw 75 cfs³. (Clear Springs was to hold two additional but junior rights to draw an additional 61.55 cfs⁴, but these rights are immaterial to the instant dispute.) The report was immediately challenged in court.

After extended litigation between the parties, the IDWR Director's report was adopted by the SRBA special master, the SRBA trial court, and eventually, by the Idaho Supreme Court, in a decision released in January of 2002. *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 40 P.3rd 119 (2002). This adjudication gave Clear Lakes the first 100 cfs, Clear Springs the next 200 cfs and Clear Lakes the third 75 cfs, and apparently marked the agreed upon event for termination of the water sharing agreement the parties had entered into in 1980.

B. The Creation of the Interim Stipulated Agreement

While the final stages of the litigation over the water rights and the priorities between Clear Springs and Clear Lakes was brewing before the Idaho Supreme Court, another concern was being addressed by the Director of IDWR concerning the Snake River Plain Aquifer – a dwindling supply of water flowing from the springs out of the Snake River canyon. In August of 2001, the Director issued a notice that the IDWR intended to curtail ground water users in the aquifer on the plain above the rim until a study could be completed of the impact the ground water use was having on the springs flowing out of the Snake River canyon wall. The Director advised the evaluations would be done by December 31, 2003.

This notice prompted the users to negotiate an interim agreement pertaining generally to ground water users above the rim. This agreement was signed by a number

³ IDWR no. 36-07004, priority date 07/21/1967.

⁴ IDWR no. 36-07201, 10 cfs, date 08/04/1971, and IDWR 36-07218, 51.55 cfs, date 01/24/1972.

of ground water users from the plain, and a number of surface water users dependent upon waters from the canyon springs, including both Clear Springs and Clear Lakes. By this agreement, the ground water users agreed to provide water to enhance the flows in the Thousand Springs reach by up to 40,000 acre feet per year for until the evaluation was completed in December of 2003. A major section of this agreement consisted of the agreements among ground water users for pooling of and payment for the water to produce the required 40,000 acre feet of replacement water. The Interim Stipulated Agreement contained a specific clause limiting the rights of the parties to pursue actions against other parties for curtailment of water. The clause is referred to as the “safe harbor” provision, and reads as follows:

In exchange for the commitments enumerated in paragraphs 2.1 through 2.7⁵ the undersigned holders of senior priority surface rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction other than as provided in paragraph 2.7⁶, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

This agreement came into being during the fall of 2001, and was ready for signature by early November. The various parties signed the agreement in counterparts over the next few months. Clear Springs signed the agreement early in the process, on November 16, 2001. Clear Lakes signed the agreement late in the process, on January 17, 2002.

C. The Director’s Orders Following the Interim Stipulated Agreement

The Director entered two orders shortly following the completion of the Stipulated Interim Agreement: an order approving the agreement, and an order creating

⁵These sections generally pertain to the ground water users commitments to provide replacement water of up to 40,000 acre feet to enhance the Thousand Springs reach.

⁶ Section 2.7of the Stipulated Agreement provides remedies if the 40,000 acre feet is not delivered.

the new water district to administer the water rights in the area of concern to the agreement.

The Director entered an order approving the Interim Stipulated Agreement on January 18, 2002, the day after Clear Lakes signed it. By this order, the Director approved the interim stipulated agreement, but did not incorporate it into the order. As is relevant to this proceeding, and with respect to the “safe harbor” clause, the Director made the following finding of fact:⁷

Under the agreements, the represented holders of senior priority surface rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide specific quantities of replacement water during the two year term of the Agreements as a replacement for water that would have resulted from curtailment of ground water diversions intended by the Director.

Of significant note is the difference in wording between the “safe harbor” clause in the stipulated agreement and the language of the Director’s order. The stipulated agreement states that it operates to protect “any junior water rights” held by a party to the agreement, while the Director’s finding observes that the forbearance agreed upon extended only to “represented holders of junior priority *ground* water rights” of a party to the agreement.

In other provisions of the referenced order, the Director concluded that with the stipulated agreement in place, further curtailment of ground water in the Thousand Springs reach was unnecessary for at least the next two years, but that interim administration of water rights in the Thousand Springs GWMA, and certain rights immediately adjacent to the GMWA, is necessary to protect the water supply available to

⁷ Finding of Fact No. 4, “Order Approving Stipulated Agreements,” dated January 18, 2002, entered by the Director in proceeding captioned “In the Matters of the American Falls Ground Water Management Area and The Thousand Springs Ground Water Management Area.”

satisfy the senior priority surface water rights diverting from the springs. The Director ordered that the watermaster for the new water districts shall have the authority to, among other things, curtail out-of-priority diversions not covered by the stipulated agreement.⁸ This order was not challenged by any party in any administrative proceeding before the Director under IDAPA⁹

On February 19, 2002, a “Final Order Creating Water District No. 130” was entered by the Director. This order refers to the Interim Stipulated agreement in the recitals and findings of fact, and notes the Director’s approval thereof by order entered January 18, 2002. This order then sets out separately the protection to be provided to junior priority water rights:

Under the agreements, the represented holders of senior priority surface water rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide specific quantities of replacement water during the two-year term of the stipulated Agreements.¹⁰

This order repeats the authority of the watermaster of the newly created water district, as is material here, 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.”¹¹ This order was not challenged by any party in any administrative proceeding before the Director under the IDAPA.

⁸ *Op. Cit.*, Conclusions of Law 4, 5 and 6.

⁹ The order provides that it is an interlocutory order, and is therefore not subject to review by reconsideration or appeal under IDAPA 37.01.01710. The Director may review the order pursuant to IDAPA 37.01.01711.

¹⁰ Finding of Fact No. 5, “Final Order Creating Water District No. 130,” dated February 19, 2002, entered by the Director in proceedings captioned “In the Matter of Creating The Thousand Springs Area Water District, Designated as Water District No. 130, etc.”

¹¹ *Op. Cit.*, Conclusion of Law 10(d).

D. The Director's Instructions to the Watermaster

On June 5, 2002, the Director issued a departmental memorandum to the watermaster of Water District 130 containing the first set of comprehensive instructions for distribution of water among the competing water rights of Clear Springs and Clear Lakes. After an informal meeting with the parties, and consideration of matters raised in informal correspondence from the parties, the Director issued a departmental memorandum with an amended set of instructions. The instructions are detailed and technical, but as is relevant to the instant proceeding, they provided that the watermaster was to adjust the gates and weirs to allocate the waters available in accordance with the priorities between Clear Lakes and Clear Springs as adjudicated in the SRBA litigation, without apparent regard to the Interim Stipulated Agreement or the 1980 water sharing agreement between the parties.

Apparently, Clear Lakes informally objected to the first set of instructions, and a conference with the Director was held. On June 10, 2002, the Director wrote a letter to Clear Lakes and its counsel, with copies to Clear Springs and its counsel, confirming the this meeting and confirming the Director's agreement to review the watermaster's instructions. In this review, the Director agreed to take into consideration certain documents and actions. Of note is that the first set of instruction, issued June 5, 2002, does not mention the Interim Stipulated Agreement as being a consideration in the formulation of the instructions. All of the documents and actions that the Director was apparently asked to consider, as outlined in his letter of June 10, involved either the parties 1980 agreement, or motions, briefs and orders entered in the SRBA litigation. Nothing was said in the June 10, 2002 letter, or in the subsequent amended instructions to

the watermaster issued June 13, 2002, of the Interim Stipulated Agreement between the ground water users and the surface water right holders.

Following his review as requested, the Director issues an amended set of instructions by departmental memorandum to the watermaster on June 13, 2002. As the Director noted in a letter to the parties through their counsel, although he added five additional pages to the instructions to the watermaster following his review of the materials requested, his previous conclusions regarding how the water rights should be administered remained unchanged.

On June 19, 2002, the watermaster of Water District 130 issued her notice of intent to redistribute flows to Clear Lakes and Clear Springs. By this notice, the watermaster advised the parties that, pursuant to the Director's instructions of June 13, 2002, she was going to adjust an identified weir to redistribute the flow of water between the two entities on July 3, 2002. This notice advised the parties that they could contest the action by petition to the IDWR within fifteen days, as provided by Idaho Code § 42-1701A(3).

No petition to contest the watermaster's notice by administrative action was filed with the IDWR within the time mandated by the notice. On July 5, 2002, the watermaster adjusted the headgates of the identified weir to reallocate the water between Clear Springs and Clear Lakes as stated in the Director's instructions to the watermaster, and in the watermaster's notice of intent.

E. The Gooding County District Court Litigation

Clear Lakes filed a lawsuit in the district court of the Fifth Judicial district, in Gooding County on June 20, 2002, naming the IDWR, the Director and the watermaster

as defendants. Shortly after this suit was started, Clear Springs moved and was granted permission to intervene as an additional party defendant. Clear Spring's motion to intervene was granted on July 2, 2002.

There appears to be no dispute that the gravamen of this lawsuit was a challenge to the watermaster's notice of intent to regulate flows on the basis that the Director had no authority to issue instructions to the watermaster because of the provisions of the safe harbor clause of the Interim Stipulated Agreement.

Clear Lakes sought a preliminary injunction against IDWR to enjoin the curtailment of its water, which was denied by the court. Clear Springs filed a motion to dismiss and IDWR filed a motion for summary judgment. Before the motions were heard, the plaintiff Clear Lakes and the defendant IDWR entered into a stipulation for dismissal of the action. The stipulation provided that the lawsuit would be dismissed *with prejudice*. The stipulation for dismissal contained the following language:

3. IDWR acknowledges Clear Lake's right under applicable statutes and rules to file a petition with IDWR initiating an administrative contested case for the purpose of seeking review and modification of the Amended Watermaster Instructions for Distribution of Water ... issued June 13, 2002 and the actions taken in accordance with those instructions under the watermaster's June 19, 2002 Notice of Intent to Redistribute Flows, which together implemented IDWR's ongoing responsibility to administer the water rights, which are the subject of the above captioned action, in accordance with applicable law.
4. The director of IDWR commits to provide for the holding of an administrative hearing or hearings to hear all issues within the jurisdiction of IDWR raised in the petition referred to in paragraph 3 above.

Clear Springs was not a party to the stipulation for dismissal. The language in the stipulation pertaining to proceeding with an administrative hearing does not apply to it.

Notwithstanding that it was not a party to the stipulation, the lawsuit was also dismissed as to it, and the dismissal was also *with prejudice*.

The “with prejudice” language was not an oversight or the inadvertent insertion of boilerplate into an order that the parties contemplated would be without prejudice. The district judge specifically commented upon this language when addressing the order to be entered, and counsel for Clear Lakes clearly reiterated to the court that the intent was a dismissal *with prejudice*.

Analysis

In this administrative proceeding, Clear Lakes has petitioned the Director to determine that the watermaster’s curtailment of Clear Lake’s diversion of water on July 5, 2002, violates IDWR’s duty to administer water in accordance with the Interim Stipulated Agreement.

The first step in the analysis is the relationship between the Interim Stipulated Agreement and the actual orders and instructions of the Director of Water Resources. Clear Lakes argues that the Interim Stipulated Agreement is the binding document, and that the Director is bound by its terms. Clear Lakes bases much of its position upon the contention that the “safe harbor” clause in that agreement is not ambiguous, and that the Director is obligated to enforce it according to its terms. I think the argument is flawed.

Neither the Director nor the IDWR was a party to the Interim Stipulated Agreement. Only the various water-using entities were parties to this agreement. The agreement was prompted by the Director’s advice that he would curtail ground water users above the rim if some agreement among users was not forthcoming. While the Interim Stipulated Agreement was submitted to the Director for his approval, and the

agreement became the basis for several important orders issued by the Director, the orders he issued, and not the agreement, are what establishes and defines the actions under examination in this proceeding

The Director has the statutory authority and duty to regulate water use throughout the state. The Director has the authority and duty to protect the priority of senior water right holders from encroachment or interruption from junior water right holders. Private parties cannot withdraw the Director's authority under the statutes or limit his duties imposed by statute by private agreement.

Clear Lakes argues that the Interim Stipulated Agreement went through several drafts; that early drafts provided that the safe harbor clause did work only to protect junior ground water users; but that the final draft eliminated the limitation to ground junior water right holders and extended the protection of the clause to "any" junior water right holder. Clear Lakes argues that this iteration of language in the various drafts makes it clear that the final intent of the agreement was not to be limited to ground water users, but was to protect all junior water right holders. Clear Lakes argues that the Director is bound by the clear, unambiguous wording of the agreement as it was finally constructed between the parties. I disagree.

I would agree that the Director had discretion to accept this clause as it was written, and had the discretion to incorporate the protections of this clause into his subsequent orders providing for the administration of the new water district, had he been so inclined. But he was not bound to do so. Private parties cannot tie the Director's hands by private agreement.

It is clear from the plain wording of the orders he entered in this case that he did not accept the breadth of the “safe harbor” clause in the Interim Stipulated Agreement as it was written. In both the order entered approving the agreement on January 18, 2002, and the order entered establishing the new water district entered February 19, 2002, the Director clearly limited the extent of the safe harbor protection to junior *ground* water users. One might say he “telegraphed” his punch in the January order approving the Interim Stipulated Agreement, then firmly established the limitations on the safe harbor provision and established his authority to regulate flows between senior and junior surface water right holders in the final order establishing the district, entered February 19, 2002. The early order might have been interlocutory but the second order was clearly final. There was no appeal or action to seek review of this order.

Clear Lakes argues that the Director is committed to enforce the Interim Stipulated Agreement by the terms of the order. Counsel points to Conclusion of Law 10(c) for this argument, which reads:

10. The Director concludes that the watermaster ... shall perform the following duties in accordance with guidelines, direction and supervision provided by the Director: ...

c. Enforce the provisions of the stipulated agreements *approved by the director*.... [Emphasis mine.]

By this last emphasized language, the Director reserved the ability to limit or qualify the enforcement of the Interim Stipulated Agreement. He did this in the case of the safe harbor provisions, both in the order approving the agreement and in the order creating the water district. The Director, in effect, stated that he will recognize and enforce the Interim Stipulated Agreement his way, in accordance with the qualifications and

limitations he imposed. I think it is clear under the law that he has the authority and discretion to do just that.

Clear Springs argues that the proper interpretation of this proceeding is an examination of whether the Director's instructions to the watermaster, and the watermaster's subsequent notice of intent to curtail water flows, was consistent with the authority established by the February 19, 2002 order establishing the water district. With respect to the instructions to the watermaster, Clear Springs argues that deference should be given to the Director when he is interpreting his own order, citing *Angstman v. City of Boise*, 128 Idaho 575 (App. 1966), and that the Director's interpretation should not be overturned unless it is plainly erroneous or inconsistent, citing *Idaho Mining Ass'n v. Browner*, 90 F. Supp 2d 1078 (U.S.D.C., Idaho, 2000). I believe this is the correct analysis.

Under this analysis, the intent of the parties to the Interim Stipulated Agreement is immaterial. It is not necessary to determine whether the parties' intent for the Safe Harbor clause was to reach priority disputes between surface water right holders, or was only to protect ground water users from the threat of the Director's order of curtailment. By his orders, the Director limited his recognition of the provision in the agreement to the latter. It is not necessary to determine whether there is any consideration flowing from Clear Lakes for the claimed protection of the Safe Harbor clause, because the decision does not turn on contract principles but on the discretion of the Director to pick and choose in incorporating provisions of the Interim Stipulated Agreement into the administrative orders he issued.

I think the Director had the authority to do exactly what he did in limiting his recognition of the safe harbor language. The Stipulated Interim Agreement came about because of the Director's concern over dwindling water supplies in The Thousand Springs reach. As I understand the impact of his notice in August 2001, he advised that, unless the water users came up with an agreement, he would curtail ground water use in the plain above the canyon rim. The target group in danger of curtailment by action of the Director, then, were the ground water users on the aquifer plain above the rim.

The issues of water allowances between Clear Springs and Clear Lakes, on the other hand, had been the subject of extended litigation in the SRBA court. At the very time the Interim Stipulated Agreement was being drafted and circulated, these issues were in the process of being finally resolved by the Idaho Supreme Court. The final decision of the Supreme Court was released within days of the date the Interim Stipulated Agreement was completed and signed by all parties. There would be no reason for the Director to interfere with this final decision of the Idaho Supreme Court on these issues. There would be no reason for the Director to extend the safe harbor provisions beyond the target group of water uses in danger of curtailment by the Director's actions. In sum, the Director's construction limiting the reach of the safe harbor provision is fully consistent with the August notice to water users that caused the agreement to come into being in the first place.

A second stumbling block to the arguments advanced by Clear Lakes is the dismissal of the Gooding County litigation with prejudice. Clear Lakes argues that the stipulation for dismissal clarifies the intention of the parties to retain the right to proceed with the administrative hearing, notwithstanding the dismissal of the state court litigation.

However, the language of the dismissal – *with prejudice* – carries significant legal ramifications. A dismissal with prejudice operates as an adjudication on the merits of all claims within the scope of the complaint, and bars further litigation of the same issues under the doctrine of *res judicata*.

Certainly the gravamen of the lawsuit – whether the director had the authority to issue the instructions in the first place – was adjudicated by the dismissal with prejudice. That a dismissal with prejudice is an adjudication on the merits is a matter of definitive rule; the parties cannot give this definitive meaning of the rule a different meaning by private agreement. In any event, since Clear Springs was not a party to the stipulation, there is no argument now that the dismissal with prejudice as to Clear Springs is anything other than an adjudication on the merits.

The rule recently announced by the Idaho Supreme Court is that, absent fraud, a Rule 41 dismissal with prejudice is an adjudication on the merits and,

...in an action between the same parties upon the same claim or demand, the former adjudication [i.e., the Rule 41 dismissal] concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.¹²

Under Rule 41 of the Idaho Rules of Civil Procedure, a dismissal before trial is without prejudice unless otherwise stipulated by the parties or ordered by the court. If the parties had said nothing, the dismissal would have been without prejudice. One would expect such where a court action is prematurely filed before all of the avenues of administrative relief have been pursued, as the parties would usually want to preserve their right to return to court if the administrative relief was not availing. In this case, the trial judge

¹² *Kawai Farms v. Longstreet*, 121 Idaho 610 (1992), referring to *Diamond v. Farmers Insurance*, 119 Idaho 146 (1990) and citing with approval *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549 (1922).

specifically inquired as to the with prejudice language in the stipulation and proposed order, and was advised by counsel that the language was correct. It was not an oversight or inadvertent error in placing boilerplate language into the documents.

The dismissal of the Gooding County lawsuit with prejudice was a final court adjudication on the issue of the Director's authority to issue the February 19, 2002 order and the June 13, 2002 amended instructions to the watermaster, and of the June 19 2002 notice of action issued by the watermaster. Insofar as the stipulation provided for further administrative inquiry into the actions of the watermaster, that inquiry would have to be directed into technical areas of compliance with the call made by Clear Springs, or into the accuracy of the watermaster's methods and measurements. Any inquiry into her authority, under the instructions from the Director, or into the Director's authority is barred by the doctrine of *res judicata*.

Conclusions of Law

Based upon the foregoing analysis, I conclude that it is the Director's order of February 19, 2002 that sets forth the "safe harbor" provision he was recognizing from the Interim Stipulated Agreement. The Director had the discretion to accept and incorporate from the stipulation that which he wished to incorporate into the order. He was not obligated or bound by the stipulation as to parts that he did not accept and incorporate into the order.

In this case, he did not incorporate the broad language of the "safe harbor" provision extending the protection to junior surface water right holders. By the plain reading of the order, he extended the safe harbor provision only to junior ground water right holders. I conclude that the dispute between Clear Springs and Clear Lakes over the

water allotments in this case were not within the reach of the Director's order of February 19, 2002, notwithstanding the language of the Interim Stipulated Agreement.

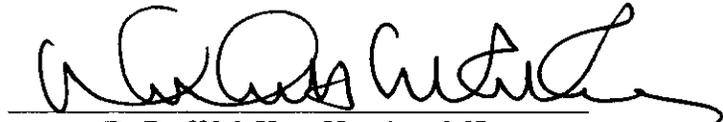
I further conclude that continued litigation over this issue by administrative proceeding is foreclosed by the district court order of dismissal with prejudice in the Gooding County litigation. The dismissal with prejudice operates as an adjudication on the merits of all issues raised in that action, and, in the absence of fraud, bars further litigation under the doctrine of *res judicata*. This prevents Clear Lakes from raising the issue of the Director's or watermaster's authority in this proceeding, and also prevents Clear Lakes from separately attempting to enforce the Interim Stipulated Agreement in this proceeding against Clear Springs. These issues were the admitted gravamen of the Gooding County district court litigation, and were resolved by the dismissal with prejudice.

Recommendations for Order

I recommend that the Director enter an order denying the motion for summary judgment filed by Clear Lakes. I recommend that the Director grant the motion to dismiss filed by Clear Springs as to all claims and contentions challenging the authority of the Director or watermaster. There may be some technical issues that remain pertaining to the accuracy of the methods and measurements, that would be within the stipulation, not barred by the dismissal of the Gooding County litigation, and that may be addressed in continued administrative proceedings, so leave should be allowed to Clear Lakes to proceed in those areas. These conclusions and recommendation make any

further stay of the watermaster's activities moot, so I recommend that motion for stay be denied.

Respectfully submitted this 13th day of April, 2003.

A handwritten signature in black ink, appearing to read "D. Duff McKee", written over a horizontal line.

D. Duff McKee, Hearing Officer

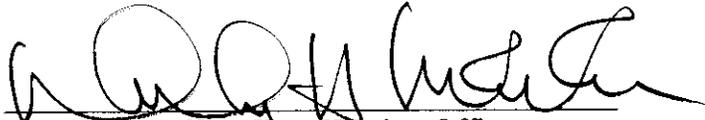
Statement of available procedures

This is a recommended order of the hearing officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this recommended order 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 agency head or designee on any issue in the proceeding.

If no party files exceptions to the recommended order with the agency head or designee, the agency head or 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.

Dated this 13th day of April, 2003.



D, Duff McKee, Hearing Officer