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Mackay, ID 83251

May 27, 2011

Mr. Gary Spackman, Acting Director
Idaho Department of Water Resources
The Idaho Water Center
PO Box 83720
Boise, ID 83720-0098

Re: Formal Comments on Proposed Document Finalization and Rule Change

Dear Mr. Spackman:

The purpose of this letter is to formally submit our comments regarding the finalization and adaptation of the PETITION TO AMEND RULE 50.01 OF THE CONJUNCTIVE MANAGEMENT RULES (37.03.11) of THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO (IDWR) and the document titled Enhanced Snake Plain Aquifer Model Final Report/by: Idaho Water Resources Research Institute – Technical Report 06-002, dated July 2006, for the IDWR, with guidance from the Eastern Snake Hydrologic Modeling Committee (ESHMC), also known as the: Eastern Snake Plain Aquifer Model Enhancement Project Scenario Document Number DDM-019 (“the document”).

I. SUMMARY

This document, if used for the purpose of legally defining aquifer boundaries,¹ should not be finalized without review through the Idaho Administrative Procedure Act (IDAPA). No such administrative procedure compliance was done for this document or the efforts under which the document was drafted.

No notice was provided to us or those similarly situated that the document and its inclusion of the Big Lost River drainage would be used in an administrative action by IDWR.

¹ Note the decision of the Idaho Supreme Court in Clear Springs Foods, Inc. v. Spackman, P.3d, 2011 WL 907115 Idaho, 2011, March 17, 2011, intends, while recognizing the flawed nature of the draft document, to adopt the findings of boundaries, thus legally providing the document with legal standing under the Idaho Administrative Procedure Act and affecting the legal rights of water right holders in the Big Lost River drainage.

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Others in different venues and geographic or political positions may have been afforded the opportunity to participate in the administrative and judicial process. However, such participation was for other purposes (obtaining curtailment orders) and without inclusion of or notification to the Big Lost River drainage stake holders. No consideration was given by IDWR as to the impact of adopting this document and what the subsequent rule change might have on our rights.

The document, as regards the Big Lost River drainage, has serious and irreconcilable technical errors and omissions that must be addressed before the document can be utilized by IDWR.

II. THE DOCUMENT AND ACTIONS TO ADOPT ITS CONCLUSIONS FAIL TO MEET THE IDAPA REQUIREMENTS

IDAPA requires that any State Agency in issuing an order comply with the provisions of the Act. (I.C. § 67-5240) IDWR is clearly an agency as defined by the act, and the adopting of the document is an order as defined by Idaho law. IDAPA governs if the issue at hand arose from a “contested case,” which the IDAPA defines as “[a] proceeding by an *agency* ... that may result in the issuance of an *order*.” I.C. § 67-5240 (emphasis added); Westway, 139 Idaho at 111, 73 P.3d at 725. Since it is an executive department of the state government, the IDWR is clearly an “agency” within the definition of the IDAPA. I.C. §§ 40-501 & 67-5201(2); Westway, 139 Idaho at 111, 73 P.3d at 725. IDAPA defines an order as “an agency action of particular applicability that determines legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” I.C. § 67-5201(12); Id. at 111, 73 P.3d at 725.

IDWR failed to provide proper notice of a hearing on the document, thereby denying us the right to a required administrative review. By this failure, IDWR has also denied us and others the right to be heard and the right, under IDAPA, for any judicial remedy. In no stretch of the imagination is the document complete or correct in its evaluation of the water flows in the Big Lost River Valley, the now intended purpose seeking to be applied by IDWR.

Further, IDAPA requires that any individual impacted by an action or order exhaust all administrative remedies prior to exercising the right to a judicial remedy. Since there was no notification, no hearing, and no review of the document, no administrative remedy has been afforded to us. While the intent of IDAPA is to allow the agency to function in a competent manner, it *must comply with the terms and conditions of IDAPA*, or it is ipso facto denying us not only our administrative procedure rights, but our judicial remedies as well. Because others may have had their administrative and judicial rights for other purposes does not negate the requirement that IDWR do so for us, and its current proposed application of the document.

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Since the document is not finalized, IDWR has an opportunity to step back and incorporate the required procedures by properly following the IDAPA requirement. Through various informal meetings and correspondence IDWR has been made aware of significant opposition to the document and the document's serious technical flaws. To now go forward without addressing these concerns in a proper and legal manner (i.e. in compliance with IDAPA) is to improperly violate its legal requirements and sweep under the rug critical administrative procedures and profound technical errors in the document.

The consequence of going forward without compliance with IDAPA and correction of the technical flaws is to invite unnecessary and expensive future legal action. Any reference or use of the document as a precedent or incorporation in the defining of water flow and modeling for legal purposes would render all future water allocation efforts based on this standard, erroneous.

While the law in Idaho does allow for judicial remedy without the proper compliance by IDWR,² IDWR clearly has a narrow window of opportunity to avoid these and other legal consequences. These include the payment by IDWR of all our legal fees and expenses in bring this injustice before the court and any losses in property or water rights that might occur. IDWR must afford us and others similarly situated the rights allowed under IDAPA before finalizing the document. As required by statute, this letter provides to IDWR formal notification of the consequences of such an action.

III. IDWR HAS BEEN MADE AWARE OF SIGNIFICANT OPPOSITION TO THE DOCUMENT AND SERIOUS TECHNICAL FLAWS IN THE DOCUMENT'S CONCLUSIONS

We will now address our technical concerns and offer comments on the scientific, technical, and statistical flaws regarding the November 10, 2010 State Court filing of Clear Springs Foods, Inc.'s PETITION TO AMEND RULE 50.01 OF THE CONJUNCTIVE MANAGEMENT RULES (37.03.11) of THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO (IDWR) and the document titled Enhanced Snake Plain Aquifer Model Final Report/by: Idaho Water Resources Research Institute – Technical Report 06-002, dated July 2006, for the IDWR, with guidance from the Eastern Snake Hydrologic Modeling Committee (ESHMC), also known as the: Eastern Snake Plain Aquifer Model Enhancement Project Scenario Document Number DDM-019.

² This Court has recognized two exceptions to this rule (the exhausting of administrative remedy prior to judicial action): (a) when the interests of justice so require, and (b) when the agency acted outside its authority. Regan v. Kootenai County, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004).

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The November 9, 2010 Clear Springs Foods, Inc.'s court petition to Modify and Amend the Idaho Department of Water Resource's Rule 50 of the Conjunctive Management Rules (37.03.11 et seq.) to properly define the hydrologic boundary of the Eastern Snake Plain Aquifer is not based upon the most recent data or information available. Specifically, Clear Springs Food's Petition requests that, The Eastern Snake Plain Aquifer, the area of coverage of this rule, be defined as the aquifer underlying the Eastern Snake River Plain and the aquifer as defined in the sub-report, Enhanced Snake Plain Aquifer Model Final Report dated July 2006, Idaho Water Resources Institute Technical Report 06-002 (referred hereafter as Tech Rpt 06-002).³ This will improperly include the Big Lost River Valley and Little Lost River Valley Basins, but is not comprehensive and does not address other similar basins. In our review we have noted that Tech Rpt 06-002 references several Technical Reports or Design Documents that address specific design topics on the eastern Snake River Plain Aquifer Model upgrade project. There are more than 50 of these sub-reports. These sub-reports form the pillars of data upon which the document is based.

The Project Scope on page 2 of Tech Rpt 06-002 states, "The scope of the project was limited to model creation and calibration and did not entail generation of water management scenarios." The document is now intended to expand the scope to indeed do just that and generates expanded water management scenarios that are incomplete and prejudicial to the water right holders in the Big Lost River Valley. There is no inclusion of most other drainages in the document, no technical data on how other drainages might affect the model and not even an attempt to address the impact of these exclusions on the overall model. In short, by failing to properly include all data from all contributing sources the document is rendered useless for any comprehensive purpose. Unfortunately, this is the exact nature of the proposed application now pending with the Idaho Supreme Court.

Tech Rpt 06-002 does not define the Snake River Plain Aquifer or its respective boundary or area of coverage for Rule 50, only a model of some Hydrologic Information that has been observed, estimated, hypothesized and is related to the Snake River Plain. Again, the report is intended for model creation and calibration only, not for water management scenarios. Tech Rpt 06-002 also does not define a new or more accurate Hydrologic Boundary for the actual Snake River Plain Aquifer. If used as proposed, the document based on these sub-reports will profoundly affect water management scenarios based upon its intended use by the Idaho Supreme Court. While we recognize the complexity of the task, and the difficulties of properly and comprehensively defining the hydrological boundary, IDWR cannot now inaccurately and

³ Please note that Tech Rpt 06-002 does not define the hydrologic boundary of the Snake River Plain Aquifer. It only defines a boundary of certain, not all, hydrologic inputs to its Model.

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incompletely attempt just such a boundary designation because the correct completion of the task is difficult or costly. A dramatic impact on our water rights will result by IDWR's finalization of the document in its present form.

A sub-report issued November 15, 2004 is titled Model Boundary. On page 5 of this sub-report the following is stated, "Ideally model boundaries are based on physical barriers to ground water flow." On page 6 the following is stated, "The decisions made regarding the model boundary will affect the ability of the model to support later administrative decisions." These comments could not more accurately support the need for a comprehensive and required administrative and technical review. No such review has been done by IDWR. Specific notation to the Big Lost River drainage is noted.⁴ Page 7 of this sub-report states, in part, "The model boundary should extend to bedrock outcrops in tributary valleys to reduce the number of inflow parameters that must be estimated. Examples where this concept can be employed are in the Big Lost River drainage and.... This results in including the Big Lost River drainage up to Mackay Reservoir and...." This model Design Decision was incorrect, flawed, and very wrong.

If the data from the Big Lost River is included (and arguably it must be, along with all other drainage data) then IDWR must consider that from the Mackay Reservoir or Mackay Dam approximately thirty (30) miles to the interface where the Big Lost Aquifer cascades several hundred feet down into the Snake Plain Aquifer where there exist significant hydrologic unknowns. Some of these unknowns are underground water flow time constants, transmissivity or hydraulic conductivity, hydraulic gradient or head and numerous others that are absent in the document. The Big Lost River Aquifer has not been modeled and therefore using data at the Mackay Dam to feed the new Snake River Plain Aquifer model is technically flawed and erroneous.

Tables and other information in the report are used for erroneous purposes. Rpt-06-002's Table 5, lists twenty two (22) Tributary Basins to the Snake River Plain Aquifer and most do not have the Model Boundary extended into their respective Aquifers like the Big Lost River Basin and the Little Lost River Basin. Rpt-06-002's Table 5, lists the Average Annual Underflow for the ESPAM of the twenty two (22) Tributary Basins to the Snake River Plain Aquifer. If the Underflows for the Big and Little Lost's are divided by Rpt-06-002's total recharge input to the Snake River Plain Aquifer, the number is extremely small, less than 1.0%. Therefore, consideration of the Big and Little Lost data is within the margin of error for determining impacts on the Snake River Plain Aquifer. Water from our property and those similarly situated

⁴ No other drainages or contributing sources are reviewed nor included in the modeling attempt. Thus, the exclusions render the proposed document and the model on which it is based, for the purposes of defining flow and use by the Court improper and technically useless. In essence, IDWR is trying to use the document for purposes it was not intended with potential catastrophic consequences.

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in our drainage are inconsequential and should not be included in the document. Alternatively, if they are to be included then all other de minimis sources must also be considered.

If a proper review and administrative procedure analysis was done, numerous other technical issues would be identified, studied and if possible resolved or corrected before IDWR places the document in the position of such an important reference source.

IV. CONCLUSION

In conclusion, the Clear Springs Foods, Inc. petition before the court to amend Rule 50 is based on false erroneous information. IDWR's attempts to finalize the document on which this petition is based have not been subjected to IDAPA as required by law. The IDWR has not thoroughly and completely considered all of the required variables upon which to base its conclusions. IDWR is attempting to utilize a report that was not intended as a modeling reference to define critical hydrologic boundaries of the Snake River Plain Aquifer. The document should not be adopted in its present form, or alternatively the Big Lost River Basin and Little Lost River Basin drainages should not be included as a significant contributing factor in the Snake River Plain Aquifer. If IDWR persists and adopts this document without significant technical changes and a proper administrative review, it is inviting complex and costly legal actions.⁵

Thank you for the opportunity to formally submit our comments, requests and concerns. We look forward to your reply and resolution of these important issues.

Sincerely,

M. Marx Hintze, P.E.

Darla Hintze

cc: Mr. Richard Rigby
Ms. Renea Ridgway
Mr. Lawrence Wasden

⁵ I.C. 12-117 - Purpose of statute governing awards of attorney fees is to serve as deterrent to groundless arbitrary agency action and to provide remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agency should never have made. I.C. §§ 12-117, 12-121. *Bogner v. State Dept. of Revenue and Taxation, State Tax Com'n* 107 Idaho 854, 693 P.2d 1056 Idaho, 1984.)