

COPY

RECEIVED

MAY 10 2000

Department of Water Resources

5-8

Clear Lakes Trout Company, Inc.

Daniel V. Steenson (ISB # 4332)
Charles L. Honsinger (ISB # 5240)
Ringert Clark, Chartered
P.O. Box 2773
Boise, ID 83702
PHONE: (208)342-4591
FAX: (208) 342-4657

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

In Re SRBA)	
)	SUBCASE NUMBERS 36-02708 and 36-07218
)	
Case No. 39576)	
)	BRIEF IN SUPPORT OF MOTION TO ALTER
)	OR AMEND JUDGMENT, OR IN THE
)	ALTERNATIVE, MOTION TO RECONSIDER
)	MEMORANDUM DECISION AND ORDER ON
)	CHALLENGE
)	

DESCRIPTION

This is Clear Lakes Trout Company, Inc.'s ("Clear Lakes"), *Brief in Support of Motion to Alter or Amend Judgment, or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge* in subcase numbers 36-02708, 36-07201 and 36-07218.

ARGUMENT

During the 1960s, Ted Eastman initiated development of a hatchery now owned by Clear Springs Foods, Inc. ("Clear Springs"), and Earl Hardy initiated development of the Clear Lakes hatchery in the Clear Lake area between the northern rim of the Snake River Canyon and the Snake River. Water being the lifeblood of a fish hatchery, each staked their claims to water by filing water right permits and constructing diversions in separate streams which were formed by numerous

springs discharging from the canyon rim above the two hatcheries. Mr. Eastman established water right no. 36-07201 to divert from a stream which flowed around the west side of the Clear Springs hatchery (the "Brailsford stream"), and established water right nos. 36-02708 and 36-07218 to divert water from a stream which flowed between the Clear Springs hatchery and the Clear Lakes hatchery (the "western stream"). Clear Lakes established water right no. 36-02659 to divert water from the western stream, and established water right no. 36-07004 to divert water from a stream which flowed separately to the east of Clear Lakes hatchery (the "eastern stream"). Since those early days, Clear Springs and Clear Lakes have each moved and modified their diversions in these streams to facilitate the development of their hatcheries.

In this adjudication, Clear Springs claims that the western stream and the eastern stream were not and are not separate sources so that it is able to divert water from the eastern stream and the springs which supply the eastern stream under its western stream water rights. This is what the miners used to call claim jumping. Through its objections to Clear Springs' water rights, Clear Lakes has sought to protect its priority in the flows of the eastern stream and its tributary springs. The court has issued partial decrees defining Clear Springs' western stream rights and Clear Lakes' eastern stream right as having the same source. The bottom line effect of this decision is to take water from Clear Lakes and give it to Clear Springs. As a result of these decrees, Clear Lakes will bear the entire brunt of the ongoing decline in spring discharges feeding both sources, while Clear Springs will receive water under water right number 36-02708 without any loss whatsoever, despite the fact that Clear Springs has never diverted any water from the eastern stream or the springs feeding the eastern stream.

The most troubling aspect of the decision is that it ignores the undisputed evidence that Clear Springs has never used nor established a right to divert any portion of the water that the court has reallocated to Clear Springs. The decision to include this eastern stream water as part of the source of Clear Springs water rights cannot be reconciled with the evidence. Equally troubling is the court's decision to decree Clear Springs' water rights with diversion points that have never existed. The only conceivable reason Clear Springs now seeks these non-existent diversion points is to attempt to take water from the source that it has never used.

I. **The water in the western stream and the eastern stream was not "all in one channel or pool" before the separate streams formed**

The court correctly found that: "The record is clear that after the water divided, it formed a western stream and an eastern stream, which two streams formed an island." *Memorandum Decision* at 21. The court clearly recognizes the western and eastern streams as "separate streams, creating an island." *Id.*, at 22. The Court erroneously concludes, however, that these two streams are one source. The sole basis for this conclusion is the finding that, prior to development of Clear Springs' and Clear Lakes' water rights, "all the springs" discharging from the canyon rim "collected and commingled" into "one channel or common body of water" before dividing into separate streams. *Id.*; see also generally pp. 22-24. There are no facts in the record to support the finding that all the water in the western stream and the eastern stream came from one channel or pool. Without this factual predicate, there is no basis for the court to conclude that the western stream and the eastern stream are not separate sources.

To reach the finding that all of the springs discharging from the Snake River canyon walls collected into a common channel before dividing into separate streams, the court mischaracterizes

Mr. Hardy's testimony, without considering any other evidence in the record.

Simply put (the Brailsford stream, Clear Springs right 36-07201 will be discussed later), water from numerous springs discharged out of the canyon wall on property owned by Idaho Power and then collected into **one** channel or common body of water. Mr. Hardy acknowledges that this was the 'original stream channel.' As pointed out above, Mr. Hardy described this channel as being about ten feet wide. RT, pp. 39 & 40. Substantial evidence supports this finding.

Memorandum Decision, at p. 22.

The court reemphasizes Mr. Hardy's alleged description of one "original stream channel" to infer the existence of one stream channel into which all the springs discharged and from which all the water in the western and eastern streams originated: "See also Finding No. 3 wherein Mr. Hardy (of Clear Lakes) testified that there were 'two stream flows from **the original stream channel.**' (Emphasis added)." *Id.*, at 24. Mr. Hardy never described any channel of water as "the original stream channel" for the western stream and the eastern stream. In fact, Clear Lakes cannot find the term "original stream channel" anywhere in the Reporter's Transcript.

The court frames the source issue rhetorically, in an erroneous manner which presumes the answer: "One need only ask the elementary question: "How could **"that water"** divide if it was not all in one channel or pool immediately before the underwater point of division? See RT, pg., 44 LL 21 and 22." *Id.*, at 22. The court's cryptic quotation of Mr. Hardy's testimony regarding "that water" is taken out of context to erroneously suggest that Mr. Hardy was referring to "all" the water in the western and eastern streams. This is not the case:

A. As I described, **the division was a, was a rise in the ground under the water. So there was water over it, but not very much water.** And then it just gradually flowed off and picked up velocity as the streams came into each side of the division. So looking at the aerial photograph, it's, of course, not -- you can't see a rise in the ground to make that division.

Q. Okay. Then is the purpose --

A. There had to be, there had to be something to divide **that water**.

RT, p. 44, lns. 12-21 (emphasis added).

Without any further consideration of the evidence, the court concludes:

The **source** of all four of the subject rights (again, exclusive of the Brailsford stream, which is the source of Clear Springs' right 36-02701 (*sic*)) is **the common** water channel before it divides into the respective streams.

Memorandum Decision, p. 23.

[T]he [Special Master's] determination of the source issue was based upon a direct finding of fact that:

[P]rior to development of the right, the water from all the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Lake, and then ultimately emptied into the Snake river. Exhibit Y.

Memorandum Decision at 24.

An actual review and examination of the evidence demonstrates that the spring discharges along the canyon rim did not "all" "collect or commingle" in "one channel or common body of water" before the western and eastern streams were formed.

Neither Earl Hardy nor any other witness ever testified that all the water in both the western and eastern streams came from one common channel. The channel which Mr. Hardy described is the short, narrow channel which formed between the northern perimeter of the property where Clear Lakes constructed its facility and the canyon wall where several of the springs discharged. The court correctly describes this as a "relatively small" channel. *Id.*, p. 24. However, the channel between the Clear Lakes island and the canyon rim does not extend to the east and west so as to collect all of the spring discharges which contribute to the flow of both the western and eastern streams.

Simply looking at the 1957, 1968 and 1969 photographs shows that this channel extended across less than 50% of that stretch of the canyon wall from which numerous springs discharged separately into the western and eastern streams. The channel was not a common source collecting all of the water from all of the springs.

As the 1957, 1967, 1968, and 1969 photographs show, many of the spring discharges forming the western stream did not discharge to the channel to the north of the Clear Lakes property. On the 1957 photograph (Exhibit Y), Mr. Hardy identified the western stream, the eastern stream, and the stream adjacent to the Snake River Trout Company facility. RT, p. 19, ln. 3 - p. 20, ln. 16; p. 23, ln. 15 - p. 24, ln. 7. Mr. Hardy testified that these streams come from spring discharges at various points across the north wall of the Snake River Canyon. RT, p. 25, ln. 25 - p. 26, ln. 11. The western stream was formed by springs discharging from the canyon wall in the area of that stream and contained a larger quantity of water than the eastern stream. RT, p. 27, lns. 2-8. In his markings on the 1968, 1969, and 1977 photographs (Exhibits L1, L2 and L3), Mr. Eastman, who developed Clear Springs' water rights, circled spring discharges contributing to the flow of the western stream from which Clear Springs diverted water under right nos. 36-02708 and 36-07218. None of the springs Mr. Eastman circled discharged into the channel between the Clear Lakes property and the canyon wall.

Mr. Hardy described a portion of the eastern stream as the "eastern leg," which formed east of the narrow channel, and collected spring flows other than those discharging into the channel, as shown in the 1967 photograph, Exhibit A :

Q. Mr. Hardy, I'm showing you a photograph that has been marked as Plaintiff's Exhibit A.

Q. When did you take the photograph?

A. In 1967.

Q. And what does it depict?

A. It's a view from -- overlooking in the foreground of the photograph the Snake River Trout Company and the retaining wall they installed. But it shows the two principal things that I believe involves this case. It shows the construction of the two ponds from which water was diverted from the western stream flow under 2659. It also shows the pond on the east side of the island from which water was diverted under 7004.

But it also depicts the western -- pardon me, the eastern, shows the eastern flow, or part of the flow that flowed east and curled back towards the west and formed the stream or part of the stream from which 7004 was applied for and appropriated from. And if I may, I could show that, relate that to the aerial also.

Q. Certainly.

A. When we first became involved with the site and before the construction was completed, the water normally flowed to the east. But it also flowed to the east beyond the island and curled and came back through this channel, which we'll see in some of the other exhibits. It didn't all flow down through the stream adjacent, immediately adjacent at the top of the part of the island. It came in near the top, but it came in a little further down and actually came from this area over in here (indicating).

And that's what this is. This is showing the eastern, the formation of the eastern leg of that stream which later became the stream that we diverted from.

Q. Would it be possible for you to indicate by marking on Exhibit Y the area that you are describing as shown in Exhibit A, the photograph, perhaps with an arrow and the designation "Exhibit A"?

A. With an arrow?

Q. Yeah.

* * *

Q. With the letters "Exhibit A" to indicate that you're referring to the area shown in Exhibit A.

(THE WITNESS COMPLIED)

RT, p. 27, ln. 18 - p. 29, ln. 22.

By the way, Exhibit A does not show all of the water in the stream to the east of the island. Because you can't see the water that was coming in because of the vegetation and trees and so on that's coming in that supplied the rest of the water to the stream. We're just seeing the eastern lake (*sic*) of that stream as I said before.

RT, p. 36, lns. 3-9.

In the portion of Mr. Hardy's testimony quoted by the court at pages 19 to 21 of the

Memorandum Decision, Mr. Hardy describes the channel between the northern perimeter of the island and the canyon wall, and the dividing point in the channel which, together with the northern bank of the island, caused the water in the channel to flow east and west. The higher elevation of the island forced the spring discharges north of the island into a deep narrow channel, less than 10 feet wide and 10 to 15 feet from the top bank of the channel to its bottom. RT, p. 40, lns. 6-21. Within that short, deep, narrow channel between the island and the canyon wall, Mr. Hardy described the dividing point as a “natural rise” or “high point” in the ground with one foot of water over it. RT, p. 39, lns. 17-23. This dividing point, then, was covered by one foot of water, and contained within a channel that was 10 feet from the island to the canyon wall. As Mr. Hardy explained, “there was water over it, but not very much water.” RT, p. 44, lns. 13-14. Because of the natural topography, this was the only point in the channel at which the water discharging from a small portion of the springs immediately north of the island could flow either to the west or to the east.

From this point the water in the channel “divided” or flowed to the east on the east side of the dividing point and to the west on the west side of the dividing point. Springs discharging from the canyon wall to the east of this dividing point contributed to the flow of the eastern stream, joined with water contributed from the eastern leg of the eastern stream, and flowed along the eastern perimeter of the Clear Lakes property, eventually discharging into Clear Lake. Similarly, springs discharging from the canyon wall to the west of this dividing point contributed to the flow of the western stream, joined with the water discharged by the springs identified by Mr. Eastman in Exhibits L1, L2, and L3, and flowed down the western stream between the Clear Lakes property and the Clear Springs property, eventually discharging into Clear Lake.

There is simply no support in the record, for the court’s conclusion that “[t]he **source** of all

four of the subject rights . . . is **the common** water channel before it divides into the respective streams.” *Memorandum Decision*, p. 23 (underlined emphasis added). Above or up-gradient of the respective streams there were only springs: those which discharged into the eastern stream and those which discharged into the western stream. In other words, the spring discharges contributing to the flow of the eastern stream did not contribute any water to the western stream, and vice versa.

Because there was no common channel or pool which collected all of the spring water before the formation of the respective streams, there is no factual basis for the court to conclude that the western and the eastern streams are or were part of the same source.

II. The court fails to consider the overwhelming evidence that Clear Springs has never established any right to use any of the water in the eastern stream

In its *Memorandum Decision* this court stated: “The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings [of the Special Master] were clearly erroneous.” *Memorandum Decision* at 12-13. Unfortunately, Clear Lakes did not receive such consideration from the court on its *Notice of Challenge*. In its supporting brief and in oral argument, Clear Lakes presented substantial, detailed evidence from the record demonstrating that the western stream and the eastern stream are separate sources, that Clear Springs has never established a right to, nor actually diverted any of the eastern stream water, and that Clear Springs has only one point of diversion for its western stream water rights. The only evidence which the court addressed in its *Memorandum Decision* was the portion of Earl Hardy’s testimony previously discussed; as pointed out in the preceding section, the court’s interpretation of that testimony is not supported by the record. In fact, the *Memorandum Decision* ignores the majority of Mr. Hardy’s testimony; ignores the testimony of Sherl Chapman, the only

expert who testified during the trial (except for a brief portion of Mr. Chapman's testimony which the court misconstrues as contrary to Clear Lakes' position), without giving a reason for disregarding his analysis and opinions; and fails to mention any of the documents in the IDWR water right files which bear on the issues in this case. The court has issued partial decrees which appear to give Clear Springs multiple points of diversion for its western stream water rights, despite the absolutely conclusive evidence adduced during trial that these water rights have only one point of diversion.

The most troubling omission is the court's failure to address the testimony of Ted Eastman, Clear Springs' current Chairman and the original developer of Clear Springs' water rights. This testimony clearly identifies the source and diversion point for Clear Springs' western stream water rights. None of the decisions entered in these subcases even mentioned the testimony of Ted Eastman. Mr. Eastman's testimony and his markings on Exhibits L1, L2, L3, and L4 establish (1) that Clear Springs has never established a right to, used, or attempted to divert any of the water in the eastern stream or the springs which supplied the eastern stream, (2) that this water has never been part of the source of Clear Springs' water right nos. 36-02708 and 36-07218 and (3) that Clear Springs has only one point of diversion from the western stream for water right nos. 36-02708 and 36-07218, rather than the multiple points of diversion allowed by the partial decrees.

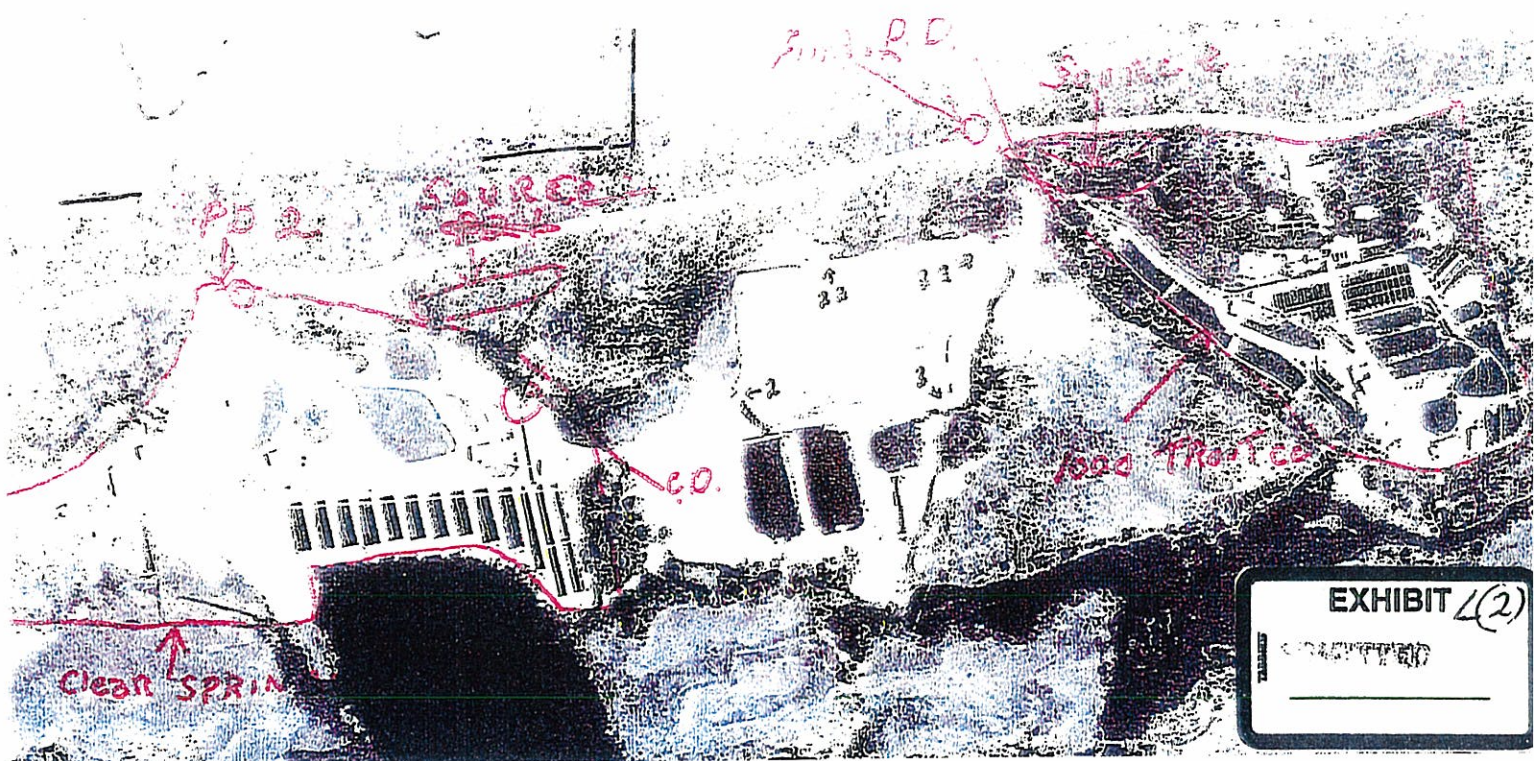
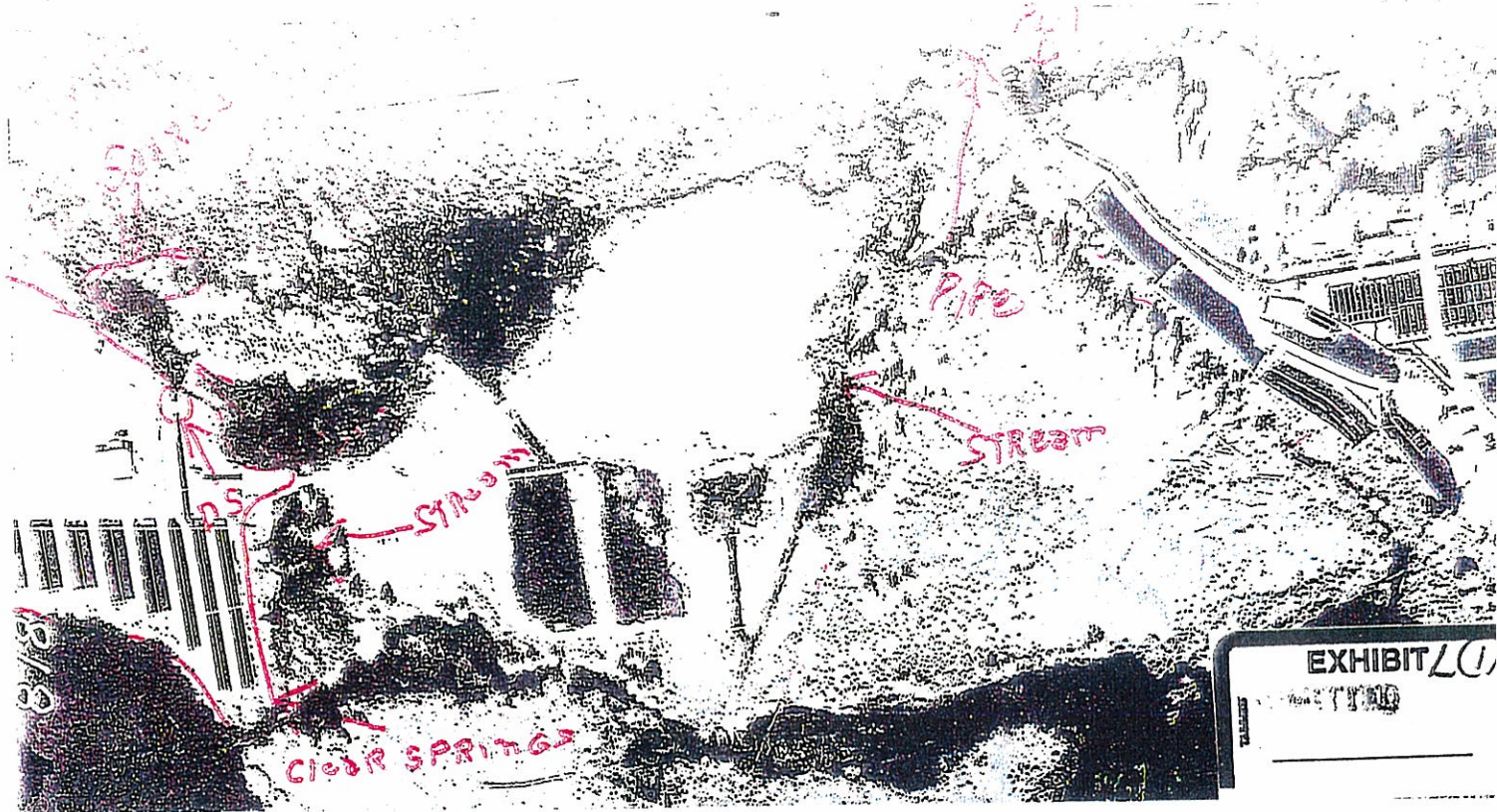
Mr. Eastman's testimony constitutes Clear Springs' judicial admission of these facts. Clear Lakes emphasized the importance and effect of this evidence in each of its briefs and oral arguments to the Special Master on its *Motion to Alter or Amend*, and to the Presiding Judge, on its *Notice of Challenge*. Clear Lakes respectfully requests, again, that the court actually examine and address this conclusive evidence in determining the source and diversion point for Clear Springs' water rights.

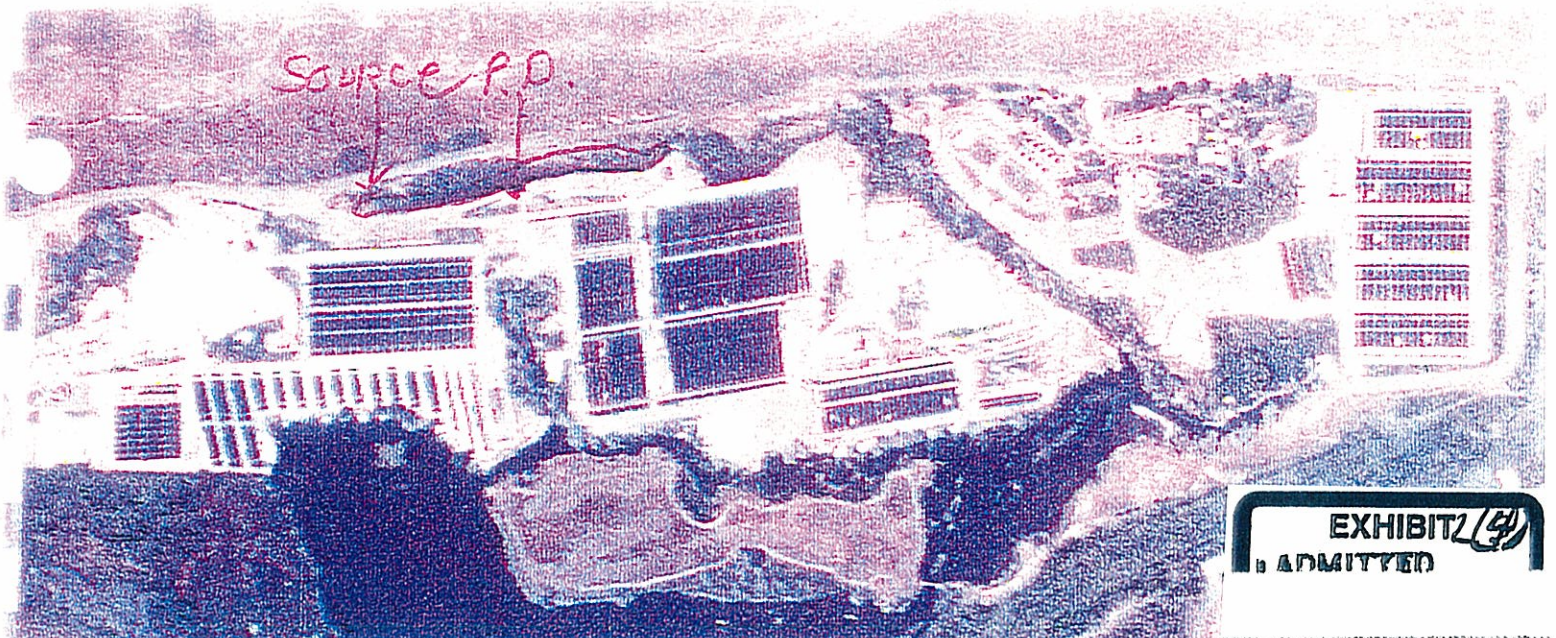
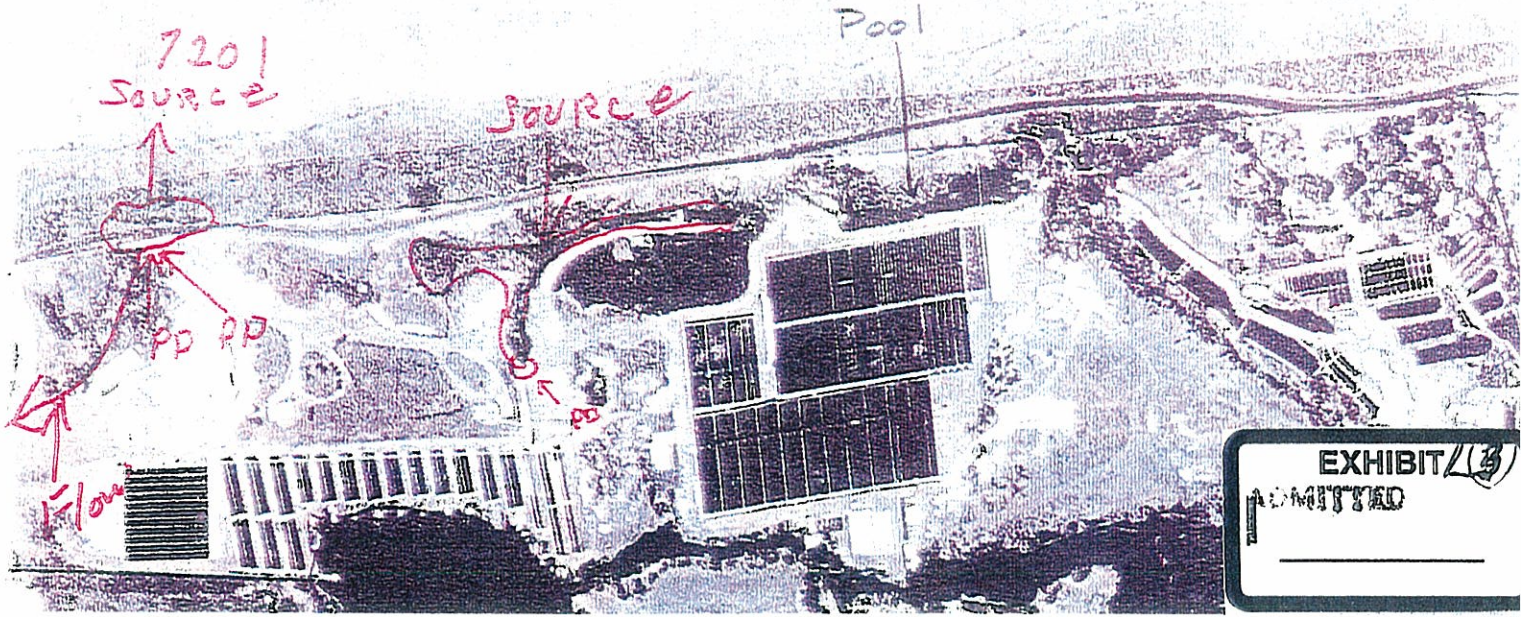
It is undisputed that Clear Springs established and perfected two water rights to divert water

from the western stream pursuant to the water right permitting and licensure statutes of the Idaho Code. Clear Springs' permit application, legal notice of the application, approved application, notice of existing permit, Field Report, and the License for water right no. 36-02708 all identify the source of that water right as "Clear Lake Stream." Ex. 16C. Mr. Eastman, Mr. Hardy, and Mr. Chapman all identified this stream as the western stream, and Mr. Eastman identified Clear Springs' diversion structure in this stream, at or near the location of the upper point of diversion described in Clear Springs' filings, map, plan, and license within the NWSE of Sec. 2. RT, p. 47, ln. 12-p. 48, ln. 4; p. 338, ln. 5- p. 339, ln. 9; p. 372, lns 2-15; p. 373, ln. 25- p. 375, ln. 5; p. 375, ln. 23- p. 376, ln. 7; p. 377, ln. 17- p. 378, ln. 18; Exs. B, L1, L2. Mr. Eastman defines point of diversion as the place where you divert water into your facility from the source. RT, p. 427, ln. 22 - p. 428, ln. 7.

It is also an undisputed legal principle that Clear Springs' priorities in the western stream apply only to the springs that are tributary to that stream. In other words, Clear Springs can only claim water that it has previously diverted and used. Mr. Eastman's testimony, together with each of the photographs he marked, clearly identify the tributary spring sources of supply for Clear Springs western stream water rights in 1968, 1969, 1977, and currently in the 1997 photograph. Mr. Eastman's depiction of the sources and diversion points for Clear Springs' water rights are shown on the following two pages.¹ In all four photos, to identify the source of Clear Springs' water rights, Ted Eastman draws circles around only springs contributing to the flow of the western stream. He never included any of the springs contributing to the eastern stream as part of Clear Springs' source.

¹ Copies of exhibits L1, L2, L3 and L4 have been cut to fit the portions of each photograph showing Mr. Eastman's markings on two pages.





Mr. Eastman circled a discrete area on each of the 1968, 1969, 1977, and 1997 photographs where the springs discharge from the canyon wall north of the western stream to show the tributary spring source for Clear Springs' western stream water rights. According to Mr. Eastman, in 1968 and 1969, Clear Springs' source was a relatively small area of springs immediately above the Clear Springs diversion structure/point. RT, p. 375, ln. 11 - p. 376, ln. 2; p. 378, lns. 4-9; Ex. L1; Ex. L2. By 1977, after Clear Springs constructed its dike on property leased by Clear Lakes, the source had expanded to include the springs above the dike over to the west side of Clear Lakes' west dike. RT, p. 381, ln. 19 - p. 382, ln. 23; Ex. L3. By 1997, after Clear Springs' modification and expansion of its dike during the early 1980s, the source became all the springs above the dike from the Clear Springs facility to the northern tip of Clear Lakes' west dike. RT, p. 385, ln. 18 - p. 386, ln. 6; Ex. L4.

At no time did the source of Clear Springs' water right numbers 36-02708 and 36-07218 as identified by Mr. Eastman include either the eastern stream or any of the springs feeding the eastern stream. In fact, Mr. Eastman testified that Clear Springs has never diverted any water out of the eastern stream or the east pool.

Q. (BY MR. STEENSON) Mr. Eastman, it's true, isn't it, that Clear Springs has never attempted to divert water from the eastern stream that you have indicated in Exhibit L1?

A. That's true.

RT, p. 388, lns. 10-14. Similarly, Mr. Chapman testified that there is no indication in IDWR's water right files for either water right no. 36-02708 or 36-07218 that Clear Springs has ever claimed the eastern stream as a source or attempted to divert from it. RT, p. 347, ln. 24 - p. 348, ln. 6; Ex. 16C.

It is inconceivable that the court can give Clear Springs the right to take water from the

eastern stream and the springs tributary to that stream (thereby denying Clear Lakes its right to that source) without even addressing this evidence which so conclusively establishes that Clear Springs has never established a right to, used or attempted to divert that water.

III. The Memorandum Decision does not adequately address the legal issue raised by Clear Lakes' objection to the recommended source of Clear Springs' water rights

Citing a jury instruction on the weight to be given opinion testimony, the court disregards the testimony of both Mr. Hardy and Mr. Chapman regarding the characteristics which make the western stream and the eastern stream separate sources. *Memorandum Decision*, p. 18. The court describes the source issue as a mixed issue of fact and law which is for the court "to interpret and determine the issue of law, not an expert witness." *Id.* However, neither the Special Master nor the Presiding Judge have identified any of the factual or legal characteristics which distinguish water sources as separate for purposes of defining and administering water rights. This analysis is essential to determining whether Clear Springs' western stream water rights and Clear Lakes' eastern stream water right are from the same source or separate sources.

Clear Lakes has discussed the factual and legal characteristics of separate sources at length in its prior briefs in support of the *Notice of Challenge*. Clear Lakes' *Brief in Support*, pp. 16-20, 25-32; Clear Lakes' *Reply Brief*, pp. 4-8. Rather than repeat its prior analysis here, Clear Lakes summarizes the essential points and refers the court to its prior briefing for further detail.

The source element of a water right identifies the water body (e.g. stream, lake, pond, springs, or groundwater (aquifer)) in which diversion works are placed to convey water to the place of use. In other words, the source is the water body from which the water is diverted. The particular source of the water flowing in a water course, whether it is rainfall, glacier, springs, swamp, surface water,

or artificially controlled water, is immaterial to determining whether a water course exists. *Scott v. Watkins*, 63 Idaho 506, 517-518, 122 P.2d 220 (1942). Kinney explains that springs are “usually tributaries to water courses.” Kinney, *Irrigation and Water Rights* at 507, 511 (1912). If a “natural channel commences at the very source or springhead, where the water first manifests itself, no matter how small the flow, it is a water course.” *Id.* at 492. Establishing a prior right in a water body also establishes priority of right in all water sources which supply that water body.

The quintessential characteristic of separate water sources for purposes of defining and administering water rights is that diversion from one will not affect the flow of water in the other. This is why the water right priorities applicable to one source are not applicable to the other source. Separate sources may originate from separate watersheds, such as the Boise River and the Payette River, or may originate from a common source, such as Billingsley Creek and Niagara Springs Creek which are formed by springs discharging from the Snake Plain Aquifer.

The existence of the western and eastern stream at the time Clear Springs and Clear Lakes acquired their permits to establish their water rights is undisputed and has been recognized by the court. Each stream contained all the characteristics of a natural watercourse. Diversion of water from one stream did not affect the flow of water in the other. When Mr. Hardy established Clear Lakes’ right to divert water from the eastern stream by filing the permit application for 36-07004, there were no other diversions from the eastern stream. By filing the permit application to divert water from that stream Mr. Hardy established Clear Lakes’ prior right to the water flowing in that stream. This priority applied to all upstream sources of supply, including the springs which fed the stream, and the Snake Plain Aquifer which fed the springs.

The source element of a water right is perhaps best defined as described by Sherl Chapman,

as “a supply of water for a particular beneficial use that is separate and apart and can be manipulated separately from other sources.” RT, p. 279, lns. 5 - 8. Mr. Chapman also testified that what separates one source from another is “[t]he ability to use that source without interference with other -- other supplies of water, without other impacts.” *Id.*, lns. 11-13. There is legal support for this definition. In a California case, the California Supreme Court held that the waters of a slough were in fact a part of a river based upon the fact that when the river was high, the taking of water from the slough would affect the flow of the river, and when the river was low, taking water from the slough would also draw water from the river. *Turner et al. v. James Canal Co. et al.*, 99 P. 520 (1909); *see also* Kinney, *Irrigation and Water Rights*, 514 (1912). Therefore, the waters in the slough “were subject to the same rules of law in connection with the river as those of the river.” Kinney, at 514. The Idaho Supreme Court has cited both *Turner* and Kinney in support of its finding that waters flowing through a slough were in fact waters of the creek connected to the slough. *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 512, 55 P.2d 1314 (1936).

If two water bodies constitute the same source based upon the fact that diversion of water from one either affects the flow of, or draws water from the other, then the converse must also be true. That is, just as Mr. Chapman stated, if the diversion of water from one water body does not affect the flow of, or draw water from the other, then the two water bodies are separate sources.

This common sense definition of a water right’s source makes sense when considered in the overall context of the prior appropriation doctrine.

It is the very essence of the doctrine of prior appropriation that as between persons claiming water by appropriation, he has the best right who is first in time, and that the prior appropriator is entitled to the water to the extent appropriated to the exclusion of any subsequent appropriator. But where both prior and subsequent appropriatory rights can be enjoyed without interference with or material impairment

of each other, the enjoyment of both is allowed. Accordingly, the residue after a prior appropriation may be appropriated by others out of the water of the same stream if there is no interference with the prior appropriator.

78 Am. Jur. 2d Waters § 327; *See also* 78 Am. Jur. 2d Waters § 338. The fundamental principle on which the prior appropriation doctrine is based is the right of the prior appropriator to divert water from a water body (source) and put it to beneficial use without interference from junior appropriators. If the junior's diversion of water interferes with the senior's rights, or in any way changes the hydrologic characteristics of the water body from which the senior has appropriated his water right, both the junior and senior must be diverting water from the same source. Conversely, just as in the case of the eastern and western streams at issue in this case, if the junior's diversion of water does not change the hydrologic characteristics of the water body from which the senior has appropriated his right, or otherwise interfere with the senior's rights, the sources must be separate.

This court should find that the eastern and western streams (and the separate springs feeding each of those streams) were historically and are currently separate sources because Clear Lakes' diversion of water from the eastern stream under water right number 36-07004 did not and does not in any way affect either Clear Springs' water right number 36-02708, or the flow of the western stream from which that water right was and is diverted.

IV. The western and eastern streams are separate sources for the same reasons that the Brailsford stream is a separate source

Since there was no common channel before the division point which supplied all the water flowing in the western stream and the eastern stream, the court's rationale for determining that the Brailsford stream is a separate source also applies to the western and eastern streams. The court distinguishes the Brailsford Stream as separate first because the Brailsford stream is fed by

“different springs.” *Memorandum Decision*, p. 29. The same is true of the western and eastern streams. The springs which feed the western stream, those to the west of the division point, are different than those to the east of the division point which feed the eastern stream.

The court’s second reason for distinguishing the Brailsford stream from the western and eastern streams is that it meets with those streams “for the first time at Clear Lake which is well below the respective points of diversion.” *Id.* The same is true as between the western and eastern streams: they met for the first time at Clear Lake, well below the point of diversion for Clear Springs’ western stream water rights and the point of diversion for Clear Lakes’ eastern stream water right.

V. The development of the hatcheries and diversion works by Clear Lakes and Clear Springs has not changed the source or priority of their respective water rights

The court adopts the Special Master’s erroneous conclusion that “no water for the Clear Lakes’ right 36-07004 is diverted on the eastern side of any claimed historic dividing point.” *Memorandum Decision*, p. 24. This conclusion contradicts the undisputed evidence and the Special Master’s own findings regarding the location of Clear Lakes’ diversion works.

Mr. Hardy marked Clear Lakes’ original point of diversion in the eastern stream on the 1968 and 1969 photographs (Exhibits B and D). In 1969 Clear Lakes constructed a dam higher up in the eastern stream to divert the stream flow into new raceways to be constructed on the upper portion of Clear Lakes’ land. RT, p. 78, ln. 6 - p. 79, ln. 2. Clear Lakes amended its permit for water right no. 36-07004 to add this point of diversion. RT, p. 73, ln. 18 - p. 74, ln. 11, p. 239, ln. 13 - p. 241, ln. 1; Ex. D; Ex. 16A. Today, this dam continues to divert the entire flow of the eastern stream into Clear Lakes’ facility through inlet or discharge pipes at the northern end of Clear Lakes’ upper

raceways. RT, p. 98, lns. 4-14, p. 297, lns. 7-9.

The Special Master recognized this dam in the eastern stream as part of Clear Lakes' diversion structure. *Special Master's Decision on Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal)* (hereinafter "*Special Master's Decision*"), at 4. Clearly, this dam is east of the historic division between the east and west streams. In addition to this structure, Clear Lakes has three pipes shown in Exhibit 9 which divert a portion of the springs which formed the eastern stream. These three pipes are also clearly east of the historic division between the east and west streams.

As a basis for its conclusion that "no water for Clear Lakes' right 36-07004 is diverted on the eastern side of any claimed historic dividing point", the *Memorandum Decision* cites Finding of Fact No. 8 in the *Special Master's Decision* as apparently dispositive on this issue. *Memorandum Decision*, at 24. However, Finding of Fact No. 8 in the *Special Master's Decision* is unsupported by any evidence whatsoever.

Finding of Fact No. 8 in the *Special Master's Decision* states that "Mr. Chapman conceded that there are no current discharge points into the Clear Lakes' facility located within the eastern pool at any point east of the historic dividing point. (Tr., p. 322, L.2 - p. 324, L. 2)." *Special Master's Decision*, at 4. In the portion of the transcript referred to by the *Special Master's Decision*, Mr. Chapman was being questioned by Clear Springs' counsel as to a blue colored line in the area of two red lines drawn on Exhibit 9. The blue colored line was referred to by Clear Springs' counsel as a "transect". RT, p. 322, ln. 23 - p. 323, ln. 2; p. 323, lns. 7 - 8; lns. 19 - 21. Mr. Chapman agreed with Clear Springs' counsel that there was no point east of the transect where water discharges out of the eastern spring pool into Clear Lakes' facility. Neither Mr. Chapman nor Clear Springs'

counsel ever referred to the “transect” as the “historic dividing point.” *Id.* Nor did either Mr. Chapman or Clear Springs’ counsel ever refer to these “discharges” as points of diversion. Yet, without citing any evidence whatsoever to support its conclusion, the *Special Master’s Decision* somehow converts the word “transect” into the words “historic dividing point,” and the word “discharges” into a determination that “[a]ll of water right 36-07004 is **diverted** out of gates located in the eastern pool.” *Special Master’s Decision*, at 4. (Emphasis added). The *Memorandum Decision* adopts the Special Master’s erroneous finding that there is no point of diversion east of these discharges. *Memorandum Decision*, at 24. Because there is absolutely no evidence in the record to support this conclusion, it must be withdrawn.

The bottom line is that currently, all eastern stream water is diverted by the eastern dam into the pool to the north of Clear Lakes’ property, and that all eastern stream water diverted into that pool subsequently flows through Clear Lakes’ facility. TR, p. 300, lns. 16 - 23; p. 305, lns. 11 - 19. The historic photos show that Clear Lakes diverted the flow of the eastern stream at the time of its original appropriation, and show the work that was done to divert the eastern stream at a higher elevation. Ex. L1, L2, L3, L4. Clear Springs has never diverted, used, nor established a right to eastern stream water.

CONCLUSION

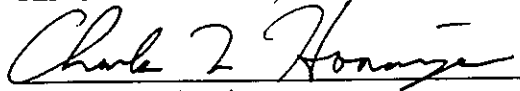
The court’s partial decrees of Clear Springs’ water right numbers 36-02708 and 36-07218 fail to specify that the source for those water rights is separate from the source for Clear Lakes’ water right number 36-07004. The court did not include such language in the decrees based upon its erroneous conclusion that all of the water contributing to both the eastern and western streams flows

into a channel or pool before dividing into the separate streams, its complete disregard of the

compelling testimony of Ted Eastman establishing that the sources are separate, and its failure to explain the factual and legal characteristics distinguishing water sources as separate. Because the Partial Decrees as issued have the effect of taking water away from Clear Lakes and awarding to Clear Springs water that it has never diverted, used or established a right to, the court should either Amend its Partial Decrees to provide that the source for water right numbers 36-02708 and 36-07218 is separate from the source for water right number 36-07004, or should reconsider and revise its *Memorandum Decision* upon which the partial decrees at issue are based.

DATED this 8th day of May, 2000.

RINGERT CLARK, CHARTERED



Charles L. Honsinger

Attorney for Clear Lakes Trout Farms, Inc.

CERTIFICATE OF MAILING

I certify that on May 8, 2000, I served by mail copies of this document, including all attachments to the following:

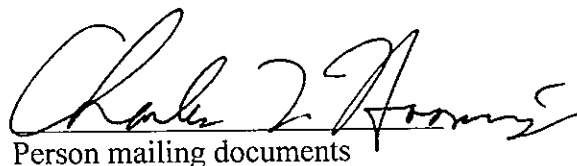
Director, Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83712
Fax: (208) 327-5400

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449
Fax: (208) 334-2690

John C. Hepworth
Hepworth Lezamiz & Hohnhorst
133 Shoshone St. N.
P.O. Box 389
Twin Falls, ID 83303-0389
Fax: (208) 734-4115

Josephine P. Beeman
Beeman & Hofstetter, PC
608 W. Franklin St.
Boise, ID 83702
Fax: (208) 388-8400

Norman Semanko
Rosholt Robertson & Tucker
P.O. Box 1906
Twin Falls, ID 83301
Fax: (208) 736-0041


Person mailing documents