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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF PROPOSED	)	
AMENDMENTS TO JUNE 13, 2002	)	
AMENDED WATERMASTER	)	PETITION TO INITIATE CONTESTED
INSTRUCTIONS FOR DISTRIBUTION OF	)	CASE
WATER AMONG RIGHT NOS. 36-02659,	)	
36-02708, 36-7004, 36-7201 AND 36-7218	)	
IN WATER DISTRICT NO. 130	)	

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys, Ringert Clark, Chartered, and files this petition for initiation of an administrative contested case for the following relief and upon the following facts and authorities.

REQUESTED RELIEF

By this petition, Clear Lakes seeks:

- 1) review and rescission of the modifications to IDWR's June 13, 2002 Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218 that are proposed by Watermaster Cindy Yenter's July 31, 2003 Memorandum to Tim Luke;

ORIGINAL

FACTS

Clear Lakes diverts water from springs commonly known as "Clear Lakes Springs" pursuant to water right nos. 36-02708 and 36-07004, to operate its fish hatchery. Water right no. 36-02659, for 100 cfs, is the most senior right to the springs and water right no. 36-07004, for 75 cfs, is the third priority right to the springs. The second priority water right to the springs, no. 36-02708 for 200 cfs, is owned by Clear Springs Foods, Inc. ("Foods") to rear fish in its hatchery, located adjacent to Clear Lakes' hatchery.

The Director issued Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218 on June 13, 2002. Those Amended Watermaster Instructions provide in relevant part that:

9. If the total flow is less than 375 cfs ($\pm$ 5 cfs), then the watermaster is to adjust the 6-ft adjustable weir such that the first 100 cfs of spring flows goes to Clear Lakes, the next 200 cfs of spring flows or part thereof goes to Clear Springs, and any remaining flow goes to Clear Lakes.
10. If an adjustment to the 6-ft adjustable weir is required, the watermaster should do the following (subject to further confirmation):
 - (a) Determine the required increase or decrease in flows to Clear Lakes to provide the flows to Clear Lakes and Clear Springs set forth in 9. above.
 - (b) Measure the height in feet of the gate stem above the adjusting wheel nut on the 6-ft adjustable weir discharging from the west diversion pool and subtract 0.64 (datum adjustment) from the measured gate stem height.
 - (c) Subtract (b) from the gage reading (in feet) from the staff gage in west diversion pool above Clear Springs' 22-ft weir.
 - (d) Determine discharge through the 6-ft adjustable weir using the attached table for the 6-ft adjustable weir.
 - (e) Add or subtract the required change in flows to Clear Lakes from (a) above to the measured discharge through the 6-ft adjustable weir determined from

(d) and determine what the change in height for the gate stem measured from the adjusting wheel nut on the 6-ft adjustable weir should be to provide the changed flow to Clear Lakes.

- (f) Adjust the 6-ft adjustable weir up or down with the handwheel to achieve the required gate stem height as determined in (e).
- (g) Repeat (a) through (f), if necessary, after allowing sufficient time for the change in flows to stabilize through the hatcheries.

On June 19, 2002 the watermaster sent a "Notice of Intent to Redistribute Flows" to Clear Lakes and to Foods. The watermaster's letter gave notice that the watermaster would reduce Clear Lakes' diversions by 27 cfs in 14 days, on July 3, 2002. The letter also advised Clear Lakes that it "may file a petition with the Director of IDWR within 15 days of receipt of this notice seeking a hearing pursuant to Idaho Code § 42-1701A(3)." On July 5th, 2002, pursuant to the Director's instructions, the watermaster adjusted the headgate for Clear Lakes' senior water right no. 36-02659 in accordance with her June 19, 2002 Notice of Intent to Redistribute Flows.

On June 20, 2003, the watermaster issued a Notice of Intent to Resume Administration of Clear Lakes Area Water Rights. The Notice states that the watermaster intended to reduce the distribution of water to Clear Lakes in the amount of 14 cfs by adjusting "the elevation of the 6-foot weir in order that the Clear Springs right no. 36-2708 is satisfied." As explained by the Director's July 23, 2003 letter to Clear Lakes' attorney Charles Honsinger, the watermaster's "adjustments to the 6-ft adjustable weir at the joint diversion structure" on July 23, 2003 "did not provide the full amount of water to which Clear Springs is entitled to receive and apply to beneficial use under its water right no. 36-02708." On July 29, 2003, Tim Luke, IDWR Water Distribution Section Manager sent a Memorandum to Watermaster Cindy Yenter authorizing her,

pursuant to Idaho Code § 42-607, to investigate alternative or additional steps necessary to "shut or fasten" the diversion for Clear Lakes water right no. 36-07004 in such manner as may be necessary to accomplish the distribution of water set forth in instruction no. 9.

The issue of whether the Watermaster is authorized to investigate and implement "alternative or additional steps necessary to "shut or fasten" the diversion for Clear Lakes water right no. 36-07004" is not an issue that has previously been raised before IDWR.

On July 31, 2003, in a Memorandum to Tim Luke, Watermaster Cindy Yenter set forth the additional steps required to redistribute flows at the Clear Lakes and Clear Springs joint diversion under the present spring flow conditions:

If total spring flows are less than 375 cfs *and* discharge at the joint diversion (west pool) falls to less than about 225 cfs, additional steps are required in order to distribute the full 200 cfs to the Clear Springs right no. 36-2708. Those steps are:

- 1) Insert dam boards in the channel slots located immediately behind the Clear Lakes 8-ft fixed weir, to partly or completely block the flow of water over the 8-ft weir. Since this is not an official measuring point, dam boards do not have to completely seal.
- 2) Simultaneously, lower the adjustable weir until the staff gage in the joint diversion pool reads 1.53'.
- 3) Calculate head at the adjustable weir to estimate flow over the weir.

The "additional steps" suggested by the Watermaster were not contemplated in the June 13, 2002 Amended Watermaster Instructions, and in fact set forth not only additional steps, but additional conditions under which those steps are applied. The June 13, 2002 Amended Watermaster Instructions provide that "[i]f the total flow is less than 375 cfs ($\pm$ 5 cfs), then the watermaster is to adjust the 6-ft adjustable weir", whereas the additional steps proposed by the watermaster are conditioned on circumstances when "total spring flows are less than 375 cfs *and* discharge at the joint diversion (west pool) falls to less than about 225 cfs."

On August 1, 2003, Clear Lakes' counsel's wrote to the Watermaster expressing concerns that the proposed implementation of additional steps did not give Clear Lakes adequate time to evaluate impacts of the additional steps, and that Clear Lakes was entitled to administrative remedies because the Watermaster's proposed additional steps amended "final" Watermaster instructions. The Director replied to Clear Lakes' counsel's correspondence in his letter of August 4, 2003, stating that he believed the steps identified by the Watermaster were consistent with his prior instructions and that he did not intend to issue further instructions.

BASIS FOR PETITION

IDWR's July 3, 2003 Order Denying Petition to Initiate Contested Case issued In the Matter of June 20, 2003 Notice of Intent to Resume Administration of Clear Lakes Area Water Rights states that Idaho Code § 42-1701A(3)

applies where the aggrieved person has not previously been afforded an opportunity for a hearing on the matter. If petitioner believes there are new or different actions by IDWR or new or different issues before the agency that have not been previously raised or decided, petitioner may file a petition that clearly identifies the new issues and the grounds for review.

The issues of whether the Watermaster can investigate or implement "alternative or additional steps necessary to "shut or fasten" the diversion for Clear Lakes water right no. 36-07004" and whether the June 13, 2002 Amended Watermaster Instructions should be modified so as to provide for additional steps under different conditions clearly raises "new or different" issues that have "not been previously raised or decided." Accordingly, Clear Lakes is entitled to a hearing on these issues.

AUTHORITIES FOR THIS PETITION

This petition is filed pursuant to the following:

1. Idaho Code, Title 42, Chapter 6, and the Director's February 19, 2002 Final Order Creating Water District 130, under which IDWR has ongoing responsibility to administer water rights in Water District 130.
2. I.C. § 42-1701A(3);
3. IDAPA 37.01.01.104, which provides that a formal proceeding must be initiated by a pleading listed in IDWR Rules 210-280;
4. IDAPA 37.01.01.230.01(c), which provides for petitions initiating contested cases;

Dated this 15th day of August, 2003.

RINGERT CLARK, CHARTERED

By: Charles L. Honsinger

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