

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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SEP 13 2005
Department of Water Resources
Southern Region

IN THE MATTER OF PROTESTED)
APPLICATION FOR PERMIT NO. 37-21278)
IN THE NAME OF MOUNTAIN VIEW)
WATER CORPORATION)
Applicant,)
)
CLEAR SPRINGS FOODS, INC.)
Protestant.)
_____)

**ORDER DENYING
MOTION TO DISMISS**

On or about July 29, 2005, protestant Clear Springs Foods, Inc. (Clear Springs) filed with the Idaho Department of Water Resources (IDWR) a motion to dismiss application to appropriate water no. 37-21278. The motion to dismiss correctly refers to an April 30, 1993 "Amended Moratorium Order" (hereafter referred to as "the moratorium order"), prohibiting new appropriations of ground water in an area commonly referred to as the "Trust Water Area." The moratorium order did not totally prohibit all appropriations of water, however. The moratorium order states, in pertinent part:

A moratorium is established on the processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake Plain Area and all tributaries thereto . . . The following provisions apply to the administration of the moratorium:

5. The moratorium does not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of requirement to file an application for permit as described in said section.

Application to appropriate water no. 37-21278 proposes an appropriation of water for a subdivision development where each individual lot and dwelling thereon would presumably satisfy the definition of a domestic use under Idaho Code § 42-111.

Clear Springs argues: (1) Mountain View Water Corporation's proposed use is not exempt from the mandatory application and permit process; (2) the moratorium prohibits all new

consumptive uses, and (3) delivery calls against ground water users dictate that consumptive use water rights without adequate mitigation must be denied.

The moratorium order intended to allow the continued processing of applications to appropriate water proposing ground water withdrawals from a single well to serve multiple ownership subdivisions if the water use for each lot and associated dwelling on the lot does not exceed the limitations of Idaho Code § 42-111.

The hearing officer agrees with Clear Springs' assertion that Mountain View Water Corporation (Mountain View) is not exempt from the filing requirement of Chapter 2, Title 42 of the Idaho Code. That is why Mountain View filed application to appropriate water no. 37-21278.

The hearing officer disagrees with Clear Springs that the moratorium prohibits all new consumptive use water rights absent mitigation. The moratorium order does not attempt to redefine Idaho Code § 42-111. On the contrary, it recognizes a type of water use for which IDWR will continue to process applications. Part of the reason for the exception is to encourage providing water to dwellings through a single well multiple service water system rather than individual wells that qualify directly under the definition of Idaho Code § 42-111. While the reference to Idaho Code § 42-111 is contained in the exception, it clearly recognizes that IDWR will continue to process applications similar to the Mountain View application.

The hearing officer agrees with Clear Springs that, given additional disputes and litigation regarding the use of ground water from the Eastern Snake Plain Aquifer, an applicant seeking to appropriate water for a consumptive use may need to provide mitigation prior to IDWR approving the application. Orders issued by IDWR in response to petitions for delivery calls required that some holders of junior priority municipal and domestic water rights supplying water that is consumptively used by homeowners must mitigate for the consumptive use component of the water right. It would be inconsistent for IDWR to approve a new water right application with a point of diversion from ground water in an area where other water right holders are mitigating for their ground water diversions without requiring mitigation from the prospective appropriator.

Mountain View proposes a diversion of ground water within an area where other water right holders are mitigating for their ground water diversions. As a result, the hearing officer will require, at the hearing, or at the time IDWR is considering the application, whichever is earlier, a showing from the applicant that it will individually mitigate for the proposed use of water, or will participate in mitigation provided by a ground water district in which the proposed point of diversion is located. Failure to provide proof will result in a denial of the application and a refusal to issue a permit therefore.

ORDER

IT IS HEREBY ORDERED that the Motion to Dismiss filed by Clear Springs Foods, Inc. is **DENIED**.

IT IS FURTHER ORDERED that the applicant, Mountain View Water Corporation, must provide, at the time of the hearing, or when IDWR is considering the application, whichever is earlier, evidence that it will individually mitigate for ground water diversions from the Eastern Snake Plain Aquifer proposed by application for permit no. 37-21278, or evidence that it will participate in a mitigation plan offered by the North Snake Ground Water District, and approved by the Director of IDWR.

DATED this 8th day of September, 2005

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2005, a true and correct copy of the above and foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Order Denying Motion to Dismiss

JOSEPH F JAMES
BROWN & JAMES
130 FOURTH AVE WEST
GOODING ID 83330

SOUTHERN REGION
ATTN ALLEN MERRITT & CINDY YENTER
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380

JOHN K SIMPSON
TRAVIS L THOMPSON
BARKER ROSHOLT & SIMPSON LLP
113 MAIN AVE WEST STE 303
TWIN FALLS ID 83301-6167


Deborah J. Gibson
Administrative Assistant