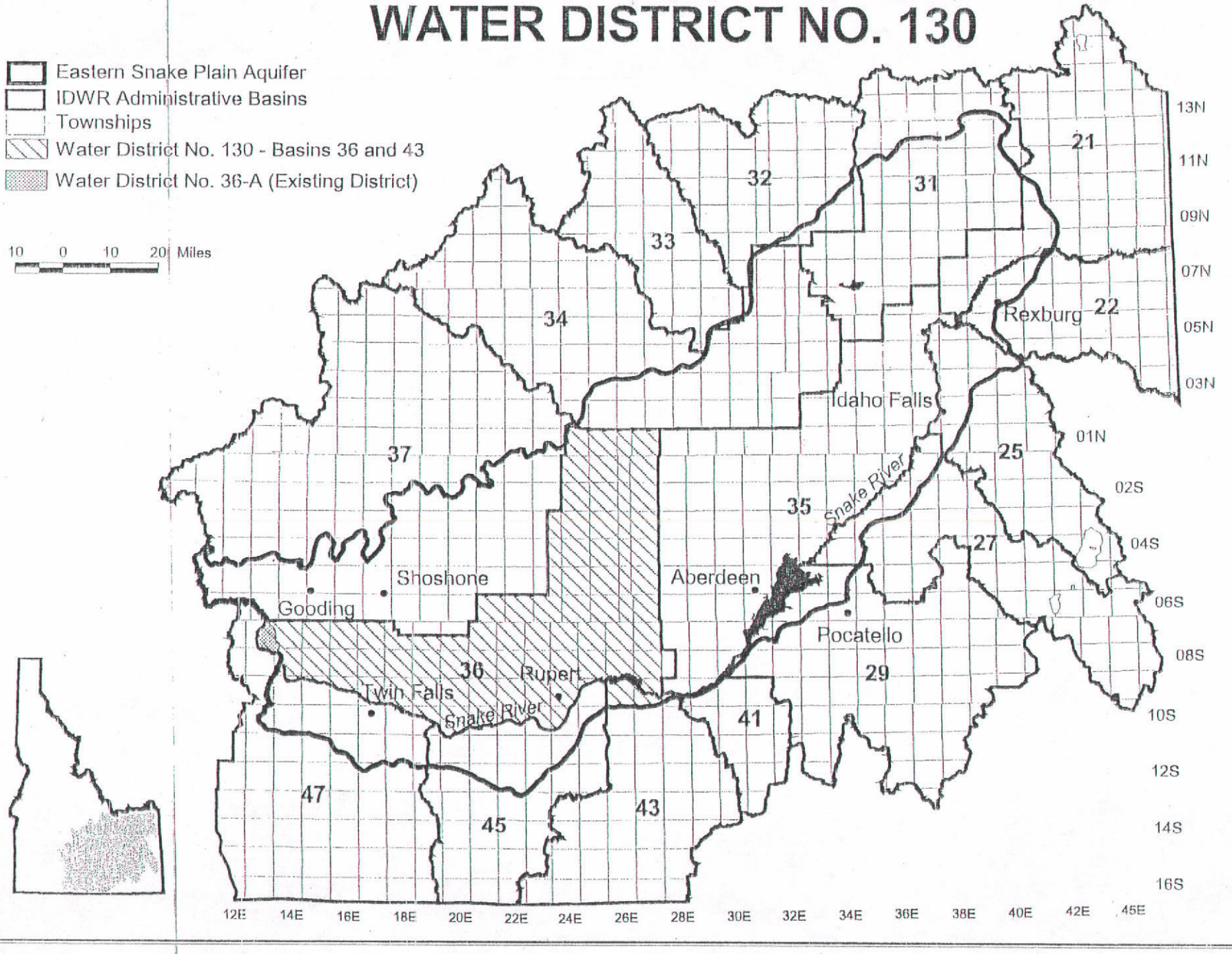
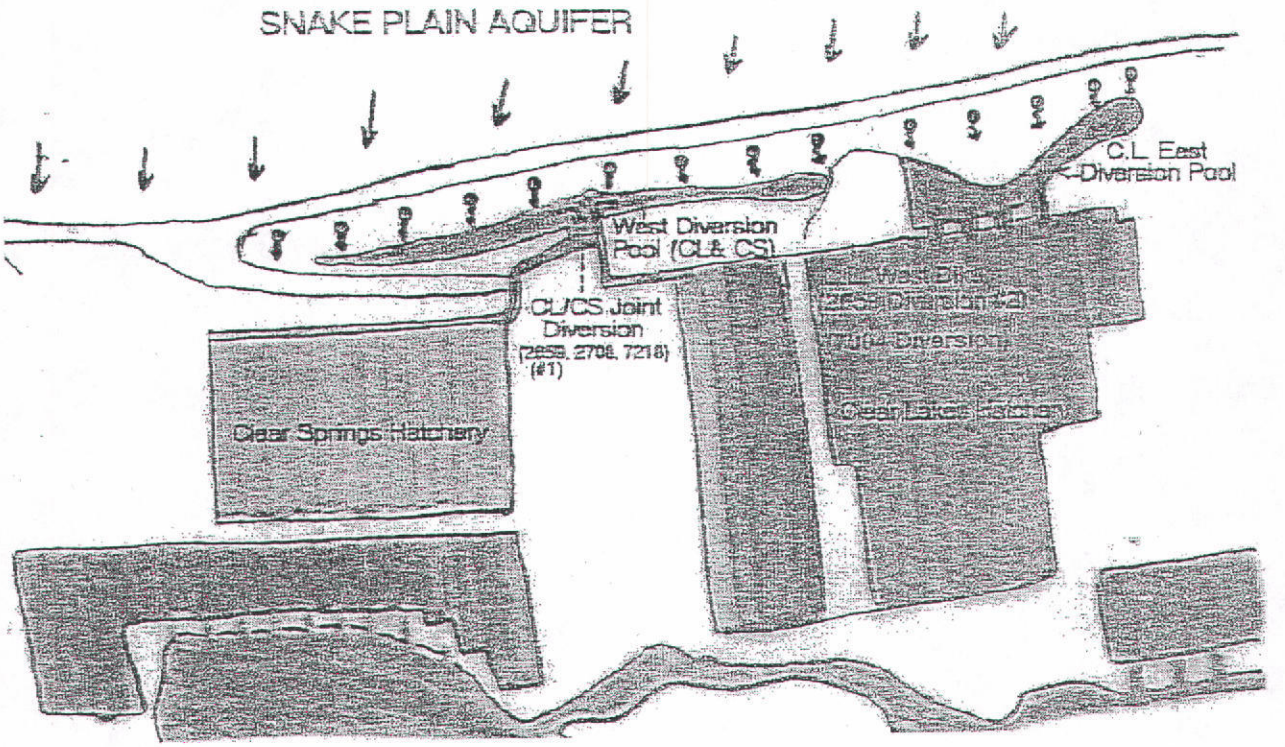
THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



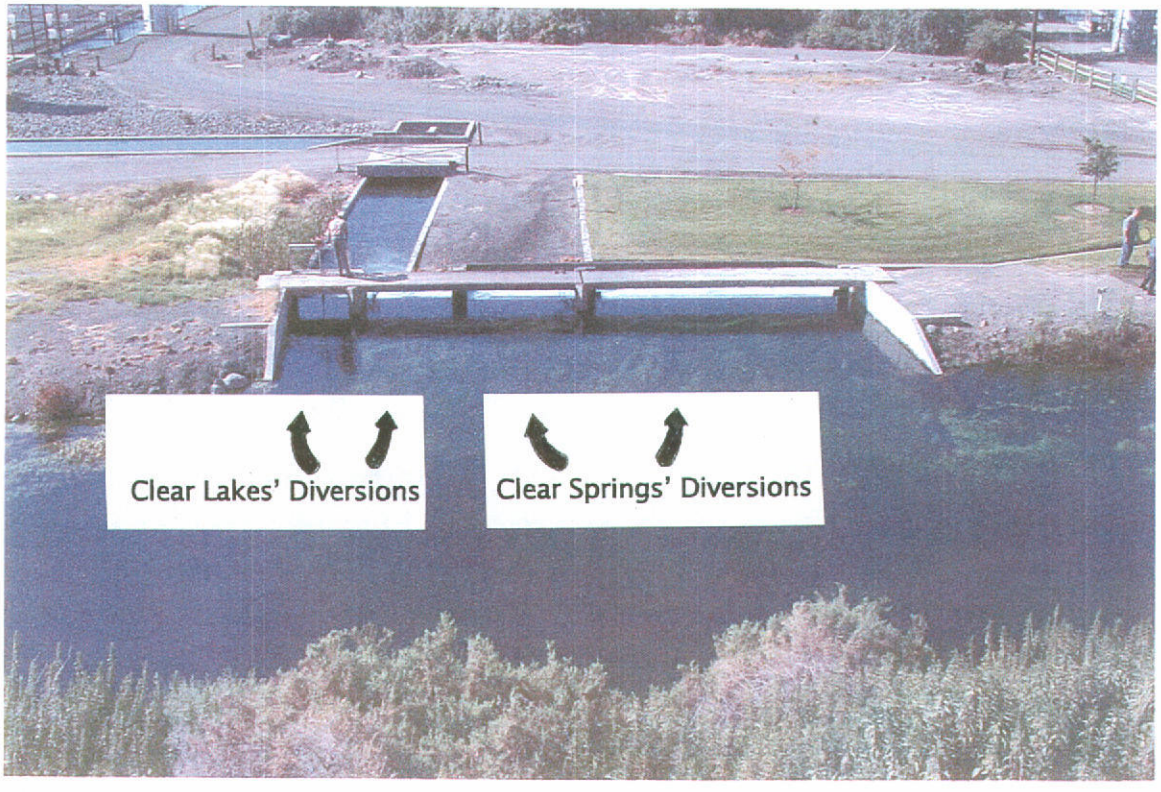
ATTACHMENT A

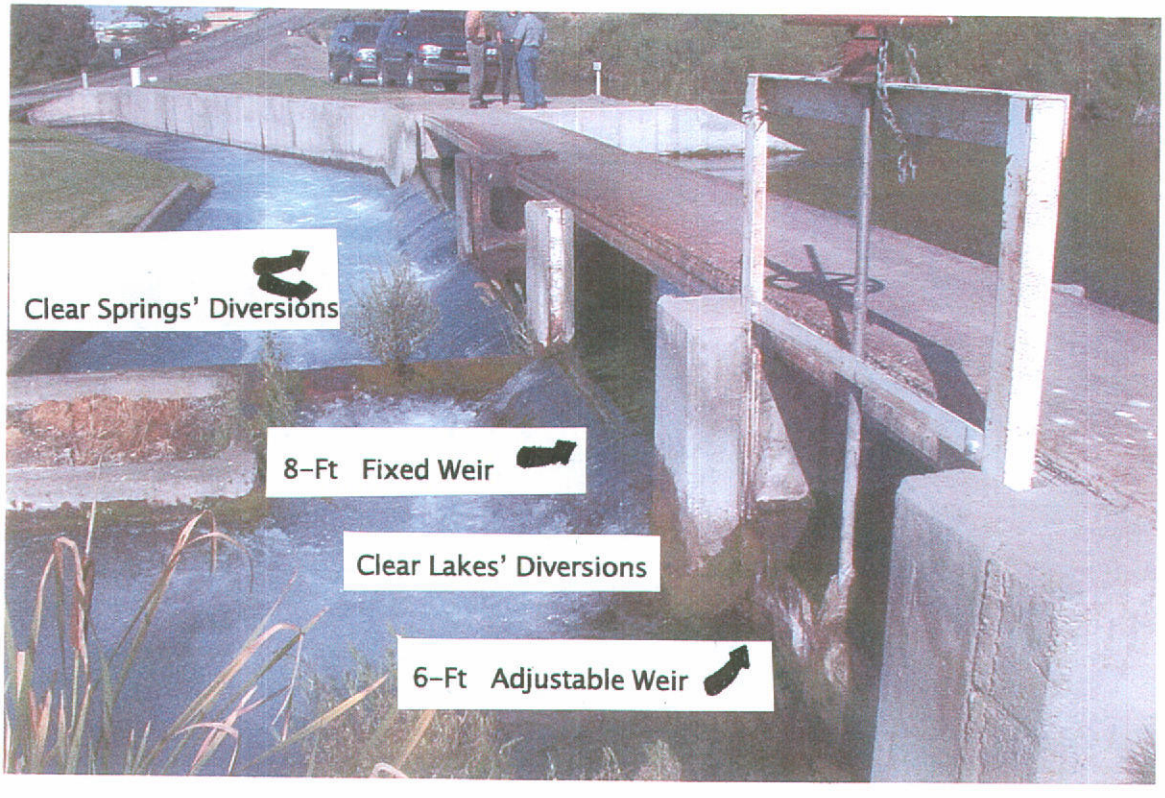


375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between [Clear] Springs and [Clear] Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to [Clear] Springs and 47% to [Clear] Lakes. All water being used by [Clear] Springs and [Clear] Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by [Clear] Springs under Permit No. 36-7201. *Agreement*, pp. 3 – 4.

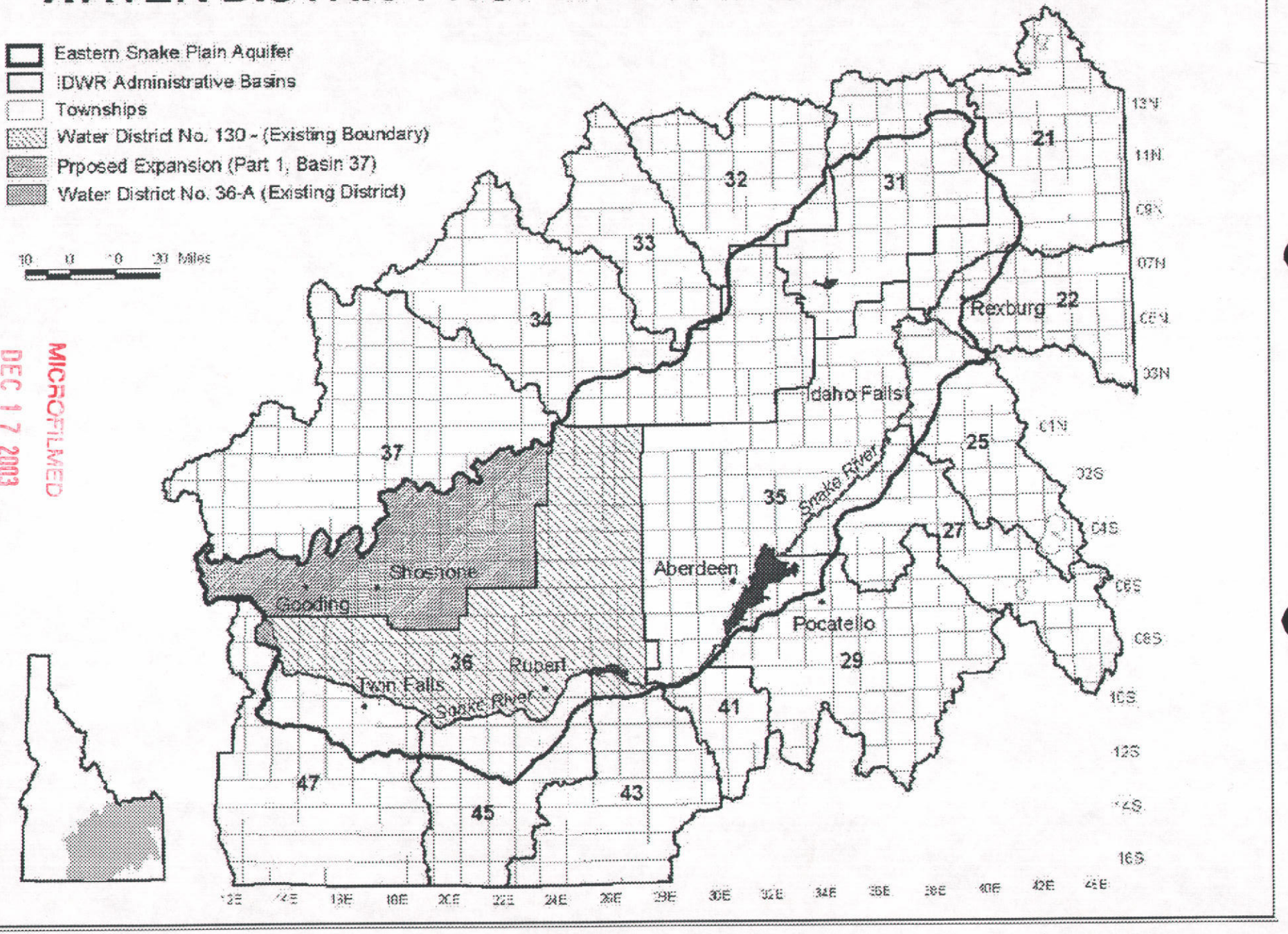
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Clear Lakes' Diversions
Clear Springs' Diversions


Clear Springs' Diversions
8-Ft Fixed Weir
Clear Lakes' Diversions
6-Ft Adjustable Weir

WATER DISTRICT NO. 130 PROPOSED EXPANSION



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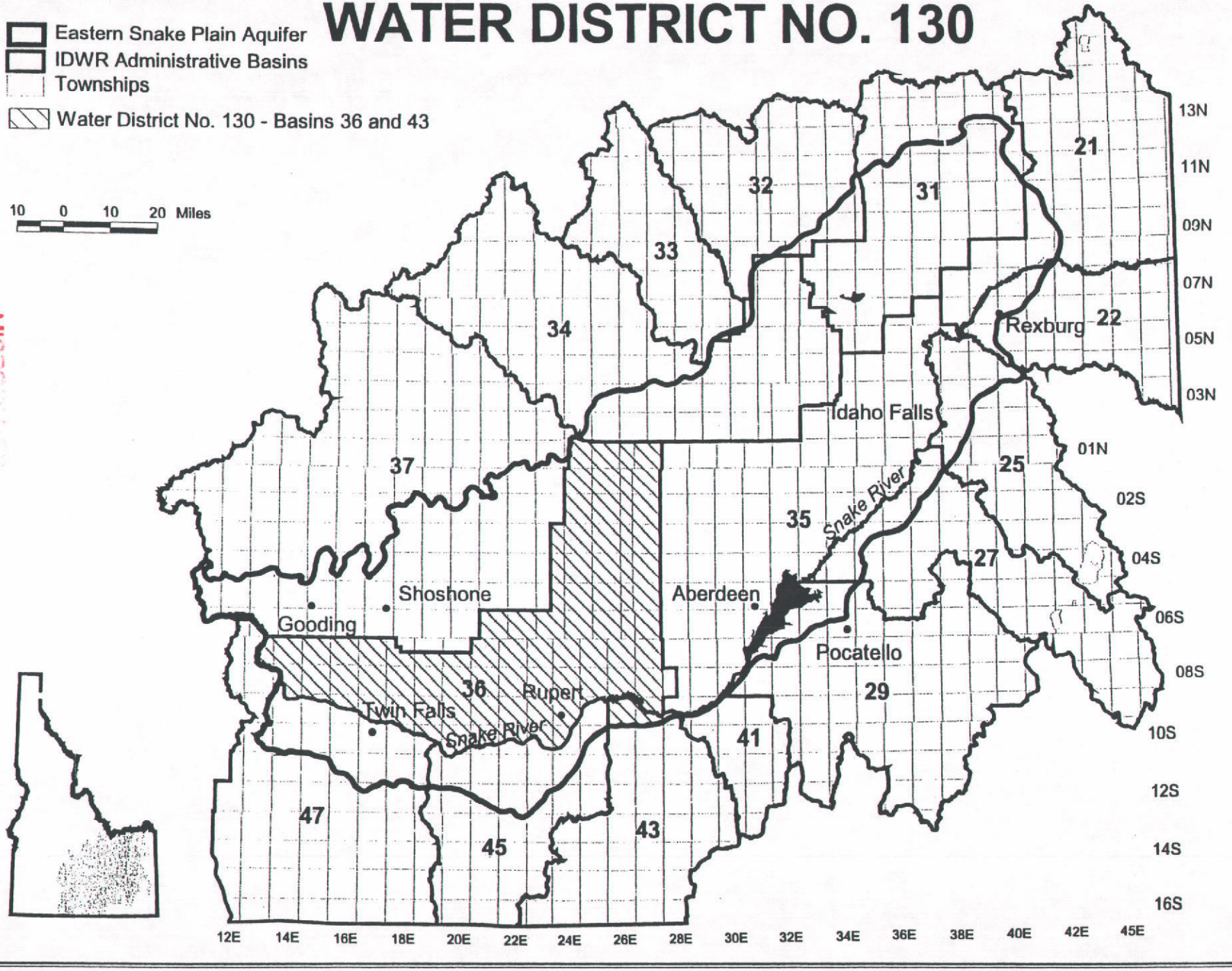
THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130

DEC 17 2003

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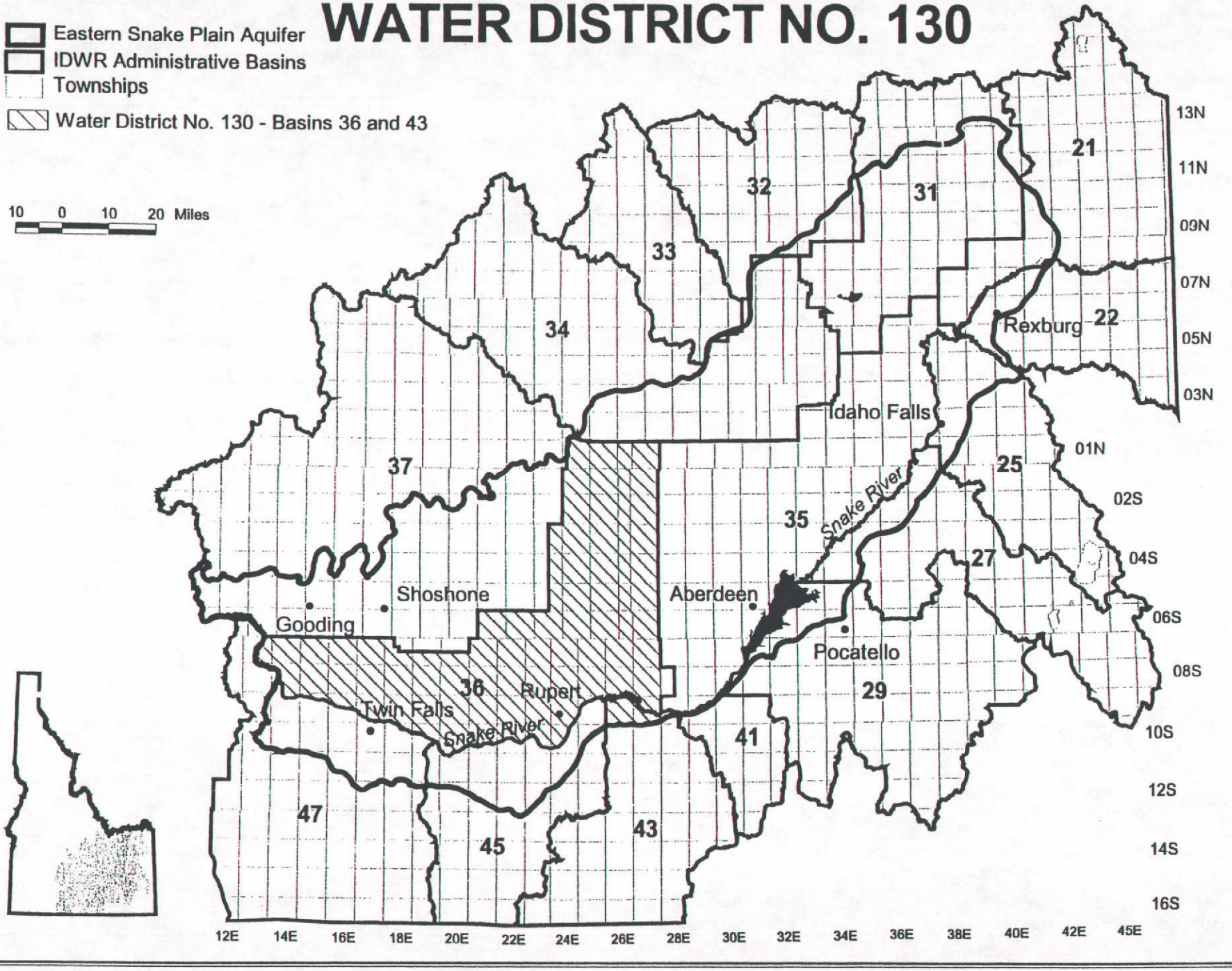
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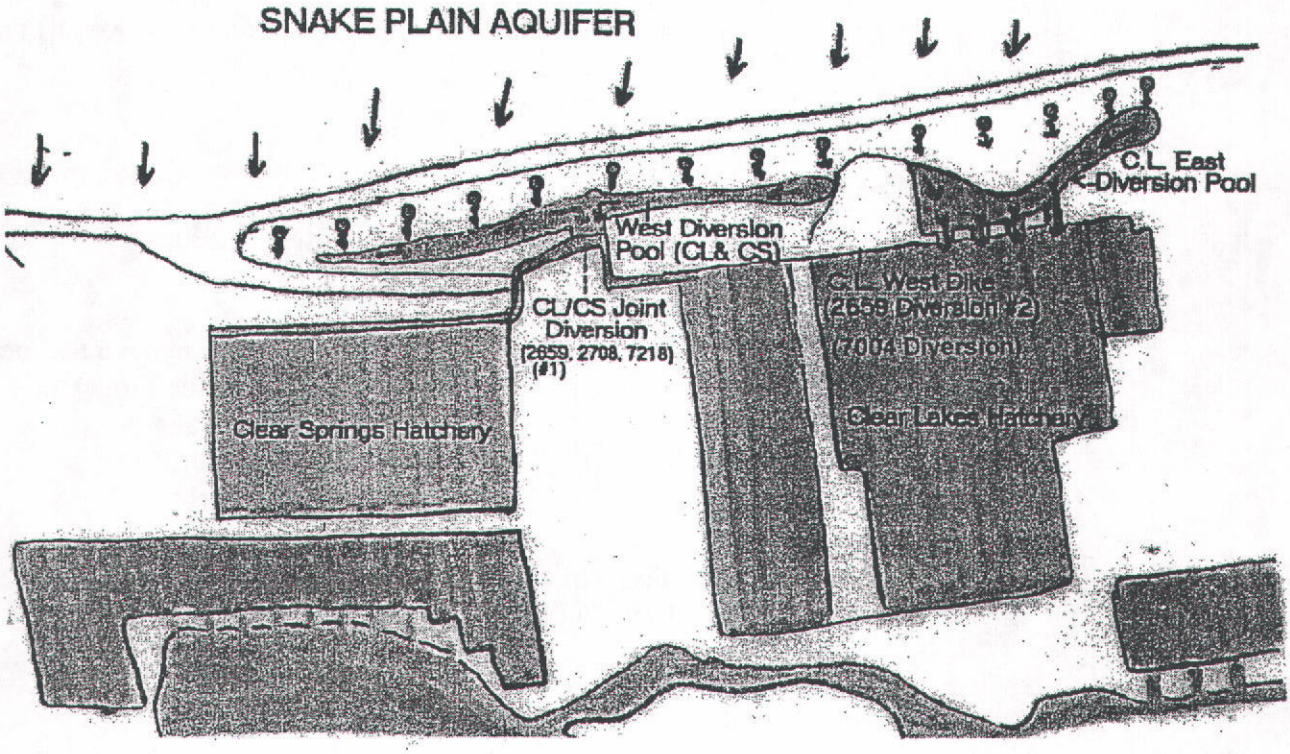
THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



FINAL ORDER CREATING WATER DISTRICT 130
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THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



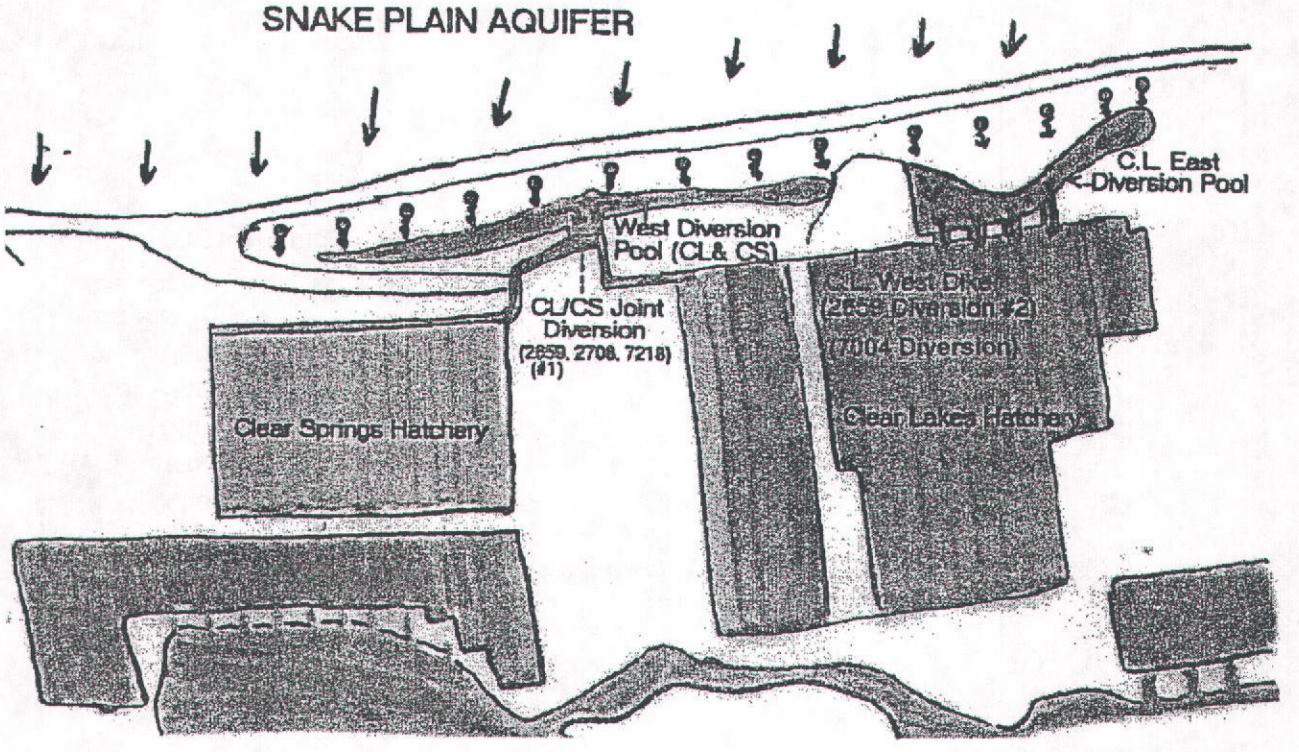


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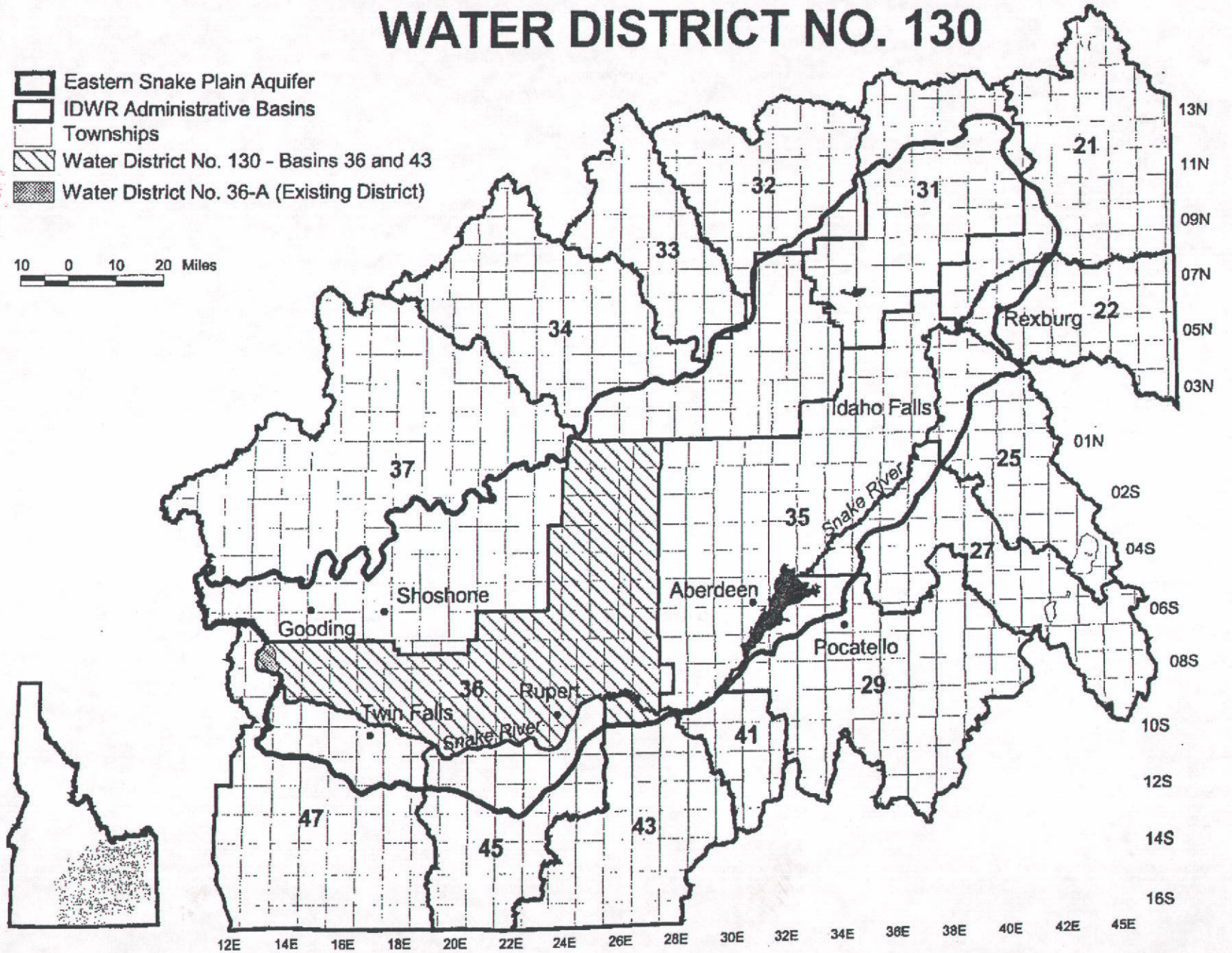
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FINAL ORDER ATTACHMENT A

DEC 17 2003

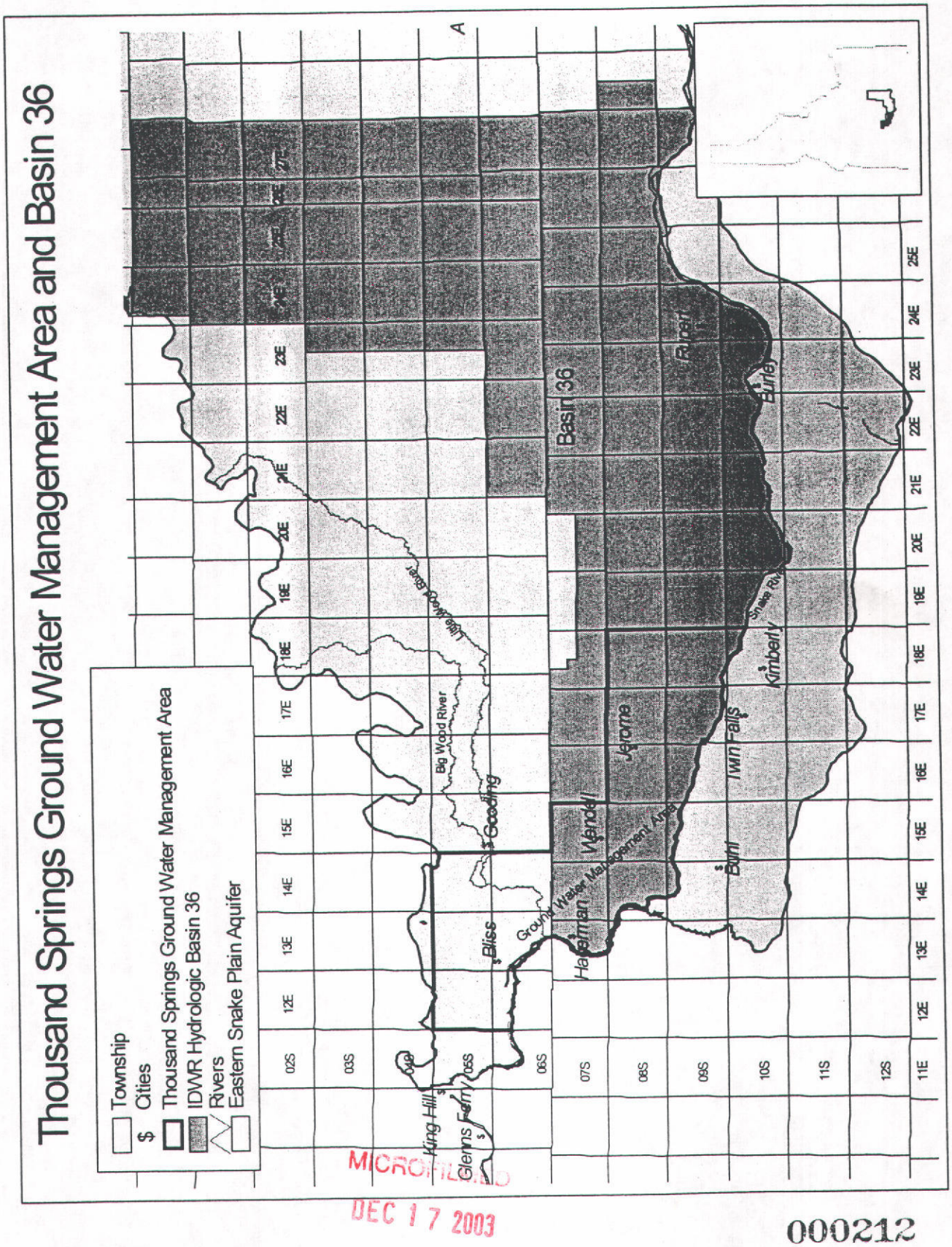
THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



ATTACHMENT A

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Attachment A

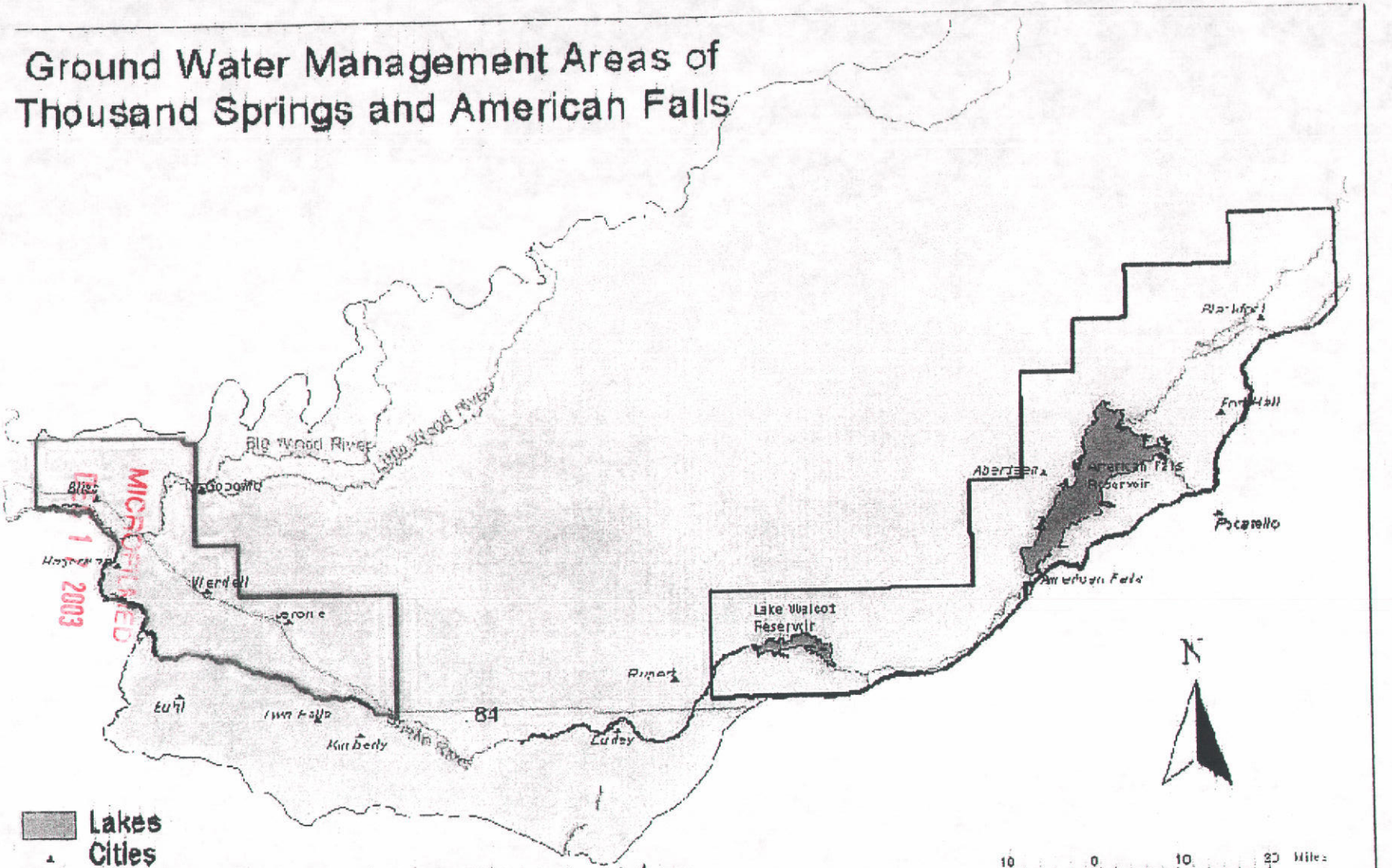


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DEC 17 2003

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Ground Water Management Areas of Thousand Springs and American Falls

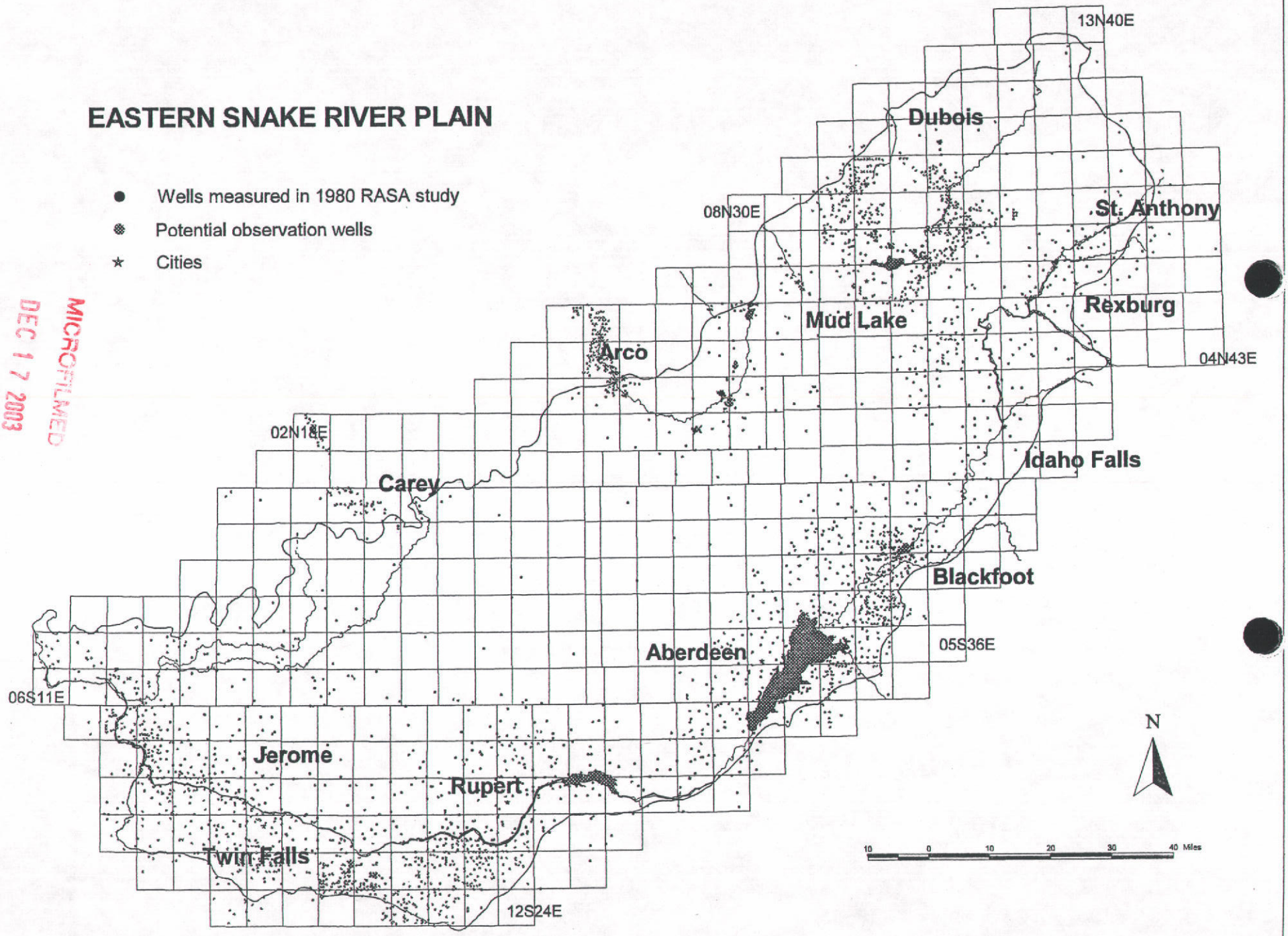


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EASTERN SNAKE RIVER PLAIN

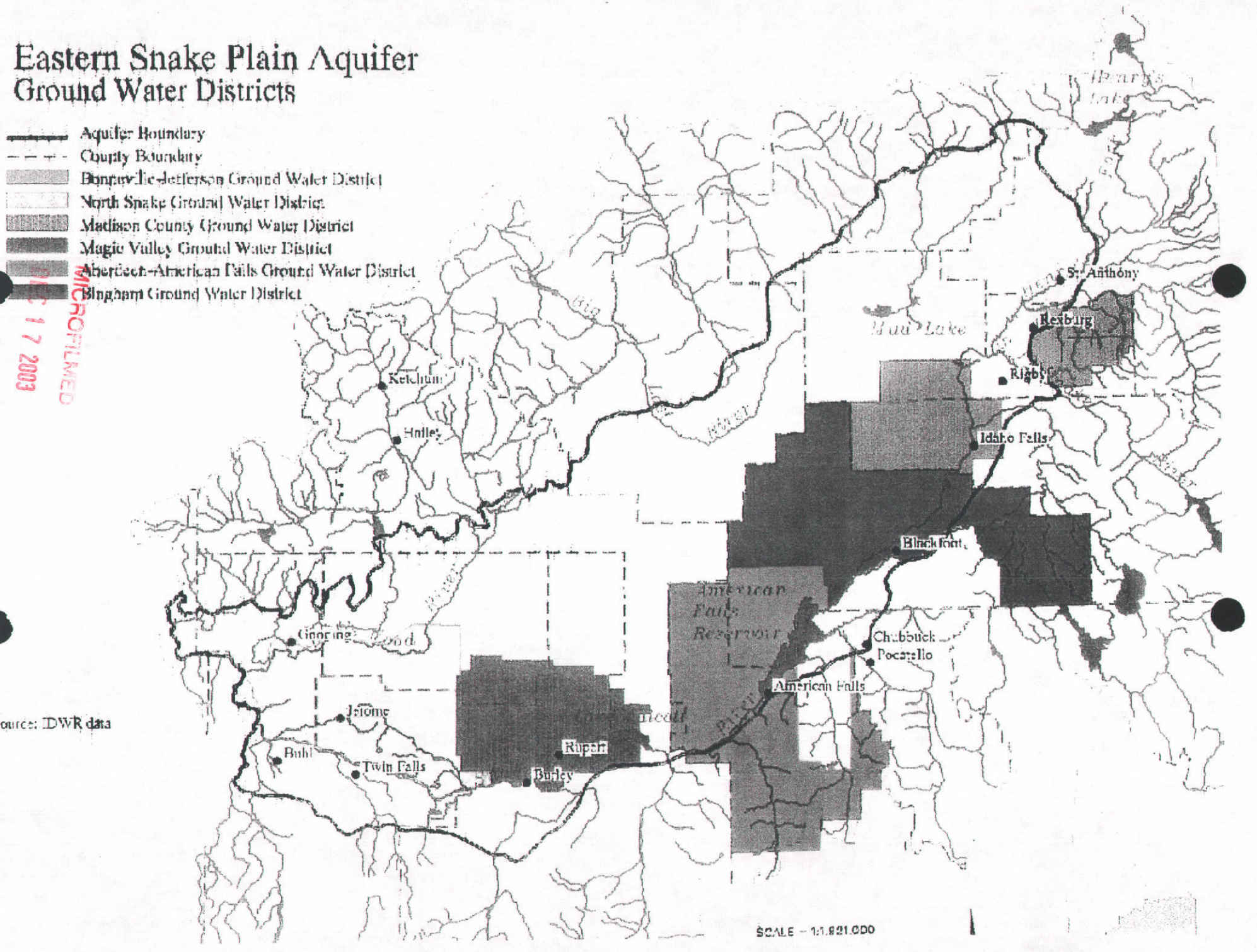
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DEC 17 2003

EASTERN SNAKE RIVER PLAIN



BACKGROUND

Eastern Snake Plain Aquifer
Ground Water Districts



Source: IDWR data

EASTERN SNAKE PLAIN AQUIFER

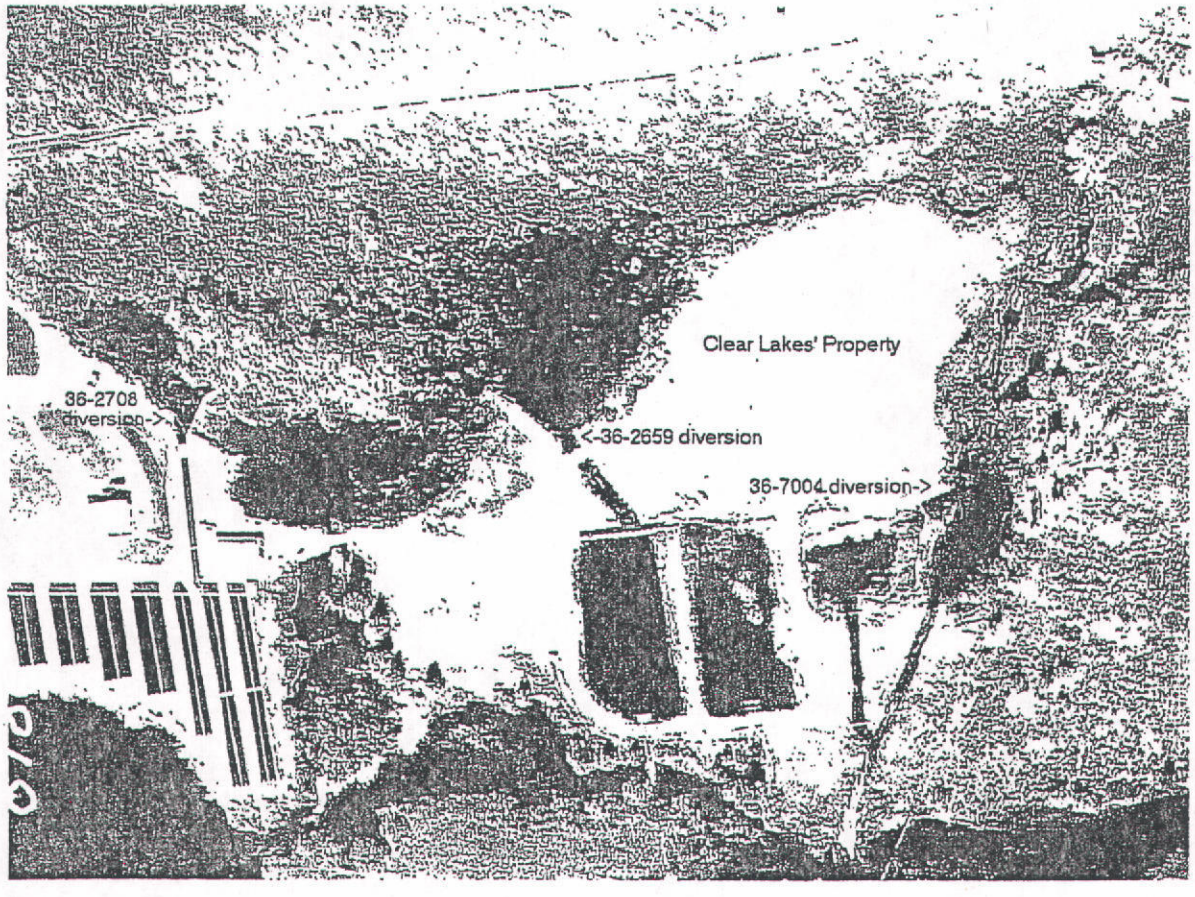
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Development of the Hatcheries, Diversions and Water Rights

Understanding how the facilities and water rights were developed provides useful background in understanding the diversion of water rights through the pools. The following chronology of events is undisputed, and has been established through photographs and the testimony of Clear Lakes' former President, Earl Hardy, and Clear Springs' Chairman of the Board, Jess Eastman in the Clear Springs Subcases.

Before Clear Springs and Clear Lakes began building their respective fish hatcheries and diverting water, numerous spring discharges from the Snake River canyon rim formed several streams which flowed south to Clear Lake. Clear Lakes' property was bracketed by the eastern stream on the east and the western stream on the west. The adjacent Clear Springs property was similarly bracketed by the western stream on the east. These streams were physically separated by the natural features and contours of the land below the canyon rim so that diversion of water from one stream did not affect the flow of water in the other.

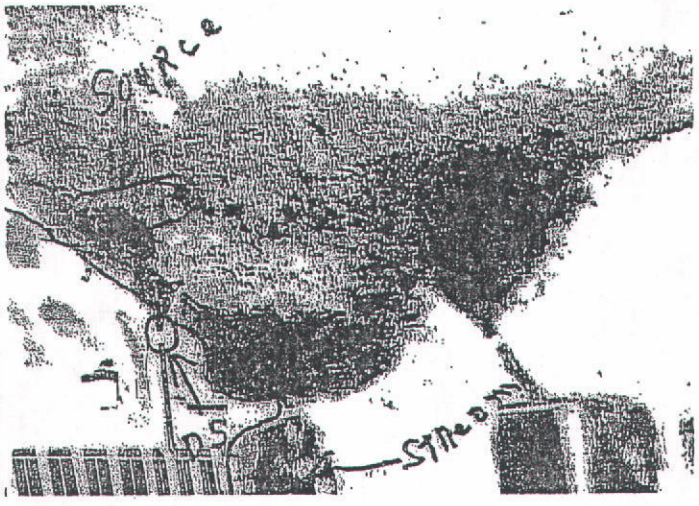
Clear Lakes obtained a permit for water right no. 36-02659 to divert 100 cfs, Clear Springs obtained a permit for water right no. 36-02708 to divert 200 cfs, and Clear Lakes obtained a permit for water right no. 36-07004. The initial diversions for each of these water rights is shown in the following 1968 photograph.



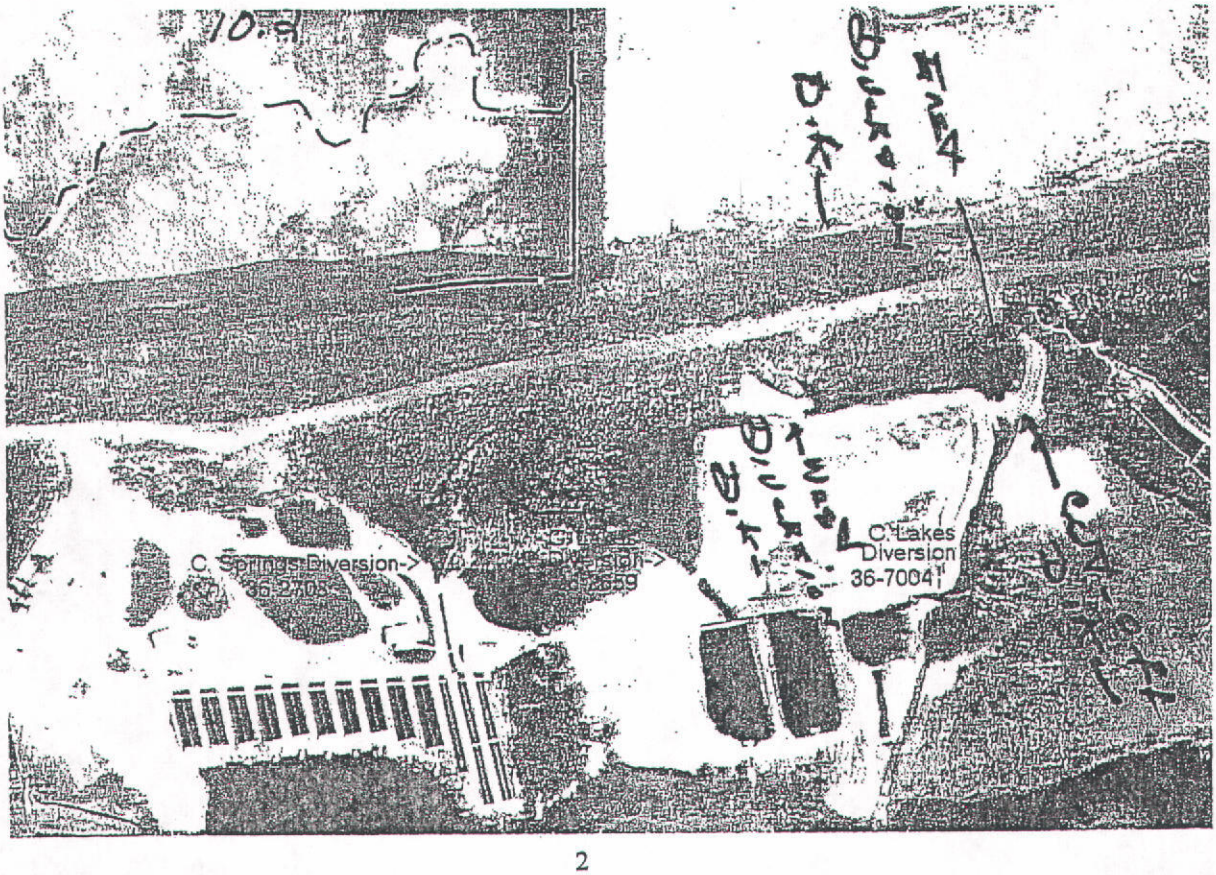
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DEC 17 2003

ATTACHMENT 5

Mr. Eastman marked the following 1968 photograph (Trial Exhibit L1) to show Clear Springs point of diversion ("D.S."), and the spring source (marked as "Source) from which Clear Springs diverted water.



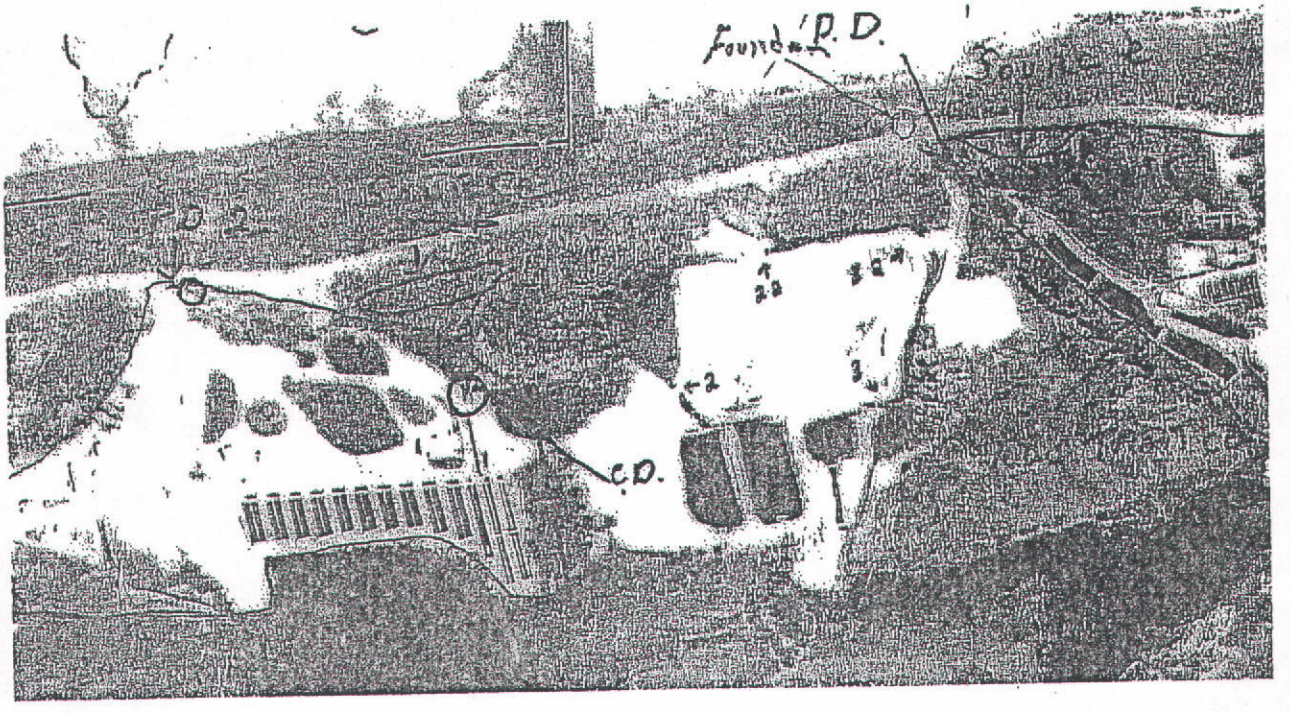
During its next phase of development, in 1969, Clear Lakes modified its property and constructed new diversions upstream of the original diversions at the northern portion of its property to increase Clear Lakes' production capability. These changes are shown in the following copy of photographic exhibit D, which Mr. Hardy marked in red.



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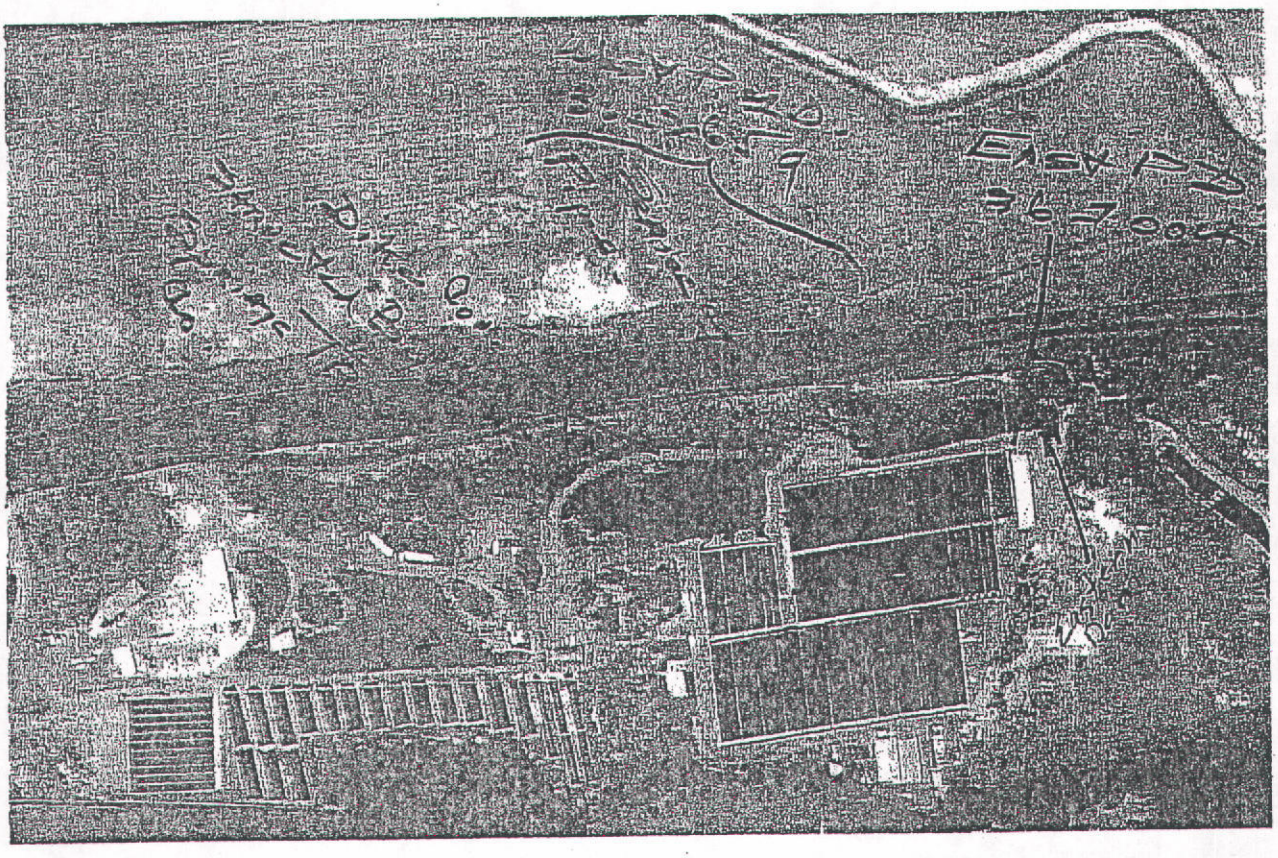
Clear Lakes constructed the "East Diversion Dike" and "Cut-off Dike" pursuant to its permit for water right no. 36-07004, and constructed the "West Diversion Dike" pursuant to its permit for water right no. 36-02659. Until construction was completed, Clear Lakes left open gates in these upper dikes so that water could flow down the western and eastern streams to Clear Lakes' original points of diversion.

Mr. Eastman marked the 1969 photograph (Exhibit L2) to show Clear Springs' diversion works ("C.D.") and the spring source ("Source") for water right 36-02708 at that time. He similarly showed a discrete and separate water source for the Snake River Trout Company adjacent to the Clear Lakes Property (upper left hand portion of the photograph, located northeast of Clear Lakes' upper diversion for water right no. 36-07004.



The following photograph, taken in 1977, shows Clear Lakes' hatchery and diversions after the raceways and the diversions were completed in 1970 or 1971. The temporary gates in the East Dike (also identified by Mr. Hardy as the "Eastern Dam") and the West Dike were permanently closed, completing the construction of the dikes and creating the Eastern Pool. Water flows through pipes and flumes in the southern boundary of the pool into the upper portion of the Clear Lakes' raceways. Clear Lakes installed pipes in springs that discharged into the eastern pool to convey water into Clear Lakes hatchery and fry pond buildings. At this time Clear Lakes, simultaneously diverted part of water right no. 36-02659 into the Eastern Pool, and part of the water right from what remained of the Western Stream through pipes into its uppermost raceways on the west side of its property. Clear Lakes diversions were measured at two points of discharge into Clear Lake. Clear Lakes submitted proof of beneficial use on September 9, 1977 for water right nos. 36-02659 and 36-07004, and received licenses for the full permitted quantities.

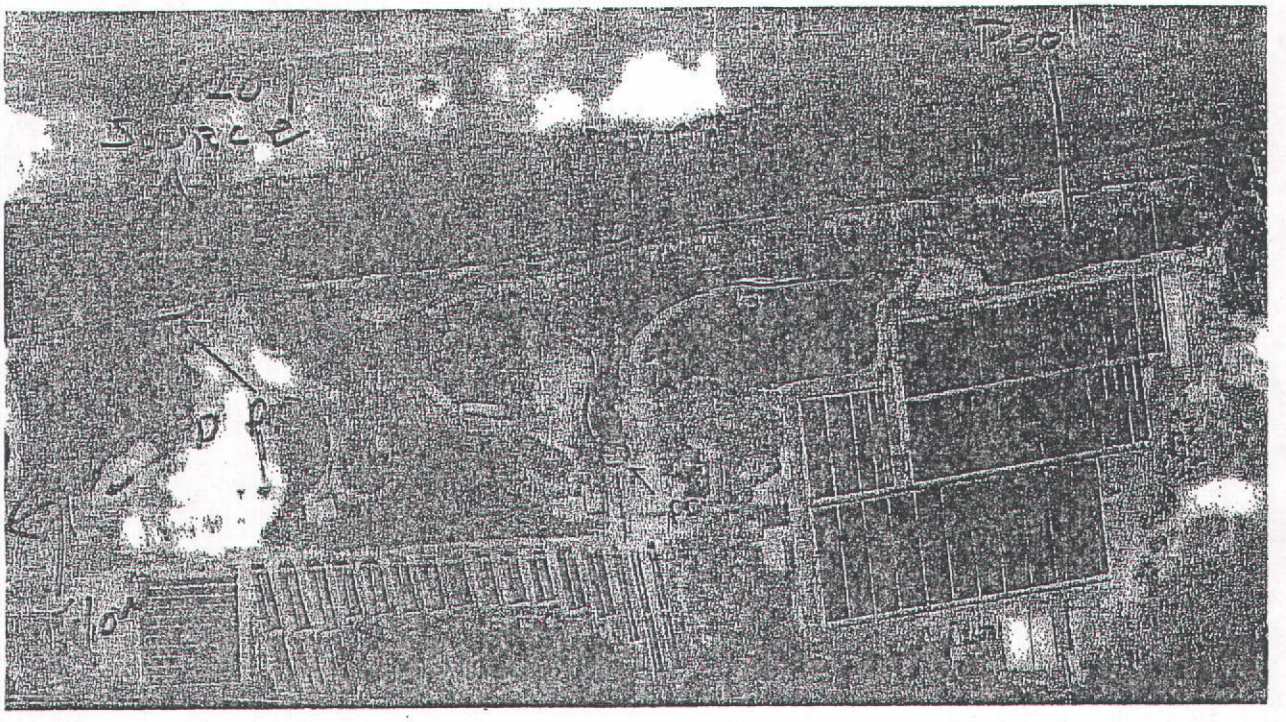
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DEC 17 2003



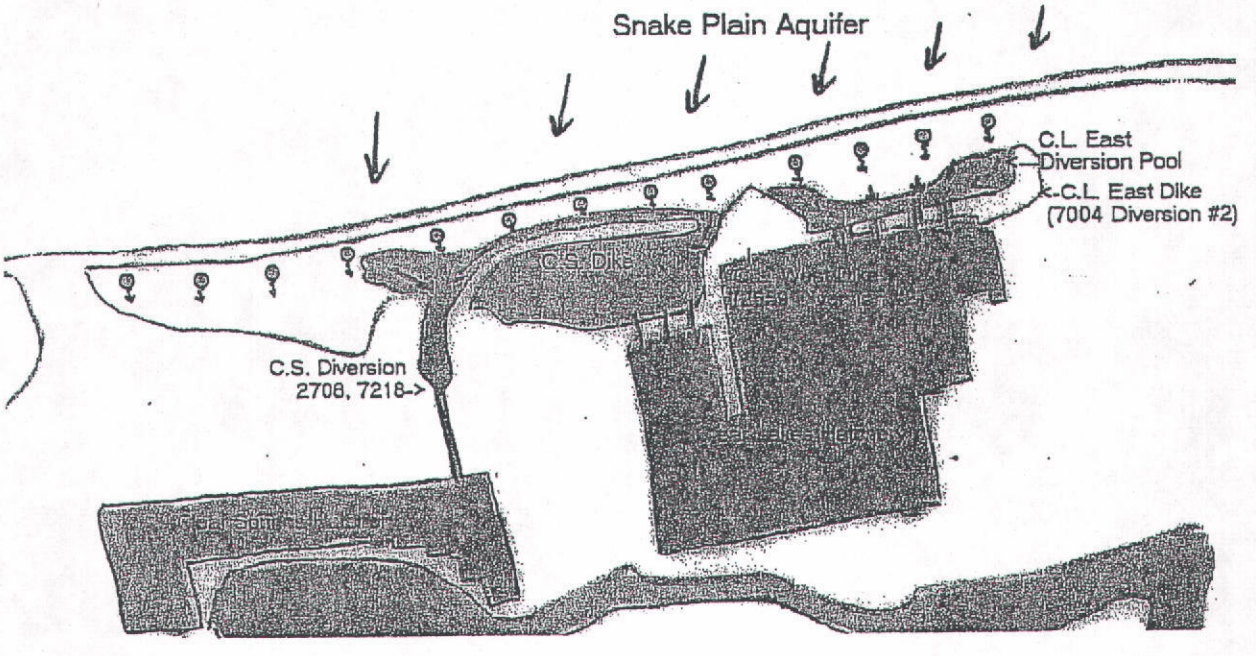
The photograph also shows the dike Clear Springs constructed in 1971 in the western stream to divert more water through Clear Springs flume. Clear Springs constructed this dike on land that Clear Lakes' leased from Idaho Power Company without notice to Clear Lakes or Clear Lakes consent. As is apparent from the photograph and the following drawing, the dike was constructed above Clear Lakes' diversion works in a manner that interfered with Clear Lakes diversion of water pursuant to its senior water right no. 36-02659. In March of 1972, Clear Springs filed an application for permit for water right no. 36-07218 for 51.55 cfs to authorize its increased diversion of water from the springs feeding the western stream - water that Clear Lakes had the prior right to divert and had diverted pursuant to water right no. 36-02659. (It does not appear that there has ever been a sufficient water supply from the springs or through the Western Pool to deliver this water to Clear Springs, unless Clear Lakes is prevented from diverting water pursuant to 36-02659.)

On the following 1977 photograph (Exhibit L3), Mr. Eastman showed the Clear Springs' diversion works for water right no. 36-02708 and the source of water for that right. Construction of the dike dramatically increased spring discharges Clear Springs could divert. Still, Clear Springs could not and did not claim the right to divert any water diverted by the Eastern Pool.

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The following diagram illustrates the flows and diversions of spring water at the time of the 1977 photograph.



ATTACHMENT 5

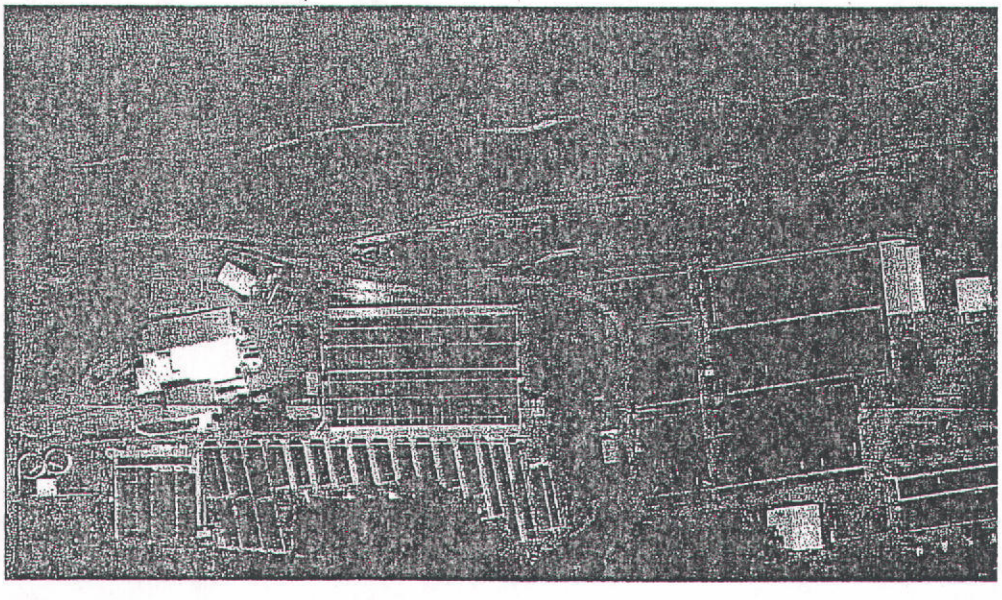
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Clear Lakes sued Clear Springs over construction of the dike. As an interim settlement, sufficient water was allowed to pass by the eastern tip of the dike to provide water to the western portion of Clear Lakes' hatchery. The litigation ultimately resulted in the 1980 settlement agreement in which Clear Lakes agreed to allow Clear Springs to complete the dike by increasing its height and extending to "include an area where the waters flow from the natural springs outlets, which a have been and are presently being used by [Clear] Lakes. 1980 Settlement Agreement, p. 2. Clear Lakes and Clear Springs agreed to share the spring water on a percentage basis, without regard to priorities or the points of diversion, until a different apportionment is "finally agreed upon or legally determined."

The agreement provided for the construction of diversion works by subsequent agreement of the parties to apportion the water rights. Clear Lakes and Clear Springs did subsequently agree to the construction of the shared diversion works. The Brockway and Anderson Report which you have reflects that subsequent agreement and describes how diversions through the shared works are to be adjusted to deliver water pursuant to the compromise. To date, the works have never been adjusted, establishing that spring flows collected by the Western and the Eastern Pools rise and fall proportionately.

Under the agreement, Clear Lakes and Clear Springs each have the continuing right to access the shared works, and have the mutual right to operate the works, whether diversions through the Western Pool continue to be delivered pursuant to the compromise in the 1980 agreement or pursuant to some other legal determination or agreement.

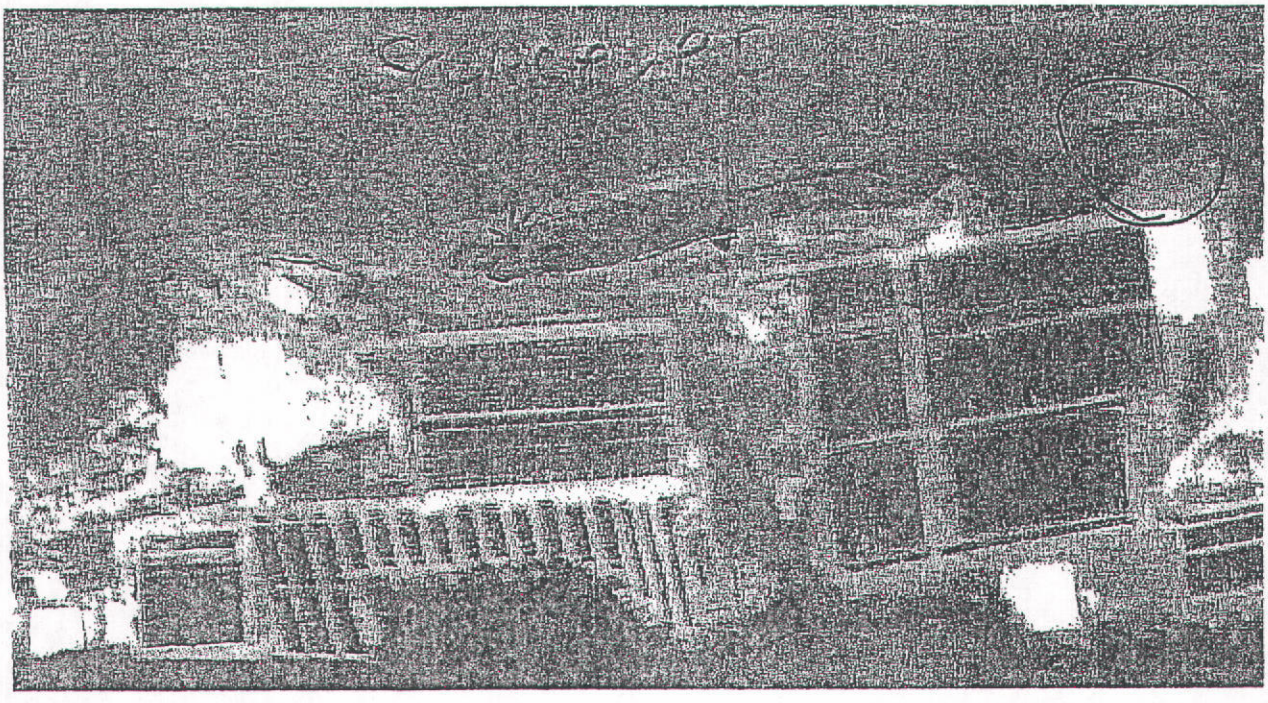
Finally we come to the present, as shown in the following 1997 photograph marked by Mr. Hardy. These photographs show the Western Pool, created by completion of the dike as provided in the 1980 settlement agreement, and the shared diversion works in the middle of that pool through which Clear Springs diverts water right no: 36-02708 and Clear Lakes diverts a portion of water right no. 36-02659.



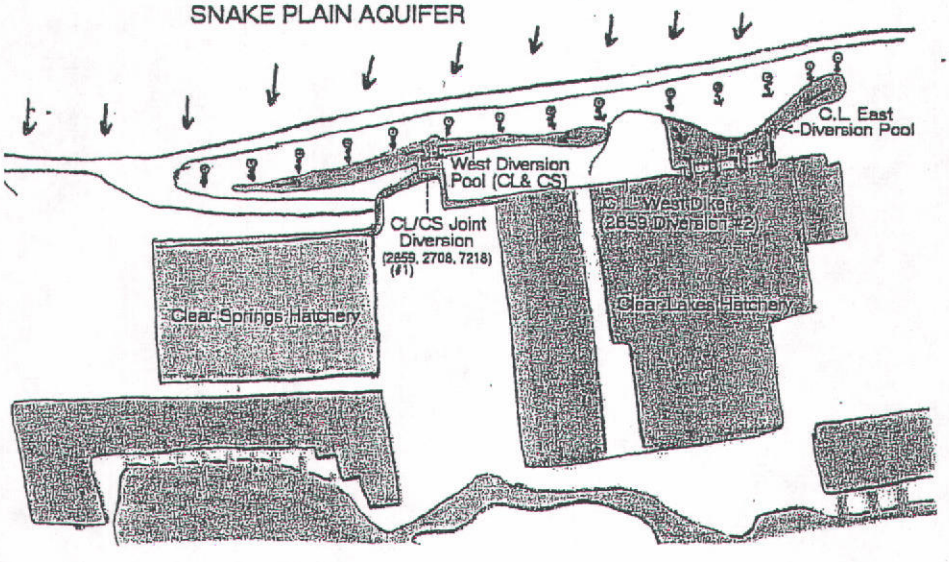
ATTACHMENT 5

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On the following photograph (Trial Exhibit L4), Mr. Eastman showed the springs collected by the Western Pool as the only source of water for Clear Springs water rights. At no time has Clear Springs ever attempted, or claimed the right, to divert or water collected by Clear Lakes Eastern Pool. Clear Lakes' relied upon these facts when it executed the 1980 agreement, permitting the completion of the dike and installation of the shared diversion works. For this reason, and the others discussed in the memorandum (futile call, no injury rule), Clear Springs cannot now claim any right to spring flows diverted through the eastern pool pursuant to water right no. 36-07004.

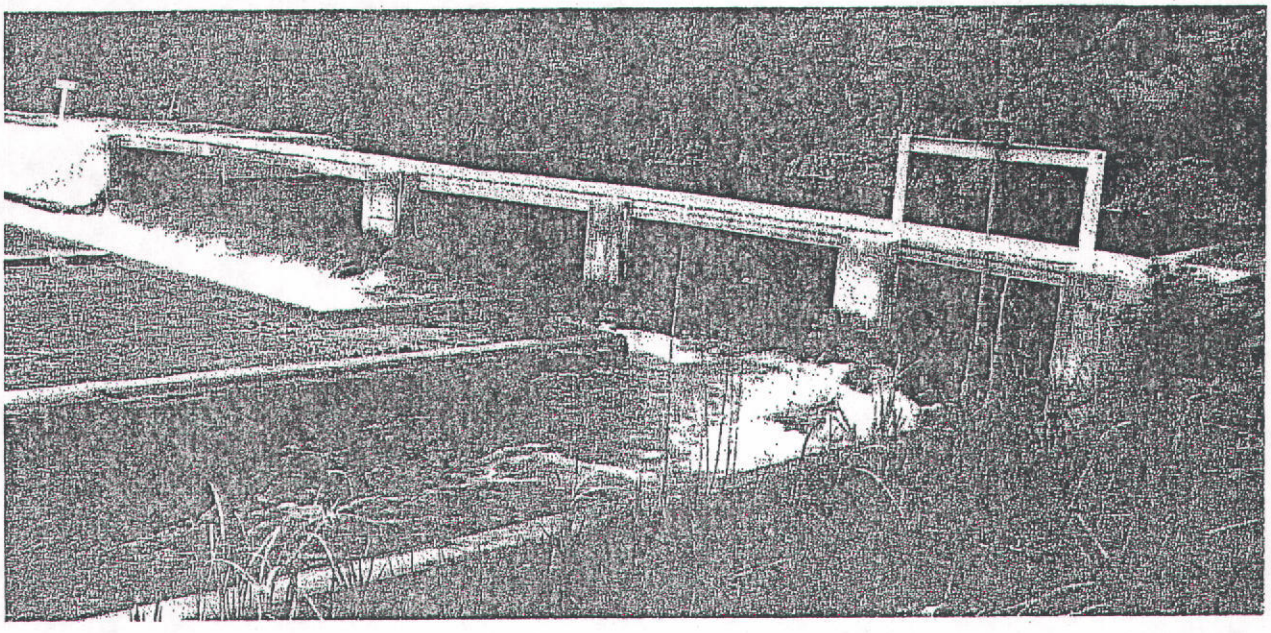


The following diagram illustrates the flow of water through the Western and Eastern Pools.

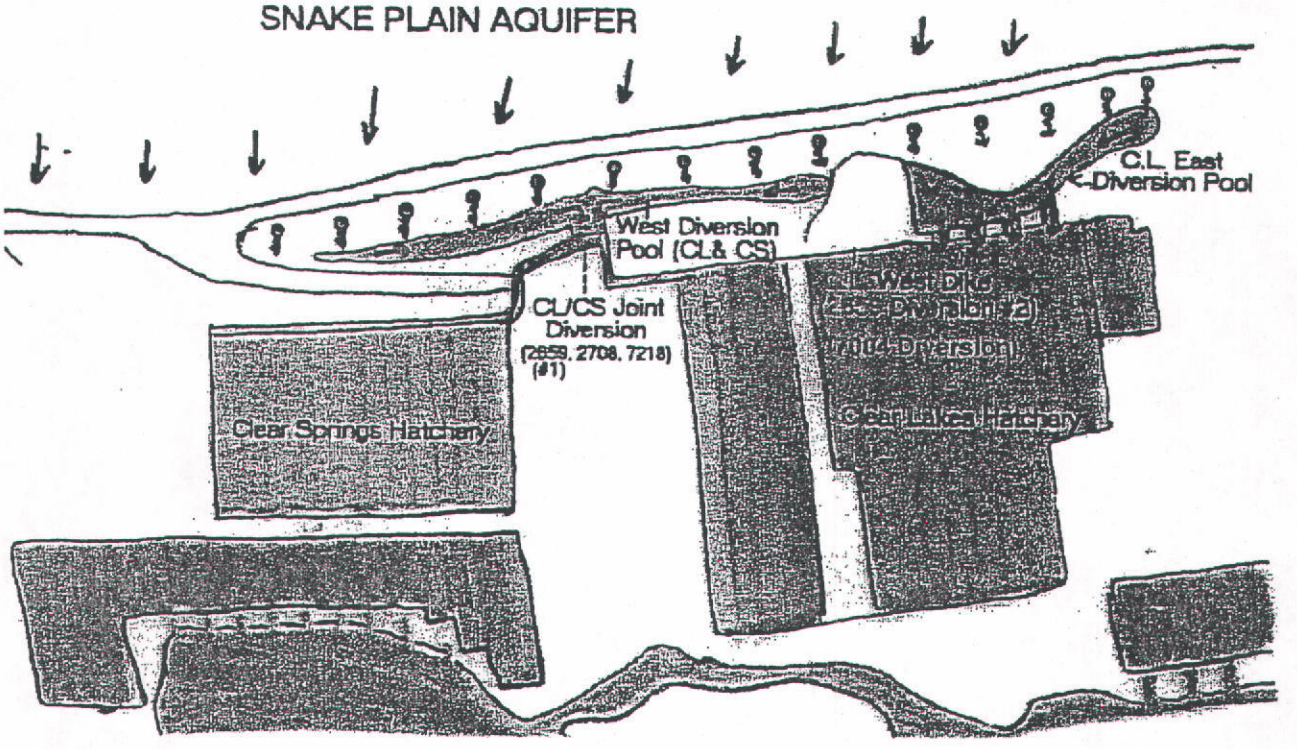


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The following photograph is included for the benefit of Department personnel who have not had an opportunity to observe the shared diversion works on site.



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The Special Master for **In Re SRBA, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218)** issued *Findings of Fact and Conclusions of Law on Involuntary Dismissal* (August 21, 1998); *Special Master's Report and Recommendations* (August 28, 1998); and *Order*

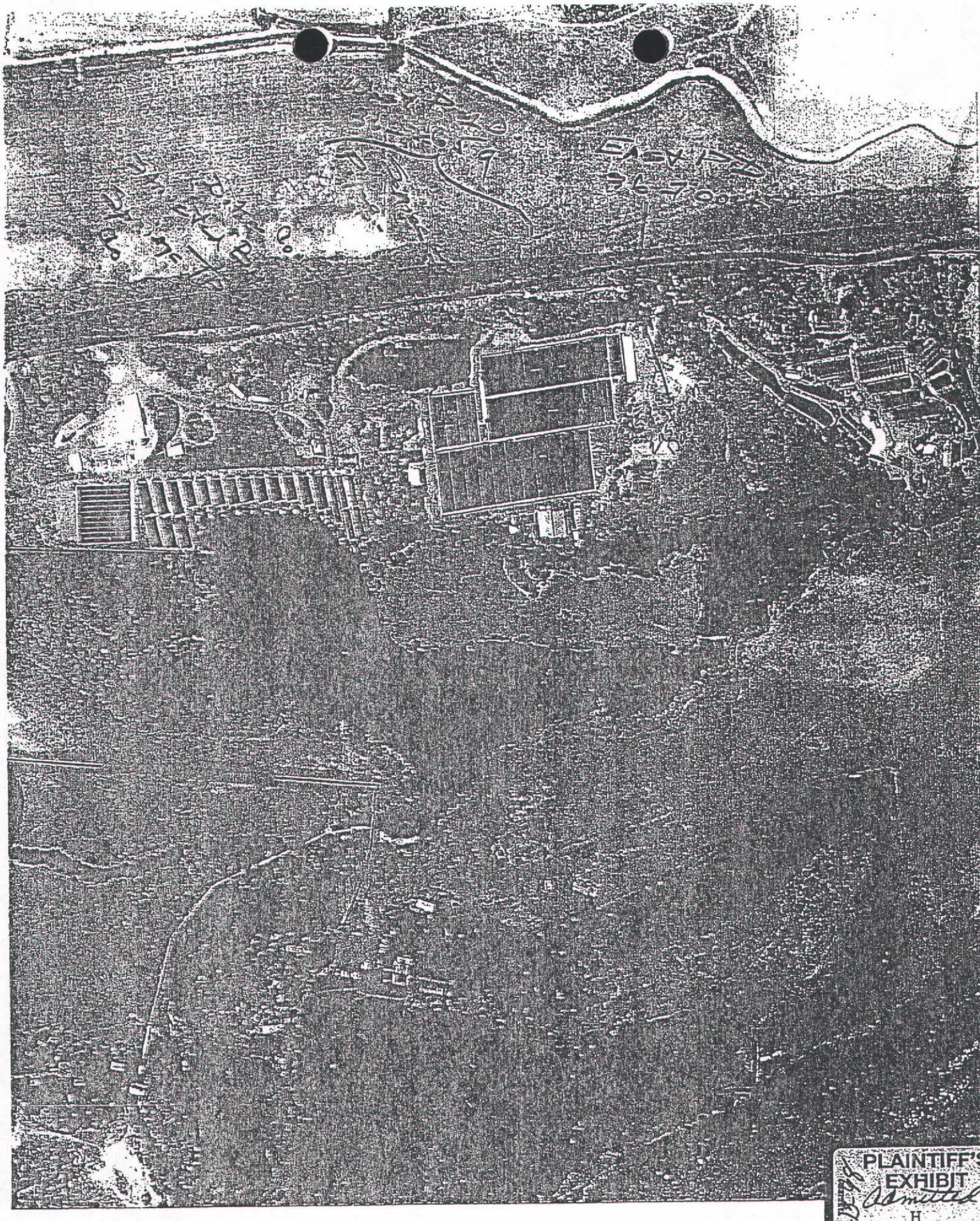
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DEC 17 2003



PLAINTIFFS EXHIBIT D

DEC 17 2003

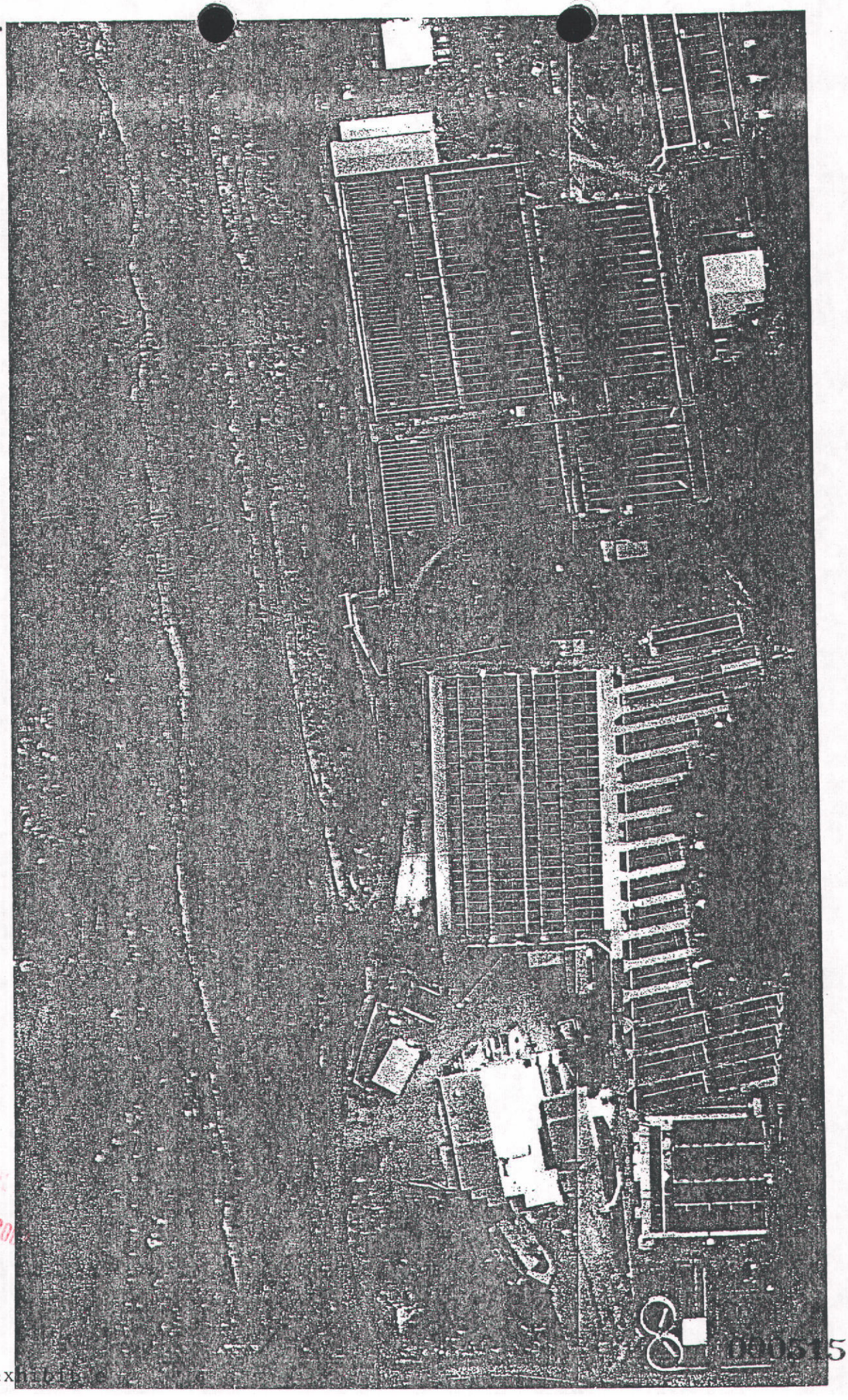
EXHIBIT C



PLAINTIFF'S EXHIBIT Admitted H

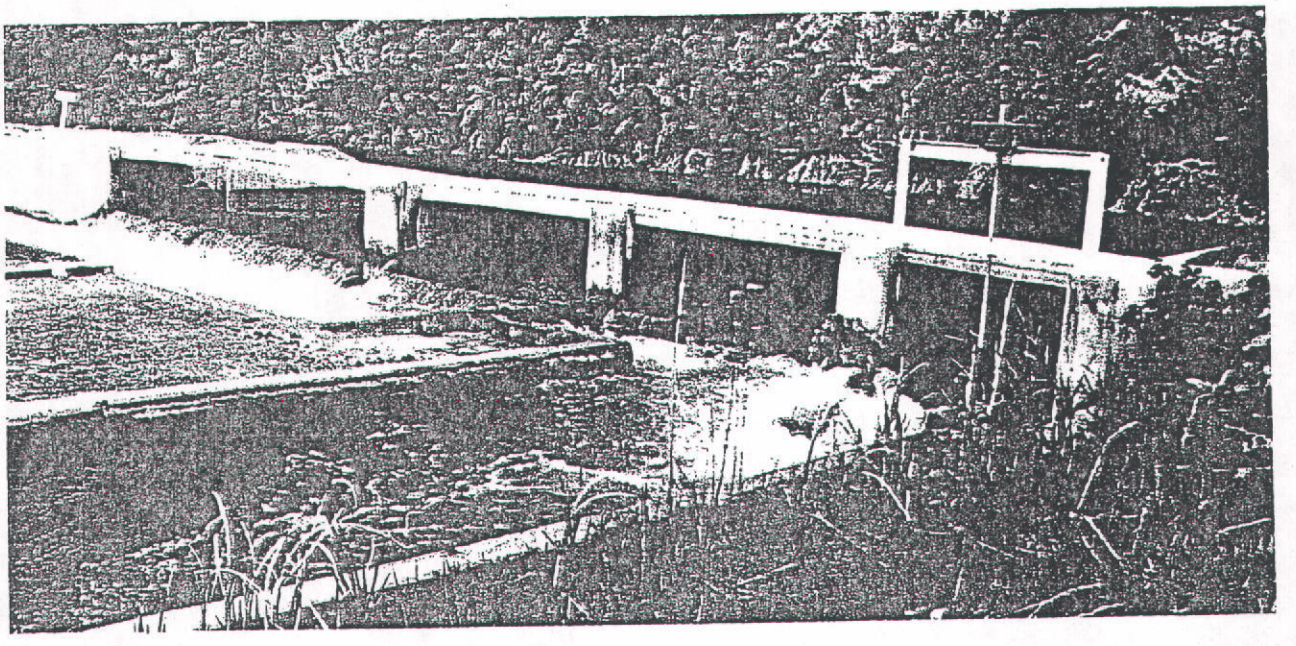
EXHIBIT D

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DEC 17 2003



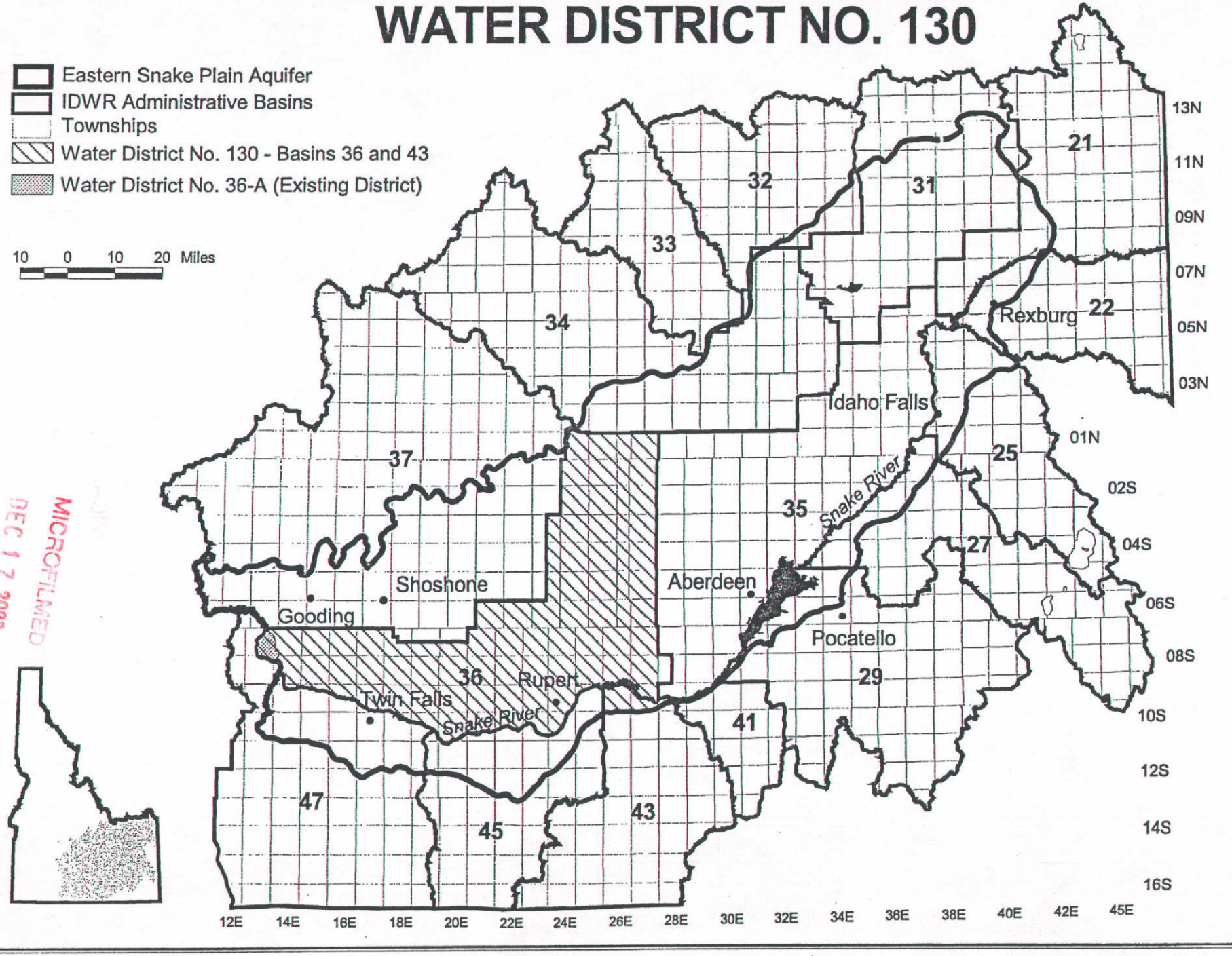
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DEC 17 20

exhibit E



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DEC 17 2003

THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



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ATTACHMENT A

FOLDER 1

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02659, 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-07004, 36-07080, 36-07167, 36-07176, 36-07725, 36-07731, AND 36-08089	**NOTICE OF CONTESTED CASE; ORDER GRANTING PETITIONS TO INTERVENE; AND NOTICE OF STATUS CONFERENCE**

NOTICE OF CONTESTED CASE

On October 27, 2003, Clear Lakes Trout Company, Inc., Fisheries Development Company, Inc, Rim View Trout Company, Inc., and Estate of Earl M. Hardy ("Petitioners") filed with the Idaho Department of Water Resources ("Department" or "Director") a petition entitled *Petition Contesting October 10, 2003 Order.* A copy of the petition can be viewed on the Department's website at www.idwr.state.id.us under News & Events.

The petition seeks a hearing before the Department, pursuant to the provisions of Idaho Code § 42-1701A(3), to contest the Director's order of October 10, 2003, entered in the above-captioned matter. The Director's order of October 10, 2003, addresses Petitioners' earlier written demands for the administration of water pursuant to the provisions of Idaho Code § 42-607 to supply Petitioners' prior water rights. Petitioners further request that their petition for an administrative hearing be held in abeyance pending resolution of the issues raised before the district court through their filing of an *Amended Verified Complaint And Petition For Writ Of Mandate* in an action captioned *Rim View Trout Company, et al. v. Dreher, et al.* (4th Jud. Dist., Ada Co. Case No. CV OC 0307551D) (filed October 21, 2003).

Idaho Code § 42-1701A(3) provides that upon the filing of a petition by a person entitled to a hearing under the provisions of the statute, the Director "shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding." The Department shall provide notice of this contested case proceeding via email to a list of persons and entities considered most likely to be affected by the Petitioners' challenge to the Director's order of October 10, 2003.

Any person or entity desiring to participate as a party in this contested case proceeding shall file a petition to intervene, on or before December 12, 2003, with the Director, Idaho Department of Water Resources, 1301 North Orchard St., Boise, Idaho 83706-2237, showing service upon all parties to the proceeding. The petition to intervene should be in conformance with Rules 351 and 352 of the Department's Rules of Procedure.

ORDER GRANTING PETITIONS TO INTERVENE

On October 23, 2003, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed *Idaho Ground Water Appropriators, Inc.'s Petition To Intervene* in this proceeding pursuant to Rule 350 of the Department's Rules of Procedure. On October 30, 2003, the City of Pocatello, Basic American Foods, and Lamb Weston ("Pocatello, et al.") filed *Petition for Intervention; or in the Alternative, Petition in Response to IDWR Order Dated October 10, 2003.*

The petitions to intervene by IGWA and Pocatello, et al. demonstrate sufficient direct and substantial interest in the above-captioned matter to justify intervention into this proceeding without unduly broadening the issues.

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN that the Director will preside over a status conference at

10:00 a.m., Friday, December 12, 2003, in Conference Rooms A&B at the Department of Water Resources offices located at 1301 North Orchard St., Boise, Idaho, to address the manner in which this matter shall proceed and, in particular, to discuss Petitioners' request that this matter be held in abeyance pending a decision in Petitioners' related cause of action before the district court.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the department, at telephone number (208) 327-7910, within (5) days prior to the conference.

IT IS HEREBY ORDERED

Dated this 21st day of November 2003.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2003, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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C/o Department of Water Resources
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Victoria Wigle
Administrative Assistant

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02659, 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-07004, 36-07080, 36-07167, 36-07176, 36-07725, 36-07731, AND 36-08089	)	**ORDER**

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of four letters dated May 14 and May 15, 2003. The first letter, dated May 14, was from Kay Hardy, President of Clear Lakes Trout Company. The second letter, dated May 15, was from Kay Hardy, President of Fisheries Development Company. The third letter dated, May 15, was from Kay Hardy, President of Rim View Trout Company. The fourth letter, dated May 15, was from Kay Hardy, General Partner of Hardy Properties, LP and Personal Representative for the Estate of Earl M. Hardy (collectively referred to as "Hardy"). All four letters demand that the Director direct the watermaster for Water District No. 130, and the watermaster for Water District No. 36A in the letter from Fisheries Development Company, "to administer water rights in the Water District(s) ... as required by Idaho Code § 42-607" in order to supply the prior rights of Clear Lakes, Fisheries Development, Rim View, and Hardy. The Director enters the following Findings of Fact, Conclusions of Law, and Order in response to these four letters.

FINDINGS OF FACT

The Eastern Snake River Plain Aquifer and the Department's Ground Water Model

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," USGS Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. (See IDAPA 37.03.11.050).

2. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA east and southeast of Hagerman, Idaho.

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3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause reductions in spring flows tributary to the Kimberly to King Hill (or Thousand Springs) reach of the Snake River, although the reductions in flows from individual springs caused by ground water withdrawals from individual wells or groups of wells cannot be determined using the Department's existing ground water model for the ESPA.

4. Surface and ground water studies for the Eastern Snake River Plain, funded in part by the Idaho Legislature, are presently being completed by or on behalf of the Department, with the participation of other public and private entities. These studies will provide additional data that will be used to reformulate and recalibrate the ground water model used by the Department to calculate the amount, location, and timing of surface water depletions caused by the withdrawal and use of ground water throughout the plain overlying the ESPA. The purpose for the additional data collection and model reformulation/calibration is to reduce uncertainty in modeled results and increase acceptance of the Department's use of the reformulated/recalibrated ground water model. Although these efforts are nearing completion, the reformulated and recalibrated ground water model will not be ready for use in making water management determinations until the mid to latter part of 2004. In the meantime, the results from simulations using the Department's existing ground water model provide the best available technical basis for making some water management decisions when the uncertainties of the existing model are appropriately addressed.

5. The Department is implementing full conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain consistent with available information and technical resources. The results of simulations from the Department's existing ground water model are suitable for determining the area containing those ground water diversions for which the depletion of water from the ESPA results in the most direct and significant reduction in the flow of water from springs tributary to the Snake River in the Thousand Springs reach.

The Thousand Springs Ground Water Management Area and Interim Stipulated Agreement

6. Dischcarges from springs in the Thousand Springs area have diminished and are expected to be further diminished because of changes in irrigation practices using surface water and the last four consecutive years of drought. Absent mitigation for the effects of depletions caused by ground water use, spring discharges would also be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in close proximity to the area of the springs.

7. On August 3, 2001, the Director issued an order designating the Thousand Springs Ground Water Management Area in exercise of his statutory authorities to administer rights to the use of ground water, subject to the confines of existing knowledge and technology, in a manner that recognizes and protects senior priority surface water rights in accordance with the

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directives of Idaho law. In issuing this order, the Director also announced his intent to issue additional orders prior to September 1, 2001, directing that holders of certain water rights for the use of ground water cease ground water withdrawals beginning March 15, 2002, pursuant to Idaho Code § 42-233b.

8. On August 31, 2001, the Director was advised by representatives of certain holders of senior priority surface water rights and certain holders of junior priority ground water rights that an agreement in principle had been reached under which the holders of junior priority ground water rights agreed to provide replacement surface water for the next two irrigation seasons in an amount equal to what the information then available to the Director indicated would have resulted from the curtailment of ground water diversions intended by the Director within the Thousand Springs Ground Water Management Area, or an appropriate reduction in ground water diversions to the extent that replacement water was not provided.

9. Based upon the representations that an agreement in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs Ground Water Management Area.

10. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into a detailed, written, stipulated agreement with representatives of certain holders of senior priority surface water rights titled: "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36" (the "Stipulated Agreement"). Clear Lakes Trout Company is a signatory to the Stipulated Agreement. The Director conditionally approved the Stipulated Agreement by interlocutory order on January 18, 2002.

11. Under the Stipulated Agreement, 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 40,000 acre feet of replacement water during each year of the two-year term of the Stipulated Agreement as replacement for water that would have resulted from curtailment of ground water diversions intended by the Director, based on the Department's simulations of curtailment using the existing ground water model for the ESPA. The replacement water was to be used to enhance spring flows in the Thousand Springs reach. In the event the full amount of replacement water could not be provided, the Stipulated Agreement provided that the holders of ground water rights would reduce their diversion and use of ground water for irrigation in proportion to the lack of replacement water provided up to a maximum reduction of 10 percent.

12. Under the Stipulated Agreement, the parties also agreed not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication ("SRBA District Court") requesting authority for the Director to implement interim administration of water rights in Basin 36. Basin 36 is the administrative basin defined by the Department primarily for the purpose of managing surface water and for administering water rights for the use of surface water decreed in proceedings preceding the Snake River Basin Adjudication. Basin 36 includes most of the area in the Thousand Springs Ground Water Management Area. The remaining portion of

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the Thousand Springs Ground Water Management Area is within the Department's Administrative Basins 37 and 43.

13. Pursuant to the Stipulated Agreement, in 2002 the parties representing the holders of ground water rights provided a total of 12,963 acre feet of replacement water, which was 32.4 percent of the 40,000 acre feet required to avoid reductions in ground water diversions. Consequently, the holders of ground water rights were required to reduce their diversion and use of ground water by an aggregate amount of 6.76 percent (10 percent maximum reduction multiplied by the factor of 1 - 0.324). The actual reduction in diversion and use of ground water achieved in 2002 was an aggregate amount of 10.37 percent based on comparing power consumption for pumping ground water for irrigation in 2002 against the power consumption for pumping ground water for irrigation averaged for the years 1999 and 2000. This reduction in the diversion and use of ground water, as measured by power consumption, was substantially more than required pursuant to the Stipulated Agreement, and the holders of ground water rights party to the Stipulated Agreement fully met their obligations under the Stipulated Agreement in 2002.

14. At a meeting held in Hagerman, Idaho on April 2, 2002, involving representatives of all of the signatories to the Stipulated Agreement on file with the Department, it was verbally agreed that in the event reductions in diversion and use of ground water either exceeded or did not meet the reductions required pursuant to the Stipulated Agreement, any surplus or deficit in reductions could be carried over to the 2003 irrigation season. The Department has determined that the carry over credit for reductions in diversion and use of ground water that exceeded reductions required in 2002 is equivalent to at least 8,894 acre feet of replacement water.

15. Pursuant to the Stipulated Agreement, in 2003 the parties representing the holders of ground water rights are providing a total of 36,000 acre feet of replacement water, relying on at least the equivalent of 4,000 acre feet of carry over credit from 2002. The Department has confirmed that all of the 36,000 acre feet of replacement water will be delivered through the North Side Canal Company facilities in 2003, and since the actual carry over credit from 2002 was substantially greater than 4,000 acre-feet, the holders of ground water rights party to the Stipulated Agreement will fully meet their obligations under the Stipulated Agreement in 2003.

Creation and Operation of Water District No. 130 and
Status of Thousand Springs Ground Water Management Area

16. Consistent with the Stipulated Agreement, the State of Idaho filed a motion with the SRBA District Court on November 19, 2001, requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of the Department's Administrative Basins 36 and 43 overlying the ESPA in the Thousand Springs Area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on February 19, 2002, creating Water District No. 130 pursuant to the provisions of Idaho Code § 42-604.

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17. On August 30, 2002, the State of Idaho filed a second motion with the SRBA District Court requesting an order authorizing the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 37 overlying the ESPA in the Thousand Springs Area. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 8, 2003, revising the boundaries of Water District No. 130 to include the portion of Administrative Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

18. Water District No. 130 was created, and its boundaries revised, to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. As a result, the watermaster for Water District No. 130 was given the following duties to be performed in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of the Stipulated Agreement; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

19. During 2002, in the course of carrying out the duties set forth in Finding 18, the watermaster for Water District No. 130 identified five unauthorized diversions of ground water for uses that were in excess of the beneficial use authorized under a water right or for uses at unauthorized places of use. Pursuant to instructions from the Director, Notices of Violation were issued, Consent Orders entered, and penalties were assessed for each of these five illegal uses of ground water.

20. To date during 2003, in the course of carrying out the duties set forth in Finding 18, the watermaster for Water District No. 130 identified two additional unauthorized diversions of ground water; one for violation of a Consent Order entered in 2002, and another for a large expansion in use beyond the beneficial use authorized under a water right. Notices of Violation are pending for both.

21. Because Water District No. 130 had been formed and was functioning, the Director issued a final order on August 29, 2003, dissolving the Thousand Springs Ground Water Management Area. Even though ground water levels and spring discharges in the Thousand Springs area have generally not improved since 2001 when the Thousand Springs Ground Water Management Area was designated, the Director determined that the Thousand Springs Ground Water Management area was no longer necessary to administer water rights for the protection of

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senior surface and ground water rights because administration of such rights is now accomplished through the operation of Water District No. 130.

22. The final order described in Finding 21 has been contested by Clear Lakes Trout Company and Clear Springs Foods, both seeking a hearing on the final order and rescission of the final order through timely filed petitions. Action on these petitions is pending.

The Conjunctive Management Rules

23. Idaho Code § 42-603 authorizes the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

24. On October 7, 1994, the Director issued *Order Adopting Final Rules*; the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Conjunctive Management Rules"), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

25. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

26. The Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02.

27. The Conjunctive Management Rules "may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right ... ." IDAPA 37.03.11.020.04.

28. Pursuant to Idaho Code § 67-5291, the 1st Regular Session of the 53rd Idaho Legislature (1995 session), and subsequent legislative sessions, had the opportunity to determine that the Conjunctive Management Rules were "violative of the legislative intent of the statute under which such rule[s] [were] made ..." and to adopt "a concurrent resolution ... rejecting, amending or modifying the same." During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature.

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The Letters from Kay Hardy Demanding Delivery of Water to Various Water Rights

29. On May 14, 2003, the Director received a letter from Kay Hardy, President of Clear Lakes Trout Company demanding that the Director "direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply Clear Lakes' prior rights. This demand includes adjustment of the weir in the Western Diversion Pool to deliver to Clear Lakes the portion of Water Right No. 36-02659 (a minimum of 66 cfs) that it is entitled to divert from the springs through the Western Diversion Pool, and adjustment of all other water diversions within the Water District as necessary to supply water right nos. 36-02659 and 36-07004."

30. On May 16, 2003, the Director received a letter from Kay Hardy, President of Fisheries Development Company ("FDC") demanding that the Director "direct the Watermasters for Water District 130 and Water District 36-A to administer water rights in the Water Districts as required by Idaho Code § 42-607 in order to supply FDC's prior rights [water rights nos. 36-07080, 36-07725, 36-07731, and 36-08089]."

31. On May 16, 2003, the Director also received a letter from Kay Hardy, President of Rim View Trout Company, demanding that the Director "direct the Watermaster for Water District 130 to administer water rights in the Water District that deplete the supply of water to Niagara Springs as required by Idaho Code § 42-607 in order to supply Rim View's prior rights [water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167]."

32. On May 16, 2003, the Director also received a letter from Kay Hardy, General Partner in Hardy Properties LP and Personal Representative for the Estate of Earl M. Hardy, demanding that the Director "direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply this prior right [water right no. 36-07176]."

33. Rule 10.04 of the Conjunctive Management Rules defines a "delivery call" as: "A request from the holder of a water right for administration of water rights under the prior appropriation doctrine." The four letters from Kay Hardy demanding delivery of water to various water rights described in Findings 29 through 32 come within the definition of a delivery call.

34. Rule 40 of the Conjunctive Management Rules is titled "Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights from Areas Having a Common Ground Water Supply in an Organized Water District." Rule 40 applies to delivery calls by the holder of senior priority water rights against the holders of junior priority ground water rights when such junior priority ground water rights are included in an organized water district created pursuant to Idaho Code § 42-604.

35. Water Districts No. 36A and No. 130 were created pursuant to Idaho Code § 42-604, and Rule 40 of the Conjunctive Management Rules applies to delivery calls by the holder of

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senior priority water rights against the holders of junior priority ground water rights in Water Districts No. 36A and No. 130.

36. Neither Rule 40 nor any other provisions of the Conjunctive Management Rules are applicable to delivery calls or demands for water distribution by the holder of a senior priority water right against the holder of a junior priority surface water right.

37. On May 19, 2003, the Director provided an initial response by letter to Kay Hardy to the four letters described in Findings 29 through 32 making delivery calls for the distribution of water to the various listed water rights. In his May 19 letter, the Director advised that determinations regarding "material injury" and "reasonableness of water diversions" would be made pursuant to Rule 40 and Rule 42 of the Conjunctive Management Rules in responding to the delivery calls against junior priority ground water rights in Water District No. 130.

38. On May 23, 2003, the Director sent a second letter to Kay Hardy in which he advised that the determinations regarding "material injury" and "reasonableness of water diversions" would be made without initiating a contested case, unless a petition to initiate a contested case was filed with the Department. In his May 23 letter, the Director also requested that he be provided copies of "all historical records of the amounts of water diverted under the listed rights as soon as practible [sic]."

Initial Response to Delivery Calls for Distribution to Water Rights Nos. 36-02659 and 36-07004 (Clear Lakes Trout Company)

39. Water rights nos. 36-02659 and 36-07004 are held by Clear Lakes Trout Company, which is a signatory to the Stipulated Agreement described in Findings 10, 11, and 12.

40. As described in Findings 13, 14, and 15, the mitigation required pursuant to the Stipulated Agreement has either been provided (during 2002) or is being provided (during 2003). Consequently, Clear Lakes Trout Company is not entitled to make delivery calls for distribution of water against the holders of junior priority ground water rights in Water District No. 130 that are providing the required mitigation until after the Stipulated Agreement expires on December 31, 2003. Kay Hardy was advised of this determination in the Director's letter of May 19, 2003.

41. Regarding the demand from Clear Lakes Trout Company that the "weir in the Western Diversion Pool [be adjusted] to deliver to Clear Lakes the portion of Water Right No. 36-02659 (a minimum of 66 cfs) that it is entitled to divert from the springs through the Western Diversion Pool," the adjustment of the weir is governed by *Amended Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218.* Although the subject of pending litigation, these watermaster instructions remain in effect and govern the adjustment of the weir, unless subsequently modified or set aside.

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Initial Response to Delivery Calls for Distribution to Water Rights Nos. 36-07080, 36-07725, 36-07731, and 36-08089 (Fisheries Development Company)

42. Water rights nos. 36-07080, 36-07725, and 36-07731 are held by Clear Lakes Trout Company for use by Fisheries Development Company. Clear Lakes Trout Company is a signatory to the Stipulated Agreement described in Findings 10, 11, and 12.

43. As described in Findings 13, 14, and 15, the mitigation required pursuant to the Stipulated Agreement has either been provided (during 2002) or is being provided (during 2003). Consequently, Clear Lakes Trout Company is not entitled to make delivery calls for distribution of water against the holders of junior priority ground water rights in Water District No. 130 that are providing the required mitigation until after the Stipulated Agreement expires on December 31, 2003. Kay Hardy was advised of this determination in the Director's letter of May 19, 2003.

44. Notwithstanding Finding 43, Clear Lakes Trout Company is entitled to make delivery calls for distribution of water against the holders of junior priority surface water rights.

45. Based on review of the Department's water right records, field investigations, and consultation with the watermasters for Water Districts Nos. 36A and 130, there currently are no surface water rights in Water Districts Nos. 36A and 130 that are junior in priority to water rights nos. 36-07080, 36-07725, and 36-07731, and that if curtailed would provide water to the prior rights held by Clear Lakes Trout Company for use by Fisheries Development Company. Counsel for Kay Hardy was advised of this determination in a letter from the Director dated July 2, 2003.

46. Water right no. 36-08089 is held by Fisheries Development Company for power generation purposes. Consistent with other water rights held for power generation, water right no. 36-08089 is subordinate to all rights for the use of water that are later in priority, other than water rights for hydropower production. Kay Hardy was advised of this determination in the Director's letter of May 19, 2003.

Initial Response to Delivery Calls for Distribution to Water Rights Nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167 (Rim View Trout Company)

47. Water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167 are held by Rim View Trout Company, which is not a signatory to the Stipulated Agreement.

48. Rim View Trout Company has not provided all historical records of the amounts of water diverted under its water rights as requested by the Director in his letter of May 23, 2003.

49. Based on the measured discharge through its facilities reported annually to the Department by Rim View Trout Company, the discharge has generally been 100 cfs or more from March of 1995 through December of 2002.

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50. None of the intermittent measurements of the discharge through the Rim View Trout Company facilities made by the watermaster for Water District No. 130 during 2003 have shown a discharge of less than 100 cfs through the Rim View facilities.

51. Based on the discharge measurements through the Rim View Trout Company facilities available to the Department, there has been a sufficient amount of water to satisfy water rights nos. 36-02680 for 60 cfs, 36-04032A for 10 cfs, 36-04032B for 10 cfs, 36-04032C for 5 cfs, and 36-04032D for 15 cfs, which total 100 cfs in order of priority.

52. Water right no. 36-07167 has a priority date of March 18, 1971, and authorizes a maximum diversion rate of 50 cfs for fish propagation. At times, there has not been a sufficient amount of water to satisfy water right no. 36-07167, for which a delivery call can be considered pursuant to the Conjunctive Management Rules.

Initial Response to Delivery Call for Distribution to Water Right No. 36-07176 (White Springs Hatchery)

53. Water right no. 36-07176 is held by the Estate of Earl M. Hardy ("Hardy Estate"), which is not a signatory to the Stipulated Agreement.

54. Water right no. 36-07176 has a priority date of May 18, 1971, and authorizes a maximum diversion rate of 38.8 cfs for fish propagation at the White Springs Hatchery.

55. The Hardy Estate has not provided all historical records of the amounts of water diverted under its water right as requested by the Director in his letter of May 23, 2003.

56. Based on the measured discharge through its facilities reported annually to the Department by the White Springs Hatchery, the discharge has continuously been less than 38.8 cfs from March of 1995 through December of 2002.

57. The intermittent measurements of the discharge through the White Springs Hatchery facilities made by the watermaster for Water District No. 130 during 2003 have all shown a discharge of less than 38.8 cfs through the facilities.

58. Based on the discharge measurements through the White Springs Hatchery facilities available to the Department, there has not been a sufficient amount of water to satisfy water right no. 36-07176 since at least March of 1995, and a delivery call can be considered pursuant to the Conjunctive Management Rules.

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Authorized Diversion Rate for Water Rights Nos. 36-07167 and 36-07176

59. Springs discharging in the Thousand Springs area do not discharge at a constant rate or at a rate that progressively increases or decreases from year to year. While there are overall increases or decreases in the discharge from individual springs between years (inter-year variations), there are also pronounced within-year or intra-year variations in discharge from individual springs.

60. Overall variations in the discharge from individual springs between years result from factors that include but are not necessarily limited to: variations in surface water supplies available for irrigation above the ESPA, which affect cropping decisions and the amount of incidental recharge to the ESPA; changes in the amounts and timing of tributary underflow to the ESPA, which also reflect numerous variations upgradient from where tributary underflow contributes to the ESPA; inter-year variations in precipitation and temperature, which not only affect the amount of surface water used above the ESPA and associated incidental recharge to the ESPA, but also affect the quantity of ground water withdrawals and depletions from the ESPA; and differences between years in the quantity of intentional recharge to the ESPA.

61. Intra-year variations in the discharge from individual springs result from the factors described in Finding 60 but also from other factors including: variations in surface water application above the ESPA and associated incidental recharge in response to seasonal changes in precipitation and temperature; variations in timing of ground water withdrawals and depletions from the ESPA in close proximity to individual springs; and the timing of intentional recharge to the ESPA in close proximity to individual springs.

62. While both the regional and local factors affecting inter-year and intra-year variations in spring discharge are generally understood, the interactions between these factors are complex and the specific effects of individual factors and various combinations of factors on the discharge from individual springs have not been quantified.

63. Inter-year and intra-year variations in the discharge from the springs that are the source for water rights nos. 36-07167 and 36-07176 existed when appropriations for these rights were initiated (March 18 and May 18, 1971, respectively). The Department has no records that show that the quantities of water diverted pursuant to water rights nos. 36-07167 and 36-07176 were consistently available at the authorized diversion rates during the years following the initial appropriations. Neither Rim View Trout Company nor the Hardy Estate have submitted historical records of the amounts of water diverted under their respective water rights that show water was historically available from the sources for these water rights to consistently fill the rights at the authorized rates of diversion.

64. The rates of diversion authorized pursuant to water rights nos. 36-07167 and 36-07176 (50 cfs and 38.8 cfs, respectively) are not quantity entitlements that are guaranteed to be available to the right holders. Rather, the authorized rates of diversion are the maximum rates at which water can be diverted under these rights, respectively, when such quantities of water are available and the rights are in priority. Neither Rim View Trout Company nor the Hardy Estate

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can call for the curtailment of junior priority water rights simply because insufficient water is available to fill the Rim View right (no. 36-0167) or the Hardy Estate right (no. 36-0176) at the authorized rate of diversion. Rim View Trout Company and the Hardy Estate can only call for the distribution of water to their rights through the curtailment of junior priority rights when such curtailment would result in a usable amount of water reaching their respective point of diversion in time of need, and the depletions caused by diversion and use of ground water under such junior priority rights have not been adequately mitigated.

Factors Considered in Determining Material Injury To and Reasonableness of Water Diversions Under Water Right No. 36-07167 (Rim View Trout Company)

65. Because Rim View Trout Company has not provided historical records of the amounts of water diverted (see Findings 38 and 48) under water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, and 36-04032D, for which the cumulative authorized diversion rate is 100 cfs, and 36-07167, for which the authorized diversion rate is 50 cfs, the only records of the amounts of water diverted through the Rim View facilities possessed by the Department are the annual reports submitted by Rim View for the time period beginning in March of 1995 through December of 2002 and the intermittent measurements made by the watermaster for Water District No. 130 in 2003.

66. Based on the annual reports submitted by Rim View Trout Company for the years 1995 through 2002, the following table summarizes the minimum daily flow and average daily flow by month through the Rim View facilities at the beginning and end of this time period:

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Month	Year	Minimum Daily Flow	Average Daily Flow
January	1996	133.1 cfs	134.6 cfs
	2002	128.0	141.5
February	1996	119.8	121.2
	2002	146.0	151.1
March	1995	97.5	101.1
	2002	131.1	153.2
April	1995	103.1	116.2
	2002	158.9	160.8
May	1995	136.0	139.4
	2002	154.1	154.6
June	1995	140.5	142.6
	2002	150.9	152.4
July	1995	142.0	142.4
	2002	150.9	153.9
August	1995	142.0	143.2
	2002	153.0	153.7
September	1995	142.9	143.4
	2002	151.9	154.3
October	1995	144.1	144.7
	2002	149.8	151.5
November	1995	145.3	146.5
	2002	150.9	153.8
December	1995	144.2	145.1
	2002	152.0	153.8

67. Comparing same-month minimum daily and average daily flows through the Rim View Trout Company facilities between years for the years shown above as well as for the other years between 1995 and 2002 not shown above, demonstrates that flows through the Rim View facilities have generally increased since 1995, particularly from 2001 to 2002.

68. Thus far during 2003, the watermaster for Water District No. 130 has recorded the following measurements of flow through the Rim View Trout Company facilities:

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Date	Measured Flow
03/04/2003	151.0 cfs
05/30/2003	151.9
06/06/2003	153.0
06/17/2003	154.1
07/09/2003	153.0
08/04/2003	153.0
08/06/2003	143.4

69. The watermaster for Water District No. 130 reported to the Director that water was available to fully satisfy water right no. 36-07167 sometime during the first part of September 2003.

70. The flows through the Rim View Trout Company facilities measured by the watermaster in 2003 are similar to the measured flow rates in 2002, except for the time period after August 4 until the early part of September.

71. Based on the historical flow measurements available to the Department and taking into account the variations in spring flows between months that have existed since the date of appropriation for water right no. 36-07167, the quantity of water available at the source for water right no. 36-07167 is currently adequate to satisfy this right. (See IDAPA 37.03.11.042.01.a).

72. Based on documentation in the Department's files for water right no. 36-07167 and the results from a field inspection conducted on May 30, 2003, by the watermaster for Water District No. 130 and Brian Patton, a registered professional civil engineer, Rim View Trout Company has expended reasonable efforts to divert water right no. 36-07167 from its source. (See IDAPA 37.03.11.042.01.b).

73. Based on simulations using the Department's existing ground water model for the ESPA, the diversion and use of ground water under certain water rights having priority dates later than the priority date for water right no. 36-07167 (March 18, 1971) do affect the quantity and timing of when water is available from springs discharging in the Thousand Springs area. However, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by the diversion and use of ground water from individual wells or groups of wells. (See IDAPA 37.03.11.042.01.c).

74. Findings 66 and 68 demonstrate that Rim View Trout Company diverts and uses surface water within the authorized cumulative diversion rate for water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, and 36-04032D (100 cfs), and generally within the authorized diversion rate for water right no. 36-07167 (50 cfs). However, there are times when the amount of water diverted by Rim View under water right no. 36-07167 exceeds the authorized diversion rate. (See IDAPA 37.03.11.042.01.e).

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75. Based on documentation in the Department's files for water right no. 36-07167 and the results from the field inspection on May 30, 2003, described in Finding 72, Rim View Trout Company has adequate water measuring and recording devices. (See IDAPA 37.03.11.042.01.f).

76. Based on the results from the field inspection on May 30, 2003, described in Finding 72, no modifications to the existing facilities of Rim View Trout Company were identified that could increase the supply of water to Rim View during times that water right no. 36-07167 is not satisfied. (See IDAPA 37.03.11.042.01.g).

77. Based on the results from the field inspection on May 30, 2003, described in Finding 72, there are potentially feasible actions that could provide alternate reasonable means of diversion or alternate points of diversion to increase the supply of water to Rim View during times that water right no. 36-07167 is not satisfied. However, based on subsequent findings in this order it is not necessary to determine whether such alternatives should be pursued. (See IDAPA 37.03.11.042.01.h).

Factors Considered in Determining Material Injury To and Reasonableness of Water Diversions Under Water Right No. 36-07176 (White Springs Hatchery)

78. Because the Hardy Estate has not provided historical records of the amounts of water diverted under water right no. 36-07176 (see Findings 38 and 55), for which the authorized diversion rate is 38.8 cfs, the only records of the amounts of water diverted through the White Springs Hatchery facilities possessed by the Department are the annual reports submitted by the White Springs Hatchery for the time period beginning in March of 1995 through December of 2002 and the intermittent measurements made by the watermaster for Water District No. 130 in 2003.

79. Based on the annual reports submitted by the White Springs Hatchery for the years 1995 through 2002, the following table summarizes the minimum daily flow and average daily flow by month through the White Springs Hatchery facilities at the beginning and end of this time period:

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Month	Year	Minimum Daily Flow	Average Daily Flow
January	1996	28.3 cfs	28.9 cfs
	2002	28.0	28.8
February	1996	28.3	28.8
	2002	27.3	27.6
March	1995	27.3	27.8
	2002	26.4	27.2
April	1995	27.3	28.0
	2002	26.4	27.1
May	1995	29.6	30.4
	2002	27.0	28.7
June	1995	30.2	31.0
	2002	29.9	31.1
July	1995	31.6	32.0
	2002	31.2	31.7
August	1995	32.2	32.8
	2002	31.2	31.8
September	1995	33.2	33.7
	2002	30.9	31.0
October	1995	31.9	32.5
	2002	30.6	31.1
November	1995	29.9	31.3
	2002	29.6	30.2
December	1995	29.3	29.5
	2002	28.3	28.9

80. Comparing same-month minimum daily and average daily flows through the White Springs Hatchery facilities between years for the years shown above demonstrates that there has been some decrease in flows through the White Springs Hatchery facilities between 1995 and 2002. However, flow measurements for the other years between 1995 and 2002 not shown above demonstrates that flows through the White Springs Hatchery facilities generally increased after 1995 through 1997 but have generally decreased since, although there was generally some recovery in 2000 and 2001 in most months.

81. Thus far during 2003, the watermaster for Water District No. 130 has recorded the following measurements of flow through the White Springs Hatchery facilities:

Date	Measured Flow
05/30/2003	29.9* cfs
10/07/2003	29.9*

*Excludes $\leq$ 0.1 cfs diverted to settling ponds

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82. The flows through the White Springs Hatchery facilities measured by the watermaster in 2003 are similar to the measured flow rates in 2002.

83. Based on the historical flow measurements available to the Department and taking into account the variations in spring flows between months that have existed since the date of appropriation for water right no. 36-07176, the quantity of water available at the source for water right no. 36-07176 is currently insufficient to fill this right, even during months when the springs providing the source for this right are discharging at the highest flows during the year, generally August through October. (See IDAPA 37.03.11.042.01.a).

84. Based on documentation in the Department's files for water right no. 36-07176 and the results from a field inspection conducted on May 30, 2003, by the watermaster for Water District No. 130 and Brian Patton, a registered professional civil engineer, the Hardy Estate has expended reasonable efforts to divert water right no. 36-07176 from its source for use at the White Springs Hatchery. (See IDAPA 37.03.11.042.01.b).

85. Based on simulations using the Department's existing ground water model for the ESPA, the diversion and use of ground water under certain water rights having priority dates later than the priority date for water right no. 36-07176 (May 18, 1971) do affect the quantity and timing of when water is available from springs discharging in the Thousand Springs area. However, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by the diversion and use of ground water from individual wells or groups of wells. (See IDAPA 37.03.11.042.01.c).

86. Findings 79 and 81 demonstrate that the Hardy Estate is currently diverting and using surface water within the authorized diversion rate for water right no. 36-07176 (38.8 cfs). (See IDAPA 37.03.11.042.01.e)

87. Based on documentation in the Department's files for water right no. 36-07176 and the results from the field inspection on May 30, 2003, described in Finding 84, the White Springs Hatchery has adequate water measuring and recording devices. (See IDAPA 37.03.11.042.01.f).

88. Based on the results from the field inspection on May 30, 2003, described in Finding 84, no modifications to the existing White Springs Hatchery facilities were identified that could increase the supply of water to the White Springs Hatchery during times that water right no. 36-07176 is not satisfied. (See IDAPA 37.03.11.042.01.g).

89. Based on the results from the field inspection on May 30, 2003, described in Finding 84, there are potentially feasible actions that could provide alternate reasonable means of diversion or alternate points of diversion to increase the supply of water to the White Springs Hatchery during times that water right no. 36-07176 is not satisfied. However, based on subsequent findings in this order it is not necessary to determine whether such alternatives should be pursued. (See IDAPA 37.03.11.042.01.h).

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Adequacy of Mitigation Provided Pursuant to Stipulated Agreement

90. The 40,000 acre feet of replacement water to be provided each year by the holders of ground water rights party to the Stipulated Agreement referred to in Finding 11 was calculated using the Department's existing ground water model to simulate the effects of curtailing all diversions and use of ground water for irrigation that met criteria specified by the Director regarding quantity and time impacts on reach gains (spring discharges) in the Thousand Springs area. The quantity criteria specified by the Director was 50 percent and the time criteria specified by the Director was within 6 months; meaning that curtailment of a ground water right was included in the modeled simulations if at least 50 percent of the depletion to the ESPA that would have resulted from continued diversion and use of ground water under that right was determined from the ground water model to be included in the reach gains in the Thousand Springs area within six months of curtailment.

91. The 50 percent quantity and within 6 months time criteria specified by the Director addressed uncertainties in the modeled results to ensure that ground water rights were not identified to be curtailed unless curtailment would result in a usable amount of water reaching the points of diversion for senior priority rights in time of need. The Director determined that eliminating at least 50 percent of the ground water depletion causing reduced spring discharges within 6 months of curtailment would result in a usable amount of water reaching springs in the Thousand Springs area in time of need.

92. Only ground water diverted and used for irrigation purposes was included in the modeled curtailment simulation, because irrigation uses (including irrigation under municipal water rights and domestic uses) cause essentially all of the depletions to the ESPA. All irrigation uses of ground water, other than domestic and small residential lots, that met the 50 percent and 6 month criteria were included in the curtailment simulation, regardless of priority date, because all such water rights are junior in priority to one or both of the most senior priority water rights that were not satisfied during the 2001 irrigation season, water right no. 36-00018 with the priority date of September 10, 1884, and water right no. 36-00004 with the priority date of April 1, 1917.

93. The simulated 40,000 acre feet of increased reach gain that would result from curtailment of all ground water diversion and use under water rights for irrigation was modeled to accrue to the reach of the Thousand Springs area as a whole. The Department's existing ground water model for the ESPA cannot provide accurate simulations of the effects on individual springs in the Thousand Springs area from curtailing individual ground water rights or groups of ground water rights.

94. The Department's existing ground water model for the ESPA provides the best and most technically sound information that is currently available concerning the effects of ground water depletions on spring discharges in the Thousand Springs area. The new ground water model resulting from the reformulation and recalibration described in Finding 4 is expected to provide more detailed and reliable information concerning the effects of ground water

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depletions on spring discharges in the Thousand Springs area. The reformulation and recalibration for the new ground water model will not be completed until the end of 2003, and the new model is not expected to be ready for use in making water management decisions until at least the mid to latter part of 2004.

95. There currently is no other technical basis as accurate as the simulations from the Department's existing ground water model for the ESPA to determine the amount of replacement water required to offset the depletions causing reductions in spring discharges in the Thousand Springs area from the diversion and use of ground water that result in material injury to the rights to use water from sources provided by such spring discharges. There also is not currently a sufficient basis to determine that the amount of replacement water or mitigation required to offset such depletions is different than 40,000 acre feet each year.

96. Through the Director's approval of the Stipulated Agreement, the Director approved the amount of replacement water as being adequate mitigation to the Thousand Springs reach for the depletionary effects of ground water withdrawals for the two-year term of the agreement. By offseting the depletionary effects, any material injury potentially caused by out-of-priority diversion of ground water is adequately mitigated during the term of the Stipulated Agreement. The amount of replacement water or other mitigation required for continued out-of-priority diversion and use of ground water is subject to change after 2003, depending on hydrologic conditions and other additional information that will be available, and has not been determined.

97. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

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> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the respective priority of the rights and in accordance with applicable Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. See Idaho Code § 42-607.

4. The Department adopted Conjunctive Management Rules, effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

5. Rule 10 of the Conjunctive Management Rules contains the following pertinent definitions:

> **01. Area Having a Common Ground Water Supply.** A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. IDAPA 37.03.11.010.01.
>
> **03. Conjunctive Management.** Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply. IDAPA 37.03.11.010.03.
>
> **04. Delivery Call.** A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. IDAPA 37.03.11.010.04.

6. Rule 20 of the Conjunctive Management Rules contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

> **01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights.** The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water

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from ground water sources and areas having a common ground water supply. IDAPA 37.03.11.020.01.

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. IDAPA 37.03.11.020.02.

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. IDAPA 37.03.11.020.04.

7. Rule 40 of the Conjunctive Management Rules sets forth the following procedures to be followed for responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district. IDAPA 37.03.11.040.

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year period to lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in section 42-604, Idaho Code, and under the following procedures:

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

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b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions of the Watermaster under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

. . . .

8. Rule 42 of the Conjunctive Management Rules sets forth the factors the Director may consider in determining material injury and the reasonableness of water diversions:

01. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available in the source from which the water right is diverted.

b. The effort or expense of the holder of the water right to divert water from the source.

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c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

9. The Director created Water District No. 130 on February 19, 2002, and extended the boundaries of the district on January 8, 2003, to provide for the administration of ground water rights in the area overlying the ESPA in the Thousand Springs Area, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

10. The Director has appointed a watermaster for Water District No. 130 to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director. The Director has given specific directions to the watermaster for Water District No. 130 to curtail illegal diversions, measure and report diversions, enforce the provisions of the Stipulated Agreement, and curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

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11. The four letters received on May 14 and 16, 2003, by the Director from Kay Hardy in her capacity as President of Clear Lakes Trout Company, President of Fisheries Development Company, President of Rim View Trout Company, and General Partner in Hardy Properties LP and Personal Representative for the Estate of Earl M. Hardy, demanding that the watermasters for Water District No. 130, and Water District No. 36A in the case of Fisheries Development Company, be directed to administer water rights in the districts that may deplete the supply of water to the spring sources relied upon by the Hardy water rights are either delivery calls under Rule 10.04 of the Conjunctive Management Rules against junior priority ground water rights or demands for the administration of surface water rights pursuant to Idaho Code § 42-607.

12. Rule 40 of the Conjunctive Management Rules applies to the delivery calls made by Kay Hardy against the holders of junior priority ground water rights, but not surface water rights, in Water Districts No. 36A and No. 130.

13. Rules 40 and 42 of the Conjunctive Management Rules require the Director to make determinations regarding "material injury" and the "reasonableness of water diversions" in responding to a delivery call against junior priority ground water rights in Water District No. 130.

14. Rule 40.02.b of the Conjunctive Management Rules requires the watermaster of Water District No. 130 to "regulate the diversions and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director." IDAPA 37.03.11.040.02.b.

15. Rule 42.02 of the Conjunctive Management Rules provides that the holder of a senior priority surface water right is prevented from making a delivery call for curtailment of pumping of any well under a junior priority ground water right if the ground water right is covered by an approved and effectively operating mitigation plan. IDAPA 37.03.11.042.02. Based upon Findings 10 through 15, the Director concludes that the Stipulated Agreement constitutes "an approved and effectively operating mitigation plan" under Rule 42.02 of the Conjunctive Management Rules.

16. Clear Lakes Trout Company is not entitled to make a delivery call under water rights nos. 36-02659 and 36-07004, or water rights nos. 36-07080, 36-07725, 36-07731, and 36-08089, for distribution of water against the holders of junior priority ground water rights in Water District No. 130 until after December 31, 2003, because it is a party to the Stipulated Agreement described in Findings 10, 11, and 12, and because the mitigation required of ground water right holders under the Stipulated Agreement has either been provided for year 2002 or is being provided for year 2003. In addition, water right no. 36-08089, held by Fisheries Development Company for power generation purposes, is subordinate to all junior priority rights other than rights held for hydropower production, and therefore Fisheries Development is not entitled to seek distribution of water from junior priority rights except from other junior priority rights for hydropower production.

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17. Clear Lakes Trout Company is not entitled to have the weir in the Western Diversion Pool adjusted to allow it to divert a minimum of 66 cfs under water right no. 36-02659 from the Western Diversion Pool because adjustment of the weir is governed by separate watermaster instructions described in Finding 41. Litigation regarding these watermaster instructions is currently pending before the Fourth Judicial District Court in *Clear Lakes Trout Co. Inc. v. Idaho Dept. of Water Resources and Clear Springs Foods, Inc.*, Ada County Case No. CV OC 0304746D.

18. Clear Lakes Trout Company is entitled under rights nos. 36-07080, 36-07725, and 36-07731, for use by Fisheries Development Company, to demand distribution of water from holders of junior priority surface water rights; however, there currently are no junior priority surface water rights within Water Districts Nos. 36A and 130 that if curtailed would provide water to the prior rights of Fisheries Development.

19. The delivery call by Rim View Trout Company for distribution of water to water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167 is not recognized because based upon facility discharge measurements there has been a sufficient amount of water available to satisfy water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and although at times there has not been sufficient water to satisfy water right no. 36-07167, this is due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority rights. Currently there is adequate water available to fill this right. (See Findings 65 through 71).

20. The delivery call by the Hardy Estate for distribution of water to water right no. 36-07176 for use at the White Springs Hatchery is recognized. Although water available at the spring source is currently insufficient to fill this right, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by diversion and use of ground water from individual wells or groups of wells. However, the 40,000 acre feet per year of replacement water for the Thousand Springs reach is determined by the Director to be adequate mitigation for the entire Thousand Springs reach for the effects of ground water diversions from the ESPA for irrigation use proximate to the Thousand Springs area during the term of the Stipulated Agreement, which is "an approved and effectively operating mitigation plan" under Rule 42.02 of the Conjunctive Management Rules.

21. Although the Hardy Estate was not a signatory to the Stipulated Agreement, the Hardy Estate did have actual notice of the Stipulated Agreement because Kay Hardy, the Personal Representative for the Estate of Earl M. Hardy, signed the Stipulated Agreement in her capacity as President of the Clear Lakes Trout Company.

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ORDER

In response to the water delivery calls made by Kay Hardy in her capacity as President of Clear Lakes Trout Company, President of Fisheries Development Company, President of Rim View Trout Company, and General Partner in Hardy Properties LP and Personal Representative for the Estate of Earl M. Hardy, and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director orders as follows:

IT IS, THEREFORE, HEREBY ORDERED that based on the information and technical resources currently available to the Director, the watermasters for Water Districts No. 36A and No. 130 are directed to continue administering water rights within Water Districts No. 36A and No. 130, under the supervision of the Director, in the same manner that the rights are presently being administered in accordance with the provisions of Idaho Code §§ 42-602 and 42-607, applicable rules adopted pursuant to Idaho Code § 42-603, and the directions and orders of the Director.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Section 42-1701A(4), Idaho Code.

DATED this 10th day of October 2003.

KARL J. DREHER
Director

OCT 17 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2003, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

DANIEL V. STEENSON
CHARLES L. HONSINGER
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE, ID 83701-2773

KAY HARDY
CLEAR LAKES TROUT COMPANY
FISHERIES DEVELOPMENT COMPANY
RIM VIEW TROUT COMPANY
HARDY PROPERTIES LP
ESTATE OF EARL M. HARDY
1301 VISTA AVE
BOISE, ID 83705

MAGIC VALLEY GWD
1099 NORTH 400 WEST
RUPERT, ID 83350

NORTH SNAKE GWD
152 E. MAIN STREET
JEROME, ID 83338

FRANK ERWIN
WATER DISTRICT 36A
2628 SOUTH 975 EAST
HAGERMAN, ID 83332

CINDY YENTER
WATER DISTRICT 130
1341 FILLMORE ST STE 200
TWIN FALLS, ID 83301-3380

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

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OCT 27 2003

This case has been appealed to the District Court

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Karl

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A.M. _____ P.M. _____

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JUN 19 2003

Department of Water Resources

JUN 19 2003

J. DAVID NAVARRO, Clerk
By CHRISSY WARDLE
DEPUTY

Daniel V. Steenson (ISB#4332)
Charles L. Honsinger (ISB #5240)
S. Bryce Farris (ISB#5636)
Ringert Clark, Chartered
P.O. Box 2773
Boise, ID 83702
(208)342-4591

Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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.	CASE NO. CV OC 0304746D PETITION FOR JUDICIAL REVIEW/NOTICE OF APPEAL

COMES NOW the Petitioner, Clear Lakes Trout Company ("Clear Lakes"), by and through its undersigned attorneys of record, Ringert Clark Chartered, and respectfully petitions the Court for judicial review of the Final Order of the Idaho Department of Water Resources, dated June 13, 2003.

1. Clear Lakes hereby petitions the District Court of the Fourth Judicial District of Ada County, Idaho for judicial review of the Final Order of IDWR, dated June 13, 2003, from the Director, Karl J. Dreher.

2. This petition is submitted pursuant to the Idaho Administrative Procedures Act (IAPA) and Idaho Rule of Civil Procedure 84, et. seq.

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3. There was a hearing or oral presentation before the agency that was recorded or reported on March 17, 2003. IDWR is in possession of said recording or reporting.

4. Petitioner intends to assert the following issues on judicial review:

a. Whether IDWR erred in failing to enforce the Interim Stipulated Agreement as written.

b. Whether IDWR erred in denying Clear Lakes a hearing and/or continued litigation before IDWR regarding the issues raised in Clear Lakes' petition challenging the Director's instructions to the watermaster for Water District No. 130 following the dismissal of the Gooding County litigation with prejudice.

5. Pursuant to I.R.C.P. 84(d)(5), Petitioner reserves the right to assert additional issues for judicial review which become later discovered by Petitioner.

6. A transcript of the hearing or oral presentation before the agency on March 17, 2003 is requested.

7. Petitioner, by and through its undersigned attorneys, certifies:

a. That service of this Petition has been made upon the state agency or local government rendering said Final Order;

b. That the clerk of the agency has been paid the estimated fee for preparation of the transcript; and

c. That the clerk of the agency has been paid the estimated fee for the preparation of the record.

8. Pursuant to the IAPA and I.R.C.P. 84(m), Petitioner also requests a stay of the enforcement of the Final Order during the consideration of this petition for judicial review.

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Petitioner also requests an expedited hearing/oral argument because of the expiration of the Interim Stipulated Agreement on December 31, 2003.

DATED this 19th day of June, 2003.

RINGERT CLARK CHARTERED

Daniel V. Steenson
Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Karl J. Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

Phillip J. Rassier
Idaho Attorney General's Office
Idaho Department of Water Resources
1301 N. Orchard
P.O. Box 83720
Boise, Idaho 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

John K. Simpson, Esq.
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701-2139

☑ U.S. Mail ☐ Fax ☐ By Hand ☐ Overnight

S. Bryce Farris

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JUN 19 2003
DAVID NAVARRO, Clerk
By CHRISSY WARDLE
DEPUTY

Daniel V. Steenson (ISB#4332)
Charles L. Honsinger (ISB #5240)
S. Bryce Farris (ISB#5636)
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Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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.	CASE NO.: CV 0C 0304746D MOTION FOR STAY RELIEF AND MEMORANDUM IN SUPPORT

COMES NOW the Petitioner, Clear Lakes Trout Company ("Clear Lakes"), by and through its undersigned attorneys of record, Ringert Clark Chartered, and respectfully moves the Court to stay enforcement of the Final Order of the Idaho Department of Water Resources (IDWR), dated June 13, 2003, during the pendency of Clear Lakes' Petition for Judicial Review. This Motion is submitted pursuant to the Idaho Administrative Procedures Act (IAPA) and Idaho Rule of Civil Procedure 84, et. seq., and is supported by the Affidavit of Gregory Kaslo submitted concurrently herewith.

I. INTRODUCTION

Concurrent with this Motion, Clear Lakes filed a Petition for Judicial Review of the Final Order of IDWR dated June 13, 2003. The Final Order directs the Watermaster for Water District

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No. 130 to immediately conduct further administration and curtailment of Clear Lakes' water rights. *Final Order*, page 21. In fact, the Watermaster informed Clear Lakes on June 17, 2003 that she intends to curtail Clear Lakes' water upon further notice from the Director. *Affidavit of Gregory Kaslo*, ¶ 7. As set forth in the accompanying Affidavit of Gregory Kaslo, the immediate curtailment of Clear Lakes' water rights would cause damage to Clear Lakes. Thus, Clear Lakes is requesting a stay from this Court of any further curtailment of its water rights during the pendency of this action so that such damage does not occur.

II. ARGUMENT

Idaho Code § 67-5274 provides that:

> The filing of a petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the review court may order, a stay upon appropriate terms.

Idaho Rule of Procedure 84(m) provides substantially the same language and also permits the court to order a stay upon appropriate terms. In this matter, the appropriate terms requested are that the enforcement of the Director's Final Order be stayed until Clear Lakes' petition for judicial review is resolved. Clear Lakes is requesting an expedited hearing/oral argument concerning its petition for judicial review because the Interim Stipulated Agreement will expire on December 31, 2003. However, in the meantime, a stay is necessary to avoid damage to Clear Lakes' fish propagation facilities and its business operations.

As explained in the accompanying Affidavit of Gregory Kaslo, the enforcement of the Director's Final Order would detrimentally impact Clear Lakes' fish propagation facilities,

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financial condition and business. When the Watermaster curtailed Clear Lakes' diversion by 27 c.f.s. in June of 2002, it required Clear Lakes to remove 268,520 pounds of trout and idle approximately 17% of Clear Lakes' fish propagation facility. *Affidavit of Gregory Kaslo* ¶ 2. On June 17, 2003, the Watermaster informed Clear Lakes that the stay has been lifted and that she intends further curtail Clear Lakes' water upon further direction from the Director. *Affidavit of Gregory Kaslo*, ¶ 7. If the Watermaster does immediately curtails Clear Lakes' diversion again, (as she has indicted that she intends to do) Clear Lakes will again have to prematurely move, sell or destroy thousands of pounds of trout. *Affidavit of Gregory Kaslo* ¶ 4, 5 and 7. Thus, it is necessary for an immediate stay of such action by the Watermaster during the pendency of Clear Lakes' petition for judicial review.

Additionally, Clear Lakes' position is that the stay of the enforcement of the Final Order will not adversely impact any other water users, in particular, Clear Springs Food, Inc. (Clear Springs). It is unlikely that Clear Springs needs any additional water from the spring source that supplies Clear Lakes at this time. *Affidavit of Gregory Kaslo* ¶ 6. Moreover, there has been no showing by Clear Springs that it even needs any additional water. The Director has not required, nor has Clear Springs shown, that any curtailment of Clear Lakes' water is based upon the reasonable needs of Clear Springs. Thus, the necessity of enforcing the Final Order is unnecessary, and is definitely outweighed by the detrimental impact Clear Lakes will suffer if the Final Order is enforced.

III. CONCLUSION

For the above stated reasons, Clear Lakes respectfully requests this Court to order a stay of

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the enforcement of the Director's Final Order during the pendency of the Petition for Judicial Review.

Oral argument and/or a hearing regarding this motion is requested.

DATED this 16th day of June, 2003.

RINGERT CLARK CHARTERED

Daniel V. Steenson
Attorneys for Clear Lakes

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Karl J. Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

Phillip J. Rassier
Idaho Attorney General's Office
Idaho Department of Water Resources
1301 N. Orchard
P.O. Box 83720
Boise, Idaho 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

John K. Simpson, Esq.
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701-2139

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S. Bryce Farris

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Department of Water Resources

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J. DAVID NAVARRO, Clerk
By CHRISSY WARDLE
DEPUTY

Daniel V. Steenson (ISB#4332)
Charles L. Honsinger (ISB #5240)
S. Bryce Farris (ISB#5636)
Ringert Clark, Chartered
P.O. Box 2773
Boise, ID 83702
(208)342-4591

Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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.	CASE NO.: CV OC 0304746D AFFIDAVIT OF GREGORY KASLO

STATE OF IDAHO)
) ss
County of Ada)

1. I am vice-president of Clear Lakes Trout Company ("Clear Lakes"), the Petitioner in the above-entitled matter, and make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. Watermaster Cindy Yenter's June 19, 2002 "Notice of Intent to Redistribute Flows" advised us that she would reduce Clear Lakes' diversion by 27 c.f.s. in 14 days, on July 3, 2002. This required Clear Lakes to remove 268,520 pounds of trout from Clear Lakes' fish hatchery and idle approximately 17% of the hatchery.

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3. On July 5, 2002, Watermaster Yenter curtailed Clear Lakes' diversion as proposed in her June 19, 2002 Notice.

4. At the time of the July, 2002 curtailment of Clear Lakes' water rights, the stocking density for the hatchery was approximately 10,000 pounds of trout per c.f.s. This figure represents a minimum stocking density. This live inventory would have to be prematurely moved, sold or destroyed in the event of additional curtailments of Clear Lakes' water rights.

5. The Director's Final Order dated June 13, 2003, directs the watermaster "to immediately resume administration of the water rights subject to this proceeding in accordance with the watermaster instructions issued by the Director on June 13, 2002." The resumption of administration contemplated by the Director's Final Order would involve the further curtailment of Clear Lakes' water rights, and would cause Clear Lakes to prematurely move, sell or destroy thousands of pounds of trout. This would detrimentally impact Clear Lakes' business operations, financial condition and result in a loss of profits.

6. It is unlikely that Clear Springs Foods, Inc. (Clear Springs) needs additional water from the spring source that supplies Clear Lakes with water in order to produce additional fish at this time. Clear Lakes is aware of numerous other commercial operations for which production has remained static or declined. Clear Lakes had been informed that Clear Springs instituted a reduction at its trout rearing facilities last summer, at the very same time it made a call to curtail Clear Lakes' water rights. Clear Lakes is also aware that, beginning last December, Clear Springs has reduced processing fish at its processing facility from five days to four days per week.

7. Furthermore, on June 17, 2003, Watermaster C. Yenter visited Clear Lakes and informed us that she intended to take thirteen cubic feet per second (c.f.s) of water from our farm

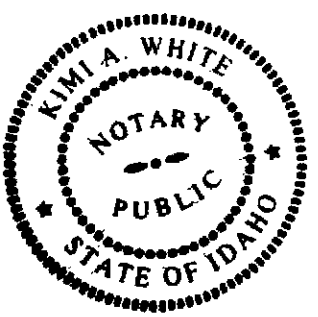
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because the stay had been lifted. She informed us that the "Notice to Redistribute Flows" would be issued immediately when so authorized by Director, Karl Dreher. This taking, or curtailment of water from Clear Lakes Trout Company, would force Clear Lakes to prematurely move or destroy approximately 130,000 pounds of trout and close four "A" raceways, two "B" raceways, one "C" raceway and three "D" raceways.

DATED this 11th day of June, 2003.

Gregory Kaslo, AIA

Sworn to and subscribed before me this 11th day of June, 2003



Notary Public for Idaho
Residing in Boise, Idaho
My commission expires: 7/10/07

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Karl J. Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

Phillip J. Rassier
Idaho Attorney General's Office
Idaho Department of Water Resources
1301 N. Orchard
P.O. Box 83720
Boise, Idaho 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

John K. Simpson, Esq.
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701-2139

☑ U.S. Mail ☐ Fax ☐ By Hand ☐ Overnight

Daniel V. Steenson

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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.	)	**FINAL ORDER**

INTRODUCTION

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "IDWR") following the issuance of a recommended decision and order by the IDWR Hearing Officer, D. Duff McKee. The action arises from a petition by Clear Lakes Trout Company ("Clear Lakes" or "Lakes") challenging the Director's instructions to the watermaster for Water District No. 130 for the distribution of water rights owned by petitioner Clear Lakes and the respondent Clear Springs Foods, Inc. ("Clear Springs" or "Springs"). The petition also challenges the water distribution actions taken by the watermaster pursuant to the Director's instructions. The Hearing Officer recommended that the Director enter an order dismissing Clear Lakes' petition.

A recommended order may become a final order only upon review of the agency head in accordance with Idaho Code § 67-5244. The agency head on review of a recommended decision exercises all the decision-making authority that he would have had if the agency head had presided over the hearing. Idaho Code § 67-5244.

The matter was heard on pending motions at the IDWR conference room in Boise on Friday, March 14, 2003. Clear Lakes appeared by company representatives and Daniel V. Steenson and Charles L. Honsinger of the law firm Ringert Clark Chartered. Clear Springs

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appeared by company representative and John K. Simpson and Travis L. Thompson of the law firm Barker Rosholt & Simpson LLP. The motions presented to the Hearing Officer 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.

The Hearing Officer determined that he had been provided with thorough and well-reasoned briefs from counsel on all potential issues involving all of the motions. He further determined that he was satisfied from the materials submitted by the parties through their counsel that there was no material fact in issue, and that the matter was appropriate for resolution by summary proceedings on motion rather than evidentiary proceeding, pursuant to Rule 413 of IDWR's Rules of Procedure. IDAPA 37.01.01.413.

Summary of Hearing Officer's Decision

The Hearing Officer recommended that the Director enter an order denying the motions advanced by Clear Lakes and grant the motion advanced by Clear Springs. The Hearing Officer recommended that the Director conclude that the orders contained in the instructions of the Director to the watermaster dated June 13, 2002, were and are: (1) consistent with the statutory authority of the Director; (2) consistent with the adjudicated water rights of the parties to this matter as determined by judicial decree of the Snake River Basin Adjudication ("SRBA") District Court and affirmed by the Idaho Supreme Court; and (3) consistent with the terms of the order of the Director adopting and interpreting the document referred to as the "Interim Stipulated Agreement." The Hearing Officer also recommended that the Director deny any interim stay of the instructions of the watermaster. Finally, the Hearing Officer recommended 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 Director's instructions to the watermaster.

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The Director has reviewed the recommended decision and order of the Hearing Officer. No exceptions were filed with the Director to the Hearing Officer's decision. The Director concurs with the factual and legal determinations made by the Hearing Officer and adopts the substance of the Hearing Officer's recommendations for order in this matter. The Director hereby enters a final order in this matter with the following findings of fact, analysis, conclusions of law, and order:

FINDINGS OF FACT

Prior Litigation between the Parties

1. 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, the parties began submitting applications for permits to appropriate water for fish propagation purposes from springs that flow from the canyon walls above the Snake River.

2. The parties entered into a private interim agreement in 1980 that allocated the water between them "until a legal determination is made or [further] agreement made regarding Permits Nos. 36-7004 and 36-2708." The agreed to allocation applied "in the event the water being produced by the Clear Lakes' springs, which is available to Lakes and Springs under their respective permits, goes below 375 cubic feet per second." The agreement provided that under such conditions 53 percent of the water would be allocated to Clear Springs and 47 percent to Clear Lakes. This agreement was clearly an interim agreement pending final determination of the rights of the parties, and notwithstanding the specific priority claims under their respective water rights. The parties operated under this agreement until the current dispute.

3. The parties became engaged in litigation between themselves before the SRBA District Court over the priority of water rights and the identification of water right sources.

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4. Matters began to come to a head in 1992 when IDWR filed its "Director's Report for Reporting Area 3" with the SRBA Court, recommending adjudication of priorities with respect to the material water rights from "springs tributary to Clear Lake(s)" as follows: Clear Lakes had the first priority right to draw 100 cubic feet per second ("cfs") from the springs serving the property;[1] Clear Springs had the second priority right to draw 200 cfs;[2] and Clear Lakes had the third priority right to draw 75 cfs.[3] Clear Springs had two more junior rights, one for 51.55 cfs,[4] and the other for 10 cfs.[5] The report was immediately challenged before the SRBA District Court.

5. After extended litigation between the parties, the IDWR Director's report was adopted by the SRBA Special Master, the SRBA District Court, and eventually by the Idaho Supreme Court in a decision released on January 18, 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, Clear Lakes the third 75 cfs, and Clear Springs the final 51.55 cfs, if available. The adjudication was a "legal determination" of the respective rights as set forth in the interim agreement the parties had entered into in 1980 and, as determined by the Director, marked the agreed upon event for termination of the water sharing portion of the 1980 agreement.

Creation of the Interim Stipulated Agreement

6. While the final stages of the litigation over the water rights and the priorities between Clear Springs and Clear Lakes was pending before the Idaho Supreme Court, another

[1] Water right no. 36-02659, priority date 06/23/1966.
[2] Water right no. 36-02708, priority date 09/28/1966.
[3] Water right no. 36-07004, priority date 07/21/1967.
[4] Water right no. 36-07218, priority date 01/24/1972.

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concern relating to the Eastern Snake River Plain Aquifer was being addressed by IDWR – a dwindling supply of water flowing from the springs fed by the aquifer. In August of 2001, the Director issued a notice that IDWR intended to curtail certain ground water users diverting on the plain above the canyon rim within the Thousand Springs Ground Water Management Area (GWMA) because there was insufficient ground water to provide a reasonably safe supply for irrigation or other uses in the basin at the then current rates of withdrawal as a result of the severe drought conditions that began in 2000 and continued through 2001.

7. This notice prompted ground water users and surface water users to negotiate an interim agreement pertaining generally to ground water users above the rim, known as the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement"). This agreement was signed by entities representing a number of ground water users on the plain, and a number of surface water users dependent upon waters discharged from the canyon springs, including both Clear Springs and Clear Lakes.

8. Under the Interim Stipulated Agreement, the ground water users agreed to provide up to 40,000 acre feet of water per year to enhance the flows in the Thousand Springs reach until a more reliable evaluation of the impacts of ground water use on generally senior priority surface water rights dependent on spring discharges could be completed by December of 2003, using a reformulated and recalibrated ground water model. A major section of this agreement consisted of the agreements among ground water users for pooling of and payment for the water to provide the required 40,000 acre feet of replacement water.

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[5] Water right no. 36-07201, priority date 08/04/1971. This right as decreed is administered as being from a source separate from the other four rights and is therefore not affected by the instant dispute.

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9. 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 2.7[6] 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 2.7,[7] of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

10. 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.

The Director's Orders Following the Interim Stipulated Agreement

11. The Director entered two orders shortly following the execution of the Interim Stipulated Agreement: an order approving the agreement; and an order creating a new water district to administer the water rights in the area of concern to the agreement.

12. The Director entered the 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:[8]

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[6] These 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 of the Snake River.

[7] Section 2.7 of the Stipulated Agreement provides for the alternative of acreage reduction in the event some or all of the 40,000 acre feet of replacement water is not available.

[8] 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."

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> 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.

13. 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 the "holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction . . . of any junior water rights held by or represented 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.

14. In other provisions of the referenced order, the Director concluded that with the Interim Stipulated Agreement in place, further curtailment of ground water in the Thousand Springs GWMA 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, was necessary to protect the water supply available to satisfy senior priority surface water rights diverting from the springs or otherwise dependent on spring discharges.

15. The Director ordered that the watermaster for the new water district shall have the authority to, among other things, curtail out-of-priority diversions not covered by the Interim Stipulated Agreement.[9] No party questioned the Director's reading of the "safe harbor" provision of the agreement and this order was not challenged by any party in any administrative proceeding before the Director under the IDAPA.[10]

---

[9] *Op. Cit.*, Conclusions of Law 4, 5 and 6.

[10] 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.

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16. On February 19, 2002, a "Final Order Creating Water District No. 130" was issued 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.[11]

17. 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."[12] Again, no party questioned how the Director construed the "safe harbor" provision from the Interim Stipulated Agreement. This order was not challenged by any party in any administrative proceeding before the Director, or before the district court on judicial review, under the IDAPA.

The Director's Instructions to the Watermaster

18. Following the creation of Water District No. 130, Clear Springs inquired of the Director how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call. After having met with both entities on site on April 2, 2002, the Director by letter dated April 11, 2002, asked each entity to provide any additional information believed to be pertinent in developing the watermaster instructions for administering the rights. Both entities submitted responding information to the Director on May 2, 2002. Clear Lakes

[11] 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."

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later supplemented the information it supplied. At no time during this information gathering process did Clear Lakes provide information to the Director asserting its broad interpretation of the "safe harbor" provision in the Interim Stipulated Agreement.

19. On June 5, 2002, the Director issued a departmental memorandum to the watermaster of Water District No. 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 Clear Lakes, and consideration of matters raised in informal correspondence from the parties, the Director issued a departmental memorandum with an amended set of instructions.

20. The instructions are detailed and technical, but as is relevant to the instant proceeding, they provided that the watermaster was to adjust the 6-ft adjustable weir at the so-called "Western Pool" to allocate the waters available in accordance with the priorities between Clear Lakes and Clear Springs as adjudicated in the SRBA litigation.

21. 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 this meeting and confirming the Director's agreement to review the watermaster's instructions in light of Clear Lakes' objections.

22. In this review, the Director agreed to take into consideration certain documents and actions. Of note is that the first set of instructions, 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 asked to consider, as set forth in his letter of June 10, involved either the parties 1980 interim agreement, or motions, briefs, and orders

[12] *Op. Cit.*, Conclusion of Law 10(d).

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entered in the SRBA litigation. Because no party raised it, 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, and in particular no mention was made of the "safe harbor" provision.

23. Following the review as requested by Clear Lakes, the Director issued 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 five additional pages were added to the instructions to the watermaster following the review of the materials requested, the Director's previous conclusions regarding how the water rights should be administered remained unchanged.

24. On June 19, 2002, the watermaster of Water District No. 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 the 6-ft adjustable weir at the "Western Pool" 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).

25. On July 3, Clear Lakes requested the Director to delay the redistribution of flows to give Clear Lakes a full 15 days to decide whether to request a hearing before IDWR. Clear Lakes did not file a petition with the IDWR to contest the watermaster's notice by administrative action within the time mandated by the notice. At no point in this extended process did Clear Lakes suggest that Clear Springs was precluded by the "safe harbor" provisions of the Interim Stipulated Agreement from making a call against Clear Lakes for distribution of water under its senior water right.

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26. On July 5, 2002, the watermaster adjusted the 6-ft adjustable weir at the "Western Pool" 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.

The Gooding County District Court Litigation

27. 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 filed, Clear Springs moved and was granted permission to intervene as an additional party defendant. Clear Springs' motion to intervene was granted on July 2, 2002.

28. There is no dispute that the gravamen of this lawsuit was a challenge to the watermaster's notice of intent to regulate flows based in part on Clear Lakes' position that the Director had no authority to instruct the watermaster to curtail Clear Lakes' water rights.

29. Clear Lakes sought a preliminary injunction against IDWR to enjoin the curtailment of its water, which was denied by the court on July 2, 2002.

30. 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 specifically provided that the lawsuit would be dismissed *with prejudice*. The stipulation for dismissal contained the following language:

> 2. Upon the Court's approval of this Stipulation for Dismissal, the Court may order the above-captioned action dismissed with prejudice, each of the parties hereto to bear its own costs and attorney fees.
>
> 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

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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.

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

32. 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 the IDWR. 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

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in that agreement is not ambiguous, and that the Director is obligated to enforce it according to its terms. This argument is flawed.

Neither the Director nor 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. The Hearing Officer disagreed with this argument and the Director concurs with the Hearing Officer.

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The Hearing Officer agreed that the Director under his authorities 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 the Director determined such action to be appropriate and consistent with his statutory duties. 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 that IDWR entered in this case that the Director did not accept the breadth of the "safe harbor" clause in the Interim Stipulated Agreement as is now argued for by Clear Lakes. No party to the agreement timely raised an objection to the Director's more narrow reading of the "safe harbor" provision. 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. The early order was interlocutory but the second order was clearly final. There was no appeal or action to seek review of this order.

Had the broad reading of the "safe harbor" provision been brought to the attention of the Director by Clear Lakes or another party to the Interim Stipulated Agreement, it is likely that the Director would have rejected such a broad application of the "safe harbor" provision on public policy grounds. The Director has the statutory authority and duty to regulate water use in accordance with Idaho law and the prior appropriation doctrine. The Director determined that approval of the Interim Stipulated Agreement as between surface and ground water users would be consistent with controlling principles of law because of the enforcement provisions in the agreement applicable to ground water users.

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Clear Lakes' invitation to the Director to read the "safe harbor' provision as protection for junior surface water right holders from a call by other senior surface right holders is in reality an invitation to disorder. Under Clear Lakes' reading of the provision, senior surface right holders give up the legal right to "seek either judicially or administratively" the curtailment or reduction of more junior surface water rights under which the state has authorized water to be diverted. As should be readily apparent, implementation of this interpretation would allow Clear Springs the option of diverting up to 251.55 cfs from the "Western Pool" (200 cfs under water right no. 36-02708 and 51.55 cfs under water right no. 36-07218). Clear Lakes would be precluded from making a priority call for distribution of water to its senior priority right, water right no. 36-02659.

The effect upon Clear Lakes and Clear Springs of such a water allocation scheme would be unfavorable to Clear Lakes. Under current spring discharge conditions and application of Clear Lakes' reading of the "safe harbor" provision, Clear Springs could receive from 20 cfs to 35 cfs, more or less, of additional water supply from the "Western Pool" and Clear Lakes could receive approximately 20 cfs to 35 cfs less water supply, being limited to only the supply of water available to it from the so-called "Eastern Pool." This would be true only because Clear Lakes would have given up its right to rely upon the more senior priority dates of its two water rights from the same source. Such a perversion of the priority doctrine perhaps could be avoided if the parties were to engage in various types of self-help to protect their rights in the absence of available recourse to judicial or administrative relief. Leaving the parties with no avenue for relief other than self-help does not comport with sound public policy and it is therefore unlikely that the Director would have approved the broad reading of the "safe harbor" provision even if it had been timely brought to his attention.

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Clear Lakes argues that the Director is committed to enforce the Interim Stipulated Agreement by the terms of the order entered February 19, 2002, creating the new water district. 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 added].

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" provision, 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, in accordance with the qualifications and limitations he imposed, in accordance with his obligations under state law. It is clear under the law that the Director has the authority to do just that.

Clear Springs argues that the proper examination in this proceeding is 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). The Hearing Officer agreed with this standard of analysis and the Director concurs.

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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. The decision does not turn on contract principles but on the authority of the Director to approve those provisions of the Interim Stipulated Agreement that were to be incorporated into the Director's administrative orders.

The Director had the authority to limit 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. The impact of the notice in August 2001, was to advise that, unless the water users came up with an agreement, the Director 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, was the ground water users from the aquifer on the plain above the rim.

The issues related to allocation of water 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 on January 18, 2002, one day after the Interim Stipulated Agreement was signed by Clear Lakes. 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" provision beyond the target group of water users in danger of curtailment by

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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, as the Hearing Officer concluded, 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.[13]

[13] *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).

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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. In this case, the trial judge 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 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 based upon some significant change in circumstances. It perhaps also could 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 the authority of the watermaster under the instructions from the Director, or into the Director's authority is barred by the doctrine of *res judicata.*

CONCLUSIONS OF LAW

1. The Director had authority to exercise reasonable discretion in approving the provisions of the Interim Stipulated Agreement. The Director was not obligated or bound by the stipulated agreement as to parts not approved in the January 18, 2002, Order Approving Interim Stipulated Agreement, and incorporated into the February 19, 2002, Order Creating Water District No. 130.

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2. Notwithstanding the lawful discretion of the Director in approving the provisions of the Interim Stipulated Agreement, the Director in fact construed the "safe harbor" provision of the agreement as extending only to the holders of ground water rights covered by the agreement.

3. The February 19, 2002, Order Creating Water District No. 130 sets forth the "safe harbor" provision from the Interim Stipulated Agreement as recognized by the Director.

4. The Director did not recognize or incorporate a broad interpretation of the "safe harbor" provision extending the protection to junior surface water right holders. By the plain reading of the order, the Director extended the safe harbor provision only to junior ground water right holders.

5. The dispute between Clear Springs and Clear Lakes over the water allocation between their respective rights in this case was not within the reach of the Director's order of February 19, 2002, notwithstanding the potential for a broad application of the language of the Interim Stipulated Agreement.

6. 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.*

7. Clear Lakes is prevented from raising the issue of the Director's or the watermaster's authority in this proceeding, and Clear Lakes also is prevented from separately attempting to enforce the Interim Stipulated Agreement in this proceeding against Clear Springs.

8. These issues came within the admitted gravamen of the Gooding County district court litigation, and were resolved by the dismissal with prejudice.

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9. Clear Lakes is not precluded by the doctrine of *res judicata* from initiating a contested case before IDWR in the future, as contemplated by the stipulation for dismissal before the district court, seeking review and modification of IDWR's watermaster instructions based upon a significant change inapplicable circumstances.

ORDER

IT IS, THEREFORE, HEREBY ORDER as follows:

1. The motion for summary judgment filed by Clear Lakes is DENIED.

2. The motion to dismiss filed by Clear Springs is GRANTED.

3. The motion filed by Clear Lakes for stay of the watermaster's activities is DENIED, effective with the date of this order.

4. The Watermaster for Water District No. 130 is directed to immediately resume administration of the water rights subject to this proceeding in accordance with the watermaster instructions issued by the Director on June 13, 2002.

Dated this 13th day of June, 2003.

KARL J. DREHER
Director

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
Ringert Clark Chartered
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Victoria Wigle
Assistant to the Director

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Department of Water Resources

RINGERT CLARK CHARTERED
FAX COVER LETTER

From: Daniel V. Steenson
Charles L. Honsinger
S. Bryce Farris
455 South Third Street
Boise, Idaho 83702
ph: (208) 342-4591
fax: (208) 342-4657

Time: Date: **June 10, 2003**

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: **Karl Dreher, Director**

WITH: **Idaho Department of Water Resources**

CITY & STATE: **Boise, Idaho**

TELEPHONE NO.: **(208)**

FAX. NO.: **(208) 327-7866**

SENDER: **Daniel V. Steenson**

WE ARE TRANSMITTING 2 PAGES (INCLUDING THIS COVER LETTER)

ADDITIONAL INFORMATION:

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Dayo E. Burt
Jeffrey R. Christenson
D. Blair Clark
Michael J. Doohle
S. Bryce Farris
Patrick D. Furey
David Hemmingway
Charles L. Honsinger
Joseph B. Jones
Janice P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney
Samuel Kaufman (1921-1986)

June 10, 2003

BY FACSIMILE AND MAIL

Karl Dreher
Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237
FAX: (208)327-7866

Re: Issuance of Final Order In the Matter of the Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 02708, 36-07004, 36-7201 and 36-07218, and Notice of Intent to Redistribute Flows

Dear Mr. Dreher:

No party to the above-referenced proceeding filed exceptions to the Hearing Officer's May 19, 2003 decision denying Clear Lakes' Petition for Reconsideration of the Hearing Officer's April 13, 2003 Decision and Recommendation for Order. Idaho Code section 67-5246(2) requires that you issue a final order following review of the Hearing Officer's recommended order. Your May 19, 2003 letter to Ms. Kay Hardy, President of Clear Lakes Trout Company, reiterates the Hearing Officer's decision that "IDWR enforced the [Interim Stipulated Agreement for Areas Within and Near Basin 36] as approved by 'Order Approving Stipulated Agreements' dated January 18, 2002, and will continue such enforcement through December 31, 2003." It is clear from this statement that you have adopted the Hearing Officer's decision. Please issue your final order immediately, so that Clear Lakes will have a meaningful opportunity to pursue an appeal prior to the expiration of the Interim Stipulated Agreement.

Sincerely,

Daniel V. Steenson

cc: Clear Lakes Trout Company

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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

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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 property[1]; Clear Springs was to hold the second priority right to draw 200 cfs[2]; 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.

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priority right to draw 75 cfs[3]. (Clear Springs was to hold two additional but junior rights to draw an additional 61.55 cfs[4], 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.

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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 2.7[5]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 2.7[6], 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

[5]These 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.

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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."

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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 IDAPA[9]

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).

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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

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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

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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.

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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

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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.

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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).

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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 for 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

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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

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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.

D. Duff McKee, Hearing Officer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
Ringert Clark Chartered
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Barker Rosholt & Simpson, LLP
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Boise, Idaho 83701-2139

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, Idaho 83301

Victoria Wigle
Administrative Assistant to the Director

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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

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

AMENDED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-02659

2002 APR 22 PM 4:12

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within Gooding County
LOT 05 (SESENE)
LOT 05 (SWSENE)

THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S 1/2 SESWNE AND THE S 1/2 SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL" LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURSE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	100.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

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SCANNED
APR 23 2002

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MAY 10 2000

Department of Water Resources

2000 MAY -9 PM 1:09

FILED

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 Nos. 36-07004 & 36-02659**
	)	**(Clear Lakes Trout Co., Inc.)**
Case No. 39576	)	
	)	**ORDER VACATING PARTIAL**
	)	**DECREES AND RECOMMITTING**
	)	**SUBCASES TO SPECIAL MASTER**
	)	**DOLAN**

PROCEDURAL BACKGROUND

1. On April 10, 2000, a ***Partial Decree*** was entered in each of the above-entitled subcases. The partial decrees were entered following this Court's ruling on a challenge filed in the above-captioned subcases on issues of "facility volume" and "additional evidence." *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcase no. 36-02708 *et al.* (Dec. 29, 1999).

2. Following entry of the partial decrees, it came to the Court's attention that previously on August 19, 1998, Special Master Dolan issued an order staying pending motions to alter or amend filed in the above-captioned subcases on the issues of "conjunctive management" and "points of diversion." *See Order Vacating Status Conference and Temporarily Staying Subcases*, subcase nos. 36-02659, 36-07004, 36-07080, 36-07731 (Aug. 19, 1998). The issues were stayed pending the issuance of the Special Master's Report in subcases 36-02708 and 36-07218 consisting of claims filed by Clear Springs Foods, Inc., pending before Special Master Haemmerle and which involved overlapping issues. Although, the issue of conjunctive management is proceeding as a

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basin-wide issue, the issues regarding "points of diversion" in the above-captioned subcases have not yet been heard by Special Master Dolan.

3. On April 24, 2000, claimant, Clear Lakes Trout Co., Inc., filed a *Motion to Stay Partial Decrees*, also bringing to the Court's attention that the pending motion had not been heard or otherwise resolved. On May 8, 2000, Clear Lakes Trout Co., Inc., also filed a supporting brief explaining the procedure of the two subcases.

4. Accordingly, the partial decrees entered in the above-captioned subcases were issued in error.

ORDER

Therefore; IT IS HEREBY ORDERED for the reasons set forth above, that the ***Partial Decree*** entered in subcase 36-07004 on April 10, 2000, and the ***Partial Decree*** entered in subcase 36-02659 on April 10, 2000, are hereby **vacated**.

IT IS FURTHER HEREBY ORDERED that the two subcases are recommitted to Special Master Dolan for further proceedings consistent with this Order.

IT IS SO ORDERED.

DATED: May 9, 2000.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **ORDER VACATING PARTIAL DECREES AND RECOMMITTING SUBCASES TO SPECIAL MASTER DOLAN** were mailed on May 9, 2000, to the following:

Idaho Department of Water Resources
Document Depository
PO Box 83720
Boise, ID 83720-0098

United States, Department of Justice
Environment & Natural Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Daniel Steenson
Charlie Honsinger
Ringert Clark Chtd
PO Box 2773
Boise, ID 83701-2773

Norman Semanko
Rosholt Robertson & Tucker
PO Box 1906
Twin Falls, ID 83303

Josephine Beeman
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Deputy Clerk of the Court

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Department of Water Resources

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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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	)	**ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 & 36-02659**
	)	
Case No. 39576	)	
	)	

I.
PROCEDURAL BACKGROUND

A ***Special Master's Report and Recommendation*** was filed on March 3, 1998, in the above captioned subcases. On April 28, 1998, a *Motion to Alter or Amend* was filed on the issue of facility volume. Claimant Clear Lakes Trout Company, Inc. ("Clear Lakes"), filed a *Motion to Alter or Amend* on May 8, 1998, regarding the issues of General Provision 5 and points of diversion.

On December 29, 1999, the SRBA District Court issued a decision on ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***. Partial decrees were issued in the above-captioned subcases but were subsequently rescinded because of the remaining *Motion to Alter or Amend* filed by Clear Lakes. Clear Lakes was the only remaining party to the subcase.

On April 15, 2002, the Special Master issued an ***Amended Order Granting in Part Clear Lakes Motion to Alter or Amend and Second Amended Special Masters Report***.

On April 16, 2002, Clear Lakes filed a *Motion to Expedite Issuance of Partial Decrees* seeking to have the partial decrees issued on an expedited basis to have the partial decrees issued prior to the organizational meeting for a water district affecting the subject rights. In furtherance of the *Motion* Clear Lakes waived its right to file a Notice of Challenge.

On April 22, 2002, a hearing was held on the *Motion* to determine whether the remark contained in the point of diversion element regarding the source for the water rights was consistent with the holding in subcases 36-02708 and 36-07218 involving water rights owned by Clear Springs Food, Inc. ("Clear Springs"). In subcases 36-02708 and 36-07218 the SRBA

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District Court held, and the Idaho Supreme Court affirmed, that the above–captioned claims and Clear Springs' water rights 36-02708 and 36-07218 shared a common source for purposes of administration. At the hearing, the Court inquired of a representative of the Idaho Department of Water Resources, as the Court's independent expert, whether based on the existing conditions of the diversion works, the remark regarding point of diversion and source is consistent with the holding regarding Clear Springs' water rights.

II.

FINDINGS

THEREFORE, based on the foregoing, the Court makes the following findings:

1. That Clear Lakes is the only party to subcases 36-02004 and 36-02659.

2. That because a ***Special Master's Report and Recommendation*** was previously issued further parties are precluded from entering the subcases by filing a *Motion to Alter or Amend* to the April 15, 2002, *Amended Recommendation*. ***SRBA AO1 Rules of Procedure*** § 13 b. ("no second Motion to Alter or Amend may be filed on the decision granting or denying a Motion to Alter or Amend").

3. That Clear Lakes has waived its right to file a Challenge in the above-captioned subcases.

4. That the partial decrees herein issued are not inconsistent with this Court's prior holding in subcases 36-02708 and 36-07218.

5. That pursuant to I.R.C.P. 53(e)(2) and ***AO1***, § 13 f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

III.

ORDER

Therefore, IT IS ORDERED that water rights 36-07004 and 36-02659 are hereby decreed as set forth in the attached ***Amended Partial Decrees*** Pursuant to I.R.C.P. 54(b).

DATED 4-22-02

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 AND 36-02659** was mailed on 4/22/02 with sufficient first-class postage to the following:

Clear Lakes Trout
Represented by:
William F Ringert
PO Box 105
Hammett, ID 83627

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Robbin Blatz
Deputy Clerk

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Department of Water Resources

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TWIN FALLS CO., IDAHO
FILED

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)	**ORDER OF PARTIAL DECREE**
)	
Case No. 39576)	**For Water Right 36-02659**
)	

The Notice of Challenge filed in the above subcase having been heard and ruled upon, IT IS THEREFORE ORDERED that water right 36-02659 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

IT IS SO ORDERED.

DATED APR 10 2000.

B Wood

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

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Department of Water Resources

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

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In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 36-02659

NAME & ADDRESS: CLEAR LAKES TROUT CO INC
1301 VISTA AVE
BOISE ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

USE OF THIS RIGHT AND RIGHT NO. 36-07004 IS LIMITED TO THE TOTAL COMBINED RATE OF DIVERSION OF 175 CFS.

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within GOODING County
LOT 5 (SWSENE)
LOT 5 (SESENE)

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	100.00 CFS

PLACE OF USE: FISH PROPAGATION Within GOODING County
T09S R14E S02 Lot 5 (SENE) Lot 6 (NESE) Lot 8 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

B/wood

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

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DEC 17 2003

Gibson, Deborah

From: Yenter, Cindy (Hodges)
Sent: Monday, June 16, 2003 11:31 AM
To: Gibson, Deborah
Cc: Baldwin, Mary
Subject: FW: Can you have someone pull your copy of the Clear Springs/Clear Lakes file and ...

Debbie:
The Clear Springs Response, and also affidavits of John Simpson and Larry Cope, all dated March 3, 2003, were received in this office on March 4. There was also a second affidavit of Simpson, dated March 13 and in support of a both a Motion to Strike Affidavits of Kay Hardy and Gregory Kaslo and a Response to Clear Lakes' Motion to Strike the Affidavit of Larry Cope. These were received March 17. Did you receive those?

Cindy

-----Original Message-----
From: Baldwin, Mary
Sent: Monday, June 16, 2003 9:49 AM
To: Yenter, Cindy (Hodges)
Subject: FW: Can you have someone pull your copy of the Clear Springs/Clear Lakes file and ...

Sorry I didn't catch you before you went to the field but perhaps you can respond to this e-mail since Allen says you have the file. Thanks!!!

-----Original Message-----
From: Gibson, Deborah
Sent: Monday, June 16, 2003 8:02 AM
To: Baldwin, Mary
Subject: Can you have someone pull your copy of the Clear Springs/Clear Lakes file and ...

I need the date your office received the Clear Spring's Response to Clear Lakes Motion for Stay and Motion for Summary Judgment, and Motion to Dismiss Petition, it should be approximately March 3rd or 4th, 2003. Also check the date on the Affidavit of John Simpson in support of this document, to be sure it was received on the same day. The SO didn't get a copy or original of these documents, and John Simpson's office has supplied them, and I would like to use the day you received them.

Thanks for your help. Call me at 327-7953 if you have any questions, and need to talk to me.

Debbie Gibson

Inter office Memo
establishing
dates Clear Springs
Response & Affidavits
were received.
dg

FOLDER 2

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-07201, AND 36-7218 IN WATER DISTRICT NO. 130.	)	**RECOMMENDED ORDER**

On August 15, 2003, Clear Lakes Trout Company ("Clear Lakes") filed a Petition to Initiate Contested Case requesting a review of actions taken by the watermaster for Water District 130 to distribute water between Clear Lakes and Clear Springs Foods, Inc. ("Clear Springs"). A hearing was held on January 7, 2004, on pending motions. The motions presented included a motion to dismiss pursuant to I.R.C.P. 12(b)(6) and 12(b)(8) filed by Clear Springs and a motion to limit and delay the hearing officer's request for staff memorandum filed by Clear Lakes. Clear Lakes was represented by Charles L. Honsinger. Clear Springs was represented by Travis L. Thompson.

FACTS AND PROCEDURAL HISTORY

1. Clear Springs and Clear Lakes operate fish hatcheries on adjacent parcels below the rim of the Snake River canyon near Buhl, Idaho, and hold various water rights to the springs that flow from the canyon wall in the Thousand Springs reach of the Snake River. The Snake

River Basin Adjudication ("SRBA") District Court issued partial decrees for the parties' rights as follows: Clear Lakes with the first priority right to divert 100 cubic feet per second ("cfs") (36-02659); Clear Springs with the second priority right to divert 200 cfs (36-02708); Clear Lakes with the third priority right to divert 75 cfs (36-07004); and Clear Springs with a more junior right to divert 51.55 cfs, if available (36-07218).[1] Those decrees were adopted by the Idaho Supreme Court in Clear Springs Foods, Inc. v. Clear Lakes Trout Co., 136 Idaho 761, 40 P.3rd 119 (2002).

2. The water rights are administered together from a common source, but through two pools, known as the western and eastern pools, formed from discharges from numerous springs in the Snake River canyon. Clear Lakes' first priority right is diverted from both the western and eastern pools. Clear Springs' second priority right is diverted from the western pool. Clear Lakes' third priority right is diverted from the eastern pool.

3. In the SRBA proceedings and before the Idaho Supreme Court, Clear Lakes challenged the source and point of diversion elements claimed by Clear Springs, arguing that the western and eastern pools were different sources of water. Both the district court and the Idaho Supreme Court disagreed and held, *inter alia*, that the water rights of the parties delivered through the western and eastern pools derive from one source. Clear Springs Foods, Inc. v. Clear Lakes Trout Company, Inc., 136 Idaho at 76.

4. In February 2002, the Director of the Idaho Department of Water Resources ("Director") created Water District No. 130 for the purpose of administering all water rights located within the district, including Clear Lakes' and Clear Springs' rights. The *Final Order Creating Water District No. 130* authorizes the watermaster for the district to "[c]urtail

[1] Water right no. 36-07201 as decreed is administered as being from a source separate from the other four rights and is therefore not relevant to this proceeding.

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."

5. On June 5, 2002, the Director issued watermaster instructions for the distribution of Clear Lakes' and Clear Springs' water rights. In response to Clear Lakes' concerns, the Director temporarily suspended the instructions and after additional review, issued amended watermaster instructions in a memorandum dated June 13, 2002 ("Instructions"). That memorandum states, in relevant part:

> [W]hen the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. ... [A]djustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.
>
> The full amount of water under the most senior right, Clear Lakes' right 36-02659, must be available for that right. When Clear Springs' water right 36-02708 is also in priority, this requires that more of the water diverted under Clear Lakes' right 36-02659 be diverted from the eastern diversion pool than has historically been the case when spring flows fell below 375 cfs. ... [A]bsent a basis for Clear Lakes being able to rely on diverting a specific portion of the water under its senior right 36-02659 from the western diversion pool, there is no injury to Clear Lakes' senior right 36-02659 so long as the right is fully satisfied and the extent of beneficial use made under right 36-02659 is not diminished. ...
>
> ....
>
> ... [T]here is no known legal basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004. ...

> ... [W]hen the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights in priority as being from a single source. ... For the purpose of administering these water rights, the eastern and western diversion pools are inextricably linked to the springs whose discharge is collected in the pools. [These water rights] must not be administered ... as though the rights were from separate sources.

The Instructions further state:

> 7. The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.
>
> ....
>
> 9. If the total flow is less than 375 cfs (± 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.

(Footnotes omitted.)

6. On June 19, 2002, the watermaster of Water District 130 issued a notice of intent to redistribute flows to Clear Lakes and Clear Springs. By this notice, the watermaster advised the parties that, pursuant to the Instructions, she was going to adjust the 6-ft adjustable weir at the western pool to redistribute the flow of water between the two entities on July 3, 2002.

7. On June 20, 2002, Clear Lakes filed a lawsuit in the District Court of the Fifth Judicial District, in Gooding County, naming the Idaho Department of Water Resources ("IDWR"), the Director, and the watermaster as defendants and challenging the Instructions.

Clear Springs moved and was granted permission to intervene as a party defendant. IDWR filed a motion for summary judgment and Clear Springs filed a motion to dismiss. Before the motions were heard, Clear Lakes and IDWR entered into a stipulation for dismissal of the action, with prejudice.

8. Subsequently, Clear Lakes filed a petition for contested case with IDWR. Clear Springs filed a motion to dismiss on grounds that the action before the district court had been dismissed with prejudice and therefore, continued litigation on the Instructions by administrative proceeding was foreclosed by the district court order of dismissal with prejudice. The hearing officer recommended that the petition be dismissed, which recommendation the Director adopted by a final order issued on June 13, 2003. Clear Lakes then appealed the Director's decision and filed a petition for judicial review with the District Court in Ada County. The judicial review proceeding is still pending.

9. In addition to issuing a final order in the contested case proceeding, the Director ordered the watermaster to resume administration of Clear Springs' and Clear Lakes' water rights. In response to the watermaster's June 20, 2003, notice that she intended to resume administration of the parties' water rights, Clear Lakes filed a petition with the Department challenging the intended distribution. On July 3, 2003, the Director issued an order denying the petition, the request for expedited hearing, and request for stay. That order was based on the Director's conclusion that Clear Lakes' petition did not allege any factual or legal issues that had not previously been raised in prior proceedings.

10. Following the denial of Clear Lakes' petition, Clear Springs asked for redistribution of flows to distribute 200 cfs under water right 36-02708 and the watermaster notified both parties that she would make the necessary adjustments and redistribute flows on

July 23, 2003.

11. On June 20, 2003, the watermaster notified Clear Lakes and Clear Springs that the distribution of Clear Lakes' junior water right 36-07004 would be reduced by approximately 14 cfs to fill the more senior Clear Springs' right 36-02708 by adjusting the 6 ft weir to reduce Clear Lakes' diversion of water right 36-02659 from the western pool. Reducing Clear Lakes' diversion of its senior right 36-02659 from the western pool requires Clear Lakes to divert more water from the eastern pool under right 36-02659, thereby reducing the amount that can be diverted under Clear Lakes' right 36-07004. The watermaster also confirmed that Clear Springs could make beneficial use of the water.

12. In response to a report from the watermaster advising that raising the 6 ft weir as high as possible did not result in delivery of the full amount of water to Clear Springs' water right 36-02708, Tim Luke, IDWR Water Distribution Section Manager, sent the watermaster a memorandum on July 29, 2003. Mr. Luke's memorandum stated, in relevant part:

> The instructions that you were given for making adjustments to the 6-ft adjustable weir were "subject to further confirmation." (See instruction no. 10 on page 14 of Water Master Instructions 02-01). If the specific steps described in instruction no. 10 do not achieve the distribution of water among the water rights set forth in instruction no. 9, you are authorized, 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.

13. On July 31, 2003, the watermaster sent a memorandum to Tim Luke confirming that raising the adjustable 6 ft weir only delivered about 192 cfs to Clear Springs. Full distribution of 200 cfs was not possible due to the 8 ft fixed weir at the western pool that also discharges into Clear Lakes' headrace. The watermaster stated:

> Watermaster Instructions dated June 13, 2002 state that the watermaster shall make adjustments to the flow distribution by moving the adjustable weir at the joint [western] diversion. The instructions provided a series of steps which

were subject to further confirmation (instruction no. 10, page 14). At this time I am confirming the additional steps required to redistribute flows at the Clear Lakes and Clear Springs joint diversion under the present spring flow conditions:

If the 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 [sic]. 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.

Note that the above additional steps **do not** require the physical alteration of any part of the joint diversion. The placement of dam boards is a temporary solution and the boards will be removed as flows increase.

14. Prior to the scheduled redistribution, Clear Lakes sent a letter to the watermaster on August 1, 2003, asserting that the watermaster was proposing to amend "final" watermaster instructions and that she did not have the authority to do so. Clear Lakes asked the watermaster to delay implementation of the additional steps so that Clear Lakes could evaluate the impact of the proposed steps and pursue administrative remedies.

15. On August 4, 2003, the Director sent a letter to Clear Lakes advising that he had reviewed the additional steps the watermaster believed to be necessary to implement instructions nos. 9 and 10 of the Instructions and believed the proposed steps were consistent with the Instructions; therefore, it was not necessary to issue further instructions to the watermaster. The letter also advised that the watermaster would not make further adjustments until August 6, 2003, to allow Clear Lakes time to evaluate the impacts of the additional steps identified.

16. Clear Lakes filed the present petition on August 15, 2003, seeking "review and recission [sic] of the modifications" to the Instructions proposed by the watermaster in her July 31, 2003, memorandum to Tim Luke. By agreement of the parties, a scheduling order was issued on October 17, 2003, setting forth a briefing schedule and oral argument on all pre-hearing motions. On January 7, 2004, a hearing was conducted on Clear Springs' motions to dismiss under I.R.C.P. 12(b)(6) and 12(b)(8) and on Clear Lakes' motion to limit and delay any request for an IDWR staff memorandum.

17. At the January 7, 2003, hearing, counsel for Clear Lakes and Clear Springs advised the hearing officer that the additional steps proposed by the watermaster had been implemented. Counsel did not know whether the additional board that was inserted at the 8 ft weir was in place on the date of hearing or had been removed.

ANALYSIS

Clear Lakes contends that it is necessary to conduct a contested case to clarify confusion on the part of IDWR staff regarding the administration of water rights as between Clear Lakes and Clear Springs. Clear Lakes also contends that because the watermaster's additional actions constituted modifications of the Instructions, it is entitled to an evidentiary hearing and the issuance of amended instructions.

Clear Springs takes the position that the petition should be dismissed under I.R.C.P. 12(b)(6) because the additional steps taken by the watermaster are consistent with the Instructions and Idaho law. In the alternative, Clear Springs argues that this case should be dismissed pursuant to I.R.C.P. 12(b)(8) because the judicial review proceeding currently pending in Ada County District Court involves the same issues and the same parties.

Although Clear Springs' motion was presented under I.R.C.P. 12(b)(6), and in the alternative I.R.C.P. 12(b)(8), Clear Springs submitted additional evidence by affidavit to which Clear Lakes did not object. By analogy to the I.R.C.P., the motion to dismiss should be treated as one for summary judgment disposition. In any event, the standard for reviewing a 12(b)(6) motion for dismissal of a complaint is the same as that applicable to motions for summary judgment in judicial proceedings. *See* Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The non-moving party is entitled to have all inferences from the record viewed in his favor, and only then may the question be asked whether a claim for relief has been stated." Id.

This petition comes before the Department pursuant to Idaho Code § 42-1701A(3), which provides that any person aggrieved by any action of the Director shall be entitled to a hearing to contest the action. Idaho Code § 67-5201(3) defines agency action to mean (1) the whole or part of rule or order; (2) the failure to issue rule or order; or (3) an agency's performance of, or failure to perform, any duty placed on it by law. *See also* IDAPA 37.01.01.005.03. Idaho Code § 67-5201(12) defines order as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons."

Whether a party is entitled to a contested case depends in part on the nature of the interest affected by an agency decision. A contested case must be conducted if a proceeding may result in the issuance of an order. Westway Construction Inc. v. Idaho Transp. Dep't, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003) ("Westway"). However, "[n]ot all decisions of particular applicability by an agency determine a person's legal rights, duties, privileges, immunities, or other legal interests." Westway, 73 P.3d 721, 727 (citing Maresh v. State, Dep't of Health and

Welfare, 132 Idaho 221, 970 P.2d 14 (1998)). Rather, "it is the legal effect of the decision—whether it affects an enumerated interest—that determines whether the agency must conduct a contested case." Id. (quoting Michael S. Gilmore & Dale D. Goble, The Idaho Administration Procedures' Act: A Primer for the Practitioner, 30 Idaho L. Rev. 273, 313 (1993)).

To determine whether Clear Lakes has stated a claim for relief, an examination of the alleged injuries and relief sought is required. In other words, it is necessary to determine the legal effect of the agency conduct on Clear Lakes' interests.

The first argument advanced is that Clear Lakes is entitled to a contested case proceeding because the watermaster's actions were unauthorized. Clear Lakes contends that Mr. Luke's July 29, 2003, memorandum only authorized the watermaster to shut or fasten the diversion for Clear Lakes' water right 36-07004. The watermaster did not propose to physically shut or fasten the diversion for Clear Lakes' water right 36-07004, which is delivered through the eastern pool. Instead, she proposed and implemented steps at the western diversion. Clear Lakes argues that the "Hearing Officer must not allow these unauthorized steps and actions to stand" and that Clear Lakes is entitled to have "those issues heard in this proceeding." Clear Lakes' *Brief in Response to Motion to Dismiss*, p. 4.

The central problem with this argument is the characterization of the watermaster's actions as unauthorized. This characterization fails to take into account the Director's subsequent approval of the watermaster's proposed steps at the western pool. Whether Mr. Luke's memorandum authorized the watermaster to take steps at the western pool or the eastern pool is not dispositive here because the Director subsequently approved the watermaster's proposed actions prior to implementation and concluded that it was not necessary to issue further instructions. The Director's August 4, 2003, letter states:

> Subsequent to receiving the memorandum from Mr. Tim Luke dated July 29, 2003, Ms. Yenter [the watermaster] has kept my office informed of the additional steps believed to be necessary to implement instructions nos. 9 and 10 of the amended watermaster instructions I issued on June 13, 2002.
>
> After reviewing the additional steps Ms. Yenter has identified as being necessary to implement instructions nos. 9 and 10 of the amended watermaster instructions, I believe that those steps are consistent with my prior instructions. Consequently, I do not find it necessary to issue further instructions to Ms. Yenter. However, Ms. Yenter will not make further adjustments until Wednesday, August 6 to allow Clear Lakes additional time to evaluate the impacts of the additional steps identified.

Even assuming that Mr. Luke's July 29, 2003, memorandum only authorized the investigation of alternative steps for water delivery at the eastern rather than the western pool, the Director subsequently determined that the watermaster's proposed actions were consistent with the Instructions. Accordingly, the watermaster's subsequent actions were authorized.

Clear Lakes' second claim is that IDWR cannot properly supervise or direct the watermaster pursuant to IDWR's statutory duties under Idaho Code §§ 42-602 and -607, because the agency is confused and/or unaware of the complexities involved in administering these rights. A corollary argument posits that an evidentiary hearing is required because the Instructions must be amended to include specific directives for circumstances that occur in water years like that of 2003.

Analysis of whether Clear Lakes has alleged or presented facts indicating that the agency will likely violate its duties begins with examination of the requirements of Idaho Code §§ 42-602 and -607. Section 42-602 gives the Director "direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom." Idaho Code § 42-602. The Director is required to "distribute water in water districts in accordance with the prior appropriation doctrine." Id.

Actual distribution is accomplished by watermasters as supervised by the Director. Id. Specifically, the duties of the watermaster are defined as follows:

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; . . . .

Idaho Code § 42-607.

In advancing the argument that agency confusion requires a contested case hearing and new order, Clear Lakes relies on two documents--Mr. Luke's memorandum and the Instructions. Clear Lakes directs attention to Mr. Luke's instruction to investigate steps to shut or fasten the diversion for water right 36-07004 in order to deliver more water to Clear Springs' right 36-02708. The Instructions provide for adjustments to the joint diversion works at the western pool to reduce the amount of water diverted under right 36-07004. With respect to Mr. Luke's directive, Clear Lakes points out that shutting or fastening the diversion at the eastern pool has no physical effect on the delivery of water from the western pool. Conversely, adjustments to the joint diversion works at the western pool have no physical effect on the amount of water available at the eastern pool. Clear Lakes contends that Mr. Luke's and the Director's statements demonstrate the agency's confusion and future inability to deliver water in accordance with Idaho Code §§ 42-602 and -607.

This argument fails for two reasons. First, there is no support for the contention that the agency cannot deliver water as between Clear Lakes and Clear Springs in a lawful manner. Clear Lakes has not asserted that its water rights were injured as a result of Mr. Luke's or the Director's statements or as a result of adding a board to the 8 ft weir. Nor has Clear Lakes

asserted that adding a board to the 8 ft weir in any way damaged the joint diversion works.

In times of scarcity, it is the Director's duty to "shut or fasten" the diversions of junior water right holders to satisfy senior water rights. *See* Musser v. Higgenson, 125 Idaho 392, 395 (1995) ("We conclude that the director's duty to distribute water pursuant to this statute [Idaho Code § 42-602] is a clear legal duty.") Accordingly, the *Final Order Creating Water District 130* directs the watermaster 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." When Clear Lakes is required to take more delivery of water right 36-02659 at the eastern pool, its third priority water right 36-07004 is effectively "shut off" so that Clear Springs' second priority right 36-02708 can be delivered. The watermaster's July 31, 2003, memorandum clearly recognizes the complexities of administering these rights in accordance with Idaho Code §§ 42-602 and -607. It recognizes steps that need to be taken to deliver water according to priority. Finally, even assuming, *arguendo*, that there was some confusion about the physical characteristics of the water delivery system, there is no showing that any legal interest was affected by the alleged confusion.

Similarly, the assertion that Clear Lakes' legal interests will be adversely affected in the future if the Director does not issue an amended order with more specific instructions concerning the delivery of water in a severe drought year is pure speculation. First, the agency has considerable expertise in fulfilling its duty to deliver water according to priority. Second, the Instructions clearly provide for continued monitoring on the part of the watermaster and continued adjustment to the diversion works so that the requirements of Idaho Code §§ 42-602 or -607 are met. Paragraph seven of the Instructions states:

> The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified

by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.

Clearly, the watermaster is authorized to adjust the distribution of water to Clear Lakes and Clear Springs so that each receives water in priority. In addition, the Instructions contemplate that additional steps at the joint diversion works that are not specified may be necessary. Although paragraph ten only references adjustments at the 6 ft weir, adjustments at the joint diversion works are subject to further confirmation so that, when the total flow is less than 375 cfs, the first 100 cfs goes to Clear Lakes, the second 200 cfs or part thereof goes to Clear Springs, and any remaining flow goes to Clear Lakes. Adding a board to the 8 ft fixed weir at the joint diversion accomplishes the distribution called for under the Instructions. Adding a board to the 8 ft fixed weir requires Clear Lakes' senior water right no. 36-02659 to be delivered from the eastern pool, effectively shutting off or reducing delivery of Clear Lakes' junior right no. 36-07004 so that Clear Springs' second priority right 36-02708 can be delivered. While this step is not specifically outlined in the instructions, it is consistent with the Instructions and results in the delivery of water from a single source according to priority.

CONCLUSIONS OF LAW

Based upon the foregoing analysis, I conclude that this petition should be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim. Even upon review of the argument and facts presented and legitimate inferences that can be drawn in favor of Clear Lakes, the petitioner has not framed a genuine issue requiring a contested case. There is no support for the allegation that the watermaster, in proposing and implementing additional steps to deliver water in priority, was unauthorized to do so. The Director's letter clearly authorizes the watermaster's actions. Nor is there any support for the allegation that agency confusion will likely result in the future

violation of Clear Lakes' water rights. To the contrary, the argument and facts presented show that the agency acted according to law; therefore, to conclude that the agency will likely violate the law in the future would be pure conjecture. None of the statutory schemes governing administrative proceedings before the agency require a contested case based on a petitioner's subjective fear that the agency could affect a party's legal interests in the future.

Because I have concluded that Clear Springs' motion to dismiss pursuant to I.R.C.P. 12(b)(6) should be granted, it is unnecessary to address Clear Springs' motion to dismiss under I.R.C.P. 12(b)(8) or Clear Lakes' motion to limit and delay the hearing officer's request for agency staff memorandum.

RECOMMENDATIONS FOR ORDER

I recommend that the Director enter an order granting Clear Springs' motion to dismiss pursuant to I.R.C.P. 12(b)(6). This recommendation makes any further consideration of Clear Springs' motion to dismiss under I.R.C.P. 12(b)(8) and Clear Lakes' motion to limit and delay request for staff memorandum unnecessary and I recommend that these motions be denied.

STATEMENT OF AVAILABLE PROCEDURES

This is the Recommended Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer 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 Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's 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.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Respectfully submitted this 25th day of February 2004.

Harriet A. Hensley

HARRIET A. HENSLEY
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February 2004, I caused to be served a true and correct copy of the foregoing RECOMMENDED ORDER, by the U.S. Mail, postage prepaid to the parties whose addresses are listed below:

LARRY COPE
CLEAR SPRINGS FOODS, INC.
P.O. BOX 712
BULH, ID 83316

CINDY YENTER, WATERMASTER
WATER DISTRICT NO. 130
c/o DEPT OF WATER RESOURCES
1341 FILLMORE ST., SUITE 200
TWIN FALLS, ID 83301-3380

JOHN K. SIMPSON
BARKER ROSHOLT AND SIMPSON
P.O. BOX 2139
BOISE, ID 83701-2139

HARRIET A. HENSLEY
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010

DANIEL V. STEENSON
CHARLES L. HONSINGER
S. BRYCE FARRIS
P.O. BOX 2773
BOISE, ID 83701-2773

Victoria Wigle
Administrative Assistant to the Director

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-07201, AND 36-07218 IN WATER DISTRICT NO. 130.	**SCHEDULING ORDER**

A pre-hearing conference on this matter was conducted on October 8, 2003. Hearing officer Harriet Hensley presided. Charles Honsinger appeared for Clear Lakes Trout Company, Inc., and John Simpson appeared for Clear Springs Foods, Inc. The parties agreed to discovery and a schedule for conducting the hearing. In accordance with the agreement of the parties, the Department of Water Resources enters the following order:

IT IS HEREBY ORDERED that all parties to the above captioned matter are authorized to engage in discovery in accordance with Rules 520 through 532 of the "Rules of Procedure of the Idaho Department of Water Resources," IDAPA 37.01.01. Copies of cover letters accompanying discovery requests and responses shall be served on the Department, the Department's designated hearing officer and all parties. The parties are in agreement that discovery deadlines will be scheduled at a later date.

IT IS FURTHER ORDERED that all pre-hearing motions with accompanying briefs shall be served on the Department, the hearing officer and all parties by December 3, 2003. All briefs responding to any pre-hearing motions shall be filed by December 17, 2003, and reply briefs shall be filed by December 24, 2003. Original documents are to be lodged with the Department of Water Resources, which will maintain the record in this case. Copies of all materials and briefs should be submitted to the hearing officer.

IT IS FURTHER ORDERED that a hearing on all pre-hearing motions shall be conducted starting at 9 a.m., January 7, 2004. The hearing will be held in Conference Room C, at the State Office of the Idaho Department of Water Resources, 1301 North Orchard St., Boise, Idaho. The hearing will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within twenty-four hours prior to the hearing. Inquiries about scheduling, hearing facilities, etc., should be directed to Victoria Wigle, Administrative Assistant to the Director, Idaho Department of Water Resources, 1301 N. Orchard St., Boise, Idaho 83706-2237, telephone: (208) 327-7910, fax: (208) 327-7866.

Pursuant to Idaho Code § 42-1701A, the hearing will be held in accordance with the provisions of Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the Department. IDAPA 37.01.01. A copy of the rules is available on the Department's internet home page at www.idwr.state.id.us or may be obtained from the Department upon request.

IT IS FURTHER ORDERED that this matter is tentatively set to be heard on April 20, 2004, commencing at 9 a.m. and will continue on April 21 and 22, 2004, as necessary to complete the hearing record. Notice of the location of the hearing will be served on all parties at least fourteen (14) days prior to the time set for hearing. In accordance with the agreement of the

parties, deadlines for disclosure of witnesses, exhibits, discovery completion, and other matters will be set following the issuance of an order on the pre-hearing motions.

Dated this 17th day of October 2003.

Harriet A. Hensley

HARRIET A. HENSLEY
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2003, I caused to be served a true and correct copy of the foregoing SCHEDULING ORDER, by the U.S. Mail, postage prepaid to the addresses listed below:

LARRY COPE
CLEAR SPRINGS FOODS, INC.
P.O. BOX 712
BUHL, ID 83316

CINDY YENTER, WATERMASTER
WATER DISTRICT NO. 130
c/o DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST., SUITE 200
TWIN FALLS, ID 83301-3380

JOHN K. SIMPSON
BARKER ROSHOLT AND SIMPSON
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DANIEL V. STEENSON
CHARLES L. HONSINGER
S. BRYCE FARRIS
P.O. BOX 2773
BOISE, ID 83701-2773

Victoria Wigle
Administrative Assistant to the Director

Legal Files/IDWR-Clear Lakes/Scheduling Order

ROSTER OF ATTENDANCE

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130.

January 7, 2004
HEARING
Beginning at 9:00 a.m.
Conducted by Harriet Hensley, HEARING OFFICER

NAME	ADDRESS	REPRESENTING
Travis Thompson		Clear Springs Foods
Charlie Honsinger	P.O. 2773 Boise, 83701	Clear Lakes Trout Co.

TESTIMONY LOG FOR

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-07004, 36-070201, AND 36-07218 IN WATER DISTRICT NO. 130

Conducted by Harriet Hensley, Hearing Officer

DATE: 1/7/2004
TAPE NUMBER 1

TAPE TO	LOCATION FROM	TESTIMONY DESCRIPTION
0010	0080	Harriet Hensley - introductions
0090	0220	Travis Thompson - Clear Springs statement / motion for dismissal
0220	0245	Charlie Honsinger - adjustments by Watermaster
0245	~~0500~~ 0518	Travis Thompson - motion for dismissal of petition
~~0530~~ 0518		Charlie Honsinger - Clear Lakes statement - discussion
		of correspondence betw Tim Luke & Cindy Yenter
0752	1050	Harriet Hensley questions to Charlie Honsinger
		on characterization of Watermasters actions
		and evidence that Clear Lake's would like to present in
		a contested case - questions about injury
1050	1107	Travis Thompson - rebuttal to Clear Lakes statement
1107	1153	Charlie Honsinger - response
1153	1184	Travis Thompson
1184	1207	Harriet Hensley - question about nature of potential new order
1207	1225	Charlie Honsinger
1225	1246	Travis Thompson
1246	1333	Charlie Honsinger - motion to limit or delay
1333	1379	Travis Thompson - response to motion to limit or delay
1379	1388	Hearing closed at 9:45AM.

EXHIBIT ROSTER FOR HEARING FOR

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-07004, 36-070201, AND 36-07218 IN WATER DISTRICT NO. 130

January 7, 2004

EXHIBIT NUMBER	EXHIBIT DESCRIPTION	STATUS OF EVIDENCE	
		INTRODUCED	ADMITTED
NO	EXHIBITS INTRODUCED		

Violated
RECEIVED
DEC 29 2003
Department of Water Resources

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
205 North 10th St., Suite 520
P.O. Box 2139
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Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this reply to CLEAR LAKES TROUT COMPANY, INC.'S ("Clear Lakes") *Brief in Response to Motion to Dismiss*.

ARGUMENT

Clear Lakes' *Response* reveals the true intent behind its *Petition* in this matter, a renewed challenge to the Director's June 13, 2002 Amended Watermaster Instructions ("instructions"). Clear Lakes bases its entire argument on a single reference in Tim Luke's July 29, 2003 Memorandum and then seeks to raise issues that have been previously addressed both in the

instructions themselves and in other legal and administrative proceedings. Essentially Clear Lakes, through this contested case, is attempting an end-around appeal of the instructions despite the fact they were already judicially confirmed by the District Court in Case No. CV-02-00377 (Gooding County) and more recently by the Director's June 13, 2003 *Final Order* issued *In the Matter of Petition to Modify Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201, and 36-7218 in Water District No. 130.*

Since I.C. § 42-607 requires the Watermaster to take the very actions currently contested to distribute water to Clear Springs' senior priority water right, and since the Watermaster instructions also provide for such actions, the Hearing Officer must dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(6). Alternatively, since Clear Springs and Clear Lakes are presently involved in a separate judicial proceeding concerning the same issues, the Hearing Officer should dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(8).

I. The Instructions Provide the Watermaster With the Authority to Implement the Steps Identified in the July 31, 2003 Memorandum to Tim Luke.

The instructions plainly require the Watermaster to distribute water between Clear Springs and Clear Lakes according to priority. Instruction number nine specifically details how water is to be distributed when the spring flows fall below 375 cfs:

> If the total flow is less than 375 cfs (± 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.

See Instructions at 14 (Exhibit C to *Thompson Aff.*).

As demonstrated above, the instructions contemplate adjustments to the parties' joint diversion works at the "western pool" to administer ***all*** of the subject water rights (36-02659, 36-

02708, and 36-07004), not just Clear Lakes' most junior water right (36-07004). *See* Exhibit P to *Thompson Aff.* Since the adjustments to the 6-ft weir did not accomplish the distribution required under the instructions, "additional steps" had to be identified and implemented so that water could be properly distributed according to priority.

Clear Lakes seeks to prevent implementation of those additional steps on the theory that Tim Luke (IDWR) only authorized the Watermaster to "shut or fasten" the diversion works for Clear Lakes junior water right no. 36-07004 at the "eastern pool." In other words, Clear Lakes would have the Watermaster ignore the detailed instructions for ***all*** water rights, which do contemplate shutting Clear Lakes' diversion at the "western pool" in order to accomplish proper administration pursuant to priority, and only look at the "eastern pool" diversion for one water right. If the Watermaster followed Clear Lakes' theory and only administered one water right without consideration of the other two, then she would violate the instructions.

Contrary to Clear Lakes' view, the instructions do provide the Watermaster with the authority to adjust the diversion works at the "western pool" in order to deliver water to Clear Springs' second priority water right, which necessarily affects diversions under Clear Lakes' water right no. 36-07004 at the "eastern pool":

> When the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the western pool. **Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.**
>
> * * *

> Therefore, there is no known legal basis for Clear Lakes to demand that a specific portion of the water right for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, **it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004.**

See Instructions at 7, 10 (emphasis added)(Exhibit C to *Thompson Aff.*).

The instructions contemplate administering the three subject water rights (36-02659, 36-02708, and 36-07004) together from the single source. The water rights are not administered in a "piece-meal" fashion as Clear Lakes would have the Hearing Officer believe. The above provisions plainly specify that the joint diversion at the "western pool" will be adjusted when spring discharges fall below 375 cfs so that Clear Springs receives 200 cfs under the second priority water right. Moreover, the instructions recognize that adjustments to the joint diversion provides for a parallel reduction of diversions under Clear Lakes' water right no. 36-07004. Since one right cannot be administered without considering the others, Clear Lakes' argument that the Watermaster can only investigate "additional steps" to "shut or fasten" water right no. 36-07004 fails. Since Clear Lakes is instructed to divert more water under water right no. 36-02659 from the "eastern pool" when spring flows fall below 375 cfs, it follows that Clear Lakes' diversion for water right no. 36-07004 is technically "shut" to that extent. Again, it must be emphasized that the instructions specifically recognize that by distributing water in this manner, "it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool . . . resulting in an increase in the quantity of water available for Clear Springs' right 36-02708." *See* Instructions at 10 (Exhibit C to *Thompson Aff.*). Therefore, the

Watermaster was not bound to only examine the actual diversion at the "eastern pool" in order to reduce diversions under Clear Lakes' water right no. 36-07004.

Although the instructions specifically direct the Watermaster to administer the parties' water rights by only making adjustments at the "western pool," which has been approved by both a District Court and by final order of the Director, Clear Lakes continues to contest the underlying instructions, only this time by challenging the Watermaster's decision to add a removable dam board to accomplish the proper water right administration. Clear Lakes even goes so far to allege that there is an "issue of confusion of the Department of Water Resources with respect to the actions necessary for the administration of Clear Lakes' and Foods' water rights" and that "IDWR is unaware of the complexities involved in administering these rights, and therefore cannot properly supervise or direct the Watermaster pursuant to its statutory duties." *Response* at 5.

Regardless of Clear Lakes' efforts to "create" a case here, the Watermaster clearly recognizes the intricacies of the administration as demonstrated by her July 31, 2003 memorandum identifying the steps needed to adjust the joint diversion further to provide Clear Springs with the 200 cfs that it is entitled to receive when at least 300 cfs of spring flow is available. The Director agreed as evidenced by his letter declining to issue additional instructions. *See* Exhibit O to *Thompson Aff.* Despite Clear Lakes' assertions, there is no confusion on IDWR's part about how the water is to be distributed on the basis of priority. Again, nothing prevents the Watermaster from adjusting the elevation of the pool so that water is properly distributed according to priority, and Clear Lakes' *Response* does not provide any facts or argument that would indicate otherwise. Moreover, there is nothing inconsistent with the Watermaster's proposed actions that would contravene the instructions. Simply adding boards to

the 8-ft fixed weir at the joint diversion physically accomplishes the distribution called for under the instructions. This additional step does not alter the parties' diversion structure in any way, but instead is a "temporary solution" used to properly distribute the water when the spring flows drop under a certain level. Moreover, the joint diversion was constructed in such a manner to specifically allow dam boards to be inserted and removed. When spring flows return to prior levels the board can be removed. Accordingly, the additional steps identified by the Watermaster are consistent and provided for under the June 13, 2002 instructions and Clear Lakes' *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6).

II. Clear Lakes and Clear Springs Are Involved in Another Action Upon the Same Facts and the Same Cause of Action.

Clear Lakes largely ignores the argument that its *Petition* should be dismissed under I.R.C.P. 12(b)(8), and instead argues that the issue of whether to "shut or fasten" the diversion for water right no. 36-07004 was not addressed by the Director's *Final Order* currently on appeal before the Ada County District Court. Clear Lakes claims the subject of that case is the "validity of the June 13, 2002 Amended Watermaster Instructions," and at the same time urges the Hearing Officer to "take evidence on the administration of the water rights pursuant" to those instructions. Clear Lakes cannot have it both ways. Assuming for argument's sake, as Clear Lakes' *Petition* alleges, that the "additional steps" identified by Watermaster Yenter amount to "modifications" to the instructions, a challenge to those "modifications" should be dismissed due to another action pending between the parties.

As explained in the *Memorandum in Support of Motion to Dismiss*, applying the two tests announced by the *Klaue* Court to the facts surrounding Clear Lakes' present *Petition*, it is evident the Hearing Officer should refrain from entertaining the case and should dismiss it pursuant to I.R.C.P. 12(b)(8). The District Court's "with prejudice" dismissal of Clear Lakes'

action in Case No. CV-02-00377 (Gooding County) decided the validity of the June 13, 2002 watermaster instructions. Moreover, the Director affirmed this dismissal in his June 13, 2003 *Final Order*. Since the judicial review proceeding of that order in the Ada County District Court involves the same facts, issues, and parties the Hearing Officer should dismiss Clear Lakes' *Petition* as directed by I.R.C.P. 12(b)(8).

CONCLUSION

The subject instructions have been in place and implemented by the Watermaster for over a year now. The three water rights at issue are administered together from a common source. The Watermaster has the specialized expertise and knowledge to implement the instructions and distribute water to Clear Springs' and Clear Lakes' water rights according to priority. Contrary to Clear Lakes' arguments, there is no "confusion" over the implementation of the instructions that rises to the level of a contested case. The Watermaster's proposed action, inserting a removable dam board into the 8-ft fixed weir diversion at the "western pool" effectively "shuts" or reduces Clear Lakes' diversion under its junior water right (36-07004) at the "eastern pool." This additional step is required by Idaho law and is entirely consistent with the Director's June 13, 2002 Amended Watermaster Instructions as demonstrated above. The Director agrees as explained in his August 4, 2003 letter to Clear Lakes' counsel. *See* Exhibit O to *Thompson Aff.*

Clear Lakes, by attempting to initiate a contested case, cannot benefit and take water that Clear Springs is legally entitled to receive. There is no basis for a contested case hearing and Clear Lakes' *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6). In addition, since the same parties are currently involved in other litigation over the same issues, the Hearing Officer should refrain from hearing this matter and dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(8).

DATED this 24th day of December, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29th, 2003, I served a true and correct copy of the foregoing *CLEAR SPRINGS FOODS, INC. 'S REPLY IN SUPPORT OF MOTION TO DISMISS* upon the following by facsimile and U.S. Mail, postage prepaid:

Original:

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706-2237
Fax: (208) 327-7866

Copies:

Harriet Hensley (Hearing Officer)
State of Idaho Attorney General's Office
P.O. Box 83720
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Cindy Yenter
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Travis L. Thompson

Barker, Rosholt & Simpson L.L.P.

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MULTIPLE FACSIMILE

FROM: TRAVIS THOMPSON

DATE: 12/24/03

FILE/CLIENT: CLEAR SPRINGS FOODS

OF PGS. INCLUDING COVER SHEET: 10

☐ Original will not be sent.
☐ Original will be sent by first class mail.
☐ Original will be sent by Federal Express.

TO: VICTORIA WIGLE FAX#: (208) 327-7866

TO: HARRIET HENSLEY FAX#: (208) 334-2690

TO: DANIEL STEENSON/CHARLES HONSINGER/BRYCE FARRIS FAX#: (208) 342-4657

TO: CINDY YENTER FAX#: (208) 736-3037

TO: _____ FAX#: _____

TO: _____ FAX#: _____

COMMENTS: _____

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Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this reply to CLEAR LAKES TROUT COMPANY, INC.'S ("Clear Lakes") *Brief in Response to Motion to Dismiss*.

ARGUMENT

Clear Lakes' *Response* reveals the true intent behind its *Petition* in this matter, a renewed challenge to the Director's June 13, 2002 Amended Watermaster Instructions ("instructions"). Clear Lakes bases its entire argument on a single reference in Tim Luke's July 29, 2003 Memorandum and then seeks to raise issues that have been previously addressed both in the

instructions themselves and in other legal and administrative proceedings. Essentially Clear Lakes, through this contested case, is attempting an end-around appeal of the instructions despite the fact they were already judicially confirmed by the District Court in Case No. CV-02-00377 (Gooding County) and more recently by the Director's June 13, 2003 *Final Order* issued *In the Matter of Petition to Modify Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201, and 36-7218 in Water District No. 130.*

Since I.C. § 42-607 requires the Watermaster to take the very actions currently contested to distribute water to Clear Springs' senior priority water right, and since the Watermaster instructions also provide for such actions, the Hearing Officer must dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(6). Alternatively, since Clear Springs and Clear Lakes are presently involved in a separate judicial proceeding concerning the same issues, the Hearing Officer should dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(8).

I. The Instructions Provide the Watermaster With the Authority to Implement the Steps Identified in the July 31, 2003 Memorandum to Tim Luke.

The instructions plainly require the Watermaster to distribute water between Clear Springs and Clear Lakes according to priority. Instruction number nine specifically details how water is to be distributed when the spring flows fall below 375 cfs:

> If the total flow is less than 375 cfs (± 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.

See Instructions at 14 (Exhibit C to *Thompson Aff.*).

As demonstrated above, the instructions contemplate adjustments to the parties' joint diversion works at the "western pool" to administer ***all*** of the subject water rights (36-02659, 36-

02708, and 36-07004), not just Clear Lakes' most junior water right (36-07004). *See* Exhibit P to *Thompson Aff.* Since the adjustments to the 6-ft weir did not accomplish the distribution required under the instructions, "additional steps" had to be identified and implemented so that water could be properly distributed according to priority.

Clear Lakes seeks to prevent implementation of those additional steps on the theory that Tim Luke (IDWR) only authorized the Watermaster to "shut or fasten" the diversion works for Clear Lakes junior water right no. 36-07004 at the "eastern pool." In other words, Clear Lakes would have the Watermaster ignore the detailed instructions for ***all*** water rights, which do contemplate shutting Clear Lakes' diversion at the "western pool" in order to accomplish proper administration pursuant to priority, and only look at the "eastern pool" diversion for one water right. If the Watermaster followed Clear Lakes' theory and only administered one water right without consideration of the other two, then she would violate the instructions.

Contrary to Clear Lakes' view, the instructions do provide the Watermaster with the authority to adjust the diversion works at the "western pool" in order to deliver water to Clear Springs' second priority water right, which necessarily affects diversions under Clear Lakes' water right no. 36-07004 at the "eastern pool":

> When the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the western pool. **Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.**
>
> * * *

> Therefore, there is no known legal basis for Clear Lakes to demand that a specific portion of the water right for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, **it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004.**

See Instructions at 7, 10 (emphasis added)(Exhibit C to *Thompson Aff.*).

The instructions contemplate administering the three subject water rights (36-02659, 36-02708, and 36-07004) together from the single source. The water rights are not administered in a "piece-meal" fashion as Clear Lakes would have the Hearing Officer believe. The above provisions plainly specify that the joint diversion at the "western pool" will be adjusted when spring discharges fall below 375 cfs so that Clear Springs receives 200 cfs under the second priority water right. Moreover, the instructions recognize that adjustments to the joint diversion provides for a parallel reduction of diversions under Clear Lakes' water right no. 36-07004. Since one right cannot be administered without considering the others, Clear Lakes' argument that the Watermaster can only investigate "additional steps" to "shut or fasten" water right no. 36-07004 fails. Since Clear Lakes is instructed to divert more water under water right no. 36-02659 from the "eastern pool" when spring flows fall below 375 cfs, it follows that Clear Lakes' diversion for water right no. 36-07004 is technically "shut" to that extent. Again, it must be emphasized that the instructions specifically recognize that by distributing water in this manner, "it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool . . . resulting in an increase in the quantity of water available for Clear Springs' right 36-02708." *See* Instructions at 10 (Exhibit C to *Thompson Aff.*). Therefore, the

Watermaster was not bound to only examine the actual diversion at the "eastern pool" in order to reduce diversions under Clear Lakes' water right no. 36-07004.

Although the instructions specifically direct the Watermaster to administer the parties' water rights by only making adjustments at the "western pool," which has been approved by both a District Court and by final order of the Director, Clear Lakes continues to contest the underlying instructions, only this time by challenging the Watermaster's decision to add a removable dam board to accomplish the proper water right administration. Clear Lakes even goes so far to allege that there is an "issue of confusion of the Department of Water Resources with respect to the actions necessary for the administration of Clear Lakes' and Foods' water rights" and that "IDWR is unaware of the complexities involved in administering these rights, and therefore cannot properly supervise or direct the Watermaster pursuant to its statutory duties." *Response* at 5.

Regardless of Clear Lakes' efforts to "create" a case here, the Watermaster clearly recognizes the intricacies of the administration as demonstrated by her July 31, 2003 memorandum identifying the steps needed to adjust the joint diversion further to provide Clear Springs with the 200 cfs that it is entitled to receive when at least 300 cfs of spring flow is available. The Director agreed as evidenced by his letter declining to issue additional instructions. *See* Exhibit O to *Thompson Aff.* Despite Clear Lakes' assertions, there is no confusion on IDWR's part about how the water is to be distributed on the basis of priority. Again, nothing prevents the Watermaster from adjusting the elevation of the pool so that water is properly distributed according to priority, and Clear Lakes' *Response* does not provide any facts or argument that would indicate otherwise. Moreover, there is nothing inconsistent with the Watermaster's proposed actions that would contravene the instructions. Simply adding boards to

the 8-ft fixed weir at the joint diversion physically accomplishes the distribution called for under the instructions. This additional step does not alter the parties' diversion structure in any way, but instead is a "temporary solution" used to properly distribute the water when the spring flows drop under a certain level. Moreover, the joint diversion was constructed in such a manner to specifically allow dam boards to be inserted and removed. When spring flows return to prior levels the board can be removed. Accordingly, the additional steps identified by the Watermaster are consistent and provided for under the June 13, 2002 instructions and Clear Lakes' *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6).

II. Clear Lakes and Clear Springs Are Involved in Another Action Upon the Same Facts and the Same Cause of Action.

Clear Lakes largely ignores the argument that its *Petition* should be dismissed under I.R.C.P. 12(b)(8), and instead argues that the issue of whether to "shut or fasten" the diversion for water right no. 36-07004 was not addressed by the Director's *Final Order* currently on appeal before the Ada County District Court. Clear Lakes claims the subject of that case is the "validity of the June 13, 2002 Amended Watermaster Instructions," and at the same time urges the Hearing Officer to "take evidence on the administration of the water rights pursuant" to those instructions. Clear Lakes cannot have it both ways. Assuming for argument's sake, as Clear Lakes' *Petition* alleges, that the "additional steps" identified by Watermaster Yenter amount to "modifications" to the instructions, a challenge to those "modifications" should be dismissed due to another action pending between the parties.

As explained in the *Memorandum in Support of Motion to Dismiss*, applying the two tests announced by the *Klaue* Court to the facts surrounding Clear Lakes' present *Petition*, it is evident the Hearing Officer should refrain from entertaining the case and should dismiss it pursuant to I.R.C.P. 12(b)(8). The District Court's "with prejudice" dismissal of Clear Lakes'

action in Case No. CV-02-00377 (Gooding County) decided the validity of the June 13, 2002 watermaster instructions. Moreover, the Director affirmed this dismissal in his June 13, 2003 *Final Order*. Since the judicial review proceeding of that order in the Ada County District Court involves the same facts, issues, and parties the Hearing Officer should dismiss Clear Lakes' *Petition* as directed by I.R.C.P. 12(b)(8).

CONCLUSION

The subject instructions have been in place and implemented by the Watermaster for over a year now. The three water rights at issue are administered together from a common source. The Watermaster has the specialized expertise and knowledge to implement the instructions and distribute water to Clear Springs' and Clear Lakes' water rights according to priority. Contrary to Clear Lakes' arguments, there is no "confusion" over the implementation of the instructions that rises to the level of a contested case. The Watermaster's proposed action, inserting a removable dam board into the 8-ft fixed weir diversion at the "western pool" effectively "shuts" or reduces Clear Lakes' diversion under its junior water right (36-07004) at the "eastern pool." This additional step is required by Idaho law and is entirely consistent with the Director's June 13, 2002 Amended Watermaster Instructions as demonstrated above. The Director agrees as explained in his August 4, 2003 letter to Clear Lakes' counsel. *See* Exhibit O to *Thompson Aff.*

Clear Lakes, by attempting to initiate a contested case, cannot benefit and take water that Clear Springs is legally entitled to receive. There is no basis for a contested case hearing and Clear Lakes' *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6). In addition, since the same parties are currently involved in other litigation over the same issues, the Hearing Officer should refrain from hearing this matter and dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(8).

DATED this 24th day of December, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 24th, 2003, I served a true and correct copy of the foregoing *CLEAR SPRINGS FOODS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS* upon the following by facsimile and U.S. Mail, postage prepaid:

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Travis L. Thompson

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December 22, 2003

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

Gentlemen:

The hearing scheduled for January 7, 2004, will be held in Conference Room A&B at the State Office of the Idaho Department of Water Resources, 1301 North Orchard Street, Boise, Idaho. The hearing was previously scheduled in Conference Room C. If you require special accommodations in order to attend, participate in or understand the hearing, please advise me within twenty-four hours prior to the hearing. Thank you for your attention to this matter.

Sincerely,

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director

:vw
c: Harriet Hensley
Larry Cope
Cindy Yenter

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BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	BRIEF IN RESPONSE TO MOTION TO DISMISS

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys, Ringert Clark, Chartered, and hereby submits this Brief in Response to Clear Springs Foods Inc.'s (hereinafter "Foods") Motion to Dismiss Clear Lakes' Petition in the above captioned matter. This Brief is supported by the record herein.

INTRODUCTION

Foods seeks dismissal of Clear Lakes' Petition pursuant to I.R.C.P. 12(b)(6) on the grounds that there are no issues to be resolved in this case, and pursuant to I.R.C.P. 12(b)(8) on grounds that there is "another action pending between" Foods and Clear Lakes which involves the same cause. Clear Springs errs as to both of its arguments.

Tim Luke's July 29, 2003 Memorandum to Watermaster Cindy Yenter refers to the

watermaster instructions under which water is distributed between Clear Lakes and Foods, and specifies that Ms. Yenter is

> authorized, 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.

Affidavit of Travis L. Thompson in Support of Clear Springs Foods' Inc.'s' Motion to Dismiss (hereinafter "*Thompson Affidavit*"), Ex. M (underlined emphasis added). Ms. Yenter did not investigate steps necessary to "shut or fasten" the diversion for water no. 36-07004. Therefore, the steps identified by Ms. Yenter as necessary to distribute 200 cfs of water to Foods' water right no. 36-02708 are invalid, and the actions taken pursuant to those identified steps should be reversed. Despite Foods' assertions to the contrary, there are obviously issues which must be resolved in this proceeding.

Foods' argument that Clear Lakes' Petition must be dismissed because there is another action pending involving the same cause is similarly erroneous. Clear Lakes has sought judicial review of a final order issued by the Director in a separate administrative proceeding. *See Thompson Affidavit*, Ex. G. The final order involved the July 13, 2002 Amended Watermaster Instructions under which water is currently distributed as between Clear Lakes and Foods. *Thompson Affidavit*, Ex. F. However, nothing in the final order addresses the "shutting or fastening" of the diversion for water right no. 36-07004. Thus, the issue raised in this proceeding is not raised in the case currently on review before the Ada County District Court. Foods' argument to the contrary should be ignored.

FACTS

Foods unnecessarily spends much of its Memorandum discussing the facts leading to the Petition which is the subject of this proceeding. The facts that are needed to result in a denial of Foods' Motion to Dismiss can be summarized in a couple of short paragraphs.

The diversion for water right no. 36-07004 is located in the "Eastern Pool" in T09S R14E S02 SWSENE and SESENE. *Thompson Affidavit*, Ex. A (Partial Decree for Water Right no. 36-07004). In contrast, Ms. Yenter's correspondence of July 31, 2003 to Tim Luke, which confirms additional steps necessary for distribution of water between Clear Lakes and Foods specifies that

> [i]f 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.

Thompson Affidavit, Ex. L (emphasis added). Ms. Yenter's correspondence goes on to describe alterations and actions she proposes which are applicable only to the joint diversion in the "west pool." *Id.*

No portion of water right no. 36-07004 is diverted through the "west pool." *Thompson Affidavit*, Ex. A (*Partial Decree for Water Right no. 36-07004*). The water rights that are diverted through the "west pool" are Clear Lakes' water right no. 36-02659 and Foods' water right no. 36-02708, both of which are senior to Clear Lakes' water right no. 36-07004. See *Thompson Affidavit*, Ex. A (*Partial Decrees* for water right nos. 36-02659 and 36-02708). Clearly, Ms. Yenter did not suggest any "alternative or additional steps" which could result in the "shutting or fastening" of the diversion for Clear Lakes water right no. 36-07004 (in the "Eastern Pool"), as the authorization from Mr. Luke specified. Despite this failure to follow the authorization given her by Mr. Luke, the Director approved the additional steps identified by Ms. Yenter as consistent with his prior

instructions, and authorized Ms. Yenter to implement the same. *Thompson Affidavit*, Ex. O.

ARGUMENT

Idaho law specifies that "[d]istribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the Director." I.C. §42-602 (emphasis added). A watermaster in a water district, has the duty to "shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water" when necessary to satisfy prior rights of others. I.C. §42-607 (emphasis added).

Although Clear Lakes agrees with Foods that "the Watermaster must be afforded some discretion on how to implement the instructions and perform her duties pursuant to I.C. §42-607," *Foods' Memorandum* at p. 11, that is not what happened in this case. Instead, the Watermaster ignored the clear instructions "to investigate alternative or additional steps necessary to "shut or fasten" the diversion for Clear Lakes water right no. 36-07004," which is located in the eastern Pool, and focused on the joint diversion in the western pool. See *Thompson Affidavit*, Ex. L. As discussed above, no portion of water right no. 36-07004 is diverted through the western pool. Therefore, the Watermaster failed to take the steps she was authorized to take, and in fact, took unauthorized steps when she investigated "additional or alternative steps" which do not relate to "shutting or fastening" the diversion works for water right no. 36-07004. The Hearing Officer must not allow these unauthorized steps and actions to stand. Obviously, despite Foods' assertions that there are no "issues" in this case, such issues do exist, and Clear Lakes is entitled to have those issues heard in this proceeding.

Beyond the issue of whether or not the Watermaster failed to take actions she had been

directed to take, and whether she instead took unauthorized actions, is the issue of the confusion of the Department of Water Resources with respect to the actions necessary for administration of water Clear Lakes' and Foods' water rights As illustrated by Mr. Luke's Memorandum to Watermaster Cindy Yenter (*Thompson Affidavit*, Ex. M) authorizing the investigation of additional steps required to "shut or fasten" the diversion for water right no. 36-07004, IDWR is unaware of the complexities involved in administering these rights, and therefore cannot properly supervise or direct the Watermaster pursuant to its statutory duties. See I.C. §§ 42-602, 42-607. This is understandable, given the counterintuitive approach to administration set forth in the June 13, 2002 Amended Watermaster Instructions. Those instructions provide for adjustments to the joint diversion works (in the western pool) for Clear Lakes' water right no. 36-02659 and Foods' water right no. 36-02708 in order to reduce the amount of water diverted under water right no. 36-07004 which is not diverted through the joint diversion works. See *Thompson Affidavit*, Ex. A (Partial Decrees for water right nos. 36-02659, 36-02708, and 36-07004); Ex. C (June 13, 2002 Amended Watermaster Instructions), p. 14. The Hearing Officer must take this opportunity to take evidence on the administration of the water rights pursuant to the June 13, 2002 Amended Watermaster Instructions to avoid any further confusion and errors on the part of IDWR or the parties.

Despite any of Foods' assertions to the contrary, the June 13, 2002 Amended Watermaster Instructions have never been applied to "shut or fasten" the diversion works for water right no. 36-07004. Nor, again despite Foods' assertion to the contrary, was the issue of whether or not the instructions can be interpreted to authorize the "shutting or fastening" of the diversion works for water right no. 36-07004 in any way addressed by the Director's decision that is currently being addressed by the Ada County District Court. Rather, (as is admitted by Foods) the Director's

decision in that case simply addresses the validity of the June 13, 2002 Amended Watermaster Instructions, not their application in a manner which they do not contemplate. See *Thompson Affidavit*, Ex. F. Accordingly, the issues raised in this case are not the same as are raised in the contested case currently on review before the Ada County District Court, and the Hearing Officer should proceed forward with this case to resolve the issues raised by Clear Lakes.

Dated this 17th day of December, 2003.

RINGERT CLARK, CHARTERED

By: _____
Charles L. Honsinger
Ringert Clark Chartered
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2003, I caused to be served a true and correct copy of the foregoing document by U.S. Mail, postage prepaid to the following individuals at the following addresses:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S MOTION TO DISMISS CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this *Motion to Dismiss* CLEAR LAKES TROUT COMPANY, INC.'S ("Clear Lakes") *Petition to Initiate Contested Case*. Clear Springs moves the Hearing Officer for an order dismissing Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b). The grounds for this motion are as follows:

1. Clear Lakes has failed to state a claim upon which relief can be granted and therefore its *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6).

2. Clear Lakes' *Petition* should be dismissed due to another action pending between Clear Lakes and Clear Springs based upon the same operative facts pursuant to I.R.C.P. 12(b)(8).

3. This motion is further supported by the *Memorandum in Support of Motion to Dismiss* and the *Affidavit of Travis L. Thompson* filed herewith.

4. Clear Springs requests oral argument on this motion.

PRAYER FOR RELIEF

Clear Springs requests that the Hearing Officer provide the following relief:

1. That Clear Lakes' *Petition to Initiate Contested Case* be dismissed with prejudice;

2. That the relief requested by Clear Lakes be denied; and

3. That such other relief is provided as is determined to be appropriate, just and equitable under the circumstances.

DATED this 2nd day of December, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2nd, 2003, I served a true and correct copy of the foregoing *CLEAR SPRINGS FOODS, INC.'S MOTION TO DISMISS CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE* upon the following by U.S. mail, postage prepaid:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this *Memorandum in Support of Motion to Dismiss* CLEAR LAKES TROUT COMPANY, INC.'S ("Clear Lakes") *Petition to Initiate Contested Case ("Petition").*

INTRODUCTION

Clear Lakes' *Petition* is the fifth action[1] in a recent lineage of administrative and judicial proceedings contesting the distribution of water between Clear Springs' and Clear Lakes' water

[1] Clear Lakes has filed the following actions contesting the distribution of water between Clear Lakes' and Clear Springs' water rights in the past eighteen months: 1) *Clear Lakes v. IDWR*, Case No. CV-02-00377 (Gooding County District Court), complaint filed June 20, 2002; 2) *In the Matter of Petition to Modify Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201, and 36-*

rights. Clear Lakes now asserts that recent measures proposed by the Watermaster to distribute water according to priority somehow constitute "modifications" to the June 13, 2002 watermaster instructions or are new "issues" requiring a contested case hearing. Clear Lakes' *Petition* is yet another attempt to prevent the lawful distribution of water according to Idaho law and the respective water rights held by the parties.

Since I.C. § 42-607 requires the Watermaster to take the very actions currently contested to distribute water to Clear Springs' senior priority water right, and since the June 13, 2002 instructions also provide for such actions, the Hearing Officer must dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(6). Alternatively, since Clear Springs and Clear Lakes are presently involved in a separate judicial proceeding concerning the same issues, the Hearing Officer should dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(8).

FACTS

Clear Springs and Clear Lakes hold various water rights to the common springs source emanating from the canyon wall in the Thousand Springs reach of the Snake River north of Buhl, Idaho. The Snake River Basin Adjudication District Court ("SRBA Court") issued partial decrees for the parties' respective rights as follows: Clear Lakes with the first priority right to divert 100 cubic feet per second ("cfs") from the springs;[2] Clear Springs with the second priority right to divert 200 cfs;[3] Clear Lakes with the third priority right to divert 75 cfs;[4] and Clear

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7218 in Water District No. 130 (IDWR contested case), petition filed December 17, 2002; *Clear Lakes v. IDWR*, Case No. CV-0C-0304746D (Ada County District Court), petition for judicial review filed June 19, 2003; 3) *Clear Lakes v. Clear Springs*, Case No. CV-02-00803 (Gooding County District Court), complaint filed December 20, 2002; and 4) *In the Matter of June 20, 2003 Notice of Intent to Resume Administration of Clear Lakes Area Water Rights* (IDWR contested case), petition filed July 2, 2003.

[2] Water right no. 36-02659, priority date 06/23/1966. *See* Exhibit A to *Aff. of Travis L. Thompson* (hereinafter "*Thompson Aff.*").

[3] Water right no. 36-02708, priority date 09/28/1966. *See* Exhibit A to *Thompson Aff.*

[4] Water right no. 36-07004, priority date 07/21/1967. *See* Exhibit A to *Thompson Aff.*

Springs with the fourth priority right to divert 51.55 cfs.[5] Although Clear Lakes had objected to Clear Springs' water rights, including the source and point of diversion elements, the Idaho Supreme Court affirmed the SRBA Court's denial of that challenge in *Clear Springs Foods, Inc. v. Clear Lakes Trout Company, Inc.*, 136 Idaho 761 (2002).

Shortly after the Supreme Court issued the *Clear Springs* decision in January 2002, the Director created Water District No. 130 by final order on February 19, 2002 for the purpose of administering all water rights located within the district. *See* Exhibit B to *Thompson Aff.* Following the district's creation, the Director began requesting information from both Clear Springs and Clear Lakes in April 2002 to determine how the parties' water rights would be administered. In response, Clear Springs and Clear Lakes submitted various factual and legal materials by letters of May 2, 2002. After considering the information submitted by both Clear Lakes and Clear Springs, the Director issued watermaster instructions for the distribution of water to the parties' water rights in a memorandum dated June 5, 2002. In response to Clear Lakes' concerns over the instructions, the Director temporarily suspended the instructions and completed additional review. The Director then issued amended watermaster instructions in a memorandum dated June 13, 2002. *See* Exhibit C to *Thompson Aff.*

On June 7, 2002, Clear Springs requested the delivery of its water rights pursuant to state law and the pertinent watermaster instructions. Watermaster Cindy Yenter then issued a *Notice of Intent to Redistribute Flows* to Clear Springs' and Clear Lakes' water rights on the basis of priority on June 19, 2002. *See* Exhibit D to *Thompson Aff.* The Watermaster redistributed the flows between Clear Springs' and Clear Lakes' water rights, pursuant to the Director's instructions, on July 5, 2002.

[5] Water right no. 36-07218, priority date 01/24/1972. *See* Exhibit A to *Thompson Aff.*

From July 5, 2002 to July 23, 2003, no adjustments were made to the parties' joint diversions works. No redistributions were made despite the drop in spring flows experienced in early 2003, and no further administration was conducted despite the fact that Clear Springs was not receiving the full 200 cfs under its water right no. 36-02708. Further administration of Clear Springs' and Clear Lakes' water rights was then stayed during the first six months of 2003 pending resolution of a contested case before IDWR where Clear Lakes had challenged the June 13, 2002 watermaster instructions and the redistribution that occurred on July 5, 2002.[6] An independent hearing officer (Judge Duff McKee) recommended that Clear Lakes' petition be dismissed, which the Director adopted by a final order issued on June 13, 2003. *See* Exhibit F to *Thompson Aff.* Thereafter, Clear Lakes appealed the Director's decision and filed a petition for judicial review with the District Court in Ada County. *See* Exhibit G to *Thompson Aff.* The judicial review proceeding is still pending before the District Court in Ada County.

In addition to issuing a final order in the contested case proceeding, the Director ordered the Watermaster to resume administration of Clear Springs' and Clear Lakes' water rights. *See* Exhibit F to *Thompson Aff.* at p. 21 ("The motion filed by Clear Lakes for stay of the watermaster's activities is DENIED, effective with the date of this order."). Due to decreased spring flows, as was experienced over the spring and early summer of 2003, Clear Springs was still not receiving the full 200 cfs under the second priority water right to the common springs source. Accordingly, the Watermaster issued a *Notice of Intent to Resume Administration of Clear Lakes Area Water Rights* on June 20, 2003. *See* Exhibit H to *Thompson Aff.* Clear Lakes immediately filed another petition with the Department challenging the intended redistribution

[6] Although Clear Lakes' had filed a motion for a stay, no final ruling on that motion was issued until the Director issued his final order in the matter on June 13, 2003. However, administration of the parties' rights was unilaterally stayed by the Director, to the detriment of Clear Springs, by his February 4, 2003 instructions to Watermaster Yenter. *See* Exhibit E to *Thompson Aff.*

on July 2, 2003. *See* Exhibit I to *Thompson Aff.* The Director issued an *Order Denying Petition to Initiate Contested Case/Request for Expedited Hearing/Petition to Stay Administration* on July 3, 2003. *See* Exhibit J to *Thompson Aff.*

Following the denial of Clear Lakes' July 2, 2003 petition, the Watermaster notified both parties that she would make the necessary adjustments and redistribute the flows on July 23, 2003. *See* Exhibit K to *Thompson Aff.* However, under the Watermaster's adjustments, Clear Springs only received an additional 6 cfs despite needing 14 cfs to fully satisfy its water right no. 36-02708 for 200 cfs. *See* Exhibit L to *Thompson Aff.* Tim Luke, IDWR's Water Distribution Section Manager, then sent Watermaster Yenter a memorandum instructing her 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." *See* Exhibit M to *Thompson Aff.* The Watermaster responded and informed Mr. Luke of the additional steps that were needed to accomplish the full distribution of Clear Springs' 200 cfs water right (36-02708), and noted that the redistribution would take place on August 4, 2003. *See* Exhibit L to *Thompson Aff.*

Prior to the scheduled redistribution that stood to satisfy Clear Springs' senior water right, Clear Lakes' counsel sent a letter to the Watermaster on August 1, 2003 raising several concerns with the Watermaster's proposed redistribution and alleging that the Watermaster proposed "new" instructions. *See* Exhibit N to *Thompson Aff.* The Director responded to Clear Lakes' letter and noted that the additional steps identified by the Watermaster were consistent with the June 13, 2002 instructions and that no further instructions were needed. *See* Exhibit O to *Thompson Aff.* Clear Lakes then filed the present *Petition* on August 15, 2003.

ARGUMENT

I. Clear Lakes' Petition Must be Dismissed Pursuant to I.R.C.P. 12(b)(6) Since There are No "Issues" to be Resolved in a Contested Case.

Clear Lakes claims that the Watermaster impermissibly proposes "modifications" to the Directors' June 13, 2002 watermaster instructions. Clear Lakes also claims that it is entitled to a hearing on the "issue" of whether the Watermaster can "investigate or implement alternative or additional steps necessary to shut or fasten" the diversion for its junior water right no. 36-07004. Essentially, Clear Lakes attempts to create a controversy that does not exist.

The Watermaster, pursuant to the June 13, 2002 instructions and in accordance with her duties under I.C. § 42-607 and the Director's *Final Order Creating Water District No. 130*, did not "modify" the instructions but instead only identified "additional steps" to accomplish the redistribution called for under the priorities of the parties' respective water rights. Adding removable boards to the 8-ft fixed weir diversion at the parties' joint diversion works will accomplish the required redistribution and is entirely consistent with the June 13, 2002 instructions. Contrary to Clear Lakes' efforts in this proceeding, inserting boards into a diversion weir does not "amend" the instructions or create an "issue" that has not been previously decided. For the reasons set forth below the Hearing Officer must dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(6).

1. Idaho Law Requires the Actions Proposed by the Watermaster.

Idaho's irrigation code sets forth specific requirements for the Department to follow in administering water rights within the state. First, the Director has "direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom." I.C. § 42-602. The Director is required to

"distribute water in water districts in accordance with the prior appropriation doctrine." I.C. § 42-602. Actual distribution is accomplished by watermasters as provided for in Title 42, Chapter 6, Idaho Code, and as "supervised" by the Director. I.C. § 42-602. Specifically, the "duties" of a watermaster are defined as follows:

> It shall be the ***duty*** of said watermaster to distribute the water of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the ***prior rights*** of each respectively, ***in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources,*** the headgates of the ditches ***or other facilities for diversion of water from such stream, streams or water supply***, when in times of scarcity of water ***it is necessary so to do in order to supply the prior rights of others in such stream or water supply*** . . .

I.C. § 42-607 (emphasis added).

In Water District No. 130, the Director controls the diversion works for Clear Springs' and Clear Lakes' water rights, including the joint diversion facility located at the western pool. *See* Exhibit P to *Thompson Aff.*[7] In addition, the Director has a statutory duty to distribute water from the common springs source to Clear Springs' and Clear Lakes' water rights according to priority. *See Musser v. Higginson*, 125 Idaho 392, 395 (1995)("We conclude that the director's duty to distribute water pursuant to this statute [I.C. § 42-602] is a clear legal duty.").

Watermaster Yenter, under the Director's supervision, actually distributes water to Clear Springs and Clear Lakes. As set forth in I.C. § 42-607, in times of scarcity, such as during the drought witnessed in southern Idaho over the past four years, Watermaster Yenter has a mandatory ***duty*** to "***shut or fasten***" the diversions of junior water right holders in order to satisfy a senior water right. Essentially, that is exactly what Watermaster Yenter proposed to do this summer, "shut" Clear Lakes' diversion for its junior water right no. 36-07004 in order to satisfy

[7] The pictures provide the Hearing Officer with a visual account of the joint diversion structure, including the 6-ft adjustable and the 8-ft fixed weirs. If needed, Clear Springs offers that the Hearing Officer may want to personally inspect the diversions through a field examination.

Clear Springs' senior right no. 36-02708. By inserting an additional dam board into the 8-ft fixed weir that would "shut" Clear Lakes' diversion, available water would then be properly distributed to Clear Springs' senior water right no. 36-02708. *See* Exhibit P to *Thompson Aff.* The "additional steps" proposed by Watermaster Yenter to properly distribute water to Clear Springs and Clear Lakes on the basis of priority are simply actions required by Idaho law, not "issues" subject to a protracted administrative proceeding.

In addition to the duties outlined in the statutes, the Director's February 19, 2002 Order creating Water District No. 130 also specifically requires the Watermaster "in accordance with guidelines, direction, and supervision provided by the Director" to 1) measure and report the diversions under water rights, and 2) curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights. *See* Exhibit B to *Thompson Aff.* at p. 5. Again, Watermaster Yenter proposed to perform exactly those duties by measuring the parties' water rights and curtailing Clear Lakes' junior water right. Moreover, the Director's February 19, 2002 Order explains that "[a]dditional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and the Director's best professional judgment." *See id* at p. 5-6. When Clear Lakes inquired whether additional instructions would be issued, the Director, in his "best professional judgment," indicated no such additional instructions were necessary. *See* Exhibit O to *Thompson Aff.* Certainly the Director and his watermasters have some "discretion" to carry out instructions and statutory duties for the purposes of water right administration. If a watermaster's activities were subject to a contested case proceeding every time a dam board was inserted or removed at a junior water right holder's diversion, administration would never occur in a timely fashion and

senior water right holders would not be afforded the protections provided by Idaho law and the prior appropriation doctrine.

Notably, the "additional steps" needed to "shut or fasten" Clear Lakes' junior water right diversion are exactly the sort of actions Rim View Trout Company ("Rim View")(whose president is also the president of Clear Lakes) seeks to compel the Department to perform in other litigation. *See* Exhibit Q to *Thompson Aff.* Rim View expressly states in its *Amended Complaint* that "Pursuant to Idaho Code § 42-607, it is Defendants' [IDWR] duty through their watermaster to distribute the waters within Water District 130 according to the prior rights of water users within the Water District so that in times of scarcity of water, the ***diversion facilities for junior water rights are shut off or otherwise controlled as necessary to supply water for the prior rights of senior water right holders*** . . ." *See* Exhibit Q to *Thompson Aff.* at 3, ¶ 5 (emphasis added). Rim View also alleges that "Defendants [IDWR] have failed to perform their statutory duties to administer the distribution of water within Water District 130 according to the prior appropriation doctrine ***so as to shut off or control the diversion of junior water rights to supply Plaintiffs' water rights.***" *See id.* at 4, ¶ 8 (emphasis added).

Unless Clear Lakes and Rim View hold differing views as to what the Watermaster in Water District No. 130 is required to do with respect to water right administration, it is evident that Clear Lakes would also recognize the statutory duty imposed on the Watermaster to "shut or fasten" junior water right diversions in order to satisfy a senior water right, including its own water rights.

Accordingly, contrary to what Clear Lakes' *Petition* attempts to create, there is no "issue" of whether Watermaster Yenter is "authorized" to investigate and implement "additional steps" necessary to "shut or fasten" the diversion for Clear Lakes' junior water right. The plain

language of I.C. § 42-607 controls and Clear Lakes' *Petition* must therefore be denied pursuant to I.R.C.P. 12(b)(6).

2. The Watermaster Instructions Provide for the "Additional Steps."

In addition to Idaho statutes, the June 13, 2002 instructions expressly acknowledge the prior appropriation doctrine and how Clear Springs' and Clear Lakes' water rights are to be administered on the basis of priority:

> [W]hen the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004, is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, ***water must be distributed to the rights in priority as being from a single source***."

See Exhibit C to *Thompson Aff.* at p. 11 (emphasis added).

The instructions plainly require the Watermaster to distribute water between Clear Springs and Clear Lakes according to priority. Although the instructions technically direct the Watermaster how to measure the respective diversions from certain outflows at the parties' facilities, the instructions do not foreclose her from taking elementary steps to distribute the water according to priority, including steps required by law. Clear Lakes attempts to create an administrative "vacuum" by claiming the Watermaster is not authorized to go beyond the face of the instructions in distributing water to the parties.

Contrary to Clear Lakes' claims, the Watermaster does not propose to "modify" the instructions, rather she has identified the necessary steps to accomplish the respective priority diversions when the common spring source flows fall below 375 cfs and the discharge at the parties' joint diversion at the western pool falls to less than 225 cfs. Instruction number nine provides the following for how water is to be distributed when the spring flows fall under 375 cfs:

> If the total flow is less than 375 cfs (± 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.

See Exhibit D to *Thompson Aff.* at p. 14.

The instruction clearly states that when the spring flows drop below 375 cfs, Clear Lakes is entitled to divert the first 100 cfs, and Clear Springs is entitled to divert the next 200 cfs. Although the instruction only specifically identifies adjustments to the 6-ft adjustable weir and not the 8-ft fixed weir, the instruction unquestionably demands that the second 200 cfs be distributed to Clear Springs. Nothing prevents the Watermaster from adjusting the elevation of the pool so that water is properly distributed according to priority.

Furthermore, the Watermaster must be afforded some discretion on how to implement the instructions and perform her duties pursuant to I.C. § 42-607. *Cf. Musser*, 125 Idaho at 396 ("The Director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has a duty to distribute water . . ."). Again, under Clear Lakes' theory, water right administration can only occur under the circumstances set forth in the instructions, and certain "vacuums" exist under natural conditions, such as where the spring flows fall below 375 cfs and the discharge from the parties' diversions in the western pool falls below 225 cfs. Whereas both statute and the instructions ***require*** Watermaster Yenter to deliver the first 100 cfs to Clear Lakes and the next 200 cfs to Clear Springs, Clear Lakes' *Petition* seeks to delay that distribution, and under the flows experienced this summer, realize the benefits of an additional 8 cfs to which Clear Springs is lawfully entitled.[8]

[8] *See* Exhibit L to *Thompson Aff.* Watermaster Yenter noted that when the adjustable weir was raised to just above the elevation of the weir pool, Clear Springs only received 192 cfs under its second priority water right, whereas Clear Lakes' junior water right, due to the fixed 8-ft fixed weir, was receiving the extra 8 cfs.

There is nothing inconsistent with the Watermaster's proposed actions that would contravene the instructions. The Watermaster is directed to adjust the 6-ft adjustable weir to accomplish the water distribution according to priority. When it was discovered the adjustable weir could not be adjusted any further to accomplish that distribution, additional steps had to investigated and identified pursuant to Idaho law. Adding boards to the 8-ft fixed weir at the joint diversion physically accomplishes the distribution called for under the instructions. Moreover, as indicated by the Watermaster, this additional step does not alter the parties' diversion structure in any way, but instead is a "temporary solution" used to properly distribute the water when the spring flows drop under a certain level. The Director plainly recognized that "no further instructions" were needed and that the Watermaster's proposed solution was consistent with his earlier guidelines. *See* Exhibit O to *Thompson Aff.*

Under Clear Lakes' theory, assuming spring flows might fall below 100 cfs, and that Clear Springs' diversion received a portion of the available flow, and adjustments to the 6-ft adjustable weir would not change that distribution, apparently Clear Lakes would argue that it is not entitled to the flow diverted by Clear Springs despite holding the first priority right to the common springs source. While this scenario is only hypothetical, it demonstrates the errors in Clear Lakes' *Petition* and the arguments that adding a dam board to "shut" a junior diversion is a "new or different" issue requiring a contested case hearing. Certainly watermasters have the discretion to insert a removable dam board in a junior water right holder's diversion without the need for a prolonged administrative action.

Just as the Director denied Clear Lakes' July 2, 2003 petition because it did not allege "any factual or legal issues that have not previously been raised in prior proceedings," the same

may be said for Clear Lakes' present *Petition*. No "modifications" are proposed to the June 13, 2002 instructions and Clear Lakes' *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6).

II. Clear Lakes' Petition Should Be Dismissed Pursuant to I.R.C.P. 12(b)(8) Due to Another Action Pending Between the Parties.

Clear Lakes' *Petition* seeks "review and rescission" of the alleged "modifications" to the June 13, 2002 watermaster instructions proposed by Watermaster Yenter's July 31, 2003 memorandum. Assuming for argument's sake that the "additional steps" identified by Watermaster Yenter amount to "modifications" to the instructions, a challenge to those "modifications" should be dismissed due to another action pending between the parties.

Clear Lakes appealed the Director's June 13, 2003 *Final Order* that dismissed Clear Lakes' earlier petition that sought among other things, "rescission or modification" of the June 13, 2002 watermaster instructions. In other words, where Clear Lakes' current *Petition* challenges the "proposed modifications" to the instructions and what actions the Watermaster can take pursuant to those instructions, its earlier petition also challenged the instructions and the Watermaster's authority to distribute water to Clear Springs and Clear Lakes according to priority. The District Court in Ada County is currently reviewing the Director's final order. *See* Exhibit G to *Thompson Aff.*

For the purposes of I.R.C.P. 12(b)(8), the Idaho Supreme Court has set forth two tests to determine whether a lawsuit should proceed where a similar lawsuit is pending in another court:

> First, the court should consider whether the other case has gone to judgment, in which event the doctrine of claim preclusion and issue preclusion may bar additional litigation.
>
> * * *
>
> The second test is whether the court, although not barred from deciding the case, should nonetheless refrain from deciding it. . . .

> In deciding whether to exercise jurisdiction over a case when there is another action pending between the same parties for the same cause, a trial court must evaluate the identity of the real parties in interest and degree to which the claims or issues are similar. The trial court is to consider whether the court in which the matter is already pending is *in a position to determine the whole controversy and to settle all the rights of the parties*. Additionally, the court may take into account the occasionally competing objectives of judicial economy, minimizing costs and delay to litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments.

Klaue v. Hern, 133 Idaho 437, 440 (1999)(emphasis in original).

Applying these two tests to the facts surrounding Clear Lakes' present *Petition*, it is evident the Hearing Officer should refrain from entertaining the case and should dismiss it pursuant to I.R.C.P. 12(b)(8). First, the District Court's "with prejudice" dismissal of Clear Lakes' action in Case No. CV-02-00377 (Gooding County) decided the validity of the June 13, 2002 watermaster instructions. The Director affirmed this dismissal in his June 13, 2003 *Final Order*, which is now currently on appeal before the District Court in Ada County. *See* Exhibit G to *Thompson Aff.*

Second, the judicial review proceeding currently pending in the Ada County District Court involves the same issues and the same parties. The present administrative and legal proceedings involving Clear Springs, Clear Lakes, and the June 13, 2002 watermaster instructions are analogous to the situation in *Roberts v. Hollandsworth*, 101 Idaho 522 (1980). In *Roberts*, the Idaho Supreme Court affirmed a district court's dismissal of an action where the plaintiff had filed a state court action when a similar federal court action was pending appeal. 101 Idaho at 523. The district court held that the federal court action pending appeal in the Ninth Circuit was based upon the same transaction and conduct and involved the same parties as the state court action and that dismissal of the state court action was proper under I.R.C.P. 12(b)(8). *Id.* at 524. In affirming the district court's dismissal, the Supreme Court noted: "The filing of

the second action in the state court under these circumstances, involving as it did the same parties, the same issues and the same facts, incurs needless and substantially increased costs to the defendants, is a waste of judicial resources, and conjures up the possibility of conflicting judgments by state and federal courts." *Id.* at 525.

For similar reasons explained in *Roberts*, the Hearing Officer should dismiss Clear Lakes' *Petition* involving the same parties, the same issues, and the same facts since it incurs needless and increased costs to Clear Springs, is a waste of IDWR's resources, and there is a possibility of conflicting judgments (assuming the Director's final decision in this proceeding is appealed). Allowing Clear Lakes to initiate an administrative contested case on any action taken by Watermaster Yenter with respect to water distribution between Clear Lakes and Clear Springs, while the same facts and issues are the subject of litigation before the Ada County District Court, is precisely the situation contemplated by I.R.C.P. 12(b)(8). The Hearing Officer should dismiss Clear Lakes' *Petition* accordingly.

Alternatively, the Hearing Officer should stay these proceedings until the Ada County District Court judicial review litigation is finally resolved.

CONCLUSION

Clear Lakes' *Petition* is just another attempt to preclude the Watermaster from properly distributing water to Clear Springs and Clear Lakes on the basis of priority. The Watermaster's proposed action, inserting a dam board into the 8-ft fixed weir to "shut" Clear Lakes' diversion to supply Clear Springs' senior water right, is required by Idaho law and is consistent with the Director's June 13, 2002 Amended Watermaster Instructions. There is no basis for a contested case hearing and Clear Lakes' *Petition* must be dismissed pursuant to I.R.C.P. 12(b)(6). In addition, since the same parties are currently involved in other litigation over the same issues, the

Hearing Officer should refrain from hearing this matter and dismiss Clear Lakes' *Petition* pursuant to I.R.C.P. 12(b)(8).

DATED this 22nd day of December, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2nd, 2003, I served a true and correct copy of the foregoing *RESPONDENT CLEAR SPRINGS FOODS, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS* upon the following by U.S. mail, postage prepaid:

Original:

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706-2237

Copies:

Harriet Hensley (Hearing Officer)
State of Idaho Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

Daniel V. Steenson, Esq.
Charles L. Honsinger, Esq.
S. Bryce Farris, Esq.
RINGERT CLARK CHARTERED
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Cindy Yenter
Watermaster, Water District No. 130
c/o Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380

Travis L. Thompson

RECEIVED
DEC - 3 2003
Department of Water Resources

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Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Respondent Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	AFFIDAVIT OF TRAVIS L. THOMPSON IN SUPPORT OF CLEAR SPRINGS FOODS, INC.'S MOTION TO DISMISS

STATE OF IDAHO)
) ss.
County of Twin Falls)

TRAVIS L. THOMPSON, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record providing legal representation to Clear Springs Foods, Inc. in the above captioned matter. I am over the age of 18 and have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

2. Appended hereto as Exhibit A are true and correct copies of the partial decrees issued by the SRBA District Court for Clear Lakes' water rights (36-02659 and 36-07004) and Clear Sprigs' water rights (36-02708 and 36-07218).

3. Appended hereto as Exhibit B is a true and correct copy of the Director's *Final Order Creating Water District No. 130.*

4. Appended hereto as Exhibit C is a true and correct copy of the Director's June 13, 2002 Amended Watermaster Instructions.

5. Appended hereto as Exhibit D is a true and correct copy of Watermaster Cindy Yenter's June 19, 2002 *Notice of Intent to Redistribute Flows.*

6. Appended hereto as Exhibit E is a true and correct copy of Director Dreher's February 4, 2003 letter to Watermaster Cindy Yenter.

7. Appended hereto as Exhibit F is a true and correct copy of Director Dreher's June 13, 2003 *Final Order* issued in the contested administrative proceeding entitled *In the Matter of Petition to Modify Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201, and 36-7218 in Water District No. 130.*

8. Appended hereto as Exhibit G is a true and correct copy of Clear Lakes Trout Company, Inc.'s *Petition for Judicial Review/Notice of Appeal* filed on June 19, 2003 in Case No. CV-OC-0304746D (Ada County District Court).

9. Appended hereto as Exhibit H is a true and correct copy of Watermaster Cindy Yenter's June 20, 2003 *Notice of Intent to Resume Administration of Clear Lakes Area Water Rights.*

10. Appended hereto as Exhibit I is a true and correct copy of Clear Lakes Trout Company, Inc.'s *Petition to Initiate Contested Case/Request for Expedited Hearing/Petition to Stay Administration* filed on July 2, 2003.

11. Appended hereto as Exhibit J is a true and correct copy of the Director's *Order Denying Petition to Initiate Contested Case/Request for Expedited Hearing/Petition to Stay Administration* issued on July 3, 2003.

12. Appended hereto as Exhibit K is a true and correct copy of Watermaster Cindy Yenter's July 21, 2003 letter to Clear Springs and Clear Lakes.

13. Appended hereto as Exhibit L is a true and correct copy of Watermaster Cindy Yenter's July 31, 2003 memorandum to Tim Luke.

14. Appended hereto as Exhibit M is a true and correct copy of Tim Luke's July 29, 2003 memorandum to Watermaster Cindy Yenter.

15. Appended hereto as Exhibit N is a true and and correct copy of Charlie Honsinger's August 1, 2003 letter to Watermaster Cindy Yenter.

16. Appended hereto as Exhibit O is a true and correct copy of Director Dreher's August 4, 2003 letter to Charlie Honsinger.

17. Appended hereto as Exhibit P are true and correct copies of pictures of Clear Springs' and Clear Lakes' joint diversion facilities.

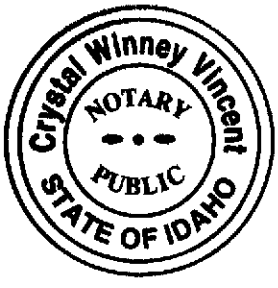
18. Appended hereto as Exhibit Q is a true and correct copy of Clear Lakes Trout Company, Inc.'s *Amended Verified Complaint and Petition for Writ of Mandate* filed in Case No. CV-OC-0307551D (Ada County District Court) on October 21, 2003.

DATED this 15th day of December 2003.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

SUBSCRIBED AND SWORN to before me this 1st day of December 2003.



Crystal Winney Vincent
Notary Public for Idaho
Residing at Twin Falls
Commission Expires: 4-8-2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2nd, 2003, I served a true and correct copy of the foregoing *AFFIDAVIT OF TRAVIS L. THOMPSON IN SUPPORT OF CLEAR SPRING FOODS, INC.'S MOTION TO DISMISS* upon the following by U.S. mail, postage prepaid:

Original:

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706-2237

Copies:

Harriet Hensley (Hearing Officer)
State of Idaho Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

Daniel V. Steenson, Esq.
Charles L. Honsinger, Esq.
S. Bryce Farris, Esq.
RINGERT CLARK CHARTERED
455 S. 3rd St.
P.O. Box 2773
Boise, Idaho 83701-2773

Cindy Yenter
Watermaster, Water District No. 130
c/o Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380

Travis L. Thompson

Exhibit A

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO

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	)	**ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 & 36-02659**
	)	
Case No. 39576	)	
	)	

I.
PROCEDURAL BACKGROUND

A ***Special Master's Report and Recommendation*** was filed on March 3, 1998, in the above captioned subcases. On April 28, 1998, a *Motion to Alter or Amend* was filed on the issue of facility volume. Claimant Clear Lakes Trout Company, Inc. ("Clear Lakes"), filed a *Motion to Alter or Amend* on May 8, 1998, regarding the issues of General Provision 5 and points of diversion.

On December 29, 1999, the SRBA District Court issued a decision on ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***. Partial decrees were issued in the above-captioned subcases but were subsequently rescinded because of the remaining *Motion to Alter or Amend* filed by Clear Lakes. Clear Lakes was the only remaining party to the subcase.

On April 15, 2002, the Special Master issued an ***Amended Order Granting in Part Clear Lakes Motion to Alter or Amend and Second Amended Special Masters Report***.

On April 16, 2002, Clear Lakes filed a *Motion to Expedite Issuance of Partial Decrees* seeking to have the partial decrees issued on an expedited basis to have the partial decrees issued prior to the organizational meeting for a water district affecting the subject rights. In furtherance of the *Motion* Clear Lakes waived its right to file a Notice of Challenge.

On April 22, 2002, a hearing was held on the *Motion* to determine whether the remark contained in the point of diversion element regarding the source for the water rights was consistent with the holding in subcases 36-02708 and 36-07218 involving water rights owned by Clear Springs Food, Inc. ("Clear Springs"). In subcases 36-02708 and 36-07218 the SRBA

District Court held, and the Idaho Supreme Court affirmed, that the above–captioned claims and Clear Springs' water rights 36-02708 and 36-07218 shared a common source for purposes of administration. At the hearing, the Court inquired of a representative of the Idaho Department of Water Resources, as the Court's independent expert, whether based on the existing conditions of the diversion works, the remark regarding point of diversion and source is consistent with the holding regarding Clear Springs' water rights.

II.

FINDINGS

THEREFORE, based on the foregoing, the Court makes the following findings:

1. That Clear Lakes is the only party to subcases 36-02004 and 36-02659.

2. That because a ***Special Master's Report and Recommendation*** was previously issued further parties are precluded from entering the subcases by filing a *Motion to Alter or Amend* to the April 15, 2002, *Amended Recommendation*. ***SRBA AO1 Rules of Procedure*** § 13 b. ("no second Motion to Alter or Amend may be filed on the decision granting or denying a Motion to Alter or Amend").

3. That Clear Lakes has waived its right to file a Challenge in the above-captioned subcases.

4. That the partial decrees herein issued are not inconsistent with this Court's prior holding in subcases 36-02708 and 36-07218.

5. That pursuant to I.R.C.P. 53(e)(2) and ***AO1***, § 13 f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

III.

ORDER

Therefore, IT IS ORDERED that water rights 36-07004 and 36-02659 are hereby decreed as set forth in the attached *Amended Partial Decrees* Pursuant to I.R.C.P. 54(b).

DATED 4-22-02

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 AND 36-02659** was mailed on 4/22/02 with sufficient first-class postage to the following:

Clear Lakes Trout
Represented by:
William F Ringert
PO Box 105
Hammett, ID 83627

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Bobbin Watts
Deputy Clerk

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

AMENDED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-07004

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 75.00 CFS

PRIORITY DATE: 07/21/1967

POINT OF DIVERSION: T09S R14E S02 LOT 05 (SWSENE) Within Gooding County
LOT 05 (SESENE)

THIS WATER RIGHT IS DIVERTED THROUGH A SPRING-FED DIVERSION POOL KNOWN AS THE "EASTERN POOL," AND THROUGH PIPES WHICH DIVERT WATER FROM SPRINGS THAT ARE TRIBUTARY TO THE EASTERN POOL, ALL OF WHICH ARE LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. A PORTION OF WATER RIGHT NO. 36-2659 IS ALSO DIVERTED THROUGH THE EASTERN POOL. ALL WATER DIVERTED IS FROM THE SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	75.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

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

AMENDED

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 36-02659

2002 APR 22 PM 4:12

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED.

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within Gooding County
LOT 05 (SESENE)
LOT 05 (SWSENE)

THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S 1/2 SESWNE AND THE S 1/2 SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL" LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURSE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	100.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

2000 APR 10 AM 10: 17
CLERK DISTRICT COURT SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	**ORDER OF PARTIAL DECREE**
	)	
Case No. 39576	)	**For Water Right 36-02708**
	)	

The Notice of Challenge filed in the above subcase having been heard and ruled upon, IT IS THEREFORE ORDERED that water right 36-02708 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

IT IS SO ORDERED.

DATED APR 10 2000.

BWood

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

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

2000 APR 10 AM 10:19

FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-02708

NAME & ADDRESS: CLEAR SPRINGS FOODS INC
THE PROSPECT CO
PO BOX 712
BUHL ID 83316

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

SOURCE IS ALSO KNOWN AS CLEAR SPRINGS.

QUANTITY: 200.00 CFS
144540.0 AFY

PRIORITY DATE: 09/28/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within GOODING County
LOT 5 (SWSENE)
NENWSE

MULTIPLE POINTS OF DIVERSION LOCATED IN T09S, R14E, S02, LOT 5 (SWSENE), SESWNE, NENWSE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	200.00 CFS
		144540.0 AFY

PLACE OF USE: FISH PROPAGATION Within GOODING County
T09S R14E S02 NWSE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER ON CHALLENGE (CONSOLIDATED ISSUES) OF "FACILITY VOLUME" ISSUE AND "ADDITIONAL EVIDENCE" ISSUE** were mailed on December 29, 1999, with sufficient first-class postage to the following:

IDWR Document Depository
PO Box 83720
Boise, ID 83270-0098

Chief, Natural Resources Div
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment & Natural Resources
Division
550 West Fort Street, MSC 033
Boise, ID 83724

Daniel Steenson
Ringert Clark Chtd
PO Box 2773
Boise, ID 83702-2773

Norman Semanko
Rosholt Robertson & Tucker
PO Box 1906
Twin Falls, ID 83303

Patrick Brown
109 S Adams
Jerome, ID 83338

Dana Hofstetter
Beeman & Hofstetter PC
PO Box 1427
Boise, ID 83701-1427

D. Craig Lewis
University of Idaho
College of Law
6th and Rayburn Street
Moscow, ID 83844-2321

John Hepworth
Hepworth, Lezamiz & Hohnhorst
PO Box 389
Twin Falls, ID 83303-0389

Deputy Clerk of the Court

2000 APR 10 AM 10:10

FILED

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	)	**ORDER OF PARTIAL DECREE**
	)	
Case No. 39576	)	**For Water Right 36-07218**
	)	

The Notice of Challenge filed in the above subcase having been heard and ruled upon, IT IS THEREFORE ORDERED that water right 36-07218 is hereby **decreed** as set forth in the attached *Partial Decree Pursuant to I.R.C.P. 54(b)*.

IT IS SO ORDERED.

DATED APR 1 0 2000.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

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

2000 APR 10 AM 10:20

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
Case No. 39576	)	Water Right 36-07218
	)	

NAME & ADDRESS: CLEAR SPRINGS FOODS INC
THE PROSPECT CO
PO BOX 712
BUHL ID 83316

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

SOURCE IS ALSO KNOWN AS CLEAR SPRINGS.

QUANTITY: 51.55 CFS

FACILITY VOLUME 335,504 CU. FT.

PRIORITY DATE: 01/24/1972

POINT OF DIVERSION: T09S R14E S02 SESWNE Within GOODING County
LOT 5 (SWSENE)
NENWSE

MULTIPLE POINTS OF DIVERSION LOCATED IN T09S, R14E, S02, LOT 5 (SWSENE), SESWNE, NENWSE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	51.55 CFS

PLACE OF USE: FISH PROPAGATION Within GOODING County
T09S R14E S02 NWSE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

A MEASURING DEVICE OF A TYPE APPROVED BY IDWR SHALL BE MAINTAINED AS A PART OF THE DIVERTING WORKS.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

THE REMARK ADDRESSING FACILITY VOLUME IS INCLUDED IN THIS WATER RIGHT ONLY BECAUSE THE REMARK APPEARED ON THE LICENSE. THE REMARK ADDRESSING FACILITY VOLUME DOES NOT DEFINE THE EXTENT OF BENEFICIAL USE AND CANNOT BE USED TO LIMIT ANY ELEMENT OF THIS WATER RIGHT. THE REMARK SHALL NOT PREVENT THE OWNER OF THE LICENSE FROM EXPANDING FACILITY VOLUME.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

BWood

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER OF PARTIAL DECREE with attached PARTIAL DECREE PURUSUANT TO I.R.C.P. 54(b)** were mailed on April 10, 2000, with sufficient first-class postage to the following:

IDWR Document Depository
PO Box 83720
Boise, ID 83270-0098

Chief, Natural Resources Div
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment & Natural Resources
Division
550 West Fort Street, MSC 033
Boise, ID 83724

Dana Hofstetter
Beeman & Hofstetter
PO Box 1427
Boise, ID 83701-1427

D. Craig Lewis
University of Idaho
College of Law
6th and Rayburn Street
Moscow, ID 83844-2321

Daniel Steenson
Ringert & Clark, Chtd
PO Box 2773
Boise, ID 83702-2773

Norman Semanko
Rosholt Robertson & Tucker
PO Box 1906
Twin Falls, ID 83303

Patrick Brown
109 S Adams
Jerome, ID 83338

John Hepworth
Hepworth Lezamiz & Hohnhorst
PO Box 389
Twin Falls, ID 83303

Deputy Clerk of the Court

Exhibit B

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

February 20, 2002

Re: Final Order Creating Thousand Springs Area Water District No. 130

Dear Water Right Holder:

The records of the Idaho Department of Water Resources ("IDWR") show that you are the holder of one or more water rights with points of diversion within the Eastern Snake Plain Aquifer (ESPA) and IDWR administrative basins 36 and 43. This area was one of two proposed water district areas described in the Department's Notice of Order Authorizing Interim Administration and Notice of Hearings Regarding Creation of Water Districts dated January 14, 2002. A copy of this notice was sent to all water right holders within the proposed districts except owners of small domestic and stock water rights. The Director of IDWR held two separate hearings concerning creation of the two water districts on February 4, 2002 in Blackfoot and Jerome, Idaho. A ten-day written comment period was provided after the hearings as required by law.

Enclosed please find a copy of the Final Order Creating the Thousand Springs Area Water District No. 130. Also enclosed is an informational sheet that explains options for responding to final orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

The earliest potential dates for scheduling the 2002 water district meeting will be from about April 22 to April 26. The water district meeting is necessary to elect a watermaster, select an advisory committee and adopt a budget for the operation of the district. The Department will send separate notice to announce the date, time and place for the water district meeting.

Please contact this office or the IDWR regional offices in Twin Falls if you have any questions concerning this matter.

Sincerely,

Tim Luke
Manager, Water Distribution Section

Enclosures

RECEIVED FEB 2 2 2002

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CREATING THE THOUSAND SPRINGS AREA WATER DISTRICT, DESIGNATED AS WATER DISTRICT NO. 130, FOR THE ADMINISTRATION OF RIGHTS TO THE USE OF GROUND WATER AND SPRINGS DISCHARGING FROM THE EASTERN SNAKE PLAIN AQUIFER IN ADMINISTRATIVE BASINS 36 AND 43.	**FINAL ORDER CREATING WATER DISTRICT NO. 130**

The Director of the Idaho Department of Water Resources ("Director") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

FINDINGS OF FACT

1. On August 3, 2001, the Director established the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the Thousand Springs GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the Thousand Springs GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. On August 31, 2001, the Director was advised by representatives of holders of

junior priority ground water rights and holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what would have resulted from the intended curtailment of certain junior ground water diversions within the Thousand Springs GWMA.

3. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs GWMA, provided the agreements in principle were implemented through detailed written agreements.

4. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into detailed written stipulated Agreements with representatives of most holders of senior priority surface water rights. The Agreements were submitted to the Director for approval. The Director approved the Agreements on January 18, 2002.

5. 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. In the event the replacement water cannot be provided, the Agreements require an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

6. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

7. Under the Agreements, the parties requested that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other similar agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

8. On November 19, 2001, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the Eastern Snake Plain Aquifer ("ESPA") in the Thousand Springs area.

9. On November 19, 2001, the SRBA District Court issued an order setting the State's motion for order authorizing interim administration for hearing on January 8, 2002. The Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State of Idaho served copies of the Court's November 19, 2001, order and the State's motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on November 26, 2001.

10. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code, based upon a

determination that such interim administration is necessary to protect senior water rights.

11. On January 14, 2002, the Director mailed notice, by regular mail, of the proposed action creating a water district in the Thousand Springs area within the ESPA in Administrative Basins 36 and 43, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water user in the proposed district affected by the creation of the water district (herein established as Water District No. 130). The notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held on February 4, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

12. In addition, the Director published notice of the proposed action creating the water district once a week for two (2) weeks in the following newspapers having general circulation within the area covered by the proposed district: *The Times News* of Twin Falls on January 17 and 24, 2002; the Burley *South Idaho Press* on January 17 and 24, 2002; and the *Minidoka County News* of Rupert on January 16 and 23, 2002.

13. The Director conducted the hearing concerning the proposed creation of the water district at the Jerome High School Auditorium in Jerome, Idaho, at 7:00 pm on February 4, 2002. Approximately fifty-five people attended the hearing.

14. Prior to commencing the hearing, the Director made a presentation and answered questions for approximately ninety minutes addressing the reasons for creation of the proposed water district and how the district would operate.

15. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through February 14, 2002, for the submission of written comments.

16. Only one person presented an oral statement for the record at the Jerome hearing. No one testified in opposition to the creation of the proposed water district. Jeff Martin presented a statement on behalf of the North Snake River Ground Water District in support of the establishment of a water district to administer ground water in accordance with the prior appropriation doctrine and State law.

17. Mr. Roger Ling, attorney for the A & B Irrigation District, stated that the questions he had were addressed by the Director during the presentation and discussion that occurred prior to going on the record.

18. The Director received no written comments from affected ground water users objecting to the creation of the proposed water district prior to the close of the February 14, 2002, comment period. Comments were received from Clear Springs Foods, Inc. of Buhl, Idaho, suggesting that water rights included within Water District 36-A (Billingsley and Riley Creeks and tributary springs) should be combined into the same water district or subdistrict with ground water rights so that the parties may continue to work together under the same watermaster. Water District 36-A submitted comments requesting that it remain autonomous

at this time while retaining the option of joining the newly formed water district in the future. The United States Fish and Wildlife Service submitted comments relating to future arrangements that may be made for the measuring and reporting of ground water usage at its affected facilities.

19. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

20. The available water supply in all or portions of Administrative Basins 36 and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

21. The administration of ground water rights within the portion of Administrative Basins 36 and 43 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed

with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

District Creation

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer water rights within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of stipulated agreements approved by the Director; and

d. 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. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and

the Director's best professional judgment.

12. The Director concludes that the water district created by this order shall include the following organizational features:

a. Election and appointment of a single watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts and irrigation districts, or as otherwise determined by the Director.

c. Selection of Water District Advisory Committee that includes, but need not be limited to, representation from boards of directors of ground water districts and irrigation districts.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Water rights not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

ORDER

IT IS ORDERED that:

1. The Thousand Springs Area Water District, designated as Water District No. 130, is hereby created to include all ground water rights and all rights to divert from springs discharging from the ESPA that are not already included in Water District No. 36-A, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference.

EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) the petition for reconsideration is disposed of; or

(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A nonparty shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a 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(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

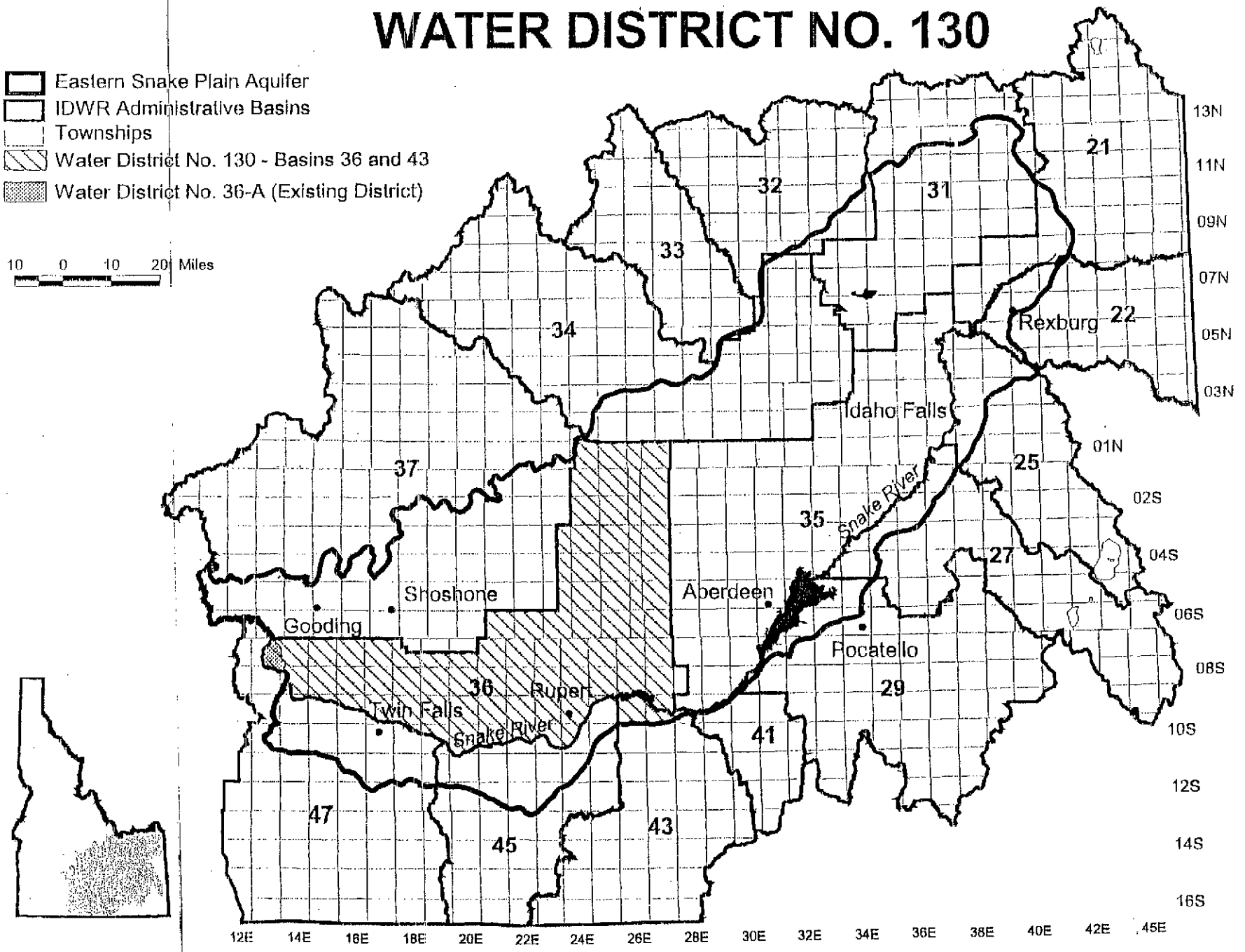
The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

2. For 2002, the water right holders within the Thousand Springs Area Water District No. 130 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 19th day of February 2002.

KARL J. DREHER
Director

THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



ATTACHMENT A

Exhibit C

Clear Spr
Supren

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

June 13, 2002

Clear Springs Foods, Inc.
c/o John K. Simpson
Barker Rosholt & Simpson LLP
205 North 10th, Suite 520
P. O. Box 2139
Boise, ID 83701-2139

Facsimile: (208) 344-6034

Clear Lakes Trout Co.
c/o Daniel V. Steenson and
Charles L. Honsinger
Ringert Clark
455 South 3rd
P. O. Box 2773
Boise, ID 83701-2773

Facsimile: (208) 342-4657

VIA FIRST FACSIMILE AND FIRST CLASS MAIL

Re: Amended Watermaster Instructions for Distribution of Water
Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218

Dear John, Dan, and Charles:

Today, I issued amended watermaster instructions for distributing water among water rights 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218, a copy of which is enclosed. As I committed to Clear Lakes, I have again thoroughly reviewed all of the pertinent information of which I am aware, particularly the governing court decisions to date. Although I have added approximately 5 additional pages of analysis, my previous conclusions regarding how these water rights should be administered are unchanged.

These watermaster instructions are written to the watermaster, not to either of your clients. In the original instructions issued June 5, I included less analysis because only the basis for the instructions needed to be communicated to the watermaster, not a justification. The circumstances surrounding the Clear Lakes and Clear Springs water rights are complex, and the current instructions, as amended, are extraordinary in the analysis and detail included. This was done to demonstrate to both Clear Lakes and Clear Springs, that all of the complexities, pertinent information, and the law have been thoroughly considered. Thus the enclosed memorandum is not a decision arising from a contested case nor is it the model or form for future watermaster instructions.

RECEIVED JUN 17 2002

The written call filed by Clear Springs on June 7 will now be handled in accordance with the enclosed instructions. Please contact either myself or Norm Young if you have any questions.

Sincerely,

Karl J. Dreher
Director

Enclosure

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MEMORANDUM

To: Cindy Yenter
Water District 130 Watermaster

Date: June 13, 2002

From: Karl J. Dreher

cc: Clear Springs Foods, Inc.
Clear Lakes Trout Co.
Norm Young
Allen Merritt
Tim Luke

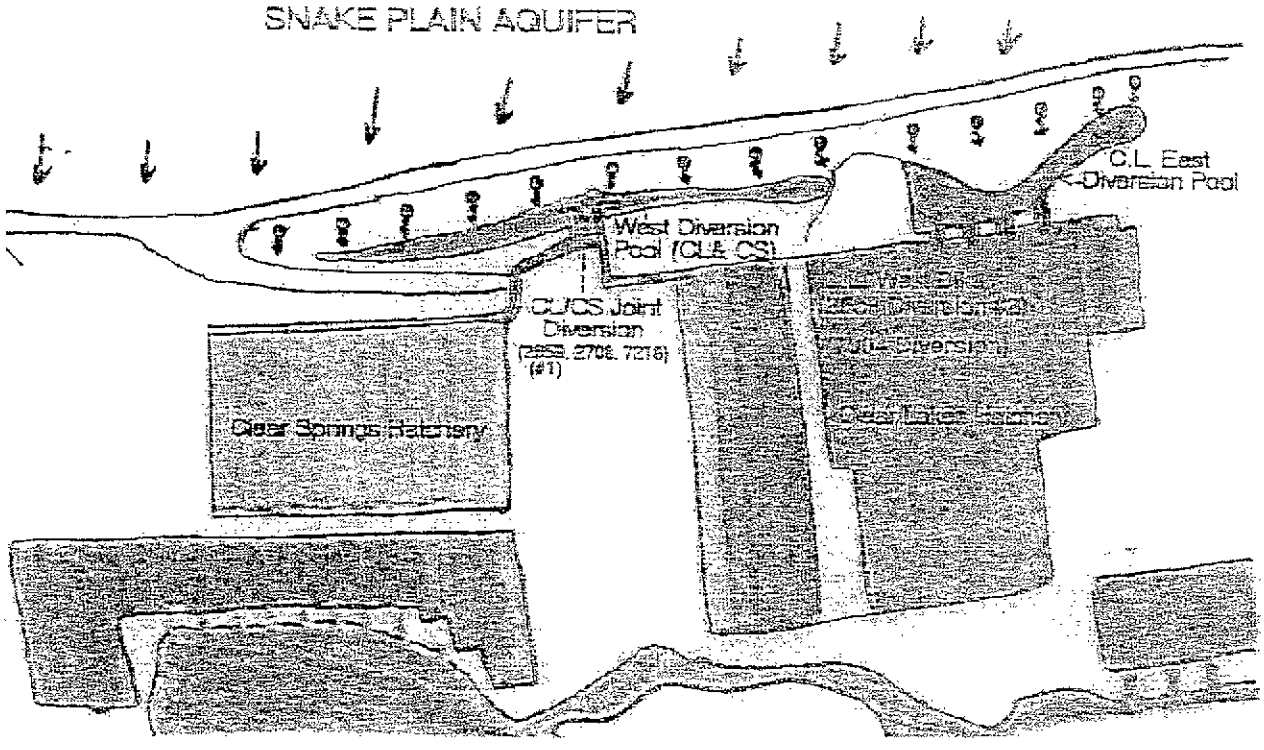
Subject: Amended Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218

Background Summary

Clear Springs Foods, Inc. (aka Clear Springs Trout Company or "Clear Springs") and Clear Lakes Trout Company ("Clear Lakes") separately own and operate adjacent fish hatcheries located below the rim of the Snake River canyon north of Buhl, Idaho. During the development of the hatcheries in the 1960s and 1970s, both Clear Springs and Clear Lakes filed applications with IDWR for permits to appropriate water from springs flowing from the Eastern Snake Plain Aquifer, and five water rights were established as follows: 36-02659 (Clear Lakes, 100 cfs, 06/23/1966); 36-02708 (Clear Springs, 200 cfs, 09/28/1966); 36-07004 (Clear Lakes, 75 cfs, 07/21/1967); 36-07201 (Clear Springs, 10 cfs, 08/04/1971); and 36-07218 (Clear Springs, 51.55 cfs, 01/24/1972). The current layout of the adjoining hatcheries and water right diversion points (except for water right no. 36-07201) are shown on the next page.

On March 13, 1980, Clear Springs and Clear Lakes entered into an agreement settling disputes regarding property ownership, access, operation and maintenance of common facilities, and the responsibilities of both parties. The 1980 agreement also provided for allocation of water between water rights nos. 36-02659, 36-02708, and 36-07004, when the amount of water flowing from springs and available under these three water rights is less than 375 cfs. The agreement provided that:

> Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permits Nos. 36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available to [Clear] Lakes and [Clear] Springs under their respective permits, goes below



375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between [Clear] Springs and [Clear] Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to [Clear] Springs and 47% to [Clear] Lakes. All water being used by [Clear] Springs and [Clear] Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by [Clear] Springs under Permit No. 36-7201. *Agreement*, pp. 3 – 4.

On November 2, 1992, IDWR filed the *Director's Report for Reporting Area 3* including it's recommendations for decreeing Clear Springs' water rights nos. 36-02708, 36-07201, and 36-07218. The "source" recommended by IDWR for all three Clear Springs water rights was springs tributary to Clear Lake(s). Clear Lakes filed objections to both the "source" and "point of diversion" elements of IDWR's recommendations for Clear Springs' water rights 36-02708 and 36-07218 alleging that these rights are diverted from a separate source than is Clear Lakes' water right no. 36-07004. Clear Lakes also filed objections to both the "source" and "point of diversion" elements of IDWR's recommendation for Clear Springs' water right 36-07201 alleging that Clear Lakes "has a water right [no. 36-02659] that diverts from the [same] source that supplies this water right [no. 36-07201]."

The Special Master for In Re SRBA, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218) issued *Findings of Fact and Conclusions of Law on Involuntary Dismissal* (August 21, 1998); *Special Master's Report and Recommendations* (August 28, 1998); and *Order*

Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) (December 31, 1998). Among other determinations, the Special Master concluded that "The source element for each water right [of Clear Springs] shall be reported as stated in the Director's Report for each water right" and that "the point of diversion for all the rights [of Clear Springs] shall be decreed as recommended in the Director's Report." Clear Lakes subsequently filed Notice of Challenge and after arguments, the Presiding Judge for the SRBA issued ***Memorandum Decision and Order on Challenge*** dated July 9, 1999. The Presiding Judge overruled and denied Clear Lakes' challenges to the Special Master's recommendation in all respects except one: the source for Clear Springs' water right no. 36-07201. Clear Lakes then filed Motion to Alter or Amend Judgment, and the Presiding Judge issued ***Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*** on August 15, 2000, denying Clear Lakes' motion.

The SRBA court issued partial decrees for Clear Springs' three water rights on April 10, 2000. After Clear Lakes' Motion to Alter or Amend judgment was denied by the SRBA court, Clear Lakes appealed to the Idaho Supreme Court. ***Idaho Supreme Court 2002 Opinion No. 17*** was filed on January 18, 2002, affirming the SRBA court ***Memorandum Decision and Order on Challenge.***

Following an inquiry from Clear Springs regarding how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call, both Clear Springs and Clear Lakes were asked to submit any additional information that either entity believed to be pertinent in developing watermaster instructions for administering these water rights. Both Clear Springs and Clear Lakes submitted information on May 2, 2002, although Clear Springs asserted that it believed IDWR already possessed all the necessary information to develop watermaster instructions.

In its May 2 submittal, *Memorandum Re: Administration of water right nos. 36-02659, 36-02708 and 36-07004*, as amended on May 7, Clear Lakes concludes that: (1) adjustment of the 6-ft adjustable weir from the west diversion pool through which water right 36-02659 is distributed to Clear Lakes would result in reducing the quantity of water distributed to the Clear Lakes' senior water right 36-02659 in favor of Clear Springs' junior water right 36-02708, which is precluded by Idaho law because Clear Lakes' senior water right would be injured; and (2) it is physically impossible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to increase the quantity of water available for Clear Springs' relatively senior water right 36-02708, making any call by Clear Springs to distribute water to Clear Springs' water right 36-02708 against Clear Lakes' water right 36-07004 futile.

Basis for Watermaster Instructions - Administration of Water Rights 36-02659, 36-02708, 36-07004, and 36-07218

Seven of the nine Findings of Fact set forth by the Special Master in *Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)* (December 31, 1998), adopted by the Presiding Judge in *Memorandum Decision and Order on Challenge* (July 9, 1999), and affirmed by the Idaho Supreme Court in *Idaho Supreme Court 2002 Opinion No. 17* (January 18, 2002) that are the most pertinent to the administration of water rights nos. 36-02659, 36-02708, 36-07004, and 36-07218 are as follows:

> 2. The place of use for both Clear Springs and Clear Lakes is located in the Snake River Canyon north of Buhl, Idaho. All the water used by both Clear Lakes and Clear Springs originates from springs flowing from the Snake River Plain Aquifer. Prior to development of the rights, the water from all the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Springs Lake, and then ultimately emptied into the Snake River. [citations omitted]
>
> 3. Earl Hardy participated in the development of Clear Lakes' water rights. Mr. Hardy testified that prior to any development of water rights 36-02659 and 36-07004, there were two stream flows from the original stream channel. Mr. Hardy testified that there was an underwater division point in the stream channel creating a "western" and "eastern" flow. ... [citations omitted]
>
> 4. After the close of Clear Lakes' case, the historic dividing point between the eastern and western flows remained unclear. According to Mr. Hardy, the historic dividing point was located 80 feet from the gate on the western dyke. Clear Lakes' expert hydrologist, Sheryl [sic] Chapman, gave several opinions on the historic dividing point. One estimate was that the historic dividing point was located 30-40 feet to the east of where Mr. Hardy estimated the historic dividing point (110-120 feet from the gate on the western dyke). Mr. Chapman's other estimate was that the dividing point was located somewhere between the "highest western flow" and the "highest eastern flow" ... [citations omitted]
>
> 5. When water rights 36-02659 and 36-07004 were first developed, Clear Lakes created two pools, a western and an eastern pool. The result of this construction was the elimination [of] one of the three islands and one of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. "But for" this one continuous structure, there would not be an eastern pool. The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows. [citations omitted]

> 6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. [citations omitted]
>
> 7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. [citations omitted]
>
> 8. There are two discharge point[s] from the eastern pool. Part of water right 36-0259 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool. 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. Stated differently, the discharge points for water right 36-07004 are located to the west of the alleged historic dividing point. [citations omitted]

Given these findings, particularly findings 6 and 7, it is clear that the SRBA court has determined that Clear Springs' water rights 36-02708 and 36-7218 together with Clear Lakes' water rights 36-02659 and 36-07004 divert water commingled from various springs which constitute a single, non-segmentable, source. Regarding the administration of Clear Lakes' water right 36-07004, the Special Master determined the following conclusion of law:

> The undisputed facts are that the source of water for water right 36-07004 uses water from both the western and eastern flows, and that the current discharge point for that water right is on the western side of the historic dividing point. The result is that water right 36-07004 uses water from both the western and eastern flows; the same western water that historically was the source for all of Clear Springs' rights. Because of these simple facts, there is no way to administer water right 36-07004 as [being from] a separate source from the Clear Springs rights. *Order Granting in Part, Denying in Part, Motion [to] Alter or Amend*, p.7.

The Presiding Judge for the SRBA court did not disturb this conclusion, and the Idaho Supreme Court affirmed after stating: "The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court." *Idaho Supreme Court 2002 Opinion No. 17*, p. 4. In his ***Order on Motion to Alter or Amend Judgment*** dated August 15, 2000, the Presiding Judge discussed the administration of two hypothetical water rights with differing priority dates in a setting the judge described as being analogous to the setting between the Clear Springs and Clear Lakes water rights:

> An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel. [Note that the judge uses the terms "stream" and "channel" synonymously.] Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. [citations omitted] However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be futile. Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. [citations omitted] Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels [other than the lawful removal of stream channel obstructions] to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. [citations omitted] In essence, the junior is protected by the respective location of the diversion works on the common source.
>
> In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. ... The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.
>
> In taking a variation to the above example, suppose both the junior and senior decide to modify their respective diversion works by altering the natural course of the stream and constructing a reservoir from which both intend to divert. **The modifications again eliminate the protection afforded the junior** by the natural fork in the stream [emphasis added]. The source is the same and the junior has permitted the senior to change his point of diversion despite the potential for injury. This is what occurred between Clear Lakes and Clear Springs in the instant case – the natural flow of the stream has been altered. *Order on Motion to Alter or Amend Judgment*, pp. 6 – 8.

In its May 2 memorandum, Clear Lakes concedes that the "source" element for water rights 36-02659, 36-02708, and 36-07004 has been decreed to be the same source (springs tributary to Clear Lake or Lakes). Clear Lakes, however, in essence contends that because: (a) water right 36-02708 is only diverted out of the western diversion pool and does not have a point of diversion out of the eastern diversion pool; and (b) water right 36-07004 is only diverted out of the eastern diversion pool and does not have a point of diversion out of the western pool; then

reducing the amount of water diverted under Clear Lakes' right 36-07004 will not make water available for Clear Springs' right 36-02708, and the amount of water diverted from the western pool under Clear Lakes' right 36-02659 can not be reduced to make water available for Clear Springs' right 36-02708, since right 36-02659 is the senior right. While the decrees for water rights 36-02708 and 36-07004 clearly recognize separate points of diversion from the western and eastern pools, respectively, the practical result of Clear Lakes' premise would be that Clear Springs' water right 36-02708 and Clear Lakes' water right 36-07004 would be administered as if they were from separate sources. However, the Presiding Judge for the SRBA court, as quoted above, has in effect concluded that the modifications to the diversions for the Clear Lakes and Clear Springs water rights has "eliminated the protection" afforded Clear Lakes' water right 36-07004.

Clear Lakes' conclusion that adjustment of the 6-ft adjustable weir from the west diversion pool, through which water right 36-02659 is distributed to Clear Lakes, would result in reducing the quantity of water distributed to the Clear Lakes' senior right 36-02659 in favor of Clear Springs' junior right 36-02708 is not correct. When the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the west diversion pool. Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.

The full amount of water under the most senior right, Clear Lakes' right 36-02659, must be available for that right. When Clear Springs' water right 36-02708 is also in priority, this requires that more of the water diverted under Clear Lakes' right 36-02659 be diverted from the eastern diversion pool than has historically been the case when spring flows fell below 375 cfs. Clear Lakes alleges that causing it to divert more water from the eastern diversion pool under its senior right 36-02659 injures that right. But absent a basis for Clear Lakes being able to rely on diverting a specific portion of the water under its senior right 36-02659 from the western diversion pool, there is no injury to Clear Lakes' senior right 36-02659 so long as the right is fully satisfied and the extent of beneficial use made under right 36-02659 is not diminished. As the holder of the junior priority right 36-07004, Clear Lakes is obviously affected by this distribution of water since the amount of water diverted under its junior priority right 36-07004 and the extent of the beneficial use under that right are both reduced. However, this does not constitute injury to Clear Lakes' senior right 36-02659.

So the question becomes: "Does Clear Lakes have a legal basis for relying on diverting a specific portion of the water under its right 36-02659 from the western diversion pool?" Under the 1980 agreement, Clear Lakes and Clear Springs agreed that "until a legal determination is

made or agreement made regarding Permits Nos. 36-7004 and 36-2708," that when spring flows into the eastern and western diversion pools fall below 375 cfs, Clear Lakes had the right to use a total of 47 percent of the spring flows under its rights 36-02659 and 36-07004, and Clear Springs had the right to use 53 percent of the spring flows under its right 36-02708. This allocation essentially results in the distribution of water between rights 36-02659, 36-02708, and 36-07004 as if all three rights were equal in priority, even though Clear Springs recognized Clear Lakes' right 36-02659 as the senior right. Issuance of the partial decrees for these rights by the SRBA court is clearly a "legal determination", and the allocation of spring flows under the 1980 agreement is no longer binding on either Clear Lakes or Clear Springs. Clear Lakes presumably agrees because in its May 2 memorandum, it asserts that when spring flows into the eastern and western pools fall below 375 cfs, the proper administration of rights 36-02659, 36-02708, and 36-07004 under the partial decrees is to distribute the first 34 cfs out of the eastern diversion pool and the first 66 cfs out of the western diversion pool to the senior Clear Lakes right 36-02659, with the remaining flow from the eastern pool going to Clear Lakes' right 36-07004 and the remaining flow from the western pool going to Clear Springs' right 36-02708. The quantities of 34 cfs and 66 cfs, are the amounts historically diverted by Clear Lakes from the eastern and western pools, respectively, when spring flows into the pools totaled at least 375 cfs. Therefore, as the holder of the most senior right diverting from either pool, Clear Lakes asserts that it has the right to divert a specific portion of the water under its right 36-02659 (66 cfs) from the western diversion pool.

The partial decree issued by the SRBA court is the first reference for determining whether Clear Lakes has a legal right to divert a specific portion of the water under its right 36-02659 from the western pool. The amended partial decree for water right 36-02659 contains the following remark under the legal description for its two points of diversion:

> This water right is diverted through a combination of two adjacent spring-fed diversion pools: (1) a diversion pool known as the "western pool" located in the S ½ SESWNE and the S ½ SWSENE, T09S, R14E, Section 2; and (2) a diversion pool known as the "eastern pool" located in a portion of Government Lot 5 known as the SWSESENE and SESWSENE, T09S, R14E, Section 2. Both pools divert water from the common source identified in the source element of this water right ...

While this remark clearly recognizes that Clear Lakes' water right 36-02659 is "diverted through a combination" of the western and eastern diversion pools, there is no recognition in the decree that Clear Lakes has the right to determine how much water is diverted from each pool under right 36-02659. Under Idaho law, the holder of a water right senior in priority to a junior priority right diverting from the same source clearly has the right to divert water ahead of the junior right provided water diverted under the senior right is reasonably needed and used for the beneficial use and in accordance with other provisions defined in a permit, license superceding the permit, or finally a decree for the right. However, the courts have found that diversion and use of water under a senior priority is not an unrestricted right and is subject to reasonableness.

For example, in *Schodde v. Twin Falls Land and Water Co.*, 161 F. 43 (1908), affirmed 224 U.S. 107 (1912), the plaintiff brought an action against the defendant and alleged damages caused by

the defendant's construction of Milner Dam. The plaintiff had appropriated water from the Snake River to irrigate farmland and provide water for a small mining operation. *Id.* The plaintiff's historic means of diversion was to use water wheels to lift the water out of the river. *Id.* The plaintiff also constructed wing dams in the river to confine the flow of the river so that the current would drive the water wheels and cause them to carry the water to the necessary height. *Id.* The defendant subsequently constructed a dam to form a reservoir, raising the water level behind the dam about 40 feet, for the purpose of supplying water for irrigation and domestic purposes to settlers on about 300,000 acres of land situated below defendant's dam. *Id.* at 44. The plaintiff alleged that the defendant's dam backed water up to and beyond the plaintiff's premises making it impossible for the water wheels to work and sued for damages. *Id.* The court did not deny the plaintiff's right to divert water and the plaintiff did not argue that his appropriation was not present after the construction of the dam. *Id.* at 45. The plaintiff claimed that he could no longer divert water by the means he first adopted and that the defendant deprived him of the right to the current of the river, which, prior to the erection of the dam, "rendered his means of diversion available." *Id.* The court found that "the current of the river was no part of plaintiff's water location, and that he has no cause of action against the defendant for destroying his current." *Id.* at 47. The court then held that "[t]he claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is...untenable" and that "it is immaterial to the state what particular method is used." *Id.* at 47. The court then stated "[t]he method adopted cannot be said to have attached as appurtenant to the appropriation as against other [junior] appropriators of water from the same stream." *Id.*

In *Schodde*, it seems clear that the court was not concerned with the method of diversion as long as the holder of a senior priority water right was able to continue full use of the right without unreasonably excluding the use of water under a junior priority water right from the same source. Clear Lakes is correct in its assertion that Idaho law does not allow regulation or curtailment of a senior water right in order to increase the water supply to a junior water right in times of shortage, or otherwise. However, if it is possible for Clear Lakes' senior water right 36-02659 to be fully satisfied and also allow for the next water right in priority from the same source to be exercised (Clear Springs' right 36-02708), then Clear Lakes is not correct in claiming that it has a right to the historical method of diversion or the historical allocation between alternative diversion points. Such method or allocation would diminish the amount of water available for the next water right in priority held by Clear Springs, and allow Clear Lakes to proceed to divert water under an even more junior right from the same source (Clear Lakes' right 36-07004) when the more senior right 36-02708 has not been satisfied.

A similar conclusions results from *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). In *Parker*, the defendant drilled a well on his property in Bear Lake County to a depth of 200 feet "for the purpose of providing irrigation for a 64 acre field." *Id.* at 507, 650 P.2d at 649. The well was located approximately 125 to 150 feet from a domestic well owned by the plaintiff, which was drilled to a depth of 71 feet. *Id.* After a pump test was conducted on the defendant's well, the plaintiff discovered that his domestic well had ceased to produce water. The following morning the well did produce water, but the water was muddy and continued to be so for several days. *Id.* The plaintiff filed suit against the defendant and obtained a temporary restraining

order that prohibited the defendant from operating his pump. *Id.* at 507-08, 650 P.2d at 649-50. The district court then granted a permanent injunction against the use of the irrigation well. *Id.* The defendant appealed the injunction and asserted that allowing one shallow domestic well to block the development of all irrigation wells in a given area is inconsistent with the policy of optimum development of water resources in the public interest. *Id.* at 511, 650 P.2d at 653. The court stated that the assertion had merit and held that the defendant "has a right to divert any surplus subterranean waters provided and so long as his diversion of such waters does not deprive Parker of his use of the water." *Id.* at 514, 650 P.2d at 656. The court then explained that Parker would not be deprived of any right to his use "if water can be obtained for Parker by changing the method or means of diversion." *Id.* The court then stated that the expense of changing the method or means of diversion must be paid by the subsequent appropriator. *Id.*

Although the *Parker* case dealt with ground water, its principles apply to administration of the Clear Lakes and Clear Springs water rights. When the spring flows into and out of the western and eastern pools have been at least 375 cfs, Clear Lakes claims to have historically received 66 cfs from the western pool and 34 cfs from the eastern pool to satisfy its senior priority water right 36-02659. Clear Lakes now claims that as the holder of the most senior priority water right diverted from the western and eastern pools, that this water right 36-02659 must receive 66 cfs from the western pool even if the next right in priority from the same source, Clear Springs' right 36-02708, is not satisfied while the more junior water right from the same source, Clear Lakes' right 36-07004, continues to divert water from the eastern pool and is insulated from the more senior Clear Springs' right diverted out of the western pool. However, if there is another reasonable means of diversion to satisfy Clear Lakes' senior priority right 36-02659 (i.e., diverting more of the water under right 36-02659 from the eastern pool), then Clear Lakes would not be deprived of using water under its senior priority right. This is the principle articulated in *Parker*. Full diversion of 100 cfs under Clear Lakes' right 36-02659 can be achieved by diverting more of the right out of the eastern pool and decreasing the amount of water diverted out of the western pool, while still providing for diversion and use of the full amount of water under the right. This would allow more water to be diverted under the next right in priority from the same source, Clear Springs' right 36-02708. If expenses are incurred by Clear Lakes in diverting water from the eastern pool under the senior right 36-02659, not the junior right 36-07004, then under *Parker*, Clear Springs may be responsible for those costs. However, since the eastern pool already has the diversion capacity for the full 100 cfs diversion under right 36-02659, it does not appear that Clear Springs would be obligated to pay anything.

Therefore, there is no known legal basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004. Thus a call from Clear Springs' right 36-02708 against the junior Clear Lakes' right 36-07004 is not futile.

Consequently, when the amount of water flowing from the springs is equal to or greater than 375 cfs, then both of Clear Lakes' water rights 36-02659 and 36-0704 as well as Clear Springs' water right 36-02708 can be filled, along with part or all of Clear Springs' water right 36-07218 when spring discharges exceed 375 cfs. But until and unless there is either a legal determination or a subsequent agreement between Clear Lakes and Clear Springs that provides for Clear Lakes diverting a specified portion of water under its right 36-02659 from the western pool, when the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights in priority as being from a single source. The "source" element for water rights 36-02659, 36-02708, 36-07004, and 36-07218, is springs tributary to Clear Lake(s). For the purposes of adminstering these water rights, the eastern and western diversion pools are inextricably linked to the springs whose discharge is collected in the pools. Water rights 36-02659, 36-02708, and 36-07004 must not be administered in the manner set forth by Clear Lakes in its May 2 memorandum as though the rights were from separate sources.

Basis for Watermaster Instructions - Administration of Water Right 36-07201

In *Memorandum Decision and Order on Challenge* dated July 9, 1999, the Presiding Judge for the SRBA court concluded the following (p. 29):

> ... the Brailsford Stream, or what is sometimes referred to as the "far western stream," which is the source of Clear Springs' right 36-07201, **never** ran into the channel or pool of water from which Clear Lakes' rights 36-02659 and 36-07004 and Clear Springs' rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights.
>
> ... because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Based on the clear language in the Presiding Judge's Decision and Order, Clear Springs' water right 36-07201 is to be administered as being from a source separate and distinct from the source for rights 36-02659, 36-02708, 36-07004, and 36-07218.

Watermaster Instructions

1. Water for Clear Springs' water right 36-07201 is to be distributed separately as being from a separate "source" from the "source" for water rights 36-02659, 36-02708, 36-07004, and 36-07218.

2. The watermaster is not to adjust the 6-ft adjustable weir unless Clear Lakes calls for distribution of water to its senior priority water right 36-02659 or Clear Springs calls for distribution of water to its water right 36-02708, which is next in priority. Such calls must be in writing to either IDWR or the watermaster.

3. If the watermaster receives a written call for distribution, the watermaster is to notify IDWR's Regional Manager in Twin Falls, or alternatively the Manager of the Water Distribution Section of the Water Management Division in the event the Regional Manager is unavailable.

4. IDWR and the watermaster must determine that when a call is made, water is needed under the senior priority water right making the call and that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right. To accomplish this determination, the watermaster is to contact representatives of both Clear Lakes and Clear Springs to schedule a time for accessing Clear Lakes and Clear Springs properties, as soon as possible after a call is made, to ascertain the amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), as well as the need to distribute water among these rights based on priority.

5. As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights with 14-day notice by personal service to the water right holder, or the facility manager for the water right holder, and by mail or facsimile, if available, that the watermaster will adjust the 6-ft adjustable weir so as to distribute water to the calling senior right, reducing or curtailing the distribution of water to the remaining water right(s) in the order of the most junior priority of the remaining right(s) being reduced or curtailed first.

6. At expiration of the 14-day notice, the watermaster is to re-confirm the amount of water flowing from springs and available under water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), based on priority, and to adjust the 6-ft adjustable weir as necessary to distribute water to the rights in order of priority.

7. The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.

8. To determine the amount of water flowing from springs and available to the above water rights, the watermaster must add together the quantities of water flowing to the Clear Lakes and Clear Springs hatcheries. To determine the amount of water flowing to the Clear Lakes hatchery (subject to further confirmation)[1]:

   (a) Read staff gage above the 40-inch west weir near the Clear Lakes hatchery holding ponds;

   (b) Determine discharge through the west weir from attached table for Clear Lakes west weir discharge;

   (c) Read staff gages on each of the six 10-ft Clear Lakes east weirs;

   (d) Determine discharge through each of the six Clear Lakes east weirs from the attached table for Clear Lakes east weirs;

   (e) Add 0.20 cfs to account for flow in the hatchery holding ponds through the perforated PVC pipe (if operating);

   (f) Add discharge from the west weir, each of the six east weirs, and the hatchery pipe to determine the total amount of water flowing to the Clear Lakes hatchery.

   To determine the amount of water flowing to the Clear Springs hatchery (subject to further confirmation)[2]:

   (g) Read staff gage in west diversion pool above 22-ft weir;

   (h) Determine discharge through the 22-ft and 10-ft weirs from attached table for Clear Springs combined weirs;

   (i) Add one (1) cfs to account for discharge of pipe into Clear Springs holding ponds and minor flow from pipes into headrace (if pipes are flowing);

   (j) Read weir measuring the discharge from the wet lab at the Clear Springs Research Laboratory.

   (k) Determine discharge for the wet lab effluent from the table for the Clear springs wet lab weir, or use the average flow which is estimated to be 0.5 cfs;

[1 & 2] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988.

(l) Add discharge from the 22-ft and 10-ft weirs, the pipes into the holding ponds and headrace, and the wet lab, to determine the total amount of water flowing to the Clear Springs hatchery.

The total amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218, is equal to the sum of (f) and (l).

8. If the total flow is equal to or greater than 375 cfs (± 5 cfs) then the amount of spring flows to Clear Lakes, 7.(f), should be 175 cfs with all the remaining flow to Clear Springs up to 251.55 cfs.

9. If the total flow is less than 375 cfs (± 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)[3]:

(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).

[3] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988; and from letter report to Dan Steenson and Charlie Honsinger, Ringert Clark Chartered, from Dave Shaw, ERO Resources Corporation, May 2, 2002.

(g) Repeat (a) through (f), if necessary, after allowing sufficient time for the change in flows to stabilize through the hatcheries.

Attachments (9 pages)

CLEAR LAKES – 10-Ft. (East) Weirs

DISCHARGE (CFS)

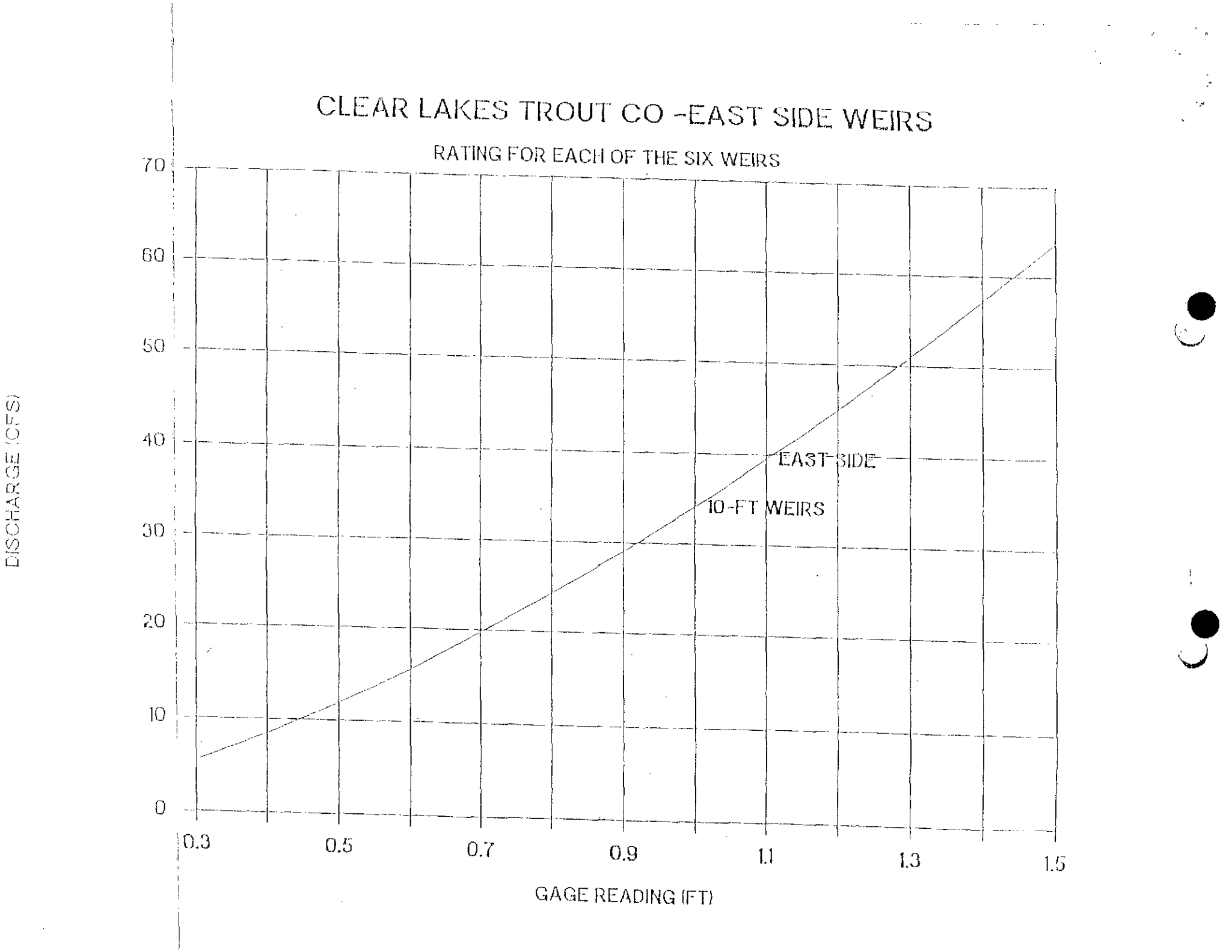
(Corrected For Velocity Of Approach)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.3 :	5.49	5.77	6.05	6.34	6.63	6.93	7.23	7.53	7.84	8.16
0.4 :	8.48	8.80	9.12	9.45	9.79	10.13	10.47	10.81	11.16	11.52
0.5 :	11.88	12.24	12.60	12.97	13.35	13.72	14.10	14.49	14.87	15.26
0.6 :	15.66	16.06	16.46	16.86	17.27	17.68	18.10	18.52	18.94	19.36
0.7 :	19.79	20.22	20.66	21.10	21.54	21.98	22.43	22.88	23.34	23.80
0.8 :	24.26	24.72	25.19	25.66	26.13	26.61	27.09	27.57	28.06	28.55
0.9 :	29.04	29.53	30.03	30.53	31.04	31.54	32.05	32.57	33.08	33.60
1.0 :	34.12	34.65	35.17	35.70	36.24	36.77	37.31	37.85	38.40	38.95
1.1 :	39.50	40.05	40.61	41.16	41.73	42.29	42.86	43.43	44.00	44.57
1.2 :	45.15	45.73	46.32	46.90	47.49	48.08	48.68	49.27	49.87	50.47
1.3 :	51.08	51.69	52.29	52.91	53.52	54.14	54.76	55.38	56.01	56.64
1.4 :	57.27	57.90	58.54	59.18	59.82	60.46	61.11	61.75	62.41	63.06
1.5 :	63.72	64.37	65.04	65.70	66.36	67.03	67.70	68.38	69.05	69.73

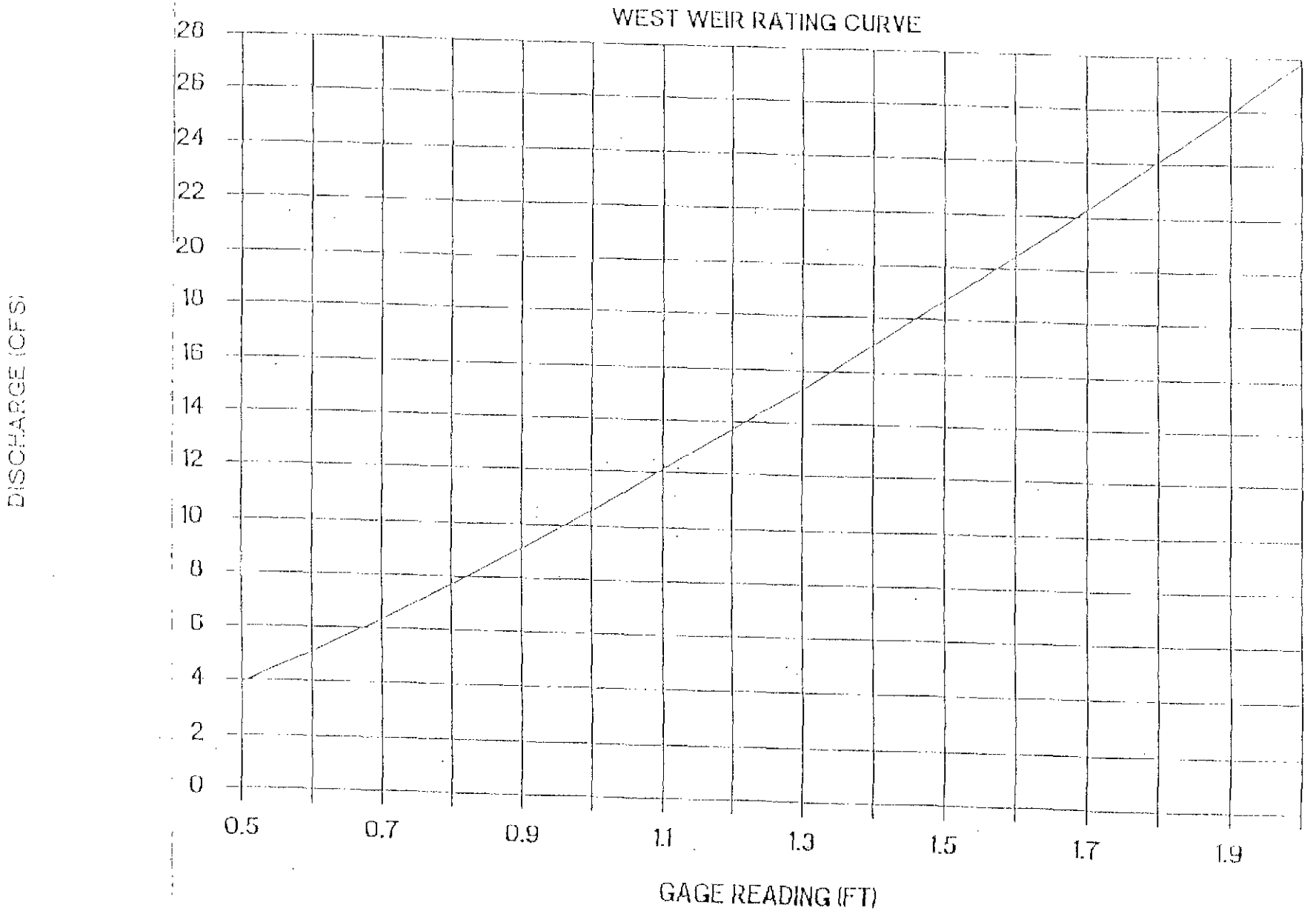
CLEAR LAKES – 40-In. (West) Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.5 :	3.92	4.03	4.15	4.26	4.38	4.50	4.61	4.73	4.85	4.97
0.6 :	5.09	5.22	5.34	5.46	5.59	5.72	5.84	5.97	6.10	6.23
0.7 :	6.36	6.49	6.62	6.75	6.89	7.02	7.15	7.29	7.42	7.56
0.8 :	7.70	7.84	7.98	8.11	8.26	8.40	8.54	8.68	8.82	8.97
0.9 :	9.11	9.25	9.40	9.55	9.69	9.84	9.99	10.14	10.28	10.43
1.0 :	10.58	10.73	10.89	11.04	11.19	11.34	11.50	11.65	11.81	11.96
1.1 :	12.12	12.27	12.43	12.59	12.74	12.90	13.06	13.22	13.38	13.54
1.2 :	13.70	13.86	14.02	14.19	14.35	14.51	14.68	14.84	15.00	15.17
1.3 :	15.33	15.50	15.67	15.83	16.00	16.17	16.34	16.50	16.67	16.84
1.4 :	17.01	17.18	17.35	17.52	17.69	17.87	18.04	18.21	18.38	18.56
1.5 :	18.73	18.90	19.08	19.25	19.43	19.60	19.78	19.96	20.13	20.31
1.6 :	20.49	20.66	20.84	21.02	21.20	21.38	21.56	21.73	21.91	22.09
1.7 :	22.27	22.45	22.64	22.82	23.00	23.18	23.36	23.55	23.73	23.91
1.8 :	24.09	24.28	24.46	24.65	24.83	25.02	25.20	25.39	25.57	25.76
1.9 :	25.94	26.13	26.32	26.50	26.69	26.88	27.06	27.25	27.44	27.63
2.0 :	27.82	28.01	28.19	28.38	28.57	28.76	28.95	29.14	29.33	29.52


CLEAR LAKES TROUT CO -EAST SIDE WEIRS
RATING FOR EACH OF THE SIX WEIRS
DISCHARGE (CFS)
70
60
50
40
30
20
10
0
EAST SIDE
10-FT WEIRS
0.3
0.5
0.7
0.9
1.1
1.3
1.5
GAGE READING (FT)

CLEAR LAKES TROUT COMPANY

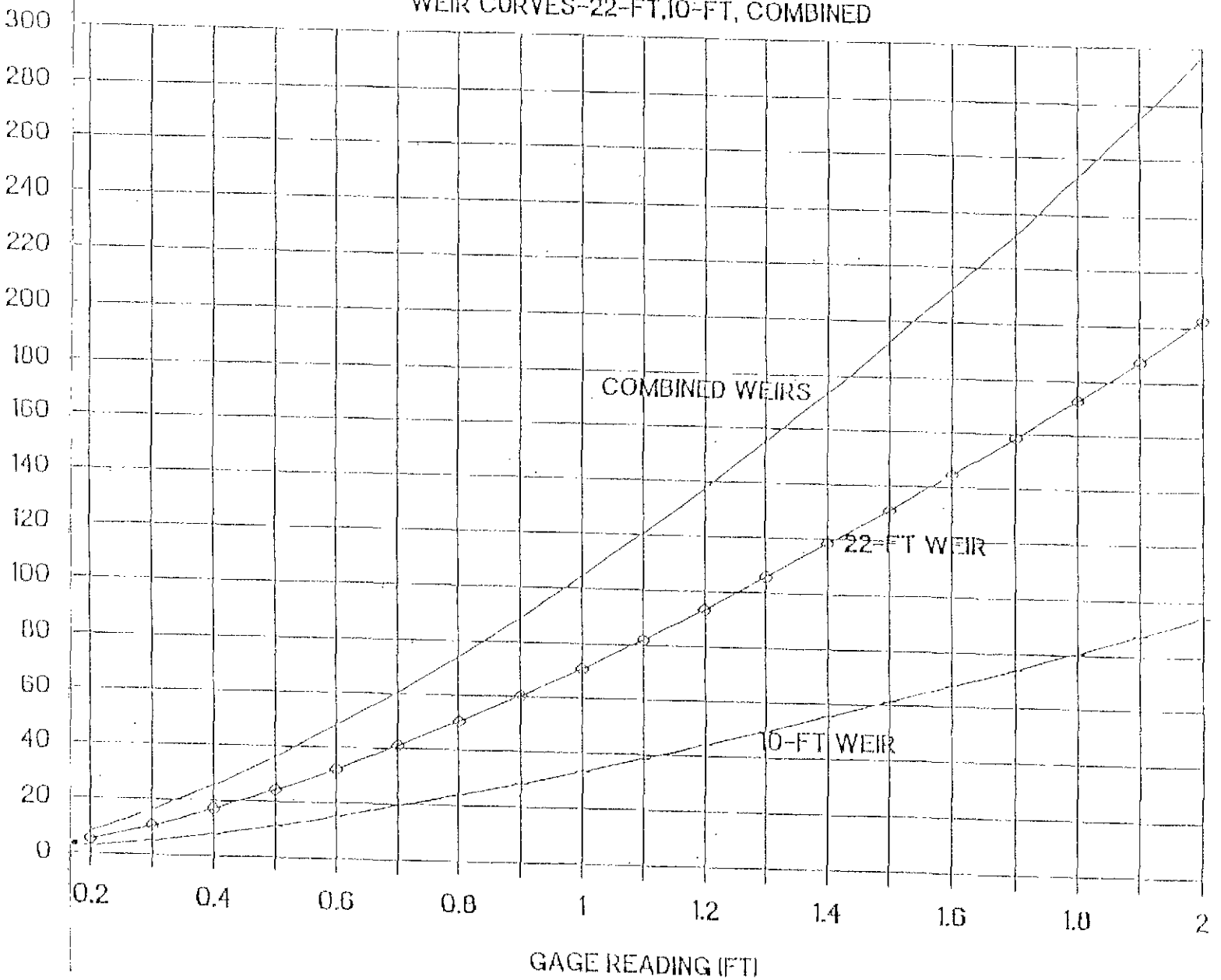


CLEAR SPRINGS – Combined Weirs

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	8.58	9.28	10.00	10.73	11.48	12.25	13.04	13.84	14.65	15.49
0.3	16.33	17.20	18.07	18.96	19.87	20.79	21.72	22.67	23.63	24.60
0.4	25.59	26.59	27.60	28.62	29.66	30.71	31.77	32.84	33.93	35.02
0.5	36.13	37.25	38.38	39.52	40.67	41.83	43.01	44.19	45.39	46.60
0.6	47.81	49.04	50.28	51.52	52.78	54.05	55.32	56.61	57.91	59.22
0.7	60.53	61.86	63.19	64.54	65.89	67.26	68.63	70.01	71.40	72.80
0.8	74.21	75.63	77.05	78.49	79.93	81.39	82.85	84.32	85.80	87.28
0.9	88.78	90.28	91.80	93.32	94.84	96.38	97.93	99.48	101.04	102.61
1.0	104.19	105.77	107.37	108.97	110.58	112.19	113.82	115.45	117.09	118.74
1.1	120.39	122.05	123.72	125.40	127.09	128.78	130.48	132.18	133.90	135.62
1.2	137.35	139.08	140.83	142.58	144.34	146.10	147.87	149.65	151.44	153.23
1.3	155.03	156.83	158.65	160.47	162.29	164.13	165.97	167.82	169.67	171.53
1.4	173.40	175.27	177.15	179.04	180.94	182.84	184.74	186.66	188.58	190.50
1.5	192.44	194.37	196.32	198.27	200.23	202.20	204.17	206.14	208.13	210.12
1.6	212.11	214.12	216.12	218.14	220.16	222.19	224.22	226.26	228.30	230.35
1.7	232.41	234.47	236.54	238.62	240.70	242.79	244.88	246.98	249.08	251.19
1.8	253.31	255.43	257.56	259.69	261.83	263.98	266.13	268.28	270.45	272.61
1.9	274.79	276.97	279.15	281.34	283.54	285.74	287.95	290.16	292.38	294.60
2.0	296.83	299.07	301.31	303.56	305.81	308.06	310.33	312.59	314.87	317.15

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS – 22-Ft. Weir

DISCHARGE (CFS)

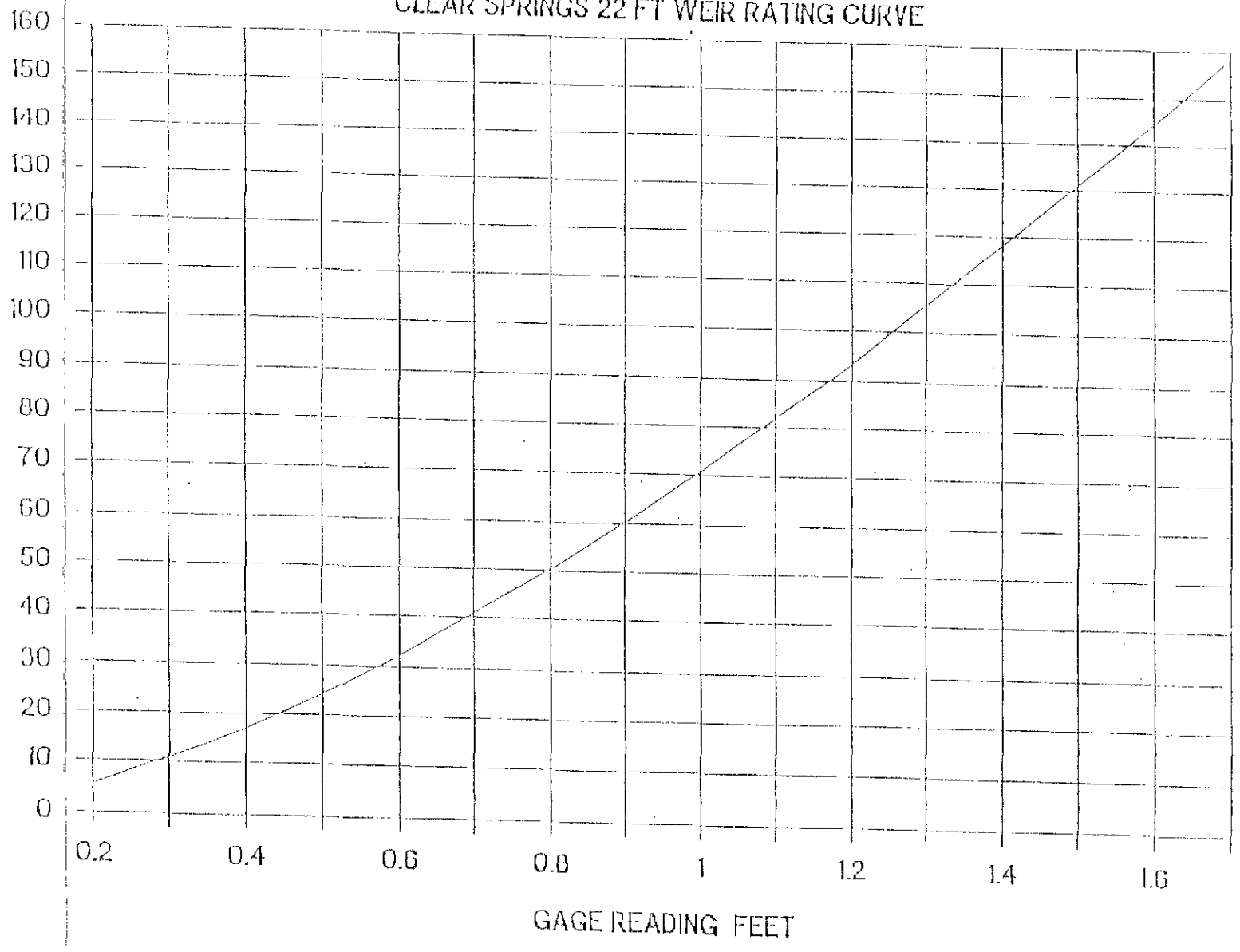
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	5.60	6.07	6.55	7.05	7.56	8.08	8.61	9.16	9.71	10.27
0.3	10.85	11.44	12.03	12.64	13.25	13.88	14.51	15.16	15.81	16.48
0.4	17.15	17.83	18.52	19.21	19.92	20.64	21.36	22.09	22.83	23.58
0.5	24.33	25.10	25.87	26.64	27.43	28.22	29.03	29.83	30.65	31.47
0.6	32.30	33.14	33.99	34.84	35.70	36.56	37.43	38.31	39.20	40.09
0.7	40.99	41.90	42.81	43.73	44.65	45.58	46.52	47.46	48.42	49.37
0.8	50.33	51.30	52.28	53.26	54.25	55.24	56.24	57.24	58.25	59.27
0.9	60.29	61.32	62.35	63.39	64.44	65.49	66.54	67.60	68.67	69.74
1.0	70.82	71.90	72.99	74.09	75.19	76.29	77.40	78.52	79.64	80.76
1.1	81.90	83.03	84.17	85.32	86.47	87.63	88.79	89.96	91.13	92.31
1.2	93.49	94.67	95.87	97.06	98.26	99.47	100.68	101.90	103.12	104.34
1.3	105.57	106.81	108.05	109.29	110.54	111.79	113.05	114.31	115.58	116.85
1.4	118.13	119.41	120.69	121.98	123.28	124.58	125.88	127.19	128.50	129.82
1.5	131.14	132.46	133.79	135.13	136.46	137.81	139.15	140.50	141.86	143.22
1.6	144.58	145.95	147.32	148.70	150.08	151.47	152.86	154.25	155.65	157.05
1.7	158.45	159.86	161.28	162.69	164.12	165.54	166.97	168.40	169.84	171.28
1.8	172.73	174.18	175.63	177.09	178.55	180.02	181.49	182.96	184.44	185.92
1.9	187.40	188.89	190.38	191.88	193.38	194.88	196.39	197.90	199.42	200.94
2.0	202.46	203.99	205.52	207.05	208.59	210.13	211.67	213.22	214.77	216.33

CLEAR SPRINGS – 10-Ft. Weir

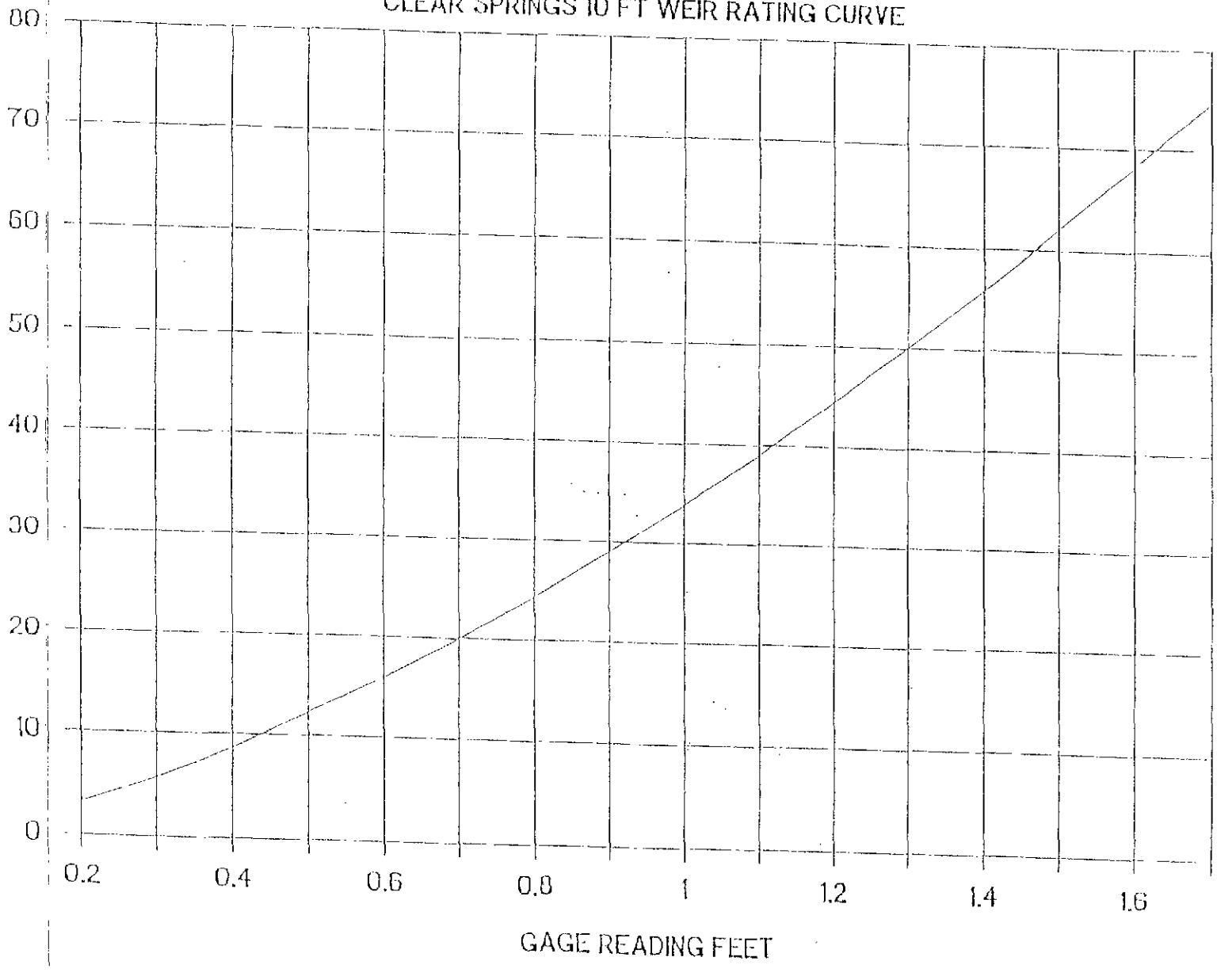
DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	2.98	3.21	3.44	3.68	3.92	4.17	4.42	4.68	4.94	5.21
0.3	5.48	5.76	6.04	6.33	6.62	6.91	7.21	7.51	7.82	8.13
0.4	8.44	8.76	9.08	9.41	9.74	10.07	10.41	10.75	11.10	11.44
0.5	11.80	12.15	12.51	12.87	13.24	13.61	13.98	14.36	14.74	15.12
0.6	15.51	15.90	16.29	16.68	17.08	17.49	17.89	18.30	18.71	19.12
0.7	19.54	19.96	20.38	20.81	21.24	21.67	22.11	22.54	22.99	23.43
0.8	23.88	24.32	24.78	25.23	25.69	26.15	26.61	27.08	27.54	28.02
0.9	28.49	28.97	29.44	29.93	30.41	30.90	31.38	31.88	32.37	32.87
1.0	33.37	33.87	34.37	34.88	35.39	35.90	36.41	36.93	37.45	37.97
1.1	38.49	39.02	39.55	40.08	40.61	41.15	41.69	42.23	42.77	43.31
1.2	43.86	44.41	44.96	45.52	46.07	46.63	47.19	47.75	48.32	48.89
1.3	49.46	50.03	50.60	51.18	51.76	52.34	52.92	53.50	54.09	54.68
1.4	55.27	55.87	56.46	57.06	57.66	58.26	58.86	59.47	60.08	60.69
1.5	61.30	61.91	62.53	63.15	63.77	64.39	65.01	65.64	66.27	66.90
1.6	67.53	68.16	68.80	69.44	70.08	70.72	71.36	72.01	72.66	73.31
1.7	73.96	74.61	75.27	75.92	76.58	77.24	77.91	78.57	79.24	79.91
1.8	80.58	81.25	81.93	82.60	83.28	83.96	84.64	85.32	86.01	86.70
1.9	87.39	88.08	88.77	89.46	90.16	90.86	91.56	92.26	92.96	93.67
2.0	94.37	95.08	95.79	96.51	97.22	97.94	98.65	99.37	100.09	100.81

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS TROUT COMPANY



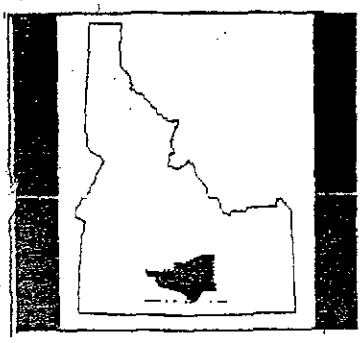
Clear Lakes -- 6 Ft Contracted Weir

Discharge in CFS adjusted for velocity of approach and weir elevation

Length = 6 Velocity Head = 0.00000

Gage Reading	0.00	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	1.84	1.98	2.12	2.26	2.40	2.55	2.70	2.86	3.01	3.17
0.3	3.33	3.50	3.66	3.83	4.00	4.18	4.35	4.53	4.71	4.90
0.4	5.08	5.27	5.46	5.65	5.84	6.04	6.24	6.44	6.64	6.84
0.5	7.05	7.26	7.47	7.68	7.89	8.11	8.33	8.54	8.77	8.99
0.6	9.21	9.44	9.67	9.90	10.13	10.36	10.60	10.83	11.07	11.31
0.7	11.55	11.79	12.04	12.28	12.53	12.78	13.03	13.28	13.53	13.79
0.8	14.04	14.30	14.56	14.82	15.08	15.35	15.61	15.88	16.14	16.41
0.9	16.68	16.95	17.23	17.50	17.78	18.05	18.33	18.61	18.89	19.17
1.0	19.46	19.74	20.03	20.31	20.60	20.89	21.18	21.47	21.76	22.06
1.1	22.35	22.65	22.95	23.25	23.55	23.85	24.15	24.45	24.76	25.06
1.2	25.37	25.67	25.98	26.29	26.60	26.92	27.23	27.54	27.86	28.17
1.3	28.49	28.81	29.13	29.45	29.77	30.09	30.41	30.74	31.06	31.39
1.4	31.72	32.04	32.37	32.70	33.03	33.37	33.70	34.03	34.37	34.70
1.5	35.04	35.38	35.71	36.05	36.39	36.73	37.08	37.42	37.76	38.11
1.6	38.45	38.80	39.15	39.49	39.84	40.19	40.54	40.89	41.25	41.60
1.7	41.95	42.31	42.66	43.02	43.38	43.74	44.09	44.45	44.81	45.17
1.8	45.54	45.90	46.26	46.63	46.99	47.36	47.72	48.09	48.46	48.83
1.9	49.20	49.57	49.94	50.31	50.68	51.06	51.43	51.80	52.18	52.56
2.0	52.93	53.31	53.69	54.07	54.45	54.83	55.21	55.59	55.97	56.36

Exhibit D



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 19, 2002

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

FACSIMILE – followed by mailed original

HAND DELIVERED

RE: Notice of Intent to Redistribute Flows

Dear Kay and Larry:

On June 7, 2002, Clear Springs Foods, Inc (Clear Springs) submitted a written call for priority distribution of water under right no. 36-2708 from springs tributary to Clear Lakes. The call indicated that the flow from the common source available for water right nos. 36-2659, 36-2708, 36-7004 and 36-2718 was insufficient to fill all of the rights and that water was being diverted under Clear Lakes Trout (Clear Lakes) right no. 36-7004 while the more senior Clear Springs right no. 36-2708 for 200 cfs was not being filled.

Pursuant to amended Watermaster instructions issued June 13, 2002, by IDWR Director Karl Dreher, Tim Luke and I met with the parties at the diversions for the above listed rights on June 18. The purpose of this meeting was to 1) determine available flows and the present distribution of water to the above listed rights, 2) establish that water is needed under the senior priority water right making the call, and 3) confirm that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right.

From our measurements yesterday, Clear Lakes is receiving a measured flow of 147.6 cfs from its combined diversions, and Clear Springs is receiving a measured flow of 173.0 cfs from its main diversion and minor contributing pipelines. Based on these measurements, there is a total of 320.6 cfs available from the source, and Clear Springs is not receiving a full complement of water under the right no. 36-2708. Additional flow distributed under this right would be put to beneficial use at Clear Springs by activating and using 4 raceways which are currently dry and not being used.

EXHIBIT F

Pursuant to the Watermaster instructions, a 14-day notice shall be provided to the holder of the junior water rights prior to any reduction in distributed flows through adjustment of the 6-foot weir. In this case, the junior right affected is Clear Lakes right no. 36-7004. ***Notice is hereby given*** that the distribution of water to right no. 36-7004 will be reduced by approximately 27 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On **July 3, 2002,** I will re-confirm available flows from the springs and confirm again whether or not right nos. 36-2659 and 36-2708 are being filled in order of priority. If right no. 36-2659 is being filled and water is also being diverted under right no. 36-7004 while right no. 36-2708 is not being filled, I will also confirm that Clear Springs can make beneficial use of any additional water distributed to right no. 36-2708. If Clear Springs can put additional water to beneficial use under its right 36-2708, I will make an adjustment to the 6-foot adjustable weir at the shared diversion, in order that the total spring flows are distributed in the following manner: the first 100 cfs to Clear Lakes Trout right no. 36-2659, the next 200 cfs to Clear Springs right no. 36-2708, and the balance of flows (up to 75 cfs) to Clear Lakes Trout right no. 36-7004. After that time, I will make weekly visits to the diversions to measure available flows, confirm that beneficial use is being made under the respective rights, and make necessary adjustments to the 6-foot adjustable weir.

Representatives from both Clear Lakes and Clear Springs are invited to be present during the July 3 measurement. Since the adjustment wheel for the 6-foot adjustable weir is locked, I will require access to that device on June 3, and will need to have a key provided to me or be allowed to place a Water District lock on the chain at that time.

If you wish to contest this action, you 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). However, such petition may not stay the above action. If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Norm Young and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co.
Charles Honsinger
Terry Huddleston, Clear Springs Foods, Inc.
John Simpson

Exhibit E

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

February 4, 2003

RECEIVED
FEB 05 2003
Department of Water Resources

Cindy Yenter
Watermaster, Water District 130
c/o Idaho Department of Water Resources
1341 Fillmore St. Ste 200
Twin Falls, Idaho 83301-3380

Re: Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201 and 36-7218 in Water District No.130, dated June 13, 2002.

Dear Ms. Yenter:

On December 17, 2002, Clear Lakes Trout Company, Inc. ("Clear Lakes") filed a *Petition to Initiate Contested Case* ("petition") with the Idaho Department of Water Resources ("IDWR") captioned *In The Matter of Petition to Modify Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201 and 36-7218 in Water District No. 130.*

On January 10, 2003, Clear Lakes filed a *Motion to Stay Further Curtailments of Clear Lakes' Water Rights*. The motion requests the independent hearing officer and/or IDWR for a stay of any actions by the watermaster for Water District 130 resulting in further curtailments of its water rights pending resolution of the issues raised by Clear Lakes' petition. A copy of Clear Lakes' motion is enclosed.

Clear Springs Foods, Inc. ("Clear Springs") filed *Respondent Clear Springs Foods, Inc's Answer to Petition* with IDWR on January 17, 2003. Pristine Springs filed a *Notice of Appearance* in the matter on January 16, 2003, for the purpose of supporting the Clear Lakes' petition.

IDWR is in the process of appointing D. Duff McKee to serve as an independent hearing officer for IDWR in this matter. I hereby instruct you not to make further redistributions of water under the above-referenced water rights, due to reduced spring flows, pending an opportunity for Clear Lakes to have its motion for stay heard before Hearing Officer McKee, and pending my further instructions to you.

Sincerely,

Karl J. Dreher
Director

Enclosure

c: Charles L. Honsinger, Esq.
John K. Simpson, Esq.
Jason R. Miciak, Esq.
Hon. D. Duff McKee
Tim Luke, Water Distribution Mgr.

Exhibit F

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.	**FINAL ORDER**

INTRODUCTION

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "IDWR") following the issuance of a recommended decision and order by the IDWR Hearing Officer, D. Duff McKee. The action arises from a petition by Clear Lakes Trout Company ("Clear Lakes" or "Lakes") challenging the Director's instructions to the watermaster for Water District No. 130 for the distribution of water rights owned by petitioner Clear Lakes and the respondent Clear Springs Foods, Inc. ("Clear Springs" or "Springs"). The petition also challenges the water distribution actions taken by the watermaster pursuant to the Director's instructions. The Hearing Officer recommended that the Director enter an order dismissing Clear Lakes' petition.

A recommended order may become a final order only upon review of the agency head in accordance with Idaho Code § 67-5244. The agency head on review of a recommended decision exercises all the decision-making authority that he would have had if the agency head had presided over the hearing. Idaho Code § 67-5244.

The matter was heard on pending motions at the IDWR conference room in Boise on Friday, March 14, 2003. Clear Lakes appeared by company representatives and Daniel V. Steenson and Charles L. Honsinger of the law firm Ringert Clark Chartered. Clear Springs

appeared by company representative and John K. Simpson and Travis L. Thompson of the law firm Barker Rosholt & Simpson LLP. The motions presented to the Hearing Officer 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.

The Hearing Officer determined that he had been provided with thorough and well-reasoned briefs from counsel on all potential issues involving all of the motions. He further determined that he was satisfied from the materials submitted by the parties through their counsel that there was no material fact in issue, and that the matter was appropriate for resolution by summary proceedings on motion rather than evidentiary proceeding, pursuant to Rule 413 of IDWR's Rules of Procedure. IDAPA 37.01.01.413.

Summary of Hearing Officer's Decision

The Hearing Officer recommended that the Director enter an order denying the motions advanced by Clear Lakes and grant the motion advanced by Clear Springs. The Hearing Officer recommended that the Director conclude that the orders contained in the instructions of the Director to the watermaster dated June 13, 2002, were and are: (1) consistent with the statutory authority of the Director; (2) consistent with the adjudicated water rights of the parties to this matter as determined by judicial decree of the Snake River Basin Adjudication ("SRBA") District Court and affirmed by the Idaho Supreme Court; and (3) consistent with the terms of the order of the Director adopting and interpreting the document referred to as the "Interim Stipulated Agreement." The Hearing Officer also recommended that the Director deny any interim stay of the instructions of the watermaster. Finally, the Hearing Officer recommended 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 Director's instructions to the watermaster.

The Director has reviewed the recommended decision and order of the Hearing Officer. No exceptions were filed with the Director to the Hearing Officer's decision. The Director concurs with the factual and legal determinations made by the Hearing Officer and adopts the substance of the Hearing Officer's recommendations for order in this matter. The Director hereby enters a final order in this matter with the following findings of fact, analysis, conclusions of law, and order:

FINDINGS OF FACT

Prior Litigation between the Parties

1. 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, the parties began submitting applications for permits to appropriate water for fish propagation purposes from springs that flow from the canyon walls above the Snake River.

2. The parties entered into a private interim agreement in 1980 that allocated the water between them "until a legal determination is made or [further] agreement made regarding Permits Nos. 36-7004 and 36-2708." The agreed to allocation applied "in the event the water being produced by the Clear Lakes' springs, which is available to Lakes and Springs under their respective permits, goes below 375 cubic feet per second." The agreement provided that under such conditions 53 percent of the water would be allocated to Clear Springs and 47 percent to Clear Lakes. This agreement was clearly an interim agreement pending final determination of the rights of the parties, and notwithstanding the specific priority claims under their respective water rights. The parties operated under this agreement until the current dispute.

3. The parties became engaged in litigation between themselves before the SRBA District Court over the priority of water rights and the identification of water right sources.

4. Matters began to come to a head in 1992 when IDWR filed its "Director's Report for Reporting Area 3" with the SRBA Court, recommending adjudication of priorities with respect to the material water rights from "springs tributary to Clear Lake(s)" as follows: Clear Lakes had the first priority right to draw 100 cubic feet per second ("cfs") from the springs serving the property;[1] Clear Springs had the second priority right to draw 200 cfs;[2] and Clear Lakes had the third priority right to draw 75 cfs.[3] Clear Springs had two more junior rights, one for 51.55 cfs,[4] and the other for 10 cfs.[5] The report was immediately challenged before the SRBA District Court.

5. After extended litigation between the parties, the IDWR Director's report was adopted by the SRBA Special Master, the SRBA District Court, and eventually by the Idaho Supreme Court in a decision released on January 18, 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, Clear Lakes the third 75 cfs, and Clear Springs the final 51.55 cfs, if available. The adjudication was a "legal determination" of the respective rights as set forth in the interim agreement the parties had entered into in 1980 and, as determined by the Director, marked the agreed upon event for termination of the water sharing portion of the 1980 agreement.

Creation of the Interim Stipulated Agreement

6. While the final stages of the litigation over the water rights and the priorities between Clear Springs and Clear Lakes was pending before the Idaho Supreme Court, another

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[1] Water right no. 36-02659, priority date 06/23/1966.
[2] Water right no. 36-02708, priority date 09/28/1966.
[3] Water right no. 36-07004, priority date 07/21/1967.
[4] Water right no. 36-07218, priority date 01/24/1972.

concern relating to the Eastern Snake River Plain Aquifer was being addressed by IDWR – a dwindling supply of water flowing from the springs fed by the aquifer. In August of 2001, the Director issued a notice that IDWR intended to curtail certain ground water users diverting on the plain above the canyon rim within the Thousand Springs Ground Water Management Area (GWMA) because there was insufficient ground water to provide a reasonably safe supply for irrigation or other uses in the basin at the then current rates of withdrawal as a result of the severe drought conditions that began in 2000 and continued through 2001.

7. This notice prompted ground water users and surface water users to negotiate an interim agreement pertaining generally to ground water users above the rim, known as the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement"). This agreement was signed by entities representing a number of ground water users on the plain, and a number of surface water users dependent upon waters discharged from the canyon springs, including both Clear Springs and Clear Lakes.

8. Under the Interim Stipulated Agreement, the ground water users agreed to provide up to 40,000 acre feet of water per year to enhance the flows in the Thousand Springs reach until a more reliable evaluation of the impacts of ground water use on generally senior priority surface water rights dependent on spring discharges could be completed by December of 2003, using a reformulated and recalibrated ground water model. A major section of this agreement consisted of the agreements among ground water users for pooling of and payment for the water to provide the required 40,000 acre feet of replacement water.

[5] Water right no. 36-07201, priority date 08/04/1971. This right as decreed is administered as being from a source separate from the other four rights and is therefore not affected by the instant dispute.

9. 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 2.7[6] 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 2.7,[7] of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

10. 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.

The Director's Orders Following the Interim Stipulated Agreement

11. The Director entered two orders shortly following the execution of the Interim Stipulated Agreement: an order approving the agreement; and an order creating a new water district to administer the water rights in the area of concern to the agreement.

12. The Director entered the 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:[8]

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[6] These 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 of the Snake River.

[7] Section 2.7 of the Stipulated Agreement provides for the alternative of acreage reduction in the event some or all of the 40,000 acre feet of replacement water is not available.

[8] 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."

> 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.

13. 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 the "holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction . . . of any junior water rights held by or represented 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.

14. In other provisions of the referenced order, the Director concluded that with the Interim Stipulated Agreement in place, further curtailment of ground water in the Thousand Springs GWMA 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, was necessary to protect the water supply available to satisfy senior priority surface water rights diverting from the springs or otherwise dependent on spring discharges.

15. The Director ordered that the watermaster for the new water district shall have the authority to, among other things, curtail out-of-priority diversions not covered by the Interim Stipulated Agreement.[9] No party questioned the Director's reading of the "safe harbor" provision of the agreement and this order was not challenged by any party in any administrative proceeding before the Director under the IDAPA.[10]

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[9] *Op. Cit.*, Conclusions of Law 4, 5 and 6.

[10] 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.

16. On February 19, 2002, a "Final Order Creating Water District No. 130" was issued 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.[11]

17. 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."[12] Again, no party questioned how the Director construed the "safe harbor" provision from the Interim Stipulated Agreement. This order was not challenged by any party in any administrative proceeding before the Director, or before the district court on judicial review, under the IDAPA.

The Director's Instructions to the Watermaster

18. Following the creation of Water District No. 130, Clear Springs inquired of the Director how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call. After having met with both entities on site on April 2, 2002, the Director by letter dated April 11, 2002, asked each entity to provide any additional information believed to be pertinent in developing the watermaster instructions for administering the rights. Both entities submitted responding information to the Director on May 2, 2002. Clear Lakes

[11] 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."

later supplemented the information it supplied. At no time during this information gathering process did Clear Lakes provide information to the Director asserting its broad interpretation of the "safe harbor" provision in the Interim Stipulated Agreement.

19. On June 5, 2002, the Director issued a departmental memorandum to the watermaster of Water District No. 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 Clear Lakes, and consideration of matters raised in informal correspondence from the parties, the Director issued a departmental memorandum with an amended set of instructions.

20. The instructions are detailed and technical, but as is relevant to the instant proceeding, they provided that the watermaster was to adjust the 6-ft adjustable weir at the so-called "Western Pool" to allocate the waters available in accordance with the priorities between Clear Lakes and Clear Springs as adjudicated in the SRBA litigation.

21. 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 this meeting and confirming the Director's agreement to review the watermaster's instructions in light of Clear Lakes' objections.

22. In this review, the Director agreed to take into consideration certain documents and actions. Of note is that the first set of instructions, 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 asked to consider, as set forth in his letter of June 10, involved either the parties 1980 interim agreement, or motions, briefs, and orders

[12] *Op. Cit.*, Conclusion of Law 10(d).

entered in the SRBA litigation. Because no party raised it, 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, and in particular no mention was made of the "safe harbor" provision.

23. Following the review as requested by Clear Lakes, the Director issued 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 five additional pages were added to the instructions to the watermaster following the review of the materials requested, the Director's previous conclusions regarding how the water rights should be administered remained unchanged.

24. On June 19, 2002, the watermaster of Water District No. 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 the 6-ft adjustable weir at the "Western Pool" 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).

25. On July 3, Clear Lakes requested the Director to delay the redistribution of flows to give Clear Lakes a full 15 days to decide whether to request a hearing before IDWR. Clear Lakes did not file a petition with the IDWR to contest the watermaster's notice by administrative action within the time mandated by the notice. At no point in this extended process did Clear Lakes suggest that Clear Springs was precluded by the "safe harbor" provisions of the Interim Stipulated Agreement from making a call against Clear Lakes for distribution of water under its senior water right.

26. On July 5, 2002, the watermaster adjusted the 6-ft adjustable weir at the "Western Pool" 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.

The Gooding County District Court Litigation

27. 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 filed, Clear Springs moved and was granted permission to intervene as an additional party defendant. Clear Springs' motion to intervene was granted on July 2, 2002.

28. There is no dispute that the gravamen of this lawsuit was a challenge to the watermaster's notice of intent to regulate flows based in part on Clear Lakes' position that the Director had no authority to instruct the watermaster to curtail Clear Lakes' water rights.

29. Clear Lakes sought a preliminary injunction against IDWR to enjoin the curtailment of its water, which was denied by the court on July 2, 2002.

30. 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 specifically provided that the lawsuit would be dismissed *with prejudice.* The stipulation for dismissal contained the following language:

> 2. Upon the Court's approval of this Stipulation for Dismissal, the Court may order the above-captioned action dismissed with prejudice, each of the parties hereto to bear its own costs and attorney fees.
>
> 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.

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

32. 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 the IDWR. 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. This argument is flawed.

Neither the Director nor 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. The Hearing Officer disagreed with this argument and the Director concurs with the Hearing Officer.

The Hearing Officer agreed that the Director under his authorities 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 the Director determined such action to be appropriate and consistent with his statutory duties. 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 that IDWR entered in this case that the Director did not accept the breadth of the "safe harbor" clause in the Interim Stipulated Agreement as is now argued for by Clear Lakes. No party to the agreement timely raised an objection to the Director's more narrow reading of the "safe harbor" provision. 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. The early order was interlocutory but the second order was clearly final. There was no appeal or action to seek review of this order.

Had the broad reading of the "safe harbor" provision been brought to the attention of the Director by Clear Lakes or another party to the Interim Stipulated Agreement, it is likely that the Director would have rejected such a broad application of the "safe harbor" provision on public policy grounds. The Director has the statutory authority and duty to regulate water use in accordance with Idaho law and the prior appropriation doctrine. The Director determined that approval of the Interim Stipulated Agreement as between surface and ground water users would be consistent with controlling principles of law because of the enforcement provisions in the agreement applicable to ground water users.

Clear Lakes' invitation to the Director to read the "safe harbor' provision as protection for junior surface water right holders from a call by other senior surface right holders is in reality an invitation to disorder. Under Clear Lakes' reading of the provision, senior surface right holders give up the legal right to "seek either judicially or administratively" the curtailment or reduction of more junior surface water rights under which the state has authorized water to be diverted. As should be readily apparent, implementation of this interpretation would allow Clear Springs the option of diverting up to 251.55 cfs from the "Western Pool" (200 cfs under water right no. 36-02708 and 51.55 cfs under water right no. 36-07218). Clear Lakes would be precluded from making a priority call for distribution of water to its senior priority right, water right no. 36-02659.

The effect upon Clear Lakes and Clear Springs of such a water allocation scheme would be unfavorable to Clear Lakes. Under current spring discharge conditions and application of Clear Lakes' reading of the "safe harbor" provision, Clear Springs could receive from 20 cfs to 35 cfs, more or less, of additional water supply from the "Western Pool" and Clear Lakes could receive approximately 20 cfs to 35 cfs less water supply, being limited to only the supply of water available to it from the so-called "Eastern Pool." This would be true only because Clear Lakes would have given up its right to rely upon the more senior priority dates of its two water rights from the same source. Such a perversion of the priority doctrine perhaps could be avoided if the parties were to engage in various types of self-help to protect their rights in the absence of available recourse to judicial or administrative relief. Leaving the parties with no avenue for relief other than self-help does not comport with sound public policy and it is therefore unlikely that the Director would have approved the broad reading of the "safe harbor" provision even if it had been timely brought to his attention.

Clear Lakes argues that the Director is committed to enforce the Interim Stipulated Agreement by the terms of the order entered February 19, 2002, creating the new water district. 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 added].

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" provision, 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, in accordance with the qualifications and limitations he imposed, in accordance with his obligations under state law. It is clear under the law that the Director has the authority to do just that.

Clear Springs argues that the proper examination in this proceeding is 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). The Hearing Officer agreed with this standard of analysis and the Director concurs.

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. The decision does not turn on contract principles but on the authority of the Director to approve those provisions of the Interim Stipulated Agreement that were to be incorporated into the Director's administrative orders.

The Director had the authority to limit 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. The impact of the notice in August 2001, was to advise that, unless the water users came up with an agreement, the Director 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, was the ground water users from the aquifer on the plain above the rim.

The issues related to allocation of water 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 on January 18, 2002, one day after the Interim Stipulated Agreement was signed by Clear Lakes. 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" provision beyond the target group of water users 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, as the Hearing Officer concluded, 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.[13]

[13] *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).

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. In this case, the trial judge 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 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 based upon some significant change in circumstances. It perhaps also could 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 the authority of the watermaster under the instructions from the Director, or into the Director's authority is barred by the doctrine of *res judicata.*

CONCLUSIONS OF LAW

1. The Director had authority to exercise reasonable discretion in approving the provisions of the Interim Stipulated Agreement. The Director was not obligated or bound by the stipulated agreement as to parts not approved in the January 18, 2002, Order Approving Interim Stipulated Agreement, and incorporated into the February 19, 2002, Order Creating Water District No. 130.

2. Notwithstanding the lawful discretion of the Director in approving the provisions of the Interim Stipulated Agreement, the Director in fact construed the "safe harbor" provision of the agreement as extending only to the holders of ground water rights covered by the agreement.

3. The February 19, 2002, Order Creating Water District No. 130 sets forth the "safe harbor" provision from the Interim Stipulated Agreement as recognized by the Director.

4. The Director did not recognize or incorporate a broad interpretation of the "safe harbor" provision extending the protection to junior surface water right holders. By the plain reading of the order, the Director extended the safe harbor provision only to junior ground water right holders.

5. The dispute between Clear Springs and Clear Lakes over the water allocation between their respective rights in this case was not within the reach of the Director's order of February 19, 2002, notwithstanding the potential for a broad application of the language of the Interim Stipulated Agreement.

6. 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.*

7. Clear Lakes is prevented from raising the issue of the Director's or the watermaster's authority in this proceeding, and Clear Lakes also is prevented from separately attempting to enforce the Interim Stipulated Agreement in this proceeding against Clear Springs.

8. These issues came within the admitted gravamen of the Gooding County district court litigation, and were resolved by the dismissal with prejudice.

9. Clear Lakes is not precluded by the doctrine of *res judicata* from initiating a contested case before IDWR in the future, as contemplated by the stipulation for dismissal before the district court, seeking review and modification of IDWR's watermaster instructions based upon a significant change inapplicable circumstances.

ORDER

IT IS, THEREFORE, HEREBY ORDER as follows:

1. The motion for summary judgment filed by Clear Lakes is DENIED.

2. The motion to dismiss filed by Clear Springs is GRANTED.

3. The motion filed by Clear Lakes for stay of the watermaster's activities is DENIED, effective with the date of this order.

4. The Watermaster for Water District No. 130 is directed to immediately resume administration of the water rights subject to this proceeding in accordance with the watermaster instructions issued by the Director on June 13, 2002.

Dated this 13th day of June, 2003.

___/Signed/___
KARL J. DREHER
Director

Exhibit G

COPY

NO. _____
FILED
A.M. _____ P.M. _____
JUN 19 2003
J. DAVID NAVARRO, Clerk
By CHRISSY WARDLE
DEPUTY

Daniel V. Steenson (ISB#4332)
Charles L. Honsinger (ISB #5240)
S. Bryce Farris (ISB#5636)
Ringert Clark, Chartered
P.O. Box 2773
Boise, ID 83702
(208)342-4591

Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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.	CASE NO. CV OC 0304746 PETITION FOR JUDICIAL REVIEW/NOTICE OF APPEAL

COMES NOW the Petitioner, Clear Lakes Trout Company ("Clear Lakes"), by and through its undersigned attorneys of record, Ringert Clark Chartered, and respectfully petitions the Court for judicial review of the Final Order of the Idaho Department of Water Resources, dated June 13, 2003.

1. Clear Lakes hereby petitions the District Court of the Fourth Judicial District of Ada County, Idaho for judicial review of the Final Order of IDWR, dated June 13, 2003, from the Director, Karl J. Dreher.

2. This petition is submitted pursuant to the Idaho Administrative Procedures Act (IAPA) and Idaho Rule of Civil Procedure 84, et. seq.

COPY

RECEIVED JUN 19 2003

3. There was a hearing or oral presentation before the agency that was recorded or reported on March 17, 2003. IDWR is in possession of said recording or reporting.

4. Petitioner intends to assert the following issues on judicial review:

a. Whether IDWR erred in failing to enforce the Interim Stipulated Agreement as written.

b. Whether IDWR erred in denying Clear Lakes a hearing and/or continued litigation before IDWR regarding the issues raised in Clear Lakes' petition challenging the Director's instructions to the watermaster for Water District No. 130 following the dismissal of the Gooding County litigation with prejudice.

5. Pursuant to I.R.C.P. 84(d)(5), Petitioner reserves the right to assert additional issues for judicial review which become later discovered by Petitioner.

6. A transcript of the hearing or oral presentation before the agency on March 17, 2003 is requested.

7. Petitioner, by and through its undersigned attorneys, certifies:

a. That service of this Petition has been made upon the state agency or local government rendering said Final Order;

b. That the clerk of the agency has been paid the estimated fee for preparation of the transcript; and

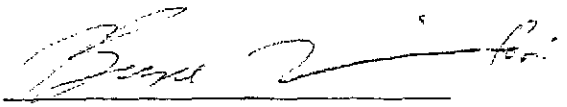
c. That the clerk of the agency has been paid the estimated fee for the preparation of the record.

8. Pursuant to the IAPA and I.R.C.P. 84(m), Petitioner also requests a stay of the enforcement of the Final Order during the consideration of this petition for judicial review.

Petitioner also requests an expedited hearing/oral argument because of the expiration of the Interim Stipulated Agreement on December 31, 2003.

DATED this 19th day of June, 2003.

RINGERT CLARK CHARTERED



Daniel V. Steenson
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Karl J. Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

Phillip J. Rassier
Idaho Attorney General's Office
Idaho Department of Water Resources
1301 N. Orchard
P.O. Box 83720
Boise, Idaho 83720-0098

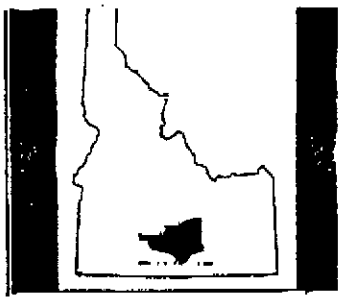
☐ U.S. Mail ☐ Fax ☑ By Hand ☐ Overnight

John K. Simpson, Esq.
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701-2139

☑ U.S. Mail ☐ Fax ☐ By Hand ☐ Overnight

S. Bryce Farris

Exhibit H



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 20, 2003

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

RE: Notice of Intent to Resume Administration of Clear Lakes Area Water Rights

Dear Kay and Larry:

On June 13, 2003, IDWR Director Karl Dreher issued a Final Order in the matter of a Motion for Summary Judgment filed by Clear Lakes Trout, a Motion to Dismiss filed by Clear Springs Foods, and a Motion to stay watermaster activity filed by Clear Lakes Trout. By that Order, the Director has denied the request to stay watermaster activity in the Clear Lakes area. Further, the Director has instructed the watermaster to immediately resume administration of water right nos. 36-2659, 36-2708, 36-7004, and 36-7218 from the Clear Lakes springs common source, in accordance with the watermaster instructions dated June 13, 2002.

On June 17, 2003 I made measurements at the Clear Lakes Trout (Clear Lakes) and Clear Springs Foods (Clear Springs) facilities and made a determination of the total available flows from the common source. The total discharge from the source was 312.3 cfs. Clear Springs was diverting 186.24 cfs and Clear Lakes was diverting 126.06 cfs. Priority distribution would prescribe that the first 100 cfs of available flow be distributed to Clear Lakes pursuant to 36-2659, the next 200 cfs be distributed to Clear Springs pursuant to 36-2708, and the final 12.3 cfs be distributed to Clear Lakes pursuant to 36-7004.

The Watermaster instructions provide for a 14-day notice to the holder of the junior water right prior to any reduction in distributed flows through the 6-foot adjustable weir. The junior right affected at this time is Clear Lakes' right no. 36-7004. ***Notice is hereby given*** that the distribution of water to right no. 36-7004 will be reduced by approximately 14 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On **Tuesday, July 8, 2003** I will re-confirm the total available flows from the springs and make an adjustment to the elevation of the 6-foot weir in order that the Clear Springs right no. 36-2708 is satisfied. You or your representatives are invited to be present at the time of this adjustment. I will be in contact with both of you and with the hatchery managers prior to the adjustment.

If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Glen Saxton and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co
Daniel Steenson, counsel for Clear Lakes Trout Co
Terry Huddleston, Clear Springs Foods Inc
John Simpson, counsel for Clear Springs Foods Inc

Exhibit A

Exhibit I

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
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Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF JUNE 20, 2003 NOTICE OF INTENT TO RESUME ADMINISTRATION OF CLEAR LAKES AREA WATER RIGHTS	PETITION TO INITIATE CONTESTED CASE/REQUEST FOR EXPEDITED HEARING/PETITION TO STAY ADMINISTRATION

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 of the determinations, methods and measurements of the watermaster in issuing the June 20, 2003 Notice of Intent to Resume Administration of Clear Lakes Area Water Rights ("June 20, 2003 Notice");

(2) rescission of the June 20, 2003 Notice;

(3) an order staying any further curtailments of Clear Lakes' water rights until (a) the issues raised by this petition are resolved and (b) issuance of an order from the district court of the

ORIGINAL

Fifth Judicial District of the State of Idaho in Clear Lakes Trout Company, Inc., v. Clear Springs Foods, Inc., Case No. CV-02-00803.

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.

By January, 2002, Clear Lakes, Foods, other spring water users, the North Snake Ground Water District, and the Magic Valley Ground Water District had signed the Interim Stipulated Agreement which led to the formation of Water District 130. The term of the Interim Stipulated Agreement is two years. The Interim Stipulate Agreement contains the following "Safe Harbor" provision:

> 2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

In March of 2002, Foods informally asked the Director how the Department intended to administer Clear Lakes' and Foods' water rights. In response, the Director developed instructions to the watermaster, which he issued on June 5, 2002. The instructions provide that if Foods makes a call for distribution of water, the Watermaster is to reduce Clear Lakes' diversion of its first priority water right through a diversion structure known as the "western diversion pool" to increase

Clear Springs' diversion of its second priority water right through that same diversion structure. The Director asserts that reducing Clear Lakes' diversion of its senior right through the western diversion pool is actually a diversion of Clear Lakes' third priority right through a separate diversion structure known as the "eastern diversion pool."

The Watermaster Instructions further provide that:

2. The watermaster is not to adjust the 6-ft adjustable weir unless . . . Clear Springs calls for distribution of water to its water right 36-02708 . . .

4. IDWR and the watermaster must determine that when a call is made, water is needed under the senior priority water right making the call and that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right. . . .

5. As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights on with 14-day notice . . . that the watermaster will adjust the 6-ft adjustable weir so as to distribute water to the calling senior right, reducing or curtailing the distribution of water to the remaining water right(s) . . .

While Clear Lakes was discussing the instructions with the Director on June 7, 2002, Foods submitted a written call for distribution of water to water right no. 36-02708. On June 13, 2002, the Director issued Amended Watermaster Instructions consistent with the instructions he issued a week earlier. 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, the watermaster adjusted the headgate for Clear Lakes' senior water right no. 36-02659 pursuant to the Director's instructions.

On December 17, 2002, Clear Lakes filed a Petition to Initiate a Contested Case seeking a determination that the watermaster's July 5, 2002 curtailment of Clear Lakes' diversion of water violates IDWR's duty to administer water rights in Water District 130 in accordance with the Interim Stipulated Agreement. Clear Lakes subsequently filed a Motion for Summary Judgment and a Motion to Stay Further Curtailments of Clear Lakes' Water Rights on January 10, 2003. The Hearing Officer recommended that the Director issue an order denying Clear Lakes' Motion for Summary Judgment and Motion for Stay. On June 13, 2003, the Director issued a Final Order denying Clear Lakes' Motion for Summary Judgment and Motion for Stay, and the Director then directed the watermaster to "immediately resume administration of the water rights subject to this proceeding in accordance with the watermaster instructions issued by the Director on June 13, 2002."

On December 23, 2002, Clear Lakes filed a complaint against Foods in the district court of the Fifth Judicial District of the State of Idaho, Case No. CV-02-00803, for breach of the Interim Stipulated Agreement, in which Clear Lakes seeks damages and an order requiring Foods to withdraw its water delivery call. Clear Lakes' filed a motion for partial summary judgment which seeks an order finding that Foods breached the Interim Stipulated Agreement and which requires Foods to withdraw its water delivery call (i.e. specific performance). Clear Lakes' motion has been fully submitted and is currently pending before the district court.

The watermaster issued the June 20, 2003 Notice to advise Clear Lakes that its water rights "will be reduced by approximately 14 cfs." The Notice refers to paragraph 5 of the Watermaster Instructions, which states: "As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights on with 14-day notice . . . that the watermaster will adjust the 6-ft adjustable weir . . ." The

Notice does not reference any written call for approximately 14 cfs by Foods, nor any determination by IDWR or the watermaster that Foods needs the water and that Foods will apply the water to beneficial use (i.e. increase fish production by raising more or larger fish in its fish rearing facility with the additional 14 cfs). The Notice fails to mention that Clear Lakes 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).

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;
5. IDAPA 37.01.01.230.01(a), which provides for petitions seeking to correct, modify, amend or stay existing orders or rules; and
6. I.C. § 67-5232, IDAPA 37.01.01.230.01(b), and IDAPA 37.01.01.400, which provide for petitions seeking a declaratory ruling on the applicability of any law, statute, rule or order administered by IDWR or a party's rights or obligations under such law.

CONCLUSION

Clear Lakes requests an immediate order no later than July 2, 2003 postponing any further curtailment of its water rights until a hearing on Clear Lakes' petition for stay may be heard. An immediate order is necessary because Clear Lakes will have to begin moving fish by July 2, 2003 in anticipation of the watermaster's proposed July 8, 2003 curtailment of Clear Lakes' water rights.

Dated this 1st day of July, 2003.

RINGERT CLARK, CHARTERED

By: _____
Daniel V. Steenson
Ringert Clark Chartered
Attorneys for Petitioner

Exhibit J

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF JUNE 20, 2003 NOTICE OF INTENT TO RESUME ADMINISTRATION OF CLEAR LAKES AREA WATER RIGHTS	**ORDER DENYING PETITION TO INITIATE CONTESTED CASE/REQUEST FOR EXPEDITED HEARING/ PETITION TO STAY ADMINISTRATION**

On July 2, 2003, Clear Lakes Trout Company, Inc., ("Clear Lakes") filed a Petition to Initiate Contested Case and a Petition to Stay Administration.[1] Through the petitions, Clear Lakes seeks to initiate a new contested case and to stay the redistribution of water between Clear Lakes and Clear Springs Foods, Inc. ("Clear Springs") scheduled to take place on July 8, 2003. The Idaho Department of Water Resources ("IDWR") denies both petitions as neither petition contains allegations of fact or law not previously raised in prior proceedings.

I. FACTS AND PROCEDURAL HISTORY

On July 2, 2003, Clear Lakes filed the petition at issue with IDWR.[2] This petition involves an ongoing dispute over the proper distribution of water between Clear Lakes and Clear Springs. There currently is another contested case on appeal to the Ada County District Court that addresses most, if not all, of the issues raised in this petition. That contested case started on December 17, 2002, when Clear Lakes filed its petition to initiate the contested proceeding before IDWR. Clear Lakes' petition sought rescission or modification of IDWR's watermaster

[1] Although filed as one petition, IDWR will address the Petition To Initiate Contested Case and the Petition to Stay Administration separately.

[2] While signed by Clear Lakes on July 1, 2003, IDWR did not receive the petitions until July 2, 2003.

instructions regarding water distribution between Clear Lakes and Clear Springs. Clear Lakes also filed a motion for stay with IDWR on January 10, 2003, requesting a stay of any further curtailment of its water rights pending completion of the contested case proceeding.

Prior to the appointment of D. Duff McKee as hearing officer for the contested case, the Director instructed the Watermaster in a letter dated February 4, 2003, "not to make further redistributions of water under the above-referenced water rights, due to reduced spring flows, pending an opportunity for Clear Lakes to have its motion for stay heard before Hearing Officer McKee, and pending my further instructions to you."

On February 6, 2003, the Director issued an order appointing D. Duff McKee to serve as the IDWR Hearing Officer to hear the contested case. On February 11, 2003, the Hearing Officer conducted a status conference in the matter at which a determination was made to consolidate the hearing on the motion for stay with an expedited hearing on the merits, thus making it unnecessary to conduct a separate hearing on the motion for stay. On March 17, 2003, Hearing Officer McKee held a hearing on Clear Lakes' *Motion for Summary Judgment* and Clear Springs' *Motion to Dismiss*. On April 15, 2003, IDWR issued the *Hearing Officer's Decision, Recommendation for Order and Statement of Available Procedure*. The Hearing Officer recommended that the Director dismiss Clear Lakes' petition relating to the authority of the Director and the Watermaster and that Clear Lakes' motion for stay be denied as moot. The Director issued a Final Order on June 13, 2003. The Final Order adopted the recommendations of the Hearing Officer dismissing Clear Lakes' petition and directing the Watermaster to resume administration of the water rights held by Clear Lakes and Clear Springs in accordance with the Amended Watermaster Instructions.

Following the Director's Final Order in the contested case, the Watermaster provided Clear Lakes and Clear Springs in a letter dated June 20, 2003, with fourteen-days notice of her

intent to redistribute water flows between the parties on July 8, 2003. A copy of the Watermaster's June 20, 2003 letter is attached hereto as Exhibit A. The notice states "distribution of water to right no. 36-7004 will be reduced by approximately 14 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs."

On June 20, 2003, the Watermaster also sent a letter to Clear Springs asking for confirmation that Clear Springs would be able to put any additional flows to beneficial use. See Letter from Watermaster to Clear Springs, dated June 20, 2003, attached hereto as Exhibit B. The Watermaster received written confirmation from Clear Springs that the additional water will be put to a beneficial use to promote the growth and quality of its swimming inventory. See Letter from Clear Springs to Watermaster, dated June 23, 2003, attached hereto as Exhibit C.

On June 19, 2003, Clear Lakes filed a petition for judicial review of the Final Order in Ada County District Court, Case No. CV-0C 0304746D. On the same day, Clear Lakes filed a Motion for Stay with the Ada County District Court seeking to stay enforcement of the Final Order issued by IDWR. Then on July 2, 2003, Clear Lakes filed the petition here at issue before IDWR. A hearing on Clear Lakes' Motion for Stay was held on July 2, 2003. The motion was denied by Ada County District Court Judge Kathryn Sticklen on July 3, 2003.

II. ANALYSIS

A. Petition to Stay Administration.

Clear Lakes filed this new petition to stay the continued redistribution of water to Clear Springs' more senior water right relative to Clear Lakes' right no. 36-7004. However, Clear Lakes does not allege new facts that would constitute grounds for IDWR to grant a stay. In its petition, Clear Lakes recites the long history regarding the dispute between Clear Lakes and Clear Springs, but does not offer grounds upon which IDWR should or could grant a stay. Clear

Lakes fails to set forth any allegations of fact or law that would justify or provide a reasonable basis for the issuance of a stay by IDWR. Furthermore, continued delay of administration would prevent Clear Springs, the holder of the more senior water right relative to Clear Lakes' right no. 36-7004, from making beneficial use of the additional water. Thus, IDWR denies the Petition to Stay Administration.

B. Petition to Initiate a Contested Case.

Clear Lakes also seeks to initiate a new contested case. Like the Petition to Stay Administration, the Petition to Initiate a Contested Case does not allege any factual or legal issues that have not previously been raised in prior proceedings. Idaho Code § 42-1701A(3) does not provide Clear Lakes a new opportunity to re-litigate issues either already decided or currently undergoing judicial review. The statute only 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. Because the current petition does not clearly identify any new issues, IDWR denies the Petition to Initiate a Contested Case.

IT IS HEREBY ORDERED that the *Petition to Initiate Contested Case/Request for Expedited Hearing/Petition to Stay Administration* is DENIED.

DATED this 3rd day of July, 2003.

Karl J. Dreher
Director

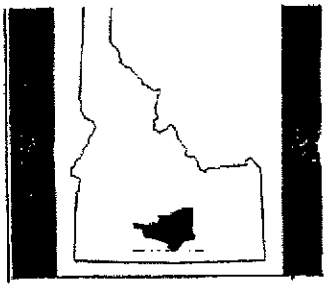
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of July, 2003, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JOHN K. SIMPSON
TRAVIS L. THOMPSON
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139

DANIEL V. STEENSON
CHARLES L. HONSINGER
S. BRYCE FARRIS
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

Victoria Wigle
Assistant to the Director
Idaho Department of Water Resources



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 20, 2003

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

RE: Notice of Intent to Resume Administration of Clear Lakes Area Water Rights

Dear Kay and Larry:

On June 13, 2003, IDWR Director Karl Dreher issued a Final Order in the matter of a Motion for Summary Judgment filed by Clear Lakes Trout, a Motion to Dismiss filed by Clear Springs Foods, and a Motion to stay watermaster activity filed by Clear Lakes Trout. By that Order, the Director has denied the request to stay watermaster activity in the Clear Lakes area. Further, the Director has instructed the watermaster to immediately resume administration of water right nos. 36-2659, 36-2708, 36-7004, and 36-7218 from the Clear Lakes springs common source, in accordance with the watermaster instructions dated June 13, 2002.

On June 17, 2003 I made measurements at the Clear Lakes Trout (Clear Lakes) and Clear Springs Foods (Clear Springs) facilities and made a determination of the total available flows from the common source. The total discharge from the source was 312.3 cfs. Clear Springs was diverting 186.24 cfs and Clear Lakes was diverting 126.06 cfs. Priority distribution would prescribe that the first 100 cfs of available flow be distributed to Clear Lakes pursuant to 36-2659, the next 200 cfs be distributed to Clear Springs pursuant to 36-2708, and the final 12.3 cfs be distributed to Clear Lakes pursuant to 36-7004.

The Watermaster instructions provide for a 14-day notice to the holder of the junior water right prior to any reduction in distributed flows through the 6-foot adjustable weir. The junior right affected at this time is Clear Lakes' right no. 36-7004. ***Notice is hereby given*** that the distribution of water to right no. 36-7004 will be reduced by approximately 14 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On **Tuesday, July 8, 2003** I will re-confirm the total available flows from the springs and make an adjustment to the elevation of the 6-foot weir in order that the Clear Springs right no. 36-2708 is satisfied. You or your representatives are invited to be present at the time of this adjustment. I will be in contact with both of you and with the hatchery managers prior to the adjustment.

If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

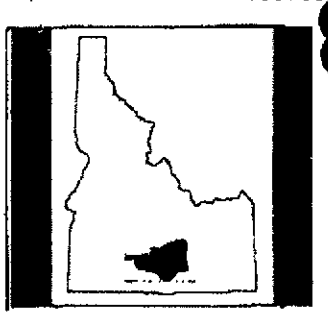
Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Glen Saxton and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co
Daniel Steenson, counsel for Clear Lakes Trout Co
Terry Huddleston, Clear Springs Foods Inc
John Simpson, counsel for Clear Springs Foods Inc

Exhibit A



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 20, 2003

LARRY COPE
CLEAR SPRINGS FOODS INC
PO BOX 712
BUHL ID 83316

RE: Confirmation of Beneficial Use of Re-distributed Flows

Dear Larry:

Pursuant to the Amended Watermaster Instructions dated June 13, 2002, prior to distribution of additional flows to a senior water right a determination must be made that additional flows distributed to the senior right may be placed to beneficial use by the water user.

A separate letter from me, also dated June 20, gives notice that I have been instructed to resume administration of water rights from Clear Lakes springs. Based on measurements made June 17, 2003 I intend to redistribute additional flows in the approximate amount of 14 cfs to Clear Springs Foods on July 8, 2003.

Please confirm that an additional 14 cfs may be beneficially used at this time within the Clear Springs Foods Clear Lakes facility. This confirmation and any supporting information should be submitted in writing to my office, no later than June 27, 2003.

Thank you for your cooperation. If you have any questions, please don't hesitate to contact me at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster
Water District 130

cc: Glen Saxton and Phil Rassier, IDWR

Exhibit B

CLEAR SPRINGS FOODS, INC.
Corporate Office P.O. Box 712, Buhl, Idaho 83316

Phone 208 543-4316
Sales 800 635-8211
Fax 208 543-5608

June 23, 2003

RECEIVED
JUN 25 2003
Department of Water Resources
Southern Region

Cindy Yenter, Watermaster
Water District 130
C/O Idaho Department of Water Resources
1341 Fillmore St Ste 200
Twin Falls, ID 83301-3380

RE: Confirmation of Beneficial Use of Re-Distributed Flows

Dear Cindy:

The purpose of this communication is to confirm that an additional 14 cfs will be beneficially used at this time within the Clear Springs Foods Clear Lakes farm. This farm is currently holding in excess of one million pounds of swimming inventory. To a great extent fish health and growth rates are determined by the quantity and quality of water flows. The full 200 cfs flow of water under license No. 35-02708 will be beneficially used.

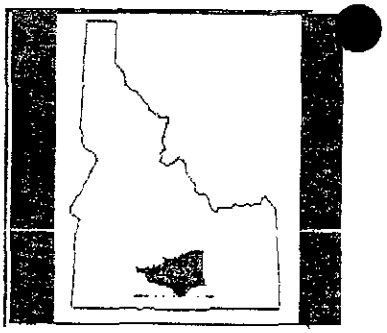
Regards,

Larry W. Cope
President & CEO

L:\Water\Cindy Yenter letter - 06-23-03.doc

Exhibit C

Exhibit K



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

July 21, 2003

ANITA KAY HARDY
CLEAR LAKES TROUT CO
1301 VISTA AVE
BOISE ID 83705

LARRY COPE
CLEAR SPRINGS FOODS INC
PO BOX 712
BUHL ID 83316

VIA FACSIMILE AND FIRST CLASS MAIL

RE: Notice of Intent to Resume Administration of Clear Lakes Area Water Rights

Dear Kay and Larry:

I was notified this morning by John Simpson that negotiations between Clear Lakes Trout and Clear Springs Foods did not result in a resolution and that Clear Springs Foods has withdrawn its request for suspension and asked for immediate redistribution of flows to the Clear Springs Foods water right no. 36-2708.

My letter of July 8 indicated that I would provide 24 to 48 hours notice for any final operational adjustments. Accordingly, the redistribution of flows will occur on **Wednesday, July 23, 2003, at approximately 10 am.** Because of the time lapse since the original notice of redistribution, prior to this week's redistribution Clear Springs Foods must again confirm in writing the need for additional water and how the water will be beneficially used.

If you have any questions please contact me at 208-736-3033 or 208-731-0901.

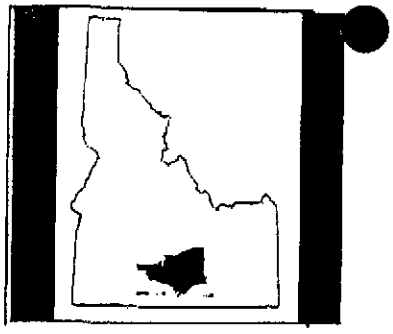
Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Glen Saxton and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co
Daniel Steenson, counsel for Clear Lakes Trout Co
Terry Huddleston, Clear Springs Foods Inc
John Simpson, counsel for Clear Springs Foods Inc

Exhibit L



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

MEMORANDUM

July 31, 2003

TO: Tim Luke, Water Distribution Section Manager

FROM: Cindy Yenter, Water District 130 Watermaster

CC: Clear Springs Foods, Inc
Clear Lakes Trout Co.
Allen Merritt

RE: Confirmation of Additional Steps Necessary for Distribution Among Water Right Nos. 36-2659, 36-2708 and 36-7004

On Wednesday, July 23, 2003 I raised the adjustable weir at the Clear Lakes / Clear Springs joint diversion works, in an attempt to redistribute available flows under the above rights. In order to satisfy the senior Clear Springs Foods (Clear Springs) right no. 36-2708 in the amount of 200 cfs, about 14 cfs needed to be redistributed from Clear Lakes Trout (Clear Lakes) to Clear Springs. Pursuant to the watermaster instructions, I raised the adjustable weir to just above the elevation of the weir pool. With the adjustable weir closed, only about 4 cfs additional flow was immediately realized at Clear Springs. On July 25, after the system had equalized, Clear Springs was receiving another 2 cfs, or about 192 cfs total. Full redistribution was not possible due to the 8-ft fixed weir which also discharges into the Clear Lakes headrace and which has no additional flow controls.

Watermaster Instructions dated June 13, 2002 state that the watermaster shall make adjustments to the flow distribution by moving the adjustable weir at the joint diversion. The instructions provided a series of steps which were subject to further confirmation (instruction no. 10, page 14). At this time I am confirming 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.

Note that the above additional steps ***do not*** require the physical alteration of any part of the joint diversion. The placement of dam boards is a temporary solution and the boards will be removed as flows increase.

I intend to further redistribute available flows under above rights in accordance with the additional steps described in this memorandum on Monday, August 4, 2003.

Exhibit M

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MEMORANDUM

To: Cindy Yenter
Water District 130 Watermaster

Date: July 29, 2003

From: Tim Luke

cc: Clear Springs Foods, Inc.
Clear Lakes Trout Co.
Allen Merritt

Subject: Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, and 36-07004

On Wednesday, July 23, 2003, you reported that you raised the 6-ft adjustable weir at the joint diversion facilities for the above rights to redistribute water between water rights nos. 36-02708 and 36-07004. You indicated that you had raised the weir to at or near the highest point possible, and that water right no. 36-02708 was still not receiving the full amount of water in accordance with the priority of the right.

Later on Wednesday, the Director received a letter from one of the attorneys representing Clear Lakes Trout, Charles Honsinger, expressing concern that you may have been contemplating alterations to the joint diversion facilities in order to supply the full amount of water authorized for water right no. 36-02708. The Director responded to Mr. Honsinger that he was reviewing the issue and had not made a determination of what additional action(s), if any, were necessary, and that Clear Lakes would receive advance notification of any additional action(s).

The instructions that you were given for making adjustments to the 6-ft adjustable weir were "subject to further confirmation." (See instruction no. 10 on page 14 of Watermaster Instructions 02-01). If the specific steps described in instruction no. 10 do not achieve the distribution of water among the water rights set forth in instruction no. 9, you are authorized, 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.

Please keep this office, as well as representatives of Clear Lakes Trout and Clear Springs Foods, advised of what steps you identify as being necessary to further implement instructions nos. 9 and 10 of Watermaster Instructions 02-01 and again prior to taking such steps.

Exhibit N

RINGERT CLARK
CHARTERED LAWYERS

Laura E. Burri
Jeffrey R. Christenson
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
Patrick D. Furey
David Hammerquist
Charles L. Honsinger
Joseph R. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney

Samuel Kaufman (1921-1986)

Transmitted by Facsimile

August 1, 2003

Ms. Cindy Yenter
Water District 130 Watermaster
c/o Idaho Department of Water Resources
1341 Fillmore St, Suite 200
Twin Falls, ID 83301-3380
Fax: (208)736-3037

Re: July 31, 2003 Memorandum Detailing Additional Steps for Distribution Among Water Right Nos. 36-2659, 36-2708 and 36-7004

Dear Ms. Yenter:

My client, Clear Lakes Trout Company, has forwarded a copy of the above referenced memorandum to me. Your memorandum specifies that "additional steps are required in order to distribute the full 200 cfs to the Clear Springs right no. 36-2708" and goes on to detail those steps you believe are necessary, including the insertion of dam boards to block the flow of water over Clear Lakes' 8-ft fixed weir. You then state your intent to insert the dam boards on August 4, 2003.

We have several concerns regarding your proposed actions. First, you are contemplating making changes to the June 13, 2002 Amended Watermaster Instructions issued by the Director. You do not have the authority to modify or add to those instructions. It is only the Director who should be modifying his own instructions.

The Director stated in his July 23, 2003 letter to me that he had "not made a determination of what additional action(s), if any, that the watermaster will be instructed to undertake" and that I would "be notified in advance of any additional action(s) that the watermaster is instructed to undertake." (Emphasis added). In his July 29, 2003 Memorandum to you, Tim Luke stated that you are authorized "to investigate alternative or additional steps necessary . . . to accomplish the distribution of water." (Emphasis added). Mr. Luke also requested that you keep his office and the parties advised of the "steps you identify as being necessary to further implement instructions nos. 9 and 10 of Watermaster Instruction 02-01 and again prior to taking such steps." (Emphasis added). Obviously, the intent of the Director's office is that, at a minimum, you notify that office and the parties of the "steps you identify" prior to their implementation so that they have opportunities to analyze and discuss the same. Your notification that you intend to take those steps in the same correspondence by which you provide notification of the steps proposed docs

not give Clear Lakes adequate time to respond, and violates both the spirit and the letter of the instructions you have been given.

Second, IDWR has asserted many times in various proceedings that the June 13, 2002 Amended Watermaster Instructions are "final" and cannot be changed unless new information is provided by Clear Lakes. The discovery that the entire quantity of water right no. 36-02708 cannot be delivered by using the 6-ft adjustable weir certainly constitutes new information, that, according to you, necessitates a change to the watermaster instructions. Because you are proposing to amend instructions that are "final," you are in fact proposing to issue new instructions (by raising this issue, Clear Lakes does not admit that you have authority to amend the June 13, 2002 Amended Watermaster Instructions). Accordingly, Clear Lakes must be given the opportunity to avail itself of the administrative remedies to which it is entitled prior to approval and implementation of any new watermaster instructions.

Finally, Clear Lakes is extremely concerned that it does not know what impact your proposed actions will have either on its flows, or on the diversion structure itself. To Clear Lakes' knowledge, no boards have ever been placed so as to block the flow of its senior water right over the 8-ft fixed weir. At a minimum, Clear Lakes is entitled to a period of time to investigate the potential impacts of your proposed actions, and if necessary, address them through an administrative process.

Please respond to this correspondence with notification that you do not intend to take the steps proposed in your July 31, 2003 Memorandum until the issues identified above have been addressed.

Sincerely,

Charles L. Honsinger

cc: Kay Hardy
Karl Dreher
Tim Luke

Exhibit O

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

August 4, 2003

Charles L. Honsinger
Ringert Clark, Chartered
455 South 3rd Street
P. O. Box 2773
Boise, ID 83701

VIA FACSIMILE TO (208) 342-4657 AND FIRST CLASS MAIL

Re: Redistribution of Water at Clear Springs/Clear Lakes Joint Diversion Structure

Dear Mr. Honsinger:

I have reviewed your letter dated August 1, 2003, to the watermaster for Water District No. 130, Ms. Cindy Yenter, regarding the additional steps Ms. Yenter intends to take to properly distribute water between water rights nos. 36-02659, 36-02708, and 36-07004. Subsequent to receiving the memorandum from Mr. Tim Luke dated July 29, 2003, Ms. Yenter has kept my office informed of the additional steps believed to be necessary to implement instructions nos. 9 and 10 of the amended watermaster instructions I issued on June 13, 2002.

After reviewing the additional steps Ms. Yenter has identified as being necessary to implement instructions nos. 9 and 10 of the amended watermaster instructions, I believe that those steps are consistent with my prior instructions. Consequently, I do not find it necessary to issue further instructions to Ms. Yenter. However, Ms. Yenter will not make further adjustments until Wednesday, August 6 to allow Clear Lakes additional time to evaluate the impacts of the additional steps identified.

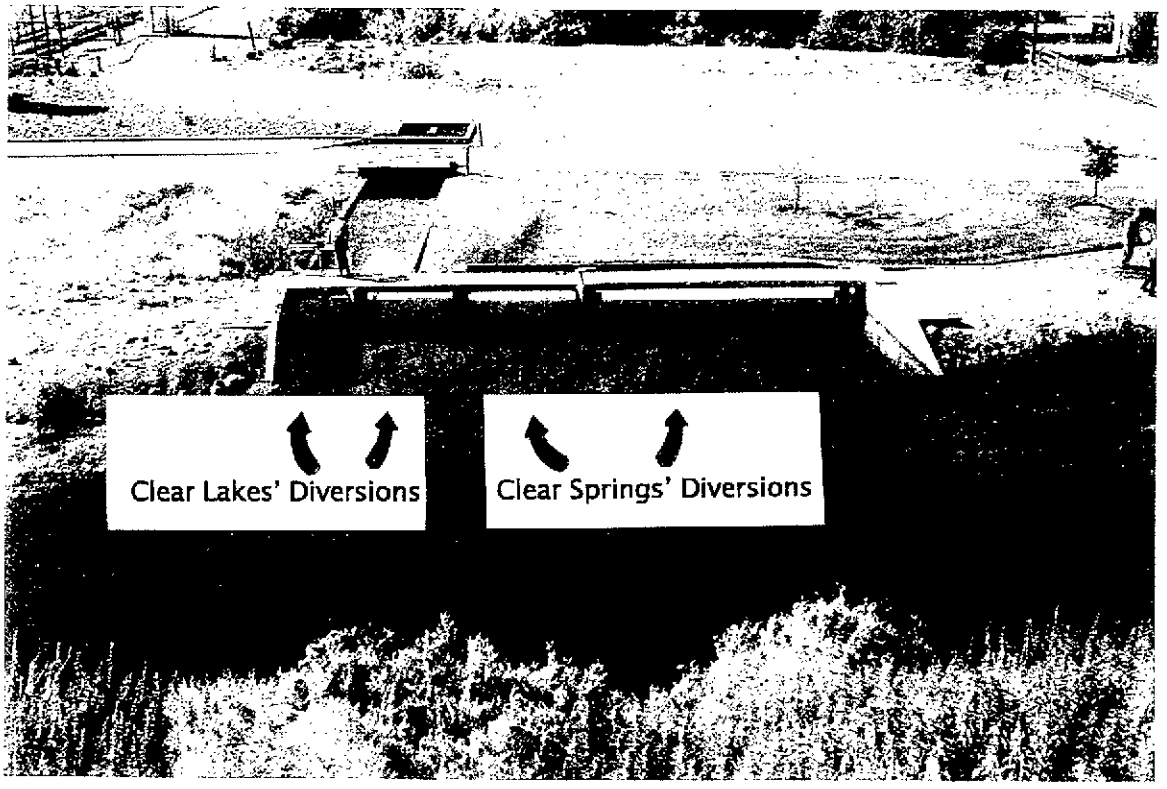
Sincerely,

Karl J. Dreher
Director

c: Kay Hardy – Clear Lakes Trout
John Simpson
Cindy Yenter

RECEIVED AUG 0 5 2003

Exhibit P


Clear Lakes' Diversions
Clear Springs' Diversions

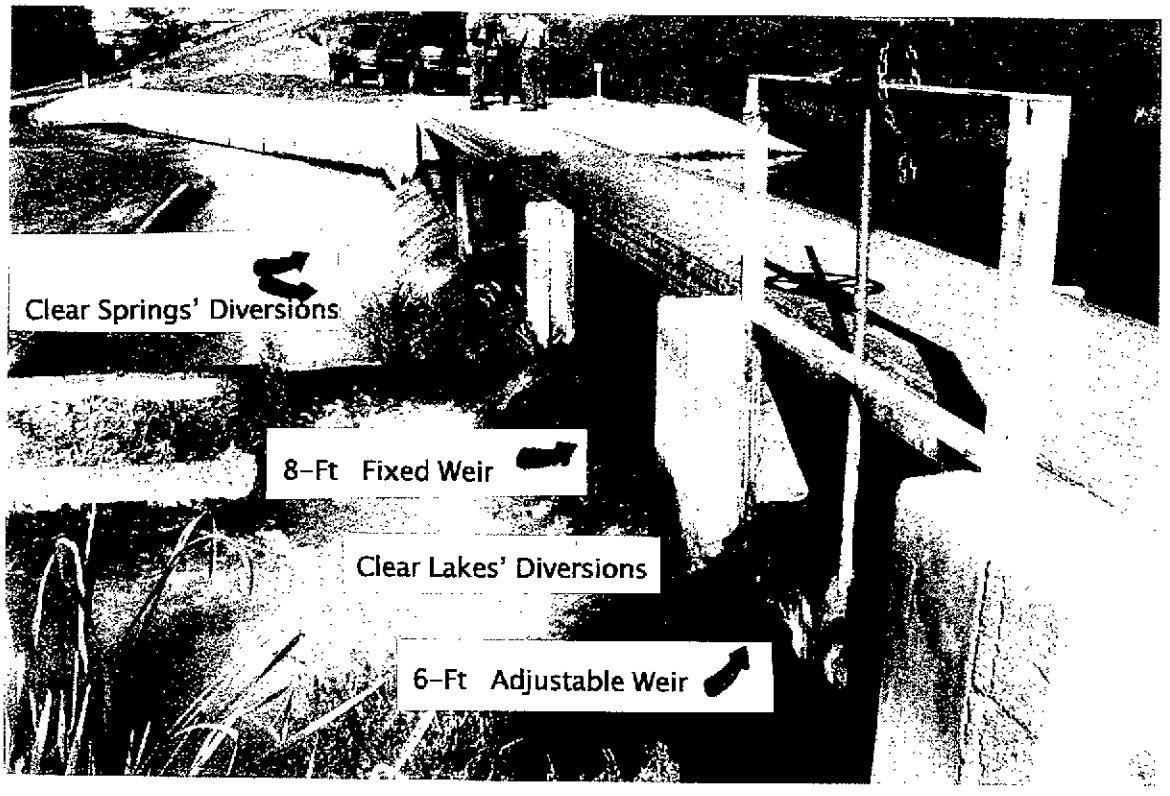

Clear Springs' Diversions
8-Ft Fixed Weir
Clear Lakes' Diversions
6-Ft Adjustable Weir

Exhibit Q

COPY

NO. _____
A.M. _____
OCT 21 2003
J. DAVID NAVARRO, Clerk
By _____

DANIEL V. STEENSON (ISB#4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB#5636)
RINGERT CLARK CHARTERED
P.O. Box 2773
Boise, ID 83702
(208)342-4591

Attorneys for Petitioners/Plaintiffs

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RIM VIEW TROUT COMPANY; and THE ESTATE OF EARL M. HARDY, Petitioners/Plaintiffs, vs. KARL J. DREHER, in his official capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents/Defendants.	CASE NO.: CV OC 0307551D AMENDED VERIFIED COMPLAINT AND PETITION FOR WRIT OF MANDATE

COME NOW the Petitioners/Plaintiffs, Rim View Trout Company and the Estate of Earl M. Hardy (hereinafter collectively referred to as "Plaintiffs"), by and through their undersigned attorneys of record, Ringert Clark Chartered, and hereby file this Amended Complaint and Petition in the above-entitled Court. Petitioners/Plaintiffs complain, allege and petition as follows:

COPY

GENERAL ALLEGATIONS

I.

Plaintiff, Rim View Trout Company ("Rim View"), is an Idaho corporation, with its principal office in Boise, Ada County, Idaho. Plaintiff, the Estate of Earl M. Hardy ("Hardy Estate"), Anita Kay Hardy, Personal Representative, is the legal successor to Earl M. Hardy, deceased, with its principal offices in Boise, Ada County, Idaho.

II.

Defendant Karl J. Dreher is a resident of Ada County, Idaho, and is the Director of the Defendant Idaho Department of Water Resources ("IDWR"), with its main offices located at 1301 N. Orchard Street, Boise, Ada County, Idaho.

III.

Plaintiffs own water rights which entitle them to use water for fish propagation purposes in Gooding County, Idaho. Rim View is the owner of the following water right: 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680 and 36-07167. The Hardy Estate is the owner of water right 36-07176. True and accurate copies of the partial decrees for the above-mentioned water rights, along with the water right report for 36-07176, are attached hereto as Exhibit A.

IV.

The spring sources of Plaintiffs' water rights are located within Water District 130, said Water District having been created pursuant to Idaho Code § 42-604 on or about February 19, 2002. Water District 130 is presently being administered by the Defendant IDWR through watermaster Cindy Yenter.

V.

Pursuant to Idaho Code § 42-602, et seq., it is the duty of Defendant Dreher, as Director of the Defendant IDWR, to direct and control the distribution of water from all natural water sources within a water district according to the prior appropriation doctrine. Pursuant to Idaho Code § 42-607, it is Defendants' duty through their watermaster to distribute the waters within Water District 130 according to the prior rights of water users within the Water District so that in times of scarcity of water, the diversion facilities for junior water rights are shut off or otherwise controlled as necessary to supply water for the prior rights of senior water right holders, including the water rights of Plaintiffs.

VI.

The water sources for Plaintiffs' water rights are springs that are part of the spring complex commonly known as the "Thousand Springs," which are supplied by the Eastern Snake River Plain Aquifer (ESPA). The springs are tributary to the Snake River and are hydrologically interconnected to the ESPA. Junior groundwater diversions from the aquifer reduce the quantity of water available to Plaintiffs when Plaintiffs need and have the right to said water.

VII.

During all or portions of the periods of use for their water rights (January 1 to December 31), Plaintiffs do not receive and have not been receiving, their full entitlement to water pursuant to their water rights, depriving them of a sufficient water supply for their fish propagation facilities, all to the proximate detriment of Plaintiffs.

VIII.

Both before and after the formation of Water District 130, Defendants have been aware of the fact that the springs which supply Plaintiffs' water rights have not provided sufficient water to supply Plaintiffs' water rights. Defendants have failed to perform their statutory duties to administer the distribution of water within Water District 130 according to the prior appropriation doctrine so as to shut off or control the diversion of junior water rights to supply Plaintiffs' water rights.

IX.

On May 15, 2003, Plaintiffs made written demands for delivery of water upon Defendant Dreher. True and accurate copies of said letters are attached hereto as Exhibit B.

X.

Defendant Dreher advised Plaintiffs that their demands would be treated as "calls for water delivery" under the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11 of the Administrative Rules of the Department of Water Resources (hereinafter "Conjunctive Management Rules"). True and accurate copies of the correspondence in which Defendant Dreher advised Plaintiffs that their demands would be treated as "calls for water delivery" are attached hereto as Exhibit C.

XI.

The Conjunctive Management Rules have not been applied to numerous demands for the delivery of water by water users other than the Plaintiffs, in Water District 130 and in other water districts throughout the state.

XII.

In an August 15, 2003 letter, Defendant Dreher stated that he would respond to Plaintiffs' demands for the delivery of water by the end of August. A true and accurate copy of said letter is attached hereto as Exhibit D. On August 20, 2003, Defendant Dreher verbally reiterated to representatives of Plaintiffs and other spring water users that he would respond by the end of August. No response was provided by the end of August. On September 12, 2003, Plaintiffs' attorney sent a letter requesting that Defendants respond to their demands for the delivery of water. A true and accurate copy of said letter is attached hereto as Exhibit E. On September 16, 2003, four months after Plaintiffs' demands for the delivery of water, Defendant Dreher sent a letter to Plaintiffs' attorney stating that he was still unable to respond to Plaintiffs' demands for the delivery of water. A true and accurate copy of said letter is attached hereto as Exhibit F.

XIII.

After Plaintiffs filed the original Complaint on September 29, 2003, and served Defendants with a copy thereof on September 30, 2003, Defendant Dreher issued his October 10, 2003 Order addressing Plaintiffs' demands for the delivery of water. A true and accurate copy of the October 10, 2003 Order is attached hereto as Exhibit G. The October 10, 2003 Order treats Plaintiffs' demands for the delivery of water as "delivery calls" under the Conjunctive Management Rules. The October 10, 2003 Order directs the watermasters for Water Districts No. 36A and No.130 "to continue administering water rights within Water Districts No. 36A and No. 130, under the supervision of the Director, in the same manner that the rights are presently being administered." The October 10, 2003 Order constitutes a denial of Plaintiffs' demands for the delivery of water.

XIV.

Defendant Dreher's October 10, 2003 Order denies Rim View's demand for delivery of water on the grounds that reductions in the supply of water available to Rim View are "due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority rights," and on the grounds that there is "adequate water available to fill" Rim View's water right no. 36-07167. Both conclusions are erroneous.

XV.

Defendant Dreher's October 10, 2003 Order denies the Hardy Estate's demand for delivery of water on the grounds that there is "'an approved and effectively operating mitigation plan' under Rule 42.02 of the Conjunctive Management Rules." This conclusion is erroneous.

XVI.

Defendant Dreher's denial of the Hardy Estate's demand for delivery of water is also based on the application of "quantity" and "time" "criteria" he allegedly "specified" prior to the October 10, 2003 Order. Exhibit G, Findings of Fact ¶ 90. Neither of these criteria is specified in any laws of the State of Idaho or in any rule promulgated by any agency of the State. Under Defendant Dreher's criteria, ground water diversions are subject to curtailment to supply senior spring water rights only if 50 percent of the water diverted by the junior ground water rights would reach the springs within 6 months. Defendants determined through use of a computer model that 40,000 acre feet of water would reach the Thousand Springs by curtailing junior ground water rights that meet these criteria. Defendants concluded that providing this amount of water is "adequate" to mitigate the injuries ESPA ground water diversions are causing to senior spring water rights.

COUNT ONE (WRIT OF MANDATE)

XVII.

Plaintiffs repeat and reallege the allegations set forth in I - XVI of Plaintiffs' Amended Verified Complaint and Petition for Writ of Mandate.

XVIII.

As a direct and proximate result of Defendants' failure and refusal to administer water rights according to Defendants' statutory duties to supply the prior water rights of Plaintiffs herein during times of water scarcity, Plaintiffs have been damaged, and presently continue to be damaged, in that they are unable to use all of their fish propagation facilities, and those fish propagation facilities that are presently being used have been damaged and continue to be damaged on a daily basis in that Plaintiffs have inadequate water pursuant to their senior water rights. As a direct and proximate result of Defendants' failure and refusal to fulfill their statutory duties and responsibilities pursuant to Idaho Code § 42-602, et seq., Plaintiffs are being irreparably damaged, and have no plain, adequate nor speedy remedy at law.

XIX.

Defendants' failure and refusal to perform their statutory duties of controlling the distribution of water within Water District 130 to distribute water to Plaintiffs' prior rights deprives Plaintiffs of the use and enjoyment of their properties and is causing Plaintiffs irreparable harm, which damage can only be remedied by an order of this Court compelling Defendants to perform their statutory duties pursuant to Idaho Code § 42-602, et seq., thereby enabling Plaintiffs to use and enjoy their senior water rights and the properties to which those rights are appurtenant.

XX.

Defendants' failure and refusal to distribute water to Plaintiffs' prior rights, and Defendants' application of the Conjunctive Management Rules, violates, interferes with and impairs the constitutionally-protected priorities of Plaintiffs' water rights, Plaintiffs' constitutional rights to equal protection of the law, and is contrary to the public policies of this state. If the Defendants' actions and/or inactions are allowed to stand, the constitutional rights of other water users of this state will be threatened and diminished.

XXI.

Defendant Dreher's "criteria" reduce the water supply and limit the number of groundwater rights that are subject to the priorities of senior water rights to the Thousand Springs, including Plaintiffs' water rights. These criteria constitute "rules" under the Idaho Administrative Procedures Act (IAPA), I.C. §§67-5201 *et. seq.*, that are void because they were not promulgated in compliance with the requirements of the IAPA.

XXII.

Defendant Dreher's criteria are contrary to law and violate, interfere with, dismiss and impair the constitutionally-protected priorities of Plaintiffs' water rights, Plaintiffs' constitutional rights to equal protection of the law, and are contrary to the public policies of this state. If the Defendants' actions and/or inactions are allowed to stand, the constitutional rights of other water users of this state will be threatened and diminished.

XXIII.

Plaintiffs' are entitled to issuance of a writ of mandate pursuant to Idaho Code § 7-302 in order to compel Defendants to perform their duties under Idaho Code §42-602 et seq. to distribute

the waters within Water District 130 to supply Plaintiffs' prior rights, and in order to prevent Defendants from using Defendant Dreher's quantity and time criteria to reduce the water supply and limit the number of groundwater rights that are subject to the priorities of senior water rights to the Thousand Springs, including Plaintiffs' water rights, or to determine that there is "an effectively operating mitigation plan" which supplants Defendants' performance of their duties.

COUNT TWO (DECLARATORY JUDGMENT)

XXIV.

Plaintiffs repeat and reallege the allegations set forth in I - XXIII of Plaintiffs' Amended Verified Complaint and Petition for Writ of Mandate.

XXV.

Defendant IDWR promulgated and adopted administrative rules entitled "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37.03.11, on or about October 7, 1994. A petition for review of or action for declaratory relief from said Conjunctive Management Rules may be filed at any time pursuant to Idaho Code § 67-5273 and/or Idaho Code § 67-5278.

XXVI.

The Conjunctive Management Rules require Plaintiffs and other similarly-situated senior surface water right holders to submit a "call" and initiate administrative procedures prior to the distribution and delivery according to Plaintiffs' prior rights. This process results in unreasonable delay in the distribution of water to senior water rights, including Plaintiffs' water rights, and is contrary to Plaintiffs' rights, Idaho law, the prior appropriation doctrine, and Idaho Code § 42-602 *et seq.*

XXVII.

The Conjunctive Management Rules contain "factors" which impose burdens on senior water rights. These "factors" include, but are not limited to, a showing of material injury, reasonableness of the senior water right diversion, and that the senior right could not be met using alternate points and/or means of diversion. The application of these "factors" results in unreasonable delay in the distribution of water to senior water rights, including Plaintiffs' water rights, and imposes burdens which are contrary to Plaintiffs' water rights and constitutional rights, Idaho law, the prior appropriation doctrine and Idaho Code § 42-602 *et seq.*

XXIII.

Defendant Dreher's application of the standards and procedures of the Conjunctive Management Rules to Plaintiffs' demands for delivery of water resulted in an five-month delay in responding to Plaintiffs' demands. Defendant Dreher's October 10, 2003 Order recited and applied "factors" or concepts from the Conjunctive Management Rules in denying Plaintiffs' demands for delivery of water. If Defendants' application of the Conjunctive Management Rules when administering the distribution and delivery of senior water rights is allowed to stand, the rights of Plaintiffs and other water users of this state will be threatened and diminished.

XXIX.

Defendants determined that a private agreement to which neither the Hardy Estate nor Rim View was a party constitutes an "approved and effectively operating mitigation plan" under the Conjunctive Management Rules, thereby negating Plaintiffs' water right priorities and demand for delivery of water. A determination that a "mitigation plan" supplants administration of water rights is contrary to the Plaintiffs' rights, Idaho law, the prior appropriation doctrine and Idaho Code § 42-

602 *et seq*. If Defendants' determination that a "mitigation plan" supplants administration of the distribution and delivery of senior water rights is allowed to stand, Plaintiffs' rights and other water users of this state will be threatened and diminished.

XXX.

Prior to their application of the Conjunctive Management Rules to Plaintiffs, Defendants have not applied the Conjunctive Management Rules to the administration and delivery of water rights in Water District 130 and other Water Districts. Defendants' application of the Conjunctive Management Rules to Plaintiffs, and their delay in distributing water to Plaintiffs, constitute unequal and inconsistent treatment of Plaintiffs in violation of the Equal Protection Clauses of the Federal and State Constitutions.

XXXI.

Plaintiffs are entitled to an order from this Court declaring that Defendants' application of the Conjunctive Management Rules is unconstitutional, contrary to law, and violates the Plaintiffs' rights and the Defendants' duties under the prior appropriation doctrine and Idaho Code § 42-602 *et seq*. Plaintiffs are also entitled to an order declaring that Defendant Dreher's "criteria" are unconstitutional, contrary to law, violate Plaintiffs' rights and the Defendants' duties, and are otherwise void because they are rules that were not promulgated as required by the IAPA.

COUNT THREE (TAKING)

XXXII.

Plaintiffs repeat and reallege the allegations set forth in I - XXXI of Plaintiffs' Amended Verified Complaint and Petition for Writ of Mandate.

XXXIII.

Defendant Dreher's quantity and time "criteria" and the application thereof to deny Plaintiffs' demands for delivery of water arbitrarily reduce the water supply and limit the number of junior water rights to which Plaintiffs' senior water rights apply.

XXXIV.

Defendant Dreher's quantity and time "criteria" and the application thereof to deny Plaintiffs' demands for delivery of water diminish and deprive Plaintiffs of the priority and the water supply of their water rights, and are therefore void as an unconstitutional taking of Plaintiffs' water rights.

XXXV.

In the event that Defendant Dreher's criteria are affirmed, Plaintiffs are entitled to just compensation pursuant to the constitutions of the State of Idaho and the United States.

REQUEST FOR ATTORNEY FEES

XXXVI.

As a direct and proximate result of the Defendants' failure and refusal and continued failure and refusal to perfom their statutory duties and their failure and refusal to distribute water during times of scarcity to senior water rights holders, including Plaintiffs herein, Plaintiffs have been required to employ the services of the law firm of Ringert Clark Chartered, and have also incurred various costs and will in the future continue to incur various future court costs and attorney fees. Therefore, under Idaho law, including, but not limited to Idaho Code §§ 12-117 and 12-121 and the Private Attorney General Doctrine, the Defendants should be required to pay to Plaintiffs their reasonable costs and attorney fees.

WHEREFORE, Plaintiffs pray for the issuance of a writ of mandate and/or order of the court directed to the Defendants ordering as follows:

(1) a writ and/or order compelling Defendants to distribute water to Plaintiffs' senior water rights as required by Idaho Code § 42-602 et seq.;

(2) an order declaring that the procedures and requirements of the Conjunctive Management Rules are void on their face because they are unconstitutional, contrary to law, and violate Plaintiffs' water rights and constitutional rights and Defendants' duties;

(3) an order declaring that Defendants' application of the Conjunctive Management Rules to Plaintiffs' demands for delivery of water is unconstitutional, contrary to law, and violates the Plaintiffs' water rights and constitutional rights and the Defendants' duties;

(4) an order declaring that Director Dreher's "criteria" are unconstitutional, contrary to law, violate Plaintiff's water rights and constitutional rights and the Defendant's duties, and are otherwise void because they are rules that were not promulgated as required by the IAPA.

(5) in the event that Defendant Dreher's "criteria" are affirmed, Plaintiffs are entitled to just compensation in an amount to be determined at trial.

(6) for such other relief as to the court shall seem just and equitable in the premises.

DATED this 20th day of October, 2003.

RINGERT CLARK CHARTERED

By: Daniel V. Steenson

Daniel V. Steenson
Attorneys for Petitioners/Plaintiffs

STATE OF IDAHO)
) ss VERIFICATION
COUNTY OF Ada)

Kay Hardy, after being first duly sworn on oath depose and state as follows:

1. That I am the President of Rim View Trout Company, the Petitioner/Plaintiff in the above-entitled action, and I have reviewed the Amended Verified Complaint and Petition for Writ of Mandate and I believe the facts contained therein to be true and correct to the best of my knowledge.

Kay Hardy

SUBSCRIBED AND SWORN TO before me this 28th day of October, 2003.

Notary Public for Idaho
Residing: Boise, ID
My Commission Expires: 9/16/08

JULIE M. MOSER NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss VERIFICATION
COUNTY OF Ada)

Kay Hardy, after being first duly sworn on oath depose and state as follows:

1. That I am the Personal Representative of the Estate of Earl M. Hardy, the Petitioner/Plaintiff in the above-entitled action, and I have reviewed the Verified Complaint and Petition for Writ of Mandate and I believe the facts contained therein to be true and correct to the best of my knowledge.

Kay Hardy
Kay Hardy

SUBSCRIBED AND SWORN TO before me this 23rd day of October, 2003.

Julie M. Moser
Notary Public for Idaho
Residing: Boise, ID
My Commission Expires: 9/16/08

JULIE M. MOSER NOTARY PUBLIC STATE OF IDAHO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-07201, AND 36-07218 IN WATER DISTRICT NO. 130.	**NOTICE OF HEARING ON MOTION TO LIMIT AND DELAY REQUEST FOR IDWR STAFF MEMORANDUM**

On October 17, 2003, the Hearing Officer issued a Notice of Intent to Request Staff Memorandum ("Notice"). In that Notice, the Hearing Officer advised the parties of her intent to invite the Idaho Department of Water Resources ("IDWR") to present staff memoranda, data compilations, or other technical information evaluating the above captioned matter, including, without limitation,

1. An analysis by IDWR staff of whether the petition at issue should be granted and, if so, any conditions that should be placed on that approval;

2 A listing of any IDWR memoranda or documents applicable to the above-captioned matter.

The Hearing Officer also invited the parties to submit, for consideration, additional issues to be addressed in the request for memoranda.

On October 24, 2003, Clear Lakes Trout Company, Inc., ("Clear Lakes") filed a

Motion to Limit and Delay Request for IDWR Staff Memorandum in which Clear Lakes argued that the IDWR Rules of Procedure do not contemplate a request for IDWR analysis of whether the petition at issue should be granted. Clear Lakes also requested that the Hearing Officer delay making any request to IDWR until a later date and requested a hearing on its motion.

On October 29, 2003, Clear Springs Foods, Inc., ("Clear Springs") filed a Response to Hearing Officer's Request for Issues in Staff Memorandum in which Clear Springs submitted, for consideration, issues to be addressed in any future request for staff memoranda or documents.

A briefing schedule and hearing date for pre-trial motions has been scheduled for January 7, 2004. See *Scheduling Order* dated October 17, 2003. At the January 7, 2004, hearing, the Hearing Officer will hear argument on the issues raised in the parties' responses to the Notice of Intent to Request Staff Memorandum.

Dated this 17th day of November 2003.

Harriet A. Hensley

HARRIET A. HENSLEY
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November 2003, I caused to be served a true and correct copy of the foregoing **NOTICE OF HEARING ON MOTION TO LIMIT AND DELAY REQUEST FOR IDWR STAFF MEMORANDUM**, by the U.S. Mail, postage prepaid to the addresses listed below:

LARRY COPE
CLEAR SPRINGS FOODS, INC.
P.O. BOX 712
BUHL, ID 83316

CINDY YENTER, WATERMASTER
WATER DISTRICT NO. 130
c/o DEPT OF WATER RESOURCES
1341 FILLMORE ST., SUITE 200
TWIN FALLS, ID 83301-3380

JOHN K. SIMPSON
BARKER ROSHOLT AND SIMPSON
P.O. BOX 2139
BOISE, ID 83701-2139

HARRIET A. HENSLEY
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010

DANIEL V. STEENSON
CHARLES L. HONSINGER
S. BRYCE FARRIS
P.O. BOX 2773
BOISE, ID 83701-2773

Victoria Wigle
Administrative Assistant to the Director

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
205 North 10th St., Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

RECEIVED
OCT 29 2003
Department of Water Resources

Attorneys for Respondent Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S RESPONSE TO HEARING OFFICER'S REQUEST FOR ISSUES IN STAFF MEMORANDUM

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby submits the following issues to be addressed in the Hearing Officer's request for memoranda as set forth in the *Notice of Intent to Request Staff Memorandum*.

Clear Springs requests the Hearing Officer to request the following:

1. IDWR staff memoranda or documents regarding general administration of water rights, including specific administration between Clear Springs and Clear Lakes.

2. IDWR staff memoranda or documents regarding IDWR's expertise and experience in implementing watermaster instructions, including the June 13, 2002 Amended Watermaster Instructions for Clear Springs' and Clear Lakes' water rights.

3. Any 2003 correspondence between IDWR and the parties (Clear Springs and Clear Lakes), including correspondence to and from counsel, regarding administration of the parties' water rights.

Clear Springs, consistent with its position stated at the pre-hearing conference on October 8, 2003, continues to support the Hearing Officer's notice of intent to request information from IDWR. IDWR, the agency with the expertise to administer water rights in the State of Idaho, including the expertise to develop and implement instructions to administer water rights, should be afforded the opportunity to present all pertinent information for the Hearing Officer's consideration. In addition to the above requests, Clear Springs reserves the right to respond to Clear Lakes' *Motion to Limit and Delay Request for IDWR Staff Memorandum* filed on October 24, 2003.

DATED this 29th day of October, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29th, 2003, I served a true and correct copy of the foregoing *RESPONDENT CLEAR SPRINGS FOODS, INC.'S RESPONSE TO HEARING OFFICER'S REQUEST FOR ISSUES IN STAFF MEMORANDUM* upon the following by facsimile:

Contested Case File
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706-2237
Fax: (208) 327-7866

Harriet Hensley (Hearing Officer)
State of Idaho Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010
Fax: (208) 334-2690

Daniel V. Steenson, Esq.
Charles L. Honsinger, Esq.
S. Bryce Farris, Esq.
RINGERT CLARK CHARTERED
455 S. 3rd St.
P.O. Box 2773
Boise, Idaho 83701-2773
Fax: (208) 342-4657

Cindy Yenter
Watermaster, Water District No. 130
c/o Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380
Fax: (208) 736-3037

Travis L. Thompson

Barker, Rosholt & Simpson L.L.P.

ATTORNEYS AT LAW

JOHN A. ROSHOLT
ALBERT P. BARKER
JOHN K. SIMPSON
AMY D. CHESTNUT
TRAVIS L. THOMPSON

Twin Falls Office
233 SECOND STREET NORTH
SUITE D
TWIN FALLS, ID 83301-6119
TELEPHONE (208) 733-0700
FAX (208) 735-2444
jar@idahowaters.com

Boise Office
205 North 10th Street Suite 520
P.O. BOX 2139
BOISE, IDAHO 83701-2139
TELEPHONE (208) 336-0700
FAX (208) 344-6034

RECEIVED
OCT 29 2003
Department of Water Resources

MULTIPLE FACSIMILE

FROM: Travis Thompson

DATE: October 29, 2003

FILE/CLIENT: Clear Springs Foods, Inc.

OF PGS INCLUDING COVER SHEET: 4

- ☑ Original will not be sent.
- ☐ Original will be sent by first class mail.
- ☐ Original will be sent by Federal Express.

TO: IDWR FAX#: 208/327-7866

TO: Harriett Hensley (Hearing Officer) FAX#: 208/334-2690

TO: Daniel Steenson & Charles Honsinger FAX#: 208/342-4657

TO: Cindy Yenter, Watermaster Water District 130 FAX#: 736-3037

TO: _____ FAX#: _____

TO: _____ FAX#: _____

COMMENTS: _____

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RECEIVED
OCT 27 2003
Department of Water Resources

RINGERT CLARK
CHARTERED LAWYERS

Laura E. Burri
Jeffrey R. Christenson
David P. Claiborne
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
Daniel V. Steenson
Allyn L. Sweeney

William F. Ringert, of Counsel
Sandy D. Kaufman (1921-1986)

TO: **IDAHO DEPARTMENT OF WATER RESOURCES**

FROM: **CHARLES L. HONSINGER** **DATE:** **10/24/03**

RE: **IN THE MATTER OF PROPOSED AMENDMENTS TO AMENDED WATERMASTER'S INSTRUCTIONS FOR DISTRIBUTION OF WATER AMOUNG WATER RIGHT NOS. 36-02569, 36-02708, 36-07004, 36-07201 AND 36-07218 IN WATER DISTRICT NO. 130**

---

1. **ORIGINAL and 1 COPY of Motion to Limit and Delay Request for IDWR Staff Memorandum**

__	FOR YOUR INFORMATION	√	FILE ORIGINAL & CONFORM COPY
__	FOR YOUR FILE	__	PLEASE REPLY FOR MY SIGNATURE
__	PLEASE FILE	__	PLEASE ANSWER AND SEND COPY OF LETTER TO ME
__	IN ACCORDANCE WITH YOUR REQUEST	__	PLEASE RECORD AND RETURN
__	PLEASE COMMENT	__	RUSH
__	PLEASE SIGN AND RETURN	__	AS PER OUR PHONE CONVERSATION
__	PLEASE TELEPHONE/SEE ME	__	PLEASE REVIEW AND **CALL** TO DISCUSS

REMARKS: Please file the above-referenced document, conform the enclosed copy and return it in the enclosed pre-paid envelope. Thank you, Kimi White.

RECEIVED
OCT 27 2003
Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	MOTION TO LIMIT AND DELAY REQUEST FOR IDWR STAFF MEMORANDUM

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Petitioner") by and through its attorneys, Ringert Clark, Chartered, and hereby moves the Hearing Officer to limit any request for a staff memorandum from the Idaho Department of Water Resources to "generally recognized technical or scientific facts within the agency's specialized knowledge," and to delay such request until it becomes necessary. This Motion is made in conformance with and pursuant to IDAPA 37.01.01.260 - IDWR's Rules of Procedure. The grounds for this Motion are that the Hearing Officer's October 17, 2003 *Notice of Intent to Request Staff Memorandum* (hereinafter "*Notice*") provides notice that the hearing officer will invite IDWR to provide data, information, and documents not contemplated by IDWR's Rules of Procedure. Petitioner requests that a hearing be scheduled on this motion.

ARGUMENT

The Hearing Officer notified the parties that she intends "to invite IDWR to present staff memoranda, data compilations, or other technical information evaluating" this matter. *Notice*, p. 1. According to the Hearing Officer, this could include, without limitation:

1. An analysis by IDWR staff of whether the petition at issue should be granted and, if so, any conditions that should be placed on that approval;
2. A listing of any IDWR memoranda or documents applicable to the above-captioned matter.

Id. Additionally, the hearing officer invited the parties to submit other issues to be addressed in her request to IDWR for a staff memorandum. *Id*, pp. 1 - 2.

The information the Hearing Officer contemplates requesting that IDWR provide in a Staff Memorandum is not the type of information that can be noticed by the Hearing Officer under IDWR's Rules of Procedure, and should not be requested. Moreover, any request by any party that IDWR provide additional information on other issues should be ignored unless such information is within that contemplated by the Rules. Finally, any request for information should be delayed until it becomes apparent that such information is necessary to assist in the Hearing Officer's and the parties' understanding of a specific issue herein.

IDWR's Rules of Procedure provide that official notice may be taken of "generally recognized technical or scientific facts within the agency's specialized knowledge." IDAPA 37.01.01.602. (Emphasis added). Examples of they types of "facts" within IDWR's specialized knowledge that could be supplied to the Hearing Officer under the Rules would be diversion rate information, anticipated water flows, or diversion structure information. An "analysis by IDWR staff of whether

the petition at issue should be granted and, if so, any conditions that should be placed on that approval" are clearly not facts within IDWR's specialized knowledge, but would instead be an opportunity and invitation for the agency to make argument about the issues in this matter. A "listing of any IDWR memoranda or documents applicable" to this matter will likely result in documents which do not contain facts within the agency's specialized knowledge, and do contain IDWR analyses, legal argument, and other information which should not be submitted under IDAPA 37.01.01.602.

Instead of making a request to IDWR for information at this time, the Hearing Officer should allow this matter to proceed, and allow the issues herein to become better defined. Later, at an appropriate time, if it is necessary to assist the Hearing Officer or the parties in understanding a specific issue, the Hearing Officer can then make a request to IDWR to supply only "generally recognized technical or scientific facts within the agency's specialized knowledge." Accordingly, Petitioner respectfully requests that the Hearing Officer delay making any request to IDWR for information until such information becomes necessary, and in any such request, specify that the information that is submitted must be limited to "generally recognized technical or scientific facts within the agency's specialized knowledge

Petitioner requests that the Hearing Officer schedule a hearing as soon as possible on its motion.

Dated this 24th day of October, 2003.

RINGERT CLARK, CHARTERED

By: _____
Charles L. Honsinger
Ringert Clark Chartered
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2003, I caused to be served a true and correct copy of the foregoing document by U.S. Mail, postage prepaid to the following individuals at the following addresses:

John K. Simpson
Barker Rosholt and Simpson
P.O. Box 2139
Boise, ID 83701-2139

Harriet A. Hensley
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010

_____
Charles L. Honsinger

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-07201, AND 36-07218 IN WATER DISTRICT NO. 130.	**NOTICE OF INTENT TO REQUEST STAFF MEMORANDUM**

WHEREAS IDAPA 37.01.01.600 allows the Idaho Department of Water Resources' ("IDWR") "experience, technical competence and specialized knowledge" to be used in the evaluation of evidence; and

WHEREAS IDAPA 37.01.01.602 allows a hearing officer to notice technical or scientific facts within IDWR's specialized knowledge, including agency staff memoranda and data;

THEREFORE, the hearing officer intends to invite IDWR to present staff memoranda, data compilations, or other technical information evaluating the above-captioned matter, which could include, without limitation:

1. An analysis by IDWR staff of whether the petition at issue should be granted and, if so, any conditions that should be placed on that approval;

2. A listing of any IDWR memoranda or documents applicable to the above-captioned matter.

The parties are invited to submit to the hearing officer, for consideration, additional

issues to be addressed in the request for memoranda. Parties wishing to do so shall submit requests for the hearing officer's consideration on or before October 29, 2003. Requests shall be filed with the Department of Water Resources with copies served on the hearing officer and the parties.

Dated this 17th day of October 2003.

Harriet A. Hensley

HARRIET A. HENSLEY
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2003, I caused to be served a true and correct copy of the foregoing **NOTICE OF INTENT TO REQUEST STAFF MEMORANDUM**, by the U.S. Mail, postage prepaid to the addresses listed below:

LARRY COPE
CLEAR SPRINGS FOODS, INC.
P.O. BOX 712
BUHL, ID 83316

CINDY YENTER, WATERMASTER
WATER DISTRICT NO. 130
c/o DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST., SUITE 200
TWIN FALLS, ID 83301-3380

JOHN K. SIMPSON
BARKER ROSHOLT AND SIMPSON
P.O. BOX 2139
BOISE, ID 83701-2139

HARRIET A. HENSLEY
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010

DANIEL V. STEENSON
CHARLES L. HONSINGER
S. BRYCE FARRIS
P.O. BOX 2773
BOISE, ID 83701-2773

Victoria Wigle
Administrative Assistant to the Director

Legal Files/IDWR-Clear Lakes/Notice of Intent to Request Staff Memorandum

ROSTER OF ATTENDANCE

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130.

October 8, 2003
PREHEARING CONFERENCE
Beginning at 1:30 p.m.
Conducted by Harriet Hensley, HEARING OFFICER

NAME	ADDRESS	REPRESENTING
Charlie Honsinger	P.O. 2773, Boise, ID 83701	Clear Lakes Trout Co.
John Simpson	205 N. 10th St. Ste 520 Boise	Clear Springs Foods

RECEIVED
SEP 25 2003
Department of Water Resources

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
205 North 10th St., Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Respondent Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S ANSWER TO CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this *Answer* to CLEAR LAKES TROUT COMPANY, INC.'S ("Clear Lakes") *Petition to Initiate Contested Case*. In accordance with the Director's *Notice of Petition to Initiate Contested Case and Order Appointing Hearing Officer*, and the Department's Rules of Procedure, IDAPA 37.01.01 et seq., this *Answer* is timely filed within 21 days of service of the *Notice* upon Respondent's counsel by United States mail.

Clear Springs denies each and every allegation contained in the *Petition* not herein specifically admitted and answers as follows:

MAIL -63201

1. In response to paragraph 1 of the *Petition* (Relief Requested), Clear Springs objects to and therefore denies that any "modifications" have either been made to, or "proposed" by the Watermaster to, the *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* ("2002 Watermaster Instructions"). Clear Springs alternatively objects to and therefore denies any basis exists for "review and rescission" of the alleged "modifications" to the final June 13, 2002 Watermaster Instructions.

2. In response to paragraph 1 of the *Petition* (Facts), Clear Springs submits that the water right partial decrees for water right nos. 36-02659, 36-07004, and 36-02708 speak for themselves.

3. In responding to paragraph 2 of the *Petition* (Facts), Clear Springs admits the Director issued the final 2002 Watermaster Instructions on June 13, 2002. Clear Springs also admits that those instructions contain the paragraphs referenced by Clear Lakes.

4. In response to paragraph 3 of the *Petition* (Facts), Clear Springs submits the June 19, 2002 *Notice* and the actions taken by the Watermaster on July 5, 2002 speak for themselves.

5. In response to paragraph 4 of the *Petition* (Facts), Clear Springs admits the Watermaster issued a June 20, 2003 Notice of Intent to Resume Administration of Clear Lakes Area Water Rights and submits that notice also speaks for itself.

6. In response to paragraph 4 of the *Petition* (Facts), Clear Springs denies the allegations made by Clear Lakes.

7. In response to paragraph 5 of the *Petition* (Facts), Clear Springs submits that Watermaster Cindy Yenter's July 31, 2003 Memorandum to Tim Luke speaks for itself.

8. In response to paragraph 6 of the *Petition* (Facts), Clear Springs denies the allegations made by Clear Lakes.

9. In response to paragraph 7 of the *Petition* (Facts), Clear Springs does not possess specific knowledge or information to form a belief as to the truth of the allegations made by Clear Lakes with respect to Clear Lakes' counsel's August 1, 2003 letter to the Director. Clear Springs submits that the Director's August 4, 2003 letter in reply speaks for itself.

10. In response to paragraphs 1-2 of the *Petition* (Basis for Petition), Clear Springs denies the allegations made by Clear Lakes.

11. Additional facts and law necessary for the determination of this contested case may be developed during the course of this proceeding. Clear Springs reserves the right to present any additional facts, law, and defenses and to amend this *Answer* as necessary during the course of this contested case.

FIRST DEFENSE

Clear Lakes has failed to state a claim for which relief can be granted pursuant to I.R.C.P. 12(b)(6). Clear Lakes filed a similar *Petition to Initiate a Contested Case* on July 2, 2003. In denying that *Petition*, the Director noted that Clear Lakes did not "allege any factual or legal issues that have not previously been raised in prior proceedings." *July 3, 2003 Order.* Clear Lakes' present *Petition* should similarly be denied since IDWR has not taken any "new or different actions" that have not been previously raised or decided either through adoption of the final June 13, 2002 watermaster instructions, or by final order of the Director.

SECOND DEFENSE

Clear Lakes' *Petition* must be dismissed due to another action pending between Clear Lakes and Clear Springs based upon the same operative facts pursuant to I.R.C.P. 12(b)(8).

Clear Lakes previously challenged the final June 13, 2002 Watermaster Instructions through a contested case proceeding. Clear Lakes' *Petition* was denied by final order of the Director. *See June 13, 2003 Order*. The Director's *Order* in that matter is currently the subject of a petition for judicial review filed by Clear Lakes in the District Court of the State of Idaho for the Fourth Judicial District.

THIRD DEFENSE

Clear Springs reserves the right to amend its *Answer* and to assert further defenses following additional discovery.

PRAYER FOR RELIEF

Clear Springs requests that the Hearing Officer provide the following relief:

1. That Clear Lakes' *Petition to Initiate Contested Case* be dismissed with prejudice;

2. That the relief requested by Clear Lakes be denied; and

3. That such other relief is provided as is determined to be appropriate, just and equitable under the circumstances.

DATED this 22ND day of September, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2003, I served a true and correct copy of the foregoing *RESPONDENT CLEAR SPRINGS FOODS, INC.'S ANSWER TO CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE* upon the following by the method indicated:

Original (by hand delivery):

Harriet Hensley (Hearing Officer)
State of Idaho Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

Copies by facsimile and United States Mail, postage prepaid:

Daniel V. Steenson, Esq.
Charles L. Honsinger, Esq.
S. Bryce Farris, Esq.
RINGERT CLARK CHARTERED
455 S. 3rd St.
P.O. Box 2773
Boise, Idaho 83701-2773
Fax: (208) 342-4657

Cindy Yenter
Watermaster, Water District No. 130
c/o Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380
Fax: (208) 736-3037

John K. Simpson

John A. Rosholt
Albert P. Barker
John K. Simpson
Amy D. Chestnut
Travis L. Thompson

BARKER ROSHOLT & SIMPSON LLP

205 North 10th Street, Suite 520
Post Office Box 2139
Boise, ID 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

233 Second Street North, Suite D
Twin Falls, ID 83301
(208) 733-0700 telephone
(208) 735-2444 facsimile

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Department of Water Resources

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Southern Region

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FROM: John Simpson

DATE: 9/22/03

FILE/CLIENT: _____

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- ☒ Original will not be sent.
- ☐ Original will be sent by first class mail.
- ☐ Original will be sent by Federal Express.

TO: Dan Steenson FAX#: 342-4657

TO: Cindy Yenter FAX#: 736-3037

TO: _____ FAX#: _____

TO: _____ FAX#: _____

TO: _____ FAX#: _____

TO: _____ FAX#: _____

COMMENTS: _____

CONFIDENTIALITY NOTICE - THE INFORMATION CONTAINED IN THIS FACSIMILE COMMUNICATION IS ATTORNEY/CLIENT PRIVILEGED AND/OR CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS COVER PAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION OR THE INFORMATION CONTAINED HEREIN IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY CALL (208) 336-0700, AND RETURN THIS FACSIMILE TO US AT THE ABOVE ADDRESS. WE APPRECIATE YOUR COOPERATION.

ROUTING SLIP

Distribution	Provided for your:	
Date: 9.24-03	Information	
To: Debbie Gibson	Comments	
From: Cindy Venter	Approval	
	Signature	
Special Notes: Per your request!		

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
205 North 10th St., Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Respondent Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.'S ANSWER TO CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE

COMES NOW, Respondent, CLEAR SPRINGS FOODS, INC. ("Clear Springs") by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this *Answer* to CLEAR LAKES TROUT COMPANY, INC.'S ("Clear Lakes") *Petition to Initiate Contested Case*. In accordance with the Director's *Notice of Petition to Initiate Contested Case and Order Appointing Hearing Officer*, and the Department's Rules of Procedure, IDAPA 37.01.01 et seq., this *Answer* is timely filed within 21 days of service of the *Notice* upon Respondent's counsel by United States mail.

Clear Springs denies each and every allegation contained in the *Petition* not herein specifically admitted and answers as follows:

1. In response to paragraph 1 of the *Petition* (Relief Requested), Clear Springs objects to and therefore denies that any "modifications" have either been made to, or "proposed" by the Watermaster to, the *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* ("2002 Watermaster Instructions"). Clear Springs alternatively objects to and therefore denies any basis exists for "review and rescission" of the alleged "modifications" to the final June 13, 2002 Watermaster Instructions.

2. In response to paragraph 1 of the *Petition* (Facts), Clear Springs submits that the water right partial decrees for water right nos. 36-02659, 36-07004, and 36-02708 speak for themselves.

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8. In response to paragraph 6 of the *Petition* (Facts), Clear Springs denies the allegations made by Clear Lakes.

9. In response to paragraph 7 of the *Petition* (Facts), Clear Springs does not possess specific knowledge or information to form a belief as to the truth of the allegations made by Clear Lakes with respect to Clear Lakes' counsel's August 1, 2003 letter to the Director. Clear Springs submits that the Director's August 4, 2003 letter in reply speaks for itself.

10. In response to paragraphs 1-2 of the *Petition* (Basis for Petition), Clear Springs denies the allegations made by Clear Lakes.

11. Additional facts and law necessary for the determination of this contested case may be developed during the course of this proceeding. Clear Springs reserves the right to present any additional facts, law, and defenses and to amend this *Answer* as necessary during the course of this contested case.

FIRST DEFENSE

Clear Lakes has failed to state a claim for which relief can be granted pursuant to I.R.C.P. 12(b)(6). Clear Lakes filed a similar *Petition to Initiate a Contested Case* on July 2, 2003. In denying that *Petition*, the Director noted that Clear Lakes did not "allege any factual or legal issues that have not previously been raised in prior proceedings." *July 3, 2003 Order*. Clear Lakes' present *Petition* should similarly be denied since IDWR has not taken any "new or different actions" that have not been previously raised or decided either through adoption of the final June 13, 2002 watermaster instructions, or by final order of the Director.

SECOND DEFENSE

Clear Lakes' *Petition* must be dismissed due to another action pending between Clear Lakes and Clear Springs based upon the same operative facts pursuant to I.R.C.P. 12(b)(8).

Clear Lakes previously challenged the final June 13, 2002 Watermaster Instructions through a contested case proceeding. Clear Lakes' *Petition* was denied by final order of the Director. *See June 13, 2003 Order*. The Director's *Order* in that matter is currently the subject of a petition for judicial review filed by Clear Lakes in the District Court of the State of Idaho for the Fourth Judicial District.

THIRD DEFENSE

Clear Springs reserves the right to amend its *Answer* and to assert further defenses following additional discovery.

PRAYER FOR RELIEF

Clear Springs requests that the Hearing Officer provide the following relief:

1. That Clear Lakes' *Petition to Initiate Contested Case* be dismissed with prejudice;

2. That the relief requested by Clear Lakes be denied; and

3. That such other relief is provided as is determined to be appropriate, just and equitable under the circumstances.

DATED this 22ND day of September, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2003, I served a true and correct copy of the foregoing *RESPONDENT CLEAR SPRINGS FOODS, INC.'S ANSWER TO CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE* upon the following by the method indicated:

Original (by hand delivery):

Harriet Hensley (Hearing Officer)
State of Idaho Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

Copies by facsimile and United States Mail, postage prepaid:

Daniel V. Steenson, Esq.
Charles L. Honsinger, Esq.
S. Bryce Farris, Esq.
RINGERT CLARK CHARTERED
455 S. 3rd St.
P.O. Box 2773
Boise, Idaho 83701-2773
Fax: (208) 342-4657

Cindy Yenter
Watermaster, Water District No. 130
c/o Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380
Fax: (208) 736-3037

John K. Simpson

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-07201, AND 36-07218 IN WATER DISTRICT NO. 130.	**NOTICE OF PREHEARING CONFERENCE**

PLEASE TAKE NOTICE, that an informal prehearing conference is set in this matter for October 8, 2003, starting at 1:30 p.m. in conference rooms A&B at the offices of the Idaho Department of Water Resources, located at 1301 N. Orchard St., Boise, Idaho.

The prehearing conference will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the department. IDAPA 37.01.01. A copy of the rules may be obtained from the department upon request.

The prehearing conference will be conducted in accordance with the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in

order to attend, participate in or understand the hearing, please advise the department within twenty-four hours prior to the hearing. Inquires about scheduling, hearing facilities, etc., should be directed to Deborah Gibson, Administrative Assistant, Idaho Department of Water Resources, 1301 N. Orchard St., Boise, Idaho 83706-2237, telephone: (208) 327-7953, fax: (208) 327-7866.

Originals of all documents intended to be part of an official record for decision in this proceeding must be filed with the Department of Water Resources, and copies of the same served upon the Hearing Officer.

Dated this 17th day of September 2003.

Harriet A. Hensley

HARRIET A. HENSLEY
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September 2003, I caused to be served a true and correct copy of the foregoing NOTICE OF PREHEARING CONFERENCE, by the U.S. Mail, postage prepaid to the addresses listed below:

LARRY COPE
CLEAR SPRINGS FOODS, INC.
P.O. BOX 712
BUHL, ID 83316

CINDY YENTER, WATERMASTER
WATER DISTRICT NO. 130
c/o DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST., SUITE 200
TWIN FALLS, ID 83301-3380

JOHN K. SIMPSON
BARKER ROSHOLT AND SIMPSON
P.O. BOX 2139
BOISE, ID 83701-2139

HARRIET A. HENSLEY
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010

DANIEL V. STEENSON
CHARLES L. HONSINGER
S. BRYCE FARRIS
P.O. BOX 2773
BOISE, ID 83701-2773

Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Legal Files/IDWR-Clear Lakes/Notice of Prehearing Conference

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PROPOSED AMENDMENTS TO JUNE 13, 2002 AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218 IN WATER DISTRICT NO. 130.	**NOTICE OF PETITION TO INITIATE CONTESTED CASE AND ORDER APPOINTING HEARING OFFICER**

NOTICE IS HEREBY PROVIDED by the Director of the Idaho Department of Water Resources ("Director" or "Department") pursuant to the provisions of Idaho Code § 42-1701A(3) that on August 15, 2003, Clear Lakes Trout Company, Inc. ("Clear Lakes") filed with the Department a *Petition To Initiate Contested Case* as captioned above. A copy of the petition is appended hereto as Attachment A.

The petition seeks review of the additional actions taken by Watermaster Cindy Yenter pursuant to IDWR's June 13, 2002 Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-2659, 36-02708, 36-07004, 36-7201, and 36-07218 as described in Ms. Yenter's July 31, 2003 Memorandum to Tim Luke. As a basis for the relief sought, the petition states:

> 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.

Idaho Code § 42-1701A(3) provides that upon the filing of a petition by a person entitled to a hearing under the provisions of the statute, the Director "shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding." Clear Springs Foods, Inc., the only other person or entity likely to be affected by a hearing on the petition, shall be served with a copy of this notice. In accordance with Rule 270 of the Department's Rules of Procedure, any answer to the petition shall be filed within twenty-one (21) days after service of this notice. All pleadings in this proceeding must be filed with the Department and show service upon the Hearing Officer and all parties to the proceeding.

A hearing before the Department in this matter shall be held or provided for in accordance with the provisions of subsections (1) and (2) of Idaho Code § 42-1701A(3). A person aggrieved by a final decision or order of the Director in this matter shall be entitled to judicial review.

ORDER APPOINTING HEARING OFFICER

IT IS HEREBY ORDERED that **Harriet A. Hensley, Deputy Attorney General, P.O. Box 83720, Boise, Idaho 83720-0010**, is appointed to serve as hearing officer, and is authorized to hear the above captioned matter and to issue a recommended order on behalf of the Department pursuant to IDAPA Rules 37.01.01.410 through 413 and the provisions of chapter 52, title 67, Idaho Code. Copies of all pleadings filed with the Department in this matter shall be served upon the Hearing Officer.

Dated this 28th day of August, 2003.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 29th day of August, 2003, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

Larry Cope
Clear Springs Foods, Inc.
P. O. Box 712
Buhl, ID 83316

John K. Simpson
Barker Rosholt & Simpson LLP
P. O. Box 2139
Boise, ID 83701-2139

Daniel V. Steenson
Charles L. Honsinger
S. Bryce Farris
455 S. Third
P.O. Box 2773
Boise, ID 83701-2773

Cindy Yenter
Watermaster, Water District No. 130
c/o Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, ID 83301-3380

Harriet A. Hensley
Deputy Attorney General
700 W. Jefferson St., Room 210
P.O. Box 83720
Boise, ID 83720-0010

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Petitioner

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AUG 15 2003
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 INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHT NOS. 36-02659, 36-02708, 36-7004,36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	PETITION TO INITIATE CONTESTED CASE

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;

ATTACHMENT A

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 (± 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 masuring 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 (± 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 identitifes 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
Ringert Clark Chartered
Attorneys for Petitioner

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
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Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Petitioner

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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 INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG RIGHT NOS. 36-02659, 36-02708, 36-7004,36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	PETITION TO INITIATE CONTESTED CASE

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 (± 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.

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    (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).

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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 masuring 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 (± 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."

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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 identitifes 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
Ringert Clark Chartered
Attorneys for Petitioner

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Boise, Id. 83701-2773

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Street, Apt. No., or PO Box No.: P.O. Box 2139

City, State, ZIP+4: Boise Id. 83701-2139

PS Form 3800, May 2000 — See Reverse for instructions

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- For an additional fee, delivery may be restricted to the addressee or addressee's authorized agent. Advise the clerk or mark the mailpiece with the endorsement: "*Restricted Delivery*".
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1. Article Addressed to:

DANIEL V STEENSON
JAMES G REID
CHARLES HONSINGER
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

36-2659

2. Article Number *(Copy from service label)*
7000 1670 0011 3313 9086

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print [redacted])* Genice Watts

B. Date of Delivery 5-20

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X [signature] ☐ Agent ☐ Addressee

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If YES, enter delivery address below: ☐ No

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
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Facsimile: (208) 342-4657
Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTERS OF 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	PETITION TO INITIATE CONTESTED CASE/REQUEST FOR EXPEDITED HEARING

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., ("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.

RELIEF REQUESTED

By this petition, Clear Lakes seeks:

(1) a determination that the watermaster's July 5th, 2002 curtailment of Clear Lakes' diversion of water violates IDWR's duty to administer water rights in Water District 130 in accordance with the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement");

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(2) rescission or modification of 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;

(3) an order directing the watermaster to return Clear Lakes' headgate to its setting prior to the watermaster's curtailment of Clear Lakes' diversion of water on July 5th, 2002.

HEARINGS AND SCHEDULING

Clear Lakes requests that the Director:

(1) appoint a hearing officer who is not an IDWR employee, as provided in paragraph 4 the *Stipulation for Dismissal*, attached hereto as Exhibit A, within 14 days after the date this Petition is filed.

(2) instruct the hearing officer to schedule a hearing within 45 days after the date this Petition is filed to hear Clear Lakes' request for a determination that the watermaster's July 5th, 2002 curtailment of Clear Lakes' diversion of water violates IDWR's duty to administer water rights in Water District 130 in accordance with the Interim Stipulated Agreement;

(3) instruct the hearing officer to convene a prehearing conference to: schedule a hearing on Clear Lake's request for modification or rescission of 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; to formulate issues, and for other purposes provided in IDAPA 37.01.01.510.

An expedited hearing on Clear Lakes' request pertaining to the Interim Stipulated Agreement is necessary and appropriate because the Agreement terminates in October, 2003, the issue is not complex, and it can be decided independently of the other issues pertaining to the Director's

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Watermaster Instructions and the curtailment of Clear Lakes' water rights pursuant to those instructions.

FACTUAL SUMMARY

Clear Lakes diverts water from springs commonly known as "Clear Lakes Springs" pursuant to water right nos. 36-02659 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 operate its hatchery, located adjacent to Clear Lakes' hatchery.

By January, 2002, Clear Lakes, Foods, other spring water users, the North Snake Ground Water District, and the Magic Valley Ground Water District had signed the Interim Stipulated Agreement which led to the formation of Water District 130. The term of the Interim Stipulated agreement is two years. The Agreement contains the following "Safe Harbor" provision:

> Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

In March of 2002, Foods informally asked the Director how the Department intended to administer Clear Lakes' and Foods' water rights. In response, the Director developed instructions to the watermaster, which he issued on June 5, 2002. The instructions provide that, if Foods makes a call for distribution of water, the Watermaster is to reduce Clear Lakes' diversion of its first priority water right through a diversion structure known as the "western diversion pool" to increase Clear Springs' diversion of its second priority water right through that same diversion structure. The

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Director asserts that reducing Clear Lakes' diversion of its senior right through the western diversion pool has the effect of decreasing Clear Lakes' diversion of its third priority right through a separate diversion structure known as the "eastern diversion pool."

While Clear Lakes was discussing the instructions with the Director on June 7, 2002, Foods submitted a written call for distribution of water to water right no. 36-02708. On June 13, 2002, the Director issued Amended Watermaster Instructions consistent with the instructions he issued a week earlier. Neither the initial nor the amended instructions identified any opportunity for administrative review.

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 June 20, 2002, Clear Lakes filed an action in the Gooding County District Court to enjoin the proposed curtailment of Clear Lakes' water rights. The court denied Clear Lakes' motion for a preliminary injunction. On July 5th, 2002, Watermaster Cindy Yenter adjusted the headgate for Clear Lakes' senior water right no. 36-02659 pursuant to the Director's instructions.

On December 9, 2002, Clear Lakes and IDWR filed a stipulation dismissing the Gooding County District Court action. In the stipulation, IDWR committed to provide an administrative hearing or hearings on all issues related to the June 13, 2002 Amended Watermaster Instructions and the June 19, 2002 Notice of Intent to Redistribute Flows. On December 12, 2002, the Gooding County District Court entered its order dismissing the lawsuit pursuant to the terms of the stipulation

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between Clear Lakes and IDWR.

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 37.01.01.102, which provides parties who participate in informal proceedings with an opportunity for formal proceedings before IDWR;

4. IDAPA 37.01.01.104, which provides that a formal proceeding must be initiated by a pleading listed in IDWR Rules 210-280;

5. IDAPA 37.01.01.230.01(c), which provides for petitions initiating contested cases;

6. IDAPA 37.01.01.230.01(a), which provides for petitions seeking to correct, modify, amend or stay existing orders or rules;

7. I.C. §5232, IDAPA 37.01.01.230.01(b), and IDAPA 37.01.01.400, which provide for petitions seeking a declaratory ruling on the applicability of any law, statute, rule or order administered by IDWR or a party's rights or obligations under such law;

8. the December 9, 2002 *Stipulation for Dismissal* entered into by and between Clear Lakes and IDWR in Gooding County District Court case no. CV-02-00377 (attached hereto as Exhibit A) which recognizes Clear Lakes' right to file this petition and in which IDWR committed to "provide for the holding of an administrative hearing or hearings to hear all issues within the jurisdiction of IDWR raised in the petition";

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9. the Interim Stipulated Agreement, IDWR's January 18, 2002 *Order Approving Stipulated Agreements*, ¶¶ 4, 7, and IDWR's *Final Order Creating Water District No. 130*, which provide for IDWR enforcement of the Interim Stipulated Agreement and the filing of a petition to IDWR in the event the Agreement is breached.

Dated this 16th day of December, 2002.

RINGERT CLARK, CHARTERED

By: _____
Daniel V. Steenson
Ringert Clark Chartered
Attorneys for Petitioner

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	)	**NOTICE OF CONTESTED CASE AND STATUS CONFERENCE**

NOTICE OF CONTESTED CASE

NOTICE IS HEREBY GIVEN that on December 17, 2002, Clear Lakes Trout Company, Inc. ("Clear Lakes"), by and through its attorneys, Ringert Clark, Chartered, filed with the Idaho Department of Water Resources ("IDWR") a Petition initiating a contested case for the purpose of seeking rescission or modification of the *Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218* ("Watermaster Instructions") issued by the Director of IDWR on June 13, 2002. The Watermaster Instructions govern the distribution of water from a spring source commonly known as "Clear Lakes Springs." Clear Lakes and Clear Springs Foods, Inc. ("Clear Springs") are the holders of water rights decreed from the spring source.

A copy of Clear Lakes' *Petition To Initiate Contested Case/Request for Expedited Hearing* is attached to this notice. Any person or entity desiring to participate as a party in this contested case proceeding shall file a response, either in support of or in opposition to the petition, on or before January 17, 2003, with the Director, Idaho Department of Water Resources, 1301 North Orchard St., Boise, Idaho 83706-2237.

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PROCEDURAL BACKGROUND

In response to the Watermaster Instructions, the Watermaster for Water District 130 issued a Notice of Intent to Redistribute Flows on June 19, 2002, to Clear Lakes and Clear Springs. Clear Lakes challenged the proposed redistribution of flows in a lawsuit brought before the Gooding County District Court on June 20, 2002. The District Court denied Clear Lakes' Motion for Preliminary Injunction on July 2, 2002. On July 5, 2002, the watermaster adjusted the flows in accordance with the Notice of Intent. The District Court dismissed Clear Lakes' lawsuit with prejudice on December 12, 2002, pursuant to a *Stipulation for Dismissal* between Clear Lakes and IDWR. *Clear Lakes Trout Co., Inc. v. IDWR*, No. CV-02-00377 (5th Jud. Dist., Gooding Co., *dismissed* Dec. 12, 2002).

In the *Stipulation for Dismissal,* IDWR acknowledged Clear Lakes' right under applicable statutes and rules to file a petition with IDWR initiating an administrative contested case for the purpose of seeking modification of the Watermaster Instructions and the actions taken by the watermaster in accordance with those instructions. In addition, IDWR committed to provide for the holding of a hearing or hearings before an independent hearing officer to hear all issues within the jurisdiction of IDWR raised in such petition.

Clear Lakes seeks in its petition the rescission or modification of the Watermaster Instructions based upon its reading of the "Safe Harbor" provision in Paragraph 2.8 of the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement"). The parties to the Interim Stipulated Agreement are North Snake Ground Water District, Magic Valley Ground Water District, North Side Canal Company, Pristine Springs, Clear Springs Foods, Inc., Buckeye Farms, Clear Lakes Trout Company, and Blue Lakes Trout Company.

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The Director of IDWR approved the Interim Stipulated Agreement in an interlocutory order issued on January 18, 2002. *Order Approving Stipulated Agreements*. That interlocutory order provides that it is not subject to review by reconsideration or appeal but may be reviewed by the Director pursuant to Rule 711 of the Department's Rules of Procedure, IDAPA 37.01.01711.

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN that prior to the appointment of an independent hearing officer in this matter, the Director will preside over a status conference at 10:00 a.m., Friday, January 10, 2003, in Conference Rooms A&B at the Department of Water Resources offices located at 1301 North Orchard St., Boise, Idaho.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the department, at telephone number (208) 327-7910, within (5) days prior to the conference.

DATED this 30th day of December 2002.

KARL J. DREHER
Director

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of December 2002, I caused a true and correct copy of the foregoing Notice of Hearing to be sent by U.S. Mail, postage paid to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
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1341 Fillmore Street, Suite 20
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Victoria Wigle
Administrative Assistant

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
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Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTERS OF 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	PETITION TO INITIATE CONTESTED CASE/REQUEST FOR EXPEDITED HEARING

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., ("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.

RELIEF REQUESTED

By this petition, Clear Lakes seeks:

(1) a determination that the watermaster's July 5th, 2002 curtailment of Clear Lakes' diversion of water violates IDWR's duty to administer water rights in Water District 130 in accordance with the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement");

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(2) rescission or modification of 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;

(3) an order directing the watermaster to return Clear Lakes' headgate to its setting prior to the watermaster's curtailment of Clear Lakes' diversion of water on July 5th, 2002.

HEARINGS AND SCHEDULING

Clear Lakes requests that the Director:

(1) appoint a hearing officer who is not an IDWR employee, as provided in paragraph 4 the *Stipulation for Dismissal*, attached hereto as Exhibit A, within 14 days after the date this Petition is filed.

(2) instruct the hearing officer to schedule a hearing within 45 days after the date this Petition is filed to hear Clear Lakes' request for a determination that the watermaster's July 5th, 2002 curtailment of Clear Lakes' diversion of water violates IDWR's duty to administer water rights in Water District 130 in accordance with the Interim Stipulated Agreement;

(3) instruct the hearing officer to convene a prehearing conference to: schedule a hearing on Clear Lake's request for modification or rescission of 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; to formulate issues, and for other purposes provided in IDAPA 37.01.01.510.

An expedited hearing on Clear Lakes' request pertaining to the Interim Stipulated Agreement is necessary and appropriate because the Agreement terminates in October, 2003, the issue is not complex, and it can be decided independently of the other issues pertaining to the Director's

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Watermaster Instructions and the curtailment of Clear Lakes' water rights pursuant to those instructions.

FACTUAL SUMMARY

Clear Lakes diverts water from springs commonly known as "Clear Lakes Springs" pursuant to water right nos. 36-02659 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 operate its hatchery, located adjacent to Clear Lakes' hatchery.

By January, 2002, Clear Lakes, Foods, other spring water users, the North Snake Ground Water District, and the Magic Valley Ground Water District had signed the Interim Stipulated Agreement which led to the formation of Water District 130. The term of the Interim Stipulated agreement is two years. The Agreement contains the following "Safe Harbor" provision:

> Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

In March of 2002, Foods informally asked the Director how the Department intended to administer Clear Lakes' and Foods' water rights. In response, the Director developed instructions to the watermaster, which he issued on June 5, 2002. The instructions provide that, if Foods makes a call for distribution of water, the Watermaster is to reduce Clear Lakes' diversion of its first priority water right through a diversion structure known as the "western diversion pool" to increase Clear Springs' diversion of its second priority water right through that same diversion structure. The

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Director asserts that reducing Clear Lakes' diversion of its senior right through the western diversion pool has the effect of decreasing Clear Lakes' diversion of its third priority right through a separate diversion structure known as the "eastern diversion pool."

While Clear Lakes was discussing the instructions with the Director on June 7, 2002, Foods submitted a written call for distribution of water to water right no. 36-02708. On June 13, 2002, the Director issued Amended Watermaster Instructions consistent with the instructions he issued a week earlier. Neither the initial nor the amended instructions identified any opportunity for administrative review.

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 June 20, 2002, Clear Lakes filed an action in the Gooding County District Court to enjoin the proposed curtailment of Clear Lakes' water rights. The court denied Clear Lakes' motion for a preliminary injunction. On July 5th, 2002, Watermaster Cindy Yenter adjusted the headgate for Clear Lakes' senior water right no. 36-02659 pursuant to the Director's instructions.

On December 9, 2002, Clear Lakes and IDWR filed a stipulation dismissing the Gooding County District Court action. In the stipulation, IDWR committed to provide an administrative hearing or hearings on all issues related to the June 13, 2002 Amended Watermaster Instructions and the June 19, 2002 Notice of Intent to Redistribute Flows. On December 12, 2002, the Gooding County District Court entered its order dismissing the lawsuit pursuant to the terms of the stipulation

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between Clear Lakes and IDWR.

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 37.01.01.102, which provides parties who participate in informal proceedings with an opportunity for formal proceedings before IDWR;

4. IDAPA 37.01.01.104, which provides that a formal proceeding must be initiated by a pleading listed in IDWR Rules 210-280;

5. IDAPA 37.01.01.230.01(c), which provides for petitions initiating contested cases;

6. IDAPA 37.01.01.230.01(a), which provides for petitions seeking to correct, modify, amend or stay existing orders or rules;

7. I.C. §5232, IDAPA 37.01.01.230.01(b), and IDAPA 37.01.01.400, which provide for petitions seeking a declaratory ruling on the applicability of any law, statute, rule or order administered by IDWR or a party's rights or obligations under such law;

8. the December 9, 2002 *Stipulation for Dismissal* entered into by and between Clear Lakes and IDWR in Gooding County District Court case no. CV-02-00377 (attached hereto as Exhibit A) which recognizes Clear Lakes' right to file this petition and in which IDWR committed to "provide for the holding of an administrative hearing or hearings to hear all issues within the jurisdiction of IDWR raised in the petition";

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9. the Interim Stipulated Agreement, IDWR's January 18, 2002 *Order Approving Stipulated Agreements*, ¶¶ 4, 7, and IDWR's *Final Order Creating Water District No. 130*, which provide for IDWR enforcement of the Interim Stipulated Agreement and the filing of a petition to IDWR in the event the Agreement is breached.

Dated this 16th day of December, 2002.

RINGERT CLARK, CHARTERED

By: _____
Daniel V. Steenson
Ringert Clark Chartered
Attorneys for Petitioner

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DEC 17 2003

DANIEL V. STEENSON (ISB #4332)
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130 Defendants, and CLEAR SPRINGS FOODS, INC., Intevener/Defendant.	Case No. CV-02-00377 STIPULATION FOR DISMISSAL

COME NOW the Plaintiff, CLEAR LAKES TROUT COMPANY ("Clear Lakes"), and the Defendants IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER and CINDY YENTER (jointly "IDWR"), and stipulate, pursuant to the provisions of I.R.C.P. 41(a)(1), that the Court may order the dismissal of the above-captioned action in accordance with the following stipulated terms:

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STIPULATION

The undersigned parties, through their respective counsel of record, hereby stipulate and agree as follows:

1. The parties enter into this Stipulation for Dismissal in order to avoid the need for further litigation before the Court in the above-captioned action.

2. Upon the Court's approval of this Stipulation for Dismissal, the Court may order the above-captioned action dismissed with prejudice, each of the parties hereto to bear its own costs and attorney fees.

3. IDWR acknowledges Clear Lakes' 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 Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218 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 implement 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.

5. The Director of IDWR commits to assign an independent hearing officer who is not an employee of the Idaho Department of Water Resources to preside over the administrative hearing on the petition referred to in paragraph 3 above.

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6. The parties shall only be bound by these stipulated terms if the Court enters an Order of Dismissal consistent with the terms of this Stipulation for Dismissal.

Based upon the foregoing, Clear Lakes and IDWR hereby respectfully request that the Court enter an Order of Dismissal consistent with the terms and conditions set forth in this Stipulation for Dismissal.

Dated this 9th day of December, 2002.

Daniel V. Steenson
Ringert Clark, Chartered
Attorneys for Plaintiff Clear Lakes Trout Company

Dated this 9th day of December, 2002.

Philip J. Rassier
Office of the Attorney General
Attorneys for Defendants Idaho Department of Water Resources, Karl Dreher and Cindy Yenter

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CERTIFICATE OF SERVICE

I certify that on December 9, 2002, I served copies of this document, including all attachments by facsimile and by U.S. Mail to the following:

Phil Rassier
Deputy Attorney General
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83706
Fax: (208)327-7866

Mr. John Simpson
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139
Fax: (208)344-6034

Person serving documents

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF REVISING THE BOUNDARIES OF WATER DISTRICT NO. 130, IN THE THOUSAND SPRINGS AREA	)))))	FINAL ORDER REVISING THE BOUNDARIES OF WATER DISTRICT NO. 130

The Director of the Idaho Department of Water Resources (Director) is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. The Director is also authorized by statute to revise the boundaries of any water district in order to properly administer uses of water. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

FINDINGS OF FACT

1. On February 19, 2002, the Director issued an Order Creating Water District No. 130, pursuant to the provisions of Idaho Code § 42-604. The boundaries of Water District No. 130 were limited to ground water rights and surface water rights in Administrative Basins 36 and 43 overlying the Eastern Snake Plain Aquifer (ESPA) in the Thousand Springs Area. The boundaries were limited to Administrative Basins 36 and 43 overlying the ESPA because water rights in those basins had either been included in a Director's Report or partially decreed by the Snake River Basin Adjudication (SRBA) District Court. In addition, holders of junior priority ground water rights in Basin 36 and Basin 37 entered into written stipulated agreements with most of the holders of senior priority surface water rights in the Thousand Springs area. 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 or reduction of ground water depletion during the two-year term of the stipulated Agreements. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

2. On August 30, 2002, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of ground water rights (except

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those whose use is solely for domestic and/or stockwater purposes) by the Director within that portion of Administrative Basin 37 overlying the ESPA. Copies of this motion were mailed to affected water right holders of record on August 30, 2002.

3. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director within that portion of Basin 37 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code.

4. On November 25, 2002, the Director mailed notice, by regular mail, of the proposed action revising the boundaries of Water District No. 130 to include water rights within Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water right holder of record in Basin 37 overlying the ESPA affected by the proposed revision of the water district. The notice described the proposed action to be taken, the reasons therefor, the time and place of a hearing to be held on December 18, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted. In addition, the Director issued a press release describing the proposed action and hearing date to newspapers and other media sources within and around the geographical area affected by the proposed action.

5. The Director conducted the hearing concerning the proposed revision of boundaries of Water District 130 at the Shoshone School District Office Board Room in Shoshone, Idaho at 4:00 pm on December 18, 2002. Approximately twenty-five people attended the hearing.

6. Prior to commencing the hearing, the Director took approximately 90 minutes to describe the background and purpose of the proposed action and address questions. The Director also presented information concerning current and future operations of the district.

7. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through December 31, 2002, for the submission of written comments.

8. Five individuals presented oral statements for the record at the Shoshone hearing:

a. Neil Bowman of Dietrich, Idaho, presented a statement on behalf of himself, as a water user in Basin 37, in support of the formation of subdistricts within Water District 130.

b. Mike Faulkner of Gooding, Idaho, presented a statement on behalf of Faulkner Land and Livestock, a water right holder in Basin 37, in support of the proposed water district boundary revision. However, Mr. Faulkner stated that there are unresolved issues concerning the Swan Falls Agreement that need to be addressed for the district.

c. George Lemmon of Hagerman, Idaho, presented a statement on behalf of himself and members of the Big Spring Water Users Association who hold water rights

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from Big Springs located in Water District 36-A (Hagerman Valley). Mr. Lemmon generally supported the proposed boundary revision. Although the Director at this hearing did not propose inclusion of Water District 36-A in Water District 130, Mr. Lemmon stated for the record that Water District 36-A should not be included in Water District 130.

d. John Faulkner of Gooding, Idaho, presented a statement on behalf of Sawtooth Sheep Co., a water right holder in Basin 37. Mr. Faulkner stated that he is not convinced that the Basin 37 area should be included in the district based on his belief that wells in the Gooding area of Basin 37 have very little effect on the springs in the Thousand Springs area. Mr. Faulkner further stated his belief that the Snake Plain ground water model used by the Idaho Department of Water Resources (Department) may have significant uncertainties and that the Director should consider the uncertainty of the model and whether or not ground water in Basin 37 is really connected with the Thousand Springs area before including Basin 37 in Water District 130.

e. Jeff Martin presented a statement on behalf of the North Snake Ground Water District (NSGWD) in support of the proposed boundary revision. Mr. Martin stated that administration of water rights in the area is a complicated matter and that the ground water model is a tool to help with administration. Mr. Martin also stated that some existing state laws may not have been given full consideration and that the NSGWD planned to submit written comments to the Director regarding certain technical and legal matters.

9. The Director received two written comments from affected ground water users prior to the close of the December 31, 2002, comment period. Comments were received from Josephine Beeman, attorney for the NSGWD, in support of the proposed action. The NSGWD suggested that the Director consider further refinement of watermaster instructions whereby administration of water rights in the water district include the following considerations:

a. Consistency with the Swan Falls Agreement and State Water Plan;

b. Calculation of the depletions to the Thousand Springs reach resulting from the transfer of winter surface water rights so that such depletions are not attributed to ground water withdrawals; and

c. Identification of depletions to the Thousand Springs reach resulting from changes in surface water irrigation under Idaho Code § 42-219 (i.e., changes that do not require a transfer pursuant to Idaho Code § 42-222).

10. Written comments were also received from Dean R. Rogers III of Bellevue, Idaho, opposing inclusion of ground water rights from the Wood River Valley in Water District No. 130. Mr. Rogers' comments appeared to be specific to the area of the Wood River Valley that is located outside of the ESPA. The Director does not intend to include in Water District

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No. 130 ground water rights from the Wood River Valley for ground water that is outside of the ESPA.

11. The United States Geological Survey (USGS) defined the boundaries of the Eastern Snake Plain based on the 1980 Regional Aquifer System Analysis Study (RASA). For administrative purposes, the Idaho Department of Water Resources considers the boundaries of the ESPA to closely approximate the boundaries of the plain as determined by the USGS. The Big and Little Wood Rivers within the Eastern Snake Plain are losing river reaches. The ESPA is not a homogeneous aquifer and does contain some layers of alluvium overlaying or inter-fingered with basalt flows. Although some areas within Basin 37 overlying the ESPA may contain alluvial deposits that are hydraulically connected to surface water in the Big and Little Wood River Basins, ground water occurrence in the area is also hydraulically connected to the ESPA.

12. The administration of ground water rights within the portion of Administrative Basin 37 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

13. To the extent that ground water withdrawals from the portion of Administrative Basin 37 overlying the ESPA affect surface water in the Big and Little Wood River Basins, the effects may be appropriately addressed by coordinating the actions of the watermasters for Water District No. 130 and water districts for the Big and Little Wood River Basins.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts or revise the boundaries of water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

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5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed with the court or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

Revision of District Boundaries

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should revise the boundaries of Water District No. 130 to include administration of ground water rights (except those whose use is solely for domestic and/or stockwater purposes) in the portion of Administrative Basin 37 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the revised boundaries of the water district should be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district, as revised pursuant to this order, shall perform the following duties in accordance with the direction and supervision of the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of the stipulated Agreements; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

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11. The instructions contained in Attachment B to the Order Creating Water District No. 130, dated February 19, 2002, shall continue to be used to guide the watermaster in performing the duties described above.

12. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, analytic or model studies, and the Director's best professional judgment.

13. The Director concludes that Water District No. 130, as revised by this order, shall include the following organizational features:

a. Election and appointment of a watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts irrigation districts or measurement districts, or other areas as may be proposed by the Director or right holders within the water district and deemed appropriate by the Director.

c. Water District Advisory Committee that includes representation from boards of directors of ground water districts and irrigation districts, or from other groups of right holders within the water district as may be appropriate.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Diversions not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

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ORDER

IT IS ORDERED that:

1. The boundaries of Water District No. 130, in the Thousand Springs Area , are hereby revised to include all ground water rights other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), within that portion of Administrative Basin 37 overlying the ESPA and as depicted on the map appended hereto as Attachment A and incorporated herein by reference.

2. The Water District No. 130 watermaster shall perform watermaster duties in accordance with the provisions of Conclusions of Law 10 through 12 of this order.

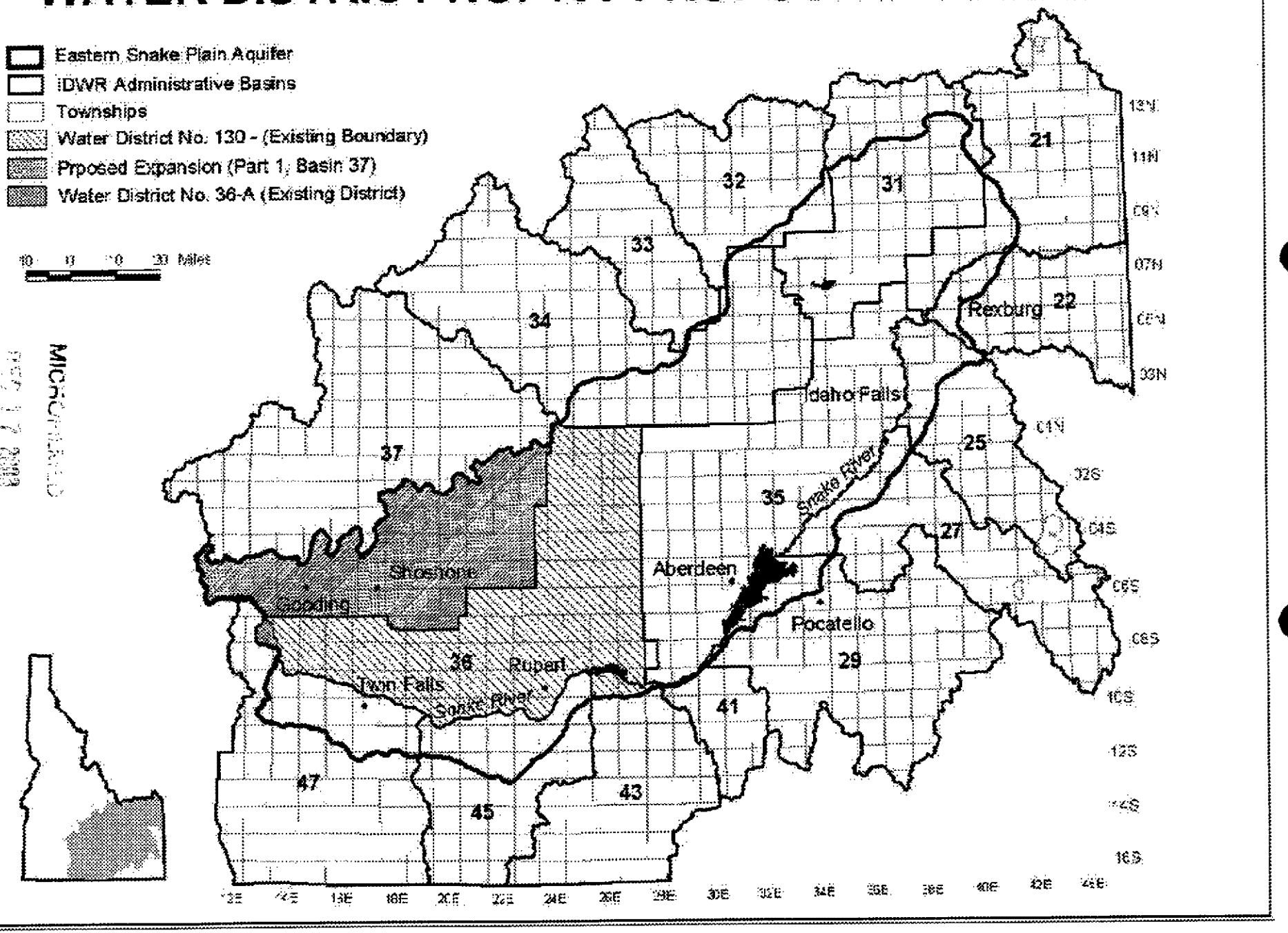
3. For 2003, the water right holders included within the revised boundaries of Water District No. 130 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 8th day of January 2003.

KARL J. DREHER
Director

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WATER DISTRICT NO. 130 PROPOSED EXPANSION



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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
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Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	MOTION TO STAY FURTHER CURTAILMENTS OF CLEAR LAKES' WATER RIGHTS

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys, Ringert Clark, Chartered, and hereby moves the independent hearing officer and/or the Idaho Department of Water Resources for a stay of any actions by the watermaster for Water District 130 resulting in further curtailments of its water rights. A stay is necessary and appropriate pending resolution of the issues raised by Clear Lakes in its Petition to Initiate Contested Case/Request for Expedited Hearing. This motion is made pursuant to IDAPA 37.01.01.260 and 37.01.01.780, and is supported by the record herein.

Dated this 10th day of January, 2003.

Charles L. Honsinger

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JAN 10 2003
Department of Water Resources

RINGERT CLARK CHARTERED
FAX COVER LETTER

From: Daniel V. Steenson
Charles L. Honsinger
S. Bryce Farris
455 South Third Street
Boise, Idaho 83702
ph: (208) 342-4591
fax: (208) 342-4657

Time: Date: **January 10, 2003**

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: **Director Karl Dreher**

WITH: **Idaho Department of Water Resources**

CITY & STATE: **Boise, Idaho**

TELEPHONE NO.: **(208) 327-7900**

FAX. NO.: **(208) 327-7866**

SENDER: **Charles L. Honsinger**

WE ARE TRANSMITTING 2 PAGES (INCLUDING THIS COVER LETTER)

ADDITIONAL INFORMATION:

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RINGERT CLARK CHARTERED
FAX COVER LETTER

From: Daniel V. Steenson
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Time: Date: **January 8, 2003**

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: **Phil Rassier**

WITH: **Attorney General Office**

CITY & STATE: **Boise, Idaho**

TELEPHONE NO.: **(208)327-7905**

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Allyn L. Sweeney
Samuel Kaufman (1921-1989)

January 8, 2003

Transmitted by Facsimile

Phil Rassier
Deputy Attorney General
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237
FAX: (208)327-7866

Re: Matters of Amended Watermaster Instructions forDistribution of Water among Water Rights Nos. 36-02659, 36-02708,36-07004, 36-7201 and 36-07218, and Notice of Intent to Redistribute Flows

Dear Phil:

As I explained to you by telephone earlier today, pursuant to IDAPA 37.01.01.651, our client hereby requests that the hearing scheduled for January 10, 2003 at 10:00 a.m. be recorded by IDWR on either audiotape or videotape.

Sincerely,

Charles L. Honsinger

cc: Kay Hardy
File

455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342-4657

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JAN 2003

LETTER TO PHIL RASSIER FROM CHARLES L. HONSINGER, DATED JANUARY *, @))# 000029

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January 10, 2003

TRANSMITTED BY FACSIMILE

Karl Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237
FAX: (208)327-7866

Re: Matters of Amended Watermaster Instructions forDistribution of Water among Water Rights Nos. 36-02659, 36-02708,36-07004, 36-7201 and 36-07218, and Notice of Intent to Redistribute Flows

Dear Karl:

Per your comments at the Status Conference held in the above referenced matter earlier this morning, it is our understanding that you intend to issue an order appointing an independent hearing officer to hear this matter in the near future. We urge you to issue this order next week. However, you suggested that the hearing officer may be appointed to hear only the issues raised by Clear Lakes related to the Interim Stipulated Agreement, and not those related to the Amended Watermaster Instructions. While we do not oppose hearing these issues separately, failure to appoint an independent hearing officer to hear all issues raised by Clear Lakes' Petition would be a violation of the Stipulation for Dismissal of the Gooding County District Court action entered into by Clear Lakes and IDWR on December 9, 2002.

In your comments of this morning, you also discussed your idea that the order appointing a hearing officer to hear issues regarding the Interim Stipulated Agreement would re-frame the issues stated by our client in its Petition. It is inappropriate for you to in any way attempt to recast the issues raised by Clear Lakes because, among other reasons, Clear Lakes is challenging your own decisions and actions. To ensure fairness in this process, your order should simply appoint a hearing officer, and forward a copy of Clear Lakes' Petition so that the hearing officer may independently evaluate and hear the issues.

Sincerely,

Charles L. Honsinger

cc: Kay Hardy
File

455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342-4657

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-ROSTER OF ATTENDANCE-

CLEARLAKES TROUT CO. PETITION

IDWR STATUS CONFERENCE

January 10, 2003

NAME	ADDRESS	REPRESENTING
John Simpson	205 N. 10th Boise	Clear Springs
Larry W. Cope	P.O. Box 712, Buhl, ID 83316	Clear Springs Foods, Inc.
Dan Steenson	P.O. 2773, Boise, 83701	Clear Lakes
Kay Harvey	1301 Vista Ave.	Clear Lakes.
Gregory Krebs	1301 Vista Ave	Clear Lakes
Charlie Honsinger	P.O. 2773 Boise ID 83701	Clear Lakes
Phil Rassier	1301 N. Orchard	IDWR
Jo Beeman	409 W. Jefferson Boise 83702	NSGWD

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Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	MOTION TO STAY FURTHER CURTAILMENTS OF CLEAR LAKES' WATER RIGHTS

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys, Ringert Clark, Chartered, and hereby moves the independent hearing officer and/or the Idaho Department of Water Resources for a stay of any actions by the watermaster for Water District 130 resulting in further curtailments of its water rights. A stay is necessary and appropriate pending resolution of the issues raised by Clear Lakes in its Petition to Initiate Contested Case/Request for Expedited Hearing. This motion is made pursuant to IDAPA 37.01.01.260 and 37.01.01.780, and is supported by the record herein.

Dated this 10th day of January, 2003.

Charles L. Honsinger

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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	MOTION FOR SUMMARY JUDGMENT

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys, Ringert Clark, Chartered, and hereby moves the independent hearing officer for summary judgment in the above captioned matter. This motion is made pursuant to IDAPA 37.01.01.260 and 37.01.01.565, and I.R.C.P. 56(c), and is supported by the Affidavit of Charles L. Honsinger in Support of Motion for Summary Judgment (hereinafter "Honsinger Affidavit"). Pursuant to IDAPA 37.01.01.565, Clear Lakes hereby requests that the independent hearing officer hear oral argument on this motion.

SUMMARY

Through this motion, Clear Lakes seeks a declaratory ruling that: (1) IDWR has responsibility to administer water rights in Water District 130 in accordance with the Interim Stipulated Agreement

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For Areas Within And Near IDWR Administrative Basin 36 (hereinafter "Interim Stipulated Agreement"); (2) the Interim Stipulated Agreement protects Clear Lakes from calls for water by senior surface water right holders who signed the Interim Stipulated Agreement; and (3) provides that IDWR cannot curtail Clear Lakes' diversion of water in response to a call for water by another signatory to the Interim Stipulated Agreement. *See* I.C. §67-5232, IDAPA 37.01.01.230.01(b), IDAPA 37.01.01.400. Clear Lakes also requests the issuance of an order directing the watermaster to return Clear Lakes' headgate to its setting prior to IDWR's July 5, 2002 curtailment of Clear Lakes' water rights.

This Motion addresses the meaning of the Interim Stipulated Agreement, and its applicability to a call by a senior surface water right holder against a junior surface water right holder. By its terms, the Interim Stipulated Agreement expires on December 31, 2003. *See* Interim Stipulated Agreement, p. 1. Thus, it is appropriate to resolve the issues addressed by this Motion separately from, and prior to, the resolution of other issues raised by Clear Lakes in this proceeding for at least two reasons: (1) to simplify the proceedings herein; and (2) to ensure that the issues addressed by this Motion are resolved before they become moot.

FACTS

Clear Lakes and Clear Springs Foods, Inc. (hereinafter "Foods") own and operate adjacent fish hatcheries located below the north rim of the Snake River Canyon near Buhl, Idaho. Both companies divert water from a common spring source through their respective fish production facilities. Clear Lakes owns two water rights diverting water from the spring source: (1) 36-02659, with a priority of June 23, 1966; and (2) 36-07004, with a priority of July 21, 1967. *See* Exhibit A to Honsinger Affidavit. Relevant to this proceeding, Foods owns one water right diverting water

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from the spring source: 26-02708, with a priority of September 28, 1966. *See* Exhibit B to Honsinger Affidavit.

On January 17, 2002, Clear Lakes signed the Interim Stipulated Agreement which had earlier been signed by other entities in Water District 130, including Foods. *See* Exhibit C to Honsinger Affidavit. Paragraph 2.8, the "Safe Harbor" provision of the Interim Stipulated Agreement, provides:

> Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

On January 18, 2002 , the Director of IDWR approved the Interim Stipulated Agreement in his Order Approving Stipulated Agreements (hereinafter "January 18, 2002 Order"). See Exhibit D to Honsinger Affidavit. Subsequently, the Director issued his February 19, 2002 Final Order Creating Water District 130 (hereinafter "February 19, 2002 Order"). See Exhibit E to Honsinger Affidavit. Each of these Orders is premised on, and mandates administration of water rights in Water District 130 in accordance with the Interim Stipulated Agreement. In the February 19, 2002 Order, the Director concluded that the watermaster of the water district, under the Director's supervision, was responsible for enforcing the terms of the Interim Stipulated Agreement. *See* Exhibit E to Honsinger Affidavit, Conclusions of Law ¶ 10.a. In the January 18, 2002 Order, the Director concluded that "[i]n the event of a breach of [the Interim Stipulated] Agreement, any party to that Agreement may petition the Director for appropriate relief," and that it is the duty of the watermaster, "[u]nder the supervision of the Director" to "enforce the provisions of the Agreements." *See* Exhibit D to Honsinger Affidavit, Conclusions of Law ¶¶ 4,7.

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On June 7, 2002 Foods submitted a "Water Delivery Call" to IDWR which sought curtailment of Lakes' water rights to increase Foods' diversion of water. *See* Exhibit F to Honsinger Affidavit. On June 19, 2002, pursuant to Instructions from the Director, the Watermaster issued a Notice of Intent to Redistribute Water, which specified that she would curtail Clear Lakes' most junior water right (36-07004) in order to provide water to Foods' more senior water right (36-02708). *See* Exhibit G to Honsinger Affidavit. Finally, on July 5, 2002, the Watermaster adjusted Clear Lakes' headgate to provide additional water to Foods.

STANDARDS

Clear Lakes asks for a declaratory ruling as to the meaning and applicability of the Interim Stipulated Agreement. Idaho Code §67-5232, IDAPA 37.01.01.230.01(b), and IDAPA 37.01.01.400 provide that a party may petition the Idaho Department of Water Resources for a declaratory ruling as to its rights under an order issued by the agency, and/or a declaratory ruling on the applicability of an order issued by the agency. The Director's January 18, 2002 and February 19, 2002 Orders are based upon, and require administration pursuant to, the Interim Stipulated Agreement. Clear Lakes also has, pursuant to I.C. § 42-1701A(3), the right to a hearing upon any order or action of the director by which it is aggrieved.

IDAPA 37.01.01.260 provides for the filing of "motions" (such as this) in a contested case requesting that the agency take action. IDAPA 37.01.01.565 provides the procedures to be followed by the hearing officer and the parties upon the filing of a motion. Although Idaho Rule of Civil Procedure 56(c) does not apply to contested case proceedings before IDWR (*see* IDAPA 37.01.01.52), the underlying reasons for using summary judgment as a procedural device in the judicial system are present in this administrative proceeding. The purpose of summary judgment is

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"to eliminate trial in cases in which it is unnecessary and would only cause delay and expense" by determining "whether there are any triable issues of fact requiring a formal trial on the merits." 73 Am. Jur. 2d Summary Judgment § 1.

Thus, the standards for I.R.C.P. 56 provide guidance for evaluation of a motion for summary judgment in a contested case proceeding. I.R.C.P. 56 provides in pertinent part that judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). Generally, the decision maker must liberally construe the facts in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). It is only when reasonable people could reach different conclusions or draw conflicting inferences from the evidence that a summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

Summary judgment containing the requested declaratory rulings and order returning Clear Lakes' headgate to its pre-July 5, 2002 setting is appropriate in this case because there is no dispute that IDWR curtailed Clear Lakes diversion of water in response to a call by Foods; and, as a matter of law: (1) the Director is required to administer water rights in Water District 130 in accordance with the Interim Stipulated Agreement; and (2) the Interim Stipulated Agreement clearly and unambiguously protects Clear Lakes from a call by any senior surface water right holder who signed the Agreement, including Foods. Therefore, IDWR cannot curtail Clear Lakes' water rights in

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response to Foods' call for water.

ARGUMENT

1. IDWR Must Administer Water Rights in Water District 130 Pursuant to the Interim Stipulated Agreement

As discussed above, pursuant to the language of the Director's January 18, 2002 and February 19, 2002 Orders, the Idaho Department of Water Resources is responsible for administering water rights in accordance with the Interim Stipulated Agreement. As established by the following deposition testimony regarding paragraph 10(c) of the Interim Stipulated Agreement, the Director agrees.

> Q. . . . And this order reflects that that decision that the Department, that the Department through you, would be under 10(c) enforcing the provisions of this; correct?
> A. Correct.

Exhibit G to Honsinger Affidavit, p. 223, lns. 13 - 17 (hereinafter "Dreher Depo.").

2. The Clear and Unambiguous Language of the Interim Stipulated Agreement Protects Clear Lakes from Curtailment in Response to Foods' Water Delivery Call

The Interim Stipulated Agreement must be construed to give effect to the intention of the parties. *Wing v. Martin,* 107 Idaho 267, 273, 688 P.2d 1172, 1178 (1984). The Agreement must be construed as a whole in order to ascertain the intent of the parties thereto. *Id.* The terms of the Interim Stipulated Agreement are clear and unambiguous. Therefore both its meaning and the intent of the parties must be determined from the plain meaning of the Agreement's own words. *Taylor v. Browning,* 129 Idaho 483, 489, 927 P.2d 873, 879 (1996). Because the Agreement's terms are clear and unambiguous, its meaning and legal effect are questions of law. *State v. Barnett,* 133 Idaho 231, 234, 985 P.2d 111, 114 (1999). No outside information is necessary to assist in the interpretation of a clear and unambiguous agreement. *Bilow v. Preco, Inc.*, 132 Idaho 23, 28, 966

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P.2d 23, 28 (1998).

Paragraph 2.8, the "Safe Harbor" provision of the Interim Stipulated Agreement, provides as follows:

> Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 **the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction**, other than as provided in paragraph 2.7, **of any junior water rights held by or represented by the undersigned** within Basin 36 for the term of this agreement.

See Exhibit C to Honsinger Affidavit. (Emphasis added). The first emphasized phrase in the provision encompasses Clear Lakes, Foods, and every other signatory that holds "senior priority surface water rights." The second emphasized phrase provides "Safe Harbor" for "**any** junior water rights" of every party that signed the Agreement, including Clear Lakes. Nothing in this provision, nor in any other provision of the Interim Stipulated Agreement, limits the application of "Safe Harbor" to any particular class of water rights, such as ground water rights. Thus, according to the "Safe Harbor" provision, junior surface water right holders are protected from calls made by senior surface water right holders.

The language of the "Safe Harbor" provision is consistent with the following recital in paragraph 1.5 of the Agreement, which explicitly refers to surface water diversions:

> The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to **senior priority surface water rights** caused by **diversions of ground water or *surface water* under junior priority water rights** within Basin 36 pending the completion of the new ESPA Ground Water Model.

See Exhibit C to Honsinger Affidavit. (Emphases added).

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Nothing in the Interim Stipulated Agreement contradicts the clearly expressed intention of the parties to provide "Safe Harbor" for all signatories holding junior water rights. Likewise, nothing in either the Director's January 18, 2002 Order nor his February 19, 2002 Order prevent the provision of "Safe Harbor" to all parties to the Interim Stipulated Agreement. Therefore, because the Director of IDWR, pursuant to his own orders, is required to enforce the provisions of the Interim Stipulated Agreement, he cannot curtail or reduce Clear Lakes' water rights in response to Foods' "Water Delivery Call."

3. The Director Recognizes That The "Safe Harbor" Provision Clearly and Unambiguously Protects Clear Lakes From a Call by Foods

The Director recognizes that within the Safe Harbor provision, the term "the undersigned" in the phrase "any junior water rights held by or represented by the undersigned" encompasses all parties to the Interim Stipulated Agreement, and unambiguously and clearly refers to both Clear Lakes and Foods. Dreher Depo, p. 223, lns. 13 - 17; p. 195, lns 3-14; p. 217, lns 10-23. He agrees that there is no language in the Interim Stipulated Agreement that contradicts or makes impermissible the plain language of paragraph 2.8 which extends Safe Harbor to junior surface water rights. *Id.*, p. 221, lns 11-18. (He also agrees that there is nothing in his Final Order Creating Water District No. 130 which contradicts the Interim Stipulated Agreement's provision for Safe Harbor for surface water users. *Id.*, p. 222, lns 5-20.) He acknowledges that the reference in the first sentence of paragraph 1.5 of the Interim Stipulated Agreement, quoted above, reflects the concept that the Safe Harbor provision applies to junior priority surface water rights. *Id.*, p. 219, lns. 7-17. He similarly acknowledges that the second sentence of paragraph 2.12 also reflects the concept that the Safe Harbor provision protects holders of junior surface water rights. *Id.*, p. 219, ln. 18 to p. 221, ln. 8.

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With this understanding of the Interim Stipulated Agreement, the Director cannot curtail Clear Lakes' junior surface water right in response to a call by Foods.

4. Safe Harbor For All Parties to the Interim Stipulated Agreement is Necessary to Effectuate its Purpose

The Interim Stipulated Agreement facilitates an effort to address declining water supplies within Basin 36 by providing Safe Harbor to all signatories as a matter of necessity and equity. The Interim Stipulated Agreement resulted from Director Dreher's announcement that he intended to curtail junior ground water diversions because they were injuring senior surface water user rights. *See* Dreher Depo. p. 194, lns. 9 - 21. The initial concept for avoiding the Director's action was that junior ground water users would take certain actions to restore water supplies for senior surface (spring) water users in exchange for the seniors' commitment not to seek curtailment of the juniors. *Id*, p. 200, ln. 19 - p. 203, ln. 10; *See also* Dreher Depo., Exhibit 34D. However, surface water users could not be expected to agree to forgo the priority of their rights if more senior surface water users could attempt to force them to curtail their diversions with no recourse against junior water rights. For this reason, providing Safe Harbor protection for all parties to the Agreement was a necessary component of the Agreement. In his deposition, the Director of IDWR acknowledged the importance of this accommodation. Dreher Depo., p. 221 ln. 22 - p. 222, ln. 4.

The Interim Stipulated Agreement was written to provide Safe Harbor to all who signed it. Several drafts of the Agreement were prepared before the parties signed it between November 9, 2001 and January 17, 2002. As originally drafted, the Safe Harbor provision and the related recital in paragraph 1.5 discussed above were written to protect only holders of ground water rights:

> 1.6 The parties desire to avoid the need for litigation at this time on the existence, nature and extent of the alleged reductions in flows to reaches of the Snake River by

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ground water pumping within Basin 36 pending the completion of the new ESPA Ground Water Model.

* * *

2.7 In exchange for the commitments by the holders of junior priority ground water rights enumerated in paragraphs 2.1 through 2.6, the undersigned holders and representatives of senior priority surface water rights agree not to seek either judicially or administratively the curtailment or reduction . . . of the **ground water rights held or represented by the undersigned** within Basin 36 for the term of this agreement.

See Dreher Depo., Exhibit 34D, ¶¶ 1.6, 2.7. (Emphasis added).

The Safe Harbor and related provisions were rewritten in the next "redline" draft of the Interim Stipulated Agreement to provide protection for surface water users as follows:

1.5 The parties desire to avoid the need for litigation at this time on the existence, nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36 pending the completion of the new ESPA Ground Water Model.

* * *

2.7 Safe Harbor: In exchange for the commitments by the ~~holders of junior priority ground water rights~~ enumerated in paragraphs 2.1 ~~and~~ through 2.6, the undersigned ~~holders of senior priority surface water rights and their representatives~~ parties agree not to seek either judicially or administratively the curtailment or reduction (other than as provided in paragraph 2.5) of the ground water rights or surface water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

* * *

2.9 . . . The parties also agree not to oppose the Director's instructions to any watermasters to administer ~~ground~~ water rights that are in accordance with this Agreement.

* * *

2.10 Holders of ~~junior priority ground~~ water rights within Basin 36 who are not party to this or other stipulated agreement, either directly or as a member of a ~~participating~~

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~~ground water district;~~ party to this Agreement, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.7. The parties agree to request that the Director notify ~~holders of ground~~ water right holders in ~~the~~ Basins 36, and other related administrative areas outside of the Basins who are not party to this or another stipulated agreement that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

Dreher Depo., Exhibit 34E, ¶¶ 1.5, 2.7, 2.9, 2.10. (Underlined, strikeout format in original). Although there were certain semantic and reformatting changes in subsequent drafts of the Agreement (*See* Dreher Depo., Exhibits 34F, ¶¶ 1.5, 2.8, 2.10, 2.11, and 34G ¶¶ 1.5, 2.8, 2.10, 2.11), the substance of these changes was retained in the final Interim Stipulated Agreement which the parties signed. *See* Exhibit C to Honsinger Affidavit, ¶¶ 1.5, 2.8, 2.10, 2.12.

CONCLUSION

The Director of the Idaho Department of Water Resources is responsible for administering water rights in Water District 130 pursuant to the terms of the Interim Stipulated Agreement. The Agreement clearly and unambiguously protects Clear Lakes from a call made by any other party to that agreement, including Foods. The Director understands his responsibility, and has acknowledged that the terms of the Interim Stipulated Agreement protect junior surface water users from calls by senior water right holders. The hearing officer should therefore issue an order declaring that Clear Lakes is so protected, and requiring the Water District 130 watermaster to return Clear Lakes' headgate to its setting prior to the July 5, 2002 curtailment.

Dated this 10th day of January, 2003.

RINGERT CLARK, CHARTERED

By: Charles L. Honsinger

Charles L. Honsinger
Ringert Clark Chartered
Attorneys for Petitioner

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	AFFIDAVIT OF CHARLES L. HONSINGER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss
COUNTY OF ADA)

CHARLES L. HONSINGER, being first duly sworn upon his oath, deposes and says that:

1. I am the attorney for Clear Lakes Trout Company, the Plaintiff in the above-entitled action, and make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. Attached hereto as Exhibit "A" are true and accurate copies of the Amended Partial Decrees for water right numbers 36-02659 and 36-07004 entered in the Snake River Basin Adjudication District Court on April 22, 2002.

3 Attached hereto as Exhibit "B" is a true and accurate copy of the Partial Decree for

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water right number 36-02708 entered in the Snake River Basin Adjudication District Court on April 10, 2000.

4. Attached hereto as Exhibit "C" is a true and accurate copy of the Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36 ("Interim Stipulated Agreement").

5. Attached hereto as Exhibit "D" is a true and accurate copy of the Order Approving Stipulated Agreements issued by the Director of the Idaho Department of Water Resources on January 18, 2002.

6. Attached hereto as Exhibit "E" is a true and accurate copy of the Final Order Creating Water District 130 issued by the Director of the Idaho Department of Water Resources on February 19, 2002.

7. Attached hereto as Exhibit "F" is a true and accurate copy of the June 7, 2002 "Water Delivery Call" submitted by Clear Springs Foods, Inc. to the Director of the Idaho Department of Water Resources.

8. Attached hereto as Exhibit "G" is a true and accurate copy of the June 19, 2002 "Notice of Intent to Redistribute Flows" sent to both Clear Lakes Trout Co. and Clear Springs Foods, Inc. by watermaster Cindy Yenter.

9. Attached hereto as Exhibit "H" is a true and accurate copy of the relevant portions of the Deposition of Karl J. Dreher, Volume II, taken on November 1, 2002 in the State of Idaho Fifth Judicial District Court case of Clear Lakes Trout Company, Inc. v. Idaho Department of Water Resources *et. al.*, together with the relevant exhibits attached thereto.

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Further your affiant sayeth naught.

Dated this 10th day of January, 2003.

Charles L. Honsinger

Sworn to and subscribed before me this 10th day of January, 2003.

CHERI DRAPER NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing in Meridian, Idaho
My Commission Expires: 12-23-2003

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Exhibit A

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EXHIBIT A

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

AMENDED

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 36-02659

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within Gooding County
LOT 05 (SESENE)
LOT 05 (SWSENE)

THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S 1/2 SESWNE AND THE S 1/2 SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL" LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURSE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	100.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

Apr-26-02 12:40P B111 Ringert 208-799-7994 P.05

DEC 12 2002

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

AMENDED

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 36-07004

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 75.00 CFS

PRIORITY DATE: 07/21/1967

POINT OF DIVERSION: T09S R14E S02 LOT 05 (SWSENE) Within Gooding County
LOT 05 (SESENE)

THIS WATER RIGHT IS DIVERTED THROUGH A SPRING-FED DIVERSION POOL KNOWN AS THE "EASTERN POOL," AND THROUGH PIPES WHICH DIVERT WATER FROM SPRINGS THAT ARE TRIBUTARY TO THE EASTERN POOL, ALL OF WHICH ARE LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. A PORTION OF WATER RIGHT NO. 36-2659 IS ALSO DIVERTED THROUGH THE EASTERN POOL. ALL WATER DIVERTED IS FROM THE SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	75.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

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366-7994
2003
Apr-26-02 12:40p Bill Ringert P.04

Exhibit B

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

2000 APR 10 AM 10:19

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-02708

NAME & ADDRESS: CLEAR SPRINGS FOODS INC
THE PROSPECT CO
PO BOX 712
BUHL ID 83316

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

SOURCE IS ALSO KNOWN AS CLEAR SPRINGS.

QUANTITY: 200.00 CFS
144540.0 AFY

PRIORITY DATE: 09/28/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within GOODING County
LOT 5 (SWSENE)
NENWSE

MULTIPLE POINTS OF DIVERSION LOCATED IN T09S, R14E, S02, LOT 5 (SWSENE), SESWNE, NENWSE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	200.00 CFS
		144540.0 AFY

PLACE OF USE: FISH PROPAGATION Within GOODING County
T09S R14E S02 NWSE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

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Exhibit C

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EXHIBIT C

INTERIM STIPULATED AGREEMENT
FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users, or their representatives, in consideration of the promises stated in this Agreement. The term of the Agreement shall extend until to December 31, 2003.

1. This Agreement is made in reference to the following facts:

1.1 The Director of the Idaho Department of Water Resources (Director) stated his intent to entirely curtail diversions under certain water rights for ground water beneath portions of Basin 36, an administrative sub-basin. The Director's intent was based upon his findings, set forth in his administrative order designating the Thousand Springs Ground Water Management Area dated August 3, 2001, that diversions of ground water under such rights cause significant reductions in spring flows tributary to the Thousand Springs reach of the Snake River, and that those reductions will further reduce the diminished water supply available to satisfy senior priority surface water rights during current drought conditions.

1.2 The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin and any alleged injury to surface water rights as a result of the diversion of water from the Eastern Snake Plain Aquifer (ESPA);

1.3 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;

1.4 The new ESPA Ground Water Model is expected to provide the parties with additional information regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River; and

1.5 The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36 pending the completion of the new ESPA Ground Water Model. The parties understand that this agreement and IDWR administrative actions described in this agreement may include water rights in areas immediately adjacent to Basin 36 as necessary to respect geohydrologic characteristics and water user organization boundaries. All subsequent references to Basin 36 in the agreement include this qualification.

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2. Interim Stipulated Agreement:

2.1 Upon the payment of necessary advances by North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD), Northside Canal Company (NSCC), shall apply annually in 2002 and 2003 for up to 40,000 acre feet of water from rental pools above Milner for diversion into the NSCC canal at such times and in such manner as NSCC agrees. NSGWD agrees to pay the necessary advances for up to 25,000 acre feet of water, and MVGWD agrees to pay the necessary advances for up to 15,000 acre feet of water. The separate obligations of NSGWD and MVGWD to pay for storage shall be based upon their proportionate share as described above. The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC system by entities other than the NSGWD and MVGWD.

2.2 The replacement water will be used to enhance the spring flows in the Thousand Springs reach by 40,000 A.F. The NSGWD members will, to the maximum extent possible, use storage water or canal company shares delivered through the Northside Canal and use Northside Canal Company waste water in lieu of pumping ground water. To the extent that the full 40,000 A.F. is not used for irrigation in lieu of groundwater pumping, the unused portion of the 40,000 A.F. will be used to enhance the spring flows in the Thousand Springs reach. Periodic reports will be prepared describing how the replacement water has been used pursuant to this Agreement.

2.3 NSCC agrees to rebate any monies provided by ground water users that are not used to acquire storage water required by paragraph 2.1.

2.4 Those parties providing replacement water agree to equitably apportion any costs associated with delivery of the water provided pursuant to paragraph 2.1. NSCC agrees to forego conveyancing costs for delivery of such water provided NSGWD uses its best efforts to use the water identified in paragraph 2.5.3. NSCC agrees to use its best efforts to minimize any other costs associated with the delivery of such water.

2.5 Those parties providing replacement water agree to, in good faith, explore the feasibility, funding and implementation of the following measures:

.1 NSGWD members who are shareholders in NSCC will make best efforts to use their NSCC shares on appurtenant lands before using ground water, unless the NSCC water is not available.

.2 NSGWD members within the NSCC service area will make best efforts to use the storage water described in paragraph 2.1 in lieu of pumping a similar amount of ground water. (Use existing NSCC headgates.)

.3 NSGWD members who are also NSCC shareholders within the NSCC service area will make best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.

.4 NSGWD will make periodic reports describing the actions being investigated and undertaken pursuant to paragraph .

2.6 NSGWD and Buckeye agree to use their best efforts to provide twelve (12) CFS of water to Buckeye from Riley Creek by the 2002 irrigation season as contemplated in the July 2001 letter to NSGWD.

2.7 The following provision will apply during the irrigation season in any year in which the following conditions occur, unless otherwise agreed by the parties: If by April 1 in any year none of the 40,000 acre feet of water identified in paragraph 2.1 is provided either by this agreement or by other replacement water, the undersigned holders of ground water rights agree that their diversion and use of ground water irrigation water rights will be ten (10) percent less than their base of ground water irrigation use, based on power and fuel consumption records, or other basis acceptable to the Director. If by April 1, some but not all of the 40,000 acre feet identified in paragraph 2.1 is provided (by this agreement and/or other replacement water) an adjustment to ground water reductions shall be made in proportion to the percentage of the 40,000 acre feet provided. In lieu of individual reductions, ground water districts may achieve reductions on a district wide basis. The parties agree to meet and establish a procedure for determining the base upon which any reductions in ground water use will be determined.

2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

2.9 By providing replacement water or, in the alternative, agreeing to a reduction in ground water irrigation diversions and use, the undersigned holders of ground water rights and their representatives do not concede that diversions of ground water are causing injury to senior priority surface water rights, nor do the undersigned holders of senior priority surface water rights and their representatives concede that the amount of replacement water accepted under this stipulated agreement compensates for the extent of the injury they allege.

2.10 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in Basin 36. The parties understand that interim administration will include: (1) enforcement of the provisions of the stipulated agreement; (2) curtailment of illegal diversions (i.e.

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any diversion without a water right or in excess of the elements of a water right); (3) measurement and reporting of diversions of water rights; and (4) curtailment of out-of-priority diversions found by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director. The parties reserve the right to file motions to participate or submit other pleadings to participate in proceedings on the motion as they deem appropriate.

2.11 The parties agree to work collaboratively with the Director to expeditiously create a water district or water districts and to formulate initial instructions to the associated watermaster(s) to administer water rights of the water district or water districts. Such instructions shall include the elements of administration identified in paragraph 2.10. The parties agree not to oppose the Director's initial instructions to these watermaster(s) that are jointly developed through this collaborative process.

2.12 The parties understand that the Director will issue an administrative order approving this Agreement, which will include the elements of interim administration identified in paragraph 2.10. Holders of water rights within the area subject to interim administration under this agreement who are not party to this or another stipulated agreement, either directly or as a member of a party to this Agreement, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.8. The parties agree to request that the Director notify water right holders in Basin 36 who are not party to this or another stipulated agreement, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

2.13 Other junior water right holders not members of NSGWD or MVGWD who desire the safe harbor protections of this agreement may join this agreement upon agreeing to pay a proportionate share of the costs and to be bound by all other terms of this agreement.

3. Process for Future Conflicts:

3.1 The undersigned parties agree to develop a process for ascertaining the extent of any injury caused by ground water diversions in the Basins under junior priority water rights to senior priority surface water rights, for sharing of information and for the development of any mitigation plans subsequently required.

3.2 For the term of this Agreement, the parties agree to use their best efforts to ensure completion of the reformulation and recalibration of the ESPA Ground Water Model and to continue discussions regarding a long-term agreement, including:

.1 The ESPA Model capabilities.

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.2 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.

.3 Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

.4 Adoption of conjunctive administration rules based on the results from the new ESPA ground water model and other necessary information to more specifically govern IDWR's administration of water rights from connected sources of surface and ground water within the ESPA.

.5 Consideration of a mechanism to account for changes in the use of water rights since the commencement of the SRBA and development of a means to administer water rights in the context of such changes.

4. Enforcement:

4.1 The parties understand the Director intends to approve this stipulated agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party may petition the Director, or the Director on his own initiative, may seek an appropriate remedy.

4.2 Upon the SRBA District Court issuing an order for interim administration of water rights within Basin 36 and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnections of ground water and surface water sources in the Snake River Basin along the reach of the Snake River along and above the Thousand Springs reach of the Snake River and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues, the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River.

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5.2 This Agreement has been reached as the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

6. Dismissal or Stay of Pending Actions:

6.1 Based upon the foregoing and the parties' understanding that the Director will stay further administrative proceedings regarding his Order In The Matter of Designating the Thousand Springs Ground Water Management Area, and unless this Agreement is breached, the parties agree as follows:

6.2 The Idaho Ground Water Appropriators, Inc., and other plaintiffs agree to secure voluntary dismissal, without prejudice, of their Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that they previously filed in the Sixth Judicial District Court.

6.3 Representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

7. General Provisions:

7.1 The provisions of this Agreement are not severable.

7.2 This Agreement shall bind and inure to the benefit of the respective successors of the parties.

7.3 This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

7.4 Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

7.5 This Agreement is executed in triplicate. Each of the three (3) Agreements with an original signature of each party shall be an original.

7.6 This Agreement shall be effective from October 11, 2001.

7.7 The parties to this Agreement may extend the term of this Agreement beyond 2003 by mutual consent on an annual basis.

The parties have executed this Agreement the date following their respective signatures.

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Date: Nov. 9, 2001

North Snake Ground Water District

North Snake Ground Water District

By: Mike R. Faulkner

Chairman

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Date: 12 November, 2001

Orlo H. Maughan Chairman
Magic Valley Ground Water District

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Date: 11-9-01, 2001 North Side Canal Co. Ted Diehl

North Side Canal Company

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Date: _____, 2001 _____

Blue Lakes Trout Company

Date: _____, 2001 _____

Pisces Investments

Date: December 17, 2001 _____ ISB #5760

Attorney for Pristine Springs Inc.

Pristine Springs

JAN 2

Date: November 16, 2001

Jerry M. Cox, President & CEO
Clear Springs Foods, Inc.

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Date: 1/9, 2002

Buckeye Farms

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Date: January 17 2002 ~~2001~~

Anita Kay Hardy, President
Clear Lakes Trout Company

Clear Lakes Trout Company

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Department of Water Resources

Date 1-10-02, 2001

Blue Lakes Trout Company

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Exhibit D

EXHIBIT D

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTERS OF THE AMERICAN FALLS GROUND WATER MANAGEMENT AREA AND THE THOUSAND SPRINGS GROUND WATER MANAGEMENT AREA	)	**ORDER APPROVING STIPULATED AGREEMENTS**

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of the Director's issuance of two separate orders on August 3, 2001, establishing the American Falls Ground Water Management Area ("American Falls GWMA") and the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director issued these orders to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the prior appropriation doctrine as established by Idaho law. The Director enters the following Findings of Fact, Conclusions of Law, and Order in furtherance of those directives.

FINDINGS OF FACT

1. On August 31, 2001, the Director was advised by representatives of certain holders of junior priority ground water rights and certain holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what the Director's currently-available information indicates would have resulted from curtailment of ground water diversions intended by the Director in areas within the American Falls and Thousand Springs GWMAs or an appropriate reduction to the extent that replacement water is not provided.

2. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the American Falls and Thousand Springs GWMAs, provided the agreements in principle were implemented through detailed written agreements.

3. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into three, detailed, written, stipulated agreements with representatives of most holders of senior priority surface water rights. These agreements are the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36" (the "Agreements"), which have been submitted to the Director for approval.

4. 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

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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. In the event the full amount of replacement water can not be provided, the Agreements require an appropriate reduction of diversion under ground water rights.

5. The signatories to the Agreements agreed not to oppose a motion by the State of Idaho seeking an order from the Snake River Basin Adjudication ("SRBA") District Court authorizing interim administration of water rights within portions of the Eastern Snake Plain Aquifer in accordance with the provisions of Idaho Code § 42-1417.

6. On November 19, 2001, the State of Idaho filed a "Motion for Order of Interim Administration and Motion for Order Expediting Hearing, pursuant to Idaho Code § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 35, 36, 41, and 43, in accordance with the Director's Reports for those water rights or in accordance with the partial decrees that have superseded the Director's Reports.

7. On January 8, 2002, the SRBA District Court granted the State of Idaho's "Motion for Order of Interim Administration" and authorized the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director's Reports or in accordance with the partial decrees that have superseded the Director's Reports in portions of Administrative Basins 35, 36, 41, and 43.

8. Under the Agreements, the parties request that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other stipulated agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

9. The Agreements provide that the parties understand that the Director has stayed further administrative proceedings regarding his "Order in the Matter of the Designating the American Falls Ground Water Management Area" and his "Order in the Matter of the Designating The Thousand Springs Ground Water Management Area."

10. The Agreements also provide that representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

CONCLUSIONS OF LAW

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director of the Department has a statutory responsibility to administer the use of ground water. See Idaho Code §§ 42-226 and 42-237a.g.

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3. The Director concludes that the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36," will provide replacement water during the term of the Agreements essentially equal in amount to what would have resulted from his intended curtailment of ground water diversions, or result in an appropriate reduction of diversion under ground water rights in the event that the full amount of replacement water can not be provided.

4. The Director concludes that issuance of curtailment orders in the American Falls and Thousand Springs GWMAs is unnecessary for at least the next two years, so long as the terms of the Agreements are fully implemented. In the event of a breach of an Agreement, any party to that Agreement may petition the Director for appropriate relief.

5. The Director concludes that interim administration of water rights in the American Falls and Thousand Springs GWMAs, and certain water rights immediately adjacent to the GWMAs, is necessary to protect the water supply available to satisfy the senior priority surface water rights diverting from or dependent on springs discharging from the Eastern Snake Plain Aquifer in the affected areas.

6. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(12), pursuant to chapter 6, title 42, Idaho Code, is necessary. Such administration shall include the formation of one or more water districts encompassing the GWMAs. While the Agreements are for a two-year period, the water districts will be formed on a permanent basis, with or without revisions to the boundaries that the Director determines to be necessary for appropriate administration, and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

7. Under the supervision of the Director, the duties of the watermaster(s) for the new water districts will be to: (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; (3) enforce the provisions of the Agreements; and (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

8. The Director concludes that regardless of whether the water users are able to reach long-term, stipulated agreements, the administration of water rights from hydraulically connected sources will be based upon the then available data, models, analytical results, rules, other pertinent information, and his best professional judgment.

Based upon the foregoing findings of facts and conclusions of law, the Director enters the following order.

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ORDER

IT IS HEREBY ORDERED that the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36," are approved.

IT IS FURTHER ORDERED that upon the entry of an order authorizing interim administration, appropriate water districts for the administration of water rights shall be established consistent with this Order as necessary to protect the water supply available to satisfy senior priority surface water rights and ground water rights.

IT IS FURTHER ORDERED that holders of ground water rights in the water districts who are not party to these Agreements, or other stipulated agreement or approved mitigation plan, be notified that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

IT IS FURTHER ORDERED that the administrative proceedings regarding the Director's "Order in the Matter of the Designating the American Falls Ground Water Management Area" and his "Order in the Matter of the Designating The Thousand Springs Ground Water Management Area" are stayed, and that the July 2001 petitions of the holders of surface water rights and the holders of ground water rights pleadings filed in response to the petitions are deemed withdrawn.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01710, this is an interlocutory order that does not decide substantive issues presented in the proceedings and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01711.

DATED this 18th day of January 2002.

KARL J. DREHER
Director

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January 2002, I caused a true and correct copy of the foregoing Order Approving Stipulated Agreements to be sent by U. S. Mail, postage paid to the following:

Jeffrey C. Fereday, Esq.
Michael C. Creamer, Esq.
John M. Marshall, Esq.
Givens, Pursley, LLP
277 N. 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720

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Barker Rosholt & Simpson LLP
142 3rd Avenue North
P.O. Box 1906
Twin Falls, ID 83303-1906

John K. Simpson
Barker Rosholt & Simpson LLP
1221 W. Idaho Street, Suite 600
P.O. Box 2139
Boise, ID 83701-2139

Scott L. Campbell, Esq.
Moffatt Thomas
101 S. Capitol Boulevard, 10th Floor
P.O. Box 829
Boise, ID 83701-0829

Josephine P. Beeman
Beeman & Associates, P.C.
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Boise, ID 83702

Roger D. Ling
Ling & Robinson
615 "H" Street
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Rupert, ID 83350-0396

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Co-Manager
Western Legends LC
P.O. Box 5656
Twin Falls, ID 83303

Ronald D. Carlson, Manager
Department of Water Resources
Eastern Regional Office
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Idaho Falls, ID 83402-6105

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Department of Water Resources
Southern Regional Office
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Twin Falls, ID 83301

Dan Steenson
Ringert Clark
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P.O. Box 2773
Boise, ID 83701-2773

Jason Miciak
P.O. Box 5298
Twin Falls, ID 83303-5298

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

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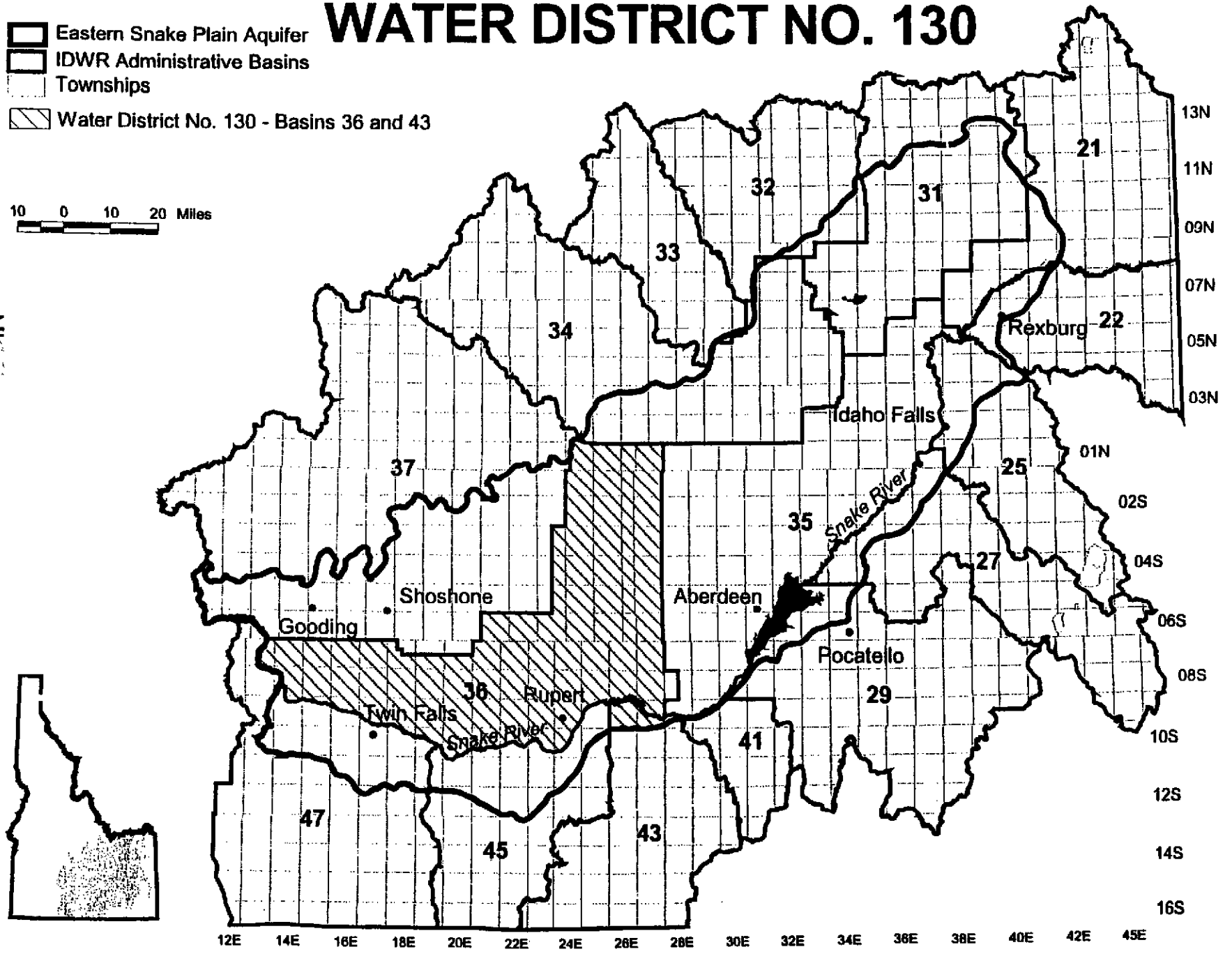
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Exhibit E

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THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130

THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CREATING THE THOUSAND SPRINGS AREA WATER DISTRICT, DESIGNATED AS WATER DISTRICT NO. 130, FOR THE ADMINISTRATION OF RIGHTS TO THE USE OF GROUND WATER AND SPRINGS DISCHARGING FROM THE EASTERN SNAKE PLAIN AQUIFER IN ADMINISTRATIVE BASINS 36 AND 43.	)	**FINAL ORDER CREATING WATER DISTRICT NO. 130**

The Director of the Idaho Department of Water Resources ("Director") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

FINDINGS OF FACT

1. On August 3, 2001, the Director established the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the Thousand Springs GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the Thousand Springs GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. On August 31, 2001, the Director was advised by representatives of holders of

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junior priority ground water rights and holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what would have resulted from the intended curtailment of certain junior ground water diversions within the Thousand Springs GWMA.

3. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs GWMA, provided the agreements in principle were implemented through detailed written agreements.

4. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into detailed written stipulated Agreements with representatives of most holders of senior priority surface water rights. The Agreements were submitted to the Director for approval. The Director approved the Agreements on January 18, 2002.

5. 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. In the event the replacement water cannot be provided, the Agreements require an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

6. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

7. Under the Agreements, the parties requested that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other similar agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

8. On November 19, 2001, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the Eastern Snake Plain Aquifer ("ESPA") in the Thousand Springs area.

9. On November 19, 2001, the SRBA District Court issued an order setting the State's motion for order authorizing interim administration for hearing on January 8, 2002. The Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State of Idaho served copies of the Court's November 19, 2001, order and the State's motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on November 26, 2001.

10. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code, based upon a

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determination that such interim administration is necessary to protect senior water rights.

11. On January 14, 2002, the Director mailed notice, by regular mail, of the proposed action creating a water district in the Thousand Springs area within the ESPA in Administrative Basins 36 and 43, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water user in the proposed district affected by the creation of the water district (herein established as Water District No. 130). The notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held on February 4, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

12. In addition, the Director published notice of the proposed action creating the water district once a week for two (2) weeks in the following newspapers having general circulation within the area covered by the proposed district: *The Times News* of Twin Falls on January 17 and 24, 2002; the Burley *South Idaho Press* on January 17 and 24, 2002; and the *Minidoka County News* of Rupert on January 16 and 23, 2002.

13. The Director conducted the hearing concerning the proposed creation of the water district at the Jerome High School Auditorium in Jerome, Idaho, at 7:00 pm on February 4, 2002. Approximately fifty-five people attended the hearing.

14. Prior to commencing the hearing, the Director made a presentation and answered questions for approximately ninety minutes addressing the reasons for creation of the proposed water district and how the district would operate.

15. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through February 14, 2002, for the submission of written comments.

16. Only one person presented an oral statement for the record at the Jerome hearing. No one testified in opposition to the creation of the proposed water district. Jeff Martin presented a statement on behalf of the North Snake River Ground Water District in support of the establishment of a water district to administer ground water in accordance with the prior appropriation doctrine and State law.

17. Mr. Roger Ling, attorney for the A & B Irrigation District, stated that the questions he had were addressed by the Director during the presentation and discussion that occurred prior to going on the record.

18. The Director received no written comments from affected ground water users objecting to the creation of the proposed water district prior to the close of the February 14, 2002, comment period. Comments were received from Clear Springs Foods, Inc. of Buhl, Idaho, suggesting that water rights included within Water District 36-A (Billingsley and Riley Creeks and tributary springs) should be combined into the same water district or subdistrict with ground water rights so that the parties may continue to work together under the same watermaster. Water District 36-A submitted comments requesting that it remain autonomous

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at this time while retaining the option of joining the newly formed water district in the future. The United States Fish and Wildlife Service submitted comments relating to future arrangements that may be made for the measuring and reporting of ground water usage at its affected facilities.

19. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

20. The available water supply in all or portions of Administrative Basins 36 and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

21. The administration of ground water rights within the portion of Administrative Basins 36 and 43 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed

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with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

District Creation

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer water rights within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of stipulated agreements approved by the Director; and

d. 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. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and

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the Director's best professional judgment.

12. The Director concludes that the water district created by this order shall include the following organizational features:

a. Election and appointment of a single watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts and irrigation districts, or as otherwise determined by the Director.

c. Selection of Water District Advisory Committee that includes, but need not be limited to, representation from boards of directors of ground water districts and irrigation districts.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Water rights not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

ORDER

IT IS ORDERED that:

1. The Thousand Springs Area Water District, designated as Water District No. 130, is hereby created to include all ground water rights and all rights to divert from springs discharging from the ESPA that are not already included in Water District No. 36-A, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference.

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2. For 2002, the water right holders within the Thousand Springs Area Water District No. 130 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 19th day of February 2002.

KARL J. DREHER
Director

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THOUSAND SPRINGS AREA WATER DISTRICT NO. 130

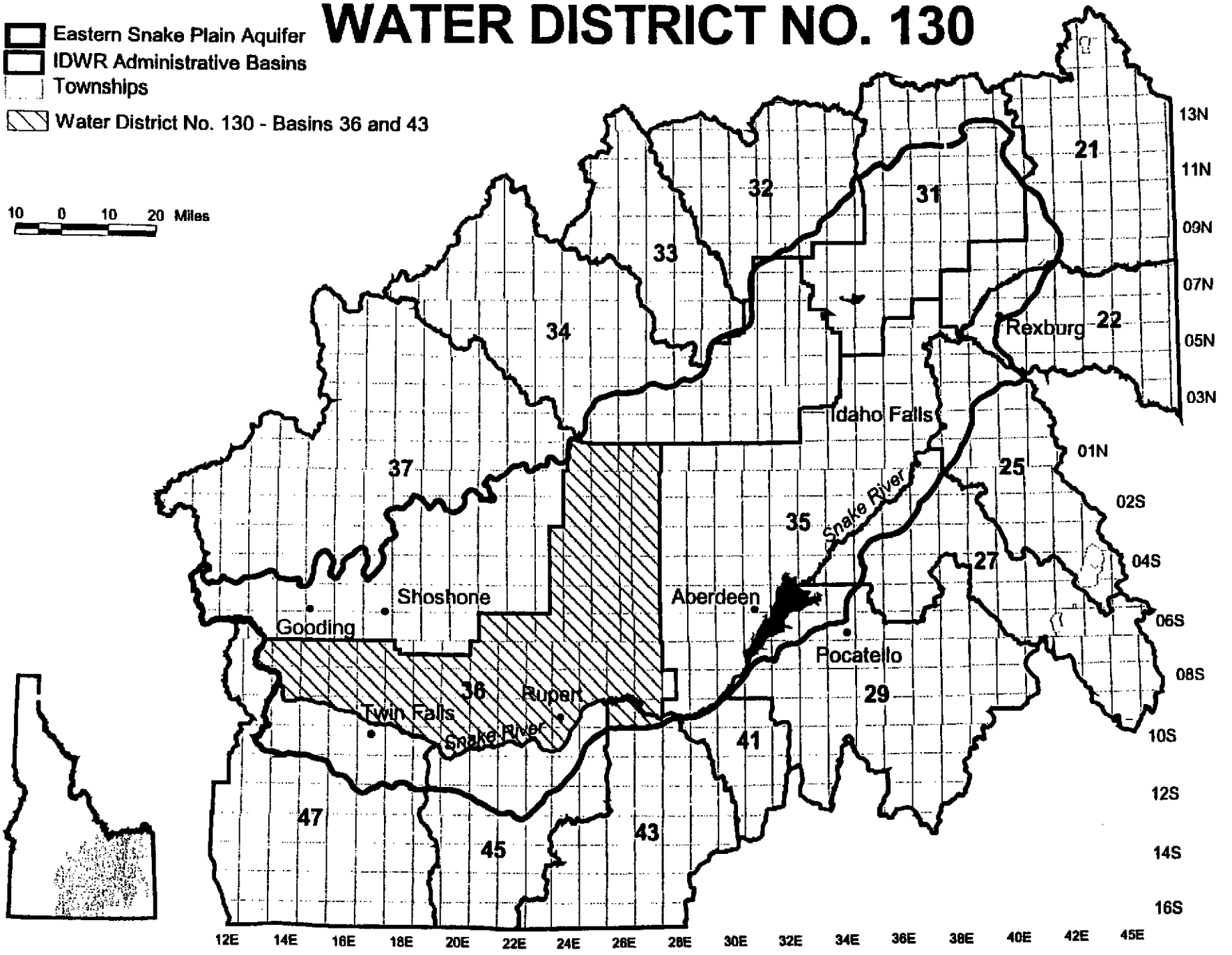


Exhibit F

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CLEAR SPRINGS FOODS, INC.
General Office P.O. Box 712, Buhl, Idaho 83316
Phone 208 543-4316
Sales 800 635-8211
Fax 208 543-5608
www.clearsprings.com

June 7, 2002

Karl Dreher
Director, Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

RECEIVED
JUN - 7 2002
Department of Water Resources

Via Fax: 208-327-7866

RE: Water Delivery Call

Dear Director:

In response to the Department's issuance of Water District 130 Watermaster Instructions No. 02-01, Clear Springs hereby requests the distribution of water to water right no. 36-02708. This request is premised upon instructions nos. 2-6 regarding notification to and subsequent investigation by the watermaster.

The last flow measurements performed jointly by the Clear Lakes Trout Farm and Clear Springs personnel recorded on April 16, 2002 indicate that the total flow from the common source available to water rights 36-02659, 36-02708, 36-07004 and 36-02718 was 330 cfs at that time. The present adjustable weir setting is delivering approximately 173 cfs to Clear Springs. This quantity does not satisfy Clear Springs' 36-02708 right of 200 cfs. Clear Springs can and will put the additional water to beneficial use upon delivery. Documented measurements are available for review and Clear Springs is immediately available to answer any questions regarding either measurements or operations at the Clear Springs facility.

Additionally, Clear Springs would welcome the opportunity to discuss with the watermaster the schedule for flow documentation and distribution of water in question. If you have any further questions, please do not hesitate to call and thank you for your attention to this matter.

Sincerely,

Larry W. Cope
President and CEO

cc. Cindy Yenter
Water District 130 Watermaster

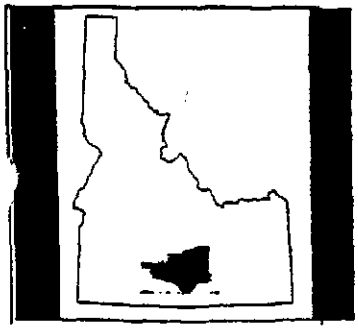
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Letter to Karl Dreher from Clear Springs Foods,
June 7, 2002

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Exhibit G

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STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 19, 2002

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

FACSIMILE – followed by mailed original

HAND DELIVERED

RE: Notice of Intent to Redistribute Flows

Dear Kay and Larry:

On June 7, 2002, Clear Springs Foods, Inc (Clear Springs) submitted a written call for priority distribution of water under right no. 36-2708 from springs tributary to Clear Lakes. The call indicated that the flow from the common source available for water right nos. 36-2659, 36-2708, 36-7004 and 36-2718 was insufficient to fill all of the rights and that water was being diverted under Clear Lakes Trout (Clear Lakes) right no. 36-7004 while the more senior Clear Springs right no. 36-2708 for 200 cfs was not being filled.

Pursuant to amended Watermaster instructions issued June 13, 2002, by IDWR Director Karl Dreher, Tim Luke and I met with the parties at the diversions for the above listed rights on June 18. The purpose of this meeting was to 1) determine available flows and the present distribution of water to the above listed rights, 2) establish that water is needed under the senior priority water right making the call, and 3) confirm that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right.

From our measurements yesterday, Clear Lakes is receiving a measured flow of 147.6 cfs from its combined diversions, and Clear Springs is receiving a measured flow of 173.0 cfs from its main diversion and minor contributing pipelines. Based on these measurements, there is a total of 320.6 cfs available from the source, and Clear Springs is not receiving a full complement of water under the right no. 36-2708. Additional flow distributed under this right would be put to beneficial use at Clear Springs by activating and using 4 raceways which are currently dry and not being used.

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Pursuant to the Watermaster instructions, a 14-day notice shall be provided to the holder of the junior water rights prior to any reduction in distributed flows through adjustment of the 6-foot weir. In this case, the junior right affected is Clear Lakes right no. 36-7004. ***Notice is hereby given*** that the distribution of water to right no. 36-7004 will be reduced by approximately 27 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On **July 3, 2002,** I will re-confirm available flows from the springs and confirm again whether or not right nos. 36-2659 and 36-2708 are being filled in order of priority. If right no. 36-2659 is being filled and water is also being diverted under right no. 36-7004 while right no. 36-2708 is not being filled, I will also confirm that Clear Springs can make beneficial use of any additional water distributed to right no. 36-2708. If Clear Springs can put additional water to beneficial use under its right 36-2708, I will make an adjustment to the 6-foot adjustable weir at the shared diversion, in order that the total spring flows are distributed in the following manner: the first 100 cfs to Clear Lakes Trout right no. 36-2659, the next 200 cfs to Clear Springs right no. 36-2708, and the balance of flows (up to 75 cfs) to Clear Lakes Trout right no. 36-7004. After that time, I will make weekly visits to the diversions to measure available flows, confirm that beneficial use is being made under the respective rights, and make necessary adjustments to the 6-foot adjustable weir.

Representatives from both Clear Lakes and Clear Springs are invited to be present during the July 3 measurement. Since the adjustment wheel for the 6-foot adjustable weir is locked, I will require access to that device on June 3, and will need to have a key provided to me or be allowed to place a Water District lock on the chain at that time.

If you wish to contest this action, you 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). However, such petition may not stay the above action. If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Norm Young and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co.
Charles Honsinger
Terry Huddleston, Clear Springs Foods, Inc.
John Simpson

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LETTER TO ANITA KAY HARDY AND LARRY COPE FROM CINDY YENTER,

Exhibit H

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

CLEAR LAKES TROUT COMPANY, INC., Plaintiff, vs IDAHO DEPARTMENT OF WATER RESOURCES; KARL J. DREHER, Director of the Idaho Department of Water Resources; and CINDY YENTER, Watermaster for Water District 130, Defendants.	Case No. CV 0200377 VOLUME II

DEPOSITION OF KARL J. DREHER

NOVEMBER 1, 2002

BOISE, IDAHO

Patricia M. Blaska
CSR

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DEC [illegible] 2002

DEPOSITION OF KARL J. DREHER

BE IT REMEMBERED that the deposition of Karl J. Dreher was taken by the attorney for Plaintiff, at the offices of Ringert CLark Chartered, located at 455 South Third, Boise, Idaho, before Patricia M. Blaska, a Court Reporter (Idaho Certified Shorthand Reporter Number 83) and Notary Public in and for the County of Ada, State of Idaho, on Friday, the 1st day of November, 2002, commencing at the hour of 9:35 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff: RINGERT CLARK CHARTERED
By: Daniel V. Steenson
And: Charles L. Honsinger
455 south Third
Post Office Box 2773
Boise, Idaho 83701

For Defendant: IDAHO DEPARTMENT OF WATER RESOURCES
By: Phillip J. Rassier
Deputy Attorney General
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Boise, Idaho 83720-0098

For Intervenor Clear Springs Food: BARKER, ROSHOLT & SIMPSON
By: John K. Simpson
205 North Tenth Street
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Post Office Box 2139
Boise, Idaho 83701-2139

Also Present: Kay Hardy
Gregory Kasio

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Whereupon the deposition proceeded as follows:

(Deposition Exhibits 34A through 34G and Exhibits 42 through 47 were marked prior to the start of the deposition.)

KARL J. DREHER

a witness having been previously sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

MR. RASSIER: Dan, before we get going I just wanted to have on the record Karl's comment before we started that his time is somewhat limited today, and he has a meeting that he can't avoid at 1:30. And so we'll be available until 1:00 today.

MR. STEENSON: Appreciate that.

EXAMINATION

BY MR. STEENSON:

Q. Karl, regarding this case, there are certain aspects that were unprecedented or have been unprecedented or fairly novel. One of those is that this case involved the first issuance of watermaster instructions in Water District 130. Isn't that correct?

A. It involved the issuance of the first set of final instructions. We had provided drafts of more general instructions earlier.

Q. Okay. And was this the first occasion in which, in your recollection, the Department has issued instructions for a watermaster in any part of Idaho regarding administration of particular water rights?

A. No.

Q. Okay. And the action taken to adjust the gate at the Clear Lakes facility was the first curtailment in Water District 130; wasn't it?

A. I believe that's correct.

Q. Okay. And the adjustment that you made, is it -- was it the first instance in which a, to your knowledge, in which a senior water right has been administered or adjusted in a response to a call by a junior?

A. The senior water right was not adjusted.

Q. Okay. I think we, during our prior meeting, we did recognize that the gate that was adjusted was a diversion for water right 2659; correct?

A. Correct.

Q. Okay. And to the extent that the diversion of water under 2659 was shifted from the western diversion pool over to the eastern pool, to that extent, it was -- that water right was adjusted; correct?

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done in this case, in order to be as fair as possible, would have been to appoint an independent hearing officer. Now granted, I still would have the final decision making, but certainly if an independent hearing officer, in conducting a hearing, reached a legal conclusion different than what I reached, I would have given that significant consideration.

I'm not opposed to saying; whoops, I made a mistake. If I did.

Q. But by this time you were clear in your mind that you had not made a mistake; correct?

A. Well, at this point in time. But if there was additional law or additional facts that had not been appropriately considered, then I would have been in error.

Q. And only in that contingency; correct?

A. No. If an independent hearing officer concluded that, based upon the same set of facts and the same law, that a different conclusion was appropriate, I would have considered that.

Q. Did you consider advising Clear Lakes that in order to address the weight and the potential bias that could be accorded your own decision by even an independent hearing officer -- who would, after all, be appointed by you -- but did you at any time consider advising Clear Lakes that you were considering such an action so that

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Clear Lakes would have greater confidence they'd get a fair hearing?

A. Well, no. But I mean, Clear Lakes is certainly adequately represented.

Q. Okay. Now, I want to turn to a different topic and ask you to look at Exhibit No. 34.

You might want to look at more than just the first page, Mr. Dreher, since there were various iterations, to make sure that you're confident that you're familiar with the document.

A. Would you like me to read the whole thing before --

Q. No. Just satisfy yourself that you're familiar with the document.

A. I'm familiar with it.

Q. Okay. Could you turn, please, to page number 3? Now, at page number 3 there is a provision which reads; safe harbor; correct?

A. Correct.

Q. Okay. Now, you recognize that among the signatories to this document are Clear Lakes Trout Company, at page 13?

A. Correct.

Q. Okay. And in addition, at page 11, one of the signatories is Clear Springs Foods, Inc.; correct?

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A. Correct.

Q. Okay. Now, this paragraph reads; safe harbor colon, in exchange for the commitments enumerated in paragraph 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7 of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

It's my standing that you're familiar with this provision as well as the others of the agreement?

A. Yes.

Q. Okay. Now, I want to look a little more closely at the language. In the second line there is reference to the undersigned holders of senior priority surface water rights. That would necessarily include, would it not, Clear Lakes and Clear Springs?

A. Yes.

Q. Okay. And in the last line, and I'll beginning with the phrase; comma, of any junior water rights held by or represented by the undersigned.

That would necessarily include Clear Lakes and Clear Springs to the extent that they held junior water rights; correct?

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A. No. That's not my understanding. The holders of the junior priority water rights referenced here are the holders of junior priority ground water rights.

Q. Okay. Do you see any language which would limit the phrase in the manner you're suggesting?

A. In my view, the context of the whole agreement limits it to that application.

Q. Okay. And describe that for me?

A. These agreements were the result of my announced action that I intended to take to curtail junior priority ground water rights because injury was occurring to the senior priority surface water rights in a connected source. When I announced that action, I also stated that we would, the State would, be available to work with the parties to see if there was an accomodation that could be made that would avoid that action. And the two agreements, actually three agreements, the one for Basin 36, Basin 35 and then one involving a processing facility, resulted from that activity. But the context was always curtailing junior priority ground water rights, to avoid injury to senior priority surface water rights.

Furthermore, you know, in this agreement, and the other agreements there was -- there's an accomodation made in exchange for actions that the junior priority ground water right holders would take. There is no such

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accomodation between the junior priority surface water rights and the senior priority surface water rights.

Q. Okay. So let's look at the language first before we talk about context. And again, I'm going to read this phrase; of any junior water rights held by or represented by the undersigned.

And you've recognized already that the undersigned necessarily refers to both Clear Lakes and Clear Springs; correct?

A. Correct.

Q. Okay. So the language, unambiguously and clearly, refers to both Clear Lakes and Clear Springs when it refers here to the undersigned; does it not?

A. Correct.

Q. Okay. Now, my understanding is that you were involved in, at various stages, in the preparation of this agreement; isn't that correct?

A. The negotiations that led to this agreement were actually underway, unbeknownst to me, prior to my announcement that we were going to curtail junior priority ground water rights. The -- there were meetings going on that I can't describe other than the fact I've been told there were meetings going on, between representatives of the grounds water right holders and representatives of the holders of surface water rights from springs.

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Q. Sure.

A. So those discussions were already underway in terms of what might be done. I wasn't aware of that when I took the steps that I did. And after taking those steps then this agreement was flushed out.

I was less involved in the negotiations for Basin 36 than I was in Basin 35. And, you know, it doesn't matter. I mean, the agreement is what the agreement is.

Q. Okay. But despite the fact that you recognize that this language that we've just talked about, unambiguously and clearly, includes Clear Lakes and Clear Springs, my understanding from what you just said is that you want to read it differently because number one, of the context of the whole agreement, and number two, because there was no commendation between junior and senior surface water right users; correct?

A. I disagree with your characterization that I want to read it differently. I believe the agreement pertains to an agreement between holders of senior priority surface water rights, and holders of junior priority ground water rights. And that understanding has been clear consistently, and I think you can see it reflected in the order that I issued approving the agreements.

Q. Okay. We'll definitely talk about that in a minute.

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Maybe one way of trying to get at this question of your interpretation of the agreement is to look at prior versions of the draft. And I'll asking you to turn to Exhibit No. 34A.

And that's a new one. I don't think it's in with the group under the Exhibit 34 tab. I'll ask you to take a look at that, and tell me whether you're familiar with that document?

A. I'm not familiar with this document, I don't believe.

Q. Do you see on the first page that you are a fax recipient. You're indicated as a fax recipient of the document?

A. I see that. I'm looking for a date. I'm trying to see when this came. Okay, all right.

Q. I think if you look at the upper left hand --

A. This was, this was faxed to us as an indication that the parties had reached an agreement in principle. I do recall this.

Q. Okay. And in fact, at this time -- well, at this time there was some urgency in obtaining an agreement in principle so that the Department could avoid taking further action in curtailing pumpers that was imminent on the last day of August or first day of September; correct?

A. This was essence for the Department. The

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Department was prepared to issue notices of curtailment on August 31st.

Q. But in order to avoid sending those notices, it was important to the Department to have something that indicated an agreement in principle; correct?

A. Well, I don't know if I'd characterize it to avoid. I mean, it's really the parties that sought to avoid the curtailment action of the Department. And it was important that we have an indication that there was some stipulated agreement or we intended to proceed.

Q. Okay. And then I'll ask you to turn to Exhibit No. 34B.

And as with Exhibit 34A, you'll see that the indicated parties there include the State of Idaho and the Department of Water Resources; right?

A. I see that indicated but we were certainly not parties. We're not parties to the --

Q. You're not now, but at least this agreement in principle prepared by whomever, contemplated that both the State of Idaho and the Department of Water Resources would be parties to the agreement; isn't that correct?

A. Someone contemplated that, but certainly was not the State.

Q. And you received this; correct?

A. Correct.

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Q. Okay. And after receiving the draft on the 29th, a draft comes out on the 30th in which under the listed parties the Department still appears. Did you take some kind of action to get the Department's name off the list of parties?
A. No, I didn't because I knew we couldn't be parties. It wasn't our position.
Q. Okay. But you recognize that people were circulating drafts and that you were indicated as parties; correct?
A. Yes.
Q. Okay. And then in the draft of August 20 -- I'm sorry, August 30th, Exhibit 34B, second page, there is a line added "H" which reads; this mitigation plan provides safe harbor from interim administration. Those not participating in this mitigation plan in Basin 36 are subject to administration.
Do you recall this as an early version of the Safe Harbor provision?
A. I don't recall it specifically. But.
Q. Looks familiar to you?
A. Looks familiar, yes.
Q. Okay. In looking at Exhibit 34C, looking at the upper left-hand corner there's an indication that this is an even further developed draft agreement in principle

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revised by JKS, which I recognize to be John Simpson. And again the parties included the State of Idaho and IDWR. Do you recall seeing this document?
A. Yes. But again, someone listed us as parties but we weren't parties.
Q. Okay. And it was on the basis of -- what day, was it the 31st or September 1st that you made the decision that based on this agreement in principal, that you would not have to issue curtailment orders?
A. Well, as I recall we made a preliminary determination that we might not have to issue curtailment orders a couple days earlier as we began to get these documents. But it was the 31st when we -- when we said definitely we're not going ahead.
Q. Okay. And it was on the basis, at less in part, of this agreement in principle; correct?
A. As reflected in this and the earlier drafts, yes.
Q. Now, turning then to Exhibit 34D. You'll see that an e-mail cover from Clive Strong to Jeff Fereday and Jo Beeman, subject confidential Basin 36 negotiations. It includes with it a version of the agreement that's looking more like what we have today, at least in terms of form; correct?
A. Correct.

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Q. Now, Clive Strong at this point, he was involved, my understanding, is he was involved on behalf of the Department; correct?
A. Incorrect.
Q. Okay. Who was he involved -- for whom was he doing this work?
A. The State of Idaho, in general. The parties had asked Clive to participate in attempting to mediate an accomodation.
Q. Okay. And were you working with Clive in that effort?
A. Yes.
Q. Okay. So were you aware of this draft on September 5th that Clive prepared? It looks to me like the first iteration that's beginning to take the form that the agreement ultimately took.
A. I, you know, I honestly do not know when I first saw the form of the agreement. I don't recall if I saw this particular iteration or not.
Q. Okay. And turning to paragraph 2.7. This paragraph says something that is more in-line, I think, with the way you're trying to read the current version of the Safe Harbor provision in that it says, quote; in exchange for the commitments by the holders of junior priority ground water rights, enumerated in paragraphs 2.1

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through 2.6, the undersigned holders and representatives of senior priority surface water rights agree not to seek either judicially or administratively the curtailment or reduction other than as provided in paragraph 2.5 of the ground water rights held or represented by the undersigned within Basin 36 for the term of this agreement.
That's reflective of your understanding of the current iteration of the agreement; correct?
A. Correct.
Q. Okay. Because this last phrase is limited to and directed to ground water rights held by or held or represented by the undersigned; correct?
A. Correct.
Q. Okay. And it reflects the accomodation that you're talking about between junior ground water users and senior surface water users; correct?
A. Correct.
Q. Okay. And in this version of the agreement as well, paragraph 1.6 on the prior page. There is what reads more like a recital than anything else and it says, quote; the parties desire to avoid the need for litigation at this time on the existence, nature and extent of the alleged reductions in flows to reaches of the Snake River by ground water pumping within Basin 36, et cetera.
A. Correct.

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Q. And again at 2.8, reflecting your understanding -- reflective of your understanding, 2.8 reads in part, quote; by providing water or in the alternative agreeing to a reduction in ground water diversions as provided in paragraph 2.5, the undersigned holders and representatives of junior priority ground water rights do not concede, et cetera.

Again, the reference is limited to ground water holders.

A. Correct.

Q. And were you aware that at this time Clear Lakes was not being provided copies of these drafts?

A. No.

Q. Okay. Now, I'd ask you to turn -- well, stop there.

Do you recall that on or about September 6, there was a meeting at the Department of Water Resources with a rather large group of ground water users, may have been 35 and -- Basin 35 and Basin 36 users, to discuss the development of these agreements and mitigation and so forth, early September?

A. I don't recall that such a meeting, but we had numerous meetings --

Q. Okay.

A. -- on this. So certainly there could have

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been and I could have been there.

Q. Let me try to frame it in time this way. Shortly after the decision not to issue the curtailment orders, there was a fairly large meeting of folks involved in this matter; correct? Do you remember?

A. I just don't remember that.

Q. Okay. Fair enough. And I'll ask you to turn to Exhibit No. 34E.

And this is the next iteration of the agreement of which you are aware, although we did not receive a version of it at the time. And ask you to look at this version of the agreement and ask if you had seen it or recall it?

A. I would have to compare this to the version, the draft version that I was asked to provide this material on. It was on my computer which we furnished to you. I'd have to compare that to this to see if I had seen this before. Because it wasn't sent to me, apparently.

Q. Okay. And you recognize, don't you, that negotiations during this time frame of early September were occurring between affected ground water pumpers and certain spring water users in the development of this agreement?

A. Yes.

Q. And would it surprise you to know that those negotiations were occurring through -- as indicated by this

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fax cover sheet -- through Jo Beeman and John Simpson?

A. As I stated earlier, neither Clive -- well, I can't speak for Clive -- I was not as directly involved in these negotiations for Basin 36 as I was in 35.

Q. Okay. Did you have the knowledge of who was involved in negotiations during this first three weeks of September time frame?

A. I knew Jo Beeman was involved.

Q. Okay.

A. And I'm not sure I know the extent of Clive's involvement.

Q. Okay. Now, looking at this document, the September 1 version. And turning to --

A. September 1 or September 21?

Q. I'm sorry if I misspoke, September 21. Turning to page 3, if you would.

You can see that in legislative or red-line type format, the Safe Harbor proposition is being changed in the following way; in exchange for commitments -- and the words by the holders of junior priority ground water rights are stricken -- in exchange for commitments enumerated in paragraphs 2.1 through 2.6, the undersigned -- and then language is stricken indicating senior priority surface water rights and adding the word parties -- agree not to seek either judicially or administratively the

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curtailment or reduction other than as provided in paragraph 2.5 of the ground water rights or -- and this language is added; or surface water rights -- held by or represented by the undersigned within Basin 36 for the term of the agreement.

Now this iteration expands, does it not, the scope of the Safe Harbor as compared to the prior draft?

In other words, to make it maybe more direct, the parties to the agreement in this paragraph are agreeing not to seek curtailment or reduction of ground water rights or surface water rights held by the undersigned; correct?

A. That would appear to be what the words are saying. But again, Dan, I wasn't involved in these negotiations. And this is certainly not consistent with what I understood the agreement was.

Q. Okay. Then back to the section, paragraph 1.5 of the agreement. It's similar to the recital we talked about with the prior version. Paragraph 1.5 says in part; the parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water -- and then added is underlined "or surface water", and the paragraph goes on from there.

That too is reflective of this more expanded notion of Safe Harbor; is it not?

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A. Appears to be. But again, I -- this isn't my agreement. I wasn't drafting this language.
Q. Now, if you look at the last page of this agreement, page 5. I'm sorry, page 6. You will see signature lines for both the State of Idaho and the Idaho Department of Water Resources. So whoever was involved in the preparation of this agreement at the time, contemplated that your Department would be a party to it; isn't that correct?
A. It appears whoever was doing the drafting.
Q. Okay. Now, again, in the section or paragraph 2.10 at page 3.
Two point ten, are you with me?
A. I'm sorry.
Q. That's okay. Two point ten, the language reads, and again there is red-line editing indicated. Quote; holders of -- and stricken are the words "junior priority ground". So it would read holders of water rights within Basin 36 who are not party to this or other stipulated agreements, either directly or as member of a -- and stricken are the words, "participating ground water district, and added are the words "party to this agreement", shall not be entitled to the benefits of the Safe Harbor, et cetera.
Again, these changes to the agreement indicate

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the more expanded concept of Safe Harbor reflected in paragraph 2.7; isn't that correct?
A. The language would appear to reflect that. But, Dan, all I cared about what was the final agreement. I didn't --
Q. And Mr. Dreher, we are going to get there so that we can have an understanding of what the agreement does say.
Now, with regard again to 2.9, the prior paragraph, the second sentence reads; the parties also agree not to oppose the Director's instructions to any watermasters to administer -- stricken is the word ground -- so that it reads, administer ground water rights that are in accordance with this agreement.
Again, reflective of the broader Safe Harbor concept reflected in this draft; correct?
A. Correct.
Q. Okay. Now, turning to the next Exhibit, 34F. And I think it will be helpful to you if you can look side-by-side at 34F and 34E, the one we just looked at. So you might want to take that clip off.
Okay. Turning first to 34F. The version of the Safe Harbor provision in that paragraph is paragraph number 2.8, at the third page.
A. Yes.

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Q. I think you can see there as you compare it to paragraph 2.7, the changes are consistent, though not exactly the same as shown in the September 21st draft, consistent with the broader view of safe harbor.
In other words, Safe Harbor; in exchange for the commitments enumerated in paragraphs 2.1 through 2.7, the undersigned holders of senior priority surface water rights and their representatives, agree not the seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.6 of any junior water rights held by or represented by the undersigned within Basin 36.
And if you look at the undersigned at page 6, that includes, in addition to Department of Water Resources and the State of Idaho, Clear Springs, Clear Lakes, Blue Lakes, Pisces Investments, Pristine Springs; correct?
A. I'm still comparing the language.
Q. That's fair.
A. The language in this last Exhibit -- what is it here, 34F -- appears to be closer to what was finally presented.
Q. I'll represent to you, and you can check, it's verbatim the same.
A. Okay. That's fine.
Q. You may want to check it.

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A. That's fine.
Q. Now, looking at paragraph 1.5 of 34F, in the third line we see the reference to surface water users again reflected, reflective, of the more encompassing description of Safe Harbor in 2.8; correct?
A. It references; or surface water.
Q. Okay. And paragraph 2.11, if you compare that to the same section just with a different number 2.10, in 34E. Comparing again section 2.11 in 34F, to 2.10 in 34E; again the notion that the Safe Harbor provision and the context for this agreement was limited to protection for ground water pumpers has been changed; has it not?
A. Well, the words have been changed. You know, I'm not sure that I can speak to the context because I was not involved in these negotiations other than providing the language that I was asked to provide.
Q. But I'm asking about the words that you see on the page.
A. The words are broader in scope.
Q. And similarly, again, in section 2.10, which was in the prior version 2.9, the second sentence reads, as it had -- as changed; the parties also agree not to oppose the Director's instructions to any watermasters to administer water rights. Not simply administer ground water rights; correct?

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A. That's what it says.
Q. Okay. And all these changes are reflective of this agreement being changed at this point to provide Safe Harbor for everybody who signed it; correct?
A. That was never my understanding.
Q. I'm asking about the words on the page.
A. I don't think you can look at the words on the page outside of the context of the agreement.
Q. Are you thinking that the words on the page are unclear to you?
A. No. I believe the words on the page can't be taken out of context.
Q. Okay. Let's talk about that context for a moment. You're aware of the -- that the attorney for the North Snake Ground Water District who proposed these changes, has advised your department and members of Water District 130, that it was very much the intention by these changes to make sure that junior surface water holders were included in the Safe Harbor protection from calls by senior surface water users. You're aware of that; aren't you?
A. I'm aware that that's their interpretation, yes.
Q. Okay. Now, as to the rationale for it, and the lack of an accomodation in your mind between a junior surface water user and pumpers on the plain. Isn't it --

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doesn't it make sense that if a junior surface water user did not have any Safe Harbor protection, as has occurred here with the way you've implemented this agreement and with the instructions you've written, then the junior is in a position, would be in a position of being curtailed in response to a call by a senior surface water right holder; correct?
A. Correct.
Q. But having no remedy against any other more junior water right holder in the whole water district that was protected by this agreement; correct?
A. Only if they were signatories to this agreement. If they were not signatories to the agreement then they would be exposed to a delivery call.
Q. Wasn't this protection necessary to induce holders of junior surface right holders to enter the agreement? Otherwise they're giving up substantial rights; are they not?
A. I don't know that that was necessary to induce it or not.
Q. It make sense to you, though; doesn't it?
In other words, why in the world would a junior surface water right owner agree to forgo any remedy against any other junior pumper, in all of Water District 130, when that same junior would be subject to a call by a

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senior?
A. Because, again, in -- in my understanding of what was being proposed, the junior ground water users were going to provide replacement water equal to what would have been discharged through the springs had we gone ahead with the curtailment orders. That was the accomodation. They provided replacement water, that would benefit all of the surface water right holders regardless of their priority.
Q. But you can see, can't you, Karl, the bind that you're suggesting by your interpretation of the agreement, entering this agreement puts junior surface water right owners in? In that they would be foregoing any remedy against any junior pumper, but be exposed to a call by a senior surface water right owner?
A. My concern --
Q. You can understand that a --
A. My concern is --
Q. I want you to limit your answer to my question. You can understand that bind from a perspective of a junior surface water owner?
A. But the junior surface right holder was exposed to a delivery call anyway. That's why I don't understand.
Q. Yeah. But, but as with the situation here, the junior surface water right owner could seek curtailment

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of other juniors; correct?
A. Of -- yeah, that's correct. Of right holders that were more junior in priority; that's correct.
Q. And that, so as with this case, Clear Springs makes a call against Clear Lakes. And you take 27 cfs away from Clear Lakes, forcing Clear Lakes to dry up 40 percent of its facility. Now, Clear Lakes has signed this agreement in which it has agreed to forego any call against any junior pumper. So Clear Lakes has no remedy. You understand that; don't you?
A. I understand that they have no remedy against the holders of junior priority ground water rights who signed this agreement.
Q. So you understand how this provision is necessary to induce someone in Clear Lakes' position, to enter this agreement in the first place?
A. No. I don't understand that. Because, again, the accomodation was replacement water in exchange for curtailment.
Q. But, let's examine that. Do you envision any circumstance in which the amount of replacement water that would come from implementation of the measures proposed by the pumpers, would replace the 27 cfs lost as a result of this call to Clear Lakes?
A. It probably would not result in 27 cfs of

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additional discharge at these particular springs.
The injury that we could quantify that was occurring was 40,000 acre feet in the entire reach of Thousand Springs. That was the injury that we felt we could quantify with certainty.
Q. And I think as you can see, if Clear Lakes had not signed this agreement, it would be able to make a call against those pumpers; wouldn't it?
A. Correct.
Q. But since it signed this agreement, it can't pursue that remedy without breaching the agreement; correct?
A. Correct.
Q. Okay. So for any surface water user who had junior rights, in fact Clear Springs has rights that are junior to Clear Lakes' rights; correct?
A. Correct.
Q. So this, this same protection that I'm talking about for junior surface water users, is equally potentially beneficial to Clear Springs; correct?
A. You know, again, my concern was the injury caused by junior priority ground water rights. That was what I was focusing on.
Q. So it's quite possible, it's sounds like, since you're saying you were not involved in the drafting

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of this agreement, and you had a focused view of the issue, that you may have misinterpreted this agreement; correct? In this respect that we're talking about.
A. No. If someone felt that I had misinterpreted the agreement, then why wouldn't they raise the issue when I issued the order approving the agreement?
Q. I'm not asking about -- I'm not asking about what someone would do in reaction to your misinterpretation, I'm asking about the possibility that you have missed this fundamentally important aspect of the agreement, to anyone who held junior surface water right owners?
A. If in fact that's what the agreement means, then that is not how I interpreted it.
Q. And, again, when we read the plain language of the document, the commitment is not to seek by any holder of any senior priority surface water right, any of the unsigned holders of senior priority surface water rights, that none of them will seek curtailment or reduction, of any junior water rights held by or represented by the undersigned, which includes Clear Lakes and Clear Springs and you've recognized that. And there is no qualifying language in this unambiguous phrase; correct?
A. There is no qualifying language. But if that's what it means, I don't understand why you wouldn't

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have raised that issue when I was asking for any factors that you felt were relevant.
Q. Okay. That's not responsive to my question. Now you're addressing the manner in which Clear Lakes pursued remedies. And what I'm trying to focus your attention on is what this document means.
A. And I don't think the document means, the final version of the document, I don't believe it means what you're saying it means.
Q. Okay. Again, when we turn to the final version of the agreement, and let's do that. Turn to Exhibit No. 34, paragraph number 2.8. That language is the same as the language in the versions in Exhibit 34F and 34E; is it not?
A. It appears to be.
Q. Okay. And in fact, using the words the undersigned, is not a substantive change from the version, the language in the September 21st draft where it refers to curtailment, reduction of ground water rights or surface water rights held by or represented by the undersigned. Both are all encompassing; correct?
A. The words, without context, are all encompassing.
Q. And it sounds like you're simply rejecting the context that I'm providing you, by discussing the

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importance of providing for junior surface water users Safe Harbor?
A. I'm not rejecting it. I'm just saying that's never been my understanding, and it has not been raised prior to just recently.
Q. And you recognize that it's not just me that's raising it now in the context of this deposition with you; correct? You recognize that there are others who are raising this very same point with you, and with other members of Water District 130; right?
A. The only other person that I'm aware of his Jo Beeman that's made this -- has this particular interpretation.
Q. And Jo Beeman represents the North Snake Ground Water District; correct?
A. That's my understanding.
Q. On behalf of her clients then she is making this position known to you, the Department, and other water users; correct?
A. She apparently made this statement at a meeting a couple days ago.
Q. And it is consistent with the plain language of the document, without the context that you would provide; right?
A. It's consistent with that one provision --

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Q. Okay. Let's look at some --
A. -- of the document.
Q. Let's look at some other changes, some other provisions of the agreement as it exists today. Again, at section 1.5. Consistent with the change that resulted from the September 21st draft that is in Exhibit No. 34E.
The language is; the parties desired to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water, under junior priority water rights within Basin 36.
That is reflective of the broader concept of Safe Harbor that we discussed in the prior drafts; correct? Because the reference is to ground water or surface water under junior priority rights; correct?
A. Correct.
Q. Okay. And again, I want you to compare, look at paragraph 2.12 in Exhibit 34, and ask you to turn at the same time to paragraph 2.10 in the September 21st draft.
A. Which is what Exhibit?
Q. I'm sorry. Exhibit 34E, at page 3, 2.10; and 34E at page 3.
And as we discussed before, changes were made to that language at that time to reflect the broader Safe

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Harbor protection that I've been suggesting to you. And that language carries over in the current and final agreement, paragraph 2.12 in the second sentence which reads, quote; holders of water rights within the areas subject to interim administration under this agreement, who are not party to this or another stipulated agreement either directly or as a member of a party to this agreement, shall not be entitled to benefits of the Safe Harbor as provided by paragraph 2.8.
Again, the discussion of Safe Harbor is expanded to make sure that it was not limited, as you suggest, to ground water pumpers; correct?
A. I haven't found the exact sentence. I've got the second sentence in 2.12 of 34.
Q. First sentence of 2.12.
A. First sentence. Okay, of 2.10?
Q. Correct.
A. Well, there are some language differences but it does -- the language is fairly expansive.
Q. To include the concept of Safe Harbor being provided for junior surface water right owners as well; correct?
A. Well, I didn't reach that conclusion, Dan.
Q. I'm asking you what conclusion do you reach from looking at it right now?

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A. My conclusion, in terms of the final agreement, is the same.
Q. I'm asking you to tell me what that language indicates to you. It is the same as prior draft language which you have previously said reflects the broader view of the Safe Harbor provision that includes surface water rights; correct?
A. This language reflects the broader view. The question is does the agreement in its entirety reflect the broader view.
Q. Okay. Now, what aspect of the agreement in your mind, contradicts, makes it impossible to read the plain language to include Safe Harbor for junior surface water right owners? What language says that? What language, as you read it, says that reading is not permissible under this agreement?
A. It's not that the language is -- reading the language that way is impermissible. The point is that this all stemmed from an action to avoid curtailment of junior priority ground water rights. And there was an accomodation made by those holders of junior priority ground water rights. I still don't see the accomodation made by the holders of junior priority surface water rights.
Q. How about foregoing any ability to make a call

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against junior ground water pumpers in the event surface water right owners called you out. Isn't that accomodation? The answer clearly is yes.
A. Yes.
Q. Okay. Now, in your order creating Water District 130 -- this is Exhibit No. 35, paragraph 5 -- I take it that this is reflective of your understanding at this time of the agreement. Paragraph 5 at page two reads, quote; under the agreement the represented holders of senior priority surface water rights agree not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments; et cetera.
That is certainly true; correct?
A. Correct.
Q. It does not say that there was no commitment and no Safe Harbor to protect junior surface water right owners from a call by senior surface water right owners. It didn't say that; does it?
A. That's correct.
Q. Okay. And then at page 5 in paragraph 10, 10(c), my understanding is that once -- eventually the Department was taken off of any signature page of the interim stipulated agreements; correct?
A. Correct.

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Q. Okay. And the reason for that was that ultimately the Department would be in a position of approving the agreements and enforcing them; correct?
A. Correct.
Q. So it made no sense for the Department to be a party in that situation; correct?
A. It never made sense for the Department to be a party to this agreement because of that.
Q. Even though Clive and others continued to have the Department as a signatory for some time; correct?
A. In the drafts they could, but I don't know why they did that.
Q. For whatever. And this order reflects that that decision that the Department, that the Department through you, would be under 10(c) enforcing the provisions of this; correct?
A. Correct.
Q. Okay. And that in 10(d), the curtailment that would occur would be junior priority water rights if not covered by a stipulated agreement. There is no limiting language there, again, that says, senior priority or injury to -- I'm sorry. Strike that.
The curtailment that would occur, is to any right not covered by a stipulated agreement; correct?
A. Correct.

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Q. Okay. Now, whether or not Clear Lakes chose at a particular time to raise this issue of the interim agreements, doesn't change what they say; correct?
A. Correct.
Q. It doesn't change the binding nature of the agreement; correct?
A. Correct.
Q. It doesn't change your obligation to enforce the agreements?
A. Correct.
Q. Okay. Now, the last time we talked about various legal concepts, one of which is beneficial use. And I want to try to get an understanding of what you mean by beneficial use. And I've looked back at a brief that the State filed in Basin Y10 with the Supreme Court in which the State described beneficial use in a manner and I want to see if you agree with it.
And first, I'll ask you with regard to Basin Y10, that was a case in which the Department of Water Resources, though not a party, was very much interested; correct?
A. I don't recall what Basin Y10 was about.
Q. That's the partial forfeiture case.
A. Oh, yes. We were interested in the outcome of that. Sure.

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Q. Okay. And in the -- off the record for a moment.
(Discussion off the record.)
MR. STEENSON: Back on the record.
BY MR. STEENSON:
Q. Exhibit 43. I'll represent to you, as you can see from the first page, that this is a brief filed by the State in Basin Y10. And ask you to turn to page number 3. At the bottom under the heading (a) there's a sentence that begins -- the essence of the paragraph begins with the sentence, quote; the essence of the prior appropriation doctrine is that beneficial use is the measure and the limit of water right. The next sentence reads, quote; the elements of a water right are used to define beneficial use. Under Idaho Code 42-1411(2), the following elements among others define beneficial use in Idaho. Colon: Priority, place of use, purpose of use, season of use, point of diversion, source and quantity. The actual beneficial use is defined by the historical use of the right.
Are you in agreement with what is written in though sentences that I just read as to what beneficial use is?
A. Well, I don't entirely agree with the sentence that says the -- well, I take that back. I see some

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qualifying language now that's -- under Idaho Code the following elements, among others, define beneficial use in Idaho; priority, place of use, purpose of use, season of use, point of diversion, source and quantity.
Yeah, I agree with that.
Q. Okay. And would you add other elements or something to that definitional language that's not there?
A. Well, beneficial use is the actual use, as under these elements.
Q. Okay. Fair enough. And then we talked about the notion of a diversion with reference to the east pool, eastern diversion pool and the western diversion pool. And I know that you, coming from the State of Colorado, often refer to case law and your experience in Colorado for guidance. And so I'll ask you to look at Exhibit No. 44, and at page 930, and I'll give you a moment to read.
I guess I'll ask you -- refer you to the prior page 929, at the paragraph in the second column which begins with the word water?
A. Okay.
Q. And then carrying over to the column in the discussion of what it means to divert water. I'll give you a moment to read that.
Off the record.
(Discussion off the record.)

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DEC 17 2003

[redacted]
From: Strong, Clive [cstrong@ag.state.id.us]
Sent: Wednesday, September 05, 2001 6:52 PM
To: 'Fereday, Jeff'; 'Beeman, Jo'
Subject: Confidential Basin 36 Negotiatons

Attached is my effort to capture our discussions today.



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[illegible] 2003

EXHIBIT
34 D

E-MAIL FROM CLIVE STRONG TO JEFF
FEREDAY, DATED SEPT 5, 2001

INTERIM STIPULATED AGREEMENT FOR IDWR ADMINISTRATIVE BASIN 36

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users on this _____ of September, 2001, in consideration of the promises stated in this Agreement.

1. This Agreement is made in reference to the following facts:

1.1 Surface water users or their representatives within the Snake River Basin along and generally above the Thousand Springs reach of the Snake River claim that diversions of ground water from the Eastern Snake Plain Aquifer (ESPA) by holders of junior priority ground water rights are at times causing injury to their senior surface water rights;

1.2 The Director of the Idaho Department of Water Resources (Director) stated his intent to curtail certain ground water rights within portions of Basin 36 with priority dates junior to July 21, 1967 based upon his finding that pumping of water under such rights is causing significant reductions in spring flows tributary to the Kimberly to King Hill, or Thousand Springs reach of the Snake River during the current drought conditions;

1.3 The undersigned ground water users or representatives of ground water users claim that there is not sufficient information to establish that diversions under their junior priority ground water rights are causing either significant reductions in spring flows or injury to surface water rights senior in priority;

1.4 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;

1.5 The new ESPA Ground Water Model is expected to provide the parties with more reliable information regarding the alleged impacts of ground water diversions from the ESPA on flows in defined reaches of the Snake River; and

1.6 The parties desire to avoid the need for litigation at this time on the existence, nature and extent of the alleged reductions in flows to reaches of the Snake River by ground water pumping within Basin 36 pending the completion of the new ESPA Ground Water Model.

2. Interim Stipulated Agreement:

2.1 The undersigned holders or representatives of ground water rights in Basin 36 agree that in exchange for the safe harbor provided in paragraph 2.6,

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Northside Canal Company (NSCC) shall apply annually for 40,000 acre feet of water and North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) shall pay the necessary advances to accompany said applications in 2002 and 2003 for diversion into the NSCC canal at such times as NSCC agrees. The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced by any other water provided through the NSCC system by entities other than the NSGWD and MVGWD within Basin 36 and other related administrative areas outside of Basin 36.

2.2. NSGWD: Pump surface water made available first, before ground water.

2.3 NSGWD members within the NSCC service area agree to use the storage water described in paragraph 2.1 in lieu of pumping a similar amount of ground water. (Use existing NSCC headgates).

2.4 NSGWD ground water users who are also NSCC shareholders within the NSCC service area will use their best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.

2.5 In the event the undersigned holders or representatives of junior priority ground water rights do not provide the full amount of water required by paragraph 2.1 in any year, the holders of junior priority ground water rights who are party to this Agreement agree to reduce the diverted volume for irrigation during that year by ten (10) percent. If some but not all of the water is provided under paragraph 2.1, an adjustment to curtailment shall be made in proportion to the amount of water provided under paragraph 2.1.

2.6 NSGWD agrees to use its best efforts to provide twelve (12) CFS of water to Buckeye from Riley Creek as contemplated in the July 2001 letter to NSGWD.

2.7 In exchange for the commitments by the holders of junior priority ground water rights enumerated in paragraphs 2.1 through 2.6, the undersigned holders and representatives of senior priority surface water rights agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.5, of the ground water rights held or represented by the undersigned within Basin 36 for the term of this agreement.

2.8 By providing water or in the alternative agreeing to a reduction in ground water diversions as provided in paragraph 2.5, the undersigned holders and representatives of junior priority ground water rights do not concede that their diversions are causing injury to senior priority surface water rights, nor do the undersigned holders or representatives of senior priority surface

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water rights concede that the amount of replacement water accepted under this stipulated agreement fully compensates for the extent of the injury they allege.

2.9 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director, during the term of this Agreement, to implement interim administration of water rights in Basin 36, and other related administrative areas outside of Basin 36, and to provide instructions to any watermasters to administer ground and surface water rights within any water district in accordance with this Agreement.

2.10 Holders of junior priority water rights within Basin 36 who are not parties or represented by a party to this agreement shall not be entitled to the benefits of the safe harbor provided by paragraph 2.7. The parties agree to request the Director to notify holders of water rights in Basin 36 who are not a party or represented by a party to this Agreement that if they elect not to join in this Agreement or join an entity that is a party to this Agreement, diversions of water under their water rights may be subject to curtailment under the prior appropriation doctrine. [NSGWD shall set forth the terms and parameters for addendums to this Agreement for those users who need safe harbor] [Policy guidance is needed on this sentence].

3. Process for Future Conflicts:

3.1 For the term of this Agreement, the parties agree to continue discussions regarding a long-term agreement. Including:

.1 [The ESPA Model capabilities]. Alternative language [Cooperation in the ongoing ESPA aquifer studies, including providing the information necessary to determine the existence, nature and extent of any injury to senior water rights that may be occurring due to ground water pumping].

.2 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.

3. Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

4. Enforcement:

4.1 The parties understand that the Director intends to approve this stipulated agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party to this

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Agreement may petition the Director or the Director on his own initiative may seek curtailment of any or all of the ground water rights within Basin 36 in accordance with the prior appropriation doctrine.

4.2 Upon approval from the SRBA District Court for interim administration of ground water rights within Basin 36 and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnection of ground water and surface water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues, the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River.

5.2 This Agreement has been reached as the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

6. Dismissal or Stay of Pending Actions:

6.1 Based upon the Director's action to stay further administrative proceedings regarding his Order In The Matter of Designating the Thousand Springs Ground Water Management Area, unless this Agreement is breached, the Idaho Ground Water Appropriators, Inc. agrees to withdraw its Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that it previously filed in the Sixth Judicial District Court.

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BEEMAN & ASSOCIATES, P.C.
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FAXED

FAX COVER SHEET

September 21, 2001

TO:	Mike Faulkner	Ralph May	John Simpson
FAX:	208-934-5570	208-324-2166	208-736-0041

FROM: Josephine Beeman

FILE NO.: 1780.2a (Ground Water Management Area Designations) (Basin 36)

MESSAGE: **Following is the Sep 21 draft of the "Interim Stipulated Agreement" for Basin 36 regarding the ground water management area designation. Should the following paragraph be included regarding "Process for Future Conflicts":**

"The undersigned parties agree to develop a process by December 1, 2001 for ascertaining the extent of any injury caused by ground water diversions in the basins under junior priority water rights to senior priority surface water rights and the development of any mitigation plans subsequently required."

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NUMBER OF PAGES BEING TRANSMITTED = This cover page plus 6
IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL JOYCE AT (208) 331-0950.
ORIGINAL TO FOLLOW: YES ___ NO ___X

EXHIBIT
34 E 00010

7 2003

INTERIM STIPULATED AGREEMENT
FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users, or their representatives, on this _____ of September, 2001, in consideration of the promises stated in this Agreement. The term of the Agreement is from September _____, 2001 to December 31, 2003.

1. This Agreement is made in reference to the following facts:

1.1 ***To be provided by Karl Dreher;***

1.2 The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin and any alleged injury to surface water rights as a right of the diversion of water from the Eastern Snake Plain Aquifer (ESPA);

1.3 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;

1.4 The new ESPA Ground Water Model is expected to provide the parties with more reliable information regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River; and

1.5 The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36 pending the completion of the new ESPA Ground Water Model. The parties understand that this agreement and IDWR administrative actions described in this agreement may include water rights in areas immediately adjacent to Basin 36 as necessary to respect hydrologic information and water user organization boundaries. All subsequent references to Basin 36 in the agreement include this qualification.

2. Interim Stipulated Agreement:

2.1a ~~The undersigned holders of ground water rights in Basin 36 or their representatives agree that in exchange for the safe harbor provided in paragraph 2.7, Northside Canal Company (NSCC),~~ Upon the payment of necessary advances by ~~and~~ North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD), Northside Canal Company (NSCC), shall apply annually in 2002 and 2003 for up to 40,000 acre feet of water from rental pools above Milner for diversion into the NSCC canal at such times as NSCC agrees.

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~~and North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) shall pay the necessary advances to accompany said applications in 2002 and 2003 for diversion into the NSCC canal at such times as NSCC agrees.~~ NSGWD agrees to pay the necessary advances for up to 25,000 acre feet of water, and MVGWD agrees to pay the necessary advances for up to 15,000 acre feet of water. The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced ~~pro rata~~ by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC system by entities other than the NSGWD and MVGWD within Basin 36 and other related administrative areas outside of Basin 36.

2.1b The parties to this Agreement agree that the costs borne by NSGWD to implement this Agreement shall be fairly shared by all parties who benefit from the safe harbor in paragraph 2.7.

2.2. NSGWD members who are shareholders in NSCC will make best efforts to use their NSCC shares on appurtenant lands before using ground water, unless the NSCC water is not available. ~~: pump surface water made available first, before ground water.~~

2.3 NSGWD members within the NSCC service area ~~agree~~ will make best efforts to use the storage water described in paragraph 2.1 in lieu of pumping a similar amount of ground water. (Use existing NSCC headgates).

2.4 NSGWD ~~ground water users~~ members who are also NSCC shareholders within the NSCC service area will ~~use their~~ make best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.

2.5 ~~In the event~~ The following provision will apply during the irrigation season in any year in which the following conditions occur: If by April 1 in any year ~~the undersigned holders of junior ground water rights or their representatives do not provide the full amount of water required by paragraph 2.1 by April 1 in any year~~, none of the 40,000 acre feet of water identified in paragraph 2.1a is provided either by this agreement or by other replacement water, the undersigned holders of ~~junior~~ ground water rights agree that ~~to reduce~~ their diversion and use of ground water irrigation ~~under their~~ water rights ~~for irrigation during that year by~~ will be ten (10) percent less than their base of ground water irrigation rights, based on power and fuel consumption records, or other basis acceptable to the Director. ~~reduced pro rata by the volume of any other replacement water otherwise provided in that year.~~ If by April 1, some but not all of the ~~water~~ 40,000 acre feet identified in paragraph 2.1a is provided (by this agreement and/or other replacement water) an adjustment to ground water reductions ~~curtailment~~ shall be made in proportion to the percentage of the 40,000 acre feet ~~amount of water~~ provided. ~~under paragraph 2.1.~~ In lieu of individual reductions, ground water districts may achieve reductions on a district wide basis.

2.6 NSGWD, Buckeye, and DWR agree to use ~~its~~ their best efforts to provide twelve (12) CFS of water to Buckeye from Riley Creek by the 2002 irrigation season as contemplated in the July 2001 letter to NSGWD.

2.7 Safe Harbor: In exchange for the commitments ~~by the holders of junior priority ground water rights~~ enumerated in paragraphs 2.1 ~~and~~ through 2.6, the undersigned ~~holders of senior priority surface water rights and their representatives~~ parties agree not to seek either judicially or administratively the curtailment or reduction (other than as provided in paragraph 2.5) of the ground water rights or surface water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

2.8 By providing replacement water or in the alternative agreeing to a ~~pro rata~~ reduction in ground water irrigation diversions and use, the undersigned holders of ~~junior priority~~ ground water rights and their representatives do not concede that diversions of ground water are causing injury to senior priority surface water rights, nor do the undersigned holders of senior priority surface water rights and their representatives concede that the amount of replacement water accepted under this stipulated agreement fully compensates for the extent of the injury they allege.

2.9 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in Basin 36, and other related administrative areas outside of the Basins. The parties also agree not to oppose the Director's instructions to any watermasters to administer ~~ground~~ water rights that are in accordance with this Agreement. The parties understand that water districts to be created as a result of this agreement are intended to include only ground water rights but may include certain surface water rights not already included in water districts, if any, that are required to be included for proper administration. The parties further agree to work collaboratively with the Director to expeditiously create water districts to implement this agreement.

2.10 Holders of ~~junior priority~~ ~~ground~~ water rights within Basin 36 who are not party to this or other stipulated agreement, either directly or as a member of a ~~participating ground water district~~, party to this Agreement, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.7. The parties agree to request that the Director notify ~~holders of ground~~ water right holders in ~~the~~ Basins 36, and other related administrative areas outside of the Basins who are not party to this or another stipulated agreement that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

2.11 The parties to this Agreement may extend the term of this Agreement beyond 2003 by mutual consent on an annual basis.

3. Process for Future Conflicts:

3.1 For the term of this Agreement, the parties agree to continue discussions regarding a long-term agreement. Including:

.1 The ESPA Model capabilities.

.2 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.

3. Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

.4 Adoption of conjunctive administration rules based on the results from the new ESPA ground water model and other necessary information to more specifically govern IDWR's administration of water rights from connected sources of surface and ground water within the ESPA.

.5 Consideration of a mechanism to account for changes in the use of water rights since the commencement of the SRBA and development of a means to administer water rights in the context of such changes.

4. Enforcement:

4.1 The parties understand the Director intends to approve this stipulated agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party may petition the Director, or the Director on his own initiative, may seek an appropriate remedy.

4.2 Upon the SRBA District Court issuing an order for interim administration of water rights within Basin 36 and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnections of ground water and surface water sources in the Snake River Basin along the reach of the Snake River along and above the Thousand Springs reach of the Snake River and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues,

the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River.

5.2 This Agreement has been reached as the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

6. Dismissal or Stay of Pending Actions:

6.1 Based upon the foregoing and the parties' understanding that the Director will stay further administrative proceedings regarding his Order In The Matter of Designating the Thousand Springs Ground Water Management Area, and unless this Agreement is breached, the parties agree as follows:

6.2 The Idaho Ground Water Appropriators, Inc. and other plaintiffs agree to secure voluntary dismissal, without prejudice, of their Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that they previously filed in the Sixth Judicial District Court.

6.3 Representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

7. General Provisions:

7.1 The provisions of this Agreement are not severable.

7.2 This Agreement shall bind and inure to the benefit of the respective successors of the parties.

7.3 This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

7.4 Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

7.5 This Agreement is executed in triplicate. Each of the three (3) Agreements with an original signature of each party shall be an original.

7.6 This Agreement shall be effective when executed by all of the parties.

The parties have executed this Agreement the date following their respective signatures.

Date: _____, 2001 _____
North Snake Ground Water District

Date: _____, 2001 _____
Magic Valley Ground Water District

Date: _____, 2001 _____
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Date: _____, 2001 _____
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Pisces Investments

Date: _____, 2001 _____
Pristine Springs

Group Send Confirm

WorkCentre 450c report for
BEEMAN & ASSOCIATES
331 0954
Sep-21-01 01:29 PM

Successful

Pages scanned 7
Pages confirmed 21

Job	Sent	To Remote Station	Duration	Mode	Pages	Results
273	Sep-21 01:19pm	208 934 5570	02:50	ECM G	7/ 7	OK,144
273	Sep-21 01:22pm	208 324 2166	03:39	ECM G	7/ 7	OK,144
273	Sep-21 01:26pm	208 736 0041	02:52	ECM G	7/ 7	OK,144

$$$ Phone charge code	F Forward	P Poll	48 4800 bps chosen
A Auto-distribute	G Group dial	PC to/from PC	96 9600 bps chosen
C Cover page	M Mailbox	PW Password	144 14400 bps chosen
ECM Error Correction		RM Receive to memory	

BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, Idaho 83702
Phone: (208) 331-0950
Fax: (208) 331-0954
E-Mail: jengell@micronet

FAX COVER SHEET

September 21, 2001

TO:	Mike Faulkner	Ralph May	John Simpson
FAX:	208-934-5570	208-324-2166	208-736-0041

FROM: Josephine Beeman

FILE NO.: 1780.2a (Ground Water Management Area Designations) (Basin 36)

MESSAGE: Following is the Sep 21 draft of the "Interim Stipulated Agreement" for Basin 36 regarding the ground water management area designation. Should the following paragraph be included regarding "Process for Future Conflicts":

"The undersigned parties agree to develop a process by December 1, 2001 for ascertaining the extent of any injury caused by ground water diversions in the basins under junior priority water rights to senior priority surface water rights and the development of any mitigation plans subsequently required."

The information contained in this facsimile is confidential information or attorney work product or both and is for the exclusive use of the intended recipient listed above. Any reading, disclosure, use or reproduction of this communication other than by the intended recipient is prohibited. If you have received this communication in error, please notify us by collect telephone call immediately and return the communication to us by U.S. Mail.

NUMBER OF PAGES BEING TRANSMITTED = This cover page plus 6
IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL JOYCE AT (208) 331-0950.
ORIGINAL TO FOLLOW: YES ____ NO __X

E-MAIL TO MIKE FAULKNER, RALPH MAY, JOHN SIMPSON
FROM: JOSEPHINE BEEMAN, DATED SEPTEMBER 21, 2001

Sept. 24, 2001
5:30

INTERIM STIPULATED AGREEMENT
FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users, or their representatives, on this _____ of September, 2001, in consideration of the promises stated in this Agreement. The term of the Agreement is from September _____, 2001 to December 31, 2003.

1. This Agreement is made in reference to the following facts:

1.1 The Director of the Idaho Department of Water Resources (Director) stated his intent to entirely curtail diversions under certain water rights for ground water beneath portions of Basin 36 (the Basin), an administrative sub-basin for surface water. The Director's intent was based upon his findings, set forth in his administrative order designating the Thousand Springs Ground Water Management Area dated August 3, 2001, that diversions of ground water under such rights cause significant reductions in spring flows tributary to the Thousand Springs reach of the Snake River, and that those reductions will further reduce the diminished water supply available to satisfy senior priority surface water rights during current drought conditions.

1.2 The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin and any alleged injury to surface water rights as a right of the diversion of water from the Eastern Snake Plain Aquifer (ESPA);

1.3 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;

1.4 The new ESPA Ground Water Model is expected to provide the parties with more reliable information regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River; and

1.5 The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36 pending the completion of the new ESPA Ground Water Model. The parties understand that this agreement and IDWR administrative actions described in this agreement may include water rights in areas immediately adjacent to Basin 36 as necessary to respect geohydrologic characteristics and water user organization boundaries. All subsequent references to Basin 36 in the agreement include this qualification.

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2. Interim Stipulated Agreement:

2.1 Upon the payment of necessary advances by North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD), Northside Canal Company (NSCC), shall apply annually in 2002 and 2003 for up to 40,000 acre feet of water from rental pools above Milner for diversion into the NSCC canal at such times as NSCC agrees. NSGWD agrees to pay the necessary advances for up to 25,000 acre feet of water, and MVGWD agrees to pay the necessary advances for up to 15,000 acre feet of water. The separate obligations of NSGWD and MVGWD to pay for storage shall be based upon their proportionate share as described above. The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC system by entities other than the NSGWD and MVGWD.

2.2 NSCC agrees to rebate any monies provided by ground water users that is not used to acquire storage water required by paragraph 2.1.

2.3 NSGWD members who are shareholders in NSCC will make best efforts to use their NSCC shares on appurtenant lands before using ground water, unless the NSCC water is not available.

2.4 NSGWD members within the NSCC service area will make best efforts to use the storage water described in paragraph 2.1 in lieu of pumping a similar amount of ground water. (Use existing NSCC headgates.)

2.5 NSGWD members who are also NSCC shareholders within the NSCC service area will make best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.

2.6 NSGWD and Buckeye agree to use their best efforts to provide twelve (12) CFS of water to Buckeye from Riley Creek by the 2002 irrigation season as contemplated in the July 2001 letter to NSGWD.

2.7 The following provision will apply during the irrigation season in any year in which the following conditions occur unless otherwise agreed by the parties: If by April 1 in any year none of the 40,000 acre feet of water identified in paragraph 2.1 is provided either by this agreement or by other replacement water, the undersigned holders of ground water rights agree that their diversion and use of ground water irrigation water rights will be ten (10) percent less than their base of ground water irrigation rights, based on power and fuel consumption records, or other basis acceptable to the Director. If by April 1, some but not all of the 40,000 acre feet identified in paragraph 2.1 is provided (by this agreement and/or other replacement water) an adjustment to ground water reductions shall be made in proportion to the percentage of the 40,000 acre feet provided. In lieu of individual reductions, ground water districts may achieve reductions on a district

wide basis. [NSGWD shall be entitled to a credit against any reduction required by this paragraph from any benefits derived from paragraphs 2.3-2.6.]

2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7, the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.6, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

2.9 By providing replacement water or in the alternative agreeing to a reduction in ground water irrigation diversions and use, the undersigned holders of ground water rights and their representatives do not concede that diversions of ground water are causing injury to senior priority surface water rights, nor do the undersigned holders of senior priority surface water rights and their representatives concede that the amount of replacement water accepted under this stipulated agreement fully compensates for the extent of the injury they allege.

2.10 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in Basin 36, and other related administrative areas outside of the Basins. The parties also agree not to oppose the Director's instructions to any watermasters to administer water rights in accordance with this Agreement, it being understood by the parties that the purpose of any such administration during the term of this agreement is to implement this agreement. The parties understand that water districts to be created as a result of this agreement are intended to include only ground water rights but may include certain surface water rights not already included in water districts, if any, that are required to be included for proper administration. The parties further agree to work collaboratively with the Director to expeditiously create water districts to implement this agreement.

2.11 Holders of water rights within Basin 36 who are not party to this or other stipulated agreement, either directly or as a member of a party to this Agreement, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.8. The parties agree to request that the Director notify water right holders in Basin 36 who are not party to this or another stipulated agreement, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

2.12 Other junior water right holders not members of NSGWD or MVGWD who desire the safe harbor protections of this agreement may join this agreement upon agreeing to pay a proportionate share of the costs and to be bound by all other terms of this agreement.

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3. Process for Future Conflicts:

3.1 [The undersigned parties agree to develop a process for ascertaining the extent of any injury caused by ground water diversions in the Basins under junior priority water rights to senior priority surface water rights, for sharing of information and for the development of any mitigation plans subsequently required.]

3.2 For the term of this Agreement, the parties agree to continue discussions regarding a long-term agreement. Including:

.1 The ESPA Model capabilities.

.2 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.

3. Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

.4 Adoption of conjunctive administration rules based on the results from the new ESPA ground water model and other necessary information to more specifically govern IDWR's administration of water rights from connected sources of surface and ground water within the ESPA.

.5 Consideration of a mechanism to account for changes in the use of water rights since the commencement of the SRBA and development of a means to administer water rights in the context of such changes.

4. Enforcement:

4.1 The parties understand the Director intends to approve this stipulated agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party may petition the Director, or the Director on his own initiative, may seek an appropriate remedy.

4.2 Upon the SRBA District Court issuing an order for interim administration of water rights within Basin 36 and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnections of ground water and surface water sources in the Snake River Basin along the reach of the

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Snake River along and above the Thousand Springs reach of the Snake River and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues, the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River Basin along and above the Thousand Springs reach of the Snake River.

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6.1 Based upon the foregoing and the parties' understanding that the Director will stay further administrative proceedings regarding his Order In The Matter of Designating the Thousand Springs Ground Water Management Area, and unless this Agreement is breached, the parties agree as follows:

6.2 The Idaho Ground Water Appropriators, Inc. and other plaintiffs agree to secure voluntary dismissal, without prejudice, of their Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that they previously filed in the Sixth Judicial District Court.

6.3 Representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

7. General Provisions:

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2003

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7.7 The parties to this Agreement may extend the term of this Agreement beyond 2003 by mutual consent on an annual basis.

The parties have executed this Agreement the date following their respective signatures.

Date: _____, 2001

North Snake Ground Water District

Date: _____, 2001

Magic Valley Ground Water District

Date: _____, 2001

North Side Canal Company

Date: _____, 2001

State of Idaho

Date: _____, 2001

Idaho Department of Water Resources

Date: _____, 2001

City of Twin Falls

Date: _____, 2001

Clear Springs Foods

Date: _____, 2001

Buckeye Farms

Date: _____, 2001

Clear Lakes Trout Company

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SEP 17 2003

Date: _____, 2001

Blue Lakes Trout Company

Date: _____, 2001

Pisces Investments

Date: _____, 2001

Prisune Springs

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DRAFT

9/24/01
5:40 P.M.

INTERIM STIPULATED AGREEMENT
FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36

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MICRO

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DEC 17 2003

wide basis. [In addition to any other reductions in ground water irrigation use documented, NSGWD shall be entitled to a credit against any reduction required by this paragraph from any benefits derived from paragraphs 2.3-2.6.] [The parties to this Agreement agree that the costs borne by NSGWD to implement this Agreement shall be fairly shared by all parties who benefit from the safe harbor in paragraph 2.8].

2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7, the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.6, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

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MICRO
DEC 17 2003

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North Side Canal Company

Date: _____, 2001 _____
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Date: _____, 2001 _____
Idaho Department of Water Resources

Date: _____, 2001 _____
City of Twin Falls

Date: _____, 2001 _____
Clear Springs Foods

Date: _____, 2001 _____
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Date: _____, 2001 _____

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Clear Lakes Trout Company

Date: _____, 2001

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Blue Lakes Trout Company

Date: _____, 2001

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Pisces Investments

Date: _____, 2001

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Pristine Springs

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DEC 17 2003

Group Send Confirm

WorkCentre 450c report for
BEEMAN & ASSOCIATES
331 0954
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Pages scanned 8
Pages confirmed 16

Job	Sent	To Remote Station	Duration	Mode	Pages	Results
281	Sep-24 06:42pm	208 324 2166	05:19	ECM G	8/ 8	OK,120
281	Sep-24 06:47pm	208 934 5570	02:56	ECM G	8/ 8	OK,144

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A	Auto-distribute	G	Group dial	PC	to/from PC	96	9600 bps chosen
C	Cover page	M	Mailbox	PW	Password	144	14400 bps chosen
ECM	Error Correction			RM	Receive to memory		

BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, Idaho 83702
Phone: (208) 331-0950
Fax: (208) 331-0954
jangell@micron.net

FAX COVER SHEET

Sept 24 2001

TO: Ralph May Mike Faulkner

FAX: 324-2166 934-5570

FROM: Joyce

FILE NO.: Ground Water Mgmt Area

MESSAGE: Jo is going to talk with Clear Springs tomorrow then call one of you. The [ ] items are discussion topics

FAXED

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ORIGINAL BY MAIL: YES ____ NO X

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E-MAIL TO RALPH MAY, MIKE FAULKNER, FROM JOYCE, BEEMAN & ASSOCIATES, DATED SEPT. 24, 2001

Jason R. Miciak, P.C. ISB #5710
Attorney at Law
139 River Vista Place, Suite 102
P.O. Box 2632
Twin Falls, Idaho 83303-2632
Telephone: (208) 734-5444
FAX: (208) 734-5605
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Counsel for Pristine Springs

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JAN 16 2003
Department of Water Resources
Southern Region

RECEIVED
JAN 17 2003
Department of Water Resources

IN THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMEMDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NO. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130

NOTICE OF APPEARANCE

Notice is given that Jason R. Miciak, P.C., Attorney at Law has undertaken representation of Pristine Springs in the above captioned matter. Pristine Springs appears in this matter to support the *Petition to Modify Amended Watermaster Instructions for Distribution of Water Among Water Rights No. 36-02659, 36-02708, 36-07004, 36-7201 and 36-7218 in Water District No. 130.* All correspondences or communication shall be made through this office at:

Jason R. Miciak, P.C. ISB #5710
Attorney at Law
139 River Vista Place, Suite 102
P.O. Box 2632
Twin Falls, Idaho 83303-2632
Telephone: (208) 734-5444
FAX: (208) 734-5605
Email: jmiciak@yahoo.com

DATED this 15th day of January, 2002.

Jason R. Miciak, P.C.
Counsel for Pristine Springs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January, 2003, I caused a true and correct copy of the foregoing *Notice of Appearance* to be sent by U.S. Mail, postage paid to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
RINGERT CLARK CHARTERED
455 South Third, P.O. Box 2773
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Larry Cope
Clear Springs Foods, Inc.
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Ted Diehl
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TF

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Michael G. Greene
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P.O. Box 1237
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Orlo Maughan
Magic Valley Ground Water Dist.
453 West 900 North
Rupert, ID 83350

Jacqueline S. Wakefield
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Mike Faulkner
North Snake Ground Water District
152 East Main
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Facsimile: (208) 344-6034

Attorneys for Clear Springs Foods, Inc.

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JAN 17 2003
Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	RESPONDENT CLEAR SPRINGS FOODS, INC'S ANSWER TO PETITION

COMES NOW, Respondent Clear Spring Foods, Inc. ("Clear Springs"), by and through its attorneys of record, and hereby responds to the *Petition to Initiate Contested Case/Request for Expedited Hearing* (*Petition*) filed by Clear Lakes Trout Company, Inc. ("Clear Lakes") on December 16, 2002 as follows:

FIRST DEFENSE

The Idaho Department of Water Resources ("IDWR") for the State of Idaho lacks subject matter jurisdiction over the matters alleged in the *Petition* pursuant to I.R.C.P. 12(b)(1). Clear Lakes is barred from seeking the relief requested by operation of the order of the Court in the District Court of the Fifth Judicial District of the State of Idaho, Gooding County, Case No. CV-02-00377, where the Court dismissed the case with prejudice.

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SECOND DEFENSE

Clear Lakes has failed to state a claim for which relief can be granted pursuant to I.R.C.P. 12(b)(6). Clear Lakes is barred from seeking the relief requested by operation of the order of the Court in the District Court of the Fifth Judicial District of the State of Idaho, Gooding County, Case No. CV-02-00377, where the Court dismissed the case with prejudice.

THIRD DEFENSE

Clear Lakes' *Petition* must be dismissed due to another action pending between Clear Lakes and Clear Springs based upon the same operative facts pursuant to I.R.C.P. 12(b)(8).

FOURTH DEFENSE

Clear Lakes is estopped from seeking the relief requested due to its failure to appeal the Watermaster's June 19, 2002 Notice of Intent to Redistribute to redistribute flows ("*Notice*") within the required timeframe provided by I.C. § 42-1701A(3). Clear Lakes waived its right to appeal the amended watermaster instructions and the Watermaster's *Notice*.

FIFTH DEFENSE

The doctrine of *res judicata* and collateral estoppel bars Clear Lakes' *Petition*.

SIXTH DEFENSE

Clear Springs reserves the right to amend its *Answer* and to assert further defenses following additional discovery.

SEVENTH DEFENSE

Clear Springs denies each and every allegation contained in the *Petition* not herein specifically admitted and answers as follows:

1. In answering paragraph 1 of the *Petition* (Relief Requested), Clear Springs objects to and therefore denies that IDWR violated its statutory duty with respect to administration of

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water rights within Water District No. 130 in accordance with the interim stipulated agreement. Further, Clear Springs objects to and denies the allegation that the watermaster's actions on July 5, 2002 were in violation of IDWR's statutory authority.

2. In answering paragraph 2 of the *Petition* (Relief Requested), Clear Springs objects to and therefore denies the basis for rescission or modification of IDWR's June 13, 2002 amended watermaster instructions.

3. In answering paragraph 3 of the *Petition* (Relief Requested), Clear Springs objects to and therefore denies any basis in law or fact for the adjustment of water deliveries in contravention to the watermaster's instructions and actions on July 5, 2002.

4. In responding to paragraphs 1-3 of the *Petition* (Hearings and Scheduling), Clear Springs responds as follows:

5. Despite the assertions by Clear Lakes regarding the simplicity of the issue regarding the interim stipulated agreement, this issue is intertwined with the remaining issues in the *Petition* and should not be bifurcated simply due to Clear Lakes' failure to appeal previous orders of the Department. Moreover, parties to the *Petition* have a right to fully discover the facts and basis for Clear Lakes' assertions and allegations contained in the *Petition*. Furthermore, prior to holding any hearing as requested by Clear Lakes, the hearing officer should determine issues of jurisdiction based upon previous court actions.

STATEMENT OF FACTS

Clear Springs specifically disputes the "Factual Summary" presented in the *Petition*. Clear Springs further reserves the right to present additional facts following discovery. In addition, Clear Springs offers the following facts.

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The watermaster instructions that are the subject of this *Petition* concerned the distribution of water from a common source, certain springs at or about Clear Lakes, near Buhl, Idaho. Director Karl Dreher began requesting information from Clear Lakes and Clear Springs for the purpose of drafting watermaster instructions in early April 2002. *See* Exhibit 1 (Letter from Karl J. Dreher, April 11, 2002). Both Clear Lakes and Clear Springs were given ample opportunity to submit all information that they believed pertinent to the administration of water between their respective rights. In response, Clear Lakes and Clear Springs submitted various materials by letters of May 2, 2002. After considering the information submitted by both Clear Lakes and Clear Springs, the Director issued watermaster instructions regarding distribution of the companies' various water rights in a memorandum dated June 5, 2002. *See* Exhibit 2. Shortly thereafter, representatives of Clear Lakes, including counsel, held a special meeting with the Director and his counsel on June 7, 2002 at IDWR's state office in Boise to further state Clear Lakes' position regarding the watermaster instructions and to submit additional information.

The Director responded to Clear Lakes' concerns and committed to complete additional review, beyond what had already been completed, consistent with the conversation at the meeting on June 7, 2002. *See* Exhibit 3. The Director even temporarily suspended the instructions that were issued on June 5, 2002. The Director again reviewed all of the factual materials submitted by Clear Lakes and Clear Springs and the pertinent legal decisions regarding administration of the water rights. The Director spent almost three full days reviewing this factual and legal material relating to the watermaster instructions. Finally, after this additional review, the Director issued amended watermaster instructions in a memorandum dated June 13, 2002. *See* Exhibit 4. These final watermaster instructions regarding Clear Lakes' and Clear

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Springs' rights were issued at the same time IDWR was in the process of drafting more general watermaster instructions for Water District No. 130. Clear Lakes did not object to the Director drafting watermaster instructions either for administration of Clear Springs' and Clear Lakes' water rights specifically, or for Water District No. 130 in general.

On June 7, 2002, Clear Springs requested the delivery of its water rights pursuant to state law and the pertinent watermaster instructions. As a result of this call, IDWR's order approving interim administration in Water District No. 130, and the development of watermaster instructions for Water District No. 130 and Clear Springs' water rights, Watermaster Cindy Yenter issued a *Notice of Intent to Redistribute Flows* ("*Notice*") from the springs source that provides water to both Clear Springs' and Clear Lakes' water rights on the basis of priority on June 19, 2002. *See* Exhibit 5. The *Notice* specifically advised Clear Lakes should it disagree with the proposed action that a hearing before the Director within 15 days was available pursuant to I.C. § 42-1701A(3). The Director, or his counsel, had apparently verbally communicated to Clear Lakes' counsel that a hearing could be requested even prior to the watermaster's *Notice*. The *Notice* also informed Clear Lakes of the ability to request a stay of the proposed redistribution concurrently with a request for a hearing.

The *Notice* indicated that redistribution of the flows would occur on July 3, 2002, or 14 days from June 19, 2002. The *Notice* also allowed Clear Lakes the opportunity to request a hearing before the Director within 15 days of June 19, 2002, or by July 4, 2002 (presumably July 5, 2002 given the holiday). Clear Lakes filed its *Complaint* against IDWR in district court on June 20, 2002. More specifically, Clear Lakes alleged that the watermaster instructions were not final and that IDWR violated the interim stipulated agreement by delivering water in accordance with the watermaster instructions. Clear Springs intervened in the civil action as a defendant

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party regarding the delivery of water to fulfill its senior water right in accordance with the watermaster instructions. Clear Lakes also sought a preliminary injunction prohibiting the redistribution of water that was heard by the district court on July 2, 2002. The court denied Clear Lakes' motion for a preliminary injunction.

On July 3, 2002, after Clear Lakes' motion for a preliminary injunction had been denied, Clear Lakes specifically requested the Director to delay the redistribution of water to afford Clear Lakes the full 15 days to decide whether or not to request a hearing in front of IDWR. *See* Exhibit 6. In its letter, Clear Lakes specifically referred to I.C. § 42-1701A(3) and acknowledged that the statute provided for 15 days to request a hearing. *Id.* Clear Lakes chose not to request a hearing pursuant to I.C. § 42-1701A(3) and did not seek a stay of the watermaster's intent to redistribute the water.

Several months earlier, on January 18, 2002, the Director issued an order approving the Interim Stipulated Agreement entered into between various senior surface water right holders and junior ground water right holders. *See* Exhibit 7. The Director later issued an order creating Water District No. 130 on February 19, 2002. *See* Exhibit 8. The interim stipulated agreement was incorporated into the Department's order providing for interim administration of water rights within Water District No. 130. Clear Lakes did not contest or seek further review of this order, either through IDWR or the district court. Furthermore, during the development of all instructions for the administration of rights within Water District No. 130, the Director was aware of the interim stipulated agreement. At no time during the development of the watermaster instructions did Clear Lakes assert an interpretation of the interim stipulated agreement inconsistent with the Director's actions. At no time prior to October 2002 did Clear Lakes raise the issue of interpretation of the stipulated agreement as an argument in its civil

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action against the Department. Furthermore, Clear Lakes specifically requested that administration pursuant to the interim stipulated agreement proceed in a certain manner consistent with the Director's actions. *See* Exhibit 8. That letter does not identify the now claimed interpretation offered by Clear Lakes.

PRAYER FOR RELIEF

WHEREFORE, Clear Springs prays for an order from the hearing officer as follows:

1. That Clear Lakes' *Petition to Initiate Contested Case* be dismissed with prejudice;

2. That the relief requested by Clear Lakes be denied; and

3. That such other relief is provided as is determined to be appropriate, just and equitable under the circumstances, including the award of reasonable attorney fees, costs and expenses to the extent permitted by law.

DATED this 17th day of January, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Attorneys for Clear Springs Foods, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 17th, 2003, I served a true and correct copy of the foregoing *RESPONDENT CLEAR SPRINGS FOODS, INC.'S ANSWER TO CLEAR LAKES TROUT COMPANY, INC.'S PETITION TO INITIATE CONTESTED CASE/REQUEST FOR EXPEDITED HEARING* upon the following by the method indicated:

Original by hand delivery:

Hearing Officer
(In the Matter of Petition to Modify Amended Watermaster
Instructions for Distribution of Water Among Water Rights
Nos. 36-02569, 36-02708, 36-07004, 36-7201 and 36-7218
In Water District No. 130)
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706

Copies by United States Mail, postage prepaid:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
RINGERT CLARK CHARTERED
455 S. 3rd St.
P.O. Box 2773
Boise, Idaho 83701-2773

Jason Miciak, Esq.
Pristine Springs
P.O. Box 2632
Twin Falls, Idaho 83303

Travis L. Thompson

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EXHIBIT 1

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EXHIBIT 1 2003

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

April 11, 2002

Larry Cope
Clear Springs Foods, Inc.
P. O. Box 712
Buhl, ID 83316

Fax: (208) 543-5608

Kay Hardy
Clear Lakes Trout Co.
1301 South Vista
Boise, ID 83705

Fax: (208) 342-4252

VIA FIRST CLASS MAIL AND FACSIMILE

Re: Administration of Water Rights Nos. 36-020708, 36-07004, and 36-07218

Dear Larry and Kay:

Thank you for meeting with me at the shared diversion works for your facilities last Tuesday, April 2. Based on the location of the shared diversion works in relationship to the locations for the various springs discharging into the pool regulated by the diversion works, I believe that Water Rights Nos. 36-020708, 36-07004, and 36-07218 will be subject to administration through the watermaster for the new Water District No. 130.

To develop what I determine to be appropriate instructions for the watermaster, I am reviewing the following documents:

1. Agreement between Clear Lakes Trout Company and Clear Springs Trout Company dated March 13, 1980, and signed by Earl M. Hardy and John C. Hepworth, respectively. (Provided by Larry Cope on April 2, 2002)

2. Letter from John C. Hepworth to Randall C. Fredericks dated March 10, 1980. (Provided by Larry Cope on April 2, 2002)

3. Letter from Randall C. Fredericks to John Hepworth dated March 13, 1980. (Provided by Larry Cope on April 2, 2002)

4. Letter from Randall C. Fredericks to John Hepworth dated March 20, 1980, and "approved" by John C. Hepworth on March 20, 1980. (Provided by Larry Cope on April 2, 2002)

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5. Stipulation for Dismissal with Prejudice, Clear Lakes Trout Company v. Clear Springs Trout Company and Clear Springs Trout Company v. Idaho Power Company, Case No. 16626, District Court of the Fifth Judicial District, dated March 20, 1980. (Provided by Larry Cope on April 2, 2002)

6. Report on Water Measurement and Distribution prepared for Clear Lakes Trout Company and Clear Springs Trout Company by C. E. Brockway and Keith E. Anderson, dated December 1988. (Provided by Larry Cope on April 2, 2002)

7. Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge (Clear Lakes v. Clear Springs / Separate Source), Case No. 39576, District Court of the Fifth Judicial District In Re SRBA, dated August 15, 2000.

8. Supreme Court of the State of Idaho 2002 Opinion No. 17, In Re SRBA Case No. 39576; Clear Springs Foods, Inc. v. Clear Lakes Trout Company; Filed January 18, 2002.

9. Memorandum to Terry Huddleston from Butch Fahrenwald, dated February 21, 2002, setting forth tabular listing of measured flows to Clear Springs Foods Clear Lake Farm, Idaho Trout Producers Clear Lake Farm, and total flow on quarterly basis beginning October 13, 1982, through January 16, 2002. (Provided by Larry Cope on April 2, 2002)

10. Table of measured water flows to Clear Springs Foods - Clear Lake Farm, Idaho Trout Producers - Clear Lake Farm, and totals, on approximately weekly basis beginning July 12, 2000, through December 10, 2001.

If either of you have other pertinent information that you believe I should consider in developing my instructions to the watermaster on administering the subject water rights, please submit such information to me, with copies to the other party, by April 25, 2002.

Sincerely,

Karl Dreher
Director

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c: John Simpson – Facsimile to (208) 344-6034
Dan Steenson – Facsimile to (208) 342-4657

EXHIBIT 2

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MEMORANDUM

To: Cindy Yenter
Water District 130 Watermaster

Date: June 5, 2002

From: Karl J. Dreher

cc: Clear Springs Foods, Inc.
Clear Lakes Trout Co.
Norm Young
Allen Merritt
Tim Luke

Subject: Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218

Background Summary

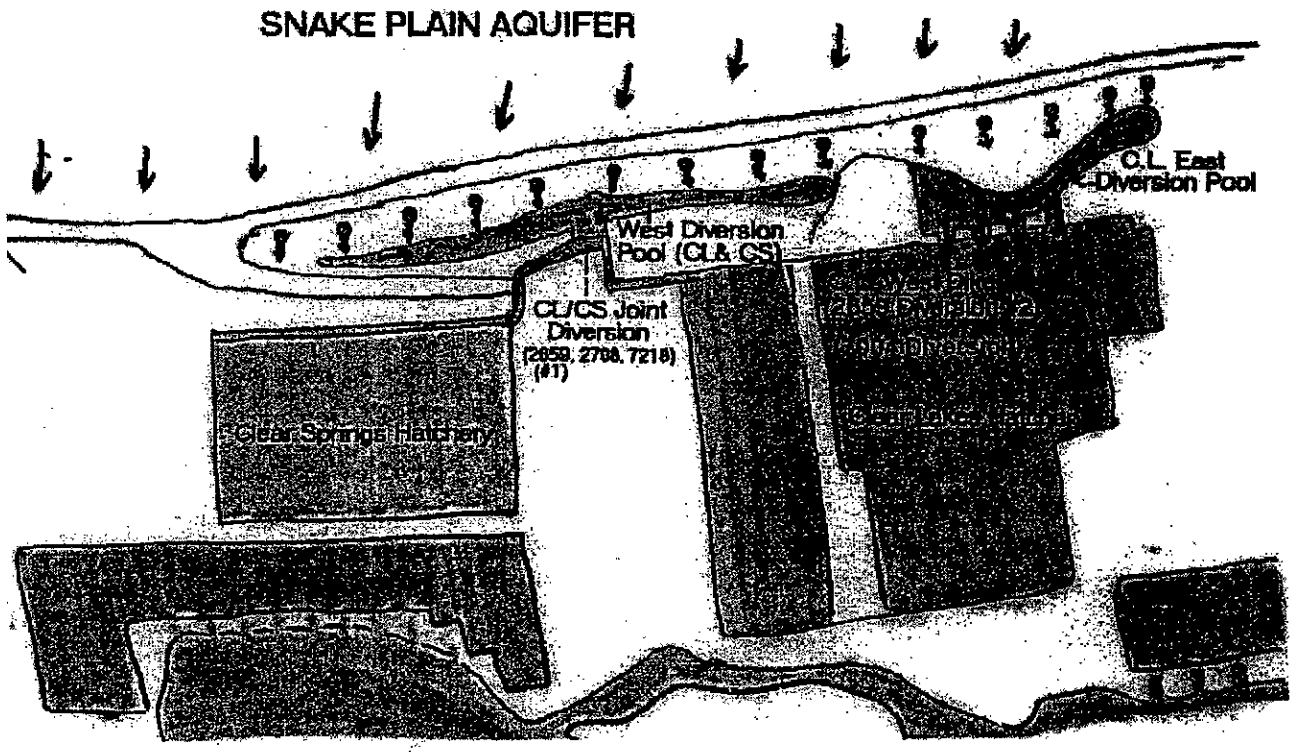
Clear Springs Foods, Inc. (aka Clear Springs Trout Company or "Clear Springs") and Clear Lakes Trout Company ("Clear Lakes") separately own and operate adjacent fish hatcheries located below the rim of the Snake River canyon north of Buhl, Idaho. During the development of the hatcheries in the 1960s and 1970s, both Clear Springs and Clear Lakes filed applications with IDWR for permits to appropriate water from springs flowing from the Eastern Snake Plain Aquifer, and five water rights were established as follows: 36-02659 (Clear Lakes, 100 cfs, 06/23/1966); 36-02708 (Clear Springs, 200 cfs, 09/28/1966); 36-07004 (Clear Lakes, 75 cfs, 07/21/1967); 36-07201 (Clear Springs, 10 cfs, 08/04/1971); and 36-07218 (Clear Springs, 51.55 cfs, 01/24/1972). The current layout of the adjoining hatcheries and water right diversion points (except for water right no. 36-07201) are shown on the next page.

On March 13, 1980, Clear Springs and Clear Lakes entered into an agreement settling disputes regarding property ownership, access, operation and maintenance of common facilities, and the responsibilities of both parties. The 1980 agreement also provided for allocation of water between water rights nos. 36-02659, 36-02708, and 36-07004, when the amount of water flowing from springs and available under these three water rights is less than 375 cfs. The agreement provided that:

> "Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permits Nos. 36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available to [Clear] Lakes and [Clear] Springs under their respective permits, goes below

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375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between [Clear] Springs and [Clear] Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to [Clear] Springs and 47% to [Clear] Lakes. All water being used by [Clear] Springs and [Clear] Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by [Clear] Springs under Permit No. 36-7201. *Agreement*, pp. 3 – 4.

On November 2, 1992, IDWR filed the ***Director's Report for Reporting Area 3*** including it's recommendations for decreeing Clear Springs' water rights nos. 36-02708, 36-07201, and 36-07218. The "source" recommended by IDWR for all three Clear Springs water rights was springs tributary to Clear Lakes. Clear Lakes filed objections to both the "source" and "point of diversion" elements of IDWR's recommendations for Clear Springs' water rights 36-02708 and 36-07218 alleging that these rights are diverted from a separate source than is Clear Lakes' water right no. 36-07004. Clear Lakes also filed objections to both the "source" and "point of diversion" elements of IDWR's recommendation for Clear Springs' water right 36-07201 alleging that Clear Lakes "has a water right [no. 36-02659] that diverts from the [same] source that supplies this water right [no. 36-07201]."

The Special Master for **In Re SRBA, Case No. 39576** issued ***Findings of Fact and Conclusions of Law on Involuntary Dismissal*** (August 21, 1998); ***Special Master's Report and Recommendations*** (August 28, 1998); and ***Order Granting in Part, Denying in Part, Motion to***

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Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) (December 31, 1998). Among other determinations, the Special Master concluded that "The source element for each water right [of Clear Springs] shall be reported as stated in the Director's Report for each water right" and that "the point of diversion for all the rights [of Clear Springs] shall be decreed as recommended in the Director's Report." Clear Lakes subsequently filed Notice of Challenge and after arguments, the Presiding Judge for the SRBA issued ***Memorandum Decision and Order on Challenge*** dated July, 9, 1999. The Presiding Judge overruled and denied Clear Lakes' challenges to the Special Master's recommendation in all respects except one: the source for Clear Springs' water right no. 36-07201.

The SRBA court then issued partial decrees for Clear Springs' three water rights on April 10, 2000. After Clear Lakes' motion to alter or amend judgment (or alternatively to reconsider memorandum decision and order on challenge) was denied by the SRBA court, Clear Lakes appealed to the Idaho Supreme Court. ***Idaho Supreme Court 2002 Opinion No. 17*** was filed on January 18, 2002, affirming the SRBA court ***Memorandum Decision and Order on Challenge.***

Following an inquiry from Clear Springs regarding how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call, both Clear Springs and Clear Lakes were asked to submit any additional information that either entity believed to be pertinent in developing watermaster instructions for administering these water rights. Both Clear Springs and Clear Lakes submitted information on May 2, 2002, although Clear Springs asserted that it believed IDWR already possessed all the necessary information to develop watermaster instructions.

In its May 2 submittal, Clear Lakes concludes that: (1) adjustment of the 6-ft adjustable weir from the west diversion pool through which water right 36-02659 is distributed to Clear Lakes would result in reducing the quantity of water distributed to the Clear Lakes' senior water right 36-02659 in favor of Clear Springs' junior water right 36-02708, which would not be consistent with Idaho law; and (2) it is physically impossible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to increase the quantity of water available for Clear Springs' relatively senior water right 36-02708, which causes a Clear Springs call to be futile.

Basis for Watermaster Instructions

The following three findings were included in the Findings of Fact set forth by the Special Master in ***Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)*** (December 31, 1998), adopted by the Presiding Judge in ***Memorandum Decision and Order on Challenge*** (July, 9, 1999), and affirmed by the Idaho Supreme Court in ***Idaho Supreme Court 2002 Opinion No. 17*** (January 18, 2002):

5. When water rights 36-02659 and 36-07004 were first developed, Clear Lakes created two pools, a western and an eastern pool. The result of this construction was the elimination [of] one of the three islands and one of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. Exhibit AA. "But for" this one continuous structure, there would not be an eastern pool. (Tr., p. 327, Ll. 18-25). The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows.

6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. (Tr., p. 300, Ll. 8-15). Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. (Tr., p. 302, L. 20 – p. 303, L. 4). Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. (Tr., p. 330, Ll. 2-6).

7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. (Tr., p. 223, Ll. 17-21; p. 225, Ll. 4-8). There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. (Tr., p. 222, L. 19 – p. 223, L. 2). Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. (Tr., p. 331, Ll. 3-10).

In ***Memorandum Decision and Order on Challenge*** dated July, 9, 1999, the Presiding Judge concluded the following (p. 29):

... the Brailsford Stream, or what is sometimes referred to as the "far western stream," which is the source of Clear Springs' right 36-07201, **never** ran into the channel or pool of water from which Clear Lakes' rights 36-02659 and 36-07004 and Clear Springs' rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights.

... because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

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Given these findings, it is clear that the SRBA court, as affirmed by the Idaho Supreme Court, has determined that Clear Springs' water rights 36-02708 and 36-7218 together with Clear Lakes' water rights 36-02659 and 36-07004 divert water commingled from various springs which constitute a single, non-segmentable, source. It is also clear that Clear Lakes' assertion in its May 2 submittal that "Neither the Supreme Court's, nor any of the SRBA District Court's, decisions addressed administration of the water rights" is incorrect given the determination of the Presiding Judge regarding the "source" for Clear Springs' water right 36-07201:

> ... for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Therefore, Clear Lakes' conclusions that adjustment of the 6-ft adjustable weir from the west diversion pool through which water right 36-02659 is distributed to Clear Lakes would result in reducing the quantity of water distributed to the Clear Lakes' senior right 36-02659 in favor of Clear Springs' junior right 36-02708 and that it is physically impossible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to increase the quantity of water available for Clear Springs' relatively senior 36-02708 are both flawed given that the SRBA court did not recognize the west and east diversion pools as separable. When the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights as being from a single source. To accomplish this distribution when the amount of water flowing from the springs is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the west diversion pool. Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior 36-02708 while maintaining the supply of water to the most senior right, Clear Springs right 36-02659. There is no basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the west diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the east diversion pool to the detriment and injury of the Clear Springs right 36-02708. Of course when the amount of water flowing from the springs is equal to or greater than 375 cfs, then both of Clear Lakes' water rights 36-02659 and 36-0704 as well as Clear Springs' water right 36-02708 can be filled, along with part or all of Clear Springs' water right 36-07218 when spring discharges exceed 375 cfs.

Although the 1980 agreement between Clear Lakes and Clear Springs provided for a different allocation of water between water rights 36-02659, 36-02708, and 36-07004, when the amount of water flowing from springs and available under these three water rights is below 375 cfs, the SRBA court, as affirmed by the Idaho Supreme Court, has made a "legal determination". Under

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the clear language of the agreement, this "legal determination" supersedes and renders the prior agreed upon allocation to be no longer binding.

Watermaster Instructions

1. Water for Clear Springs' water right 36-07201 is to be distributed separately as being from a separate "source" from the source for water rights 36-02659, 36-02708, 36-07004, and 36-07218.

2. The watermaster is not to adjust the 6-ft adjustable weir unless Clear Lakes calls for distribution of water to its senior priority water right 36-02659 or Clear Springs calls for distribution of water to its water right 36-2708, which is next in priority. Such calls must be in writing to either IDWR or the watermaster.

3. If the watermaster receives a written call for distribution, the watermaster is to notify IDWR's Regional Manager in Twin Falls, or alternatively the Manager of the Water Distribution Section of the Water Management Division in the event the Regional Manager is unavailable.

4. IDWR and the watermaster must determine that when a call is made, water is needed under the senior priority water right making the call and that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right. To accomplish this determination, the watermaster is to contact representatives of both Clear Lakes and Clear Springs to schedule a time for accessing Clear Lakes and Clear Springs properties, as soon as possible after a call is made, to ascertain the amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), as well as the need to distribute water among these rights based on priority.

5. As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights 14-day notice by personal service to the water right holder, or the facility manager for the water right holder, and by mail or facsimile, if available, that the watermaster will adjust the 6-ft adjustable weir so as to distribute water to the calling senior right, reducing or curtailing the distribution of water to the remaining water right(s) in the order of the most junior priority of the remaining right(s) being reduced or curtailed first.

6. At expiration of the 14-day notice, the watermaster is to re-confirm the amount of water flowing from springs and available under water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), based on priority, and to adjust the 6-ft adjustable weir as necessary to distribute water to the rights in order of priority.

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7. The watermaster is to document and check the distribution of water on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and further adjustment is necessary.

8. To determine the amount of water flowing from springs and available to the above water rights, the watermaster must add together the quantities of water flowing to the Clear Lakes and Clear Springs hatcheries. To determine the amount of water flowing to the Clear Lakes hatchery (subject to further confirmation)[1]:

   (a) Read staff gage above the 40-inch west weir near the Clear Lakes hatchery holding ponds;

   (b) Determine discharge through the west weir from attached table for Clear Lakes west weir discharge;

   (c) Read staff gages on each of the six 10-ft Clear Lakes east weirs;

   (d) Determine discharge through each of the six Clear Lakes east weirs from the attached table for Clear Lakes east weirs;

   (e) Add 0.20 cfs to account for flow in the hatchery holding ponds through the perforated PVC pipe (if operating);

   (f) Add discharge from the west weir, each of the six east weirs, and the hatchery pipe to determine the total amount of water flowing to the Clear Lakes hatchery.

   To determine the amount of water flowing to the Clear Springs hatchery (subject to further confirmation)[2]:

   (g) Read staff gage in west diversion pool above 22-ft weir;

   (h) Determine discharge through the 22-ft and 10-ft weirs from attached table for Clear Springs combined weirs;

   (i) Add one (1) cfs to account for discharge of pipe into Clear Springs holding ponds and minor flow from pipes into headrace (if pipes are flowing);

   (j) Read weir measuring the discharge from the wet lab at the Clear Springs Research Laboratory.

[1&2] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988.

(k) Determine discharge for the wet lab effluent from the table for the Clear springs wet lab weir, or use the average flow which is estimated to be 0.5 cfs;

(l) Add discharge from the 22-ft and 10-ft weirs, the pipes into the holding ponds and headrace, and the wet lab, to determine the total amount of water flowing to the Clear Springs hatchery.

The total amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218, is equal to the sum of (f) and (l).

8. If the total flow is equal to or greater than 375 cfs (± 5 cfs) then the amount of spring flows to Clear Lakes, 7.(f), should be 175 cfs with all the remaining flow to Clear Springs up to 251.55 cfs.

9. If the total flow is less than 375 cfs (± 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)[3]:

(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) Read staff gage on the 6-ft adjustable weir discharging from the west diversion pool.

(c) Determine discharge through the 6-ft adjustable weir using the attached table for the 6-ft adjustable weir.

(d) 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 (c) and determine what the staff gage reading should be to provide the changed flow to Clear Lakes.

[3] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988.

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(e) Adjust the 6-ft adjustable weir up or down with the handwheel to achieve the required staff gage reading as determined in (d).

(f) Repeat (a) through (e), if necessary, after allowing sufficient time for the change in flows to stabilize through the hatcheries.

Attachments (10 pages)

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CLEAR LAKES – 10-Ft. (East) Weirs

DISCHARGE (CFS)

(Corrected For Velocity Of Approach)

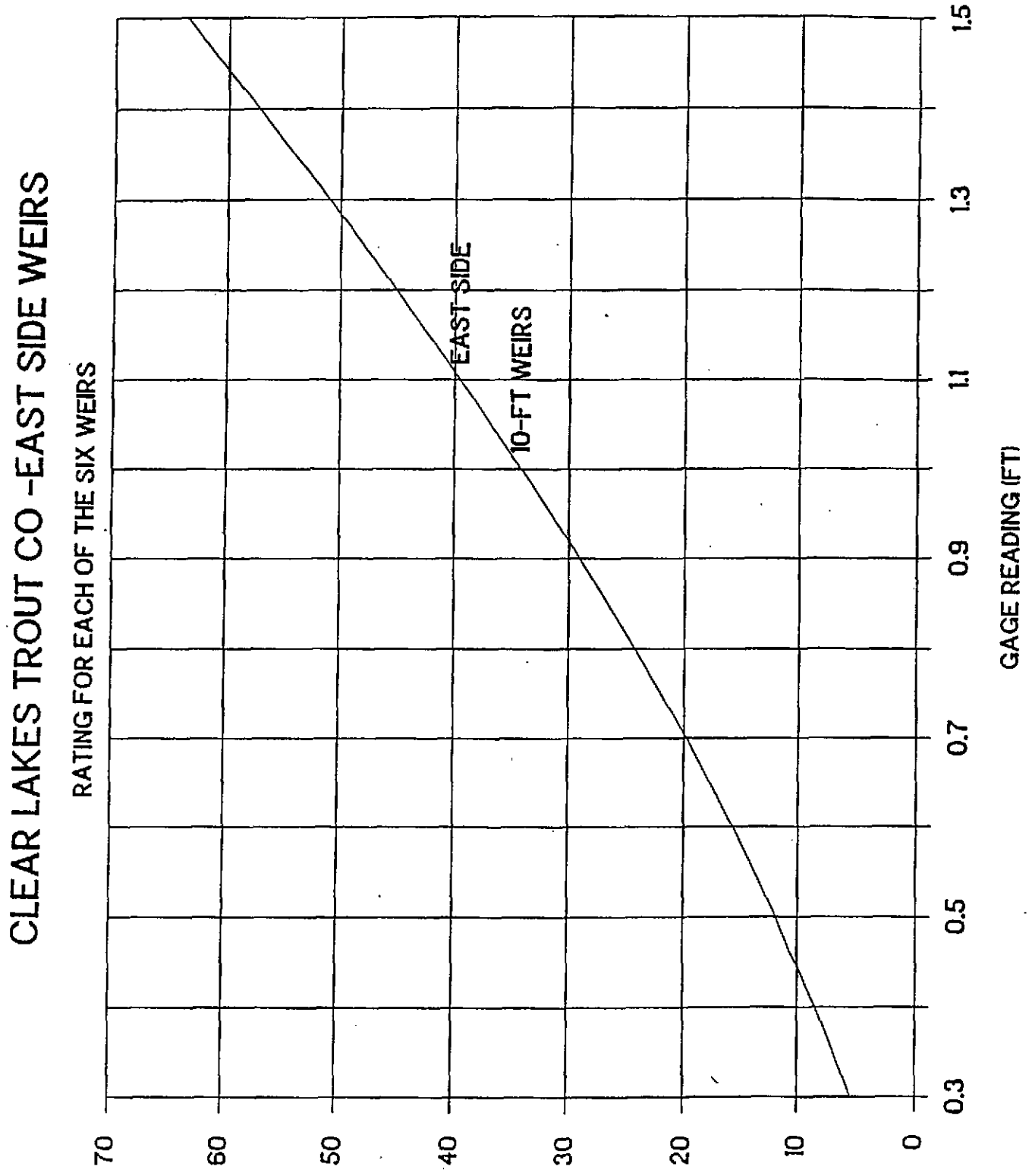
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.3	5.49	5.77	6.05	6.34	6.63	6.93	7.23	7.53	7.84	8.16
0.4	8.48	8.80	9.12	9.45	9.79	10.13	10.47	10.81	11.16	11.52
0.5	11.88	12.24	12.60	12.97	13.35	13.72	14.10	14.49	14.87	15.26
0.6	15.66	16.06	16.46	16.86	17.27	17.68	18.10	18.52	18.94	19.36
0.7	19.79	20.22	20.66	21.10	21.54	21.98	22.43	22.88	23.34	23.80
0.8	24.26	24.72	25.19	25.66	26.13	26.61	27.09	27.57	28.06	28.55
0.9	29.04	29.53	30.03	30.53	31.04	31.54	32.05	32.57	33.08	33.60
1.0	34.12	34.65	35.17	35.70	36.24	36.77	37.31	37.85	38.40	38.95
1.1	39.50	40.05	40.61	41.16	41.73	42.29	42.86	43.43	44.00	44.57
1.2	45.15	45.73	46.32	46.90	47.49	48.08	48.68	49.27	49.87	50.47
1.3	51.08	51.69	52.29	52.91	53.52	54.14	54.76	55.38	56.01	56.64
1.4	57.27	57.90	58.54	59.18	59.82	60.46	61.11	61.75	62.41	63.06
1.5	63.72	64.37	65.04	65.70	66.36	67.03	67.70	68.38	69.05	69.73

CLEAR LAKES – 40-In. (West) Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.5	3.92	4.03	4.15	4.26	4.38	4.50	4.61	4.73	4.85	4.97
0.6	5.09	5.22	5.34	5.46	5.59	5.72	5.84	5.97	6.10	6.23
0.7	6.36	6.49	6.62	6.75	6.89	7.02	7.15	7.29	7.42	7.56
0.8	7.70	7.84	7.98	8.11	8.26	8.40	8.54	8.68	8.82	8.97
0.9	9.11	9.25	9.40	9.55	9.69	9.84	9.99	10.14	10.28	10.43
1.0	10.58	10.73	10.89	11.04	11.19	11.34	11.50	11.65	11.81	11.96
1.1	12.12	12.27	12.43	12.59	12.74	12.90	13.06	13.22	13.38	13.54
1.2	13.70	13.86	14.02	14.19	14.35	14.51	14.68	14.84	15.00	15.17
1.3	15.33	15.50	15.67	15.83	16.00	16.17	16.34	16.50	16.67	16.84
1.4	17.01	17.18	17.35	17.52	17.69	17.87	18.04	18.21	18.38	18.56
1.5	18.73	18.90	19.08	19.25	19.43	19.60	19.78	19.96	20.13	20.31
1.6	20.49	20.66	20.84	21.02	21.20	21.38	21.55	21.73	21.91	22.09
1.7	22.27	22.45	22.64	22.82	23.00	23.18	23.36	23.55	23.73	23.91
1.8	24.09	24.28	24.46	24.65	24.83	25.02	25.20	25.39	25.57	25.76
1.9	25.94	26.13	26.32	26.50	26.69	26.88	27.06	27.25	27.44	27.63
2.0	27.82	28.01	28.19	28.38	28.57	28.76	28.95	29.14	29.33	29.52

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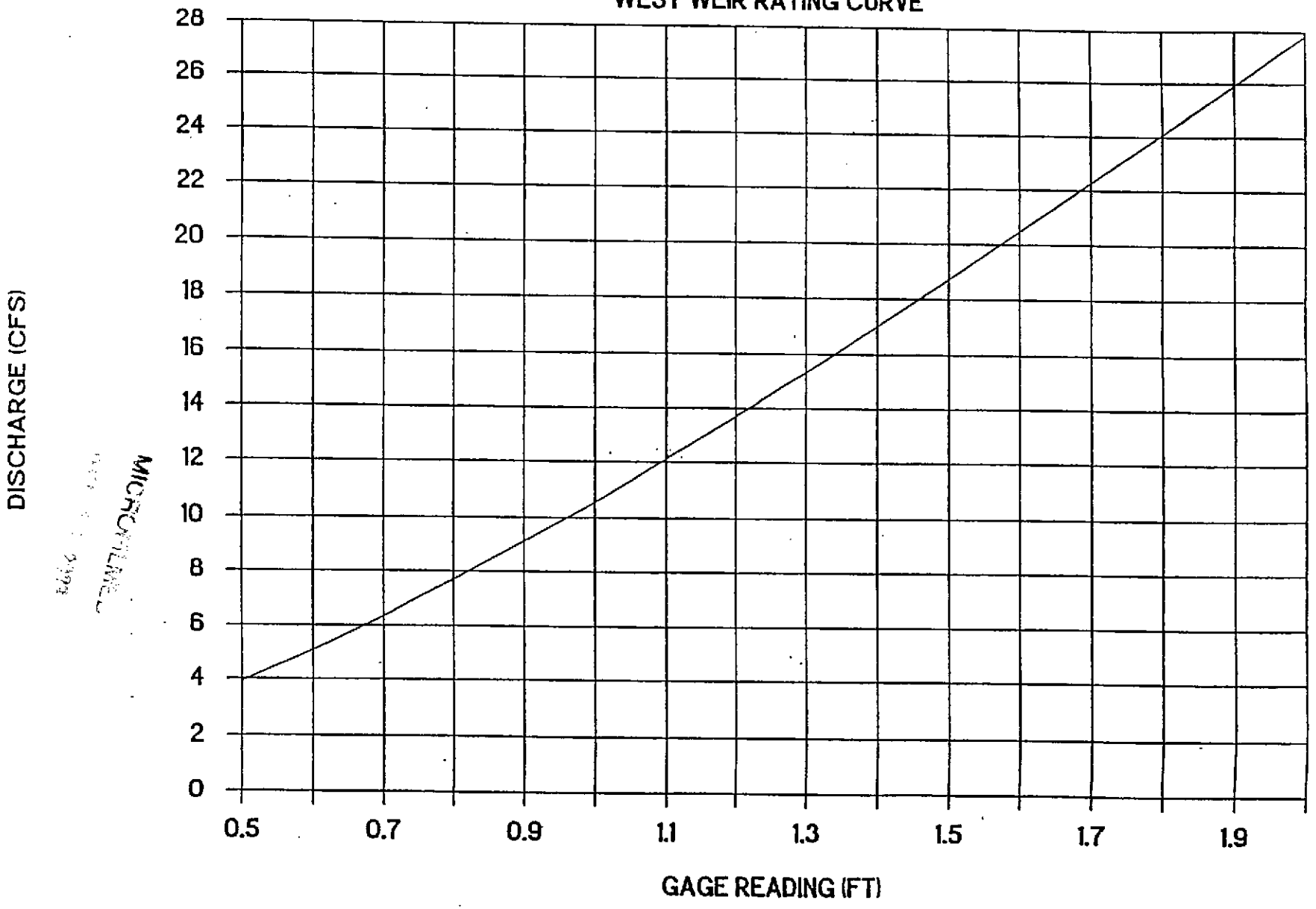


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LETTER TO CINDY YENTER FROM KARL J. DREHER, DATED JUNE 5, 2002

CLEAR LAKES TROUT COMPANY

WEST WEIR RATING CURVE



CLEAR SPRINGS – Combined Weirs

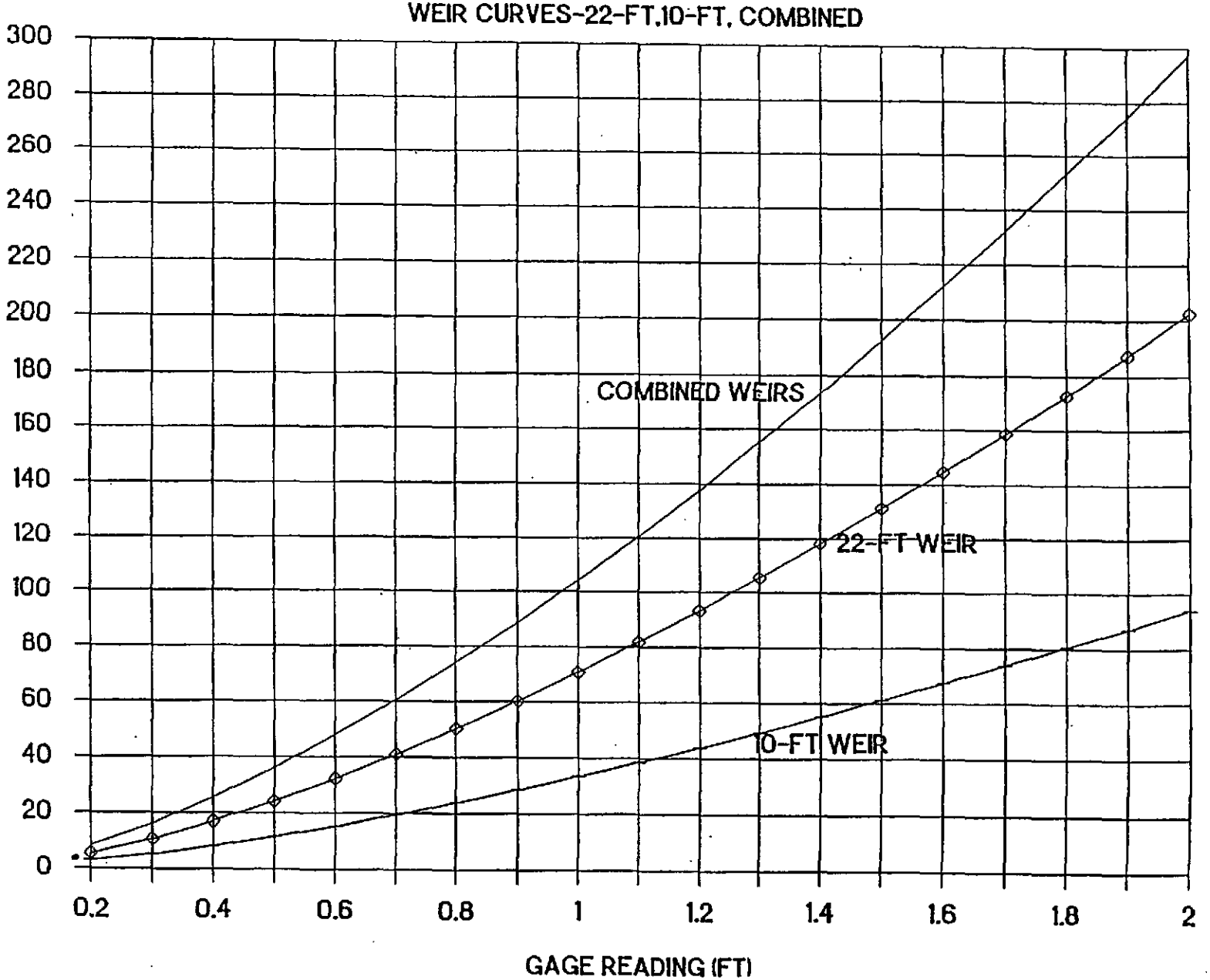
DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	8.58	9.28	10.00	10.73	11.48	12.25	13.04	13.84	14.65	15.49
0.3	16.33	17.20	18.07	18.96	19.87	20.79	21.72	22.67	23.63	24.60
0.4	25.59	26.59	27.60	28.62	29.66	30.71	31.77	32.84	33.93	35.02
0.5	36.13	37.25	38.38	39.52	40.67	41.83	43.01	44.19	45.39	46.60
0.6	47.81	49.04	50.28	51.52	52.78	54.05	55.32	56.61	57.91	59.22
0.7	60.53	61.86	63.19	64.54	65.89	67.26	68.63	70.01	71.40	72.80
0.8	74.21	75.63	77.05	78.49	79.93	81.39	82.85	84.32	85.80	87.28
0.9	88.78	90.28	91.80	93.32	94.84	96.38	97.93	99.48	101.04	102.61
1.0	104.19	105.77	107.37	108.97	110.58	112.19	113.82	115.45	117.09	118.74
1.1	120.39	122.05	123.72	125.40	127.09	128.78	130.48	132.18	133.90	135.62
1.2	137.35	139.08	140.83	142.58	144.34	146.10	147.87	149.65	151.44	153.23
1.3	155.03	156.83	158.65	160.47	162.29	164.13	165.97	167.82	169.67	171.53
1.4	173.40	175.27	177.15	179.04	180.94	182.84	184.74	186.66	188.58	190.50
1.5	192.44	194.37	196.32	198.27	200.23	202.20	204.17	206.14	208.13	210.12
1.6	212.11	214.12	216.12	218.14	220.16	222.19	224.22	226.26	228.30	230.35
1.7	232.41	234.47	236.54	238.62	240.70	242.79	244.88	246.98	249.08	251.19
1.8	253.31	255.43	257.56	259.69	261.83	263.98	266.13	268.28	270.45	272.61
1.9	274.79	276.97	279.15	281.34	283.54	285.74	287.95	290.16	292.38	294.60
2.0	296.83	299.07	301.31	303.56	305.81	308.06	310.33	312.59	314.87	317.15

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LETTER TO CINDY YENTER FROM KARL J. DREHER, DATED JUNE 5, 2002

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS – 22–Ft. Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	5.60	6.07	6.55	7.05	7.56	8.08	8.61	9.16	9.71	10.27
0.3	10.85	11.44	12.03	12.64	13.25	13.88	14.51	15.16	15.81	16.48
0.4	17.15	17.83	18.52	19.21	19.92	20.64	21.36	22.09	22.83	23.58
0.5	24.33	25.10	25.87	26.64	27.43	28.22	29.03	29.83	30.65	31.47
0.6	32.30	33.14	33.99	34.84	35.70	36.56	37.43	38.31	39.20	40.09
0.7	40.99	41.90	42.81	43.73	44.65	45.58	46.52	47.46	48.42	49.37
0.8	50.33	51.30	52.28	53.26	54.25	55.24	56.24	57.24	58.25	59.27
0.9	60.29	61.32	62.35	63.39	64.44	65.49	66.54	67.60	68.67	69.74
1.0	70.82	71.90	72.99	74.09	75.19	76.29	77.40	78.52	79.64	80.76
1.1	81.90	83.03	84.17	85.32	86.47	87.63	88.79	89.96	91.13	92.31
1.2	93.49	94.67	95.87	97.06	98.26	99.47	100.68	101.90	103.12	104.34
1.3	105.57	106.81	108.05	109.29	110.54	111.79	113.05	114.31	115.58	116.85
1.4	118.13	119.41	120.69	121.98	123.28	124.58	125.88	127.19	128.50	129.82
1.5	131.14	132.46	133.79	135.13	136.46	137.81	139.15	140.50	141.86	143.22
1.6	144.58	145.95	147.32	148.70	150.08	151.47	152.86	154.25	155.65	157.05
1.7	158.45	159.86	161.28	162.69	164.12	165.54	166.97	168.40	169.84	171.28
1.8	172.73	174.18	175.63	177.09	178.55	180.02	181.49	182.96	184.44	185.92
1.9	187.40	188.89	190.38	191.88	193.38	194.88	196.39	197.90	199.42	200.94
2.0	202.46	203.99	205.52	207.05	208.59	210.13	211.67	213.22	214.77	216.33

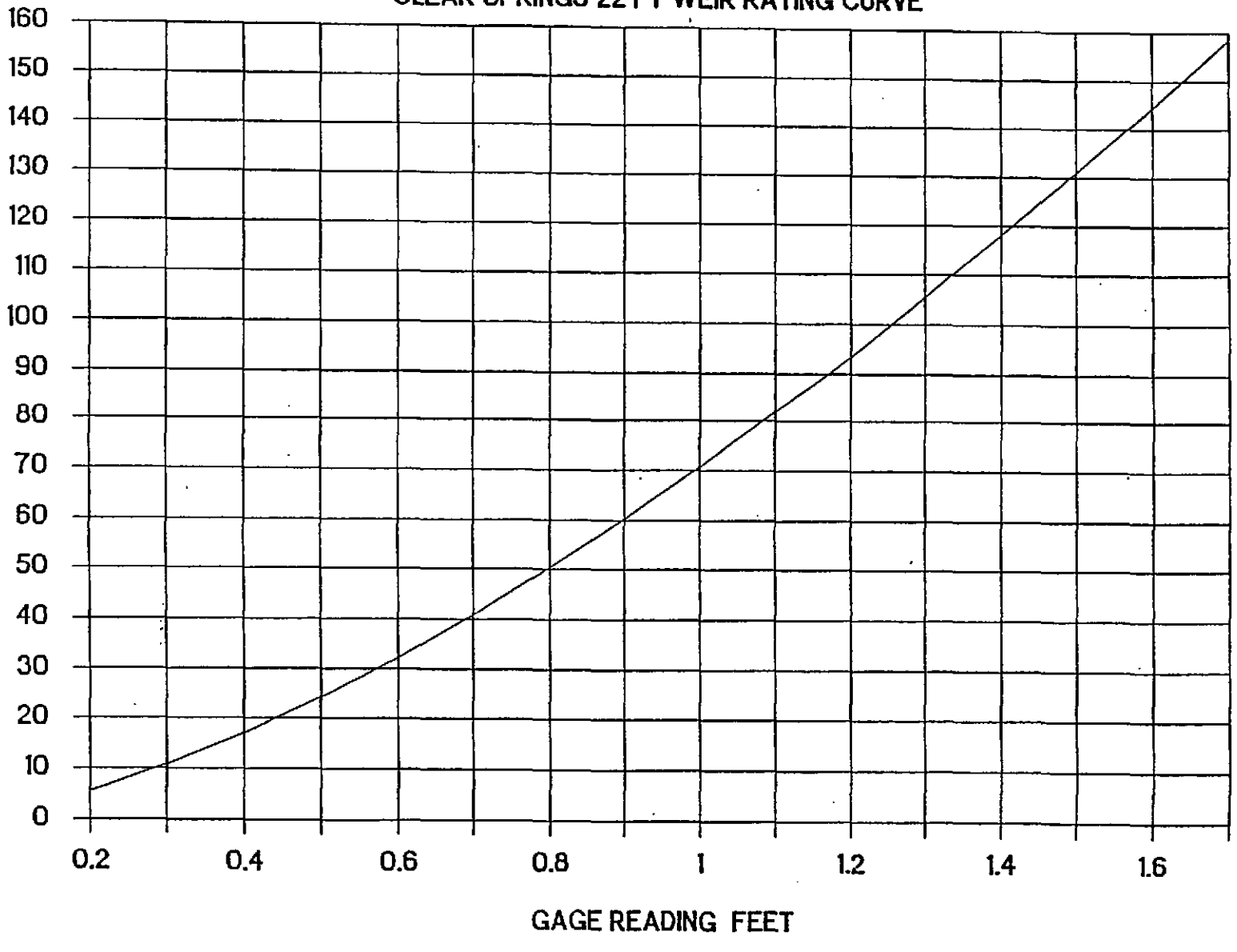
CLEAR SPRINGS – 10–Ft. Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	2.98	3.21	3.44	3.68	3.92	4.17	4.42	4.68	4.94	5.21
0.3	5.48	5.76	6.04	6.33	6.62	6.91	7.21	7.51	7.82	8.13
0.4	8.44	8.76	9.08	9.41	9.74	10.07	10.41	10.75	11.10	11.44
0.5	11.80	12.15	12.51	12.87	13.24	13.61	13.98	14.36	14.74	15.12
0.6	15.51	15.90	16.29	16.68	17.08	17.49	17.89	18.30	18.71	19.12
0.7	19.54	19.96	20.38	20.81	21.24	21.67	22.11	22.54	22.99	23.43
0.8	23.88	24.32	24.78	25.23	25.69	26.15	26.61	27.08	27.54	28.02
0.9	28.49	28.97	29.44	29.93	30.41	30.90	31.38	31.88	32.37	32.87
1.0	33.37	33.87	34.37	34.88	35.39	35.90	36.41	36.93	37.45	37.97
1.1	38.49	39.02	39.55	40.08	40.61	41.15	41.69	42.23	42.77	43.31
1.2	43.86	44.41	44.96	45.52	46.07	46.63	47.19	47.75	48.32	48.89
1.3	49.46	50.03	50.60	51.18	51.76	52.34	52.92	53.50	54.09	54.68
1.4	55.27	55.87	56.46	57.06	57.66	58.26	58.86	59.47	60.08	60.69
1.5	61.30	61.91	62.53	63.15	63.77	64.39	65.01	65.64	66.27	66.90
1.6	67.53	68.16	68.80	69.44	70.08	70.72	71.36	72.01	72.66	73.31
1.7	73.96	74.61	75.27	75.92	76.58	77.24	77.91	78.57	79.24	79.91
1.8	80.58	81.25	81.93	82.60	83.28	83.96	84.64	85.32	86.01	86.70
1.9	87.39	88.08	88.77	89.46	90.16	90.86	91.56	92.26	92.96	93.67
2.0	94.37	95.08	95.79	96.51	97.22	97.94	98.65	99.37	100.09	100.82

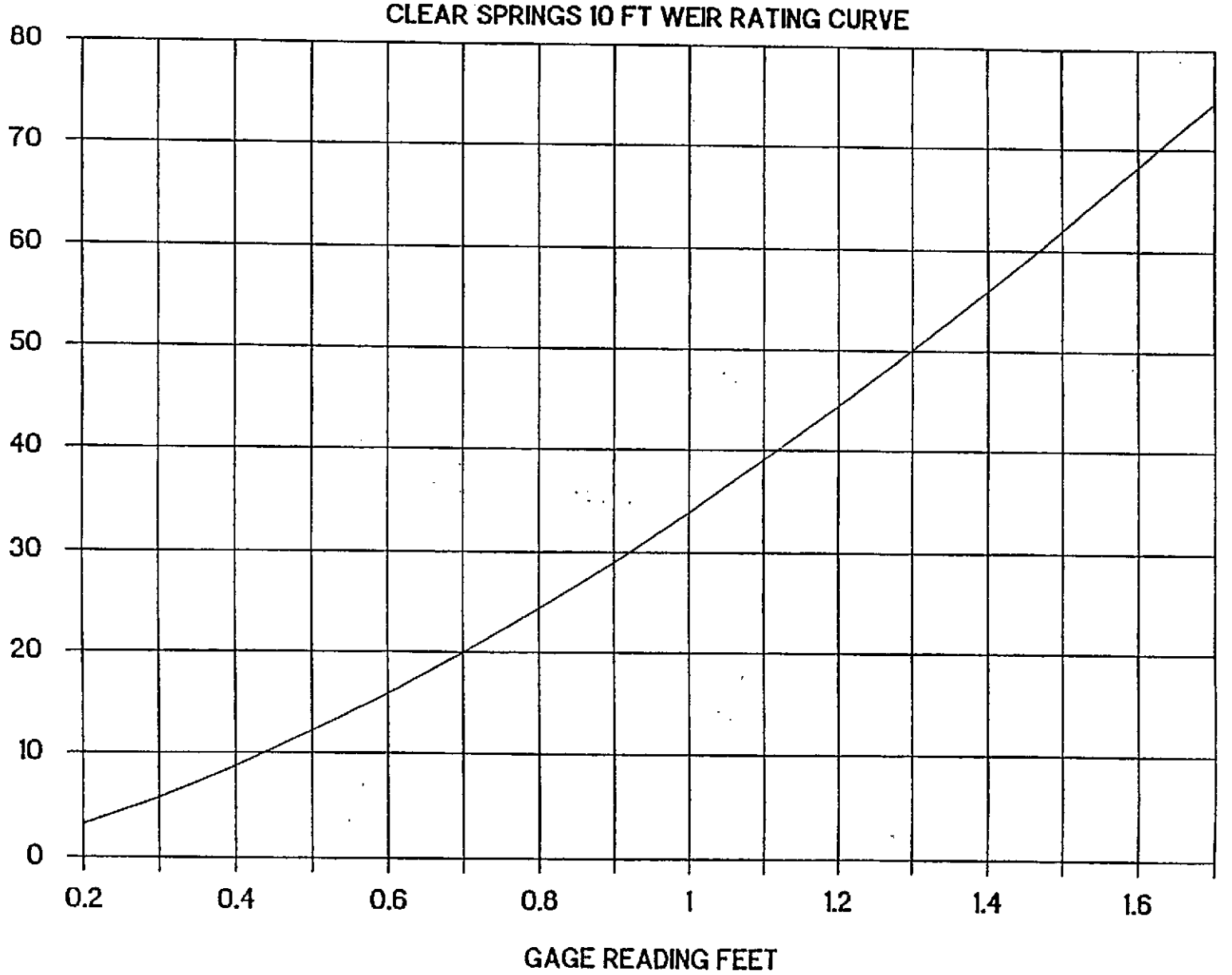
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CLEAR SPRINGS TROUT COMPANY



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LETTER TO CINDY YENTER FROM KARL J. DREHER, DATED JUNE 5, 2002

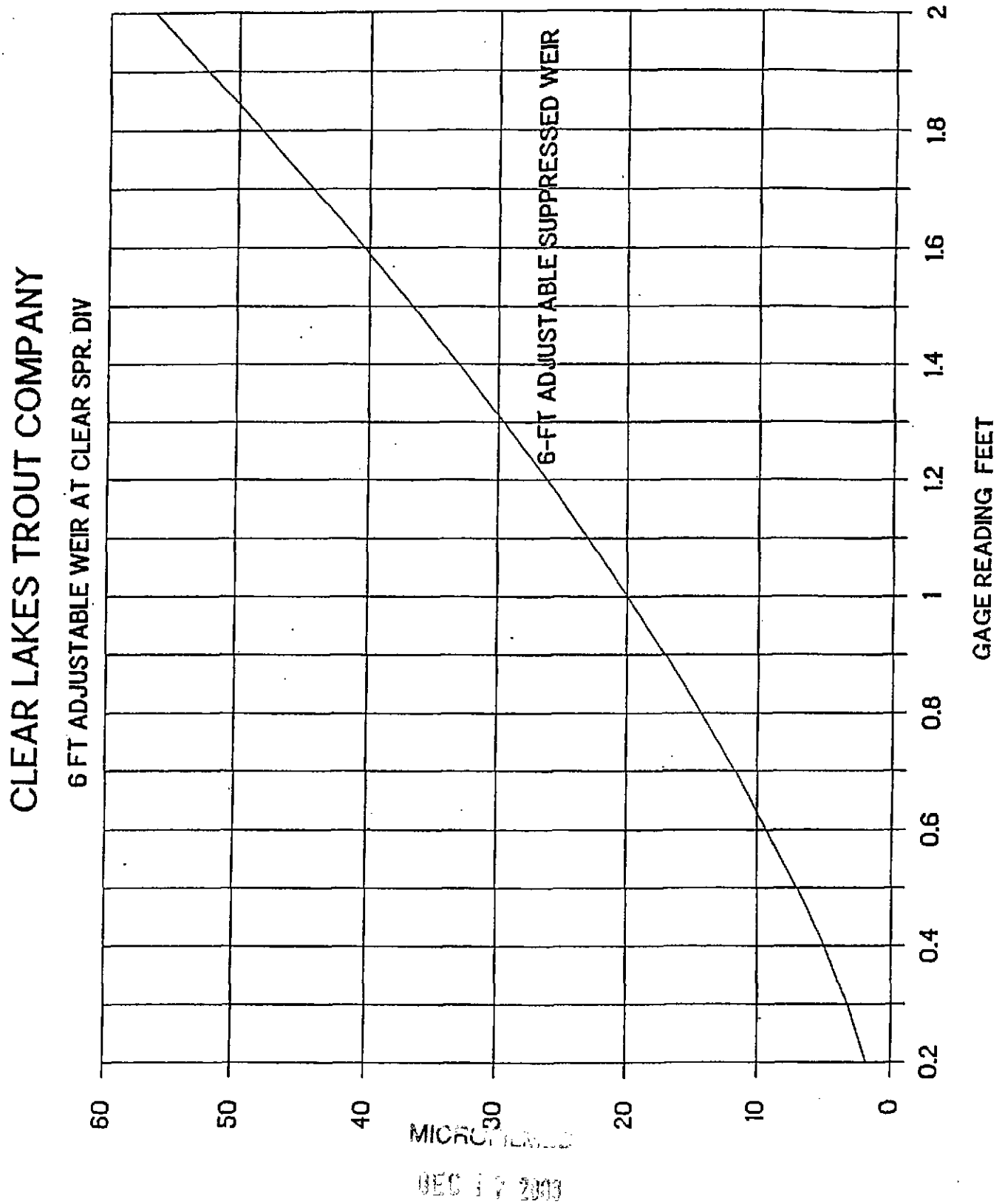
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CLEAR LAKES – 6-Ft. Adjustable Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	1.79	1.92	2.06	2.20	2.35	2.50	2.65	2.80	2.96	3.12
0.3 :	3.28	3.45	3.62	3.79	3.96	4.14	4.32	4.50	4.68	4.87
0.4 :	5.05	5.25	5.44	5.63	5.83	6.03	6.23	6.44	6.64	6.85
0.5 :	7.06	7.28	7.49	7.71	7.93	8.15	8.37	8.60	8.83	9.05
0.6 :	9.29	9.52	9.75	9.99	10.23	10.47	10.71	10.96	11.20	11.45
0.7 :	11.70	11.95	12.21	12.46	12.72	12.98	13.24	13.50	13.76	14.03
0.8 :	14.30	14.57	14.84	15.11	15.38	15.66	15.93	16.21	16.49	16.78
0.9 :	17.06	17.34	17.63	17.92	18.21	18.50	18.79	19.09	19.38	19.68
1.0 :	19.98	20.28	20.58	20.89	21.19	21.50	21.80	22.11	22.42	22.74
1.1 :	23.05	23.37	23.68	24.00	24.32	24.64	24.96	25.29	25.61	25.94
1.2 :	26.26	26.59	26.92	27.26	27.59	27.92	28.26	28.60	28.93	29.27
1.3 :	29.61	29.96	30.30	30.65	30.99	31.34	31.69	32.04	32.39	32.74
1.4 :	33.10	33.45	33.81	34.17	34.53	34.89	35.25	35.61	35.97	36.34
1.5 :	36.71	37.07	37.44	37.81	38.18	38.56	38.93	39.30	39.68	40.06
1.6 :	40.44	40.82	41.20	41.58	41.96	42.35	42.73	43.12	43.51	43.90
1.7 :	44.29	44.68	45.07	45.46	45.86	46.25	46.65	47.05	47.45	47.85
1.8 :	48.25	48.65	49.06	49.46	49.87	50.28	50.68	51.09	51.50	51.91
1.9 :	52.33	52.74	53.16	53.57	53.99	54.41	54.83	55.25	55.67	56.09
2.0 :	56.51	56.94	57.36	57.79	58.22	58.64	59.07	59.50	59.94	60.37

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LETTER TO CINDY YENTER FROM EARL SHEHER, DATED JUNE 5, 2002

EXHIBIT 3

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

June 10, 2002

Kay Hardy
Clear Lakes Trout Co.
c/o Daniel V. Steenson and Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, ID 83701-2773

VIA FACSIMILE TO (208) 342-4657

Re: Watermaster Instructions for Distribution of Water
Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218

Dear Kay:

While we were meeting on Friday afternoon, Clear Springs faxed a written call for distribution of water to water right no. 36-2708. I have enclosed is a copy of Clear Springs' call for your information and reference.

Regardless of having received this written call, I will complete the additional review that I committed to last Friday on the basis for the water master instructions. To provide for the additional review, the watermaster instructions that I issued last Wednesday, June 5, will be temporarily suspended for a short period of time (expected to be less than 1 week). During this period of suspension, I will again consider the following:

1. Agreement between Clear Lakes Trout Company and Clear Springs Trout Company dated March 13, 1980, and signed by Earl M. Hardy and John C. Hepworth, respectively.

2. Order Granting In Part, Denying in Part, Motion [To] Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source), Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218), District Court of the Fifth Judicial District In Re SRBA, dated December 31, 1998.

3. Memorandum Decision and Order On Challenge, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218), District Court of the Fifth Judicial District In Re SRBA, dated July 9, 1999.

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4. Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge (Clear Lakes v. Clear Springs / Separate Source), Case No. 39576

(Subcases 36-02708, 36-07201, and 36-07218), District Court of the Fifth Judicial District In Re SRBA, dated August 15, 2000.

5. Idaho Supreme Court 2002 Opinion No. 17, In Re SRBA Case No. 39576; Clear Springs Foods, Inc. v. Clear Lakes Trout Company; Filed January 18, 2002.

6. Order Granting In Part Clear Lakes Motion To Alter Or Amend and Amended Special Master Report, Case No. 39576 (Subcases 36-02659 and 36-07004), District Court of the Fifth Judicial District In Re SRBA, dated April 12, 2002.

7. Memorandum and attachments on administration of water right nos. 36-02659, 36-02708, and 36-07004, submitted by Clear Lakes Trout Company on May 2, 2002, and amended on May 7, 2002.

8. Letter from John K. Simpson Re: Administration of Water Rights Nos. 36-02708, 36-07004, and 36-07218, submitted on behalf of Clear Springs Foods, Inc., on May 2, 2002.

As I discussed with you last Friday, the objective of this additional review is to ensure that I correctly apply the law and the facts primarily regarding two central issues: (1) whether diversions from the eastern and western diversion pools (which are physically two separate pools) are to be administered separately, from which Clear Lakes concludes a delivery call for Clear Springs' water right no. 36-02708 against Clear Lakes' water right no. 36-07004 is futile, even though the SRBA court as affirmed by the Idaho Supreme Court has decreed water rights no. 36-02659, 36-02708, and 36-07004 as being from the same source; and (2) whether as the holder of the most senior water right of the three rights (no. 36-02659), Clear Lakes can demand that a specific portion of the water diverted under this right be diverted from the western diversion pool. While I believe that I have thoroughly considered these issues, after I complete this additional review I will amend the watermaster instructions as appropriate.

Sincerely,

Karl J. Dreher
Director

Enclosure

c (w/o enclosure) to: Cindy Yenter – Water District No. 130 – Facsimile (208) 736-3037
Allen Merritt – IDWR – Facsimile (208) 736-3037
Tim Luke – IDWR
Larry Cope – Clear Springs Food – Facsimile (208) 543-5608
John Simpson - Barker Rosholt & Simpson – Facsimile (208) 344-6034

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EXHIBIT 4

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Clear Springs
Supreme Ct

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

June 13, 2002

Clear Springs Foods, Inc.
c/o John K. Simpson
Barker Rosholt & Simpson LLP
205 North 10th, Suite 520
P. O. Box 2139
Boise, ID 83701-2139

Facsimile: (208) 344-6034

Clear Lakes Trout Co.
c/o Daniel V. Steenson and
Charles L. Honsinger
Ringert Clark
455 South 3rd
P. O. Box 2773
Boise, ID 83701-2773

Facsimile: (208) 342-4657

VIA FIRST FACSIMILE AND FIRST CLASS MAIL

Re: Amended Watermaster Instructions for Distribution of Water
Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218

Dear John, Dan, and Charles:

Today, I issued amended watermaster instructions for distributing water among water rights 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218, a copy of which is enclosed. As I committed to Clear Lakes, I have again thoroughly reviewed all of the pertinent information of which I am aware, particularly the governing court decisions to date. Although I have added approximately 5 additional pages of analysis, my previous conclusions regarding how these water rights should be administered are unchanged.

These watermaster instructions are written to the watermaster, not to either of your clients. In the original instructions issued June 5, I included less analysis because only the basis for the instructions needed to be communicated to the watermaster, not a justification. The circumstances surrounding the Clear Lakes and Clear Springs water rights are complex, and the current instructions, as amended, are extraordinary in the analysis and detail included. This was done to demonstrate to both Clear Lakes and Clear Springs, that all of the complexities, pertinent information, and the law have been thoroughly considered. Thus the enclosed memorandum is not a decision arising from a contested case nor is it the model or form for future watermaster instructions.

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The written call filed by Clear Springs on June 7 will now be handled in accordance with the enclosed instructions. Please contact either myself or Norm Young if you have any questions.

Sincerely,

Karl J. Dreher
Director

Enclosure

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... 2002

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MEMORANDUM

To: Cindy Yenter
Water District 130 Watermaster

Date: June 13, 2002

From: Karl J. Dreher

cc: Clear Springs Foods, Inc.
Clear Lakes Trout Co.
Norm Young
Allen Merritt
Tim Luke

Subject: Amended Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218

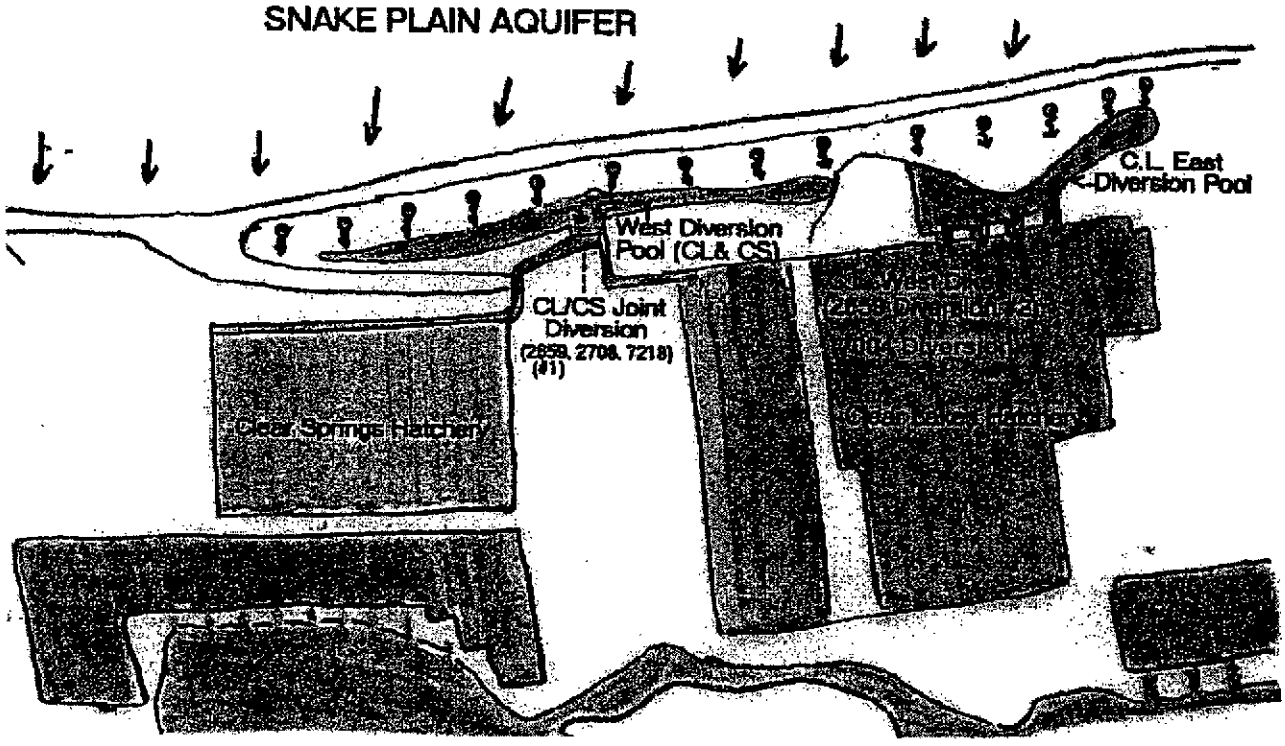
Background Summary

Clear Springs Foods, Inc. (aka Clear Springs Trout Company or "Clear Springs") and Clear Lakes Trout Company ("Clear Lakes") separately own and operate adjacent fish hatcheries located below the rim of the Snake River canyon north of Buhl, Idaho. During the development of the hatcheries in the 1960s and 1970s, both Clear Springs and Clear Lakes filed applications with IDWR for permits to appropriate water from springs flowing from the Eastern Snake Plain Aquifer, and five water rights were established as follows: 36-02659 (Clear Lakes, 100 cfs, 06/23/1966); 36-02708 (Clear Springs, 200 cfs, 09/28/1966); 36-07004 (Clear Lakes, 75 cfs, 07/21/1967); 36-07201 (Clear Springs, 10 cfs, 08/04/1971); and 36-07218 (Clear Springs, 51.55 cfs, 01/24/1972). The current layout of the adjoining hatcheries and water right diversion points (except for water right no. 36-07201) are shown on the next page.

On March 13, 1980, Clear Springs and Clear Lakes entered into an agreement settling disputes regarding property ownership, access, operation and maintenance of common facilities, and the responsibilities of both parties. The 1980 agreement also provided for allocation of water between water rights nos. 36-02659, 36-02708, and 36-07004, when the amount of water flowing from springs and available under these three water rights is less than 375 cfs. The agreement provided that:

> Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permits Nos. 36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available to [Clear] Lakes and [Clear] Springs under their respective permits, goes below

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375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between [Clear] Springs and [Clear] Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to [Clear] Springs and 47% to [Clear] Lakes. All water being used by [Clear] Springs and [Clear] Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by [Clear] Springs under Permit No. 36-7201. *Agreement,* pp. 3 – 4.

On November 2, 1992, IDWR filed the ***Director's Report for Reporting Area 3*** including it's recommendations for decreeing Clear Springs' water rights nos. 36-02708, 36-07201, and 36-07218. The "source" recommended by IDWR for all three Clear Springs water rights was springs tributary to Clear Lake(s). Clear Lakes filed objections to both the "source" and "point of diversion" elements of IDWR's recommendations for Clear Springs' water rights 36-02708 and 36-07218 alleging that these rights are diverted from a separate source than is Clear Lakes' water right no. 36-07004. Clear Lakes also filed objections to both the "source" and "point of diversion" elements of IDWR's recommendation for Clear Springs' water right 36-07201 alleging that Clear Lakes "has a water right [no. 36-02659] that diverts from the [same] source that supplies this water right [no. 36-07201]."

The Special Master for **In Re SRBA, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218)** issued ***Findings of Fact and Conclusions of Law on Involuntary Dismissal*** (August 21, 1998); ***Special Master's Report and Recommendations*** (August 28, 1998); and ***Order***

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Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) (December 31, 1998). Among other determinations, the Special Master concluded that "The source element for each water right [of Clear Springs] shall be reported as stated in the Director's Report for each water right" and that "the point of diversion for all the rights [of Clear Springs] shall be decreed as recommended in the Director's Report." Clear Lakes subsequently filed Notice of Challenge and after arguments, the Presiding Judge for the SRBA issued ***Memorandum Decision and Order on Challenge*** dated July 9, 1999. The Presiding Judge overruled and denied Clear Lakes' challenges to the Special Master's recommendation in all respects except one: the source for Clear Springs' water right no. 36-07201. Clear Lakes then filed Motion to Alter or Amend Judgment, and the Presiding Judge issued ***Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*** on August 15, 2000, denying Clear Lakes' motion.

The SRBA court issued partial decrees for Clear Springs' three water rights on April 10, 2000. After Clear Lakes' Motion to Alter or Amend judgment was denied by the SRBA court, Clear Lakes appealed to the Idaho Supreme Court. ***Idaho Supreme Court 2002 Opinion No. 17*** was filed on January 18, 2002, affirming the SRBA court ***Memorandum Decision and Order on Challenge.***

Following an inquiry from Clear Springs regarding how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call, both Clear Springs and Clear Lakes were asked to submit any additional information that either entity believed to be pertinent in developing watermaster instructions for administering these water rights. Both Clear Springs and Clear Lakes submitted information on May 2, 2002, although Clear Springs asserted that it believed IDWR already possessed all the necessary information to develop watermaster instructions.

In its May 2 submittal, *Memorandum Re: Administration of water right nos. 36-02659, 36-02708 and 36-07004*, as amended on May 7, Clear Lakes concludes that: (1) adjustment of the 6-ft adjustable weir from the west diversion pool through which water right 36-02659 is distributed to Clear Lakes would result in reducing the quantity of water distributed to the Clear Lakes' senior water right 36-02659 in favor of Clear Springs' junior water right 36-02708, which is precluded by Idaho law because Clear Lakes' senior water right would be injured; and (2) it is physically impossible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to increase the quantity of water available for Clear Springs' relatively senior water right 36-02708, making any call by Clear Springs to distribute water to Clear Springs' water right 36-02708 against Clear Lakes' water right 36-07004 futile.

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Basis for Watermaster Instructions - Administration of Water Rights 36-02659, 36-02708, 36-07004, and 36-07218

Seven of the nine Findings of Fact set forth by the Special Master in ***Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)*** (December 31, 1998), adopted by the Presiding Judge in ***Memorandum Decision and Order on Challenge*** (July 9, 1999), and affirmed by the Idaho Supreme Court in ***Idaho Supreme Court 2002 Opinion No. 17*** (January 18, 2002) that are the most pertinent to the administration of water rights nos. 36-02659, 36-02708, 36-07004, and 36-07218 are as follows:

> 2. The place of use for both Clear Springs and Clear Lakes is located in the Snake River Canyon north of Buhl, Idaho. All the water used by both Clear Lakes and Clear Springs originates from springs flowing from the Snake River Plain Aquifer. Prior to development of the rights, the water from all the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Springs Lake, and then ultimately emptied into the Snake River. [citations omitted]
>
> 3. Earl Hardy participated in the development of Clear Lakes' water rights. Mr. Hardy testified that prior to any development of water rights 36-02659 and 36-07004, there were two stream flows from the original stream channel. Mr. Hardy testified that there was an underwater division point in the stream channel creating a "western" and "eastern" flow. ... [citations omitted]
>
> 4. After the close of Clear Lakes' case, the historic dividing point between the eastern and western flows remained unclear. According to Mr. Hardy, the historic dividing point was located 80 feet from the gate on the western dyke. Clear Lakes' expert hydrologist, Sheryl [sic] Chapman, gave several opinions on the historic dividing point. One estimate was that the historic dividing point was located 30-40 feet to the east of where Mr. Hardy estimated the historic dividing point (110-120 feet from the gate on the western dyke). Mr. Chapman's other estimate was that the dividing point was located somewhere between the "highest western flow" and the "highest eastern flow" ... [citations omitted]
>
> 5. When water rights 36-02659 and 36-07004 were first developed, Clear Lakes created two pools, a western and an eastern pool. The result of this construction was the elimination [of] one of the three islands and one of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. "But for" this one continuous structure, there would not be an eastern pool. The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows. [citations omitted]

> 6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. [citations omitted]
>
> 7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. [citations omitted]
>
> 8. There are two discharge point[s] from the eastern pool. Part of water right 36-0259 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool. 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. Stated differently, the discharge points for water right 36-07004 are located to the west of the alleged historic dividing point. [citations omitted]

Given these findings, particularly findings 6 and 7, it is clear that the SRBA court has determined that Clear Springs' water rights 36-02708 and 36-7218 together with Clear Lakes' water rights 36-02659 and 36-07004 divert water commingled from various springs which constitute a single, non-segmentable, source. Regarding the administration of Clear Lakes' water right 36-07004, the Special Master determined the following conclusion of law:

> The undisputed facts are that the source of water for water right 36-07004 uses water from both the western and eastern flows, and that the current discharge point for that water right is on the western side of the historic dividing point. The result is that water right 36-07004 uses water from both the western and eastern flows; the same western water that historically was the source for all of Clear Springs' rights. Because of these simple facts, there is no way to administer water right 36-07004 as [being from] a separate source from the Clear Springs rights. *Order Granting in Part, Denying in Part, Motion [to] Alter or Amend*, p.7.

The Presiding Judge for the SRBA court did not disturb this conclusion, and the Idaho Supreme Court affirmed after stating: "The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court." *Idaho Supreme Court 2002 Opinion No. 17*, p. 4. In his ***Order on Motion to Alter or Amend Judgment*** dated August 15, 2000, the Presiding Judge discussed the administration of two hypothetical water rights with differing priority dates in a setting the judge described as being analogous to the setting between the Clear Springs and Clear Lakes water rights:

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> An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel. [Note that the judge uses the terms "stream" and "channel" synonymously.] Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. [citations omitted] However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be futile. Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. [citations omitted] Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels [other than the lawful removal of stream channel obstructions] to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. [citations omitted] In essence, the junior is protected by the respective location of the diversion works on the common source.
>
> In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. ... The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.
>
> In taking a variation to the above example, suppose both the junior and senior decide to modify their respective diversion works by altering the natural course of the stream and constructing a reservoir from which both intend to divert. **The modifications again eliminate the protection afforded the junior** by the natural fork in the stream [emphasis added]. The source is the same and the junior has permitted the senior to change his point of diversion despite the potential for injury. This is what occurred between Clear Lakes and Clear Springs in the instant case – the natural flow of the stream has been altered. *Order on Motion to Alter or Amend Judgment*, pp. 6 – 8.

In its May 2 memorandum, Clear Lakes concedes that the "source" element for water rights 36-02659, 36-02708, and 36-07004 has been decreed to be the same source (springs tributary to Clear Lake or Lakes). Clear Lakes, however, in essence contends that because: (a) water right 36-02708 is only diverted out of the western diversion pool and does not have a point of diversion out of the eastern diversion pool; and (b) water right 36-07004 is only diverted out of the eastern diversion pool and does not have a point of diversion out of the western pool; then

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reducing the amount of water diverted under Clear Lakes' right 36-07004 will not make water available for Clear Springs' right 36-02708, and the amount of water diverted from the western pool under Clear Lakes' right 36-02659 can not be reduced to make water available for Clear Springs' right 36-02708, since right 36-02659 is the senior right. While the decrees for water rights 36-02708 and 36-07004 clearly recognize separate points of diversion from the western and eastern pools, respectively, the practical result of Clear Lakes' premise would be that Clear Springs' water right 36-02708 and Clear Lakes' water right 36-07004 would be administered as if they were from separate sources. However, the Presiding Judge for the SRBA court, as quoted above, has in effect concluded that the modifications to the diversions for the Clear Lakes and Clear Springs water rights has "eliminated the protection" afforded Clear Lakes' water right 36-07004.

Clear Lakes' conclusion that adjustment of the 6-ft adjustable weir from the west diversion pool, through which water right 36-02659 is distributed to Clear Lakes, would result in reducing the quantity of water distributed to the Clear Lakes' senior right 36-02659 in favor of Clear Springs' junior right 36-02708 is not correct. When the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the west diversion pool. Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.

The full amount of water under the most senior right, Clear Lakes' right 36-02659, must be available for that right. When Clear Springs' water right 36-02708 is also in priority, this requires that more of the water diverted under Clear Lakes' right 36-02659 be diverted from the eastern diversion pool than has historically been the case when spring flows fell below 375 cfs. Clear Lakes alleges that causing it to divert more water from the eastern diversion pool under its senior right 36-02659 injures that right. But absent a basis for Clear Lakes being able to rely on diverting a specific portion of the water under its senior right 36-02659 from the western diversion pool, there is no injury to Clear Lakes' senior right 36-02659 so long as the right is fully satisfied and the extent of beneficial use made under right 36-02659 is not diminished. As the holder of the junior priority right 36-07004, Clear Lakes is obviously affected by this distribution of water since the amount of water diverted under its junior priority right 36-07004 and the extent of the beneficial use under that right are both reduced. However, this does not constitute injury to Clear Lakes' senior right 36-02659.

So the question becomes: "Does Clear Lakes have a legal basis for relying on diverting a specific portion of the water under its right 36-02659 from the western diversion pool?" Under the 1980 agreement, Clear Lakes and Clear Springs agreed that "until a legal determination is

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made or agreement made regarding Permits Nos. 36-7004 and 36-2708," that when spring flows into the eastern and western diversion pools fall below 375 cfs, Clear Lakes had the right to use a total of 47 percent of the spring flows under its rights 36-02659 and 36-07004, and Clear Springs had the right to use 53 percent of the spring flows under its right 36-02708. This allocation essentially results in the distribution of water between rights 36-02659, 36-02708, and 36-07004 as if all three rights were equal in priority, even though Clear Springs recognized Clear Lakes' right 36-02659 as the senior right. Issuance of the partial decrees for these rights by the SRBA court is clearly a "legal determination", and the allocation of spring flows under the 1980 agreement is no longer binding on either Clear Lakes or Clear Springs. Clear Lakes presumably agrees because in its May 2 memorandum, it asserts that when spring flows into the eastern and western pools fall below 375 cfs, the proper administration of rights 36-02659, 36-02708, and 36-07004 under the partial decrees is to distribute the first 34 cfs out of the eastern diversion pool and the first 66 cfs out of the western diversion pool to the senior Clear Lakes right 36-02659, with the remaining flow from the eastern pool going to Clear Lakes' right 36-07004 and the remaining flow from the western pool going to Clear Springs' right 36-02708. The quantities of 34 cfs and 66 cfs, are the amounts historically diverted by Clear Lakes from the eastern and western pools, respectively, when spring flows into the pools totaled at least 375 cfs. Therefore, as the holder of the most senior right diverting from either pool, Clear Lakes asserts that it has the right to divert a specific portion of the water under its right 36-02659 (66 cfs) from the western diversion pool.

The partial decree issued by the SRBA court is the first reference for determining whether Clear Lakes has a legal right to divert a specific portion of the water under its right 36-02659 from the western pool. The amended partial decree for water right 36-02659 contains the following remark under the legal description for its two points of diversion:

> This water right is diverted through a combination of two adjacent spring-fed diversion pools: (1) a diversion pool known as the "western pool" located in the S ½ SESWNE and the S ½ SWSENE, T09S, R14E, Section 2; and (2) a diversion pool known as the "eastern pool" located in a portion of Government Lot 5 known as the SWSESENE and SESWSENE, T09S, R14E, Section 2. Both pools divert water from the common source identified in the source element of this water right ...

While this remark clearly recognizes that Clear Lakes' water right 36-02659 is "diverted through a combination" of the western and eastern diversion pools, there is no recognition in the decree that Clear Lakes has the right to determine how much water is diverted from each pool under right 36-02659. Under Idaho law, the holder of a water right senior in priority to a junior priority right diverting from the same source clearly has the right to divert water ahead of the junior right provided water diverted under the senior right is reasonably needed and used for the beneficial use and in accordance with other provisions defined in a permit, license superceding the permit, or finally a decree for the right. However, the courts have found that diversion and use of water under a senior priority is not an unrestricted right and is subject to reasonableness.

For example, in *Schodde v. Twin Falls Land and Water Co.*, 161 F. 43 (1908), affirmed 224 U.S. 107 (1912), the plaintiff brought an action against the defendant and alleged damages caused by

the defendant's construction of Milner Dam. The plaintiff had appropriated water from the Snake River to irrigate farmland and provide water for a small mining operation. *Id.* The plaintiff's historic means of diversion was to use water wheels to lift the water out of the river. *Id.* The plaintiff also constructed wing dams in the river to confine the flow of the river so that the current would drive the water wheels and cause them to carry the water to the necessary height. *Id.* The defendant subsequently constructed a dam to form a reservoir, raising the water level behind the dam about 40 feet, for the purpose of supplying water for irrigation and domestic purposes to settlers on about 300,000 acres of land situated below defendant's dam. *Id.* at 44. The plaintiff alleged that the defendant's dam backed water up to and beyond the plaintiff's premises making it impossible for the water wheels to work and sued for damages. *Id.* The court did not deny the plaintiff's right to divert water and the plaintiff did not argue that his appropriation was not present after the construction of the dam. *Id.* at 45. The plaintiff claimed that he could no longer divert water by the means he first adopted and that the defendant deprived him of the right to the current of the river, which, prior to the erection of the dam, "rendered his means of diversion available." *Id.* The court found that "the current of the river was no part of plaintiff's water location, and that he has no cause of action against the defendant for destroying his current." *Id.* at 47. The court then held that "[t]he claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is...untenable" and that "it is immaterial to the state what particular method is used." *Id.* at 47. The court then stated "[t]he method adopted cannot be said to have attached as appurtenant to the appropriation as against other [junior] appropriators of water from the same stream." *Id.*

In *Schodde*, it seems clear that the court was not concerned with the method of diversion as long as the holder of a senior priority water right was able to continue full use of the right without unreasonably excluding the use of water under a junior priority water right from the same source. Clear Lakes is correct in its assertion that Idaho law does not allow regulation or curtailment of a senior water right in order to increase the water supply to a junior water right in times of shortage, or otherwise. However, if it is possible for Clear Lakes' senior water right 36-02659 to be fully satisfied and also allow for the next water right in priority from the same source to be exercised (Clear Springs' right 36-02708), then Clear Lakes is not correct in claiming that it has a right to the historical method of diversion or the historical allocation between alternative diversion points. Such method or allocation would diminish the amount of water available for the next water right in priority held by Clear Springs, and allow Clear Lakes to proceed to divert water under an even more junior right from the same source (Clear Lakes' right 36-07004) when the more senior right 36-02708 has not been satisfied.

A similar conclusions results from *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). In *Parker*, the defendant drilled a well on his property in Bear Lake County to a depth of 200 feet "for the purpose of providing irrigation for a 64 acre field." *Id.* at 507, 650 P.2d at 649. The well was located approximately 125 to 150 feet from a domestic well owned by the plaintiff, which was drilled to a depth of 71 feet. *Id.* After a pump test was conducted on the defendant's well, the plaintiff discovered that his domestic well had ceased to produce water. The following morning the well did produce water, but the water was muddy and continued to be so for several days. *Id.* The plaintiff filed suit against the defendant and obtained a temporary restraining

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order that prohibited the defendant from operating his pump. *Id.* at 507-08, 650 P.2d at 649-50. The district court then granted a permanent injunction against the use of the irrigation well. *Id.* The defendant appealed the injunction and asserted that allowing one shallow domestic well to block the development of all irrigation wells in a given area is inconsistent with the policy of optimum development of water resources in the public interest. *Id.* at 511, 650 P.2d at 653. The court stated that the assertion had merit and held that the defendant "has a right to divert any surplus subterranean waters provided and so long as his diversion of such waters does not deprive Parker of his use of the water." *Id.* at 514, 650 P.2d at 656. The court then explained that Parker would not be deprived of any right to his use "if water can be obtained for Parker by changing the method or means of diversion." *Id.* The court then stated that the expense of changing the method or means of diversion must be paid by the subsequent appropriator. *Id.*

Although the *Parker* case dealt with ground water, its principles apply to administration of the Clear Lakes and Clear Springs water rights. When the spring flows into and out of the western and eastern pools have been at least 375 cfs, Clear Lakes claims to have historically received 66 cfs from the western pool and 34 cfs from the eastern pool to satisfy its senior priority water right 36-02659. Clear Lakes now claims that as the holder of the most senior priority water right diverted from the western and eastern pools, that this water right 36-02659 must receive 66 cfs from the western pool even if the next right in priority from the same source, Clear Springs' right 36-02708, is not satisfied while the more junior water right from the same source, Clear Lakes' right 36-07004, continues to divert water from the eastern pool and is insulated from the more senior Clear Springs' right diverted out of the western pool. However, if there is another reasonable means of diversion to satisfy Clear Lakes' senior priority right 36-02659 (i.e., diverting more of the water under right 36-02659 from the eastern pool), then Clear Lakes would not be deprived of using water under its senior priority right. This is the principle articulated in *Parker*. Full diversion of 100 cfs under Clear Lakes' right 36-02659 can be achieved by diverting more of the right out of the eastern pool and decreasing the amount of water diverted out of the western pool, while still providing for diversion and use of the full amount of water under the right. This would allow more water to be diverted under the next right in priority from the same source, Clear Springs' right 36-02708. If expenses are incurred by Clear Lakes in diverting water from the eastern pool under the senior right 36-02659, not the junior right 36-07004, then under *Parker*, Clear Springs may be responsible for those costs. However, since the eastern pool already has the diversion capacity for the full 100 cfs diversion under right 36-02659, it does not appear that Clear Springs would be obligated to pay anything.

Therefore, there is no known legal basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004. Thus a call from Clear Springs' right 36-02708 against the junior Clear Lakes' right 36-07004 is not futile.

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Consequently, when the amount of water flowing from the springs is equal to or greater than 375 cfs, then both of Clear Lakes' water rights 36-02659 and 36-0704 as well as Clear Springs' water right 36-02708 can be filled, along with part or all of Clear Springs' water right 36-07218 when spring discharges exceed 375 cfs. But until and unless there is either a legal determination or a subsequent agreement between Clear Lakes and Clear Springs that provides for Clear Lakes diverting a specified portion of water under its right 36-02659 from the western pool, when the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights in priority as being from a single source. The "source" element for water rights 36-02659, 36-02708, 36-07004, and 36-07218, is springs tributary to Clear Lake(s). For the purposes of adminstering these water rights, the eastern and western diversion pools are inextricably linked to the springs whose discharge is collected in the pools. Water rights 36-02659, 36-02708, and 36-07004 must not be administered in the manner set forth by Clear Lakes in its May 2 memorandum as though the rights were from separate sources.

Basis for Watermaster Instructions - Administration of Water Right 36-07201

In ***Memorandum Decision and Order on Challenge*** dated July 9, 1999, the Presiding Judge for the SRBA court concluded the following (p. 29):

> ... the Brailsford Stream, or what is sometimes referred to as the "far western stream," which is the source of Clear Springs' right 36-07201, **never** ran into the channel or pool of water from which Clear Lakes' rights 36-02659 and 36-07004 and Clear Springs' rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights.
>
> ... because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Based on the clear language in the Presiding Judge's Decision and Order, Clear Springs' water right 36-07201 is to be administered as being from a source separate and distinct from the source for rights 36-02659, 36-02708, 36-07004, and 36-07218.

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LETTER TO CINDY YENTER FROM KARL J. DREHER DATED JUNE 13, 2002
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Watermaster Instructions

1. Water for Clear Springs' water right 36-07201 is to be distributed separately as being from a separate "source" from the "source" for water rights 36-02659, 36-02708, 36-07004, and 36-07218.

2. The watermaster is not to adjust the 6-ft adjustable weir unless Clear Lakes calls for distribution of water to its senior priority water right 36-02659 or Clear Springs calls for distribution of water to its water right 36-02708, which is next in priority. Such calls must be in writing to either IDWR or the watermaster.

3. If the watermaster receives a written call for distribution, the watermaster is to notify IDWR's Regional Manager in Twin Falls, or alternatively the Manager of the Water Distribution Section of the Water Management Division in the event the Regional Manager is unavailable.

4. IDWR and the watermaster must determine that when a call is made, water is needed under the senior priority water right making the call and that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right. To accomplish this determination, the watermaster is to contact representatives of both Clear Lakes and Clear Springs to schedule a time for accessing Clear Lakes and Clear Springs properties, as soon as possible after a call is made, to ascertain the amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), as well as the need to distribute water among these rights based on priority.

5. As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights with 14-day notice by personal service to the water right holder, or the facility manager for the water right holder, and by mail or facsimile, if available, that the watermaster will adjust the 6-ft adjustable weir so as to distribute water to the calling senior right, reducing or curtailing the distribution of water to the remaining water right(s) in the order of the most junior priority of the remaining right(s) being reduced or curtailed first.

6. At expiration of the 14-day notice, the watermaster is to re-confirm the amount of water flowing from springs and available under water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), based on priority, and to adjust the 6-ft adjustable weir as necessary to distribute water to the rights in order of priority.

7. The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.

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8. To determine the amount of water flowing from springs and available to the above water rights, the watermaster must add together the quantities of water flowing to the Clear Lakes and Clear Springs hatcheries. To determine the amount of water flowing to the Clear Lakes hatchery (subject to further confirmation)[1]:

   (a) Read staff gage above the 40-inch west weir near the Clear Lakes hatchery holding ponds;

   (b) Determine discharge through the west weir from attached table for Clear Lakes west weir discharge;

   (c) Read staff gages on each of the six 10-ft Clear Lakes east weirs;

   (d) Determine discharge through each of the six Clear Lakes east weirs from the attached table for Clear Lakes east weirs;

   (e) Add 0.20 cfs to account for flow in the hatchery holding ponds through the perforated PVC pipe (if operating);

   (f) Add discharge from the west weir, each of the six east weirs, and the hatchery pipe to determine the total amount of water flowing to the Clear Lakes hatchery.

   To determine the amount of water flowing to the Clear Springs hatchery (subject to further confirmation)[2]:

   (g) Read staff gage in west diversion pool above 22-ft weir;

   (h) Determine discharge through the 22-ft and 10-ft weirs from attached table for Clear Springs combined weirs;

   (i) Add one (1) cfs to account for discharge of pipe into Clear Springs holding ponds and minor flow from pipes into headrace (if pipes are flowing);

   (j) Read weir measuring the discharge from the wet lab at the Clear Springs Research Laboratory.

   (k) Determine discharge for the wet lab effluent from the table for the Clear springs wet lab weir, or use the average flow which is estimated to be 0.5 cfs;

[1&2] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988.

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(l) Add discharge from the 22-ft and 10-ft weirs, the pipes into the holding ponds and headrace, and the wet lab, to determine the total amount of water flowing to the Clear Springs hatchery.

The total amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218, is equal to the sum of (f) and (l).

8. If the total flow is equal to or greater than 375 cfs (± 5 cfs) then the amount of spring flows to Clear Lakes, 7.(f), should be 175 cfs with all the remaining flow to Clear Springs up to 251.55 cfs.

9. If the total flow is less than 375 cfs (± 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)[3]:

(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).

[3] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988; and from letter report to Dan Steenson and Charlie Honsinger, Ringert Clark Chartered, from Dave Shaw, ERO Resources Corporation, May 2, 2002.

(g) Repeat (a) through (f), if necessary, after allowing sufficient time for the change in flows to stabilize through the hatcheries.

Attachments (9 pages)

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CLEAR LAKES – 10-Ft. (East) Weirs

DISCHARGE (CFS)

(Corrected For Velocity Of Approach)

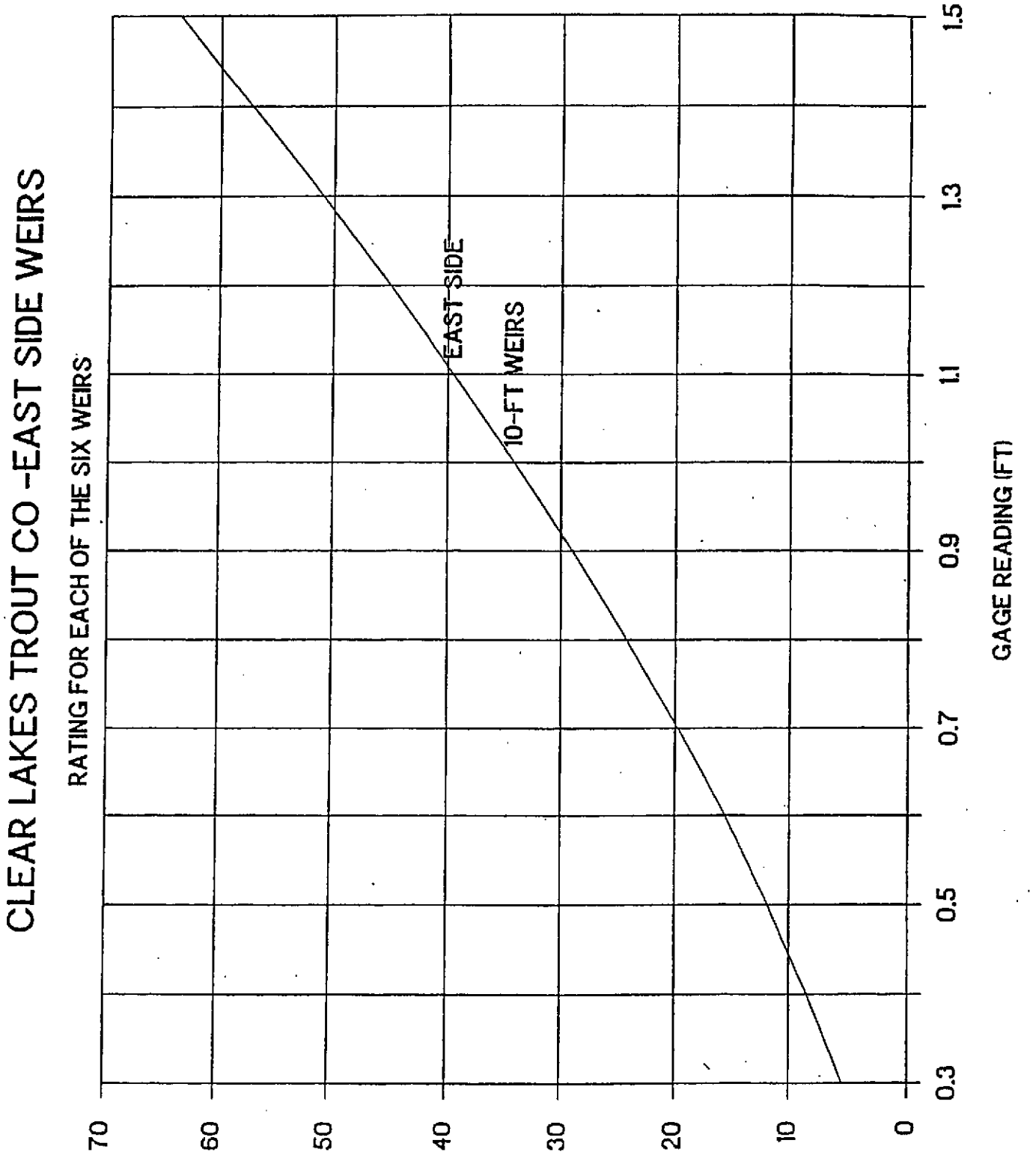
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.3 :	5.49	5.77	6.05	6.34	6.63	6.93	7.23	7.53	7.84	8.16
0.4 :	8.48	8.80	9.12	9.45	9.79	10.13	10.47	10.81	11.16	11.52
0.5 :	11.88	12.24	12.60	12.97	13.35	13.72	14.10	14.49	14.87	15.26
0.6 :	15.66	16.06	16.46	16.86	17.27	17.68	18.10	18.52	18.94	19.36
0.7 :	19.79	20.22	20.66	21.10	21.54	21.98	22.43	22.88	23.34	23.80
0.8 :	24.26	24.72	25.19	25.66	26.13	26.61	27.09	27.57	28.06	28.55
0.9 :	29.04	29.53	30.03	30.53	31.04	31.54	32.05	32.57	33.08	33.60
1.0 :	34.12	34.65	35.17	35.70	36.24	36.77	37.31	37.85	38.40	38.95
1.1 :	39.50	40.05	40.61	41.16	41.73	42.29	42.86	43.43	44.00	44.57
1.2 :	45.15	45.73	46.32	46.90	47.49	48.08	48.68	49.27	49.87	50.47
1.3 :	51.08	51.69	52.29	52.91	53.52	54.14	54.76	55.38	56.01	56.64
1.4 :	57.27	57.90	58.54	59.18	59.82	60.46	61.11	61.75	62.41	63.06
1.5 :	63.72	64.37	65.04	65.70	66.36	67.03	67.70	68.38	69.05	69.73

CLEAR LAKES – 40-In. (West) Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.5 :	3.92	4.03	4.15	4.26	4.38	4.50	4.61	4.73	4.85	4.97
0.6 :	5.09	5.22	5.34	5.46	5.59	5.72	5.84	5.97	6.10	6.23
0.7 :	6.36	6.49	6.62	6.75	6.89	7.02	7.15	7.29	7.42	7.56
0.8 :	7.70	7.84	7.98	8.11	8.26	8.40	8.54	8.68	8.82	8.97
0.9 :	9.11	9.25	9.40	9.55	9.69	9.84	9.99	10.14	10.28	10.43
1.0 :	10.58	10.73	10.89	11.04	11.19	11.34	11.50	11.65	11.81	11.96
1.1 :	12.12	12.27	12.43	12.59	12.74	12.90	13.06	13.22	13.38	13.54
1.2 :	13.70	13.86	14.02	14.19	14.35	14.51	14.68	14.84	15.00	15.17
1.3 :	15.33	15.50	15.67	15.83	16.00	16.17	16.34	16.50	16.67	16.84
1.4 :	17.01	17.18	17.35	17.52	17.69	17.87	18.04	18.21	18.38	18.56
1.5 :	18.73	18.90	19.08	19.25	19.43	19.60	19.78	19.96	20.13	20.31
1.6 :	20.49	20.66	20.84	21.02	21.20	21.38	21.55	21.73	21.91	22.09
1.7 :	22.27	22.45	22.64	22.82	23.00	23.18	23.36	23.55	23.73	23.91
1.8 :	24.09	24.28	24.46	24.65	24.83	25.02	25.20	25.39	25.57	25.76
1.9 :	25.94	26.13	26.32	26.50	26.69	26.88	27.06	27.25	27.44	27.63
2.0 :	27.82	28.01	28.19	28.38	28.57	28.76	28.95	29.14	29.33	29.52

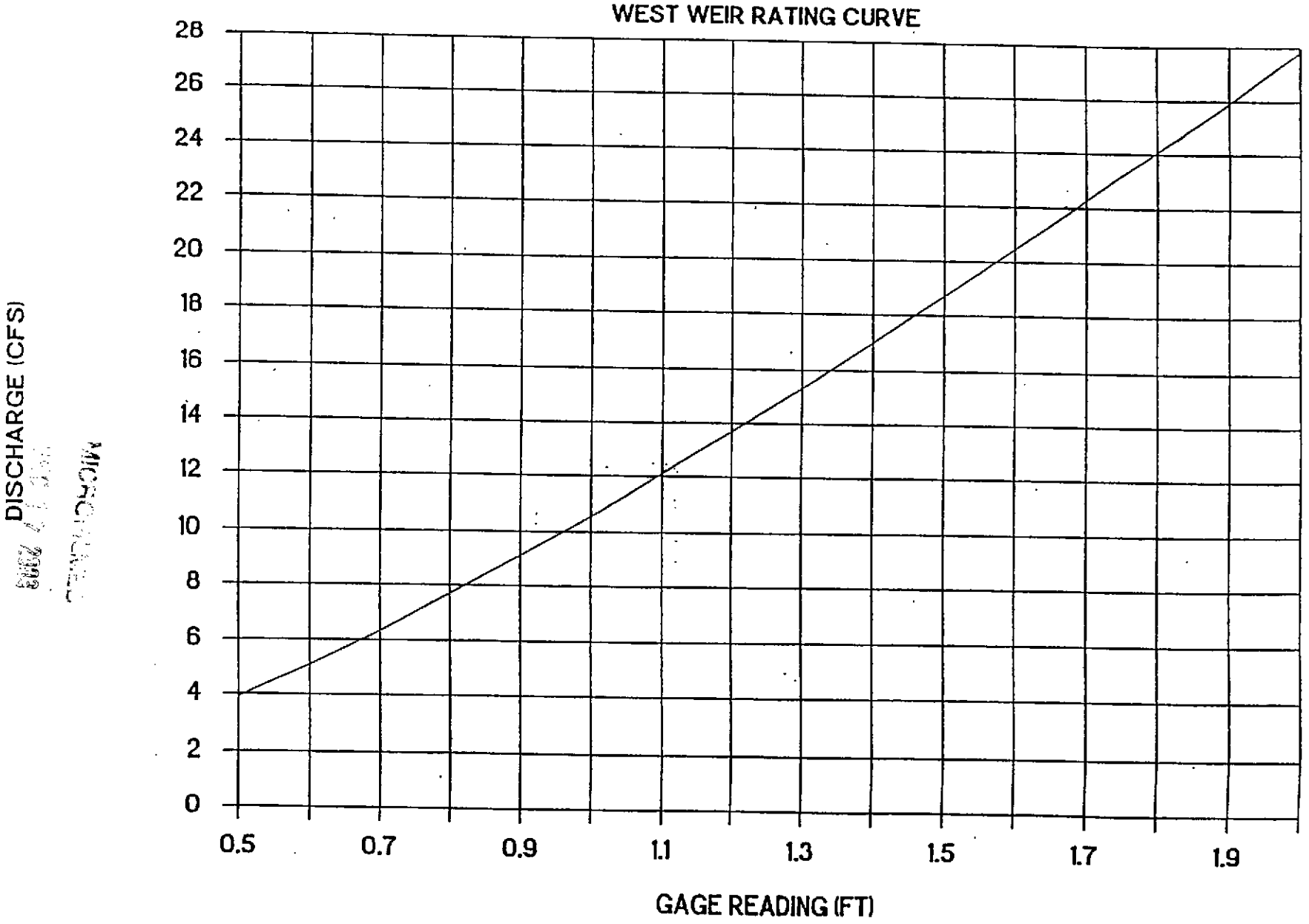
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LETTER TO CINDY YENTER FROM KARL J. DREHER DATED JUNE 13, 2002

CLEAR LAKES TROUT COMPANY



CLEAR SPRINGS – Combined Weirs

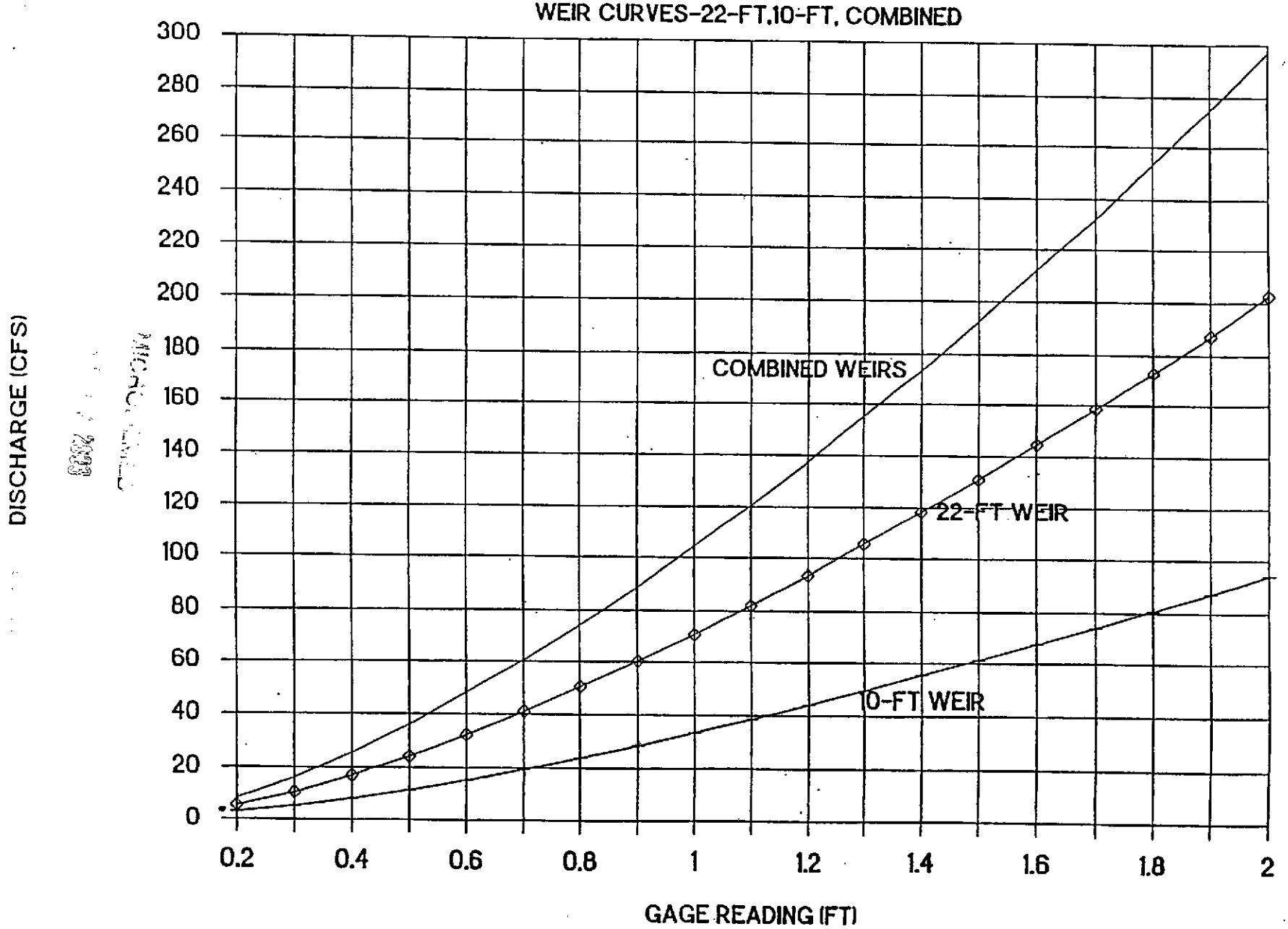
DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	8.58	9.28	10.00	10.73	11.48	12.25	13.04	13.84	14.65	15.49
0.3	16.33	17.20	18.07	18.96	19.87	20.79	21.72	22.67	23.63	24.60
0.4	25.59	26.59	27.60	28.62	29.66	30.71	31.77	32.84	33.93	35.02
0.5	36.13	37.25	38.38	39.52	40.67	41.83	43.01	44.19	45.39	46.60
0.6	47.81	49.04	50.28	51.52	52.78	54.05	55.32	56.61	57.91	59.22
0.7	60.53	61.86	63.19	64.54	65.89	67.26	68.63	70.01	71.40	72.80
0.8	74.21	75.63	77.05	78.49	79.93	81.39	82.85	84.32	85.80	87.28
0.9	88.78	90.28	91.80	93.32	94.84	96.38	97.93	99.48	101.04	102.61
1.0	104.19	105.77	107.37	108.97	110.58	112.19	113.82	115.45	117.09	118.74
1.1	120.39	122.05	123.72	125.40	127.09	128.78	130.48	132.18	133.90	135.62
1.2	137.35	139.08	140.83	142.58	144.34	146.10	147.87	149.65	151.44	153.23
1.3	155.03	156.83	158.65	160.47	162.29	164.13	165.97	167.82	169.67	171.53
1.4	173.40	175.27	177.15	179.04	180.94	182.84	184.74	186.66	188.58	190.50
1.5	192.44	194.37	196.32	198.27	200.23	202.20	204.17	206.14	208.13	210.12
1.6	212.11	214.12	216.12	218.14	220.16	222.19	224.22	226.26	228.30	230.35
1.7	232.41	234.47	236.54	238.62	240.70	242.79	244.88	246.98	249.08	251.19
1.8	253.31	255.43	257.56	259.69	261.83	263.98	266.13	268.28	270.45	272.61
1.9	274.79	276.97	279.15	281.34	283.54	285.74	287.95	290.16	292.38	294.60
2.0	296.83	299.07	301.31	303.56	305.81	308.06	310.33	312.59	314.87	317.15

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LETTER TO CINDY YENTER FROM KARL J. DREHER DATED JUNE 13, 2002

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS – 22-Ft. Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	5.60	6.07	6.55	7.05	7.56	8.08	8.61	9.16	9.71	10.27
0.3 :	10.85	11.44	12.03	12.64	13.25	13.88	14.51	15.16	15.81	16.48
0.4 :	17.15	17.83	18.52	19.21	19.92	20.64	21.36	22.09	22.83	23.58
0.5 :	24.33	25.10	25.87	26.64	27.43	28.22	29.03	29.83	30.65	31.47
0.6 :	32.30	33.14	33.99	34.84	35.70	36.56	37.43	38.31	39.20	40.09
0.7 :	40.99	41.90	42.81	43.73	44.65	45.58	46.52	47.46	48.42	49.37
0.8 :	50.33	51.30	52.28	53.26	54.25	55.24	56.24	57.24	58.25	59.27
0.9 :	60.29	61.32	62.35	63.39	64.44	65.49	66.54	67.60	68.67	69.74
1.0 :	70.82	71.90	72.99	74.09	75.19	76.29	77.40	78.52	79.64	80.76
1.1 :	81.90	83.03	84.17	85.32	86.47	87.63	88.79	89.96	91.13	92.31
1.2 :	93.49	94.67	95.87	97.06	98.26	99.47	100.68	101.90	103.12	104.34
1.3 :	105.57	106.81	108.05	109.29	110.54	111.79	113.05	114.31	115.58	116.85
1.4 :	118.13	119.41	120.69	121.98	123.28	124.58	125.88	127.19	128.50	129.82
1.5 :	131.14	132.46	133.79	135.13	136.46	137.81	139.15	140.50	141.86	143.22
1.6 :	144.58	145.95	147.32	148.70	150.08	151.47	152.86	154.25	155.65	157.05
1.7 :	158.45	159.86	161.28	162.69	164.12	165.54	166.97	168.40	169.84	171.28
1.8 :	172.73	174.18	175.63	177.09	178.55	180.02	181.49	182.96	184.44	185.92
1.9 :	187.40	188.89	190.38	191.88	193.38	194.88	196.39	197.90	199.42	200.94
2.0 :	202.46	203.99	205.52	207.05	208.59	210.13	211.67	213.22	214.77	216.33

CLEAR SPRINGS – 10-Ft. Weir

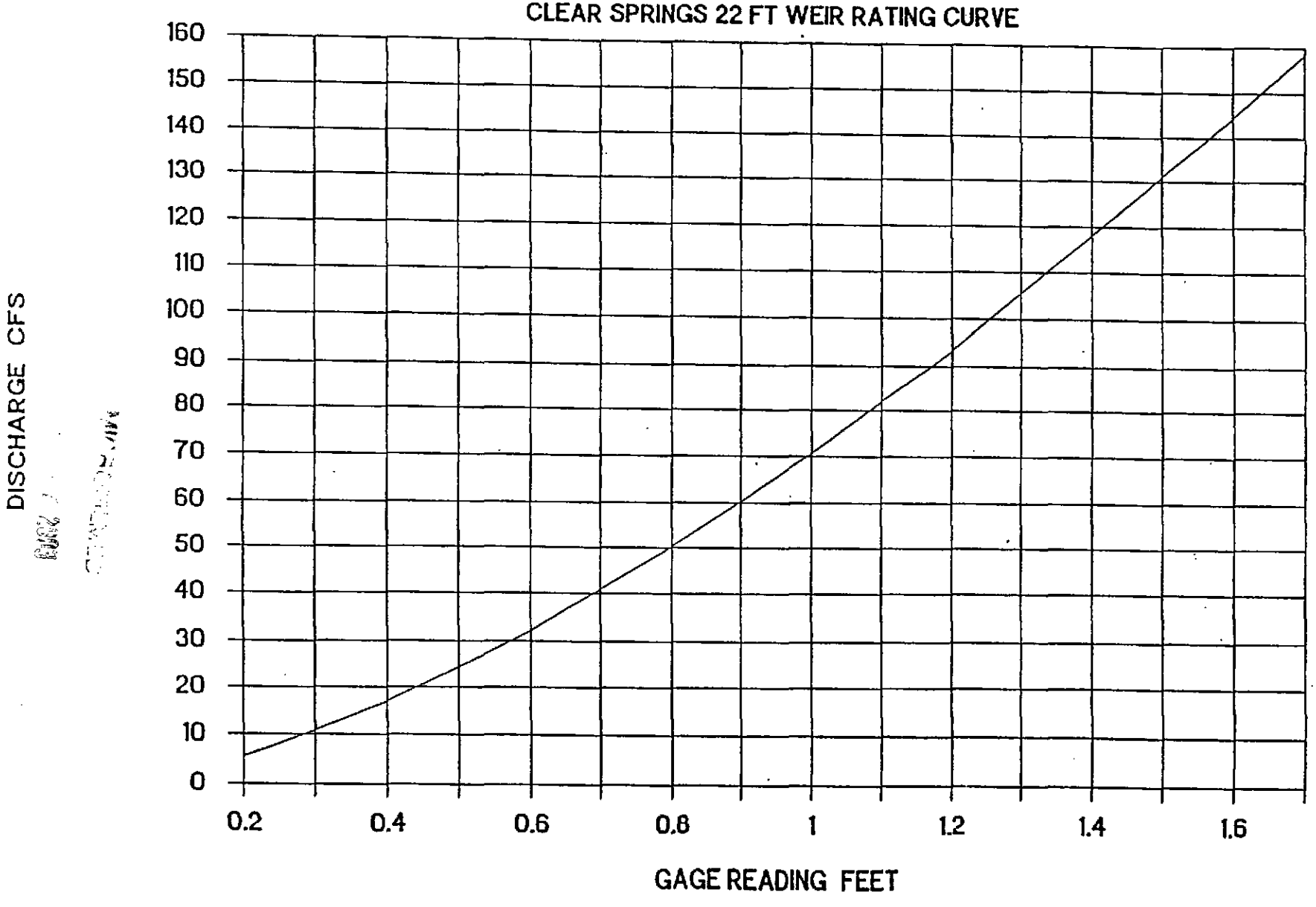
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DISCHARGE (CFS)

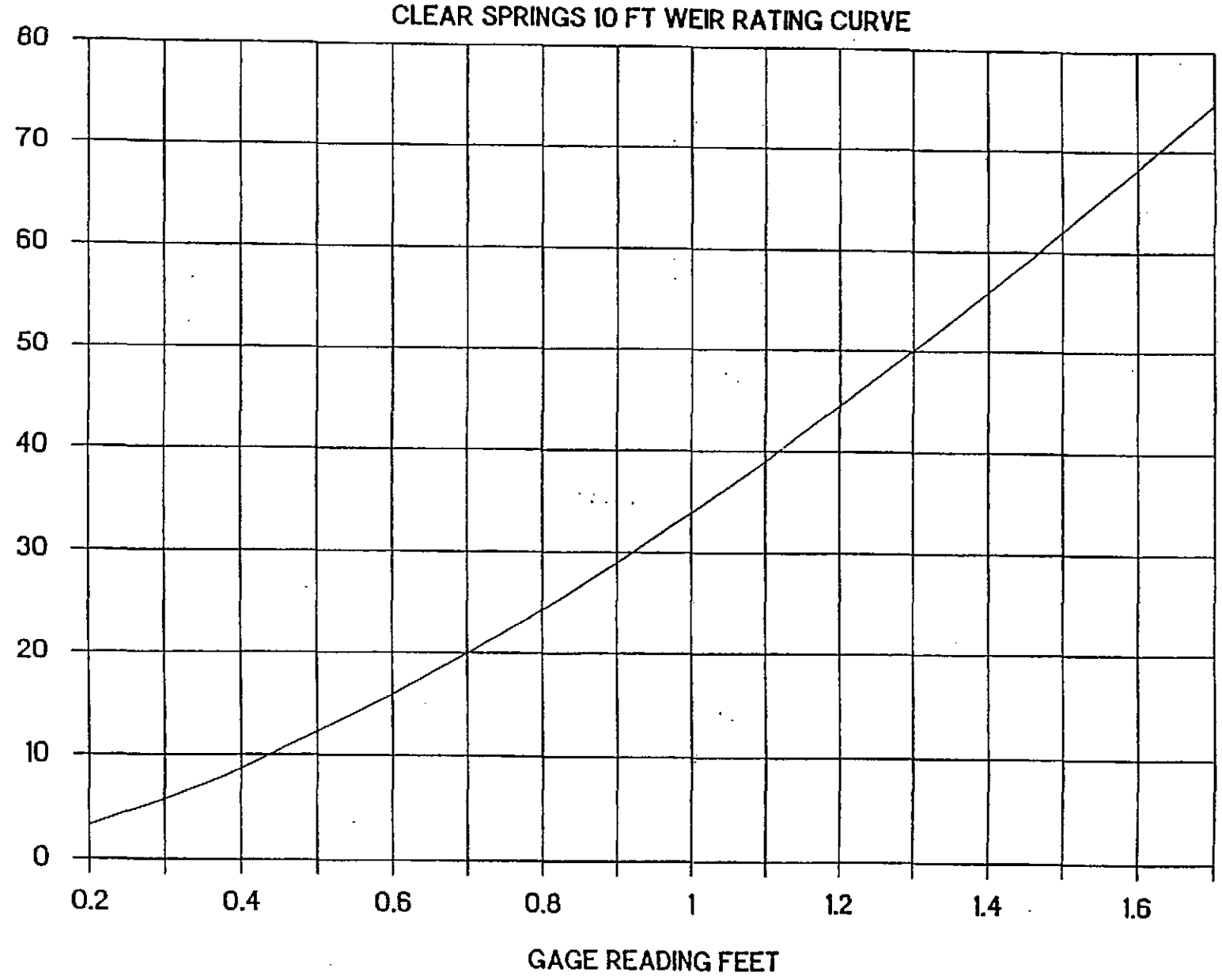
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	2.98	3.21	3.44	3.68	3.92	4.17	4.42	4.68	4.94	5.21
0.3 :	5.48	5.76	6.04	6.33	6.62	6.91	7.21	7.51	7.82	8.13
0.4 :	8.44	8.76	9.08	9.41	9.74	10.07	10.41	10.75	11.10	11.44
0.5 :	11.80	12.15	12.51	12.87	13.24	13.61	13.98	14.36	14.74	15.12
0.6 :	15.51	15.90	16.29	16.68	17.08	17.49	17.89	18.30	18.71	19.12
0.7 :	19.54	19.96	20.38	20.81	21.24	21.67	22.11	22.54	22.99	23.43
0.8 :	23.88	24.32	24.78	25.23	25.69	26.15	26.61	27.08	27.54	28.02
0.9 :	28.49	28.97	29.44	29.93	30.41	30.90	31.38	31.88	32.37	32.87
1.0 :	33.37	33.87	34.37	34.88	35.39	35.90	36.41	36.93	37.45	37.97
1.1 :	38.49	39.02	39.55	40.08	40.61	41.15	41.69	42.23	42.77	43.31
1.2 :	43.86	44.41	44.96	45.52	46.07	46.63	47.19	47.75	48.32	48.89
1.3 :	49.46	50.03	50.60	51.18	51.76	52.34	52.92	53.50	54.09	54.68
1.4 :	55.27	55.87	56.46	57.06	57.66	58.26	58.86	59.47	60.08	60.69
1.5 :	61.30	61.91	62.53	63.15	63.77	64.39	65.01	65.64	66.27	66.90
1.6 :	67.53	68.16	68.80	69.44	70.08	70.72	71.36	72.01	72.66	73.31
1.7 :	73.96	74.61	75.27	75.92	76.58	77.24	77.91	78.57	79.24	79.91
1.8 :	80.58	81.25	81.93	82.60	83.28	83.96	84.64	85.32	86.01	86.70
1.9 :	87.39	88.08	88.77	89.46	90.16	90.86	91.56	92.26	92.96	93.67
2.0 :	94.37	95.08	95.79	96.51	97.22	97.94	98.65	99.37	100.09	100.82

LETTER TO CINDY YENTER FROM KARL J. DREHER DATED JUNE 13. 2002

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS TROUT COMPANY



DISCHARGE CFS

LETTER TO CINDY YENTER FROM KARL J. DREHER DATED JUNE 13, 2002

RECEIVED
JUN 17 2002
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Clear Lakes -- 6 Ft Contracted Weir
Discharge in CFS adjusted for velocity of approach and weir elevation

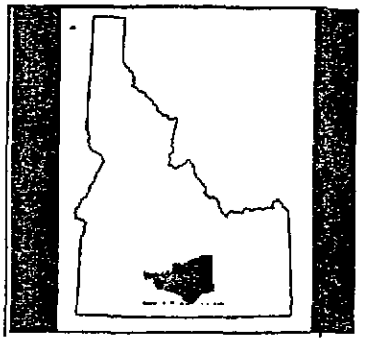
Length = 6 Velocity Head = 0.00000

Gage Reading	0.00	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	1.84	1.98	2.12	2.26	2.40	2.55	2.70	2.86	3.01	3.17
0.3	3.33	3.50	3.66	3.83	4.00	4.18	4.35	4.53	4.71	4.90
0.4	5.08	5.27	5.46	5.65	5.84	6.04	6.24	6.44	6.64	6.84
0.5	7.05	7.26	7.47	7.68	7.89	8.11	8.33	8.54	8.77	8.99
0.6	9.21	9.44	9.67	9.90	10.13	10.36	10.60	10.83	11.07	11.31
0.7	11.55	11.79	12.04	12.28	12.53	12.78	13.03	13.28	13.53	13.79
0.8	14.04	14.30	14.56	14.82	15.08	15.35	15.61	15.88	16.14	16.41
0.9	16.68	16.95	17.23	17.50	17.78	18.05	18.33	18.61	18.89	19.17
1.0	19.46	19.74	20.03	20.31	20.60	20.89	21.18	21.47	21.76	22.06
1.1	22.35	22.65	22.95	23.25	23.55	23.85	24.15	24.45	24.76	25.06
1.2	25.37	25.67	25.98	26.29	26.60	26.92	27.23	27.54	27.86	28.17
1.3	28.49	28.81	29.13	29.45	29.77	30.09	30.41	30.74	31.06	31.39
1.4	31.72	32.04	32.37	32.70	33.03	33.37	33.70	34.03	34.37	34.70
1.5	35.04	35.38	35.71	36.05	36.39	36.73	37.08	37.42	37.76	38.11
1.6	38.45	38.80	39.15	39.49	39.84	40.19	40.54	40.89	41.25	41.60
1.7	41.95	42.31	42.66	43.02	43.38	43.74	44.09	44.45	44.81	45.17
1.8	45.54	45.90	46.26	46.63	46.99	47.36	47.72	48.09	48.46	48.83
1.9	49.20	49.57	49.94	50.31	50.68	51.06	51.43	51.80	52.18	52.56
2.0	52.93	53.31	53.69	54.07	54.45	54.83	55.21	55.59	55.97	56.36

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EXHIBIT 5

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STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 19, 2002

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

FACSIMILE – followed by mailed original

HAND DELIVERED

RE: Notice of Intent to Redistribute Flows

Dear Kay and Larry:

On June 7, 2002, Clear Springs Foods, Inc (Clear Springs) submitted a written call for priority distribution of water under right no. 36-2708 from springs tributary to Clear Lakes. The call indicated that the flow from the common source available for water right nos. 36-2659, 36-2708, 36-7004 and 36-2718 was insufficient to fill all of the rights and that water was being diverted under Clear Lakes Trout (Clear Lakes) right no. 36-7004 while the more senior Clear Springs right no. 36-2708 for 200 cfs was not being filled.

Pursuant to amended Watermaster instructions issued June 13, 2002, by IDWR Director Karl Dreher, Tim Luke and I met with the parties at the diversions for the above listed rights on June 18. The purpose of this meeting was to 1) determine available flows and the present distribution of water to the above listed rights, 2) establish that water is needed under the senior priority water right making the call, and 3) confirm that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right.

From our measurements yesterday, Clear Lakes is receiving a measured flow of 147.6 cfs from its combined diversions, and Clear Springs is receiving a measured flow of 173.0 cfs from its main diversion and minor contributing pipelines. Based on these measurements, there is a total of 320.6 cfs available from the source, and Clear Springs is not receiving a full complement of water under the right no. 36-2708. Additional flow distributed under this right would be put to beneficial use at Clear Springs by activating and using 4 raceways which are currently dry and not being used.

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DEC 17 2003

Pursuant to the Watermaster instructions, a 14-day notice shall be provided to the holder of the junior water rights prior to any reduction in distributed flows through adjustment of the 6-foot weir. In this case, the junior right affected is Clear Lakes right no. 36-7004. ***Notice is hereby given*** that the distribution of water to right no. 36-7004 will be reduced by approximately 27 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On **July 3, 2002,** I will re-confirm available flows from the springs and confirm again whether or not right nos. 36-2659 and 36-2708 are being filled in order of priority. If right no. 36-2659 is being filled and water is also being diverted under right no. 36-7004 while right no. 36-2708 is not being filled, I will also confirm that Clear Springs can make beneficial use of any additional water distributed to right no. 36-2708. If Clear Springs can put additional water to beneficial use under its right 36-2708, I will make an adjustment to the 6-foot adjustable weir at the shared diversion, in order that the total spring flows are distributed in the following manner: the first 100 cfs to Clear Lakes Trout right no. 36-2659, the next 200 cfs to Clear Springs right no. 36-2708, and the balance of flows (up to 75 cfs) to Clear Lakes Trout right no. 36-7004. After that time, I will make weekly visits to the diversions to measure available flows, confirm that beneficial use is being made under the respective rights, and make necessary adjustments to the 6-foot adjustable weir.

Representatives from both Clear Lakes and Clear Springs are invited to be present during the July 3 measurement. Since the adjustment wheel for the 6-foot adjustable weir is locked, I will require access to that device on June 3, and will need to have a key provided to me or be allowed to place a Water District lock on the chain at that time.

If you wish to contest this action, you 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). However, such petition may not stay the above action. If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Norm Young and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co.
Charles Honsinger
Terry Huddleston, Clear Springs Foods, Inc.
John Simpson

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DEC 17 2003

EXHIBIT 6

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2003

RINGERT CLARK
CHARTERED LAWYERS

Lloyd E. Ringert
Jeffrey R. Christensen
D. Blair Clark
Michael J. Doohitle
S. Bryce Farris
Patrick D. Bailey
David Hammerquist
Charles L. Honsinger
Robyn M. Jones
James P. Kaufman
Jennifer Reid McGarvey
Robert D. Reed
William F. Ringert
Daniel V. Steenstra
Allyn L. Sweeney

Samuel Rawlings (1921 - 1996)

July 3, 2002

TRANSMITTED BY FACSIMILE

Karl Dreher
Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237
FAX: (208)327-7866

Re: Administration of Clear Lakes Trout Co.'s water rights

Dear Karl:

Pursuant to Watermaster Cindy Yenter's June 19, 2002 Notice of Intent to Redistribute Flows, an adjustment to the weir from which Clear Lakes takes its water from the Western Pool is to occur today, July 3. However, the Notice of Intent to Redistribute Flows also specifies that Clear Lakes may file a petition contesting the notice pursuant to I.C. §42-1701A(3) within fifteen days of receipt of the Notice. The statute itself also provides a fifteen day period for the filing of a petition. Adjustments to the weir through which Clear Lakes' water from the Western Pool is diverted should not occur until the fifteen day period provided by the Notice has run.

My client received the Notice by facsimile on June 19, 2002. Fifteen days from June 19, 2002 will be July 4, a holiday, which makes July 5 the date on which a petition to challenge the Notice of Intent to Redistribute Flows must be filed.

My client has not yet determined whether or not to file a Petition challenging the Notice. However, by my reading of both the Notice and the statute, it is entitled to the entire fifteen day period within which to make that decision. Moreover, any adjustments to my client's diversion works cannot be made until the fifteen day period provided by the statute and the watermaster's Notice has run.

Please contact me with a response to this correspondence as soon as possible.

Sincerely,

Charles L. Honsinger

cc: Kay Hardy

MICRO[illegible]
2003

455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342-4657

EXHIBIT 7

MICRO
2003

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTERS OF THE AMERICAN FALLS GROUND WATER MANAGEMENT AREA AND THE THOUSAND SPRINGS GROUND WATER MANAGEMENT AREA	**ORDER APPROVING STIPULATED AGREEMENTS**

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of the Director's issuance of two separate orders on August 3, 2001, establishing the American Falls Ground Water Management Area ("American Falls GWMA") and the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director issued these orders to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the prior appropriation doctrine as established by Idaho law. The Director enters the following Findings of Fact, Conclusions of Law, and Order in furtherance of those directives.

FINDINGS OF FACT

1. On August 31, 2001, the Director was advised by representatives of certain holders of junior priority ground water rights and certain holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what the Director's currently-available information indicates would have resulted from curtailment of ground water diversions intended by the Director in areas within the American Falls and Thousand Springs GWMAs or an appropriate reduction to the extent that replacement water is not provided.

2. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the American Falls and Thousand Springs GWMAs, provided the agreements in principle were implemented through detailed written agreements.

3. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into three, detailed, written, stipulated agreements with representatives of most holders of senior priority surface water rights. These agreements are the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36" (the "Agreements"), which have been submitted to the Director for approval.

4. 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

MAR 12 2003

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. In the event the full amount of replacement water can not be provided, the Agreements require an appropriate reduction of diversion under ground water rights.

5. The signatories to the Agreements agreed not to oppose a motion by the State of Idaho seeking an order from the Snake River Basin Adjudication ("SRBA") District Court authorizing interim administration of water rights within portions of the Eastern Snake Plain Aquifer in accordance with the provisions of Idaho Code § 42-1417.

6. On November 19, 2001, the State of Idaho filed a "Motion for Order of Interim Administration and Motion for Order Expediting Hearing, pursuant to Idaho Code § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 35, 36, 41, and 43, in accordance with the Director's Reports for those water rights or in accordance with the partial decrees that have superseded the Director's Reports.

7. On January 8, 2002, the SRBA District Court granted the State of Idaho's "Motion for Order of Interim Administration" and authorized the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director's Reports or in accordance with the partial decrees that have superseded the Director's Reports in portions of Administrative Basins 35, 36, 41, and 43.

8. Under the Agreements, the parties request that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other stipulated agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

9. The Agreements provide that the parties understand that the Director has stayed further administrative proceedings regarding his "Order in the Matter of the Designating the American Falls Ground Water Management Area" and his "Order in the Matter of the Designating The Thousand Springs Ground Water Management Area."

10. The Agreements also provide that representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

CONCLUSIONS OF LAW

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director of the Department has a statutory responsibility to administer the use of ground water. See Idaho Code §§ 42-226 and 42-237a.g.

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3. The Director concludes that the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36," will provide replacement water during the term of the Agreements essentially equal in amount to what would have resulted from his intended curtailment of ground water diversions, or result in an appropriate reduction of diversion under ground water rights in the event that the full amount of replacement water can not be provided.

4. The Director concludes that issuance of curtailment orders in the American Falls and Thousand Springs GWMAs is unnecessary for at least the next two years, so long as the terms of the Agreements are fully implemented. In the event of a breach of an Agreement, any party to that Agreement may petition the Director for appropriate relief.

5. The Director concludes that interim administration of water rights in the American Falls and Thousand Springs GWMAs, and certain water rights immediately adjacent to the GWMAs, is necessary to protect the water supply available to satisfy the senior priority surface water rights diverting from or dependent on springs discharging from the Eastern Snake Plain Aquifer in the affected areas.

6. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(12), pursuant to chapter 6, title 42, Idaho Code, is necessary. Such administration shall include the formation of one or more water districts encompassing the GWMAs. While the Agreements are for a two-year period, the water districts will be formed on a permanent basis, with or without revisions to the boundaries that the Director determines to be necessary for appropriate administration, and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

7. Under the supervision of the Director, the duties of the watermaster(s) for the new water districts will be to: (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; (3) enforce the provisions of the Agreements; and (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

8. The Director concludes that regardless of whether the water users are able to reach long-term, stipulated agreements, the administration of water rights from hydraulically connected sources will be based upon the then available data, models, analytical results, rules, other pertinent information, and his best professional judgment.

Based upon the foregoing findings of facts and conclusions of law, the Director enters the following order.

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DEC 17 2003

ORDER

IT IS HEREBY ORDERED that the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36," are approved.

IT IS FURTHER ORDERED that upon the entry of an order authorizing interim administration, appropriate water districts for the administration of water rights shall be established consistent with this Order as necessary to protect the water supply available to satisfy senior priority surface water rights and ground water rights.

IT IS FURTHER ORDERED that holders of ground water rights in the water districts who are not party to these Agreements, or other stipulated agreement or approved mitigation plan, be notified that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

IT IS FURTHER ORDERED that the administrative proceedings regarding the Director's "Order in the Matter of the Designating the American Falls Ground Water Management Area" and his "Order in the Matter of the Designating The Thousand Springs Ground Water Management Area" are stayed, and that the July 2001 petitions of the holders of surface water rights and the holders of ground water rights pleadings filed in response to the petitions are deemed withdrawn.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01710, this is an interlocutory order that does not decide substantive issues presented in the proceedings and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01711.

DATED this 18th day of January 2002.

KARL J. DREHER
Director

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JAN 17 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January 2002, I caused a true and correct copy of the foregoing Order Approving Stipulated Agreements to be sent by U. S. Mail, postage paid to the following:

Jeffrey C. Fereday, Esq.
Michael C. Creamer, Esq.
John M. Marshall, Esq.
Givens, Pursley, LLP
277 N. 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720

John A. Rosholt, Esq.
Barker Rosholt & Simpson LLP
142 3rd Avenue North
P.O. Box 1906
Twin Falls, ID 83303-1906

John K. Simpson
Barker Rosholt & Simpson LLP
1221 W. Idaho Street, Suite 600
P.O. Box 2139
Boise, ID 83701-2139

Scott L. Campbell, Esq.
Moffatt Thomas
101 S. Capitol Boulevard, 10th Floor
P.O. Box 829
Boise, ID 83701-0829

Josephine P. Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702

Roger D. Ling
Ling & Robinson
615 "H" Street
P.O. Box 396
Rupert, ID 83350-0396

Michael J. McCarthy
Co-Manager
Western Legends LC
P.O. Box 5656
Twin Falls, ID 83303

Ronald D. Carlson, Manager
Department of Water Resources
Eastern Regional Office
900 North Skyline Drive
Idaho Falls, ID 83402-6105

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, ID 83301

Dan Steenson
Ringert Clark
455 S. Third
P.O. Box 2773
Boise, ID 83701-2773

Jason Miciak
P.O. Box 5298
Twin Falls, ID 83303-5298

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

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DEC 17 2003

EXHIBIT 8

MICROFILMED
2009

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CREATING THE THOUSAND SPRINGS AREA WATER DISTRICT, DESIGNATED AS WATER DISTRICT NO. 130, FOR THE ADMINISTRATION OF RIGHTS TO THE USE OF GROUND WATER AND SPRINGS DISCHARGING FROM THE EASTERN SNAKE PLAIN AQUIFER IN ADMINISTRATIVE BASINS 36 AND 43.	**FINAL ORDER CREATING WATER DISTRICT NO. 130**

The Director of the Idaho Department of Water Resources ("Director") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

FINDINGS OF FACT

1. On August 3, 2001, the Director established the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the Thousand Springs GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the Thousand Springs GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. On August 31, 2001, the Director was advised by representatives of holders of

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junior priority ground water rights and holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what would have resulted from the intended curtailment of certain junior ground water diversions within the Thousand Springs GWMA.

3. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs GWMA, provided the agreements in principle were implemented through detailed written agreements.

4. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into detailed written stipulated Agreements with representatives of most holders of senior priority surface water rights. The Agreements were submitted to the Director for approval. The Director approved the Agreements on January 18, 2002.

5. 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. In the event the replacement water cannot be provided, the Agreements require an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

6. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

7. Under the Agreements, the parties requested that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other similar agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

8. On November 19, 2001, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the Eastern Snake Plain Aquifer ("ESPA") in the Thousand Springs area.

9. On November 19, 2001, the SRBA District Court issued an order setting the State's motion for order authorizing interim administration for hearing on January 8, 2002. The Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State of Idaho served copies of the Court's November 19, 2001, order and the State's motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on November 26, 2001.

10. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code, based upon a

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determination that such interim administration is necessary to protect senior water rights.

11. On January 14, 2002, the Director mailed notice, by regular mail, of the proposed action creating a water district in the Thousand Springs area within the ESPA in Administrative Basins 36 and 43, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water user in the proposed district affected by the creation of the water district (herein established as Water District No. 130). The notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held on February 4, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

12. In addition, the Director published notice of the proposed action creating the water district once a week for two (2) weeks in the following newspapers having general circulation within the area covered by the proposed district: *The Times News* of Twin Falls on January 17 and 24, 2002; the Burley *South Idaho Press* on January 17 and 24, 2002; and the *Minidoka County News* of Rupert on January 16 and 23, 2002.

13. The Director conducted the hearing concerning the proposed creation of the water district at the Jerome High School Auditorium in Jerome, Idaho, at 7:00 pm on February 4, 2002. Approximately fifty-five people attended the hearing.

14. Prior to commencing the hearing, the Director made a presentation and answered questions for approximately ninety minutes addressing the reasons for creation of the proposed water district and how the district would operate.

15. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through February 14, 2002, for the submission of written comments.

16. Only one person presented an oral statement for the record at the Jerome hearing. No one testified in opposition to the creation of the proposed water district. Jeff Martin presented a statement on behalf of the North Snake River Ground Water District in support of the establishment of a water district to administer ground water in accordance with the prior appropriation doctrine and State law.

17. Mr. Roger Ling, attorney for the A & B Irrigation District, stated that the questions he had were addressed by the Director during the presentation and discussion that occurred prior to going on the record.

18. The Director received no written comments from affected ground water users objecting to the creation of the proposed water district prior to the close of the February 14, 2002, comment period. Comments were received from Clear Springs Foods, Inc. of Buhl, Idaho, suggesting that water rights included within Water District 36-A (Billingsley and Riley Creeks and tributary springs) should be combined into the same water district or subdistrict with ground water rights so that the parties may continue to work together under the same watermaster. Water District 36-A submitted comments requesting that it remain autonomous

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at this time while retaining the option of joining the newly formed water district in the future. The United States Fish and Wildlife Service submitted comments relating to future arrangements that may be made for the measuring and reporting of ground water usage at its affected facilities.

19. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

20. The available water supply in all or portions of Administrative Basins 36 and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

21. The administration of ground water rights within the portion of Administrative Basins 36 and 43 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed

with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

District Creation

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer water rights within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of stipulated agreements approved by the Director; and

d. 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. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and

the Director's best professional judgment.

12. The Director concludes that the water district created by this order shall include the following organizational features:

a. Election and appointment of a single watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts and irrigation districts, or as otherwise determined by the Director.

c. Selection of Water District Advisory Committee that includes, but need not be limited to, representation from boards of directors of ground water districts and irrigation districts.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Water rights not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

ORDER

IT IS ORDERED that:

1. The Thousand Springs Area Water District, designated as Water District No. 130, is hereby created to include all ground water rights and all rights to divert from springs discharging from the ESPA that are not already included in Water District No. 36-A, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference.

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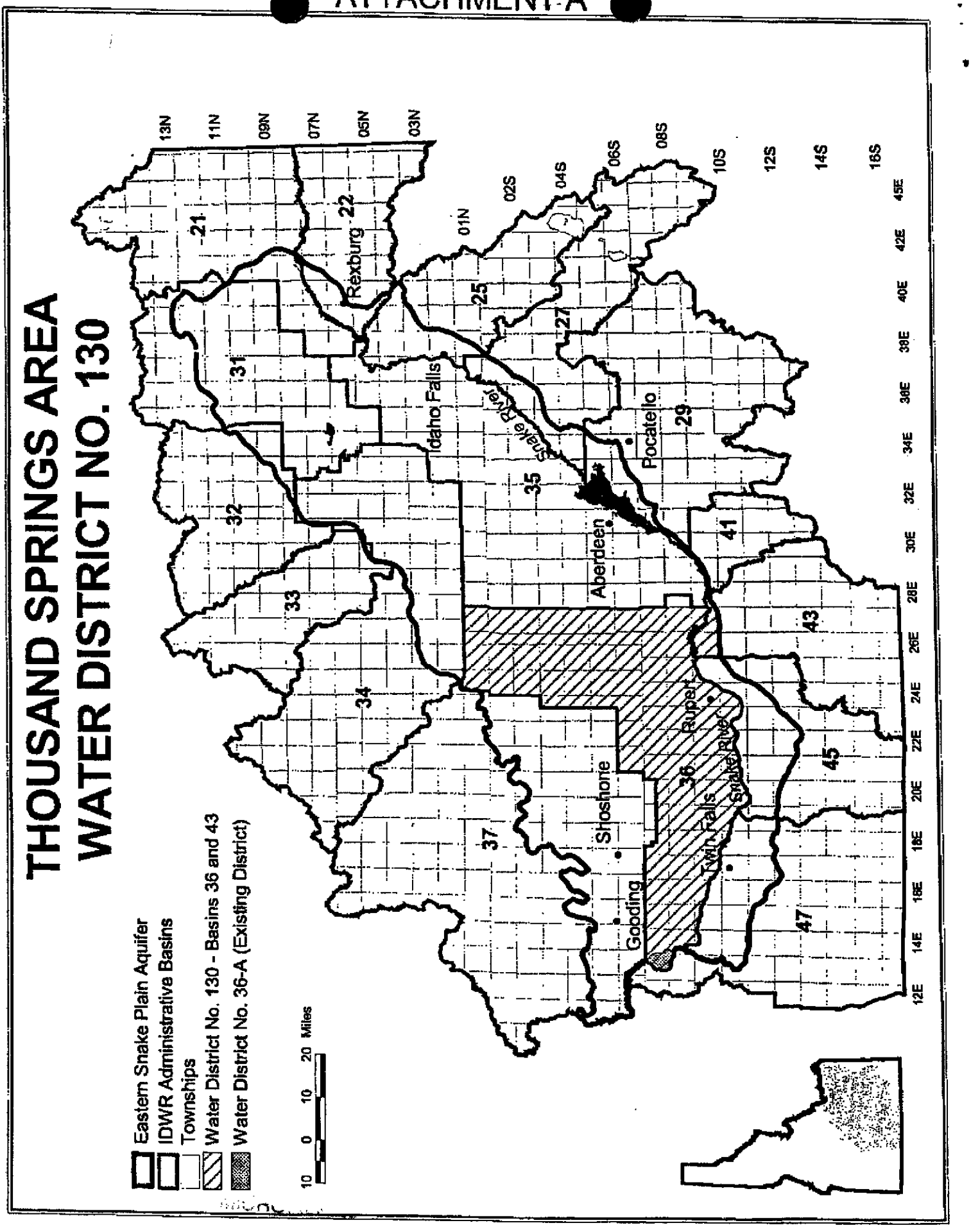
2. For 2002, the water right holders within the Thousand Springs Area Water District No. 130 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 19th day of February 2002.

KARL J. DREHER
Director

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FINAL ORDER ATTACHMENT A

EXHIBIT 9

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RINGERT
CLARK
CHARTERED
LAWYERS

Linda E. Burri
Jeffrey R. Christenson
D. Blair Clark
Michael A. Doellle
S. Bryce Farris
Patrick D. Farley
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
Jessica F. Kaufman
Jennifer Reid Mahoney
James C. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney

Samuel Rountree (1921-1986)

July 10, 2002

BY FACSIMILE (327-7866)

Phil Rassier
Deputy Attorney General
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706

Re: Administration of Water Rights Pursuant to the June 7, 2002 call for distribution of water by Clear Springs' Foods, Inc. ("Clear Springs")

Dear Phil:

In response to Clear Springs' June 7, 2002 call for "the distribution of water to water right no. 36-02708", the Director of the Idaho Department of Water Resources instructed the Watermaster to reduce Clear Lakes Trout Company's (Clear Lakes) diversion of its senior water right no. 36-02659 through the western diversion pool. The Director believes that this action is merely a manipulation of the "method or means" of Clear Lakes' diversion of its senior right, and results in an increase in the quantity of water diverted through the eastern diversion pool pursuant to water right no. 36-02659, and a concurrent reduction in the quantity of water diverted pursuant to water right no. 36-07004. The Director's response to Clear Springs' call, as far as we have been advised, did not include any action with respect to water rights diverting from the Eastern Snake Plain Aquifer ("ESPA") that are junior in priority to both of Clear Lakes' rights.

The Director's isolated administration of Clear Lakes' senior rights to increase the supply of water to Clear Springs' junior right is patently unfair, is contrary to his responsibilities pursuant to Title 42, chapter 6 of the Idaho Code, and violates the prior appropriation doctrine, and the Federal and State constitutions. However, notwithstanding the issues presently pending before the Gooding County District Court, and without waiving any claim that it has made pursuant to that lawsuit, our client is entitled to action from the Director which reduces the impact of his response to Clear Springs' call.

Neither Clear Springs' call for distribution nor the Director's response to that call can be selectively directed solely against Clear Lakes' water rights. Once the Director administers one water right in order to satisfy another, he must equally administer all other water rights that are subject to administration as precipitated by Clear Springs' call.

455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342-4657

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The Director is well aware of numerous more junior water rights diverting water from the ESPA that should have been curtailed before he subjected Clear Lakes' more senior water rights to administration. Now, the Director must immediately administer the remainder of the junior rights in Water District 130 that he overlooked when he manipulated and curtailed Clear Lakes' diversion and use of water in response to Clear Springs' call.

At a minimum, this means that the Director must immediately require that all parties to the Interim Stipulated Agreement reduce their diversions from the ESPA as required by the agreement, and immediately curtail all other diversions from the ESPA that are not covered by the agreement. Additionally, consistent with the Director's position that Clear Lakes' senior water right is subject to adjustment in response to Clear Springs' call, he must immediately identify all senior water rights whose "method or means" of diversions could be adjusted, by, for example, adjustments among multiple points of diversion, adjustments of times of diversion, and any other option which may result in additional water flowing from the spring source from which Clear Springs diverts. The Director cannot manipulate Clear Lakes' diversion of its senior right if he is not also willing to manipulate the diversions of all other senior water rights in Water District 130.

Given the severe impact of the Director's prejudicial action on Clear Lakes, and his lack of action with respect to water rights junior in priority to those held by Clear Lakes, Clear Lakes hereby demands his immediate response to this letter and his immediate action to fulfill his responsibilities under the law in response to Clear Springs' call for distribution of water.

Sincerely,

Daniel V. Steenson

cc: Kay Hardy

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DEC 17 2003

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	)	**ORDER APPOINTING HEARING OFFICER AND NOTICE OF STATUS CONFERENCE**

This matter is before the Idaho Department of Water Resources ("IDWR") as a result of Clear Lakes Trout Company, Inc. ("Clear Lakes") filing a *Petition to Initiate Contested Case* ("petition") with IDWR on December 17, 2002. The Petition initiated a contested case for the purpose of seeking rescission or modification of the *Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218* ("Watermaster Instructions") issued by the Director of IDWR on June 13, 2002. IDWR considers the Watermaster Instructions to be final following the district court's December 12, 2002, approval of a *Stipulation for Dismissal* between Clear Lakes and IDWR, dismissing with prejudice Clear Lakes' lawsuit challenging the redistribution of water pursuant to the Watermaster Instructions. *Clear Lakes Trout Co., Inc. v. IDWR*, No. CV-02-00377 (5th Jud. Dist., Gooding Co., *dismissed* Dec. 12, 2002).

On December 30, 2002, IDWR served a *Notice of Contested Case And Status Conference* upon all signatories to the *Interim Stipulated Agreement For Areas Within and Near IDWR Administrative Basin 36*. The notice set a status conference in the matter to be presided over by the Director on January 10, 2003. The notice also required that any responses to the petition be filed by January 17, 2003.

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On January 10, 2003, prior to the status conference, Clear Lakes filed with IDWR a *Motion to Stay Further Curtailments of Clear Lakes' Water Rights* and a *Motion For Summary Judgment* supported by the *Affidavit of Charles L. Honsinger in Support of Motion for Summary Judgment*. The filing of the two motions was not discussed at the January 10 status conference and the file does not reflect service of the motions and affidavit upon any other persons.

On January 17, 2003, Clear Springs Foods, Inc. ("Clear Springs") filed *Respondent Clear Springs Foods, Inc's Answer to Petition.* Pristine Springs filed a *Notice of Appearance* in the matter on January 16, 2003, for the purpose of supporting the Clear Lakes' petition.

Clear Lakes' *Motion to Stay* requests the independent hearing officer and/or IDWR for a stay of any actions by the watermaster for Water District 130 resulting in further curtailments of its water rights pending resolution of the issues raised by Clear Lakes' petition. On February 4, 2003, the Director sent a letter to the Watermaster for Water District No. 130 instructing the watermaster not to make further redistributions of water under the affected water rights, due to reduced spring flows, pending an opportunity for Clear Lakes to have its *Motion to Stay* heard before an appointed hearing officer, and pending further instructions from the Director. The Director has not considered the merits of the *Motion to Stay.* The Director's February 4, 2003, letter to the watermaster is not to be construed as an action based upon the merits of the *Motion to Stay.*

ORDER

IT IS HEREBY ORDERED as follows:

1. D. Duff McKee is hereby appointed to serve as hearing officer and is authorized to hear this matter, including all pending and future motions, on behalf of the Idaho Department of Water Resources pursuant to IDAPA Rules 37.01.01.410-413 and the provisions of chapter 52, title 67, Idaho Code.

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2. In presiding over this matter, the hearing officer shall allow a reasonable period of time following entry of this order for the parties to file responses to any motions previously filed in this matter.

3. Pursuant to IDAPA Rule 37.01.01.602, the hearing officer shall ask IDWR to submit an agency staff memorandum or agency staff report prior to the hearing on the substantive issues in the matter.

4. The hearing officer shall prepare and issue a recommended order(s), pursuant to sections 67-5243 and 67-5248, Idaho Code, and IDAPA Rule 37.01.01.720 addressing the issues raised by the petition and the answers thereto, except that the hearing officer shall issue interlocutory orders for the purposes identified in IDAPA Rule 37.01.01.710.

Dated this 6th day of February, 2003.

Karl J. Dreher, Director

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN that Hearing Officer D. Duff McKee will preside over a status conference in this matter at **3:00 p.m., Tuesday, February 11, 2003**, in Conference Rooms A&B at the Department of Water Resources offices located at 1301 North Orchard St., Boise, Idaho.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the department, at telephone number (208) 327-7910 at least twenty-four (24) hours prior to the conference.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February 2003, I caused a true and correct copy of the foregoing **Order Appointing Hearing Officer and Notice of Status Conference** to be sent by U.S. Mail, postage paid to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773

John K. Simpson, Esq.
Barker Rosholt & Simpson LLP
P.O. Box 2139
Boise, ID 83701-2139

Jason Miciak, Esq.
Pristine Springs
P.O. Box 2632
Twin Falls, ID 83303

Law Office of
D. Duff McKee
P.O. Box 941
Boise, Idaho 83701

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, ID 83301

Deborah J. Gibson
Deborah J. Gibson
Administrative Assistant
Department of Water Resources

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FEB 17 2003

Post-it® Fax Note 7671 | Date | # of pages ▶ 1
To Phil Rassier | From Allen Merritt
Co./Dept. | Co.
Phone # | Phone #
Fax # | Fax #

HAEMMERLE, P.L.L.C.
Attorneys at Law

900
1333

400 South Main Street, Suite 102
Tel: (208) 578-0520
Fax: (208) 578-0564

February 10, 2003

RECEIVED
FEB 10 2003
Department of Water Resources

RECEIVED
FEB 10 2003
Department of Water Resources

Honorable D. Duff McKee
P.O. Box 941
Boise, ID 83701
VIA FAX (208) 381-0083

Re: Water District No. 130 Dispute – Clear Lakes, Clear Springs, and Pristine Springs

Dear Judge McKee:

The purpose of this letter is twofold. First, Jason Miciak, who had been representing Pristine Springs, Inc. ("Pristine Springs"), is on medical leave. Accordingly, I have been contacted by Pristine Springs to represent its interests. I would be happy to file a Notice of Substitution of Counsel, if required.

Second, after discussing this matter with representatives of Pristine Springs, it is no longer its intent to remain in this case. The sole interest of Pristine Springs was, and is, to support the position of Clear Lakes. At the time the Notice of Appearance was filed, it was not the intent of Pristine Springs to actively participate in this dispute, as Pristine Springs believes that Clear Lakes has very able counsel to represent and advocate its own interests. Without objection, I would file any necessary document to remove Pristine Springs from the case including filing a Notice of Withdrawal, if necessary.

On behalf of Pristine Springs, I do not wish to participate in the status conference currently set for Tuesday, February 11, 2003, at 3:00 p.m. Thank you for your consideration of this matter.

Sincerely,

HAEMMERLE & HAEMMERLE, P.L.L.C.

Fritz X. Haemmerle

FXH: fxh
cc: client
John Simpson, Esq. VIA FAX (208) 344-6034
Dan Steenson, Esq. VIA FAX (208) (208) 342-4657
Allen Merritt, IDWR VIA FAX (208) 736-3037

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FEB 27 2003

LETTER TO HONORABLE D DUFF MCKEE FROM FRITZ X. HAEMMERLE
DATED FEBRUARY 10, 2003

D. DUFF McKEE, Hearing Officer
Post Office Box 941
Boise, Idaho 83701
Telephone: (208) 381-0060
Facsimile: (208) 381-0083

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

In the matter of the petition to modify amended watermaster instructions for distribution of water among water right nos. 36-02659, 36-02708, 36-7004, 36-7201 and 36-7218 all in water district no. 130.	Scheduling Order and Notice of Hearing on "Motion for Summary Judgment"

A scheduling conference was held Tuesday, February 11, 2003 at the Idaho Department of Water Resources building in Boise. Hearing officer D. Duff McKee presided. Clear Lakes Trout Company appeared by Dan Steenson and Charles Honsinger, its counsel, and Kay Hardy and Gregory Kaslo, representatives of the company. Clear Springs Foods, Inc. appeared by its counsel John Simpson. The IDWR was represented by deputy attorney general John Homan. Following a discussion, the following procedural matters were agreed upon:

1. The issues before the hearing officer are framed in the "Motion for Summary Judgment" filed by Clear Lakes Trout Company. If this motion can be heard expeditiously, the issues within the motion subsume the issues in the "Motion to Stay Further Curtailment," making a separate hearing on this motion unnecessary. Clear Springs Foods counsel agreed that resolution of the "Motion for Summary Judgment" within the schedule set forth in this order would be expeditious, and that a separate hearing on the motion for stay was not necessary at this time.
2. A hearing on the "Motion for Summary Judgment" is scheduled for **Monday, March 17, 2003 at 9:30 a.m.**, in conference rooms at the Idaho Department of Water Resources in Boise. Unless advance request is made to the hearing officer, with notice to all participants, the hearing will be based upon written submissions only. No testimony is anticipated by either party at this time.
3. Subject to its right to answer or rebut the submissions of other parties, the submission of materials from Clear Lakes Trout Company in support of its motion is complete.
4. The Director of IDWR may have until Tuesday, February 18, 2003 to submit a staff report under IDAPA Rule 602.

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5. Clear Springs Foods Inc. may have until Tuesday, March 4, 2003, to submit its brief and responsive materials in answer to the motion and materials filed by petitioner.
6. Clear Lakes Trout Company may have until Tuesday, March 11, 2003, to submit any rebuttal materials.
7. Parties are to decide whether the proceedings framed in the instant petition can be bifurcated with the resultant hearing and order on the pending "Motion for Summary Judgment" to be a final order for purposes of judicial review, if any. If no stipulation is agreed upon, this issue may be argued at the hearing.
8. All originals are to be lodged with the Department of Water Resources, which will maintain the record in this case. Copies of all materials and briefs should be submitted to the hearing officer
9. The foregoing provisions are hereby made an order governing these proceedings. If necessary, the hearing officer will hold a further status conference, either in person or by telephone, upon the request of any party.

IT IS SO ORDERED

Dated: February 11, 2003.

D. Duff McKee, Hearing Officer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of February, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
Ringert Clark Chartered
455 S Third
P.O. Box 2773
Boise, Idaho 83701-2773

John K. Simpson, Esq.
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, Idaho 83701-2139

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, Idaho 83301

The Honorable
D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

February 13, 2003

RE: In the matter of petition to modify amended watermaster instructions for distribution of water among water right nos. 36-02659, 36-02708, 36-7004 and 36-7218 all in water district no. 130.

Dear Parties:

Enclosed is a copy of a **Scheduling Order and Notice of Hearing on "Motion for Summary Judgment"** issued in accordance with the scheduling conference held February 11, 2003 for the above-entitled matter. The Conference Rooms A&B are reserved for this hearing on March 17, 2003, in the IDWR state office located at 1301 N. Orchard Street in Boise. Any documents filed with the Department should be directed to my attention for filing purposes, as well as a copy to the hearing officer as the order directs.

Sincerely,

Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Encl.
Cc: Service List
Karl Dreher, Director

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SEP 17 2003

HEARING INFO FOLDER 2

RECEIVED
FEB 18 2003
Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	)	**IDWR STAFF MEMORANDUM**

The Idaho Department of Water Resources ("IDWR") submits this *IDWR Staff Memorandum* pursuant to the Hearing Officer's February 11, 2003, *Scheduling Order and Notice of Hearing on "Motion for Summary Judgment,"* and pursuant to the provisions of IDAPA Rule 37.01.01.602. Through its petition initiating this contested case, Clear Lakes seeks declaratory relief construing the "Safe Harbor" provision in Paragraph 2.8 of the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement").

This matter is set for hearing before the IDWR Hearing Officer on March 17, 2003, for the purpose of hearing the arguments of the parties on the *Motion to Stay* and the *Motion for Summary Judgment* filed by the petitioner Clear Lakes Trout Company, Inc. ("Clear Lakes"). The only remaining respondent in this proceeding is Clear Springs Foods, Inc. ("Clear Springs").

A copy of the Interim Stipulated Agreement is attached as Exhibit C to *Affidavit of Charles L. Honsinger in Support of Motion for Summary Judgment.* In addition to Clear Lakes and Clear Springs, the other parties to the Interim Stipulated Agreement are the North Snake Ground Water District, Magic Valley Ground Water District, North Side Canal Company, Pristine Springs, Buckeye Farms, and Blue Lakes Trout Company.

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Based upon its reading of the Safe Harbor provision in the Interim Stipulated Agreement, Clear Lakes seeks rescission or modification of the *Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218* ("Watermaster Instructions") issued by the Director of IDWR on June 13, 2002. The Watermaster Instructions are attached as Exhibit 4 to *Respondent Clear Springs Foods, Inc's Answer to Petition.* IDWR considers the Watermaster Instructions to be final following the district court's December 12, 2002, approval of a *Stipulation for Dismissal* between Clear Lakes and IDWR, dismissing with prejudice Clear Lakes' lawsuit challenging the redistribution of water pursuant to the Watermaster Instructions. *Clear Lakes Trout Co., Inc. v. IDWR*, No. CV-02-00377 (5th Jud. Dist., Gooding Co., *dismissed* Dec. 12, 2002). *See* IDWR *Order Appointing Hearing Officer* at 1.

Within IDWR, the Water Management Division has the responsibility for management of the distribution of water within water districts and elsewhere in the State. Based upon the wording of the documents and on discussions with the Director of IDWR at the time the documents were created or received, the administrator of the Division and the staff involved in matters relating to the creation and operation of Water District No. 130 applied the *Interim Stipulated Agreement* as affecting the use of water by the holders of rights from ground water as necessary to protect senior surface water rights.

The surface and ground water users who are party to the Interim Stipulated Agreement signed the agreement on separate dates between November 9, 2001, and January 17, 2002. Clear Springs signed the agreement on November 16, 2001, and Clear Lakes signed on January 17, 2002. The parties entered into the Interim Stipulated Agreement to make it unnecessary for the Director of IDWR to enter an order curtailing ground water diversions within the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA"). The Director entered

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the order designating the Thousand Springs GWMA on August 3, 2001. A copy of the *Order* is attached hereto as Exhibit "A". The prefatory text of the order states:

> The Director initiates this matter in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer rights to the use of ground water in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law.

Order Designating the Thousand Springs GWMA at 1. Conclusion of Law No. 8 of the order provides:

> 8. The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until such time as the Director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given. I.C. § 42-233b.

Order Designating the Thousand Springs GWMA at 4.

Following the designation of the Thousand Springs GWMA, the Director publicly announced that unless he received notice in writing of an agreement in principle between ground and surface water users describing a mitigation program acceptable to senior surface water users, the Director would enter an order pursuant to I. C. § 42-233b on August 31, 2001, requiring certain ground water users to cease or reduce withdrawals during the 2002 irrigation season.

The Director received a letter dated August 31, 2001, Re: Curtailment Orders – Basin 36, from attorney John A. Rosholt. A copy of the Rosholt letter including a two-page attachment titled "Agreement in Principle" is attached hereto as Exhibit "B". The letter notes the occurrence of recent meetings between representatives of certain surface and ground water users "to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002." The letter further states:

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> We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversion within the Thousand Springs Ground Water Management Area established on August 3, 2001.

The Agreement in Principle attached to the Rosholt letter states, at page 2, Disclaimer B: "This Agreement represents a framework for settlement of claims regarding the administration of interconnected ground water rights from the Snake Plain Aquifer and surface water rights from the Snake River and its tributaries. ..." (emphasis added).

Based upon the representation that an agreement in principle had been reached, the Director announced on August 31, 2001, that no curtailment order would be issued for the Thousand Springs GWMA. *See Order Approving Stipulated Agreements*, Finding of Fact No. 2, IDWR, January 18, 2002. A copy of the *Order Approving Stipulated Agreements* is attached hereto as Exhibit "C".

Because IDWR was not a party to the Interim Stipulated Agreement, the agreement calls for the Director to issue an order approving the agreement. The order describes the Director's understanding of the agreement and how it would be enforced by IDWR. The Director's understanding of the scope and purpose of the agreement is stated in Finding of Fact No. 4 of the order, which provides:

> 4. Under the Agreement[], 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 Agreement[] as a replacement for water that would have resulted from curtailment of ground water diversions intended by the Director. In the event the full amount of replacement water can not be provided, the Agreements require an appropriate reduction of diversion under ground water rights.

Order Approving Stipulated Agreements at 1-2 (emphasis added).

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Conclusion of Law No. 4 concludes:

> 4. The Director concludes that issuance of curtailment orders in the . . . Thousand Springs GWMA[] is unnecessary for at least the next two years, so long as the terms of the Agreement[] are fully implemented. In the event of a breach of an Agreement, any party to that Agreement may petition the Director for appropriate relief.

Order Approving Stipulated Agreements at 3.

In considering whether the "safe harbor" provision in Paragraph 2.8 of the *Interim Stipulated Agreement* now may be construed as requested by Clear Lakes in this proceeding, the Hearing Officer should consider what rules would then govern the allocation of water between two or more holders of surface water rights from the same source. If no rules would apply, the Hearing Officer should consider whether as a matter of public policy and the Director's statutory responsibilities, the Director properly could have approved such an agreement.

A chronology of salient events relevant to this proceeding is set forth as follows:

1. August 3, 2001 - IDWR Order Designating the Thousand Springs GWMA.

2. August 3, 2001 – Public announcement of IDWR Director's intent to issue an order curtailing junior ground water rights in the Thousand Springs area prior to September 1, 2001.

3. August 31, 2001 – Agreement in Principle presented to the Director.

4. November 9, 2001 to January 17, 2002 – Interim Stipulated Agreement signed by surface and ground water parties.

5. January 18, 2002 – Order Approving Interim Stipulated Agreement.

6. February 19, 2002 – Order Creating Water District No. 130.

7. April 2, 2002 – Meeting between Director and representatives of Clear Lakes and Clear Springs at the shared diversion works to determine IDWR jurisdiction for administration purposes.

8. April 11, 2002 – Letter from Director indicating IDWR jurisdiction to administer the Clear Lakes/Clear Springs water rights, listing documents to be reviewed, and asking the two right holders to submit any other pertinent information that the parties believed the Director should consider in developing the watermaster instructions.

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9. May 2, 2002 – Clear Lakes and Clear Springs submitted additional information to the Director for consideration in developing the watermaster instructions. No statement was made by Clear Lakes in reliance upon the "safe harbor" provision of the Interim Stipulated Agreement.

10. June 5, 2002 – First watermaster instructions issued by Director.

11. June 7, 2002 – Clear Lakes' request for reconsideration of watermaster instructions. No statement was made by Clear Lakes in reliance upon the "safe harbor" provision of the Interim Stipulated Agreement.

12. June 7, 2002 – Clear Springs' written call for distribution of water under water right no. 36-2708.

13. June 13, 2002 – Amended Watermaster Instructions issued by Director.

14. June 19, 2002 – Notice of Intent to Redistribute Flows issued by Watermaster.

15. June 20, 2002 – Clear Lakes' complaint for injunctive relief filed with the district court. No statement was made by Clear Lakes in reliance upon the "safe harbor" provision of the Interim Stipulated Agreement.

16. July 2, 2002 – Motion for preliminary injunction denied by the district court.

17. July 3, 2002 – Clear Lakes request to the Director to delay the redistribution of flows to give Clear Lakes a full 15 days to decide whether to request a hearing before IDWR.

18. July 5, 2002 – Initial redistribution of flows between Clear Lakes and Clear Springs; monitoring and periodic adjustments occurred thereafter.

19. December 12, 2002 - Clear Lakes' complaint for injunctive relief dismissed with prejudice by the district court, pursuant to a stipulation with IDWR.

20. December 16, 2002 – Clear Lakes Petition to Initiate Contested Case filed with IDWR formally contesting IDWR's failure to apply the "safe harbor" provision of the Interim Stipulated Agreement.

Dated this 18TH day of February, 2003.

NORMAN C. YOUNG, Administrator
Water Management Division

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February 2003, I caused a true and correct copy of the foregoing **IDWR Staff Memorandum** to be sent by U.S. Mail, postage paid to the following:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
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John K. Simpson, Esq.
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D. Duff McKee
P.O. Box 941
Boise, Idaho 83701

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, ID 83301

Deborah J. Gibson
Deborah J. Gibson
Administrative Assistant
Department of Water Resources

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EXHIBIT A

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DEC 17 2003

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DESIGNATING THE THOUSAND SPRINGS GROUND WATER MANAGEMENT AREA

ORDER

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of the severe drought conditions being experienced across the Snake River Basin and the possibility that the drought conditions could continue into the 2002 irrigation season and beyond. The Director initiates this matter in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer rights to the use of ground water in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law. The Director enters the following Findings of Fact, Conclusions of Law and Order in furtherance of those directives.

FINDINGS OF FACT

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," USGS Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply (see Rule 50, IDAPA 37.03.11050).

2. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from the ESPA for irrigation and other consumptive purposes, which occur in relatively close proximity to the Thousand Springs area, cause significant reductions in spring flows tributary to the Kimberly to King Hill, or Thousand Springs, reach of the Snake River within six (6) months or less from the time the withdrawals occur.

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4. Although all consumptive ground water diversions from the ESPA eventually affect surface water flows to varying degrees, the Department's model simulations demonstrate that ground water diversions occurring within a five (5) to ten (10) kilometer band from the canyon wall along the north side of the Snake River in the Thousand Springs reach result in seasonal spring flow reductions equal to fifty percent (50 percent) or more of the amount of water diverted and consumptively used, and such reductions occur within six (6) months of the diversions.

5. Surface and ground water studies for the Eastern Snake River Plain, funded in part by the Idaho Legislature, are presently being performed by or on behalf of the Department, with the participation of other public and private entities. These studies will provide additional data that will be used to further refine and calibrate the ground water model used by the Department to calculate the amount, location, and timing of surface water depletions caused by the withdrawal and use of ground water throughout the plain overlying the ESPA. The purpose for the additional data collection and model refinement/calibration is to reduce uncertainty in the model and increase acceptance of the Department's use of the model to implement long-term, conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain. Although efforts are underway to improve the Department's ground water model, the results from simulations using the ground water model as it presently exists provide a suitable basis for making some water management decisions when the uncertainties of the existing model are appropriately addressed.

6. The Department presently does not have a sufficient basis to undertake full conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain. The Department is confident, however, that the results of simulations from its existing ground water model are suitable for determining the area containing those ground water diversions for which the depletion of water from the ESPA results in the most direct and significant reduction in the flow of water from springs tributary to the Snake River in the Thousand Springs reach with an acceptable degree of accuracy. For the purposes of this order and to account for the uncertainties in the Department's present ground water model, a ground water diversion is considered to cause a direct and significant reduction in the flow of water from springs tributary to the Snake River if, based on simulations using the Department's ground water model, the flow of water from the springs is reduced by an amount equal to fifty percent (50 percent) or more of the ground water depletion associated with the ground water diversion, and such reduction occurs within six (6) months of the ground water diversion.

7. The water supply available for use under senior surface water rights from spring sources in the Thousand Springs area is expected to be further diminished because of the drought and inadequate to fully satisfy all senior surface water rights during the next irrigation season. This water supply is also expected to be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in close proximity to the area of the springs without mitigating the effects of the associated ground water depletions.

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8. Based upon the depletionary effects of ground water withdrawals on the flow of water from springs tributary to the Snake River in the Thousand Springs area and the inadequate water supply expected to be available for senior surface water rights, that portion of the ESPA in the Thousand Springs area may be approaching the conditions of a critical ground water area. The Director also bases this finding, in part, upon flow measurements showing a pronounced diminishment in spring flows in the Thousand Springs area during the current drought period.

9. On July 13, 2001, Clear Springs Foods, Inc. ("Clear Springs") submitted to the Department through its attorney a written request asking for the "designation of Basin 36 as a Groundwater Management Area pursuant to I.C. § 42-233(b)." The Department will proceed under the Department's Rules of Procedure, IDAPA 37.01.01, to consider the Clear Springs request as a petition for creation of a ground water management area including all of Basin 36 in accordance with Rule 30.06, IDAPA 37.03.11030.06.

10. The action of the Director in the present matter relates only to that portion of the ESPA, as depicted on the map identified as Attachment A, that contains all or parts of the townships north of the Snake River that encompass or are adjacent to the five (5) to ten (10) kilometer band described in Finding of Fact No. 4. The action is taken as a result of the Director's independent initiative and is not taken in response to the Clear Springs petition.

CONCLUSIONS OF LAW

1. Idaho law declares all ground waters in this state to be the property of the state of Idaho, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. I.C. § 42-226.

2. The Director of the Department has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights and yet allow full economic development of the state's underground water resources in the public interest. See I.C. §§ 42-226 and 42-237a.g.

3. Section 42-233a, Idaho Code, authorizes the Director to designate a "critical ground water area" which is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time by the Director.

4. Section 42-233b, Idaho Code, authorizes the Director to designate a "ground water management area" which is defined as any ground water basin or designated part thereof which the Director has determined may be approaching the conditions of a critical ground water area.

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5. Although Rule 30.06, IDAPA 37.03.11030.06, provides a procedure that the Department may follow in a proceeding upon a petition for designation of a ground water management area, the present action is taken as a result of the Director's independent initiative and is not taken in response to a petition.

6. When a ground water management area is designated by the Director, or at any time thereafter during the existence of the designation, the Director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water. I.C. § 42-233b.

7. The Director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting the Department in determining available ground water supplies and their usage. I.C. § 42-233b.

8. The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until such time as the Director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given. I.C. § 42-233b.

9. Based upon the foregoing findings, the Director determines that the portion of the ESPA located in the Thousand Springs area in the vicinity of Hagerman, Idaho may be approaching the conditions of a critical ground water area.

10. The Director should designate a ground water management area for the Thousand Springs area of the ESPA as ordered below.

11. Upon designation of a ground water management area the Director shall publish notice in two (2) consecutive weekly issues of one or more newspapers of general circulation in the area. I.C. § 42-233b.

12. Any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days following published notice of the order, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Section 42-1701A(4), Idaho Code.

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ORDER

IT IS, THEREFORE, HEREBY ORDERED that the following described area be included within and designated as the "Thousand Spring Ground Water Management Area."

That portion of the Eastern Snake Plain Aquifer within all or parts of the following townships north of the Snake River in Gooding and Jerome Counties:

T5S and T6S, R12E, Boise Meridian (B.M.); T5S, T6S, T7S and T8S, R13E, B.M.; T5S, T6S, T7S, T8S and T9S, R14E, B.M.; T7S, T8S and T9S, R15E, B.M.; T8S and T9S, R16E, B.M.; T8S and T9S, R17E, B.M.; and T8S, T9S and T10S, R18E, B.M.

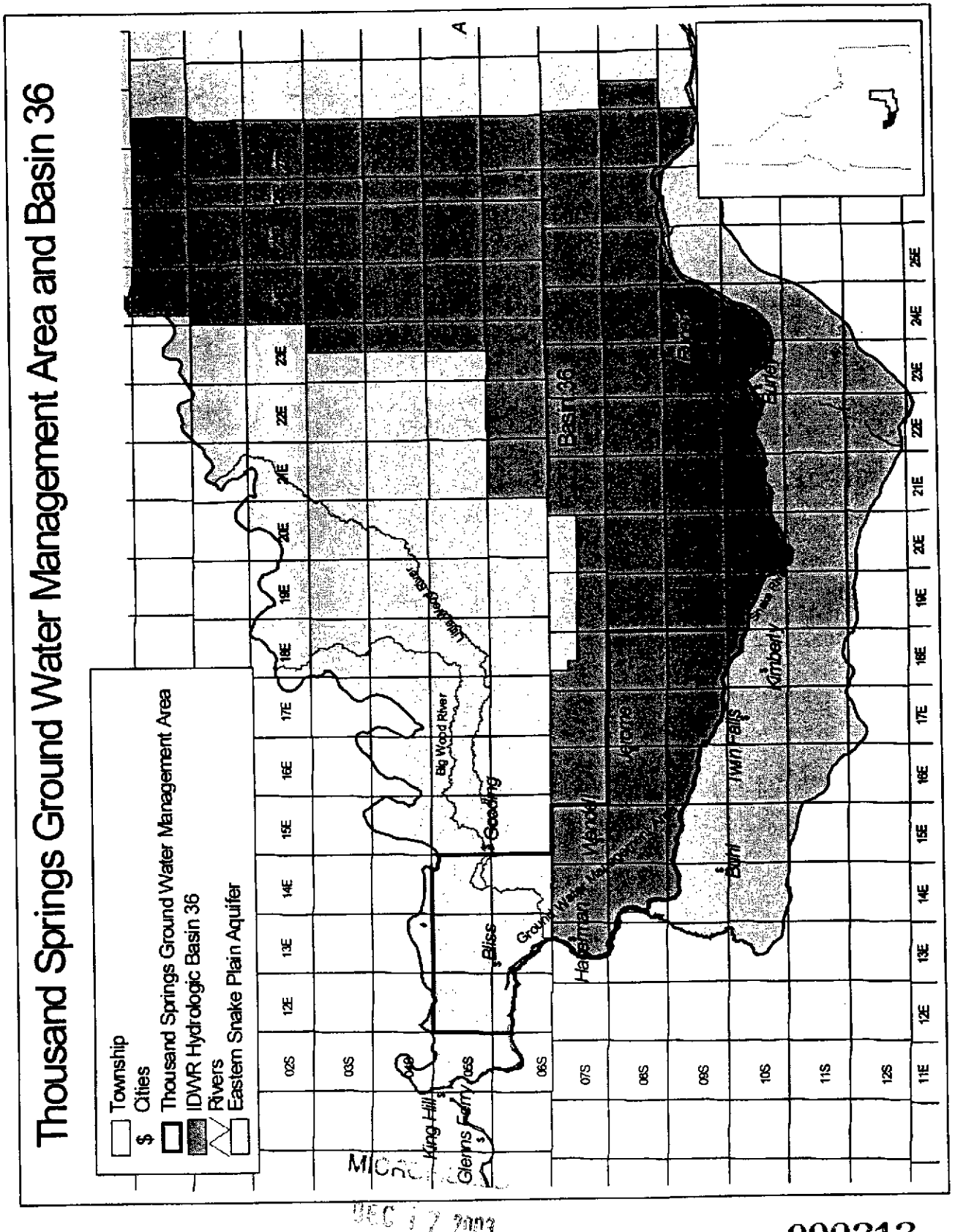
Attached to this Order is a map identified as Attachment A, that graphically shows the boundaries of the "Thousand Springs Ground Water Management Area."

DATED this 3rd day of August 2001.

KARL J. DREHER
Director

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DEC 17 2001

Attachment A



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ORDER DESIGNATING THE THOUSAND SPRINGS GROUND WATER MANAGEMENT AREA

EXHIBIT B

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BARKER, ROSHOLT & SIMPSON
ATTORNEYS AT LAW

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Department of Water Resources

August 31, 2001

VIA FACSIMILE Attn: Lisa Hall (208) 327-7866
and U.S. MAIL

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

Re: **Curtailment Orders– Basin 36**

Dear Karl:

As you know, representatives of Clear Springs Foods, Inc., Blue Lakes Trout Company, and Pisces Investments have been meeting with representatives of the North Snake Ground Water District. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resource issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversion within the Thousand Springs Ground Water Management Area established on August 3, 2001.

Respectfully,

BARKER, ROSHOLT & SIMPSON, LLP

By: John A. Rosholt
JOHN A. ROSHOLT

JAR/jl
cc: Larry Cope, Clear Spring Foods
Mike Greene, Blue Lakes Trout
J. Evan Robertson, Pisces Investments

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LETTER TO KARL DREHER FROM JOHN A ROSHOLT DATED AUGUST 31, 2001

Basin 36
August 31, 2001
11:00 a.m draft

CONFIDENTIAL

AGREEMENT IN PRINCIPLE

Parties:	NSGWD	Clear Springs Foods
	NSCC	Clear Lakes Trout
	State of Idaho	Blue Lakes Trout
	IDWR	Pisces Investments
	City of Twin Falls	Pristine Springs

Term: 2 years – 2002 – end of irrigation season 2003 (regardless that drought might abate) – extend by mutual agreement.

Consideration:

A. In exchange for safe harbor, provided through the following mitigation plan, NSCC shall apply for 25,000 A/F from the Water District Rental Pool and NSGWD shall pay the necessary advances to accompany said application in 2002 and 2003 for diversion into NSCC canal at such times as NSCC agrees.

B. Pump surface water made available first, before ground water well water.

C. Delivery of storage identified above to NSGWD members who are within NSCC service area for irrigation use in lieu of pumping same amounts. (Use existing NSCC headgates) NSGWD users who are NSCC shareholders within NSCC service area will use best efforts to pump NSCC sediment pond water and other wastewater.

D. NSGWD shall set forth the terms and parameters for addendums to this Agreement for those users who need safe harbor.

E. Holders of water rights to both surface water and ground water agree not to oppose interim administration sought by the State of Idaho in the Snake River Basin Adjudication for Basin 36 and other related administrative areas outside of Basin 36.

F. If no water is provided under Paragraph A, participants will curtail 10% of the volume diverted for irrigation. If some but not all of the water is provided under Paragraph A, an adjustment to curtailment shall be made.

G. Best efforts to provide 12 cfs of water to Buckeye from Riley Creek as contemplated in July 2001 letter to NSGWD.

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H. This mitigation plan provides a safe harbor from Interim Administration. Those not participating in this mitigation plan in Basin 36 are subject to administration.

Long Term Agreement: For the term of this Agreement, the parties agree to continue discussions regarding a long term agreement. Including:

A. The ESPA Model capabilities.
B. Finalization of Water Management Rules.
C. Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

Disclaimers:

A. The parties agree that this Agreement in Principle may not be used for any purpose other than as stated above and for providing guidance in drafting a final agreement and for obtaining the IDWR's approval of a stay of current administrative proceeding to establish a Ground Water Management Area for the purpose of issuance of a curtailment order.

B. This Agreement represents a framework for settlement of claims regarding the administration of interconnected ground water rights form the Snake Plain Aquifer and surface water rights from the Snake River and its tributaries. The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin above Thousand Springs and any alleged injury to surface water rights as a result of diversion of water from the Snake Plain Aquifer. In order to avoid litigation of these issues, the parties have agreed to negotiate an agreement consistent with this Agreement in Principle. Because this Agreement in Principle provides a framework for resolution of a disputed claim, the parties agree that neither this Agreement in Principle nor any subsequent agreement that may result from further negotiations shall be so construed or interpreted as to waive or prejudice any contention by any party regarding the legal or factual relationship between surface and ground water rights in the Snake River Basin above Thousand Springs.

C. This Agreement has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

(!jll/jar/basin 36/agreement)

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EXHIBIT C

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTERS OF THE AMERICAN FALLS GROUND WATER MANAGEMENT AREA AND THE THOUSAND SPRINGS GROUND WATER MANAGEMENT AREA	)	**ORDER APPROVING STIPULATED AGREEMENTS**

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of the Director's issuance of two separate orders on August 3, 2001, establishing the American Falls Ground Water Management Area ("American Falls GWMA") and the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director issued these orders to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the prior appropriation doctrine as established by Idaho law. The Director enters the following Findings of Fact, Conclusions of Law, and Order in furtherance of those directives.

FINDINGS OF FACT

1. On August 31, 2001, the Director was advised by representatives of certain holders of junior priority ground water rights and certain holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what the Director's currently-available information indicates would have resulted from curtailment of ground water diversions intended by the Director in areas within the American Falls and Thousand Springs GWMAs or an appropriate reduction to the extent that replacement water is not provided.

2. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the American Falls and Thousand Springs GWMAs, provided the agreements in principle were implemented through detailed written agreements.

3. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into three, detailed, written, stipulated agreements with representatives of most holders of senior priority surface water rights. These agreements are the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36" (the "Agreements"), which have been submitted to the Director for approval.

4. 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

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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. In the event the full amount of replacement water can not be provided, the Agreements require an appropriate reduction of diversion under ground water rights.

5. The signatories to the Agreements agreed not to oppose a motion by the State of Idaho seeking an order from the Snake River Basin Adjudication ("SRBA") District Court authorizing interim administration of water rights within portions of the Eastern Snake Plain Aquifer in accordance with the provisions of Idaho Code § 42-1417.

6. On November 19, 2001, the State of Idaho filed a "Motion for Order of Interim Administration and Motion for Order Expediting Hearing, pursuant to Idaho Code § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 35, 36, 41, and 43, in accordance with the Director's Reports for those water rights or in accordance with the partial decrees that have superseded the Director's Reports.

7. On January 8, 2002, the SRBA District Court granted the State of Idaho's "Motion for Order of Interim Administration" and authorized the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director's Reports or in accordance with the partial decrees that have superseded the Director's Reports in portions of Administrative Basins 35, 36, 41, and 43.

8. Under the Agreements, the parties request that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other stipulated agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

9. The Agreements provide that the parties understand that the Director has stayed further administrative proceedings regarding his "Order in the Matter of the Designating the American Falls Ground Water Management Area" and his "Order in the Matter of the Designating The Thousand Springs Ground Water Management Area."

10. The Agreements also provide that representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

CONCLUSIONS OF LAW

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director of the Department has a statutory responsibility to administer the use of ground water. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director concludes that the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36," will provide replacement water during the term of the Agreements essentially equal in amount to what would have resulted from his intended curtailment of ground water diversions, or result in an appropriate reduction of diversion under ground water rights in the event that the full amount of replacement water can not be provided.

4. The Director concludes that issuance of curtailment orders in the American Falls and Thousand Springs GWMAs is unnecessary for at least the next two years, so long as the terms of the Agreements are fully implemented. In the event of a breach of an Agreement, any party to that Agreement may petition the Director for appropriate relief.

5. The Director concludes that interim administration of water rights in the American Falls and Thousand Springs GWMAs, and certain water rights immediately adjacent to the GWMAs, is necessary to protect the water supply available to satisfy the senior priority surface water rights diverting from or dependent on springs discharging from the Eastern Snake Plain Aquifer in the affected areas.

6. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(12), pursuant to chapter 6, title 42, Idaho Code, is necessary. Such administration shall include the formation of one or more water districts encompassing the GWMAs. While the Agreements are for a two-year period, the water districts will be formed on a permanent basis, with or without revisions to the boundaries that the Director determines to be necessary for appropriate administration, and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

7. Under the supervision of the Director, the duties of the watermaster(s) for the new water districts will be to: (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; (3) enforce the provisions of the Agreements; and (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

8. The Director concludes that regardless of whether the water users are able to reach long-term, stipulated agreements, the administration of water rights from hydraulically connected sources will be based upon the then available data, models, analytical results, rules, other pertinent information, and his best professional judgment.

Based upon the foregoing findings of facts and conclusions of law, the Director enters the following order.

ORDER

IT IS HEREBY ORDERED that the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36," and the "Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36," are approved.

IT IS FURTHER ORDERED that upon the entry of an order authorizing interim administration, appropriate water districts for the administration of water rights shall be established consistent with this Order as necessary to protect the water supply available to satisfy senior priority surface water rights and ground water rights.

IT IS FURTHER ORDERED that holders of ground water rights in the water districts who are not party to these Agreements, or other stipulated agreement or approved mitigation plan, be notified that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

IT IS FURTHER ORDERED that the administrative proceedings regarding the Director's "Order in the Matter of the Designating the American Falls Ground Water Management Area" and his "Order in the Matter of the Designating The Thousand Springs Ground Water Management Area" are stayed, and that the July 2001 petitions of the holders of surface water rights and the holders of ground water rights pleadings filed in response to the petitions are deemed withdrawn.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01710, this is an interlocutory order that does not decide substantive issues presented in the proceedings and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01711.

DATED this 18th day of January 2002.

KARL J. DREHER
Director

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January 2002, I caused a true and correct copy of the foregoing Order Approving Stipulated Agreements to be sent by U. S. Mail, postage paid to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	RESPONSE TO IDWR STAFF MEMORANDUM

RESPONSE

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys, Ringert Clark, Chartered, and hereby submits this Response to the IDWR Staff Memorandum filed in the above-captioned matter on February 18, 2003.

I. The HearingOfficer Can Not Take Official Notice of Material in IDWR's Staff Memorandum

The Idaho Department of Water Resources ("IDWR") submitted a document entitled "Staff Memorandum," ostensibly pursuant to the Scheduling Order issued by the Hearing Officer in this case, which allows IDWR to "submit a staff report under IDAPA Rule 602." Scheduling Order, ¶ 4 (Feb. 11, 2003). IDAPA Rule 602 provides that official notice may be taken of two types of facts: (1) "facts that could be judicially noticed in the courts of Idaho"; and (2) "generally recognized

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technical or scientific facts within the agency's specialized knowledge." The document submitted by IDWR contains no facts that fit within either category which would permit official notice of the same. In actuality, the document is nothing more than a legal brief submitted by IDWR in an improper attempt to influence the independent hearing officer's decision, and should simply be dismissed.

I.C. §9-101 lists types of facts of which Idaho courts may take judicial notice. These facts include such items as public and private official acts of the legislative, executive, and judicial departments of Idaho, and the laws of nature, among other types of facts. I.C. §9-101. The statute is not an exclusive list of judicially notable facts. *City of Lewiston v. Frary*, 91 Idaho 322, 325, 420 P.2d 805, 808 (1966). Facts that are within "common knowledge," such as the fact that newspapers are widely circulated and read are also judicially noticeable. *O'Malley v. Statesman Printing Co.*, 60 Idaho 326, 91 P.2d 357, 361 (1939). Other facts that may be judicially noticed include: those which are capable of immediate verification, 29 AmJur 2d Evidence § 24; the size and location of cities, *Chamberlain v. Lewiston*, 23 Idaho 154, 129 P. 1069 (1912); and official publications of state executive agencies, such as drivers' manuals. *Howard v. Missman*, 81 Idaho 82, 337 P.2d 592 (1959). However, "judicial notice is used cautiously and only when the facts judicially noted cannot be disputed." 29 AmJur 2d Evidence § 24.

The material contained in IDWR's submission is not judicially notable. Instead, the submission contains items such as: an expression of IDWR's opinion regarding the effect of a *Stipulation for Dismissal* upon the Watermaster Instructions issued by the Director, IDWR Staff Memorandum, p. 2; conclusory statements regarding IDWR's "application" of the *Interim Stipulated Agreement* to water right holders within Water District 130, *Id*; and a request that the hearing officer consider whether the Director could have approved the Interim Stipulated Agreement as a matter of

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public policy, *Id*, at p. 5. Quite simply, these statements of opinion by IDWR are not even "facts" at all, let alone the type of facts that are judicially notable. These "facts" can be disputed, are not official publications, and are not within "common knowledge." Moreover, there are no facts in IDWR's Staff Memorandum (such as diversion rate information, or anticipated water flows) which can even purport to be within the agency's specialized or technical knowledge. Accordingly, the hearing officer should simply ignore IDWR's submission as uninvited legal argument by a non-party in this proceeding, and should refuse to take notice of any material contained therein.

II. If The Hearing Officer Takes Official Notice of IDWR's Staff Memorandum, He Must Immediately Notify the Parties

IDAPA Rule 602 provides in relevant part that: [n]otice that official notice will be taken should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed," and that "responsible staff employees or agents shall be made available for cross-examination."

Because Motion for Summary Judgment is pending and scheduled for hearing on March 17, 2003, the hearing officer must immediately notify the parties of any information contained in the Staff Memorandum of which he intends to take official notice, so that the parties have the opportunity to determine whether to cross-examine the employee who prepared the Memorandum, and contest or rebut such facts or material in further briefing and at the hearing on the Motion for Summary Judgment scheduled for March 17, 2003.

Dated this 27th day of February, 2003.

Charles L. Honsinger

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2003, a true and correct copy of the foregoing was served upon all parties listed below by United States Mail.

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC'S RESPONSE TO CLEAR LAKES TROUT COMPANY INC.'S MOTION FOR STAY AND MOTION FOR SUMMARY JUDGMENT MOTION TO DIMISS PETITION TO INITIATE CONTESTED CASE

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List of Referenced Exhibits:

A	General Maps of Eastern Snake Plain Aquifer
B	Map of North Snake Ground Water District Boundaries
C	August 31, 2001 Letters to Director Dreher
D	Clear Lakes' August 31, 2001 Letter to Director Dreher
E	*Order Staying Proceedings* issued by Director Dreher on September 14, 2001
F	List or ground water rights in Water District No. 130
G	Interim Stipulated Agreement Basin 35 and 41
H	*Order Granting State of Idaho's Motion for Order of Interim Administration*
I	Clear Springs' and Clear Lakes' Letters of May 2, 2002
J	Excerpts of Deposition of Karl Dreher November 1, 2002
K	Amended Watermaster Instructions June 13, 2002
L	Clear Lakes' *Verified Complaint* in Case No. CV-02-00377
M	*Order Granting Intervention, And Denying Motion for Preliminary Injunction*
N	Clear Lakes' *Memorandum in Support of Motion for Preliminary Injunction*
O	Clear Lakes' *Memorandum in Opposition to IDWR's Motion for Summary Judgment and Clear Springs' Motion to Dismiss*
P	*Order Dismissing Complaint Pursuant to Stipulation for Dismissal*
Q	Transcript of Motion to Dismiss Hearing December 10, 2002
R	*Clear Springs Foods, Inc. v. Clear Lakes Trout Company, Inc.* 136 Idaho 761 (2002).
S	Clear Lakes' *Motion to Expedite Issuance of Partial Decrees*
T	Clear Lakes' *Verified Complaint* in Case No. CV-02-00803
U	Tim Luke's February 20, 2002 Letter including February 19, 2002 Order

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC'S RESPONSE TO CLEAR LAKES TROUT COMPANY INC.'S MOTION FOR STAY AND MOTION FOR SUMMARY JUDGMENT MOTION TO DIMISS PETITION TO INITIATE CONTESTED CASE

COMES NOW, Respondent Clear Spring Foods, Inc. ("Clear Springs"), by and through its attorneys of record, and in accordance with the Hearing Officer's order hereby responds to the *Motion to Stay Further Curtailments of Clear Lakes' Water Rights* and the *Motion for Summary Judgment* filed by Clear Lakes Trout Company, Inc. ("Clear Lakes") on January 10, 2003. Clear Springs also raises its affirmative defenses in a *Motion to Dismiss* Clear Lakes' *Petition to Initiate Contested Case*, which is set forth as a separate section below.

I. INTRODUCTION

Clear Lakes, in its *Petition* and *Motion for Summary Judgment* generally seeks: 1) a determination that the watermaster's curtailment of its water right on July 5, 2002 "violates" IDWR's duty to administer water rights in Water District No. 130 according to the Interim

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Stipulated Agreement, and 2) a recission of the watermaster instructions issued by the Director on June 13, 2002. Clear Lakes argues that IDWR violated its "duty" to administer water rights in accordance with the terms of the Interim Stipulated Agreement. Under basic tenets of administrative law Clear Lakes' argument fails. Regardless of Clear Lakes' "after the fact" interpretation of the Interim Stipulated Agreement, the Director's source of authority for administering water rights in Water District No. 130, and authority to enforce that agreement, his February 19, 2002 Order, has gone unchallenged. No affected water right holder, including Clear Lakes, sought further administrative or judicial review of that order. Moreover, under well-established principles of administrative law, the Director's actions taken pursuant to that order are accorded "deference," especially since IDWR is the agency committed to administering water rights in the State of Idaho. The Director, in formulating watermaster instructions and instructing the watermaster to redistribute flows as between Clear Lakes and Clear Springs on July 5, 2002, took action that was consistent and reasonable under his February 19, 2002 Order. Since the Director's interpretation of that order was not "clearly erroneous," Clear Lakes' *Petition* must be dismissed.

Furthermore, the Director's actions were recently judicially validated when the District Court of the Fifth Judicial District in Gooding County (Case No. CV-02-00377) entered an order dismissing Clear Lakes' action, seeking to enjoin IDWR from administering Clear Lakes' water rights in violation of the Interim Stipulated Agreement, "with prejudice." Accordingly, Clear Lakes' current *Petition* must be dismissed for this reason as well.

Alternatively, if the "intent" and terms of the Interim Stipulated Agreement are truly at issue and necessary for resolution of this proceeding, the provisions of the entire agreement clearly demonstrate that safe harbor was only given for junior ground water users, or those

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parties who provided mitigation and replacement water to compensate for injuries to senior surface water users. Further, when read in its entirety, the Interim Stipulated Agreement does not preclude all water administration among surface water users as alleged by Clear Lakes, or allow junior surface water users who provide no mitigation to take a senior user's water. Moreover, the agreement's context and the course of negotiations in which the agreement was reached reveal the overall purpose behind the agreement in the first place. Finally, Clear Lakes' *Petition* and *Motion for Summary Judgment* ultimately fail since such an interpretation of the agreement renders the agreement void due to a lack of mutual assent and a lack of consideration as between Clear Lakes and Clear Springs.

The Hearing Officer should dismiss Clear Lakes' *Petition* with prejudice. Alternatively, Clear Lakes' *Motion for Summary Judgment* should be denied given the "agreement" that was actually reached between the two sets of parties, junior ground water users and senior surface water users.

II. STATEMENT OF FACTS

A. Designation of Thousand Springs Groundwater Management Area / Agreement by Junior Ground Water Users and Senior Surface Water Users.

The Eastern Snake Plain Aquifer (ESPA) geographically extends from King Hill easterly and north easterly into the upper reaches of the Snake River Basin. *See* Exhibit A to *Aff. of John K. Simpson*. Spring flows discharge from the aquifer and are tributary to the Snake River from King Hill through the American Falls Reservoir reach. Historically, these spring flows have increased over time with the advent of surface water irrigation practices dating back to the late 1800s. Notably, return flows and seepage from surface water irrigation have contributed significantly to the aquifer level and emanating spring flows, including the famous Thousand Springs area between Hagerman and Buhl, Idaho.

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Beginning in the 1950s, ground water development, along with other natural and artificial causes, resulted in a steadily declining trend in both the level of the aquifer and the discharging spring flows. More recently, spring flows in the Thousand Springs reach have declined to levels that have not been seen for nearly a century. The spring flows in the Thousand Springs reach are the source of water for many senior surface water rights, including aquaculture rights developed beginning in the mid-1900s. Other surface water rights to the spring flows, particularly irrigation rights in the Hagerman Valley, have priority dates going back as far the late 1800s. These rights also depend upon the spring flows emanating from the aquifer as a source of their water rights.

Ground water development of the Eastern Snake Plain Aquifer has, at least in part, been a primary reason for the declining spring flows. It is this ground water development and the declining trends in the spring flows that became the focus of the Idaho Department of Water Resource's (IDWR) attention in 2001. That year, due to the continued drought being experienced by the State of Idaho, IDWR began examining the spring flows emanating, among other places, in the Thousand Springs reach. In conjunction with this investigation, Clear Springs filed a petition requesting the Director to designate all or a portion of the Eastern Snake Plain Aquifer as a ground water management area pursuant to I.C. § 42-233b. *See* Exhibit 1 to *Aff. of Larry Cope.* The investigation resulted in the Director designating a portion of the Thousand Springs reach as a ground water management area on August 3, 2001. *See* Exhibit A to *IDWR Staff Memorandum.* The designation recognized that spring flows in the Thousand Springs reach were not sufficient to satisfy senior surface water rights. The designation identified ***ground water rights that would be curtailed*** in the event senior surface water rights were not satisfied. The designation did not identify any surface water rights that would be curtailed.

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As a result of the Director's designation, the North Snake Ground Water District[1], or the ground water district located immediately adjacent to the Thousand Springs reach, contacted a number of the surface water spring users in order to begin discussions on how and if the parties could resolve their differences in accordance with the Director's designation. *See Aff. of Larry Cope* at 2, ¶ 8. The primary parties that participated in these initial negotiations included the North Snake Ground Water District, the Northside Canal Company, and Clear Springs. *See id.* The series of negotiations resulted in an Agreement in Principle that was submitted to the Director on August 31, 2001. *See* Exhibit B to *IDWR Staff Memorandum.* A number of parties or their representatives sent letters to the Director notifying him of the agreement that had been reached between the ground water users and the surface water users. *See* Exhibit C to *Aff. of John K. Simpson.* Importantly, counsel on behalf of Clear Lakes also sent a letter to the Director, which stated the following:

> Although we have not been full participants in the negotiations, it is our understanding that the purpose of these meetings is to explore the potential for reaching ***a negotiated agreement as an alternative to the Department of Water Resources' issuance of orders curtailing ground water diversions*** in the Thousand Springs Groundwater Management Area.

See Exhibit D to *Aff. of John K. Simpson* (emphasis added).

All of the letters sent by the parties, including Clear Lakes', acknowledge that the agreed to "settlement principles" would be formalized in a written agreement. The Agreement in Principle, or the basis for the letters that were sent to the Director, sets forth the consideration that was being provided by the junior ground water users to the senior surface water users. *See* Exhibit B to *IDWR Staff Memorandum.* Nothing in the letters or the Agreement in Principle refers to any dispute, potential curtailment, or mitigation to be provided by any junior ***surface***

[1] A map of the general boundaries of the North Snake Ground Water District is attached as Exhibit B to the *Aff. of John K. Simpson.*

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water right holders. Based upon the Agreement in Principle, the Director stayed the effect of his ground water management order ***requiring curtailment of junior priority ground water rights*** within the ground water management area. *See* Exhibit E to *Aff. of John K. Simpson.*

Critical to an understanding of the negotiations between the parties was that the ground water management order pertained only to ground water rights, not to surface water rights within the ground water management area. Further, the Agreement in Principle only covered ground water rights and the provision that mitigation water would be provided by the ground water entities in lieu of curtailment of their water rights.

Following the Director's September 14, 2001 order staying the effect of his previous order, the North Snake Ground Water District and Clear Springs commenced a series of negotiations to complete a formal expression of the Agreement in Principle. Clive Strong, an attorney with the State of Idaho Attorney General's Office, acted as drafter of this agreement and managed meetings among the parties. *See Aff. of Larry Cope*, at 3, ¶ 13. At no point during these negotiations was the underlying premise of the Agreement in Principle, foregoing curtailing junior ground water rights in exchange for mitigation and replacement water, modified or altered. *Id.* Neither the parties nor Mr. Strong ever identified a change in the intent of the Safe Harbor provision that applied to the junior ground water right holders. *Id.* Clear Springs did not intend to provide safe harbor to any other party other than those providing mitigation or replacement water as provided in paragraphs 2.1 through 2.7. *Id.*, at 3, ¶ 16. Once agreement between the North Snake Ground Water District and Clear Springs had been reached, Mr. Strong held additional discussions with other water users in an effort to encourage participation in the agreement. *Id.* at 3, ¶ 13. Following its negotiations with the North Snake Ground Water District, Clear Springs had no substantive discussions regarding the Interim Stipulated

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Agreement, or the intent of the Safe Harbor provision, with any surface spring water users. *Id.*, at 4, ¶ 17. Finally, no party asserted that the Safe Harbor provision precluded administration as between surface water users. *Id.*, at 4, ¶ 18.

Since several ground water rights in Basin 36 predate surface water users' rights, the Safe Harbor language was changed to accurately reflect the priorities of the two sets of parties. *Id. See* Exhibit F to *Aff. of John K. Simpson*. Instead of referring to just junior ground water rights, the language refers to "ground water or surface water rights." Interim Stipulated Agreement at 3, ¶ 2.8. This change in language is unique and different from the Safe Harbor provision in the agreement between ground water users and surface water users in Basin 35 and 41, where no ground water rights held by parties to that agreement are senior to the surface water users. *See* Exhibit G to *Aff. of John K. Simpson*.

B. Development of Watermaster Instructions / Prior Litigation

As a result of the Agreement in Principle, and pending the drafting of the Interim Stipulated Agreement, the State of Idaho filed a motion with the Snake River Basin Adjudication (SRBA) District Court on November 19, 2001, seeking an order authorizing interim administration of water rights in Basins 35, 36, 41, and 43. On January 8, 2002, the SRBA Court issued an order authorizing interim administration of water rights by the Director in all, or parts, of basins 36 and 43 based upon a determination that such interim administration was necessary to protect senior water rights. *See* Exhibit H to *Aff. of John K. Simpson*. The Court's order authorized curtailment of out of priority diversions. None of the affected water right holders in Basin 36, including Clear Lakes, appealed the Court's January 8, 2002 order.

After all the participating parties signed the agreement, and shortly after the SRBA Court entered its order allowing interim administration, the Director issued an *Order Approving*

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Stipulated Agreements on January 18, 2002. *See* Exhibit 7 to *Clear Springs' Answer*. In the findings of fact, the Director specifically acknowledged that:

> 4. 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 Agreements as a replacement for water that would have resulted from curtailment of ground water diversions intended by the Director.

Order Approving Stipulated Agreements at 1-2 (Exhibit 7 to *Clear Springs' Answer*)(emphasis added).

In the conclusions of law, the Director also noted the following:

> 5. The Director concludes that interim administration of water rights in the American Falls and Thousand Springs GWMAs, and certain water rights immediately adjacent to the GWMAs, is necessary to protect the water supply available to satisfy the senior priority surface water rights diverting from or dependent on springs discharging from the Eastern Snake Plain Aquifer in the affected areas.

Id. at 3 (Exhibit 7 to *Clear Springs' Answer*).

A month later, the Director issued his *Final Order Creating Water District No. 130* on February 19, 2002. *See* Exhibit 8 to *Clear Springs' Answer*. In this order, the Director similarly acknowledged the following in his findings of fact:

> 5. ***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. In the event the replacement water cannot be provided, the Agreements required an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

Final Order Creating Water District No. 130 at 2 (Exhibit 8 to *Clear Springs' Answer*)(emphasis added).

In his conclusions of law, the Director further stated:

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4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

* * *

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with ***the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water*** held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with the guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of stipulated agreements approved by the Director; and

d. ***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. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and the Director's best professional judgment.

Id. at 4-5 (Exhibit 8 to *Clear Springs' Answer*)(emphasis added).

No affected water right holders, including Clear Lakes, sought further administrative or judicial review of the Director's January 18 and February 19, 2002 orders. In response to these orders, IDWR began the process of drafting general watermaster instructions for the district as a whole, and other specific instructions as between certain water rights.

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The watermaster instructions that are the subject of this *Petition* concern the distribution of water from a common source, certain springs at or about Clear Lakes, near Buhl, Idaho. The litigation surrounding the "source" of Clear Springs' and Clear Lakes' water rights is explained below in Section II.C. The Director began requesting information from Clear Lakes and Clear Springs for the purpose of drafting watermaster instructions in early April 2002. *See* Exhibit 1 to *Clear Springs' Answer*. Both Clear Lakes and Clear Springs were given an opportunity to submit all factual and legal information that they was believed pertinent to the administration of water between their respective rights. In response, Clear Lakes and Clear Springs submitted various materials by letters of May 2, 2002. *See* Exhibit I to *Aff. of John K. Simpson*. After considering the information submitted by both Clear Lakes and Clear Springs, the Director issued watermaster instructions for the distribution of the companies' various water rights in a memorandum dated June 5, 2002. *See* Exhibit 2 to *Clear Springs' Answer*. These instructions were issued prior to Clear Springs' call that was made on June 7, 2002. Shortly thereafter, representatives of Clear Lakes, including counsel, held a special meeting with the Director and his counsel on June 7, 2002 at IDWR's state office in Boise to further state Clear Lakes' position regarding the watermaster instructions and to submit additional information. *See* Exhibit J to *Aff. of John K. Simpson*, Dreher Depo., p. 172, lns. 23 – p. 173, lns. 7.

The Director responded to Clear Lakes' concerns and committed to complete additional review, beyond what had already been completed, consistent with the conversation at the meeting on June 7, 2002. *See* Exhibit 4 to *Clear Springs' Answer*. The Director even temporarily suspended the instructions that were issued on June 5, 2002 to complete the additional review requested by Clear Lakes. *See id.* The Director again reviewed all of the factual materials submitted by Clear Lakes and Clear Springs and the pertinent legal decisions

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regarding administration of the water rights. *See* Exhibit J to *Aff. of John K. Simpson*, Dreher Depo., p. 176, lns. 7-9. The Director spent almost three full days reviewing this factual and legal material relating to the watermaster instructions. *Id.*, p. 177, lns. 19-20. Finally, after this additional review, the Director issued amended watermaster instructions in a memorandum dated June 13, 2002. *See* Exhibit K to *Aff. of John K. Simpson*. These final watermaster instructions regarding Clear Lakes' and Clear Springs' rights were issued at the same time IDWR was in the process of drafting more general watermaster instructions for Water District No. 130. Clear Lakes did not object to the Director drafting watermaster instructions either for administration of Clear Springs' and Clear Lakes' water rights specifically, or for Water District No. 130 in general. *See* Exhibit J to *Aff. of John K. Simpson*, Dreher Depo., p. 161, ln. 21 – p. 162, ln. 3. More specifically, Clear Lakes did not object to submitting information in the spring of 2002 when the Director was formulating watermaster instructions for the purpose of administering Clear Springs' and Clear Lakes' water rights. Furthermore, Clear Lakes did not claim protection from curtailment based on the Interim Stipulated Agreement at this time.

On June 7, 2002, Clear Springs requested the delivery of its water rights pursuant to state law and the pertinent watermaster instructions. As a result of this call, the Director's February 19, 2002 Order providing for interim administration in Water District No. 130, and the development of watermaster instructions for Water District No. 130 and Clear Springs' and Clear Lakes' water rights, Watermaster Cindy Yenter issued a *Notice of Intent to Redistribute Flows* ("*Notice*") from the common springs source that provides water to Clear Springs' and Clear Lakes' water rights on the basis of priority on June 19, 2002. *See* Exhibit 5 to *Clear Springs' Answer*. The *Notice* specifically advised Clear Lakes should it disagree with the proposed action that a hearing before the Director within 15 days was available pursuant to I.C. § 42-1701A(3).

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See id. The Director, or his counsel, had apparently verbally communicated to Clear Lakes' counsel that a hearing could be requested even prior to the watermaster's *Notice*. *See* Exhibit J to *Aff. of John K. Simpson*, Dreher Depo., p. 180, ln. 19 – p. 181, ln. 8. The *Notice* also informed Clear Lakes of the ability to request a stay of the proposed redistribution concurrently with a request for a hearing. *Id.*, p. 186, ln. 24 – p. 187, ln. 7. The *Notice* indicated that redistribution of the flows would occur on July 3, 2002, or 14 days from June 19, 2002. The *Notice* also allowed Clear Lakes the opportunity to request a hearing before the Director within 15 days of June 19, 2002, or by July 4, 2002 (presumably July 5, 2002 given the holiday).

On July 3, 2002 Clear Lakes specifically requested the Director to delay the redistribution of water to afford Clear Lakes the full 15 days to decide whether or not to request a hearing in front of IDWR. *See* Exhibit 6 to *Clear Springs' Answer*. In its letter, Clear Lakes specifically referred to I.C. § 42-1701A(3) and acknowledged that the statute provided for 15 days to request a hearing. *Id.* Clear Lakes chose not to request a hearing pursuant to I.C. § 42-1701A(3) and did not seek a stay of the watermaster's redistribution of water. Finally, Clear Lakes specifically requested that administration pursuant to the Interim Stipulated Agreement proceed in a certain manner consistent with the Director's actions. *See* Exhibit 9 to *Clear Springs' Answer*.

The day after the watermaster's *Notice* was issued, Clear Lakes filed suit against the Idaho Department of Water Resources (IDWR) on June 20, 2002 and sought to permanently enjoin IDWR from redistributing water according to the *Notice*. *Clear Lakes Trout Company, Inc. v. Idaho Department of Water Resources*, Case No. CV-02-00377 (Fifth Judicial District, Gooding County). *See* Exhibit L to *Aff. of John K. Simpson*. Since Clear Springs' water right no. 36-02708 was being injured at the time, the pending redistribution of water stood to satisfy Clear Springs' senior right. Consequently, Clear Springs successfully intervened in the lawsuit

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and participated as a co-defendant. The Court granted Clear Springs' motion to intervene as a matter of right pursuant to I.R.C.P. 24(a).[2] Clear Lakes immediately filed a motion for a preliminary injunction to prohibit the redistribution of water according to the amended watermaster instructions and the watermaster's *Notice*. *See* Exhibit N to *Aff. of John K. Simpson*. The Court denied Clear Lakes' request for a preliminary injunction and the case proceeded to a point in litigation where dispositive motions were filed by both Clear Springs and IDWR. Several issues were before the Court at that time, including the legality of the Director's actions in issuing the amended watermaster instructions, the legality of the watermaster's curtailment of Clear Lakes' junior water right to satisfy Clear Springs' senior water right, and the alleged injury or damages suffered by Clear Lakes as a result of the redistribution of water. In opposing the dispositive motions filed by IDWR and Clear Springs, Clear Lakes filed a *Memorandum in Opposition* and specifically alleged the following:

> ***Clear Springs' call violates the "safe harbor" provision in paragraph 2.8 of the Interim Stipulated Agreement*** For Areas Within And Near IDWR Administrative Basin 36 (Stipulated Agreement) signed by Clear Springs and Clear Lakes. . . . ***The Watermaster's curtailment of Clear Lakes' diversion in response to that call violates the Director's responsibility to enforce the provisions of the Stipulated Agreement pursuant to the Director's February 19, 2002 Final Order Creating Water District No. 130.***

Memorandum at 10 (emphasis added)(Exhibit O to *Aff. of John K. Simpson*).

Clear Lakes argued extensively about the effect of the Interim Stipulated Agreement and how Clear Springs' call violated the "safe harbor" provision in that agreement. Clear Lakes also alleged that the Director violated his responsibility to enforce the agreement by: 1) issuing the watermaster instructions; and 2) curtailing Clear Lakes' water right. *See id.* at 18-21 (Exhibit O

[2] Although the Court issued its *Order Granting Intervention, And Denying Motion for Preliminary Injunction* on July 22, 2002, the Court advised the parties that it was granting Clear Springs' motion to intervene at the hearing on the motion for a preliminary injunction on July 2, 2002. The Court's order is attached to the *Aff. of John K. Simpson* at Exhibit M.

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water right. The Special Master, and ultimately the Presiding Judge of the SRBA Court, determined that Clear Springs' and Clear Lakes' water rights derived from a common springs source.

Clear Lakes had originally objected to, among other things, the source element of Clear Springs' water right and requested that language be added to state that it was "separate and distinct from the source of water" for Clear Lakes' water right. 136 Idaho at 763. The issues were tried before a Special Master who ultimately determined that Clear Lakes' water rights were not from a separate source. *Id.* The Presiding Judge affirmed the Special Master's decision and issued partial decrees for Clear Springs' water rights. *Id.*

On appeal, Clear Lakes alleged that the SRBA Court erred by finding the parties' water rights all derived from the same source. The Supreme Court disagreed and held:

> The special master looked at the evidence presented and determined that Appellant [Clear Lakes] had not met its burden to overcome the district court's report. The SRBA district court after reviewing the evidence and hearing oral arguments came to a similar conclusion. The findings of fact as to the source of the contested water rights are supported by substantial competent evidence. This Court affirms the SRBA district court's grant of Respondent's [Clear Springs] motion for involuntary dismissal.

Id. at 766.

Apart from finding that Clear Springs' and Clear Lakes' water rights share the same "source," the Court also determined the following with respect to Clear Lakes' argument regarding Clear Springs' points of diversion:

> Substantial evidence in the record supports the SRBA district court's conclusion that Appellant [Clear Lakes] is estopped and waived its point of diversion argument. This Court agrees and holds that the special master and SRBA district court did not err by prohibiting Appellant from submitting evidence at trial concerning the point of diversion.

Id. at 767.

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This appeal finally resolved Clear Lakes' objections to the source and points of diversion elements of Clear Springs' water rights. The partial decrees that had been issued for Clear Springs' rights were therefore judicially confirmed. Accordingly, Clear Springs' water rights were undoubtedly subject to administration and curtailment based on priority and pursuant to the subsequent formation of Water District No. 130.

D. Clear Lakes' Partial Decrees and Motion to Modify Those Decrees.

Less than three months from the Idaho Supreme Court's decision, Clear Lakes filed a motion to alter or amend the Special Master's Report and Recommendation for its water right nos. 36-02659 and 36-07004. The SRBA proceedings on Clear Lakes' water rights that are derived from the same source as Clear Springs' water rights is best summarized as follows.

Clear Lakes filed applications and received a water right licenses for water right nos. 36-02659 and 36-07004. These licensed rights were later claimed in the SRBA. Objections were filed and a trial was eventually held on January 8, 1998. The first Special Master's Report and Recommendation was issued and motions to alter or amend were filed by both Clear Lakes and the North Snake Ground Water District. North Snake's motion, concerning the issues of "facility volume" and "additional evidence," was denied by the Special Master on July 9, 1998. That decision was challenged and ultimately resolved by order of the Presiding Judge on December 29, 1999. Partial decrees were initially entered for water right nos. 36-02659 and 36-07004 on April 10, 2000. Clear Lakes immediately filed a motion to stay the partial decrees in order to resolve its pending motion to alter or amend the Special Master's Report and Recommendation. The Court, finding the partial decrees to have been issued in error, vacated the decrees and recommitted the subcase back to the Special Master to hear Clear Lakes' motion to alter or amend on May 9, 2000.

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Nearly two years later, Clear Lakes finally submitted a brief in support of its motion to alter or amend the Special Master's report on April 2, 2002. In that supporting memorandum, Clear Lakes specifically took issue with the Special Master's findings claiming they "did not accurately describe the diversions for water right nos. 36-02659 and 36-07004." Clear Lakes specifically requested that the following remark be added "to more precisely describe the location and configuration of the diversions to provide for proper definition and administration of water right no. 36-02569":

> This water right is diverted through a combination of two adjacent spring-fed diversion pools: (1) a diversion pool known as the "Western Pool" located in the S1/2SESWNE and the S1/2SWSENE, T09S R14E Section 2; and (2) a diversion pool known as the "Eastern Pool" located in the SWSESENE and SESWSENE, T09S R14E Section 2.

Motion to Alter or Amend Memorandum at 3.

The water right description, including the above remark, was stipulated to by Clear Lakes and approved by the Idaho Department of Water Resources (IDWR) through a Standard Form 5 that was filed on April 11, 2002. Special Master Dolan issued an *Amended Order Granting in Part Clear Lakes Motion to Alter or Amend and 2nd Amended Special Master Report* on April 15, 2002, recommending water right no. 36-02569 be decreed with the remark noted above.

A day later, Clear Lakes filed a motion to expedite the issuance of the partial decree for water right nos. 36-02659 and 36-07004. In that motion Clear Lakes readily admitted:

> Clear Lakes has examined the *Special Master's Recommendations* of water right nos. 36-02659 and 36-07004 attached to the *2nd Amended Report* ***and determined that they are accurate.***

Motion to Expedite at 2 (emphasis added)(Exhibit S to *Aff. of John K. Simpson*).

Clear Lakes further noted that:

> ***[B]ecause the subcases have been resolved as Clear Lakes desires, it hereby waives any right it may have to move for the alteration or amendment of the*** current *Special Master's Recommendations* of the subject ***water rights.***

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> [T]he subcases have already been resolved as Clear Lakes desires. Therefore, ***Clear Lakes does not wish to Challenge the current Special Master's Recommendations of its water rights*** that are attached to the *2nd Amended Report, and hereby waives its right to file a Notice of Challenge in these subcases.*

Id. at 3 (emphasis added)(Exhibit S to *Aff. of John K. Simpson*).

Finally, Clear Lakes requested that the Court expedite issuing the partial decree for its water rights nos. 36-02659 and 36-07004 specifically for the purpose of allowing IDWR to administer its water rights:

> ***Clear Lakes makes this Motion because of the pending creation and organization of Water District 130 (the organizational meeting for the Water District is currently scheduled for April 23, 2002). The organization of Water District 130 will result in the administration of all water rights whose priorities have been adjudicated. See I.C. § 42-604.*** However, because Clear Lakes' water right nos. 36-02659 and 36-07004 have not yet been decreed, it is unclear whether they are subject to such administration. ***Therefore, Clear Lakes requests that the Court expedite its issuance of the Partial Decrees of these water rights so that they come within the confines of the administration contemplated by I.C. § 42-604.***

Id. at 1-2 (emphasis added)(Exhibit S to *Aff. of John K. Simpson*).

In response to Clear Lakes' motion, this Court issued amended partial decrees for water right nos. 36-02659 and 36-07004, along with accompanying Rule 54(b) certificates on April 22, 2002. Clear Lakes did not seek an appeal of the amended partial decree. Importantly, Clear Lakes sought these expedited decrees after the Interim Stipulated Agreement had been signed and just before it submitted material to the Director for purposes of formulating watermaster instructions for administration of its and Clear Springs' water rights. Clears Lakes did file a motion to modify its partial decree on October 18, 2002, or after it had filed suit against IDWR seeking to enjoin the administration of its water right no. 36-02659. Clear Springs filed a motion to participate and a response opposing that motion on February 10, 2003. Clear Lakes

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subsequently withdrew its motion on 14, 2003, and the SRBA Court entered an order of dismissal on February 20, 2003.

E. *Clear Lakes v. Clear Springs* (Case No. CV-02-00803)

Just eight days after the Court dismissed its case with prejudice in Case No. CV-02-0377, Clear Lakes filed suit against Clear Springs for damages on December 20, 2002. (Case No. CV-02-00803, District Court for the Fifth Judicial District, Gooding County) *See* Exhibit T to *Aff. of John K. Simpson.* Clear Springs filed a motion to dismiss Clear Lakes' complaint on January 20, 2003. Thereafter Clear Lakes dismissed the presiding judge (Judge R. Barry Wood) and the case was transferred to Judge John Melanson in Minidoka County. Clear Springs' motion was recently heard on February 26, 2003. A decision on Clear Springs' motion is currently pending.

III. MOTION TO STAY RESPONSE

Clear Lakes filed a motion to stay "any actions by the watermaster for Water District 130 resulting in further curtailments of its water rights." Clear Lakes claims that a "stay is necessary and appropriate pending resolutions of the issues raised" in its petition to initiate a contested case. Clear Lakes only cites to IDAPA 37.01.01.260 and 37.01.01.780 for support.

IDWR's rules of procedure provide the following with respect to a stay:

> Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion.

IDAPA 37.01.01.780.

Although IDWR's rules of procedure do not provide a governing standard for a motion to stay an interlocutory or final order, Clear Lakes' motion is analogous to a motion for a preliminary injunction. Essentially Clear Lakes is requesting IDWR to refrain from carrying out its statutory duty to administer decreed water rights according to priority pursuant to I.C. §§ 42-

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602, 607. Because Idaho law and the Director's June 13, 2002 instructions require the watermaster to reduce Clear Lakes' junior priority water right no. 36-07004 in order to satisfy Clear Springs' senior water right no. 36-02708 in times of shortage, the Hearing Officer should require Clear Lakes to prove the elements of I.R.C.P. 65(e) in order to stay those actions. I.R.C.P. 65(e) provides that a preliminary injunction is only appropriate in the following cases:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.
>
> . . .

I.R.C.P. 65(e).

Importantly, Clear Lakes does not provide any factual or legal support for its *Motion to Stay*. Apparently Clear Lakes is relying solely on the record submitted for its motion. Without any supporting argument the Hearing Officer should deny that motion outright. Additionally, the motion should be denied because the June 13, 2002 watermaster instructions are consistent with Idaho law. A senior water right holder should not bear the burden of injury just because a junior water right holder merely challenges the actions of IDWR and its Director. Although Clear Lakes apparently seeks this stay to prevent any impact to its water right, such an impact is contemplated and provided for under the prior appropriation doctrine in Idaho. Reduction of junior water rights must occur in order to satisfy a senior water right. As such, Clear Lakes cannot prove any "irreparable injury" or "waste" necessary to satisfy its motion.

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Moreover, the specific watermaster instructions and resulting actions taken by the watermaster in this matter were previously affirmed by the District Court in Case No. CV-02-00377 when Clear Lakes' complaint was dismissed "with prejudice." For the same reasons Clear Lakes' motion for preliminary injunction was denied in that case, the Hearing Officer should likewise deny Clear Lakes' present motion for a stay in this proceeding. *See* Exhibit M to *Aff. of John K. Simpson.*

Accordingly, Clear Springs requests the Hearing Officer deny Clear Lakes' request for a "stay" because it cannot satisfy the grounds for a preliminary injunction under I.R.C.P. 65(e) and because a stay is not necessary pending the resolution of this administrative proceeding.

IV. MOTION TO DISMISS CLEAR LAKES' PETITION TO INITIATE CONTESTED CASE

Pursuant to the status/scheduling conference held on February 11, 2003 and the Hearing Officer's recent *Scheduling Order and Notice of Hearing on "Motion for Summary Judgment"*, Clear Springs hereby raises the affirmative defenses listed in its *Answer to Petition* filed on January 20, 2002. These defenses are hereby raised in the context of a Rule 12(b) motion to dismiss the underlying *Petition* filed by Clear Lakes. Accordingly, Clear Springs moves to dismiss Clear Lakes' *Petition* for the reasons set forth below. Clear Springs desires to have these defenses argued and heard prior to Clear Lakes' motion for summary judgment.

In summary, the "deference" afforded to agency interpretations of their own orders and regulations requires Clear Lakes' *Petition* questioning the Director's interpretation of and the actions taken pursuant to his February 19, 2002 to be dismissed. In addition, the previous lawsuit between Clear Lakes, IDWR, and Clear Springs finally resolved any question over the legality of the actions taken by IDWR pursuant to the June 13, 2002 watermaster instructions, the June 19, 2002 *Notice*, and the July 5, 2002 redistribution of water. Next, Clear Lakes' also "waived" its opportunity for both administrative and judicial review when it failed to request a

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hearing before IDWR as provided by I.C. § 42-1701A(3) within the stated 15-day timeframe. Furthermore, the doctrines of *res judicata* and collateral estoppel bar Clear Lakes' present attempt to appeal those instructions and the redistribution of water that was made pursuant to those instructions by operation of the District Court's order dismissing its prior case "with prejudice."

A. Clear Lakes' *Petition* Must Be Dismissed Pursuant to I.R.C.P. 12(b)(6) Since the Director Did Not Violate Any Prior Administrative Order.

Clear Lakes' entire *Petition* hinges on the allegation that the Director "violated" his duty to administer water rights in Water District No. 130 "in accordance" with the Interim Stipulated Agreement. In other words, Clear Lakes claims that the Director, in formulating watermaster instructions and instructing the watermaster to redistribute water to Clear Springs according to the law of prior appropriation, somehow acted contrary to his February 19, 2002 Order. Clear Lakes cannot argue that the Director breached the Interim Stipulated Agreement since he was not a party to that agreement, so it resorts to arguing that the Director "violated" his earlier order providing for its enforcement. This argument is nothing more than an attempted end around appeal of the Director's February 19, 2002 Order. That order was a "final order" for purposes of any "aggrieved party" seeking further administrative or judicial review. *See* Exhibit U to *Aff. of John K. Simpson*. None of the affected water right holders in Water District No. 130, including Clear Lakes, sought any further review.

In the February 19, 2002 Order creating Water District No. 130, the Director instructed the watermaster to undertake the following tasks:

> 10. The Director concludes that ***the watermaster*** of the water district created by this order ***shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director.***

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a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. ***Enforce the provisions of stipulated agreements approved by the Director***; and

d. ***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. ***Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon*** available data, models, and ***the Director's best professional judgment.***

Order at 5-6 (emphasis added). *See* Exhibit E to *Aff. of Charles L. Honsinger.*

Critical to understanding the above tasks is the manner in which they were directed to be performed. Such tasks or duties were not directed to be performed in accordance with the Interim Stipulated, rather they were to be carried out in accordance "with guidelines, direction, and supervision provided by the Director." The Director, not the Interim Stipulated Agreement, governed the direction and supervision provided to the watermaster. Although the order contemplates the watermaster will "enforce the provisions" of the agreement, such enforcement was to be performed under the direction and supervision of the Director. Accordingly, such actions were committed to the discretion of the Director or IDWR, the agency charged with administering water rights in the State of Idaho. Since the Director had to interpret his own February 19, 2002 Order when he formulated the watermaster instructions and directed the redistribution of water between Clear Lakes and Clear Springs, it was analogous to interpreting an agency regulation, not a statute. The order generally outlines the procedures that would govern the formation and operation of Water District No. 130. *See* Order at 5-6 (Exhibit U to *Aff. of John K. Simpson*). For example, in addition to detailing watermaster duties, the order also

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provides for certain organizational features such as electing a watermaster, creating subdistricts, selecting an advisory committee, and appointment of deputy watermasters. *See id.* (Exhibit U to *Aff. of John K. Simpson*). Accordingly, the Director's order mimics an agency rule or regulation outlining various "rules" for how Water District No. 130 would operate. Therefore, subsequent actions by the Director with respect to that order are properly characterized as an agency "interpretation" of its own "rules." Such interpretations are given due deference when reviewed by a court, or in this case an adjudicatory arm of the agency (Hearing Officer).

Courts defer to the interpretation of regulations by agencies charged with their implementation. Administrative Law 2 Am Jur.2d § 240. When the construction of an administrative regulation rather than a statute is in issue, judicial deference to the administrative agency's interpretation is even more clearly in order. *Id.* Deference is particularly required when the agency construction rests on matters peculiarly within the agency's field of expertise, or concerns internal agency matters. *Id.*

Idaho follows this canon of administrative law. In *Angstman v. City of Boise*, 128 Idaho 575 (Ct. App. 1996), the Idaho Court of Appeals held the following with respect to a city council's interpretation of its own city code:

> ***[T]he City refers to the administrative law canon that great weight should be given to an agency's interpretation of its own rules. . . . We agree with this conclusion.*** Under the applicable standard of review, we will defer to the City Council's interpretation of their own ordinance.

128 Idaho at 578 (emphasis added).

In this proceeding Clear Lakes seeks a determination that the Director, or IDWR, violated a "duty" to administer water rights pursuant to the Director's February 19, 2002 Order. Since the Director's actions, or an interpretation of his own order, was not "plainly erroneous or inconsistent" with that order, it must be upheld. *Cf. Idaho Mining Ass'n, Inc. v. Browner*, 90

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F.Supp.2d 1078, 1086 (D. Idaho 2000). The basic administrative law canon of "deference" is particularly applicable where the matter rests within the particular expertise of the agency.

Accordingly, Clear Lakes' *Petition* fails to present facts or state a claim upon which relief can be granted. The Director, in instructing the watermaster to redistribute water to Clear Springs according to priority, acted well within his discretion and properly interpreted his "final order" creating Water District No. 130. Clear Lakes' allegation that the Director had to administer water rights "in accordance" with the Interim Stipulated Agreement therefore fails. The Hearing Officer should dismiss Clear Lakes' *Petition* accordingly.

B. Clear Lakes' *Petition* Must Be Dismissed Pursuant to I.R.C.P. 12(b)(1), (6), and By Operation of *Res Judicata* and Collateral Estoppel.

Clear Lakes' *Petition*, and the basis for its claim for relief in this proceeding, was undeniably one of the claims and issues raised in a prior lawsuit that was dismissed with prejudice by order the District Court of the Fifth Judicial District in Gooding County, Case No. CV-02-00377. *See* Exhibit P to *Aff. of John K. Simpson*. Therefore, Clear Lakes' present *Petition* is barred by the doctrines of *res judicata* and collateral estoppel and must similarly be dismissed.

Res judicata is a "well established" rule of law in Idaho. *U.S. Bank Nat. Ass'n. v. Kuenzli*, 134 Idaho 122, 226 (2000). The doctrine of *res judicata* was first announced in *Joyce v. Murphy Land Co.*, 35 Idaho 549 (1922). In that case, the Idaho Supreme Court upheld a prior decree and affirmed the trial court's judgment of nonsuit. In applying *res judicata*, the Court stated:

> We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication 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.

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35 Idaho at 553.

Additionally, the Idaho Supreme Court has explained that:

> *Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, ***a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim.***
>
> * * *
>
> ***The doctrine of claim preclusion bars*** not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of ***any claims relating to the same cause of action which were actually made or which might have been made.***

Hindmarsh v. Mock, ____ Idaho ____, 57 P.3d 803, 805 (2002)(emphasis added).

Therefore, in Idaho, *res judicata*, or claim preclusion, acts as an absolute bar to a subsequent action between the same parties upon the same claim where there is a valid final judgment on the merits that was rendered by a court of competent jurisdiction. Moreover, *res judicata* applies to the effect of administrative decisions. *J & J Contractors/O.T. Davis Construction v. State of Idaho*, 118 Idaho 535, 537 (1990); *Blackburn v. Olson*, 69 Idaho 428, 434 (1949). Accordingly, *res judicata* applies two-fold to bar Clear Lakes' *Petition*.

First, since the Director's February 19, 2002 Order, his watermaster instructions, and the subsequent watermaster's *Notice* and redistribution were unchallenged by Clear Lakes, those administrative actions became "final" and cannot now be attacked some six months later. Whereas I.C. § 42-1701A(3) provided Clear Lakes with an opportunity to request a hearing on the watermaster's *Notice* within 15 days, it blatantly ignored that opportunity and sought immediate relief with the judiciary. The filing of Clear Lakes' lawsuit did not toll the 15-day timeframe. Accordingly, those "final" actions, as well as the "final" order entered on February

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19, 2002, operate to bar subsequent administrative challenges, such as Clear Lakes' current *Petition*.

Second, after comparing Clear Lakes' current *Petition* with its complaint in Case No. CV-02-00377, it is obvious that the elements of *res judicata* are satisfied and that Clear Lakes' cause of action should be dismissed accordingly. There is no question this action involves the same parties in Case No. CV-02-00377. Clear Lakes filed a complaint on June 20, 2002, and the Court granted Clear Springs' motion to intervene as a matter of right on July 2, 2002. Thereafter, Clear Springs participated as an intervener/defendant to protect its interest and support the actions that were taken by IDWR. Accordingly, the "same" parties element of *res judicata* is satisfied.

Second, Clear Lakes' current action is predicated upon the "same claim" that was included in its lawsuit in Case No. CV-02-00377. What constitutes a "same claim" has been further defined and explained by the Idaho Supreme Court in *Diamond v. Farmers Group, Inc.*, 119 Idaho 146 (1990). In *Diamond*, the Court adopted the Restatements' "transaction" approach to analyzing the "same claim" element. 119 Idaho at 149. The "transaction" approach, or the general concept of what consists of a claim has been defined as follows:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the [rule of merger], ***the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.***
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Wing v. Hulet, 106 Idaho 912, 915 (Ct. App. 1984)(emphasis added)(citing RESTATEMENT (SECOND) OF JUDGMENTS (1982) § 24).

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The Court in *Wing* further cited:

> ***The present trend is to see claim in factual terms and to make it coterminus with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories***, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

106 Idaho at 916 (emphasis added)(citing citing "Comment a" to RESTATEMENT (SECOND) OF JUDGMENTS (1982) § 24).

Stated another way, the "sameness" of a cause of action for purposes of *res judicata* is determined by examining "the operative facts underlying the two lawsuits." *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 446 (1982).

The "operative facts" underlying Clear Lakes' prior lawsuit and its current *Petition* are the Director's watermaster instructions, the watermaster's *Notice* and actions redistributing water, and the Director's interpretation of his orders approving and providing for enforcement of the Interim Stipulated Agreement. In Case No. CV-02-00377, Clear Lakes challenged IDWR's actions in redistributing the flow of water pursuant to the amended watermaster instructions drafted by the Director. The amended watermaster instructions were issued as a result of the Director's review of all pertinent information, both factual and legal, that applied to the distribution of water to satisfy Clear Springs' senior water right no. 36-02708. As part of that review process, the Director was certainly aware of his prior approval of the Interim Stipulated Agreement and the effect of his February 19, 2002 Order providing for the enforcement of that agreement. Therefore, the amended watermaster instructions and the *Notice* issued by the watermaster incorporated the Director's interpretation of the Interim Stipulated Agreement as well as and the effect of his February 19, 2002 Order on distribution of water within Water

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District No. 130, particularly distribution to Clear Springs' water right no. 36-02708. When Clear Springs issued a call on June 7, 2002, the "operative facts" surrounding that request were directly related to the Director's amended watermaster instructions, the Interim Stipulated Agreement, and the effect of the Director's prior orders approving and providing for enforcement of the agreement.

Clear Lakes admittedly recognized these interrelated facts in Case No. CV-02-00377. In addition to the count in its complaint seeking to enjoin IDWR from redistributing the water, Clear Lakes specifically alleged the following in its *Memorandum* opposing the dispositive motions filed by Clear Springs and IDWR:

> Clear Springs' June 7, 2002 call for distribution of water sought curtailment and reduction of Clear Lakes' water rights in order supply water to Clear Springs' water right no. 36-02708. The Director's position is that, in response to Clear Springs' call, the Watermaster has curtailed Clear Lakes' diversion of its junior water right no. 36-07004. Dreher Depo., p. 51, ln. 9- p. 52, ln. 10. ***Clear Springs' call violates the "safe harbor" provision in paragraph 2.8 of the Interim Stipulated*** Agreement For Areas Within And Near IDWR Administrative Basin 36 (Stipulated Agreement) signed by Clear Springs and Clear Lakes. Dreher Depo., Exhibit 34; Hardy Affidavit, ¶ 2, Exhibit A. ***The Watermaster's curtailment of Clear Lakes' diversion in response to the call violates the Director's responsibility to enforce the provisions of the Stipulated Agreement pursuant to the Director's February 19, 2002 Final Order*** Creating Water District No. 130. . . .

Memorandum in Opposition at 10 (emphasis added). *See* Exhibit O to *Aff. of John K. Simpson.*

Undoubtedly the fact Clear Springs made a call for water and IDWR responded in redistributing the water was central to the "transaction" or "operative facts" underlying Clear Lakes' lawsuit in Case No. CV-02-00377. The issuance of the amended watermaster instructions, and IDWR's actions in redistributing the water to satisfy Clear Springs' water right was the very "agency action" that Clear Lakes sought to enjoin. Stated another way, the call for water and the Director's subsequent redistribution

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pursuant to the instructions and in accordance with his February 19, 2002 Order, was at the very heart of Clear Lakes' cause of action. Coincidentally, in the present proceeding, Clear Lakes likewise seeks the following:

> (1) A determination that the watermaster's July 5th, 2002 curtailment of Clear Lakes' diversion of water violates IDWR's duty to administer water rights in Water District 130 in accordance with the *Interim Stipulated Agreement For Areas Within and Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement");

Petition at 1.

The "sameness" of the "operative facts" underlying the prior lawsuit and the current *Petition* filed by Clear Lakes is patently obvious. As such, the "claim" regarding IDWR's "violation" of its duty to administer water rights in accordance with the Interim Stipulated Agreement was part of the "transaction" or "series of connected transactions" out of which Clear Lakes' prior lawsuit arose. Moreover, it does not change the effect of *res judicata* that Clear Lakes only sought injunctive relief against IDWR in the prior lawsuit, for:

> A factual grouping constitutes a "transaction" – and therefore a "claim" – regardless of whether the plaintiff, in separate lawsuits, has asserted different types of harm or has sought different forms of relief.

Wing, 106 Idaho at 916.

Since Clear Lakes previously alleged that IDWR, or the Director, "violated" a "duty" to administer water rights in accordance with the Interim Stipulated Agreement in Case No. CV-02-00377, there is no question Clear Lakes is raising the same "claim" in this case. Certainly if *res judicata* acts to bar subsequent claims that "could" have been raised in a prior lawsuit, there is no question the doctrine prevents subsequent claims that were indeed ***actually*** raised in the prior proceeding. As demonstrated above, Clear Lakes isn't alleging a "new" cause of action in its ***Petition***, it is simply raising a claim that was clearly before the district court in the prior lawsuit.

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In addition to the "same" parties and "same" claim, *res judicata* also requires a valid final judgment on the merits rendered by a court of competent jurisdiction. The District Court of the Fifth Judicial District, Gooding County, is certainly a court of "competent jurisdiction." Furthermore, the Court's December 12, 2002 order dismissing Clear Lakes' complaint "with prejudice" operates as a "valid final judgment on the merits." Although Clear Lakes and IDWR stipulated to dismiss the case pursuant to I.R.C.P. 41(a)(1), the Court entered an order dismissing the case ***with prejudice***, which for purposes of *res judicata* effected a final judgment on the merits. In *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610 (1992), the Idaho Supreme Court was faced with a similar question about the effect of a "dismissal with prejudice" and observed:

> Case law discussing the effect of ***a Rule 41 stipulation of dismissal with prejudice confirms that the doctrine of res judicata is applicable here as if the parties had proceeded to trial.***

121 Idaho at 614 (emphasis added).

Although the Court refused to apply *res judicata* in *Kawai Farms, Inc.* due to the fact it found a "question of material fact" as to whether or not Kawai Farms should have reasonably discovered alleged fraud, it nonetheless approved the above statement of law. Other decisions from Idaho courts have also confirmed this rule of law. *See Green v. Gough*, 96 Idaho 927, 930 (1975)("The stipulation and order dismissing plaintiffs' first cause of action with prejudice as to defendants [ ] operates as a final adjudication of the merits adverse to the plaintiffs."); *In re Christensen*, 148 B.R. 601, 603 (D. Idaho 1992)("the doctrine [of *res judicata*] is applicable to a stipulated dismissal with prejudice as if the parties had proceeded to trial on the matter."). Jurisdictions outside of Idaho have also concluded that a "stipulation of dismissal with prejudice" operates as a judgment on the merits for purposes of *res judicata*. *See First Bank, (N.A.) Western Montana, Missoula v. District Court for the Fourth Judicial District*, 737 P.2d

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1132, 1135 (Mont. 1987); *Tolstrup v. Miller*, 726 P.2d 1304, 1306 (Alaska 1986); *Torrey Pines Bank v. Superior Court*, 265 Cal.Rptr. 217, 221 (1989). Accordingly, the Court's order dismissing Clear Lakes' cause of action in Case No. CV-02-00377 with prejudice indisputably constituted a "final judgment on the merits."

In sum, all of the elements of *res judicata* are satisfied in this case and the Court's order in case no. CV-02-00377 effectively bars Clear Lakes' current *Petition*. Since the Court denied Clear Lakes' motion for a preliminary injunction, and dismissed the entire case with prejudice, there is no question that Clear Lakes' allegation that IDWR violated its duty to administer water rights pursuant to the Interim Stipulated Agreement was before the Court as well. Where the Court previously dismissed Clear Lakes' challenge of IDWR's redistribution of water according to the Director's January 18, and February 19, 2002 Orders, the watermaster instructions, and Clear Springs' request for distribution of water pursuant to its senior water right, IDWR's actions were judicially validated. Clear Lakes cannot now circumvent that decision by raising the same claims in this administrative proceeding. In addition to *res judicata*, collateral estoppel also bars Clear Lakes' current *Petition*.

A part of *res judicata*, issue preclusion, or collateral estoppel, also bars a party from relitigating issues that were adjudicated in a prior lawsuit between the same parties. Five factors are required to be met for collateral estoppel to apply:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issued decided in an earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Mastrangelo v. Sandstrom, Inc.,___ Idaho___, 55 P.3d 298, 302 (2002); *see also Anderson v. City of Pocatello*, 112 Idaho 176 (1986).

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The issue of the Director's alleged "violation" of his duty to administer water rights and enforce the Interim Stipulated Agreement was raised in case no. CV-02-00377. As noted above, Clear Lakes, IDWR, and Clear Springs were all parties to that lawsuit. Additionally, Clear Lakes had a "full and fair opportunity" to litigate the issue. The Court dismissed Clear Lakes' complaint with prejudice, effecting an adjudication on the merits. Essentially, the Court's order dismissing Clear Lakes' complaint with prejudice decided all issues that were raised, including the Director's or IDWR's alleged "violation" of the "duty" to administer water rights and enforce the Interim Stipulated Agreement. Accordingly, the elements of collateral estoppel are met here as well.

For the foregoing reasons, Clear Lakes' *Petition* must also be dismissed pursuant to the doctrine of collateral estoppel and I.R.C.P. 12(b)(1) and (6).

C. Clear Lakes' *Petition* Must Be Dismissed Pursuant to I.R.C.P. 12(b)(1) and (6) By Operation of "Waiver" and Its Failure to Timely Appeal the Actions Taken By IDWR.

Clear Lakes' petition must also be dismissed pursuant to I.R.C.P. 12(b)(6) on the theory that it has "waived" its right to petition IDWR for a hearing on the watermaster instructions. Clear Lakes is estopped from seeking the relief requested due to its failure to timely appeal the Director's watermaster instructions issued on June 13, 2002, or the Watermaster's June 19, 2002 Notice of Intent to Redistribute to redistribute flows ("*Notice*") within the required timeframe provided by I.C. § 42-1701A(3).

Clear Lakes apparently seeks an administrative hearing on the watermaster instructions pursuant to I.C. § 42-1701A(3). *Petition* at 5. That statute allows "any person aggrieved" by any "decision, determination, order or action" of the Director to file a petition and request a hearing within 15 days after such action. I.C. § 42-1701A(3). On July 3, 2002 Clear Lakes

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specifically requested the Director to delay the redistribution to afford it the full 15 days to request a hearing on the watermaster's *Notice*. *See* Exhibit 6 to *Clear Springs' Answer*. Although Clear Lakes admittedly acknowledged that I.C. § 42-1701A(3) provided it with an opportunity to request a hearing on the watermaster's June 19, 2002 *Notice*, it nonetheless "waived" its right to such a hearing, or what could have been characterized as further administrative review. Clear Lakes cannot now, nearly seven months later request a hearing pursuant to a statute that only provided it with a 15-day timeline to make such a request.

Such a failure is analogous to failing to file a timely appeal of a district court decision. Should the Hearing Officer accept Clear Lakes' challenge of IDWR's actions beyond the mandatory time limit provided by I.C. § 42-1701A(3), it would in effect be extending the statute's timeframe. Such an action is not allowed by the judiciary, and should be followed administrative agencies. *Grand Canyon Dories v. State Tax Com'n*, 121 Idaho 515, 516 (Ct. App. 1992), appeal after remand, 124 Idaho 1 (1993)(A court has no power to avoid a jurisdictional defect caused by a failure to file an appeal by extending the time for filing). As such, Clear Lakes' appeal of IDWR's actions, some six months later, cannot cure the fact that IDWR is divested with jurisdiction to hear its challenge. *Walton Inc. v. Jensen*, 132 Idaho 716, 719 (Ct. App. 1999)(It is well established that the failure to timely file a notice of appeal is jurisdictional and shall cause automatic dismissal of such appeal); *State v. Payan*, 128 Idaho 866, 867 (Ct. App. 1996)(holding that appeal time limitations are jurisdictional and dismissing an appeal that was filed one day after the deadline). For similar reasons, Clear Lakes' *Petition* is untimely and should be dismissed.

The fact that Clear Lakes and IDWR previously stipulated to a dismissal of Clear Lakes' previous lawsuit does not affect this analysis. First, since the Court dismissed the case "with

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prejudice," it is clear that IDWR's, including the Director's, previous actions were judicially validated. Where Clear Lakes previously claimed that IDWR violated it duty to administer water rights and enforce the Interim Stipulated Agreement it is now barred from raising such a claim through its *Petition*. Second, pursuant to the terms of the stipulation IDWR only "acknowledged" Clear Lakes' right "under applicable statutes and rules to file a petition" initiating a contested case. *Stipulation* at 2 (Exhibit A to *Petition*). As indicated above, no "applicable statutes or rules" allow Clear Lakes to file its current *Petition*. I.C. § 42-1701A(3) only provides 15 days to file a petition and request a hearing, not six months. Further, IDWR only committed to provide a hearing "within the jurisdiction of IDWR." *Id.* Clear Lakes' failure to request a hearing within 15 days as provided by statute is fatal to IDWR's jurisdiction. Accordingly, Clear Lakes' has "waived" any opportunity it had to challenge IDWR's actions and its *Petition* should be dismissed.

V. RESPONSE TO CLEAR LAKES' MOTION FOR SUMMARY JUDGMENT

If discerning the "intent" of the Interim Stipulated Agreement is indeed necessary for resolving this administrative proceeding as claimed by Clear Lakes, Clear Springs hereby responds to the "contract" issues that are raised in Clear Lakes' summary judgment motion. As indicated below, the true intent of the Interim Stipulated Agreement is reflected by carefully examining the entire agreement and realizing the "bargained for exchange" that was actually made between the two sets of parties to the agreement, ground water users and surface water users. Accordingly, Clear Lakes' *Petition* and *Summary Judgment Motion* may be dismissed as a matter of law.

Alternatively, if the parties' "intent" is at issue, the facts undeniably demonstrate that there was no "agreement" as between Clear Springs and Clear Lakes. Given the lack of

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consideration and mutual assent, the agreement was "void" as between Clear Springs and Clear Lakes. As such, the Director's watermaster instructions and actions taken pursuant to those instructions should be affirmed.

A. Legal Standard

The standard of review upon a motion for summary judgment has been set forth as follows by the Idaho Supreme Court:

> All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review. *Post v. Idaho Farmway, Inc.*, 135 Idaho 475, 20 P.3d 11 (2001).

Infanger v. City of Salmon, 137 Idaho 45, __, 44 P.3d 1100, 1102 (2002).

The Court has also made the following observations with respect to denying summary judgment motions:

> Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact ... [t]he nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Northwest Bec Corp v. Home Living Service*, 136 Idaho 835, 838-39, 41 P.3d 263, 266-67 (2002) (internal citations and quotations omitted).

Willie v. Board of Trustees, ___ Idaho ___, 59 P.3d 302, 303 (2002).

Additionally, in the event the evidence presents conflicting inferences, summary judgment is not precluded, especially since the Hearing Officer will hear this matter. When a trial court [or Hearing Officer], rather than a jury, will be the trier of fact, summary judgment is appropriate where the material facts are undisputed, despite the possibility of conflicting

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inferences, because the court [Hearing Officer] alone is responsible for resolving conflicts between those inferences." *Stafford v. Weaver*, 136 Idaho 223, 225 (2001). This standard is applicable here where the Hearing Officer will resolve any conflicting inferences presented by the evidence.

B. Summary of Argument

Since the facts demonstrate the Director's June 13, 2002 watermaster instructions are final, and in accord with Idaho law, and that the directed administration of Clear Lakes' and Clear Springs' water rights was in conformance with his February 19, 2002 Order, interpretation of the Interim Stipulated Agreement is not at issue and Clear Lakes' *Petition* should be dismissed accordingly. However, in the event the interpretation of the Interim Stipulated Agreement is a question to be determined by the Hearing Officer, the language of the agreement, along with the context and subsequent actions of the parties clearly demonstrates that the Safe Harbor provision did not apply to protect administration as between senior and junior ***surface*** water rights.

C. The Interim Stipulated Agreement Safe Harbor Provision Only Applies as Between Ground Water Users and Surface Water Users.

Clear Lakes contends that the Interim Stipulated Agreement entered into between various surface water right holders and junior ground water right holders somehow "conditions" or limits the Director's statutory authority to administer water rights within Water District No. 130. Clear Lakes alleges that by reading the Safe Harbor provision (Paragraph 2.8) of the agreement in isolation, the plain terms require the Hearing Officer to refrain from considering the context of that provision and all other evidence, including the actual dispute between the two sets of parties, the course of negotiations surrounding the signing of the agreement, and the "bargained for exchange" made between the ground water users and the surface water users. Contrary to Clear Lakes' arguments, the entire agreement must be carefully assessed in order to properly construe

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the meaning and intent behind the Safe Harbor provision. In addition, the entire context of the Director's January 18 and February 19, 2002 Orders must similarly be carefully analyzed to determine whether or not the Director acted in contravention to those orders in instructing the watermaster to redistribute the water to Clear Springs' senior water right.

In interpreting any provision of a contract, the entire agreement must be viewed as a whole to ascertain the mutual intent of the parties at the time their contract was made. *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, ___, 53 P.3d 330, 333 (2002); *First Security Bank of Idaho v. Murphy*, 131 Idaho 787, ___ (1998); *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619, *cert. denied*, 451 U.S. 912 (1981). The primary objective in interpreting a contract is to discover and give effect to the intent of the parties. *Win of Michigan Inc.*, 53 P.3d at 333. Moreover, a contract must be construed so as to give effect to every part of it, if at all possible. *Insurance Associates Corp. v. Hansen*, 111 Idaho 206, 208 (Ct. App. 1986). In other words, the language of a particular provision in a contract cannot be viewed in a "vacuum," and all other provisions of the contract must be construed together so as to determine the parties' intent. Finally, the intent of the parties should be ascertained from the language of the contract, and if it is unambiguous, the meaning and legal effect of the contract is a question of law. *Win of Michigan, Inc.*, 53 P.3d at 334. However, if a contract is ambiguous, a question of fact exists and extrinsic evidence may be considered to discern the true intent of the parties. *Bilow v. Preco, Inc.*, 132 Idaho 23, 27 (1998).

The Interim Stipulated Agreement contains a number of important provisions, including recitals that set the context for the "bargain" that was made between the ground water users and the surface water users, foregoing curtailing junior groundwater right holders within the Thousand Springs Management Area for two years in exchange for mitigation and replacement

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water. The first paragraph sets the stage and clearly identifies the two sets of parties the agreement was being entered into between:

> ***This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users***, or their representatives, ***in consideration of the promises stated in this Agreement.*** The term of this Agreement shall extend until December 31, 2003.

Interim Stipulated Agreement at 1 (emphasis added). *See* Exhibit C to *Aff. of Charles L. Honsinger.*

Importantly, the agreement is entered into "***between***" the groundwater users and the surface water users, not between two sets of surface water users. The recital clearly identifies the two sets of parties that would exchange the "promises" set forth in the agreement. Nowhere does the agreement reflect that it is being entered into between two sets of surface water users.

Additionally, the following "facts" demonstrate the reason for the agreement in the first place:

> 1. ***This Agreement is made in reference to the following facts:***
>
> 1.1. The Director of the Idaho Department of Water Resources (Director) stated his intent to entirely curtail diversions under certain water rights for ground water beneath portions of Basin 36, an administrative sub-basin. ***The Director's intent was based upon his findings, set forth in his administrative order designating the Thousand Springs Ground Water Management Area dated August 3, 2001, that diversions of ground water under such rights cause significant reductions in spring flows tributary to the Thousand Springs reach of the Snake River, and that those reductions will further reduce the diminished water supply available to satisfy senior priority surface water rights during current drought conditions.***
>
> * * *
>
> 1.4 The new ESPA Ground Water Model is expected to provide the parties with additional information ***regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River;*** and

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1.5 ***The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36*** pending the completion of the new ESPA Ground Water Model. . . .

Interim Stipulated Agreement at 1 (emphasis added). *See* Exhibit C to *Aff. of Charles L. Honsinger.*

The basis for the agreement is succinctly summarized as being made in response to the Director's designation of the Thousand Springs Ground Water Management Area, and to allow for further opportunity to explore the interconnection between ground water and surface water sources in Basin 36. The Agreement in Principle, or the underlying promises that were made and that served as the foundation for the Interim Stipulated Agreement, was likewise predicated on such facts. *See* Exhibit C to *IDWR Staff Memorandum*. Nothing references a specific dispute as between two surface water users who shared a common source. The two sets of parties, or the surface and ground water users, desired to avoid the inevitable litigation had the Director curtailed diversions of ground water to satisfy senior surface water rights, as was contemplated by his August 3, 2001 order. Any alleged injury to senior surface water rights by other junior surface water rights was not contemplated as specifically between Clear Springs and Clear Lakes. The fact Paragraph 1.5 includes the reference to "surface water" under junior priority rights does not change the fundamental basis underlying the agreement.

Apart from the specific "facts" detailing the overall purpose behind the Agreement, the substantive provisions also shed light on the intent of the two sets of parties and what was actually agreed to:

2. Interim Stipulated Agreement:

a. ***Upon the payment of necessary advances by North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD).***

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.. NSGWD agrees to pay the necessary advances for up to 25,000 acre feet of water, and MVGWD agrees to pay the necessary advances for up to 15,000 acre feet of water. The separate *obligations of NSGWD and MVGWD to pay for storage* shall be based upon their proportionate share as described above. The *obligation of NSGWD and MVGWD to provide 40,000 acre feet of water* will be reduced by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC system by entities other than the NSGWD and MVGWD.

b. *The replacement water will be used to enhance the spring flows in the Thousand Springs reach by 40,000 A.F. The NSGWD members will, to the maximum extent possible, use storage water or canal company shares delivered through the Northside Canal and use Northside Canal Company waste water in lieu of pumping ground water. To the extent that the full 40,000 A.F. is not used for irrigation in lieu of groundwater pumping, the unused portion of the 40,000 A.F. will be used to enhance the spring flows in the Thousand Springs reach. . . .*

* * *

2.5 *Those parties providing replacement water agree to*, in good faith, explore the feasibility, funding and implementation of *the following measures:*

.1 *NSGWD members* who are shareholders in NSCC *will make best efforts to use their NSCC shares on appurtenant lands before using ground water*, unless the NSCC water is not available.

.2 *NSGWD members* within the NSCC service area *will make best efforts to use the storage water* described in paragraph 2.1 *in lieu of pumping a similar amount of ground water.* (Use existing NSCC headgates.)

.3 *NSGWD members* who are also NSCC shareholders within the NSCC service area *will make best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.*

.4 NSGWD will make periodic reports describing the actions being investigated and undertaken pursuant to paragraph .

2.6 *NSGWD and Buckeye agree to use their best efforts to provide (12) CFS of water to Buckeye from Riley Creek by the 2002 irrigation season* as contemplated in the July 2001 letter to NSGWD.

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2.7 . . . In lieu of individual reductions, ground water districts may achieve reductions on a district wide basis. ***The parties agree to meet and establish a procedure for determining the base upon which any reductions in ground water use will be determined.***

Id. at 2-3 (emphasis added). *See* Exhibit C to *Aff. of Charles L. Honsinger.*

All of the above provisions specifically reference "obligations," "payments," and "agreements" on behalf of the two ground water districts for purposes of providing "replacement water" to help enhance the spring flows for use by senior surface water users. The procurement of replacement water was agreed to so that junior ground water right holders would not have to pump as much water, thereby decreasing the likelihood of injury to senior surface water right holders in the Thousand Springs reach. Noticeably absent from any of the provisions in the above paragraphs of the Interim Stipulated Agreement is any "obligation," or "agreement" on behalf of any junior surface water right holder to mitigate for any injuries that those rights may cause to senior surface water right holders. Such mitigation was clearly not provided for in the agreement. Stated another way, no "consideration" was provided by junior surface water right holders to senior surface water right holders in exchange for not calling out those junior water rights in times of shortage. The Safe Harbor provision in Paragraph 2.8 acknowledges the consideration given by the ground water districts, but does not so provide for junior surface water rights that may be injuring senior surface water rights:

2.8 Safe Harbor: ***In exchange for the commitments enumerated in paragraphs 2.1 through 2.7*** the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

Id. at 3 (emphasis added). *See* Exhibit C to *Aff. of Charles L. Honsinger.*

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The Safe Harbor provision does not recognize any "commitments" made by junior surface water right holders that might enjoy the benefit of not being called out by a senior surface water right holder, nor could it since no such "commitments" were made. *See Aff. of Larry Cope*, at 3, ¶ 16. Clear Lakes conveniently glosses over this key language in making its argument. Only by reading the safe harbor provision without this key phrase can one achieve the interpretation advanced by Clear Lakes. The Interim Stipulated Agreement provides a shining example of the danger in isolating and interpreting single provisions in a contract without examining the entire document and the very essence of the parties' "agreement."

Idaho law demands that in interpreting any provision in a contract, the ***entire agreement*** must be viewed as a whole. *St. Clair v. Krueger*, 115 Idaho 702, 705 (1989). Furthermore, to the extent the language in the Safe Harbor provision conflicts with or is inconsistent with the rest of the agreement, such a construction should be made so as to give effect to the intention of the parties "as gathered from the whole contract." *Madrid v. Roth*, 134 Idaho 802, 806 (Ct. App. 2000). Thus, where possible, a construction will be placed upon ambiguous or inconsistent provisions of a contract as will give protection to both parties, as against construction which would only be in the interest of one of the parties to the contract. *Id.* The intention of the parties, as gathered from the entire contract, clearly indicates that junior ground water right users would be providing mitigation or replacement water in exchange for senior surface water users not calling out those junior ground water rights for two years. All "commitments" and "obligations" regarding mitigation in the agreement pertain to the two ground water districts. Nothing references mitigation given by a junior surface water right to satisfy an injury of a senior surface water right. Accordingly, even if the language in the Safe Harbor provision is inconsistent with the rest of the agreement, that language can still be read to give the effect

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intended by the parties, that is senior surface water users foregoing their call on junior ground water users.

Furthermore, apart from the language itself, in construing a contract so as to determine the intent of the parties, a court may also scrutinize the circumstances surrounding the contract's formation. *Transamerica Leasing Corp. v. Van's Realty Co.*, 91 Idaho 510, 520 (1967). Further, the conduct of parties to a contract and their practical interpretation of it is an important factor when there is a dispute over its meaning. *Commercial Credit Corporation v. S & E Enterprises, Inc.*, 97 Idaho 441, 443 (1976).

As set forth in the facts in this *Response* in Section II, the underlying basis for the Interim Stipulated Agreement relates back to the Director's designation of the Thousand Springs Ground Water Management Area and the then pending curtailment of junior ground water rights. The circumstances surrounding the Agreement in Principle, and the Interim Stipulated Agreement, centered upon a dispute between senior surface water users and junior ground water users, not between two surface water users. The parties convinced the Director to stay his pending curtailments on the basis that an agreement between the two sets of parties had been made. *See* Exhibit C to *Aff. of John K. Simpson* (8/31/01 letters). The subsequent conduct of the parties, particularly Clear Lakes, is indicative of that general agreement that was made. For instance, Clear Lakes did not object to the Director's actions in formulating watermaster instructions in spring of 2002. Although various other concerns were raised after the first set of instructions were issued, Clear Lakes did not raise the Interim Stipulated Agreement as precluding such administration of its and Clear Springs' water rights. This understanding of that administration is also reflected by Clear Lakes' rush to have its partial decrees issued by the SRBA Court in April 2002. Clear Lakes admittedly sought those decrees in order that its water rights would fall

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under the jurisdiction and administration of Water District No. 130. Only in October 2002, months after the Director issued his February 19, Order, and months after the watermaster instructions were formulated, did Clear Lakes object to administration on the basis of the safe harbor provision in the agreement. Such an argument is clearly inconsistent with Clear Lakes' prior conduct and the course of negotiations when the agreement was actually made.

D. No "Mutuality of Assent" Under Clear Lakes' Interpretation of the Interim Stipulated Agreement as Between Clear Lakes and Clear Springs.

Alternatively, if the "intent" of the agreement or the parties is at issue, Clear Lakes' *Petition* and *Motion for Summary Judgment* may be dismissed since there was no "meeting of the minds" as between Clear Springs and Clear Lakes. Such an interpretation does not undermine the "agreement" as between junior ground water users and senior surface water users. As such, the Interim Stipulated Agreement does not fail as to those sets of parties, but would instead only be "void" as between Clear Springs and Clear Lakes.

The facts submitted in the *Affidavit of Larry Cope* unequivocally establish that a "meeting of the minds" never occurred between Clear Springs and Clear Lakes, under the theory that senior surface water right holders were foreclosed from calling out junior surface water right holders that were causing injury.

It is the very essence of contract law that there must be a meeting of the minds of the parties for the contract to be binding upon them. *Haener v. Ada County Highway Dist.*, 108 Idaho 170, 173 (1985). In other words, the formation of a contract requires "mutual assent." *Thompson v. Pike*, 122 Idaho 690, 696 (1992). With respect to proving "mutual assent," the Idaho Supreme Court has noted the following:

> Proof of a "meeting of the minds" requires evidence that the parties had a mutual understanding of the terms of their agreement and that they mutually assented to be bound by those terms. The determination of whether there was sufficient

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evidence to show a meeting of the minds to form an express agreement is a question of fact to be resolved by the trier of fact.

Thomas v. Schmelzer, 118 Idaho 353, 356 (1990).

Furthermore, The Idaho Supreme Court, in *Hansen v. State Farm Mutual Automobile Insurance Co.*, 112 Idaho 663, 669 (1987), specifically stated:

> ***Mutuality of assent refers to the heart of the bargain.*** That is, the question of mutuality of assent goes to the formation of a contract as a whole. ***It does not refer to a single term of a contract unless that term goes to the heart of the bargain as represented by the contract as a whole.***

112 Idaho at 669 (emphasis added).

The language in the Safe Harbor provision referring to junior surface water right holders does not go to the "heart of the bargain" that is represented by the Interim Stipulated Agreement as a whole. The commitments made by the ground water districts, in exchange for no calls being made by senior surface water right holders is clearly reflected throughout the "facts" and the "heart" of the agreement. The Agreement in Principle, as well as the parties' letters to the Director, and the overall language of the Interim Stipulated Agreement clearly reflect the "mutuality of assent" as between the junior ground water users and the senior surface water users. On the contrary, nothing indicates a "mutuality of assent" as between Clear Springs and Clear Lakes and the alleged agreement not to call out each other's junior surface water rights. Clear Lakes has offered nothing more than the isolated language of the Safe Harbor provision for claiming that there was such a "contract" between Clear Lakes and Clear Springs. To the contrary, all of the facts, including Clear Lakes' July 10, 2002 letter to the Director, and its conduct up until it lodged a *Memorandum in Opposition* of Clear Springs' Motion to Dismiss in Case No. 0C-02-00377, clearly demonstrate that Clear Lakes had just the opposite interpretation of the agreement in mind. *See* Exhibit 9 to *Clear Springs' Answer*. Accordingly, under Clear

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Lakes' interpretation of the agreement it is obvious there is no "mutuality of assent" and the agreement is void as between Clear Springs and Clear Lakes.

E. Lack of Consideration under Clear Lakes' Interpretation.

Similar to the lack of "mutual assent," under Clear Lakes' interpretation of the Interim Stipulated Agreement, there is also no consideration between Clear Springs and Clear Lakes. Accordingly, no contract exists as between Clear Springs and Clear Lakes. Whereas the two ground water districts agreed to provide mitigation to satisfy senior surface water users as expressed in paragraphs 2.1 through 2.7, junior surface water users, on the other hand, did not agree to provide any mitigation for injuries caused to senior surface water users.

Consideration is a necessary element of any contract. *Vance v. Connell*, 96 Idaho 417, 419 (1974). Consideration for a promise may take the form of an act by the promisee that is bargained for and given in exchange for the promise, or it may also consist of a detriment to the promisee or a benefit to the promisor. *Rule Sales and Service, Inc. v. U.S. Bank National Ass'n.*, 133 Idaho 669, 674 (Ct. App. 1999). Lack or want of consideration, as distinguished from failure of consideration, refers to instances in which no consideration ever existed to support the contract. *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880 (Ct. App. 1986).

Clear Lakes simply asserts that the "Interim Stipulated Agreement was written to provide Safe Harbor to all who signed it." *Brief* at 9. For support, Clear Lakes cites to prior drafts of the agreement to show the differences between drafts circulated in September 2001 and the actual agreement that was signed by the parties in November 2001 through January 2002. *Id.* at 9-11. Such an argument fails to explain the substantive purpose behind the Safe Harbor provision, and the parties who it was intended to benefit. Whereas the Agreement in Principle was reached between ground water users providing mitigation in exchange for senior surface water users

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DEC 17 2003

foregoing making delivery calls, nothing was "bargained for" as between surface water users. Furthermore, while language referring only to junior ground water users was subsequently changed during the drafting process of the formal agreement in the early fall of 2001; Clear Lakes did not participate or raise any concerns for purposes of having that language changed to include "junior surface water rights." As explained earlier, such a change was made to accurately describe the unique situation in Basin 36, where certain ground water rights are actually "senior" to various surface water rights.

In other words, Clear Lakes did not provide any consideration to Clear Springs in exchange for an agreement not to call out Clear Lakes' junior water right. Similarly, Clear Springs did not provide any consideration to Clear Lakes in exchange for an agreement not to call out Clear Springs' junior water right. Therefore, Clear Lakes' interpretation of the Interim Stipulated Agreement clearly fails since there was a lack of consideration as between specific surface water users.

F. Alternatively, the Interim Stipulated Agreement's Terms are Ambiguous in the Specific Situation of Administration Between Clear Lakes and Clear Springs

Alternatively, should the Hearing Officer determine that consideration and a "mutuality of assent" did exist between Clear Lakes and Clear Springs and that the parties' intent is at issue, Clear Lakes' motion should be denied. Despite arguing that its motion may be considered as "matter of law," Clear Lakes apparently creates an issue of "material fact" by citing to and including earlier drafts of the Interim Stipulated Agreement in its argument. Stated another way, Clear Lakes submits external evidence for the Hearing Officer to consider yet it argues that the Interim Stipulated Agreement is "clear and unambiguous" and "must be determined from the plain meaning of the Agreement's own words." *Brief* at 6. Clear Lakes' own actions belie its

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argument and the motion must be denied. However, since the Hearing Officer serves as the "fact finder" in this proceeding, all facts are before the Hearing Officer, including the *IDWR Staff Memorandum*, which may aid the interpretation of the agreement, particularly the effect of the Safe Harbor provision as between Clear Springs and Clear Lakes. Those facts, as set forth earlier in this *Response*, demonstrate why Clear Lakes' *Petition* and *Motion for Summary Judgment* should be dismissed.

Notably, Clear Lakes fails to explain the reason behind the changes from the drafts to the agreement signed by the parties. In light of the changes that were made, the interpretation of the Safe Harbor provision is ambiguous, as that language applies between Clear Springs and Clear Lakes, and must be interpreted in accordance with the entire agreement, prior negotiations, the Agreement in Principle, and the circumstances surrounding why and to whom safe harbor was being provided.

Determining whether a contract is ambiguous or not is a question of law. *Bilow v. Preco, Inc.*, 132 Idaho 23, 27 (1998). A contract is ambiguous if it is "reasonably subject to conflicting interpretations." *Id.* at 28. Moreover, to the extent a contract contains absurdities or contradictions, the contract will be deemed ambiguous as a matter of law. *George v. University of Idaho*, 121 Idaho 30, 35 (Ct. App. 1992). Resolution of an ambiguous contract, or its ambiguous provisions, is a question of fact. *Id.* In determining the parties' intent, the fact finder is free to consider the objective and purpose of the agreement, as well as the conduct of the parties to the agreement. *Id.* at 36. Similar to interpretation of an unambiguous contract, a fact finder reviewing an ambiguous contract must construe the contract as a whole, rather than focusing on isolated provisions. *Id.*

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The facts set forth in the Interim Stipulated Agreement, as well as the mitigation provisions and obligations of the ground water districts in Paragraphs 2.1 to 2.7, make it clear that the "heart of the bargain" mimics the Agreement in Principle that was reached on August 31, 2001. That "agreement" called for replacement water and reduced groundwater pumping from junior priority ground water users in exchange for senior surface water rights foregoing their pending delivery calls. The terms of the Safe Harbor provision acknowledge this "bargained for" exchange between the two separate groups of users as it explicitly provides "***In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 . . .***" As noted above, Clear Lakes did not assume any "obligations" or "commitments" set forth in paragraphs 2.1 through 2.7, as between itself and Clear Springs. At the least, the Safe Harbor provision contains a contradiction that is ambiguous in its application between two surface water users. For this reason, the Hearing Officer should consider additional information to ascertain the parties "true intent" in entering into the Stipulated Agreement.

All of the facts presented above reveal the true intent and applicability of the Safe Harbor provision. The "bargained for" exchange in the agreement was for the ground water users to provide mitigation and replacement water in exchange for senior surface water users to refrain from making a call for two years. Clear Lakes' *Petition* and *Motion for Summary Judgment* must be dismissed accordingly.

VI. CONCLUSION

Clear Lakes' *Petition* is nothing more than another attempt in its unending quest to have its junior water right secure from a call by Clear Springs' senior water right. Idaho law, including specific decisions involving Clear Lakes and Clear Springs, demands otherwise. Despite a decision from the Idaho Supreme Court, an order from the District Court in Gooding

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County dismissing its prior case "with prejudice," the SRBA District Court's order dismissing its motion to modify its partial decrees, and its own failure to timely request a hearing on IDWR's actions taken last summer, Clear Lakes continues with its litigious ways. Pursuant to *res judicata* and collateral estoppel, the administrative law canon of "deference" given to agency's interpretations of their own orders, and "waiver," Clear Lakes' *Petition* must be dismissed.

Alternatively, under the law of contracts in Idaho, it is clear that when construing the entire Interim Stipulated Agreement, the context in which the agreement was reached, and the subsequent conduct of the parties, Clear Lakes' motion for summary judgment should be denied as well. The "bargained for exchange" was made between junior ground water users and senior surface water users. Clear Lakes' efforts to extract an "after the fact" meaning based solely on isolated language in the Safe Harbor provision ignores the basis of the agreement and the true intentions of the parties. For the foregoing reasons, Clear Springs respectfully requests the Hearing Officer to dismiss Clear Lakes' *Petition* and *Motion for Summary Judgment.*

DATED this 3rd day of March, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 3rd, 2003, I served a true and correct copy of the foregoing *RESPONDENT CLEAR SPRINGS FOODS, INC.'S RESPONSE TO CLEAR LAKES TROUT COMPANY, INC.'S MOTION FOR STAY AND MOTION FOR SUMMARY JUDGMENT / MOTION TO DISMISS PETITION TO INITIATE CONTESTED CASE* upon the following by U.S. Mail, postage prepaid:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

Daniel V. Steenson
James G. Reid
Charles L. Honsinger
Ringert Clark
455 S. Third Street
Boise, Idaho 83701-2773

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore St., Suite 20
Twin Falls, Idaho 83301

Travis L. Thompson

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JUN 13 2003

HP OfficeJet G Series G95
Personal Printer/Fax/Copier/Scanner

Fax History Report for
IDWR

Feb 18 2003 5:46pm

Last Fax

Date	Time	Type	Identification	Duration	Pages	Result
Feb 18	5:38pm	Sent	9-3424657	7:03	24	OK

Result:
OK - black and white fax
Okay color - color fax

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MAR 27 2003

HP OfficeJet G Series G95
Personal Printer/Fax/Copier/Scanner

Fax History Report for
IDWR

Feb 18 2003 5:18pm

Last Fax

Date	Time	Type	Identification	Duration	Pages	Result
Feb 18	5:09pm	Sent	9-12087352444----162	7:27	25	OK

Result:
OK - black and white fax
Okay color - color fax

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FEB 27 2003

HEARING INFO FOLDER 3

Rec'd in Southern Reg. 3/4/03 - dgf

RECEIVED
JUN 17 2003
Department of Water Resources

John K. Simpson, ISB # 4242
Travis L. Thompson, ISB # 6168
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	AFFIDAVIT OF JOHN K. SIMPSON

STATE OF IDAHO)
) ss.
County of Ada)

JOHN K. SIMPSON, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record providing legal representation to Clear Springs Foods, Inc. in the above captioned matter. I am over the age of 18 and have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

2. Appended hereto as Exhibit A are two true and correct copies of general geographic maps depicting the location of the Eastern Snake Plain Aquifer. The first

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JUN 17 2003

map also depicts the boundaries of the Thousand Springs Ground Water Management Area.

3. Appended hereto as Exhibit B is a true and correct copy of the Eastern Snake Plain Aquifer that also depicts the boundaries of the North Snake Ground Water District.

4. Appended hereto as Exhibit C is a true and correct copy of the August 31, 2001 letters to Director Karl J. Dreher sent by or on behalf of the North Snake Ground Water District, Aberdeen-Springfield Canal Company, Aberdeen-American Falls Ground Water District, Basic American, Lamb-Weston, J.R. Simplot, FMC, City of Pocatello, Pristine Springs, Aqua Life, Twin Falls Canal Company, City of Twin Falls, Bingham Groundwater District, Bonneville-Jefferson Ground Water District, Clear Springs Food, Inc., Blue Lakes Trout Farm, and Pisces Investments.

5. Appended hereto as Exhibit D is a true and correct copy of the August 31, 2001 letter to Director Karl J. Dreher sent on behalf of Clear Lakes Trout Company, Inc.

6. Appended hereto as Exhibit E is a true and correct copy of the *Order Staying Proceedings* issued by Director Dreher on September 14, 2001.

7. Appended hereto as Exhibit F is a true and correct copy of the list of ground water rights in the Thousand Springs Ground Water Management Area provided by Tim Luke of the Idaho Department of Water Resources.

8. Appended hereto as Exhibit G is a true and correct copy of the Interim Stipulated Agreement entered into between ground water users and surface water users in Basins 35 and 41.

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9. Appended hereto as Exhibit H is a true and correct copy of the *Order Granting State of Idaho's Motion for Order of Interim Administration* entered by the Presiding Judge of the Snake River Basin Adjudication District Court on January 8, 2002.

10. Appended hereto as Exhibit I are true and correct copies of the May 2, 2002 letters and materials submitted to Director Dreher on behalf of Clear Springs Foods, Inc. and Clear Lakes Trout Company, Inc.

11. Appended hereto as Exhibit J are true and correct copies of the relevant excerpts of the Deposition of Karl J. Dreher taken on November 1, 2002 for Case No. CV-02-00377.

12. Appended hereto as Exhibit K is a true and correct copy of the amended watermaster instructions issued by Director Dreher on June 13, 2002.

13. Appended hereto as Exhibit L is a true and correct copy of the *Verified Complaint* filed by Clear Lakes on June 20, 2002 in Case No. CV-02-00377.

14. Appended hereto as Exhibit M is a true and correct copy of the *Order Granting Intervention, And Denying Motion for Preliminary Injunction* issued by the District Court for the Fifth Judicial District, Gooding County, in Case No. CV-02-00377 on July 22, 2002.

15. Appended hereto as Exhibit N is a true and correct copy of Clear Lakes' *Memorandum in Support of Motion for Preliminary Injunction* filed in Case No. CV-02-00377 on June 28, 2002.

16. Appended hereto as Exhibit O is a true and correct copy of *Clear Lakes' Memorandum in Opposition to IDWR's Motion for Summary Judgment and Clear Springs' Motion to Dismiss* filed in Case No. CV-02-00377 on November 12, 2002.

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17. Appended hereto as Exhibit P is a true and correct copy of the *Order Dismissing Complaint Pursuant to Stipulation for Dismissal* issued by the District Court for the Fifth Judicial District, Gooding County, in Case No. CV-02-00377 on December 12, 2002.

18. Appended hereto as Exhibit Q is a true and correct copy of the transcript of the *Motion to Dismiss* hearing held before the District Court for the Fifth Judicial District, Gooding County, in Case No. CV-02-00377 on December 10, 2002.

19. Appended hereto as Exhibit R is a true and correct copy of the Idaho Supreme Court's decision in *Clear Springs Foods, Inc. v. Clear Lakes Trout Company, Inc.* as reported at 136 Idaho 761 (2002).

20. Appended hereto as Exhibit S is a true and correct copy of the *Motion to Expedite Issuance of Partial Decrees* in Subcase Nos. 36-07004 and 36-02659 filed by Clear Lakes Trout Company, Inc. on April 16, 2002.

21. Appended hereto as Exhibit T is a true and correct copy of the *Verified Complaint* filed by Clear Lakes on December 20, 2002 in Case No. CV-02-00803.

22. Appended hereto as Exhibit U is a true and correct copy of the February 20, 2002 letter from Tim Luke (IDWR) including a copy of the February 19, 2002 Order issued by Director Dreher.

DATED this 31st day of March 2003.

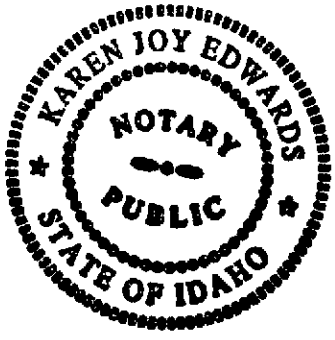
BARKER ROSHOLT & SIMPSON LLP

John K. Simpson

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DEC 17 2003

SUBSCRIBED AND SWORN to before me this 3rd day of March 2003.



Karen Joy Edwards
Notary Public for Idaho
Residing at: Meridian, Idaho
Commission Expires: 8/2/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2003, I caused to be served a true and correct copy of the foregoing *AFFIDAVIT OF JOHN K. SIMPSON* via to the following by U.S. Mail, postage prepaid:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

Daniel V. Steenson
James G. Reid
Charles L. Honsinger
Ringert Clark
455 S. Third Street
Boise, Idaho 83701-2773

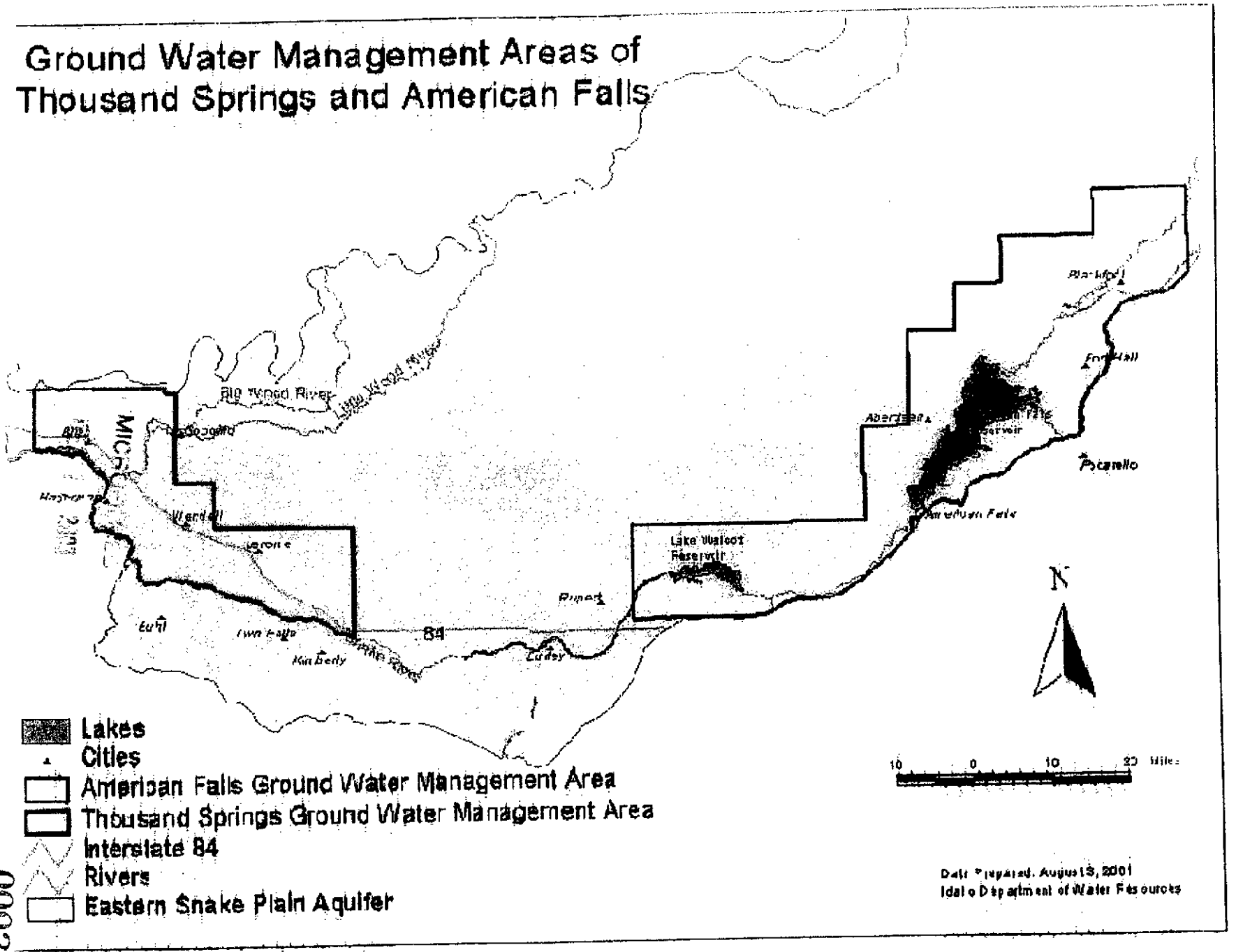
Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore St., Suite 20
Twin Falls, Idaho 83301

Travis L. Thompson

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Exhibit A

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Ground Water Management Areas of
Thousand Springs and American Falls
Big Wood River
Little Wood River
Aberdeen
Pocatello
Lake Walcott
Reservoir
84
N
Lakes
Cities
American Falls Ground Water Management Area
Thousand Springs Ground Water Management Area
Interstate 84
Rivers
Eastern Snake Plain Aquifer
10 0 10 20 Miles
Idaho Department of Water Resources

EASTERN SNAKE RIVER PLAIN

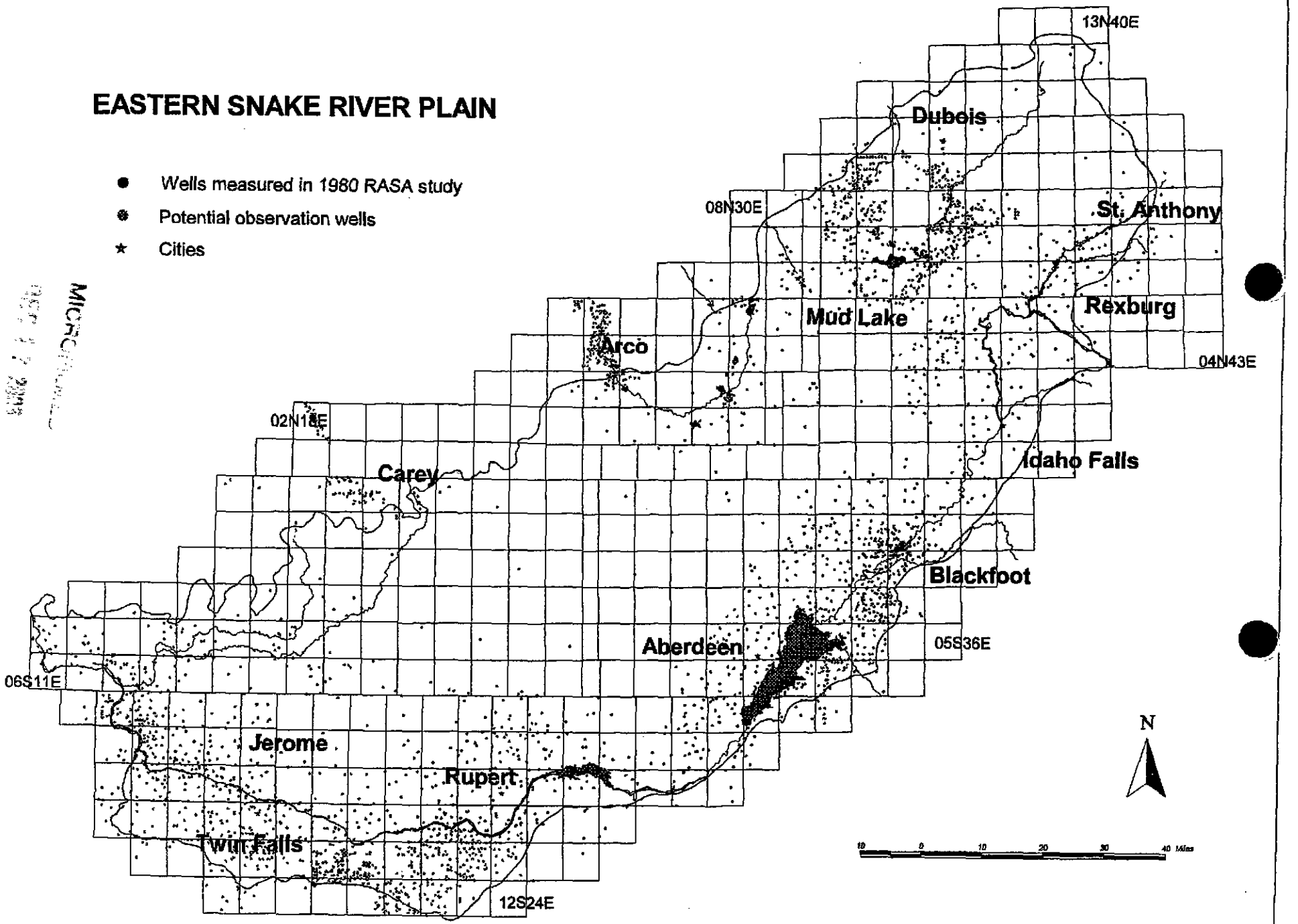
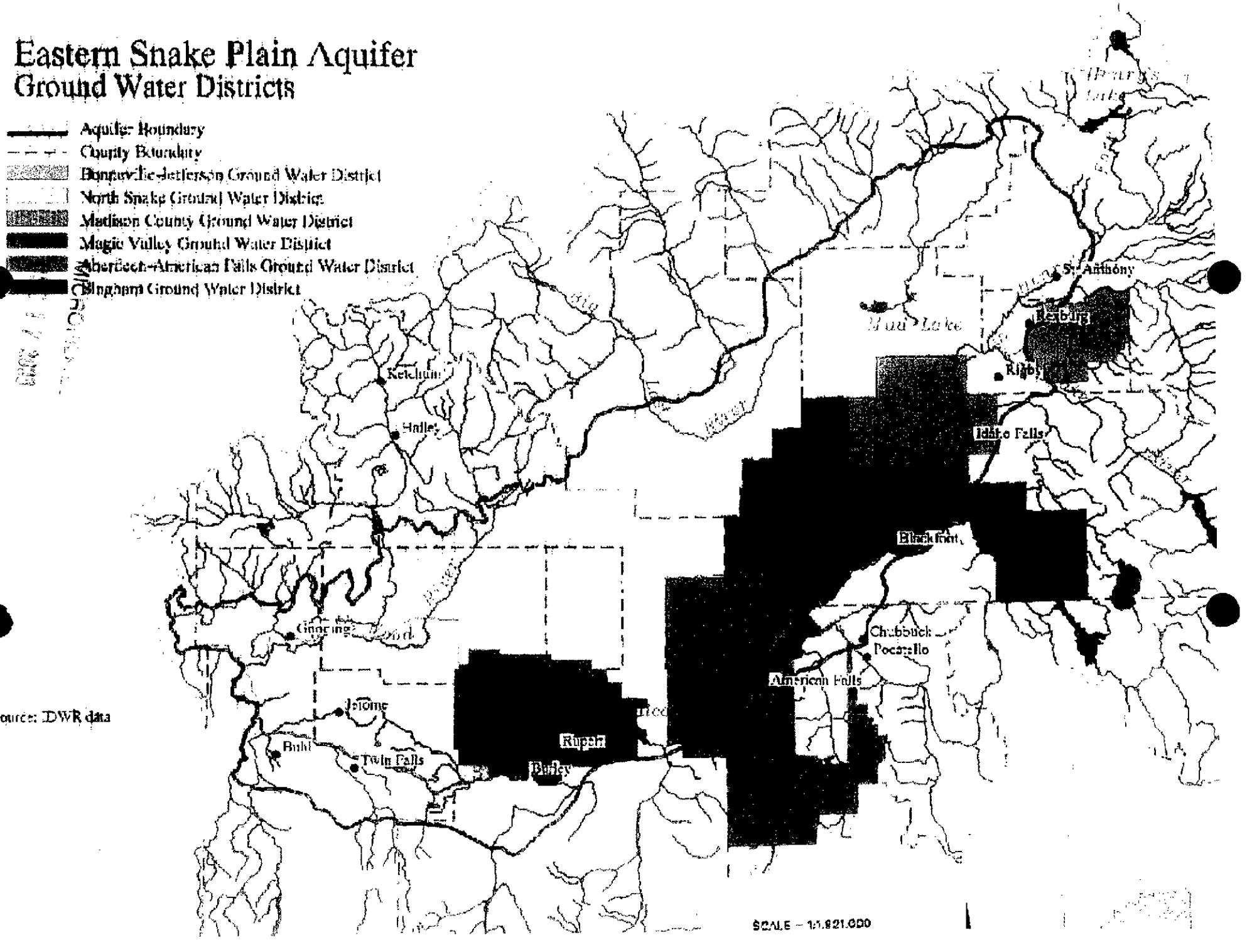


Exhibit B

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Eastern Snake Plain Aquifer
Ground Water Districts



EASTERN SNAKE PLAIN AQUIFER

Source: IDWR data

000290

Exhibit C

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2003

EXHIBIT C

NORTH SNAKE GROUND WATER DISTRICT
(208) 536-5795 • 2092 East 3600 South • Wendell, Idaho 83355

August 30, 2001

Dear Director Dreher:

As you know, representatives of the North Snake Ground Water District have been meeting with representatives of the holders of senior priority surface water rights dependent on spring discharge. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the Thousand Springs Ground Water management Area established on August 3, 2001.

Sincerely,

Ralph L. May

Ralph L. May
Vice Chairman
North Snake Ground Water District

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AUG 17 2001

LETTER TO DIRECTOR DREHER FROM RALPH L. MAY, NORTH SNAKE GROUND WATER DISTRICT, DATED AUGUST 30, 2001

Aberdeen-Springfield Canal Company

144 South Main
PO Box 857
Aberdeen, Idaho 83210

Tel (208) 397-4192 Fax (208) 397-4510 Email: ascc@ida.net

August 31, 2001

Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706

ATTN: Lisa Hall

Dear Director Dreher,

As you know, representatives of Aberdeen-Springfield Canal Company have been meeting with representatives of the Aberdeen-American Falls, Bingham, and Bonneville-Jefferson Ground Water Districts. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources' issuance of orders curtailing ground water diversions in 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the American Falls Ground Water Management Area established on August 3, 2001.

For the Board of Directors,

Steven T. Howser,
Secretary

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LETTER TO DIRECTOR DREHER, FROM STEVEN T HOWSER, ABERDEEN-SPRINGFIELD CANAL COMPANY DATED AUGUST 31, 2001

CC0293

Aberdeen - American Falls
Ground Water District
514 Tyhee Ave.
P.O. Box 70
American Falls, ID 83211
(208)226-5914
(208)226-1253 fax

Aberdeen - American Falls Ground Water District

August 31st, 2001

I.D.W.R.
Director Dreher
P.O. Box 83720
Boise, Id 83720

VIA FACSIMILE: (208) 327-7866

Dear Director Dreher:

As you know, representatives of the Aberdeen – American Falls Ground Water District have been meeting with representatives of the holders of senior priority surface water rights that are diverted from the Snake River between Shelley, Idaho and Milner Dam. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the American Falls Ground Water Management Area established on August 3, 2001.

Sincerely,

Kevin Michaelson

Board of Directors of the
Aberdeen – American Falls
Ground Water District
By: Kevin Michaelson
Chairman

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LETTER TO DIRECTOR DREHER FROM KEVIN MICHAELSON, CHAIRMAN, ABERDEEN-AMERICAN FALLS GROUND WATER DISTRICT DATED AUGUST 31, 2001

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Department of Water Resources

Aberdeen - American Falls
Ground Water District
514 Tyhee Ave.
P.O. Box 70
American Falls, ID 83211
(208)226-5914
(208)226-1253 fax

Aberdeen - American Falls Ground Water District

August 31st, 2001

I.D.W.R.
Director Dreher
P.O. Box 83720
Boise, Id 83720

VIA FACSIMILE: (208) 327-7866

Dear Director Dreher:

As you know, representatives of the Aberdeen – American Falls Ground Water District have been meeting with representatives of the holders of senior priority surface water rights that are diverted from the Snake River between Shelley, Idaho and Milner Dam. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the American Falls Ground Water Management Area established on August 3, 2001.

Sincerely,

Kevin Michaelson

Board of Directors of the
Aberdeen – American Falls
Ground Water District
By: Kevin Michaelson
Chairman

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Department of Water Resources

BEEMAN & ASSOCIATES, P.C.

Counselors and Attorneys at Law
409 West Jefferson Street
Boise, Idaho 83702-6049

Josephine P. Beeman
jbeeman@micron.net
Deborah E. Nelson
debnelson@micron.net

Telephone
(208) 331-0950
Facsimile
(208) 331-0954

August 31, 2001

Via Facsimile (208) 327-7866
And original by mail

Karl Dreher
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706

ATTN: LISA HALL

Re: American Falls Ground Water Management Area -- Curtailment

Dear Director Dreher:

As you know, representatives of Basic American, Lamb-Weston, J.R. Simplot, FMC, and City of Pocatello have been meeting with representatives of the holders of senior priority surface water rights that are diverted from the Snake River between Shelley, Idaho and Milner Dam. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources' issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the American Falls Ground Water Management Area established on August 3, 2001.

Sincerely,

BEEMAN & ASSOCIATES, P.C.

Jo Beeman

Josephine P. Beeman
On behalf of Basic American, Lamb-Weston, J.R. Simplot, FMC, and City of Pocatello

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Department of Water Resources

JASON R. MICIAK, P.C.
Attorney at Law

392 Falls Avenue
P.O. Box 2632
Twin Falls, ID 83303

Phone: (208) 733-5500
Fax: (208) 733-5553
Email:jmiciak@yahoo.com

August 31, 2001

Director Dreher
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

Dear Director Dreher:

As you know, representatives of the Pristine Springs and Aqua Life have been meeting with representatives of the North Snake Ground Water District. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for you approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the Thousand Springs Ground Water Management Area established on August 3, 2001.

Sincerely,

JASON R. MICIAK

JRM:klj

MICROFILMED
SEP 17 2001

LETTER TO DIRECTOR DREHER FROM JASON R. MICIAK DATED AUGUST 31, 2001

TWIN FALLS CANAL COMPANY

POST OFFICE BOX 326
TWIN FALLS, IDAHO 83303-0326

August 31, 2001

Karl J. Dreher, Director
State of Idaho
Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, Idaho 83706-0098

Dear Director Dreher:

As you know, representatives of the Twin Falls Canal Company have been meeting with representatives of the Aberdeen-American Falls, Bingham, and Bonneville-Jefferson Ground Water Districts. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversion within the American Falls Ground Water Management Area established on August 3, 2001.

Sincerely,

John Honcik
Chairman of the Board
Twin Falls Canal Company

JH:cs

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357 6th Ave. West • Twin Falls 83301
Phone (208) 733-6731 • Fax (208) 733-1958 • www.tfcanal.com

LETTER TO DIRECTOR DREHER FROM JOHN HONCIK DATED AUGUST 31, 2001

WONDERLICH & WAKEFIELD
ATTORNEYS AT LAW

Fritz Wonderlich
Jacqueline Wakefield
Internet: www.tfidlaw.com

P.O.Box 1812
Twin Falls, Idaho 83303-1812

Telephone: (208) 732-8811
Facsimile: (208) 732-8822
E-mail: fritz@tfidlaw.com

August 31, 2001

BY FAX (208) 327-7866

Mr. Karl Dreher, Director
State of Idaho, Department of Water Resources
1301 North Orchard
Boise, ID 83706

Re: Curtailment Orders

Dear Mr. Dreher:

The City of Twin Falls has been advised that representatives of various interests and entities have been exploring a negotiated agreement as an alternative to the Department issuing curtailment orders for the 2002 water year. I have reviewed the Agreement in Principle reached by these parties and I am aware of the parties' interest in reaching a final written agreement to submit for your approval. The City joins the parties in their request that the Department not proceed to order the curtailment of ground water diversions within the Thousand Springs Ground Water Management Area established August 3, 2001 in light of the Agreement in Principle reached by the parties.

Very truly yours,

Fritz Wonderlich

Fritz Wonderlich

Dreher.ltr(curtailmentorders)

LETTER TO KARL DREHER FROM FRITZ WONDERLICH DATED AUGUST 31, 2001

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Bingham Groundwater District
P.O. Box 42
Pingree, ID 83262-0042
208-684-9634

August 31, 2001

Dear Director Dreher:

As you know, representatives of the Bingham Ground Water District have been meeting with representatives of the holders of senior priority surface water rights that are diverted from the Snake River between Shelley, Idaho and Milner Dam. The purpose of these meeting was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We also understand from our conversation with you that ground water users who are not a party to these negotiations may be subject to curtailment or mitigation beyond that specified in this written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the American Falls Ground Water Management Area established on August 3, 2001.

Sincerely,

Craig B. Evans
Chairman Bingham Water District

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LETTER TO DIRECTOR DREHER FROM CRAIG B EVANS, BINGHAM GROUNDWATER DISTRICT, DATED AUGUST 31, 2001
DEC 17 2003

Bill Taylor
Bonneville – Jefferson Ground Water District
VIA FACSIMILE (208) 522-7470

Bill,

We request that you forward a letter acknowledging agreement and requesting that the curtailment orders not be issued.

Please fax the letter to the Department of Water Resources at (208) 327-7866, by 11:00 a.m. Friday. Attn: Lisa Hall

Please mail the original to the department at: 1301 N. Orchard, Boise, ID. 83706

SAMPLE LANGUAGE FOR LETTER FROM:
Bonneville – Jefferson Ground Water District

Aug 31, 2001

Dear Director Dreher:

As you know, representatives of the Bonneville - Jefferson Ground Water District have been meeting with representatives of the holders of senior priority surface water rights that are diverted from the Snake River between Shelley, Idaho and Milner Dam. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversions within the American Falls Ground Water Management Area established on August 3, 2001.

William H Taylor
Chairman

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LETTER TO DIRECTOR DREHER FROM WILLIAM H TAYLOR, CHAIRMAN, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, DATED AUGUST 31, 2001

BARKER, ROSHOLT & SIMPSON
ATTORNEYS AT LAW

JOHN A. ROSHOLT
ALBERT P. BARKER
JOHN K. SIMPSON
AMY D. CHESTNUT
TRAVIS L. THOMPSON

Boise Office
1221 W. IDAHO, SUITE 600
P.O. BOX 2139
BOISE, IDAHO 83701-2139
TELEPHONE (208) 336-0700
FAX (208) 344-6034

Twin Falls Office
142 3rd AVENUE NORTH
P.O. BOX 1906
TWIN FALLS, IDAHO 83301-1906
TELEPHONE (208) 734-0700
FAX (208) 736-0041

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Department of Water Resources

August 31, 2001

VIA FACSIMILE Attn: Lisa Hall (208) 327-7866
and U.S. MAIL

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

Re: **Curtailment Orders– Basin 36**

Dear Karl:

As you know, representatives of Clear Springs Foods, Inc., Blue Lakes Trout Company, and Pisces Investments have been meeting with representatives of the North Snake Ground Water District. The purpose of these meetings was to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resource issuance of orders curtailing ground water diversions during 2002.

We have reached an understanding of the principles for settlement and are in the process of finalizing a written agreement. We will submit a final agreement for your approval in the near future. Therefore, we respectfully request that you not proceed to order the curtailment of ground water diversion within the Thousand Springs Ground Water Management Area established on August 3, 2001.

Respectfully,

BARKER, ROSHOLT & SIMPSON, LLP

By: John A. Rosholt
JOHN A. ROSHOLT

JAR/jl
cc: Larry Cope, Clear Spring Foods
Mike Greene, Blue Lakes Trout
J. Evan Robertson, Pisces Investments

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Basin 36
August 31, 2001
11:00 a.m draft

CONFIDENTIAL

AGREEMENT IN PRINCIPLE

Parties:	NSGWD	Clear Springs Foods
	NSCC	Clear Lakes Trout
	State of Idaho	Blue Lakes Trout
	IDWR	Pisces Investments
	City of Twin Falls	Pristine Springs

Term: 2 years – 2002 – end of irrigation season 2003 (regardless that drought might abate) – extend by mutual agreement.

Consideration:

A. In exchange for safe harbor, provided through the following mitigation plan, NSCC shall apply for 25,000 A/F from the Water District Rental Pool and NSGWD shall pay the necessary advances to accompany said application in 2002 and 2003 for diversion into NSCC canal at such times as NSCC agrees.

B. Pump surface water made available first, before ground water well water.

C. Delivery of storage identified above to NSGWD members who are within NSCC service area for irrigation use in lieu of pumping same amounts. (Use existing NSCC headgates) NSGWD users who are NSCC shareholders within NSCC service area will use best efforts to pump NSCC sediment pond water and other wastewater.

D. NSGWD shall set forth the terms and parameters for addendums to this Agreement for those users who need safe harbor.

E. Holders of water rights to both surface water and ground water agree not to oppose interim administration sought by the State of Idaho in the Snake River Basin Adjudication for Basin 36 and other related administrative areas outside of Basin 36.

F. If no water is provided under Paragraph A, participants will curtail 10% of the volume diverted for irrigation. If some but not all of the water is provided under Paragraph A, an adjustment to curtailment shall be made.

G. Best efforts to provide 12 cfs of water to Buckeye from Riley Creek as contemplated in July 2001 letter to NSGWD.

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H. This mitigation plan provides a safe harbor from Interim Administration. Those not participating in this mitigation plan in Basin 36 are subject to administration.

Long Term Agreement: For the term of this Agreement, the parties agree to continue discussions regarding a long term agreement. Including:

A. The ESPA Model capabilities.
B. Finalization of Water Management Rules.
C. Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

Disclaimers:

A. The parties agree that this Agreement in Principle may not be used for any purpose other than as stated above and for providing guidance in drafting a final agreement and for obtaining the IDWR's approval of a stay of current administrative proceeding to establish a Ground Water Management Area for the purpose of issuance of a curtailment order.

B. This Agreement represents a framework for settlement of claims regarding the administration of interconnected ground water rights form the Snake Plain Aquifer and surface water rights from the Snake River and its tributaries. The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin above Thousand Springs and any alleged injury to surface water rights as a result of diversion of water from the Snake Plain Aquifer. In order to avoid litigation of these issues, the parties have agreed to negotiate an agreement consistent with this Agreement in Principle. Because this Agreement in Principle provides a framework for resolution of a disputed claim, the parties agree that neither this Agreement in Principle nor any subsequent agreement that may result from further negotiations shall be so construed or interpreted as to waive or prejudice any contention by any party regarding the legal or factual relationship between surface and ground water rights in the Snake River Basin above Thousand Springs.

C. This Agreement has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

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Exhibit D

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RINGERT
CLARK
CHARTERED
LAWYERS

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Department of Water Resources

Laura E. Burri
Jeffrey R. Christenson
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
Patrick D. Furey
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney

Samuel Kaufman (1921-1986)

August 31, 2001

Karl Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard Street
Boise, Id 83706-2237
FAX: (208) 327-7866

Re: Thousand Springs Groundwater Management Area Curtailment Orders

Dear Director Dreher:

As you are aware, this law firm represents Clear Lakes Trout Company with respect to its water right matters. As you are also aware, representatives of Clear Lakes Trout Company and representatives of other surface and spring water users in the Thousand Springs area have recently been meeting with representatives of the North Snake Groundwater District.

Although we have not been full participants in the negotiations, it is our understanding that the purpose of these meetings is to explore the potential for reaching a negotiated agreement as an alternative to the Department of Water Resources' issuance of orders curtailing ground water diversions in the Thousand Springs Groundwater Management Area.

It is our understanding that the parties are in the process of finalizing a written agreement incorporating settlement principles which will be submitted for your approval in the near future. Because we have not been full participants in the negotiations, we are not apprised of all of these principles. Nevertheless, we anticipate participating in future negotiations regarding this issue. Therefore, we would not oppose a delay in the issuance of a orders to curtail ground water diversions within the Thousand Springs Ground Water Management Area established on August 3, 2001 pending a final agreement.

Sincerely,

Charles L. Honsinger

Charles L. Honsinger

cc: Kay Hardy

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DEC 17 2003

LETTER TO KARL DREHER FROM CHARLES L HONSINGER DATED AUGUST 31, 2001

Exhibit E

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTERS OF DESIGNATING THE AMERICAN FALLS GROUND WATER MANAGEMENT AREA AND THE THOUSAND SPRINGS GROUND WATER MANAGEMENT AREA	)	**ORDER STAYING PROCEEDINGS**

On August 3, 2001, the Director of the Idaho Department of Water Resources ("Director") issued separate orders establishing the American Falls Ground Water Management Area ("American Falls GWMA") and the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the two ground water management areas due to the depletionary effects of ground water withdrawals under junior priority water rights on the already inadequate water supplies expected to be available for senior priority water rights from connected surface water sources because of the severe drought conditions being experienced across the Snake River Plain. Notice of the establishment of the two ground water management areas was published for two weeks in newspapers of general circulation in the affected areas.

In response to requests for hearing, the Director on August 12, 2001, set the two GWMA designations for hearing on September 24, 25, 26, and 27, 2001, at the Department's main office in Boise. The following entities have entered appearances or moved to intervene in one or both of the proceedings: Idaho Ground Water Appropriators, Inc.; Jerome Cheese Company; Milk Producers of Idaho, Inc.; Unit Three Water Users Association; Aberdeen-American Falls Ground Water District; and Bingham Ground Water District (all through the law firm of Givens Pursley LLP); Aberdeen-Springfield Canal Company; A & B Irrigation District; and Falls Irrigation District (all through the law firm of Ling and Robinson); Basic American Foods; Lamb-Weston; North Snake Ground Water District; J. R. Simplot Company; and the City of Pocatello (all through the law firm of Beeman & Associates, P.C.); Idaho Dairymen's Association through the law firm of Moffatt Thomas Barrett Rock & Fields; and Western Legends LC through its co-manager, Michael McCarthy (petition to intervene in Thousand Springs only).

Upon designation of a GWMA, Idaho Code § 42-233b authorizes the curtailment of water rights on a time priority basis within an area determined by the Director, provided the order of curtailment is issued prior to September 1 for the following irrigation season. On August 31, 2001, the Director announced that because of agreements in principle reached between holders of junior priority ground water rights and holders of senior priority surface water rights, no curtailment orders would be issued for the American Falls GWMA or the Thousand Springs GWMA, provided the agreements in principle are followed by detailed written agreements that provide for increases in surface water supplies similar to those that the Department sought to achieve through designation of the ground water management areas and curtailment of ground water diversions under certain junior priority water rights. Because of

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these agreements, the Director has determined to stay further action in these proceedings challenging the designation of the ground water management areas until the designations are withdrawn or the parties to the agreements in principle and subsequent written agreements fail to implement their commitments.

ORDER

IT IS THEREFORE ORDERED that the entities identified above who have filed petitions contesting the American Falls or Thousand Springs Ground Water Management Area designations, or who have filed notices of appearance or petitions to intervene in one or both of the proceedings are hereby recognized as full parties through timely appearance or intervention in the respective proceedings.

IT IS FURTHER ORDERED that the hearing presently set in these proceedings to commence on September 24, 2001, is hereby vacated, and all matters associated with the proceedings shall be stayed until further order of the Director. The existing rights of the parties to raise issues regarding these matters shall not be diminished by the issuance of this order.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01710, this is an interlocutory order that does not decide substantive issues presented in the proceedings and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01711.

DATED this 14th day of September 2001.

KARL J. DREHER
Director

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DEC 17 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September 2001, I caused a true and correct copy of the foregoing Order Staying Proceedings to be sent by U.S. Mail, postage paid to the following:

Jeffrey C. Fereday, Esq.
Michael C. Creamer, Esq.
John M. Marshall, Esq.
Givens, Pursley, LLP
277 N. 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720

John A. Rosholt, Esq.
Barker Rosholt & Simpson LLP
142 3rd Avenue North
P.O. Box 1906
Twin Falls, ID 83303-1906

John K. Simpson
Barker Rosholt & Simpson LLP
1221 W. Idaho Street, Suite 600
P.O. Box 2139
Boise, ID 83701-2139

Scott L. Campbell, Esq.
Moffatt Thomas
101 S. Capitol Boulevard, 10th Floor
P.O. Box 829
Boise, ID 83701-0829

Josephine P. Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702

Roger D. Ling
Ling & Robinson
615 "H" Street
P.O. Box 396
Rupert, ID 83350-0396

Michael J. McCarthy
Co-Manager
Western Legends LC
P.O. Box 5656
Twin Falls, ID 83303

Ronald D. Carlson, Manager
Department of Water Resources
Eastern Regional Office
900 North Skyline Drive
Idaho Falls, ID 83402-6105

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, ID 83301

Lisa A. Hall

Lisa A. Hall
Administrative Assistant
Director's Office

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Exhibit F

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THOUSAND SPRINGS 10K GROUND WATER USERS

Basin	Sequence	Suffix	PriorityDate	Basis	Rate Div. (cfs)	WaterUses	Acres	PointofDiversion	FirstName	LastName
36	14133		7/15/1904	Decreed	0.12	STOCKWATER, DOMESTIC		08S16E26NENENW	CARMEN PRUNTY	JACKSON
36	10499		1/1/1906	Decreed	0.13	STOCKWATER, DOMESTIC		08S14E23NWNESW		
36	4195		12/31/1907	Beneficial Use	0.39	MUNICIPAL		08S17E19NWNWNE		
36	10434		12/31/1907	Decreed	0.17	STOCKWATER, DOMESTIC		08S15E5SENWNW	JANICE L	STOCKHAM
36	14061		12/31/1908	Decreed	0.13	STOCKWATER, DOMESTIC		09S17E11NWSWNW	JOE L	FRAZIER
36	10436		6/9/1909	Decreed	0.11	STOCKWATER, DOMESTIC		08S14E1NENESE	CLIFFORD E	KIMBROUGH
37	11141		8/10/1910	Beneficial Use	0.14	STOCKWATER, DOMESTIC		06S14E9SESESE	JOHN F	BRYAN
36	4152		1/1/1911	Decreed	0.14	STOCKWATER, DOMESTIC		08S16E22NENENE	LAUREL	PLOSS
36	10564		1/1/1912	Decreed	0.13	STOCKWATER, DOMESTIC		07S15E29SESESW	CAROLANNE	MILLER
36	10803		1/1/1914	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E15NENW	ELDON K	JOHNSTON
36	10804		1/1/1914	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E14NWNE	EDWIN B	JOHNSTON
37	11294		1/1/1915	Beneficial Use	0.11	STOCKWATER, DOMESTIC		06S14E16NWNWNE		
36	14358		1/2/1916	Decreed	0.23	STOCKWATER, DOMESTIC		09S16E8SESESE	BARRETT	MC CLURE
36	10482		1/1/1917	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E28SWSWNW	JANE	REITSMA
36	14365		1/1/1917	Decreed	0.15	STOCKWATER, DOMESTIC		09S17E5NESESE	CHARLENE	LICKLEY
37	11137		12/31/1917	Beneficial Use	0.21	STOCKWATER, DOMESTIC		06S13E26SESWNE	MOLLIE B	DALTON
36	10668		1/1/1918	Decreed	0.2	STOCKWATER, DOMESTIC		07S14E26SENESE	SHERMAN	YOUNG JR
36	14366		5/1/1918	Decreed	0.11	STOCKWATER, DOMESTIC		09S17E1NWNWSW	CHARLENE	LICKLEY
36	10435		12/31/1918	Decreed	0.17	STOCKWATER, DOMESTIC		07S15E32SWSESW	WALTER HERBERT	STOCKHAM SR
36	14363		3/1/1920	Decreed	0.2	STOCKWATER, DOMESTIC		09S17E1SESWSW	CHARLENE	LICKLEY
36	14605		3/1/1920	Decreed	0.11	STOCKWATER, DOMESTIC		08S16E27NENWNW	OPAL	WEBSTER
36	14606		3/1/1920	Decreed	0.13	STOCKWATER, DOMESTIC		08S16E28NENENE	JOHN D	WEBSTER
36	14664		3/29/1920	Decreed	0.11	STOCKWATER, DOMESTIC		08S16E22NWNWNE	CLARE	FIFE
37	4419		6/1/1922	Statutory Claim	0.2	DOMESTIC		06S13E8NWNENW		
37	4306		2/1/1923	Statutory Claim	0.15	MUNICIPAL		06S13E5SESE		
36	14281		4/3/1923	Decreed	0.12	STOCKWATER, DOMESTIC		09S17E4NENENE	DENZEL	LARSEN
36	4258		1/1/1924	Decreed	0.13	STOCKWATER, DOMESTIC		08S14E15NENENE	LAVON	PARISH
37	10612		1/1/1924	Beneficial Use	0.16	STOCKWATER, DOMESTIC		06S13E24NENESE	PATTY	HOOPER
36	10769		12/31/1925	Beneficial Use	0.14	STOCK, COMM, DOMESTIC		08S14E35SESESW		
36	10467		5/10/1928	Decreed	0.2	STOCKWATER, DOMESTIC		07S15E29NWSWSW	LORETTA FERN	BIRD
36	10065		6/1/1928	Decreed	0.11	STOCKWATER, DOMESTIC		07S14E25SESESW	EDWARD M	CIOCCA
36	15062		12/31/1928	Decreed	0.23	STOCKWATER, DOMESTIC		09S18E7NENE	LOIS	LICKLEY
36	10031		1/1/1930	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E26SESENE	WANDA L	KOBER
37	10913		1/1/1930	Beneficial Use	0.14	STOCKWATER, DOMESTIC		06S14E19NWSWSW	PATTY	HOOPER
37	11741		6/1/1930	Statute	0.11	STOCKWATER, DOMESTIC		06S14E15SESESE	FLEETA	MICHALS
36	15361		12/31/1930	Decreed	2.87	MUNICIPAL		08S17E19NWNWNE		
36	4096		1/1/1931	Decreed	0.16	STOCKWATER, DOMESTIC		09S17E3NWNWNW	MARILYN E	JONES
36	10535		4/20/1931	Decreed	0.13	STOCKWATER, DOMESTIC		08S14E10NESENE	ESSIE	MC HAN
36	11026		5/1/1936	Decreed	0.11	STOCKWATER, DOMESTIC		07S14E6SESWSE	ROBERT T	SMALLEY
36	10743		11/1/1936	Decreed	0.24	STOCKWATER, DOMESTIC		08S15E24SWSW		
36	10148		1/1/1937	Decreed	0.13	STOCKWATER, DOMESTIC		07S14E35NESENE	JACK	VERBREE JR
36	10658		6/11/1937	Decreed	0.2	STOCKWATER, DOMESTIC		07S14E34SENE		

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36	10215		1/1/1938	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E26SESESE	KENNETH	KECK
36	11022		6/1/1940	Decreed	0.16	STOCKWATER, DOMESTIC		07S14E18NENENE	JAMES H	MC CAUGHEY
36	10383		12/31/1940	Decreed	0.13	STOCKWATER, DOMESTIC		08S14E9NENENE	MICHAEL G	BRANCHFLOWER
36	10779		12/31/1940	Decreed	0.13	STOCKWATER		08S15E27SWSWSW	NEIL	DE WIT
36	14407		3/1/1942	Decreed	0.13	STOCKWATER, DOMESTIC		08S17E33NENENE	AUDREY	HAYES
36	4159		6/1/1942	Decreed	0.16	STOCKWATER, DOMESTIC		08S16E30SWNENE		
36	4191		12/31/1943	Decreed	0.16	STOCKWATER, DOMESTIC		08S16E34NENENE	KATHRYN	WILLIAMS
36	10021		1/1/1944	Decreed	0.18	STOCKWATER, DOMESTIC		08S15E11SWSESW	ALICE L	DORAMUS
36	10427		6/29/1944	Decreed	0.11	STOCKWATER, DOMESTIC		08S14E36SENENE	EVELYN G	STRICKLAND
37	12909		1/1/1946	Beneficial Use	0.11	STOCKWATER, DOMESTIC		06S13E10NESE		
36	10838		6/1/1946	Decreed	0.2	IRRIGATION, STOCKWATER, D	10	08S16E18SWSWSE	DONNA M	HEGI
36	14655		5/13/1947	Decreed	0.13	STOCKWATER, DOMESTIC		09S17E7SESWSE	MARTIN	HUNTER
36	14461		7/1/1947	Decreed	0.13	STOCKWATER, DOMESTIC		09S16E9SWNWNW		
36	15071		12/31/1947	Beneficial Use	0.11	COMMERCIAL, DOMESTIC		08S17E30SESWSW	WILLIAM G	LAIRD
37	12571		12/31/1947	Beneficial Use	0.11	STOCKWATER, DOMESTIC		06S14E9SENESE	VERLA RAE	FLORES
36	14310		12/31/1948	Decreed	0.19	STOCKWATER, COMMERCIAL, DOMES		08S16E23SENENE		
36	15111		12/31/1948	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E36NENENE		
36	14361		4/1/1949	Decreed	0.15	STOCKWATER, DOMESTIC		09S17E11NWNENW	CHARLENE	LICKLEY
36	4062		5/1/1949	Decreed	1.34	IRRIGATION	144	08S15E27SENWSW	MELINDA	DE WIT
36	10296		1/1/1950	Decreed	0.19	STOCKWATER, DOMESTIC		07S14E9NENESE		
36	10415		1/1/1950	Decreed	0.11	STOCKWATER, DOMESTIC		08S16E18NENESE	JOHN	BEUKERS
36	2087	A	1/23/1950	License	4.31	IRRIGATION	2184	09S15E3NENENW		
36	2087	B	1/23/1950	License	0.52	IRRIGATION	273	08S15E33NESESE	CAROL	VISSER
36	4002		4/2/1950	Decreed	1.73	IRRIGATION	142	08S15E34SESESE	DONALD	AARDEMA
37	12910		7/5/1950	Beneficial Use	0.24	COMMERCIAL, DOMESTIC		06S14E31SWSE	DON	MC FARLAND
36	10362		7/24/1950	Decreed	0.74	IRRIGATION	37	08S14E26NENENE	LISA S	THOMPSON
36	14431		10/10/1950	Decreed	0.11	STOCKWATER, DOMESTIC		09S17E12NWNW	DAVID W	BAXTER
36	11074		12/31/1950	Decreed	0.12	STOCKWATER, DOMESTIC		09S15E2NWNWSW	DONALD	AARDEMA
36	13882		12/31/1950	Decreed	0.17	STOCKWATER, DOMESTIC		08S14E11NWNW	ED	SOUTHFIELD
37	12908		1/1/1951	Beneficial Use	0.24	DOMESTIC		06S14E27SESE	DON	MC FARLAND
36	2719		2/2/1951	Decreed	2.44	IRRIGATION	164	08S15E36SESESE	KRISTYN	AARDEMA
36	2114		3/10/1951	Decreed	3.05	IRRIGATION	245	08S14E27SESESE	IRENE	VANDER VEGT
36	2113	A	3/12/1951	License	2.23	IRRIGATION	2184	08S15E32SENENW		
36	2113	B	3/12/1951	License	0.27	IRRIGATION	273	08S15E33NESESE	TONY	VISSER
36	2120		6/4/1951	Decreed	1.54	IRRIGATION, DOMESTIC	151	08S15E20SWSESW	LINDA	HILLIS
36	2148	A	11/7/1951	License	1.29	IRRIGATION	107	08S15E30NENWSE	CLARA H	CNOSSEN
36	2152		11/9/1951	Decreed	3.12	IRRIGATION	160	09S16E9NENENE		
37	2526	A	11/28/1951	License	3.65	IRRIGATION	208	06S13E12NENE		
36	2160	A	12/27/1951	Decreed	1.78	IRRIGATION	96	07S14E18NENENW	RONNIE D	SMITH
36	10799		1/1/1952	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E15SWNW	KURT B	ALBERTI
36	2161	A	1/11/1952	License	1.32	IRRIGATION	2184	08S15E32NESESW		
36	2161	B	1/11/1952	License	0.16	IRRIGATION	273	08S15E33NESESE	TONY	VISSER
36	2166		2/27/1952	License	2.04	IRRIGATION	370	07S14E34SESWNW		

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WATER RESOURCES

36	4046	3/18/1952	Decreed	1.6	IRRIGATION	80 09S14E1NENENENW	MELVIN J	BROWN
36	4119	6/9/1952	Decreed	1.6	IRRIGATION	150 08S14E15SESWSE		
36	2178	9/18/1952	License	1.68	IRRIGATION, DOMESTIC	370 07S14E34SESWNW		
36	2181	11/22/1952	Decreed	1.5	IRRIGATION	102 08S17E27NESENE	HAROLD I	BULCHER
36	2188	1/30/1953	Decreed	1	IRRIGATION	75 07S14E34NENENW		
36	2720	2/23/1953	Decreed	1.3	IRRIGATION	65 08S14E34SENENE	DBA	BOX CANYON DAIRY
36	4023	4/1/1953	Decreed	1.4	IRRIGATION, STOCKWATER	80 08S14E14NENENW	LEANN	JACOBSON
36	2215	4/10/1953	Decreed	4.8	IRRIGATION	240 08S14E1NENWSE	DAVID W	BECKER JR
36	4017	5/1/1953	Decreed	0.8	IRRIGATION	40 08S14E34SENESW	MONTY B	MONTGOMERY
36	2224	5/11/1953	Decreed	0.72	IRRIGATION	36 08S14E36NENWNE	TOM	HEIDA
36	2229	7/15/1953	Decreed	1.36	IRRIGATION	185 07S14E23SENWSE	KATHY L	BRANCHFLOWER
36	2232	11/21/1953	Decreed	0.8	IRRIGATION	40 08S14E11SENWSE	CORNELIA	AARDEMA
36	2244	12/29/1953	Decreed	2.06	IRRIGATION	109 07S14E35NWNWSW		
36	2241	12/31/1953	Decreed	1.5	IRRIGATION	459 08S15E36SWNWSW	WYLENE	SLADE
36	2242	12/31/1953	Decreed	2.6	IRRIGATION	142 08S15E36NENENE	GAYLE	AARDEMA
36	2247 A	3/2/1954	License	1.17	IRRIGATION	116 08S14E11NENE	IRENE	VANDER VEGT
37	2549	3/11/1954	License	1.86	IRRIGATION	576 06S14E18NENENW	JAMES D	NAFZIGER
37	2550	3/11/1954	License	2.67	IRRIGATION	576 06S14E18NENENW	JAMES D	NAFZIGER
36	2264 C	3/12/1954	License	2.38	IRRIGATION	167 09S18E9NWSE		
36	2264 D	3/12/1954	License	0.38	STOCKWATER, COMMERCIAL	09S18E17SENE		
36	2264 F	3/12/1954	Decreed	0.66	STOCKWATER, COMMERCIAL	09S18E17SENE		
36	2256	4/7/1954	License	1	IRRIGATION	73 08S15E9SESESE	PEDRO	FERNANDES
36	2262	5/25/1954	Decreed	2	IRRIGATION	154 08S14E12NWSWNW		
36	4050	7/1/1954	Decreed	0.74	IRRIGATION	54 08S14E11NESWSW	DBA	BOX CANYON DAIRY
36	4001	8/1/1954	Decreed	1.5	IRRIGATION	220 08S14E33SWSENE	CORNELIA	AARDEMA
36	4151 A	8/15/1954	Decreed	0.36	IRRIGATION	18 08S14E25NESWSE	DBA	BOX CANYON DAIRY
36	4151 B	8/15/1954	Decreed	1.04	STOCKWATER, COMMERCIAL	08S14E25SWSW	CORNELIA	AARDEMA
36	10297	1/1/1955	Decreed	0.12	STOCKWATER	07S14E9NWSWNE		
36	7337 C	2/10/1955	Decreed	3.18	IRRIGATION	159 08S14E5NWNWSE	FLORENCE M	SANDY
36	2277	2/25/1955	Decreed	1.52	IRRIGATION	76 08S14E15SESENW	JOSEPH	HULTS JR
36	4117	3/15/1955	Decreed	0.5	IRRIGATION	25 08S14E25NWNWSW	DBA	BOX CANYON DAIRY
36	2279	4/18/1955	Decreed	1.8	IRRIGATION	100 07S14E15SESWSE	EDWARD	CIOCCA
36	2285	5/31/1955	Decreed	3.5	IRRIGATION	194 08S14E14SWNWNE	JOHN H	BORCHARD
36	2286 A	6/24/1955	Decreed	0.15	IRRIGATION	8 08S14E2NENWSE	IRENE	VANDERVEGT
36	2286 B	6/24/1955	Decreed	1.45	IRRIGATION	138 08S14E2SENESE	GEORGE	VANDERVEGT TESTAM
36	2289 C	12/2/1955	License	0.43	IRRIGATION	70 08S15E20SWSE	JOE	VALADAO
36	2289 D	12/2/1955	License	0.36	IRRIGATION	2184 08S15E31SWNESW		
36	2290	12/28/1955	Decreed	1.87	IRRIGATION	101 08S15E20NWNW	GARY B	DIMOND
37	12776	12/31/1955	Beneficial Use	0.12	STOCKWATER, DOMESTIC	06S14E8SWSWSW		
37	12779	12/31/1955	Beneficial Use	0.23	STOCKWATER, DOMESTIC	06S13E1SESESE		
36	2295	2/17/1956	Decreed	2.8	IRRIGATION	154 08S14E14NESENW	WILLIAM P	KEARLEY
36	2296	3/21/1956	Decreed	1.7	IRRIGATION	85 08S14E15NENENE	KARIN L	BORCHARD
36	15219 A	3/22/1956	Decreed	0.56	IRRIGATION	28 08S14E3NESESE		

MICHAEL

36	15219 B	3/22/1956	Decreed	0.26 IRRIGATION	99	08S14E3SESW	MICHAEL G	BRANCHFLOWER
36	2297	3/23/1956	Decreed	1.82 IRRIGATION	91	08S14E10SESENW		
36	2418	5/1/1956	Decreed	1.82 IRRIGATION	95	08S15E6NENESE	HAROLD S	DIMOND
36	4157	6/1/1956	Decreed	1 IRRIGATION	50	07S15E30SENWSW	KEVIN S	ANDREWS
36	2304	6/26/1956	Decreed	1.6 IRRIGATION	180	07S14E9NESESE		
36	2311 A	11/23/1956	License	2.68 IRRIGATION	2184	09S15E4NENENE		
36	2311 B	11/23/1956	License	0.32 IRRIGATION	273	08S15E33NESESE	CAROL	VISSER
36	2312 A	11/26/1956	License	0.75 IRRIGATION	66	08S14E25SESENE	DEWEY	DURFEE
36	2312 B	11/26/1956	License	0.75 IRRIGATION	66	08S14E25SESENE	THOMAS	HEIDA
36	10555	12/31/1956	Decreed	0.16 STOCKWATER, DOMESTIC		08S15E30SESW	KENNETH C	ANDERSON
36	2316	1/21/1957	License	2.4 IRRIGATION	699	09S16E7NENWNW		
37	12905	3/15/1957	Beneficial Use	0.24 STOCKWATER, DOMESTIC		06S14E35NESE	DON	MC FARLAND
36	4196	7/4/1957	Beneficial Use	5.68 MUNICIPAL		08S17E19NWNWNE		
36	2335	7/8/1957	Decreed	3.16 IRRIGATION	279	08S14E16SWSWNE	GLENN R	VAN DER GIESSEN
36	2645	2/6/1958	Decreed	1.5 IRRIGATION	120	09S16E10NESENE	JOHN W	VAN BEEK
36	2348	3/7/1958	Decreed	0.74 IRRIGATION	37	08S15E33SESWNE	JOHN	WIERSMA
36	4048	3/25/1958	Decreed	3.14 IRRIGATION	193	08S14E23NWNWSE		
36	2350	4/14/1958	Decreed	1.82 IRRIGATION	163	07S14E24NENENW	R W	REED
36	2352	4/29/1958	License	1.48 IRRIGATION	74	07S14E23NWSENE	FRANK	VEENSTRA
36	2366 A	12/16/1958	Decreed	1.24 IRRIGATION	62	07S13E1SESESW	WILLIAM L	PUGH
36	2366 B	12/16/1958	Decreed	0.76 IRRIGATION	181	07S13E1NESW	RICHARD H	WAITE
36	2366 C	12/16/1958	License	0.72 IRRIGATION	36	07S13E1SESESW	WILLIAM L	PUGH
36	2366 D	12/16/1958	License	0.52 IRRIGATION	26	07S13E1SESESW	SHARLENE M	SMITH
36	2372	1/19/1959	Decreed	2.97 IRRIGATION	459	08S15E36SENWNW	WILLIAM J	SLADE
36	2374 A	1/29/1959	Decreed	2.88 IRRIGATION	144	08S14E24NWSESW	LISA A	THOMPSON
36	2374 B	1/29/1959	Decreed	1.94 IRRIGATION	97	08S14E23SWSENE		
36	2380	4/3/1959	Decreed	1.8 IRRIGATION	95	08S15E29NENWSW	OLE	KLEVMOEN
36	2413	12/10/1959	License	3.12 IRRIGATION	156	08S14E9NESWSE	JOSEPH	HULTS JR
36	10633	1/1/1960	Decreed	0.11 STOCKWATER		09S15E1NWNWNE		
36	14012	1/1/1960	Decreed	0.14 STOCKWATER, DOMESTIC		09S16E12SESENW	BRUCE T	KUBIK
36	2412 C	1/22/1960	License	5.14 IRRIGATION	322	09S15E1SENWNW	A N	AMBROSE
36	2419	2/8/1960	Decreed	4.81 IRRIGATION	404	07S14E33NENWSE		
36	2698	2/25/1960	License	0.36 STOCKWATER		08S14E13NESE		
36	2425 A	3/9/1960	Decreed	1.42 IRRIGATION	71	08S14E1NESENE	STANLEY	LEHMANN
36	2425 B	3/9/1960	Decreed	0.14 IRRIGATION	84	08S14E1NESENW	STANLEY	LEHMANN
36	2426	3/14/1960	Decreed	1.47 IRRIGATION	124	08S14E35SWSESE	KEITH A	CONNER
36	2429	3/11/1960	Decreed	2.44 IRRIGATION	155	07S14E29SESESW		
36	10301	1/1/1961	Decreed	1.97 IRRIGATION	176	07S14E8SENENW	ROBERT J	MEYERS
36	2470	1/31/1961	Decreed	1.36 IRRIGATION	68	07S14E13NESESW	FRANK	VEENSTRA
36	2474	2/10/1961	Decreed	2.7 IRRIGATION	208	08S16E28SENWSE	ALICE RUTH	DE KRUYF
36	2475	2/20/1961	Decreed	0.88 IRRIGATION	49	08S14E22NENESE	JOSEPH W	MRACHEK
36	2464	3/12/1961	Decreed	2.75 IRRIGATION	183	08S15E6SESWSE	REBA MARIE	MATTHEWS
36	4175	3/15/1961	Decreed	0.71 IRRIGATION	38	08S15E29NWNENE	PAUL R	LESNESKI

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37	11202	4/1/1961	Beneficial Use	0.85	IRRIGATION, STOCKWATER, D	25 06S14E6SWSWSW	LONNIE	LEAVELL
36	2404 A	4/3/1961	License	0.3	IRRIGATION	25 07S14E34NENW	EDWARD	ISSACS
36	2404 D	4/3/1961	License	0.82	IRRIGATION, STOCKWATER, C	30 07S14E34NENW		
36	10767 A	5/1/1961	Decreed	0.12	IRRIGATION, STOCKWATER, C	.2 08S14E35SESW		
36	10767 B	5/1/1961	Decreed	0.58	STOCKWATER, COMMERCIAL	08S14E35SWSW		
36	2486	5/26/1961	Decreed	0.78	IRRIGATION	39 08S14E15SESENW	JOSEPH	HULTS JR
37	12906	6/3/1961	Beneficial Use	0.24	COMMERCIAL, DOMESTIC	06S14E33SWNW	CAROL	MC FARLAND
36	2487	6/7/1961	License	1	IRRIGATION	146 08S16E22SESW	IRENE	VANDER VEGT
36	2488	6/10/1961	License	1.3	IRRIGATION	08S15E34NWNE	HARLAN	ANDERSEN
36	2489	6/12/1961	Decreed	0.36	IRRIGATION	18 08S15E28NENWSE	WARREN	LAWTON
36	2491	6/16/1961	Decreed	1.32	IRRIGATION	66 08S14E34NESWSW	MONTY B	MONTGOMERY
36	2492 A	6/26/1961	Decreed	1.03	IRRIGATION	69 09S16E13NENENE	GERALD	MARTENS
36	2493 C	6/28/1961	Decreed	2.38	IRRIGATION	134 08S14E36SESWSE	JOHN	MADALENA
36	2493 E	6/28/1961	Decreed	0.24	IRRIGATION	13.8 08S15E31NWSESE	BILL C	FLEMING
36	2494	7/5/1961	Decreed	0.99	IRRIGATION	65 08S14E23NENENE	MILES Z	CHISHAM
36	2495 A	7/5/1961	License	0.3	IRRIGATION	15 08S15E30SESENE	FRANK W	CNOSSEN
36	2495 B	7/5/1961	Decreed	1.12	IRRIGATION	97 08S15E30NENWNE	CLARA	CNOSSEN
36	2496	7/5/1961	Decreed	0.98	IRRIGATION	157 07S14E32SENWSE	HARVEY E	TATE
36	2527	7/6/1961	Decreed	0.8	IRRIGATION	40 07S14E36NENWNW	ANN A	CIOCCA
36	2497	7/14/1961	Decreed	0.82	IRRIGATION	41 08S15E31NENENW	EVELYN G	STRICKLAND
36	2498 B	7/14/1961	License	0.12	STOCKWATER, COMMERCIAL	07S14E26NENE	JACK	VERBREE
36	2498 C	7/14/1961	License	0.46	IRRIGATION	23 07S14E24NWSESW	JACK	VERBREE
36	2498 D	7/14/1961	License	1.29	IRRIGATION	66 07S14E24SESW	MARGARET	VERBREE
36	2499	7/14/1961	Decreed	1	IRRIGATION	80 07S14E26SESENE	MICHAEL G	JACOBSON
36	2500 A	7/18/1961	License	1.78	IRRIGATION	2184 08S15E33SENESW		
36	2500 B	7/18/1961	License	0.22	IRRIGATION	273 08S15E33NESESE	TONY	VISSER
36	2502	7/24/1961	Decreed	0.99	IRRIGATION	90 08S14E22NESENE	DANNY	VANDERHAM
36	2503 A	7/27/1961	License	0.34	IRRIGATION	17 08S15E9SENWNW	WILMA L	ROJAS
36	2503 B	7/27/1961	License	0.92	IRRIGATION	102 08S15E9SENW	CLAYTON B	POPE
36	4037	8/1/1961	Decreed	2.56	IRRIGATION	128 08S14E26SWSWSE	IRENE	VANDER VEGT
36	4018	8/4/1961	Decreed	2.36	IRRIGATION	617 09S16E9SWSESE	JERRY	CALLEN
36	2505	8/8/1961	Decreed	1.82	IRRIGATION	109 07S14E32NENWNE		
36	2506	8/10/1961	License	2.02	IRRIGATION	184 09S14E3NENWNE	CINDY	MOORE
36	2507	8/17/1961	Decreed	1.38	IRRIGATION	75 08S15E4NENESE	CARI L	PRINCE
36	2508	8/22/1961	Decreed	1.46	IRRIGATION	73 07S14E20NWNESW	CAROLYN	COLEMAN
36	2900	8/22/1961	Decreed	2.08	IRRIGATION	153 09S16E14SESENW	DANIEL A	SUHR
36	2509	8/25/1961	License	1.5	IRRIGATION	155 08S15E5SENESE	KATHI L	MEYERS
36	2510	8/25/1961	Decreed	0.68	IRRIGATION	34 07S15E31SESWSE	TAMI	CHANDLER
36	2691	8/31/1961	Decreed	2.85	IRRIGATION	617 09S16E9SWSESE	JERRY	CALLEN
37	4051	9/1/1961	Statutory Claim	1.55	IRRIGATION, STOCKWATER	180 06S13E13NWNE	MARY A	CARLISLE
36	2517 A	9/11/1961	Decreed	1.06	IRRIGATION	124 08S14E2NENENE	MICHAEL G	BRANCHFLOWER
36	2517 B	9/11/1961	Decreed	0.21	IRRIGATION	25 08S14E2NENW	KATHY L	BRANCHFLOWER
36	2517 C	9/11/1961	Decreed	0.17	IRRIGATION	32 08S14E11SWNW	WIETZE	DEVRIES

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36	2518	9/14/1961	License	1.11	MUNICIPAL		08S17E19NWNWNE		
36	2520	10/2/1961	License	1.5	IRRIGATION	84	08S14E1NESENW	STANLEY	LEHMANN
36	2519	10/3/1961	Decreed	3	IRRIGATION	171	09S15E3NENWNE	WILLIAM J	SLADE
36	2526	10/27/1961	License	5.68	IRRIGATION	294	09S17E10SWNWSE	ARLEN	CROUCH TRUST
36	2528	11/6/1961	License	1.2	IRRIGATION	60	08S15E21SESESE	SCOTT L	CUTLER
36	2535	12/23/1961	Decreed	1.42	IRRIGATION	98	08S14E15SESWSW	DBA	BOX CANYON DAIRY
36	2514	12/26/1961	License	2	IRRIGATION	129	09S17E9NWNESE	LEROY A	DEAN
36	2532	12/29/1961	Decreed	2.56	IRRIGATION	198.5	07S14E25NESWNE	FRANK	VEENSTRA
36	2539 A	4/26/1962	License	3.19	IRRIGATION	475	09S18E17NWSENE	SIMON A	ROTH
36	2539 B	4/26/1962	License	0.85	STOCKWATER, COMMERCIAL		09S18E17SENE	SIMON A	ROTH
36	4036	5/1/1962	Decreed	1.48	IRRIGATION	74	09S14E3NENENE	ROBERT J	MEYERS
36	2726 B	5/23/1962	Decreed	0.27	STOCKWATER, COMMERCIAL		09S16E3NESE	DONALD J	AARDEMA
36	2726 C	5/23/1962	Decreed	1.83	IRRIGATION	524.4	09S15E2SWNWSE	DONALD	AARDEMA
36	2726 D	5/23/1962	Decreed	0.22	STOCKWATER, COMMERCIAL		08S15E35SESE	DONALD J	AARDEMA
36	2545	8/20/1962	Decreed	0.55	IRRIGATION, STOCKWATER	69.5	08S14E24SESESE	PAUL H	LEDERER
36	14846	12/31/1962	Beneficial Use	0.12	STOCKWATER, COMMERCIAL, DOMES		09S17E8SWNENW	RAY	VANDER VEGT
37	2687	3/8/1963	License	2.32	IRRIGATION	120	06S14E34SESW	DON	MC FARLAND
36	2584	12/30/1963	Decreed	1.5	IRRIGATION	75	08S15E9SESENE	DARLENE	EVERS
36	2588	2/20/1964	License	2.02	IRRIGATION	101	07S14E29NENWNE	GLORIA	VADER
36	13835	3/1/1964	Decreed	0.11	STOCKWATER, DOMESTIC		08S15E33SWSWNE	SANDI	WIERSMA
36	2590	5/19/1964	Decreed	2.42	IRRIGATION	142	08S14E12SESWSW		
36	2598	1/7/1965	Decreed	0.98	IRRIGATION	459	08S15E36SENWNW	WYLENE	SLADE
36	2610	3/22/1965	Decreed	2	IRRIGATION	220	08S14E33SWSENE	CORNELIA	AARDEMA
36	2614 A	6/7/1965	License	3.66	IRRIGATION	2184	09S15E3NENENW		
36	2614 B	6/7/1965	License	0.44	IRRIGATION	273	08S15E33NESESE	CAROL	VISSER
36	2707	1/5/1966	Decreed	4.58	IRRIGATION	325	07S14E21NENENE	FRANCIS W	CAMPBELL JR
36	2646	3/29/1966	License	7.47	MUNICIPAL		09S17E28SENE		
37	2733	4/12/1966	License	0.57	IRRIGATION	32	06S13E36SESW	THOMAS E	ANDERSON
36	2658	9/3/1966	Decreed	1.23	IRRIGATION	80	08S15E34NESENW	MELINDA	DE WIT
36	2665 A	10/11/1966	License	2.92	IRRIGATION	221	07S14E22SWNWSE	BOYD L	HARMS
36	2671 E	1/9/1967	Decreed	0.17	IRRIGATION	263	07S14E1NESE		
36	7003	7/21/1967	Decreed	0.9	IRRIGATION	45	08S14E15NWNENE	MYRNA L	HENSLEE
37	7001	7/25/1967	License	0.7	IRRIGATION	117	06S14E27SWSE	SHELLY L	PEREIRA
36	7006	10/30/1967	Decreed	1.4	IRRIGATION	70	08S14E1SENENW	GARY E	COX
36	7012	11/17/1967	Decreed	1.66	IRRIGATION, STOCKWATER	118	08S15E28NWNESE	WARREN	LAWTON
36	7023	4/15/1968	Decreed	1.14	IRRIGATION, STOCKWATER	56	08S14E11SENESE	BILLY D	ANDERSON
36	7048	12/18/1968	Decreed	0.17	IRRIGATION, COMMERCIAL, D	4	09S17E10NWSENE		
36	7049	1/10/1969	License	2.41	IRRIGATION	126	08S15E34SWNWSW	KRISTYN	AARDEMA
36	7060	5/12/1969	Decreed	1.34	IRRIGATION	160	09S17E12SWSENW	DAVID W	BAXTER
36	7109	12/3/1969	Decreed	0.27	IRRIGATION, STOCKWATER	14	08S16E31SESWSW		
36	15169 A	12/11/1969	License	12.46	IRRIGATION	2184	08S15E33SENESW		
36	15169 B	12/11/1969	License	1.51	IRRIGATION	273	08S15E33NESESE	TONY	VISSER
36	7110	12/22/1969	Decreed	4.68	IRRIGATION	313	08S15E14NESWSE		

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36	7111	12/22/1969	Decreed	5.13	IRRIGATION	264	08S15E15NWSESW	
36	10745	12/22/1969	Decreed	0.24	STOCKWATER, DOMESTIC		08S15E14SWSW	
36	15211	1/30/1970	Decreed	0.33	IRRIGATION	75	07S14E34NENENW	
36	7119	2/24/1970	Decreed	2.41	IRRIGATION	153	08S15E35SESWSW	WYLENE SLADE
36	7123	2/27/1970	Decreed	3.9	IRRIGATION	699	09S16E6SENESW	
36	7136	7/10/1970	Decreed	4.2	IRRIGATION	235	08S14E21NENWNE	A N AMBROSE
36	10963	12/31/1970	Decreed	0.2	STOCKWATER, DOMESTIC		08S14E14SESE	JOHN SILVEIRA FONTES
36	7153	1/20/1971	Decreed	2.8	IRRIGATION	140	08S15E24SWNENW	
36	7156	2/8/1971	License	2.56	IRRIGATION	190	07S14E19NESENE	ORVAL E VADER
36	7157 B	2/16/1971	License	4.13	IRRIGATION	310	06S14E33NENW	CAROL MC FARLAND
36	7163	3/3/1971	Decreed	5.49	IRRIGATION	420	08S14E21NENWNE	A N AMBROSE
36	7173	4/30/1971	Decreed	1	IRRIGATION	154	08S15E15SWSENE	KANDIS L JOHNSTON
37	7107 A	7/22/1971	License	0.17	IRRIGATION	11	06S14E28NESESW	JOSEPH D SHAFFER
37	7107 B	7/22/1971	License	1.71	IRRIGATION	111	06S14E28NESESW	MARY JANE VEENSTRA
36	7208	11/10/1971	Decreed	3.68	IRRIGATION	184	08S16E30NWNENW	
36	10268	1/1/1972	Decreed	0.13	STOCKWATER, DOMESTIC		07S14E25NENWNE	RANDY JACOBSON
36	7214	1/3/1972	Decreed	2.45	IRRIGATION	144	08S15E30SWSESW	KENNETH C ANDERSON
36	7215	1/3/1972	Decreed	0.84	IRRIGATION	164	08S15E36SESESE	DONALD AARDEMA
36	7219	1/24/1972	Decreed	4	IRRIGATION	351	09S15E1SENWNW	
36	10845	/28/1972	Decreed	0.24	STOCKWATER, DOMESTIC		09S16E3SWNW	TED BAAR
36	7235	4/19/1972	Decreed	5	IRRIGATION	354	09S18E5SESWNW	JAY H MARTIN
36	7255	7/13/1972	Decreed	2	IRRIGATION	108	08S16E33NENWNE	
36	7250	7/21/1972	Decreed	0.25	STOCKWATER, COMMERCIAL, DOMES		09S16E2SESWSW	EVELYN AARDEMA
36	7254	8/9/1972	Decreed	3.2	IRRIGATION	459	08S15E36NENENW	WILLIAM J SLADE
36	15229	8/17/1972	Beneficial Use	0.3	IRRIGATION	153	08S15E35SESWSW	WYLENE SLADE
36	7260	9/15/1972	License	1.5	IRRIGATION	129	07S14E23NENWNE	BERT R HILARIDES
36	7260 A	9/15/1972	License	1.4	IRRIGATION	120	07S14E23NENWNE	LUIS M BETTENCOURT
36	7274	11/17/1972	Decreed	0.8	IRRIGATION	50	07S14E23NENENE	FRANK W VEENSTRA
36	7277 A	12/4/1972	Decreed	1.84	IRRIGATION	102	08S15E8NENWNW	PIETER DEELSTRA
36	7277 B	12/4/1972	Decreed	0.39	STOCKWATER, COMMERCIAL		08S15E8NWNW	NIESJE DEELSTRA
36	7283	1/5/1973	Decreed	1.16	IRRIGATION	76	08S14E26NENESW	IRENE VANDER VEGT
37	7191	1/5/1973	License	4.61	IRRIGATION	351	06S14E20SWSE	LINDA JOY MC CABE
36	7284	1/10/1973	License	3	IRRIGATION	233	08S16E30NWNENE	
36	7289	1/22/1973	Decreed	2.1	IRRIGATION	105	08S14E26NWSWSE	IRENE VANDER VEGT
36	7290	1/23/1973	Decreed	1.6	IRRIGATION	80	09S16E6NWNENW	
36	7291 C	1/23/1973	License	1.04	IRRIGATION	51.8	08S14E35NENENE	EDWARD HUBBARD
36	7292	1/23/1973	Decreed	0.28	STOCKWATER		08S16E31SESESW	
37	7198	1/29/1973	License	3.32	IRRIGATION	166	06S14E35SWSE	DON MC FARLAND
36	7301	2/13/1973	Decreed	1.12	IRRIGATION	459	08S15E35SESENE	WYLENE SLADE
37	7205	2/16/1973	License	5.81	IRRIGATION	336	06S13E25NESENE	GRAHAM HOOPER
36	7304 A	2/23/1973	License	5.2	IRRIGATION	322	08S14E24NWNENE	A N AMBROSE
36	7307 A	2/26/1973	License	2.78	IRRIGATION	2184	09S15E3NENENW	
36	7307 B	2/26/1973	License	0.34	IRRIGATION	273	08S15E33NESESE	CAROL VISSER

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36	7288 A	2/28/1973 License	4.58 IRRIGATION	229	08S16E20NENWSW	JOHN	BEUKERS
36	7288 C	2/28/1973 License	4.38 IRRIGATION	219	08S16E20SWSWNW	JOHN	BEUKERS
36	7288 D	2/28/1973 License	2.24 STOCKWATER, COMMERCIAL		08S16E19NESE	RUTH	BEUKERS
36	7310	3/2/1973 Decreed	2.56 IRRIGATION	144	08S15E28SENENE	WAYNE K	WERT
36	7303	3/16/1973 Decreed	1.11 IRRIGATION	70	07S14E29NWSENW	HARRY G	DE WOLFE
36	7317 A	3/21/1973 Decreed	2.2 IRRIGATION	110	08S16E33NWNENW		
36	7317 B	3/21/1973 Decreed	0.2 STOCKWATER, COMMERCIAL		08S16E33NWNW		
36	7318 A	3/21/1973 License	0.24 COMMERCIAL		07S14E26SWSE	JACK	VERBREE JR
36	7318 D	3/21/1973 License	0.26 STOCKWATER, COMMERCIAL		07S14E35SENE	MARGARET	VERBREE
36	7319	3/22/1973 Decreed	1.11 IRRIGATION	74	09S14E2NWNENW		
37	7213	3/28/1973 License	5.02 IRRIGATION, STOCKWATER	283	06S14E17SWSW		
37	7214	3/28/1973 License	2.9 IRRIGATION, STOCKWATER	218	06S14E19SENE		
36	7326	4/6/1973 Decreed	0.64 IRRIGATION	36	08S14E13NWNWSW	BARBARA E	HUNSAKER
36	7329	4/18/1973 Decreed	0.8 IRRIGATION	40	08S15E34SWNWSW	GAYLE	AARDEMA
36	7341	6/18/1973 Decreed	2.06 IRRIGATION	103	07S14E4SWSWNE	MARY JANE	VEENSTRA
36	7342	6/20/1973 Decreed	2.23 IRRIGATION	151	08S15E35SWSWNW	ELMER	JOHNSON JR
36	7345 A	6/21/1973 License	3.45 IRRIGATION	191.7	08S15E18SWNWSE	JOHN	REITSMA
37	7247	7/10/1973 License	4.18 IRRIGATION	226	06S14E32SWSE		
36	7350	7/18/1973 Decreed	2.34 IRRIGATION	132	08S15E7NESENW	IRENE	VANDER VEGT
36	7352	7/18/1973 Decreed	2.05 IRRIGATION	151	08S15E25NWSWNW	BEN F	KOBER
36	7353	7/18/1973 Decreed	1.98 IRRIGATION	99	08S15E12NWSESW	DEBRA K	BRANDSMA
36	7361	8/2/1973 Decreed	3 IRRIGATION	150	08S15E24NESWNE		
36	7362 A	8/2/1973 License	4.45 IRRIGATION	2184	08S15E31SWNESW		
36	7362 B	8/2/1973 License	0.54 IRRIGATION	273	08S15E33NESESE	CAROL	VISSER
36	7363 A	8/7/1973 Decreed	1.23 IRRIGATION	110	08S14E27SESESW	TOM	HEIDA
36	7363 B	8/7/1973 Decreed	2.56 IRRIGATION	245	08S14E27SESESE	IRENE	VANDER VEGT
36	7364 A	8/10/1973 Decreed	2.35 IRRIGATION	125	08S16E31NWSWNW		
36	7364 B	8/10/1973 Decreed	4.22 IRRIGATION	304	08S16E31NESENE		
36	7365 A	8/10/1973 License	1.12 IRRIGATION	106	08S15E9SWNWSW	JOE M	DORAMUS
36	7367 B	8/13/1973 License	0.43 IRRIGATION	263	07S14E1NESE		
36	7367 C	8/13/1973 Decreed	0.33 STOCKWATER, COMMERCIAL		07S14E1NESE	TONY	VISSER
36	7367 E	8/13/1973 Decreed	0.6 IRRIGATION	263	07S14E1NESE		
36	7368 A	8/16/1973 License	0.46 IRRIGATION	120	07S14E23NENWNE	MARIA	BETTENCOURT
36	7370	8/21/1973 Decreed	6.68 IRRIGATION	334	07S14E27SWNWSE	BOYD L	HARMS
36	15227	8/27/1973 Beneficial Use	0.7 IRRIGATION	163	07S14E24NENENW	CAROL A	REED
36	7377 A	9/7/1973 License	2.12 IRRIGATION	283	08S14E9NWNENE	KATHERINE L	BRANCHFLOWER
36	7377 B	9/7/1973 License	0.11 STOCKWATER, COMMERCIAL		08S14E11NWNW		
37	7279	9/13/1973 License	1.23 IRRIGATION, STOCKWATER	80	06S14E30SENE	LAURA KAY	HOOPER
36	7379 A	9/18/1973 License	1.96 IRRIGATION	132	08S14E13SESWNW		
36	7379 B	9/18/1973 License	0.27 STOCKWATER, COMMERCIAL		08S14E13NENW		
36	7376	9/29/1973 Decreed	2.75 IRRIGATION	185	07S14E17NESWSW	LEN	RIDDLE
36	7386	10/9/1973 Decreed	3.2 IRRIGATION	160	08S15E16SWSWSW	FRANK L	ORTH
36	7387 A	10/27/1973 License	0.44 IRRIGATION	66	08S14E25SESENE	YNES	DURFEE

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36	7387 B	10/27/1973	License	0.44	IRRIGATION	66 08S14E25SESENE	MARY JANE	HEIDA
36	7396	10/29/1973	Decreed	0.15	IRRIGATION, DOMESTIC	5.5 08S15E36NWNWNW	OLIVER	JOHNSON
37	7315	11/7/1973	License	3.2	IRRIGATION	160 06S14E35SENW	GARY R	COLEMAN
37	7316	11/7/1973	License	3.1	IRRIGATION	155 06S14E27SWSE	SHELLY L	PEREIRA
36	7402	11/8/1973	Decreed	2.78	IRRIGATION	263 07S14E1NESE	TONY	VISSER
36	7409 A	11/21/1973	License	2.19	IRRIGATION	268 08S15E7SWSWSE		
36	7411	11/29/1973	Decreed	1.48	IRRIGATION	151 08S15E20SWSESW	LINDA	HILLIS
36	7295 A	12/11/1973	License	2.43	IRRIGATION	177 08S14E8NESE		
36	7295 B	12/11/1973	License	2.8	IRRIGATION	190.9 08S14E9NWSW		
36	10509	1/1/1974	Decreed	0.12	STOCKWATER	09S17E6SWSESE	IRENE	VANDER VEGT
36	7562 B	1/21/1974	Decreed	0.72	IRRIGATION	36 08S15E26NESESE	KENNETH L	KECK
36	7562 C	1/21/1974	Decreed	0.6	IRRIGATION	30 08S15E26NESESE	KENNETH L	KECK
36	7562 E	1/21/1974	License	0.15	IRRIGATION	30 08S15E26NESE	CECELIA W	WRIGHT
36	7438	1/31/1974	Decreed	2	IRRIGATION	100 09S16E5SESESW	MARGARET	MC CAUGHEY
37	7338	2/6/1974	License	1.34	IRRIGATION	440 06S13E14NESE	JESS D	ELLIOTT
36	7445 B	2/21/1974	Decreed	0.13	IRRIGATION	263 07S14E1NESE		
36	7445 E	2/21/1974	License	0.18	IRRIGATION	263 07S14E1NESE		
36	7448	2/27/1974	License	2.23	IRRIGATION	137 07S14E24SESESE	ANN A	CIOCCA
37	7343	3/3/1974	License	1.8	IRRIGATION	90 06S14E32NESENW	VERNON F	RAVENSCROFT
36	7450 A	3/6/1974	Decreed	5.2	IRRIGATION	261 08S15E19SWNESW	EVELYN G	STRICKLAND
36	7450 B	3/6/1974	Decreed	0.76	IRRIGATION	37 08S15E19SESW	JERRY	STRICKLAND
36	7452	3/11/1974	Decreed	0.5	IRRIGATION	235 08S14E21NENWNE	A N	AMBROSE
36	7453	3/11/1974	Decreed	1.34	IRRIGATION	67 08S14E21NENWNE	A N	AMBROSE
36	7454	3/11/1974	Decreed	0.28	IRRIGATION	74 09S14E2NWNENW		
36	10037	3/15/1974	Beneficial Use	1.65	IRRIGATION	404 07S14E33NENWSE		
36	7460 AG	3/25/1974	License	0.18	IRRIGATION	10 07S14E28NWSWSE	KATHY	BRANCHFLOWER
36	7460 B	3/25/1974	Decreed	1.04	IRRIGATION	99 08S14E3SESW	KATHY	BRANCHFLOWER
36	7460 C	3/25/1974	License	12.72	IRRIGATION	715 07S14E28NWSWSE		
36	7460 E	3/25/1974	Decreed	0.13	IRRIGATION	8 08S14E2NWNENW	KATHY	BRANCHFLOWER
36	7460 F	3/25/1974	Decreed	0.12	IRRIGATION	8 08S14E2NENE	KATHY	BRANCHFLOWER
36	7460 G	3/25/1974	Decreed	0.19	IRRIGATION	32 08S14E11SWNW	WIETZE	DEVRIES
36	7460 J	3/25/1974	License	1.23	IRRIGATION	69 08S14E11SWNW	IRENE	VANDER VEGT
36	7460 T	3/25/1974	License	8.06	IRRIGATION	453 07S14E28SWNWNE		
36	7462	4/3/1974	Decreed	0.89	IRRIGATION	80 08S15E34SENE	ELMER	JOHNSON JR
36	7472	5/8/1974	Decreed	2.16	IRRIGATION	157 07S14E32SENWSE	HARVEY E	TATE
36	7477 A	5/28/1974	License	1.43	IRRIGATION	2184 08S15E32NESESE		
36	7477 B	5/28/1974	License	0.17	IRRIGATION	273 08S15E33NESESE	TONY	VISSER
36	7480 C	5/31/1974	License	0.28	IRRIGATION	263 07S14E1NESE		
36	7480 D	5/31/1974	Decreed	0.21	STOCKWATER, COMMERCIAL	07S14E1NESE	TONY	VISSER
36	7480 F	5/31/1974	Decreed	0.4	IRRIGATION	263 07S14E1NESE		
37	7363	5/31/1974	License	1.64	IRRIGATION	117 06S14E27SWSE	TIM W	PEREIRA
37	7440	5/31/1974	License	1.6	IRRIGATION	80 06S14E34SESW	DON	MC FARLAND
36	15328	7/6/1974	Decreed	5.19	IRRIGATION	263 08S15E16NENESE	LUCILE	GIBBS

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37	7370	7/22/1974	License	3.26	IRRIGATION	576 06S14E18NENENW	JAMES D	NAFZIGER
37	7385 A	9/20/1974	License	0.22	IRRIGATION	11 05S13E16NENW	R RANDOLPH	ERKINS
37	7385 B	9/20/1974	License	2.53	IRRIGATION, STOCKWATER	124 05S13E16NENW	HELEN	DE MOSS
37	7379	9/21/1974	License	3.96	IRRIGATION	233 06S14E21SWSW	ROBERT	MC CABE
36	7563	9/26/1974	Decreed	4.38	IRRIGATION	219 08S15E23NESWNE		
37	7388	9/30/1974	License	0.78	IRRIGATION	39 06S14E32SWSE		
36	7508 A	11/5/1974	License	0.61	IRRIGATION	33 08S15E17NWNENE	HAROLD	RUBY
36	7508 B	11/5/1974	Decreed	2.42	IRRIGATION	132 08S15E17NWNENE	JOHN	REITSMA
36	7510	11/7/1974	Decreed	1.1	IRRIGATION	55 08S14E27NESWNE	EARL M	HARDY
36	7515	12/12/1974	Decreed	0.73	IRRIGATION	38 07S14E36NWNWSW	JERRY	SABALA
36	7518	12/17/1974	Decreed	1.6	IRRIGATION	80 08S15E28NWNENW	WAYNE K	WERT
37	7419 A	1/29/1975	License	2.204	IRRIGATION	110.2 06S14E34SESW	DON	MC FARLAND
37	7419 B	1/29/1975	License	0.196	IRRIGATION	9.8 06S14E34SESW		
37	7420	1/29/1975	License	2.06	IRRIGATION	103 06S14E35NESW	CAROL	MC FARLAND
36	13875	3/1/1975	Beneficial Use	0.14	STOCKWATER, DOMESTIC	08S14E26SWSESE		
36	7524	3/5/1975	Decreed	4.36	IRRIGATION	232 08S15E25SWSWNE	WAYNE	FATTIG
36	10033	3/15/1975	Beneficial Use	0.96	IRRIGATION	370 07S14E34SESWNW		
36	15256 B	3/15/1975	Decreed	0.13	STOCKWATER, COMMERCIAL	09S16E3NESE	DONALD J	AARDEMA
36	15256 C	3/15/1975	Decreed	0.92	IRRIGATION	524.4 09S15E2SWNWSE	DONALD	AARDEMA
36	15256 D	3/15/1975	Decreed	0.11	STOCKWATER, COMMERCIAL	08S15E35SESE	DONALD J	AARDEMA
36	7525	3/20/1975	Decreed	0.2	DOMESTIC, RECREATION	08S17E30SESWNW		
36	7526	3/24/1975	Decreed	5.08	IRRIGATION	306 07S14E16NESENW	FRANK W	VEENSTRA
37	7805	3/25/1975	License	0.78	IRRIGATION	39 06S14E32SWSE		
36	7533 A	3/27/1975	Decreed	1.13	IRRIGATION	72 08S14E24NENE		
36	7533 B	3/27/1975	Decreed	1.12	IRRIGATION	81 08S15E18SWNW		
36	7533 C	3/27/1975	Decreed	0.42	IRRIGATION	30 08S14E13NESE		
36	7534 A	4/8/1975	Decreed	2.34	IRRIGATION	185 07S14E23SENWSE	MICHAEL G	BRANCHFLOWER
36	7534 B	4/8/1975	License	0.68	IRRIGATION	34 07S14E23SWNWSW		
36	7535	4/9/1975	Decreed	4.34	IRRIGATION	305 07S14E22NWNWNE	MARVEN L	PRIEBE
37	7435	4/22/1975	License	0.8	IRRIGATION	40 06S14E34SESW	DON	MC FARLAND
36	7547 A	5/13/1975	License	3.08	IRRIGATION	283 08S14E9NENENE	KATHERINE L	BRANCHFLOWER
36	7547 B	5/13/1975	License	0.12	STOCKWATER, COMMERCIAL	08S14E11NWNW		
37	7438	5/13/1975	License	3	IRRIGATION	153 06S14E28NENENE	LARRY J	STRICKLAND
36	7561	8/9/1975	Decreed	3	IRRIGATION	400 09S15E2SENWSE		
37	7453	8/27/1975	License	2.14	IRRIGATION, STOCKWATER	146 06S14E20NWSW		
36	7569	9/24/1975	Decreed	6.02	IRRIGATION	302 07S14E21NENESW		
36	7571	10/14/1975	Decreed	1.5	IRRIGATION	305 07S14E22NWNWNE	MARVEN L	PRIEBE
36	7572	10/14/1975	Decreed	2.64	IRRIGATION	132 08S15E24SENWSW		
36	7574	10/30/1975	Decreed	1.5	IRRIGATION	108 08S15E12NENWSW	VOLNEY G	FLEISCHMAN
36	7573	10/31/1975	Decreed	2.92	IRRIGATION	188 08S17E26SESESW	MARK	BARNES
36	7575	10/31/1975	Decreed	0.43	IRRIGATION, STOCKWATER	37 08S14E12SENESE	SHANE	JOHNSON
36	7576	11/17/1975	Decreed	1.97	IRRIGATION	140 08S15E13NESESW	HILL	BRANDSMA
36	7583	12/9/1975	Decreed	0.22	IRRIGATION	142 08S14E12SESWSW		

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36	7584		12/9/1975	Decreed	1.08	IRRIGATION	154	08S14E12NWSWNW	
36	7585		12/9/1975	Decreed	0.52	IRRIGATION	97	08S15E30NENWNE	FRANK W CNOSSEN
37	7470		12/9/1975	License	3.12	IRRIGATION	156	06S14E35SENW	CAROLYN F COLEMAN
36	7582		1/1/1976	Decreed	1.6	IRRIGATION	138	08S14E2SENESE	IRENE VANDERVEGT
36	7592		1/6/1976	Decreed	2.44	IRRIGATION	178	08S14E35NENENW	MARIE E BORGES
37	7476		1/7/1976	License	1.4	IRRIGATION	70	06S14E21SWSW	LINDA JOY MC CABE
36	7606	A	2/4/1976	License	1.34	IRRIGATION	2184	09S15E4NENENE	
36	7606	B	2/4/1976	License	0.16	IRRIGATION	273	08S15E33NESESE	TONY VISSER
36	7610		2/27/1976	Decreed	2.4	IRRIGATION	120	08S14E36NENWNE	TOM HEIDA
37	7480		3/1/1976	Permit	17.92	IRRIGATION	896	06S13E10NESW	
36	7617		3/11/1976	Decreed	10	IRRIGATION	619	08S15E26SWNWSW	BEN F KOBER
36	10082		3/15/1976	Beneficial Use	0.27	IRRIGATION	208	08S16E28SENWSE	CALVIN DE KRUYF
36	14317		3/20/1976	Beneficial Use	0.67	IRRIGATION	153	09S16E14SESENW	DANIEL A SUHR
36	7623		4/13/1976	Decreed	0.64	IRRIGATION, COMMERCIAL	27	08S17E31NESENW	VIRGIL AND AMA LEI BROCKMAN FAMILY T
36	7622	A	4/29/1976	License	0.45	IRRIGATION	30	08S15E26NESE	JOHN W WRIGHT
36	7622	B	4/29/1976	License	0.15	STOCKWATER, COMMERCIAL		08S15E26NESE	JOHN W WRIGHT
36	10835		5/4/1976	Decreed	0.11	STOCKWATER, DOMESTIC		08S16E18NENE	RONALD L LEE
36	7631	A	6/23/1976	License	3.17	IRRIGATION	268	08S15E7NWSENE	
36	7650	A	7/30/1976	Decreed	1.22	IRRIGATION	220	08S14E34SESENW	CORNELIA AARDEMA
36	7619		8/16/1976		4.15	COMMERCIAL, RECREATION, FIRE PR(	09S17E14NWNW		KEITH SLIGAR
36	7644		9/22/1976	Decreed	3.34	IRRIGATION	211	08S18E31SESWSE	RAYMOND G CLARK
37	7531		10/6/1976	License	0.66	IRRIGATION	33	06S14E27SESW	TIM W PEREIRA
36	7640		10/8/1976	Decreed	2.13	IRRIGATION	108	07S14E35SWNWSE	DAVID C SYBESMA
36	7666	A	1/5/1977	Decreed	1.64	IRRIGATION	82	07S14E17SESENE	FRANK VEENSTRA
36	7666	B	1/5/1977	Decreed	0.66	STOCKWATER, COMMERCIAL		07S14E17SENE	FRANK VEENSTRA
36	7668		1/13/1977	Decreed	1.22	IRRIGATION	76	08S15E9SESENE	J RAY EVERS
36	7672		1/27/1977	Decreed	1.77	IRRIGATION	103	08S14E14SESWSE	
37	7545		2/1/1977	License	36	IRRIGATION	9	06S14E35NESW	DON MC FARLAND
36	7681	A	2/14/1977	Decreed	0.9	IRRIGATION	56.7	08S15E31NWSESE	
36	7682		2/14/1977	Decreed	1.24	IRRIGATION	78	08S14E36SESESW	TOM HEIDA
36	7734		3/11/1977	License	1	IRRIGATION, STOCKWATER, C	30	09S16E2SESWSW	DON AARDEMA
37	7572		3/21/1977	License	2.53	IRRIGATION	576	06S14E18NENENW	JAMES D NAFZIGER
37	7634		5/23/1977	License	1.31	IRRIGATION	576	06S14E18NENENW	JAMES D NAFZIGER
36	7706		5/25/1977	Decreed	1.45	IRRIGATION	136	07S14E26SWNWNW	JIM BEADZ
36	10416		6/22/1977	Decreed	0.11	STOCKWATER, DOMESTIC		08S16E18NENESE	JOHN BEUKERS
37	7639		7/8/1977	License	3	IRRIGATION	150	06S14E34SESW	DON MC FARLAND
36	7713	A	8/13/1977	Decreed	0.85	IRRIGATION	107	08S15E30NENWSE	FRANK W CNOSSEN
36	7745		8/15/1977	Decreed	4.5	IRRIGATION	292	09S17E12NWSWSE	JEANETTE R FRAZIER
36	7748		8/25/1977	License	0.22	IRRIGATION, IRRIGATION STO	5	09S16E24NWNENW	JOHN B METZ
36	7759		10/28/1977	Decreed	1.5	IRRIGATION	304	08S16E31NESENE	
36	7337	F	11/25/1977	Decreed	0.66	COMMERCIAL		08S16E25NWNE	
36	7337	K	11/25/1977	Decreed	1.3	STOCKWATER, COMMERCIAL		08S15E14NENW	JIM D SCARROW
36	7337	L	11/25/1977	Decreed	0.72	IRRIGATION	36	08S14E5NWNWSE	WILLIAM A SANDY

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36	8649		1/25/1978	Decreed	1.47	IRRIGATION	73.5	07S14E34NWNENE	ALICE	MC CORD
36	7777		2/7/1978	Decreed	1.33	IRRIGATION	75	08S14E36NWNENW	GEORGE	ANDERSON
36	7779	A	2/22/1978	License	4.19	IRRIGATION	2184	09S15E4NENENE		
36	7779	B	2/22/1978	License	0.51	IRRIGATION	273	08S15E33NESESE	CAROL	VISSER
36	15076		3/1/1978	Decreed	0.24	STOCKWATER, DOMESTIC		08S16E9SESWSE	CONSTANTINO	XAVIER
36	7782		3/10/1978	Decreed	2.43	IRRIGATION	132	08S15E8NESWSW		
36	7793		6/1/1978	Decreed	2.26	IRRIGATION	144	08S15E19SENESE	VIRGIL L	JENKS
36	7799		6/27/1978	Decreed	0.8	IRRIGATION	40	08S16E30NWNENE		
36	7817		10/14/1978	Decreed	1.1	IRRIGATION	55	07S14E27NESENE	BOYD L	HARMS
36	7832	A	12/11/1978	License	0.36	IRRIGATION	2184	08S15E31NESENE		
36	10298		1/1/1979	Decreed	0.12	STOCKWATER, DOMESTIC		07S14E9NWNWNW	ELLA JEAN	OSBORNE
36	7847		7/28/1979	Decreed	0.56	IRRIGATION	28	08S15E18NWNWNE		
37	12778		6/12/1979	Beneficial Use	0.23	STOCKWATER		06S13E1SESESE		
36	11017		8/10/1979	Decreed	0.24	STOCKWATER, DOMESTIC		08S14E2NESW	MICHAEL A	GALLAGHER
36	10483		9/1/1979	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E28NENESW	JANE	REITSMA
36	7871		9/24/1979	License	1	IRRIGATION, STOCKWATER, C	40	08S14E26NWNE	ROBERT C	THOMPSON
36	10789		10/1/1979	Decreed	0.13	STOCKWATER, DOMESTIC		08S14E13NENENW	TINA	FOLKINGA
36	10586		10/31/1979	Decreed	0.13	STOCKWATER, DOMESTIC		08S14E10NESENW	DENNIS	LEHMANN
36	10451		11/7/1979	Decreed	0.11	STOCKWATER, DOMESTIC		08S15E4NWSWNE	YOLANDA	YODER
36	7879	A	11/19/1979	License	0.12	IRRIGATION, DOMESTIC	5	08S14E14SESESE	DALE M	MC MINN
36	10801		1/1/1980	Decreed	0.24	STOCKWATER, DOMESTIC		08S14E13SENWNE	HELEN M	MATOS
36	10547		4/1/1980	Beneficial Use	0.25	IRRIGATION	154	08S14E14NESENW	SUSAN L	KEARLEY
36	15233		4/6/1980	Beneficial Use	0.73	IRRIGATION	180	07S14E9NESESE		
36	10454		8/10/1980	Decreed	0.15	STOCKWATER, DOMESTIC		08S14E34SWNE	ALLEN	MOYLE
36	10806		10/31/1980	Beneficial Use	0.18	STOCKWATER, DOMESTIC		08S16E7NENWNE	RICHARD B	VAN DYK
36	10889		11/1/1980	Decreed	0.11	STOCKWATER		08S15E20SWSWNW	LINDA	HILLIS
36	7948		11/21/1980	License	0.87	IRRIGATION	160	09S17E12SWSENW	DAVID W	BAXTER
36	7947		11/28/1980	Decreed	0.13	IRRIGATION, STOCKWATER, D	4	08S15E32NWNWSW	VIRGIL L	JENKS
36	15109		12/31/1980	Decreed	0.23	STOCKWATER		08S16E31SWSWSW		
36	10798		1/1/1981	Decreed	0.13	STOCKWATER, DOMESTIC		08S15E15SWNW	KURT B	ALBERTI
36	10035		3/15/1981	Beneficial Use	0.98	IRRIGATION	370	07S14E34NESESW		
36	10744		7/15/1981	Decreed	0.24	STOCKWATER, DOMESTIC		08S15E23NENE		
36	10455		8/18/1981	Beneficial Use	0.15	STOCKWATER, DOMESTIC		08S14E34SWNE	ALLEN	MOYLE
36	8000		9/11/1981	Decreed	0.8	IRRIGATION	40	08S15E22SWSESW	RITA	WERT
36	8047	A	12/9/1981	License	1.15	IRRIGATION	116	08S14E11NENE	IRENE	VANDER VEGT
36	8047	B	12/9/1981	License	0.17	STOCKWATER, COMMERCIAL		08S14E11NENE	IRENE	VANDER VEGT
36	8050		12/11/1981	Decreed	4.06	IRRIGATION	699	09S16E7NENWNW		
36	8048		12/21/1981	Decreed	0.41	IRRIGATION	20.2	07S14E32SENWSE		
36	8049		12/21/1981	License	0.94	IRRIGATION	47	09S17E12NWSWSE	JOE L	FRAZIER
36	8021		1/2/1982	Decreed	0.22	STOCKWATER, COMMERCIAL		09S16E3NENESE	FRANS	AARDEMA
36	8060		2/9/1982	Decreed	0.2	COMMERCIAL		08S16E33NENENE		
36	8061		2/9/1982	License	0.2	STOCKWATER, COMMERCIAL		08S16E33NWNW		
36	8065		2/17/1982	Decreed	0.12	IRRIGATION, DOMESTIC	5	08S14E13SWSWSW	DUKE	BONAWITZ

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36	15181		3/15/1982	Beneficial Use	0.23	IRRIGATION	54	08S14E11NESWSW	MARY JANE	HEIDA
37	8005	C	3/20/1982	License	1.6	IRRIGATION	122	06S14E8NESW		
36	15077		4/1/1982	Beneficial Use	0.91	IRRIGATION	198.5	07S14E25NESWNE	FRANK	VEENSTRA
36	8090		6/16/1982	License	0.51	IRRIGATION, STOCKWATER, D	24	09S17E16NWSENW		
36	8100		7/13/1982	Decreed	0.15	IRRIGATION, STOCKWATER, D	5	07S14E17SENWNE	LA VOR R	JACKSON
36	8101		7/13/1982	Decreed	0.8	IRRIGATION	40	07S14E17NESWSW	LA VOR R	JACKSON
37	8010		12/5/1982	License	2.52	IRRIGATION	126	06S14E16NESWSW		
36	8140		1/21/1983	Decreed	0.11	STOCKWATER, COMMERCIAL		08S16E30SENENE		
36	8169		4/6/1983	License	0.26	STOCKWATER, COMMERCIAL		08S15E35NESESE	CORNELIA	AARDEMA
36	8165		4/7/1983		1.95	STOCKWATER, COMMERCIAL		09S16E10NENE		
36	7641		5/19/1983	Decreed	1.28	IRRIGATION	64	08S14E25SESENE	DEWEY D	DURFEE
36	8200		5/26/1983	License	0.28	IRRIGATION	154	08S14E14SENW	WILLIAM P	KEARLEY
36	8199		6/15/1983	License	0.2	STOCKWATER, COMMERCIAL		07S14E23SWSENW	ARLIN C	HILARIDES
36	8224		6/29/1983	License	0.17	IRRIGATION, STOCKWATER, C	2	08S16E33NENENE		
36	8219		6/30/1983	License	1.72	IRRIGATION	86	07S14E15SWSE	ANN	CIOCCA
36	8295		6/30/1983	License	2.16	IRRIGATION, STOCKWATER, D	131	08S16E29SWSE	ZIPPORA	STAHL
37	8054		7/1/1983	License	3.34	IRRIGATION	167	06S14E30NESESE		
36	8237		12/22/1983	License	2.71	MUNICIPAL		08S17E19NWNWNE		
36	8234		1/11/1984		1.23	IRRIGATION, COMMERCIAL, D	14	09S17E14NWNW	DAVID	MILLARD
36	10044		3/1/1984	Beneficial Use	0.55	IRRIGATION	124	08S14E35SWSESE	KEITH A	CONNER
36	8223		3/11/1984	License	0.62	IRRIGATION, STOCKWATER, C	5	08S16E32NWSW	TED	MILLER
36	14062		3/14/1984	Decreed	0.11	STOCKWATER, DOMESTIC		09S17E13SWNWNW	JOE L	FRAZIER
36	8260		12/3/1984	Decreed	0.23	STOCKWATER		08S16E33SESENW		
36	8255		12/7/1984	License	1.16	IRRIGATION	154	08S14E1NESENE	TONY M	CIOCCA
36	10511		1/1/1985	Decreed	0.12	STOCKWATER		09S17E6SWSESE	IRENE	VANDER VEGT
36	8263		2/3/1985	License	0.85	IRRIGATION	128	08S15E15SENE	JIM	SCARROW
36	8265		3/7/1985	License	0.15	STOCKWATER, COMMERCIAL		07S14E25SESWSW	CECIL	HILT
36	15223		3/12/1985	Decreed	0.8	IRRIGATION	233	09S18E9NWNWSE	JAMES	ROTH
36	15253		3/15/1985	Decreed	0.34	IRRIGATION	211	08S18E31SESWSE	RAYMOND G	CLARK
36	8266		3/18/1985		0.83	STOCKWATER, COMMERCIAL, DOMES		09S17E17NESE	ESTATE OF RAY	CHUGG
36	10225	A	5/1/1985	Beneficial Use	1.27	IRRIGATION	2184	09S15E3NENENW		
36	10225	B	5/1/1985	Beneficial Use	0.17	IRRIGATION	273	08S15E33NESESE	CAROL	VISSER
36	8276		6/6/1985	License	0.14	IRRIGATION	121	08S14E36SWSE	GRACE V	MADALENA
36	8286		6/26/1985	License	0.21	IRRIGATION	225	08S18E31SWSE	RAYMOND G	CLARK
36	8164		6/27/1985	License	2.08	IRRIGATION	104	08S15E16SWSW	FRANK L	ORTH
36	8298		9/23/1985	License	0.27	COMMERCIAL		08S17E33SENESE		
36	8305		2/14/1986		2.4	IRRIGATION	120	08S14E11NESWSE		
37	11201		4/1/1986	Beneficial Use	0.5	STOCKWATER, DOMESTIC		06S14E6SWSE	LONNIE	LEAVELL
36	10696		5/1/1986	Decreed	0.12	STOCKWATER, DOMESTIC		08S15E30SESWNE	FRANK W	CNOSSEN
37	8757		2/4/1987	License	2.56	IRRIGATION	160	06S13E11SWSE		
36	8324		4/3/1987	License	2	FIRE PROTECTION		08S16E25NESE		
37	19848		4/15/1987	Beneficial Use	0.29	IRRIGATION	142.4	06S14E16NESWSW		
36	14790		4/21/1987	Decreed	0.13	STOCKWATER, DOMESTIC		09S17E7SESWSE	MARTIN	HUNTER

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36	10666	5/1/1987	Decreed	0.19	IRRIGATION	142	08S14E12SESWSW		
36	8333	8/25/1987		3.66	IRRIGATION	183	07S14E20SWNE	RONNIE D	SMITH
36	8344	2/12/1988		1.11	IRRIGATION	191	09S17E19NWNENW		
36	8350	4/5/1988	License	0.31	STOCKWATER, COMMERCIAL		08S16E32NENW		
36	8355	5/9/1988	License	0.13	STOCKWATER, COMMERCIAL, DOMES		08S16E21SESE	KEN	VANDERHAM
36	8362	6/3/1988	License	1	STOCKWATER, COMMERCIAL		08S14E25SESW		
36	8351	6/15/1988	License	0.19	STOCKWATER, COMMERCIAL, DOMES		07S14E35NESE	DAVID	SYBESMA
36	8359	6/15/1988		0.5	COMMERCIAL		09S16E7NESE		
36	8367	6/21/1988	License	0.11	STOCKWATER, COMMERCIAL		08S14E25NENE	JAMES M	DURFEE
36	8363	7/12/1988	License	0.22	STOCKWATER, COMMERCIAL		07S14E25SESW	ANN A	CIOCCA
36	15206	7/29/1988	Decreed	0.24	STOCKWATER		07S14E32SWSESE	FRANK	VEENSTRA
36	8585	8/11/1988	License	0.22	IRRIGATION	171	08S15E6SWSE	J W	MATTHEWS
36	8382	8/16/1988		1	STOCKWATER, COMMERCIAL, DOMES		08S16E18NESE		
36	8379	8/19/1988	License	0.38	STOCKWATER, COMMERCIAL, DOMES		08S15E10NWSE		
36	8387	8/31/1988	License	2.48	IRRIGATION	149	08S14E10NWSE		
36	8389	9/1/1988	License	0.18	STOCKWATER, COMMERCIAL		08S16E7NWNE	RICHARD B	VAN DYK
36	8395	9/23/1988		0.24	STOCKWATER, COMMERCIAL, DOMES		08S16E17SWSW	LLOYD	WIERSEMA
36	8408	1/19/1989		0.54	COMMERCIAL, DOMESTIC		09S17E8NWNE	ERIC A	HETTINGA
36	8409	1/23/1989	License	0.2	IRRIGATION	10	09S17E8SWNW	SHIRLEY W	STOKES
36	8417	3/1/1989		1.89	STOCKWATER, DOMESTIC		08S16E31SESW		
36	8418	3/16/1989		0.5	STOCKWATER, COMMERCIAL, DOMES		09S16E5NWSW		
36	8411	4/18/1989	License	0.5	STOCKWATER, COMMERCIAL		08S16E16SWNW	JOHN	REITSMA
36	8422	4/20/1989		0.4	STOCKWATER, COMMERCIAL		08S16E33NENE	JOHNNY H	LOPEZ
36	8452	8/22/1989	License	0.16	COMMERCIAL		08S15E4SWNE		
36	8468	9/26/1989		1.6	COMMERCIAL		08S16E31SESE		
36	8471	10/4/1989	License	0.18	COMMERCIAL		08S16E14SWSE		
36	8491	10/31/1989		0.56	STOCKWATER, COMMERCIAL		08S15E27NWSW	NEIL	DE WIT
36	8478	11/7/1989		0.6	STOCKWATER, COMMERCIAL, DOMES		09S16E3SESWNW		
36	8481	12/4/1989		0.34	STOCKWATER		08S16E33SESE		
36	7854	2/16/1990	License	2.71	IRRIGATION	142	08S14E34NESE	ROBERT	MEYERS
36	8505	2/23/1990		0.2	STOCKWATER, COMMERCIAL, DOMES		08S16E16SESESE	ARTHUR	NUNES
36	8517	4/3/1990		0.26	STOCKWATER, COMMERCIAL		09S16E1NESENE		
36	8529	4/5/1990		0.7	IRRIGATION	35	08S14E4SWSE	TERRY S	CRUMRINE
36	8530	4/5/1990		1	STOCKWATER, COMMERCIAL, DOMES		09S16E4NENE	CALVIN	DE KRUYF
36	8535	4/12/1990	License	0.13	IRRIGATION, DOMESTIC	4	08S16E35SWSW	BYRON	LYONS
36	8539	4/13/1990	License	0.27	IRRIGATION, STOCKWATER, C	1	09S16E3NWNW	DOUG	BENSON
36	8523	4/25/1990		7.68	IRRIGATION	384	09S17E17NENESE	HERB	ALLEN
36	8554	5/13/1990		0.5	STOCKWATER, COMMERCIAL, DOMES		08S14E13NWNE	AGNELO J	MATOS
36	8538	6/1/1990		0.4	STOCKWATER, COMMERCIAL		08S16E28NWNW		
36	8552	6/28/1990		0.12	STOCKWATER, COMMERCIAL, DOMES		07S14E34SENE		
36	8553	7/9/1990	License	0.13	IRRIGATION	4.3	09S16E11SWSE	EVERETT L	WHITTAKER
37	8685	9/20/1990		0.84	STOCKWATER, INDUSTRIAL		06S13E1SWSE		
36	8579	2/8/1991	License	0.68	IRRIGATION	52	09S16E5SWSE	WALT	MC CAUGHEY

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36	8580		2/19/1991		0.7	IRRIGATION	35	07S14E35NENE	JANICE	LLOYD
36	8582		2/20/1991	License	0.46	IRRIGATION	23	08S14E2SENW	KATHY	BRANCHFLOWER
36	8584		2/26/1991		2.88	IRRIGATION	144	08S15E11NENENE		
36	8577		2/28/1991	License	1.68	IRRIGATION	94	09S17E10NWNW	THOMAS R	PETERS
36	8591		3/6/1991	License	1	IRRIGATION	66	09S16E6SENE	ROBERT J	PARKINSON
36	8581		3/13/1991	License	0.74	IRRIGATION	39	08S14E2SWNW	KATHY	BRANCHFLOWER
37	8732		4/13/1991	License	3	IRRIGATION	587	06S14E18NENW	JAMES D	NAFZIGER
36	8589		5/9/1991		0.13	IRRIGATION, DOMESTIC	3	08S15E5NESWNW	WARREN E	SCHOTH
36	8603		6/14/1991	License	0.14	STOCKWATER		09S16E9NWNW		
36	8608		9/3/1991	License	0.98	IRRIGATION, STOCKWATER, C	2	08S14E24NWNW		
36	8608		9/3/1991		1.46	IRRIGATION, STOCKWATER, C	2	08S14E24NWNW		
36	8607		11/18/1991	License	0.5	STOCKWATER, DOMESTIC, FIRE PROT		09S17E16NWNW		
36	8628		11/26/1991		0.18	IRRIGATION, STOCKWATER, D	8	09S17E9NWSW	KENT F	EDWARDS
36	8637		12/6/1991	License	0.23	IRRIGATION	245	08S15E25SWNE	WAYNE	FATTIG
36	8735		1/10/1992		0.13	STOCKWATER, COMMERCIAL		09S17E3SWNW		
36	8736		5/19/1992		1.53	STOCKWATER, COMMERCIAL		08S15E17NWNW	JOHN	REITSMA
36	8661		5/21/1992		0.26	STOCKWATER, COMMERCIAL		08S15E33NENENE	WILLIAM C	STOUDER
36	8662		5/26/1992		0.24	STOCKWATER, COMMERCIAL		07S14E20SWNWSW		
36	8666		7/10/1992		0.27	STOCKWATER, COMMERCIAL, DOMES		07S14E25NWSW	MARGARET	VERBREE
36	8667		7/10/1992		0.27	STOCKWATER, COMMERCIAL, DOMES		07S14E26SWSE	JACK	VERBREE JR
36	8396		10/20/1992		0.2	STOCKWATER, COMMERCIAL		08S15E18NENENE		
36	8578		2/8/1993		0.25	STOCKWATER, COMMERCIAL		08S15E33SWSWNE		
36	8727		5/5/1994		0.45	DOMESTIC		09S17E16NWSENW		
36	8399		1/5/1995		0.7	DOMESTIC		09S17E18NESE		
36	8398		2/14/1995		0.6	STOCKWATER, COMMERCIAL		09S16E3SESE		
36	8768		6/16/1997		0.2	STOCKWATER, COMMERCIAL		08S14E34SENE	ALLEN	MOYLE
36	8378		7/23/1997		0.23	STOCKWATER, COMMERCIAL		08S15E28NESW	PETE	REITSMA
36	8636		9/23/1997		1	STOCKWATER, COMMERCIAL, DOMES		08S14E22NENE	DANNY C	VANDERHAM
37	8886		11/24/1998		0.45	MUNICIPAL		06S13E8NWNE		

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THOUSAND SPRINGS 10K WATER USERS

OrganizationName

SOUTHFIELD DAIRY
CITY OF JEROME

IDAHO STATE BANK

MICROFILMED
SEP 17 2009

BLISS SCHOOL DISTRICT NUMBER 234
UNION PACIFIC RAILROAD CO

GOOD HART DAIRIES INC

CITY OF JEROME

GLENNDALE RANCHES INC

NUNES BROTHERS DAIRY

0003227

THOUSAND SPRINGS 10K WATER USERS

MC CORD FAMILY PARTNERSHIP

LITTLE SKY FARMS

HOLTZEN FARMS

PRODUCERS LIVESTOCK MARKETING ASSN
IANSS FARMS

IDAHO LAND & LIVESTOCK INC

SAND SPRINGS RANCH & COMPANY

SAND SPRINGS RANCH & COMPANY

HOLTZEN FARMS
ELLIOTT FAMILY LIMITED PARTNERSHIP

SAND SPRINGS RANCH & COMPANY

SALMON FALLS LAND & LIVESTOCK CO INC

000328

THOUSAND SPRINGS 10K WATER USERS

BLICK BROTHERS
SALMON FALLS LAND & LIVESTOCK CO INC

V & L DAIRY

NUNES BROTHERS DAIRY

SI ELLEN DAIRY
SI ELLEN DAIRY
SI ELLEN DAIRY

SUNSHINE FARMS

IDAHO LAND & LIVESTOCK INC

MENTARY TRUST

SAND SPRINGS RANCH & COMPANY

LOS CABALLEROS LTD
LOS CABALLEROS LTD

LIBERTY TRUST

000329

THOUSAND SPRINGS 10K WATER USERS

SOUTHFIELD DAIRY

IDAHO LAND & LIVESTOCK INC
SAND SPRINGS RANCH & COMPANY

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STANDING HAT RANCH INC

CITY OF JEROME

SOUTHFIELD DAIRY

SOUTHFIELD DAIRY

SAND SPRINGS RANCH & CO

SALMON FALLS LAND & LIVESTOCK CO INC
SOUTHFIELD DAIRY PARTNERSHIP

JANSS FARMS

MICROFILMED
DEC 17 2008

000330

V & L DAIRY
GOEDHART & GOEDHART PARTNERSHIP
GOEDHART & GOEDHART PARTNERSHIP

THOUSAND SPRINGS 10K WATER USERS

SAND SPRINGS RANCH & COMPANY

JANSS FARMS

MICROFILMED
DEC 17 2009

THOUSAND SPRINGS 10K WATER USERS

CITY OF JEROME

SOUTHFIELD DAIRY A PARTNERSHIP

SAND SPRINGS RANCH & COMPANY

CITY OF TWIN FALLS

J & T DAIRY

KOA KAMPGROUND

CIRCLE 4 CATTLE CO
SAND SPRINGS RANCH & COMPANY

GLENNDALE RANCHES INC

MICROFILMED
DEC 17 2003

000334

THOUSAND SPRINGS 10K WATER USERS

GLENNDALE RANCHES INC
GLENNDALE RANCHES INC
V & L DAIRY

STANDING HAT RANCH INC

GLENNDALE RANCHES INC

MC CORD FAMILY PARTNERSHIP

SAND SPRINGS RANCH & CO

L-M DAIRY

MC CORD FAMILY PARTNERSHIP

MAY FARMS

CIRCLE 4 CATTLE CO

SAND SPRINGS RANCH & COMPANY

MICROFILMED
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000333

THOUSAND SPRINGS WATER USERS

LONG VIEW DAIRY
LONG VIEW DAIRY

GOEDHART & GOEDHART PARTNERSHIP
LITTLE SKY FARMS
LITTLE SKY FARMS

FARM CREDIT BANK OF SPOKANE

GLENNDALE RANCHES INC
SAND SPRINGS RANCH & COMPANY

MAY FARMS
MAY FARMS

J & T DAIRY

J & T DAIRY

DOUBLE V PARTNERSHIP

VANDERHAM BROTHERS
MATOS DAIRY

0000334

THOUSAND SPRINGS 10K WATER USERS

HAWKINS LAND INVESTMENT

SOUTHFIELD DAIRY
SOUTHFIELD DAIRY

J & T DAIRY
J & T DAIRY

GOEDHART & GOEDHART PARTNERSHIP
SALMON FALLS LAND & LIVESTOCK CO INC

JANSS FARMS

JANSS FARMS

SAND SPRINGS RANCH & COMPANY

J & T DAIRY

J & T DAIRY

000335

THOUSAND SPRINGS 10K WATER RIGHTS

GLENNDALE RANCHES INC
FARM CREDIT BANK OF SPOKANE

BIG SKY DAIRIES

SOUTHFIELD DAIRY PARTNERSHIP

SALMON FALLS LAND & LIVESTOCK CO INC

JEROME RECREATION DISTRICT

FARM CREDIT BANK OF SPOKANE
SOUTHFIELD DAIRY PARTNERSHIP
SOUTHFIELD DAIRY PARTNERSHIP
SOUTHFIELD DAIRY PARTNERSHIP

TAYLOR FARMS INC

DOUBLE V PARTNERSHIP

SAND SPRINGS RANCH & CO
LITTLE SKY FARMS
V AND L DAIRY

GLENNDALE RANCHES INC

SUNSHINE FARMS

000336

THOUSAND SPRINGS WATER USERS

SUNSHINE FARMS

SAND SPRINGS RANCH & COMPANY

LITTLE SKY FARMS - A PARTNERSHIP

TRUST

HAWKINS LAND INVESTMENT

MICROFILMED
2006

SOUTHFIELD DAIRY

FLEMING FAMILY PARTNERSHIP

MAY FARMS
JEROME CHEESE CO

0000337

THOUSAND SPRINGS WATER USERS

SAND SPRINGS RANCH & COMPANY

CHURCH OF JESUS CHRIST LATTER DAY SAINTS

MC CORD FAMILY PARTNERSHIP

SAND SPRINGS RANCH & COMPANY

MAGIC VALLEY DAIRY SUPPLY INC
LOS CABALLEROS LTD

IDAHO LAND & LIVESTOCK INC

JANSS FARMS

SALMON FALLS LAND & LIVESTOCK CO INC
GLENNDALE RANCHES INC

STANDING HAT RANCH INC
RANGEN INC

L-M DAIRY
LONG VIEW DAIRY

000338

THOUSAND SPRINGS 10K WATER USERS

FAULKNER LAND & LIVESTOCK CO INC

UNIT #3 WATERUSERS ASSN

OPPIO FAMILY LIMITED PARTNERSHIP
MC CORD FAMILY PARTNERSHIP

NORTHWEST FARM CREDIT SERVICES

L-M DAIRY

BIG SKY DAIRY
CITY OF JEROME

LONG VIEW DAIRY

SAND SPRINGS RANCH & COMPANY

MOSS GREENHOUSES INC
AARDEMA & HEIDA DAIRY

LOS CABALLEROS LTD
WESTERN IDAHO POTATO PROCESSING CO
OPPIO FAMILY LIMITED PARTNERSHIP

0000339

SOUTHFIELD DAIRY A PARTNERSHIP

JEROME COUNTRY CLUB
TED MILLER DAIRY

AARDEMA & HEIDA DAIRY

NORTHWEST FARM CREDIT SERVICES ACA

NORTHWEST FARM CREDIT SERVICES ACA
ROCHA DAIRY
GOEDHART & GOEDHART

CNOSSEN BROTHERS COMPANY INC
DE GROOT DAIRY

WENDELL GAS & OIL CO
NORTHWEST FARM CREDIT SERVICES ACA
J R SIMPLOT CO

NORTHWEST FARM CREDIT SERVICES
NORTHWEST FARM CREDIT SERVICES ACA

AARDEMA DAIRIES

MAGIC VALLEY DAIRY SUPPLY INC
NUNES BROTHERS DAIRY

LOS CABALLEROS

000340

NORTHWEST FARM CREDIT SERVICES

HOLTZEN FARMS INC
SOUTHFIELD DAIRY
SOUTHFIELD DAIRY
COUNTRY CLUB ESTATES WATER ASSN INC

G & G DAIRY

NORTHEWEST FARM CREDIT SERVICES FLCA

MAGIC VALLEY DAIRY SUPPLY
WOODEN SHOE DAIRY
UNIT 3 WATER ASSN INC
NORTH RIM FAIRWAYS OWNERS ASSN INC
AARDEMA DAIRY

CITY OF BLISS

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Exhibit G

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INTERIM STIPULATED AGREEMENT
FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 35

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users, or their representatives, in consideration of the promises stated in this Agreement.

1. This Agreement is made in reference to the following facts:

1.1 The Director of the Idaho Department of Water Resources (Director) stated his intent to entirely curtail diversions under certain water rights for ground water beneath portions of administrative surface water sub-basins consisting of Basins 27, 29, 35, 36, 41, 43, and 45 (the Basins). The Director's intent was based upon his findings, set forth in his administrative order designating the American Falls Ground Water Management Area dated August 3, 2001, that diversions of ground water under such rights cause significant reductions in the gains to the American Falls reach of the Snake River, and that those reductions will further reduce the diminished water supply available to satisfy senior priority surface water rights should current drought conditions continue into the 2002 water year;

1.2 The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin and any alleged injury to surface water rights as a right of the diversion of water from the Eastern Snake Plain Aquifer (ESPA);

1.3 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;

1.4 The new ESPA Ground Water Model is expected to provide the parties with more reliable information regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River; and

1.5 The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water under junior priority water rights within the Basins pending the completion of the new ESPA Ground Water Model.

2. Interim Stipulated Agreement:

2.1 The undersigned holders of ground water rights in the Basins or their representatives agree that in exchange for the safe harbor provided in paragraph 2.3, they will use their best efforts to provide annually 28,500 acre feet of replacement water during the 2002 and 2003 irrigation seasons. The agreed

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obligation to provide 28,500 acre feet of water will be reduced by any other replacement water provided, on either a temporary or permanent basis, by other entities within the Basins. The replacement water will be provided to holders of senior priority surface water rights in a manner determined by the Director, after consultation with the holders of senior priority surface water rights, to provide the maximum benefit to the holders of senior priority surface water rights.

2.2 In the event the undersigned holders of junior priority ground water rights or their representatives do not provide the full amount of water required by paragraph 2.1 by April 1 in any year, the undersigned holders of junior priority ground water rights agree to reduce their diversion and use of ground water under their water rights for irrigation during that year by fifteen (15) percent based on power and fuel consumption records, or other basis acceptable to the Director, reduced pro rata by the volume of any other replacement water otherwise provided in that year. In lieu of individual reductions, ground water districts may achieve the fifteen (15) percent reduction on a district-wide basis.

2.3 In exchange for the commitments by the holders of junior priority ground water rights enumerated in paragraphs 2.1 and 2.2, the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.2, of the ground water rights held or represented by the undersigned within the Basins for the term of this Agreement.

2.4 By providing replacement water or in the alternative agreeing to a pro rata reduction in ground water diversions, the undersigned holders of junior priority ground water rights and their representatives do not concede that diversions of ground water are causing injury to senior priority surface water rights, nor do the undersigned holders of senior priority surface water rights and their representatives concede that the amount of replacement water accepted under this stipulated agreement fully compensates for the extent of the injury they allege.

2.5 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in the Basins, and other related administrative areas outside of the Basins. The parties also agree not to oppose the Director's instructions to any watermasters to administer ground water rights that are in accordance with this Agreement. The parties understand that water districts to be created as a result of this Agreement are intended to include only ground water rights but may include certain surface water rights not already included in water districts, if any, that are required to be included for proper administration. The parties further agree to work collaboratively with the Director to expeditiously create water districts to implement this Agreement.

2.6 Holders of junior priority ground water rights within the Basins who are not party to this or other stipulated agreement, either directly or as a member of a

DEC 17 2003

participating ground water district, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.3. The parties agree to request that the Director notify holders of ground water rights in the Basins who are not party to this or another stipulated agreement that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

3. Process for Future Conflicts:

3.1 The undersigned parties agree to develop a process by December 1, 2001, for ascertaining the extent of any injury caused by ground water diversions in the Basins under junior priority water rights to senior priority surface water rights and for the development of any mitigation plans subsequently required.

3.2 The parties agree to meet with IDWR on at least a quarterly basis during the term of this Agreement to discuss and attempt to negotiate settlements of issues regarding the administration of water rights from connected surface and ground water sources in the Snake River Basin between Shelley, Idaho and Milner Dam. These discussions and negotiations will include, among other things:

.1 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.

.2 Adoption of conjunctive administration rules based on the results from the new ESPA ground water model and other necessary information to more specifically govern IDWR's administration of water rights from connected sources of surface and ground water within the ESPA.

.3 Consideration of a mechanism to account for changes in the use of water rights since the commencement of the SRBA and development of a means to administer water rights in the context of such changes.

3.3 The parties agree to meet at the offices of the Twin Falls Canal Company within 90 days of the date of this Agreement to begin the process of sharing relevant information to facilitate the development of a long-term settlement agreement. The representatives of the undersigned holders of ground water rights, through Tim Deeg, and holders of surface water rights, through Chuck Coiner, will exchange lists of desired information. The parties agree in good faith to provide the requested information in a timely manner.

4. Enforcement:

4.1 The parties understand the Director intends to approve this stipulated Agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party may petition the Director, or the Director on his own initiative, may seek an appropriate remedy.

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DEC 17 2003

4.2 Upon the SRBA District Court's issuing an order for interim administration of water rights within the Basins and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnections of ground water and surface water sources in the Snake River Basin along the reach of the Snake River between Shelley, Idaho and Milner Dam and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues, the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along the reach of the Snake River between Shelley, Idaho and Milner Dam.

5.2 This Agreement has been reached as the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

6. Dismissal or Stay of Pending Actions:

Based upon the foregoing and the parties' understanding that the Director will stay further administrative proceedings regarding his Order In The Matter of Designating the American Falls Ground Water Management Area, and unless this Agreement is breached, the parties agree as follows:

6.1 The Idaho Ground Water Appropriators, Inc. and other plaintiffs agree to secure voluntary dismissal, without prejudice, of their Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that they previously filed in the Sixth Judicial District Court.

6.2 Representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

7. General Provisions:

7.1 The provisions of this Agreement are not several.

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DEC 17 2003

7.2 This Agreement shall bind and inure to the benefit of the respective successors of the parties.

7.3 This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

7.4 Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

7.5 This Agreement is executed in triplicate. Each of the three (3) Agreements with an original signature of each party shall be an original.

7.6 This Agreement shall be effective from October 11, 2001.

7.7 This Agreement shall expire on December 31, 2003, unless extended by mutual written consent of the parties.

The parties have executed this Agreement the date following their respective signatures.

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Craig Evans, President
Bingham Ground Water District

Dated: Oct 24, 2001

MICROFILMED
OCT 17 2001

Bill Taylor, President
Bonneville-Jefferson Ground Water District

Dated: Oct 4, 2001

MICROFILMED
NOV 07 2003

Kevin Michaelson

Kevin Michaelson, President
Aberdeen American Falls Ground Water District

Dated: Oct 12 - 2001

MICROFILMED
DEC 17 2001

John Honcik, Chairman & President
Twin Falls Canal Company District

Dated: 10-22-01

MICROFILMED
DEC 17 2003

Bob Esterbrook, Chairman & President
American Falls Reservoir District, #2

Dated: 10/25/01

MICROFILMED
DEC 17 2003

Scott Breeding, Chairman & President
Milner Irrigation District

Dated: 10/23/01

MICROFILMED
DEC 17 2003

Harold L. Grant

Harold Grant, Chairman & President
North Side Pumping Company

Dated: 10-24-01

MICRO
DEC 17 2003

Russell Wooley

Russ Wooley, Chairman & President
North Side Canal Company

Dated: 10/22/01

MICR

Exhibit H

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DEC 17 2003

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 92-00021**
	)	**(Interim Administration)**
Case No. 39576	)	
	)	**ORDER GRANTING STATE OF IDAHO'S**
	)	**MOTION FOR ORDER OF INTERIM**
	)	**ADMINISTRATION**

On November 19, 2001, the State of Idaho filed a *Motion for Order of Interim Administration and Motion for Order Expediting Hearing*, pursuant to I.C. § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 35, 36, 41, and 43, in accordance with the Director's Reports for those water rights or in accordance with partial decrees that have superseded the Director's Reports.

On November 19, 2001, the Court issued its *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AOI 6f(2)* (Subcase 92-00021), which established the service procedures and hearing schedule for the State of Idaho's *Motion*.

On November 23, 2001, the State of Idaho served copies of the *Motion* and supporting briefing and affidavits and the *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AOI 6f(2)* (Subcase 92-00021) on all affected parties by U.S. Mail.[1] The State of Idaho filed the Certificate of Service with the Court on November 26, 2001.

[1] The "affected parties" are claimants in Basins 35, 36, 41, and 43 with water rights within the area shown on Attachment 1, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

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On January 8, 2002, the Court held a hearing on the State of Idaho's *Motion*.

This Court, having heard the *Motion* and reviewed the pleadings, makes the following findings of fact and conclusion of law and enters its ***Order*** as follows:

A. FINDINGS OF FACT

1. The State of Idaho has complied with the service requirements of I.C. § 42-1417(2)(b) and this Court's *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021) (Issued November 19, 2001).

2. The available water supply in all or portions of Administrative Basins 35, 36, 41, and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

B. CONCLUSION OF LAW

1. Interim administration in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1 in accordance with the Director's Reports and the partial decrees for water rights is reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.

C. ORDER

The State of Idaho's *Motion for Interim Administration* is hereby GRANTED. Pursuant to Idaho Code § 42-1417, the Court authorizes distribution of water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and the partial decrees that have superseded the Director's Reports, in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1.

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This *Order* shall continue in force and effect until modified or dissolved by this Court.

DATED this 8th day of January, 2002.

/s/Roger Burdick
ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

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Exhibit I

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John A. Rosholt
Albert P. Barker
John K. Simpson
Amy D. Chestnut
Travis L. Thompson

BARKER
ROSHOLT
&
SIMPSON
LLP

205 North 10th, Suite 520
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

233 Second Avenue North, Suite D
Twin Falls, Idaho 83301
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

John K. Simpson
jks@idahowaters.com

May 2, 2002

VIA FACSIMILE: 327-7866

Mr. Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard
Boise, Idaho 83706

Re: Administration of Water Rights Nos. 36-020708, 36-07004, and 36-07218

Dear Karl:

The Department indicated that it intends to issue instructions to the watermaster in Water District No. 130 for the delivery of water from the common source to right holders, Clear Springs and Clear Lakes. Certain information was given to the Director in early April. (See Director's letter of April 11, 2002). At the request of Clear Lakes, the right holders were given the opportunity to submit any additional "pertinent" information, which they believe relevant to the administration of water from the springs constituting the common source.

At the request of Clear Lakes a meeting was held on May 1, 2002 with the Department wherein Clear Lakes requested clarification as to the process utilized by the Department in creating the instructions to the watermaster. The Department indicated that the instructions were being developed in the event of a delivery call by Clear Springs due to the declining spring flows.

First, with respect to your willingness to accept additional "pertinent information", Clear Springs believes that the Director has the necessary information to instruct the watermaster on deliveries by priority as between the right holders in question. Partial decrees have been entered in the Snake River Basin Adjudication. The Idaho Supreme Court decision brought to finality nearly 25 years of dispute between the parties regarding the relationship their respective rights. To

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allow under the guise of administration a party to re-argue what the courts have previously decided, would ignore the intent of the Adjudication.[1]

The watermaster has the necessary information from the adjudication record and the partial decree to administer water in priority. I.C. Sec. 42-607. Further, the watermaster can only look to the face of the existing decrees and cannot go beyond the provisions of the decree in administering rights. *Stethem v. Skinner,* 11 Idaho 374, 379 (1905). As later affirmed by the Supreme Court, "the watermaster must look to the decree for instructions as to the source of the water. If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree." S*tate v. Nelson,* 131 Id 12, 951 P.2d 943, 947 (1998).

Clear Springs reiterates that it does not believe the director has the authority to go beyond the face of the decree in administering water rights. In the event that the Department and its employees, including the watermaster in Water District No. 130, choose to go beyond the decrees in administering water within the District, what would they need or be required to consider? In this particular case they have the benefit of the Idaho Supreme Court decision and Clear Lakes' admissions during the course of that litigation in the court record to assist them. The water rights dispute and administration of the rights as depicted in the 1980 agreement was brought before the SRBA Court in the form of Clear Lakes' objection to the Department's recommendation of Clear Springs' rights. The courts considered the issues and denied Clear Lakes' challenge. With respect to the relationship of the water rights and the respective priority of those rights reserved in the 1980 agreement, there is nothing left for consideration.

The Idaho Supreme Court in its January 18, 2002 Opinion affirmed the SRBA District Court's decision and held that the rights of the parties derive from the same source. In making this conclusion, the courts rejected Clear Lakes' demand that language be added to the Director's Report for Clear Springs' rights stating the source of Clear Lakes' 36-7004 right was "separate and distinct from the source of water" for Clear Springs' rights.

Moreover, the Supreme Court stated:

"Appellant objected to the Idaho Department of Water Resources' ("IDWR") recommendation by arguing its water right derives from a separate water source distinct from the Respondent's water rights and therefore, even though filed subsequent to the Respondent's water right, has priority. The SRBA district court found that the water rights of the parties derive from the same source and denied Appellant's challenge. We affirm."

January 18, 2002 Opinion, pp 1-2.

---

[1] The 1994 Interim Legislative Committee Report states in pertinent part:
While the quantification of water rights is important, it is of little use if the decree fails to provide an adequate basis for future administration. The State must know how each water right relates to another with sufficient legal and hydrologic certainty to ensure delivery in accordance with priority and in order to know what water supplies remain for future use.
p.33

The Supreme Court thus held that Clear Lakes' 36-7004 right did not have priority over Clear Springs' right. Consequently, to administer these water rights in time of shortage, the 36-7004 right would be subject to curtailment in order to fulfill Clear Springs' 36-2708 right. Contrary to assertions by Clear Lakes that the Supreme Court decision did not address administration as between the rights in question, the clear language of the decision states otherwise. Administration of the water from the common source shall give priority to the 36-02718 right over the 36-7004 right.

Under the Supreme Court's decision in *Nelson*, if the 1980 agreement or any of the supplement "pertinent" information that Clear Lakes wishes to have you consider, was essential to the definition of the rights, it too should have been referenced in the decrees. Yet, the 1980 agreement reserved for later resolution the very issue, the source of water for the subject water rights, which has been litigated in Idaho courts for the past 10 years.

> As Clear Lakes has acknowledged,
> In 1980, Clear Springs and Clear Lakes entered an agreement, which resolved the dispute arising from the construction of the dike. [Citations omitted] Clear Lakes agreed to allow the dike to remain on its property with modifications to raise water elevation and capture additional water, with a regulatory system to properly deliver water rights to each party. The agreement acknowledged Clear Lakes' water right no 36-02659 as senior, and **reserved for future resolution the issue presented in this case regarding the sources and priorities as between Clear Springs' water right no. 36-02708 and Clear Lakes' water right no 36-07004. The agreement provided that, until the dispute was resolved, ...**

Attachment A: Clear Lakes' Brief in Support of Challenge to Special Master's Recommendation, pg 8. [Citations omitted] (Emphasis added)

> The SRBA Court agreed,
> First, on June 29, 1998, Clear Lakes filed its Pre-trial Memorandum. That memorandum stated in relevant part as follows:
>
> (6) (A) The **purpose of this litigation is to resolve the issue of whether the source for Clear Springs' water rights 36-02708 and 36-02718 are separate from the source for Clear Lakes' water right no. 36-7004, ...**

Attachment A: Memorandum Decision and Order on Challenge, pg 30. (Emphasis added)

These excerpts from the SRBA record clearly reveal that Clear Lakes' intended to resolve that portion of the 1980 Agreement addressing the relationship between Clear Springs' 36-02708 and 36-02718 rights and Clear Lakes' 36-7004 right. Once resolved, as the record indicates, the rights can be administered by priority.

Water from the common source can be administered at this time to deliver water in accordance with the priorities. Indeed, that was the very reason for the general provisions in the Basin Wide

Issue No. 5, so the Department would be able to determine how to administer which rights in priority. The briefing at the special master and district court level by Clear Lakes support this proposition. *See generally, Clear Lakes' Brief in Support of Challenge to Special Master's recommendations; Clear Lakes' Brief in Support of Motion to Alter or Amend; Memorandum Decision and Order on Challenge.* Arguments regarding the applicability of a futile call defense or points of diversions were addressed and dismissed by the Special Master. *See, Findings of Fact and Conclusions of Law on Involuntary Dismissal, p. 5; See also Clear Lakes' Brief in Support of Challenge to Special Master's Recommendation, p.40; Order on Motion to Alter or Amend Judgment.*

In response to the Department's statement regarding the anticipated application of the watermaster's instructions, a requirement that a senior appropriator has to make a "delivery call" against a junior water user is contrary to the prior appropriation doctrine.[2] The SRBA Court addressed this issue:

> Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the *Musser* case. Instead, IDWR should look to the respective decrees on a common source and if necessary, curtail junior rights or make other delivery adjustments to satisfy rights in a manner that is not inconsistent with the prior appropriation doctrine. Mechanisms such as the delivery call are nonetheless in place should a water right holder dispute the administrative action or lack thereof.

Order on Cross Motions for Summary Judgment, Subcase 91-00005 (Basin-Wide Issue 5), p. 31.

Clear Springs and all water users within Water District No. 130 should expect that the watermaster will carry out the administrative responsibilities with or without delivery calls being made. Consequently, the instructions to the water master should be to administer these rights from a common source in accordance to the respective priority. If that involves changes to how the water has been delivered in the past, then that is for the water master to determine.

Sincerely,

John K. Simpson

cc: Dan Steenson
Larry Cope

[2] The statutory scheme set forth in Title 42, Chapter 6 recognizes this principle in that a watermaster is to distribute waters by priority upon direction by IDWR ". . . when in time of scarcity of water it is necessary so to do in order to supply the prior rights of other in such stream or water supply." I.C. Sec. 42-607.

VOLUME 1 of 2 **CASE NO. 26925**

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: SRBA CASE NO. 39576

CLEAR SPRINGS FOODS, INC.,

Claimant - Respondent,

vs.

CLEAR LAKES TROUT COMPANY,

Objector - Appellant.

Appealed from the SRBA District Court of the Fifth Judicial District of the State of Idaho, in and for Twin Falls County

HONORABLE BARRY WOOD, ADMINISTRATIVE DISTRICT JUDGE AND PRESIDING JUDGE OF THE SNAKE RIVER BASIN ADJUDICATION

Hepworth, Lezamiz & Hohnhorst,

Attorneys for Clamaint - Respondent,

Ringert Clark, Chartered,

Attorney for Objector - Appellant.

FILED THIS _____DAY OF _____, 1999,

_____CLERK

BY_____DEPUTY

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specificity the different sources.[2] Clear Lakes argues that the two sources are defined by a historic split in flows from the original stream channel. One source is the western flow, and one source is the eastern flow. Here, the court cannot identify with any specificity the location of the historic dividing point allegedly splitting the flows. Because of conflicting testimony, the court cannot be sure which dividing point is accurate in making its recommendation.[3]

Third, even if the historic dividing point defines the sources, both Mr. Hardy and Mr. Chapman testified that the eastern and western flow are currently commingled in the east pond. Furthermore, it is conceded that no water flows east as it may have done historically. Most importantly, Mr. Chapman testified that there are no current diversion points for water right 36-07004 located on the eastern side of any historic dividing point. In other words, accepting Clear Lakes' claim that there are two different sources defined by eastern and western flows, there is no evidence that water right 36-07004 is currently diverted from a source on the eastern side of any historic dividing point. Because the historic dividing point is no longer present, because there is no eastern flow, because the historic eastern and western flows are commingled in the east pond, and because there is no current water right diverted from the historic eastern stream, there is no way to administer the historic separate sources; sources which do not exist today.

Fourth, whatever dividing point which may have existed, does not exist today. The dividing point and eastern flow were eliminated through work performed by Clear Lakes. Consequently, Clear Lakes is estopped from claiming two separate historic sources. Under Clear Lakes' argument, it would be entitled to claim separate sources even though those sources do not currently exist. The result of such a claim would be that Clear Lakes could satisfy all its senior 36-02659 right from the west pond at the expense of Clear Springs' junior rights. At the same time, Clear Lakes could then divert all its 36-07004 junior water right from the east pond and insulate that right from Clear Springs' senior rights diverted out of the west pond. If Clear Lakes wanted to claim the benefit of these separate sources, it should have maintained the separate nature of the sources.

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2 As previously indicated, the court does not consider two sources located on either side of an island as separate sources. In addressing Clear Lakes' argument as to the separate stream flows, the court is not making any finding that the two stream flows have ever been separate sources.

3 Is the dividing point 80 feet from the western gate as Mr. Hardy testified? Or the dividing point located 110-120 feet from the western gate as Mr. Chapman testified? Or is the dividing point between the historical "highest western flow" and historical "highest eastern flow" as Mr. Chapman opined in his deposition?

Re 7
Corresp
file #3

Clear Lakes Trout Company, Inc.

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MAY 18 1999
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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, 36-07201 and 36-07218
Case No. 39576	REPLY BRIEF IN SUPPORT OF CHALLENGE TO SPECIAL MASTER'S RECOMMENDATIONS

DESCRIPTION

This is Clear Lakes Trout Company, Inc.'s ("Clear Lakes") *Reply Brief in Support of Challenge to Special Master's Recommendations* for water right numbers 36-02708, 36-07201 and 36-07218.

ARGUMENT

In its Response Brief (C.S. Brief), Clear Springs reiterates the Special Master's findings of fact and conclusions of law without advancing any additional substantial support in the record or in the law for those findings and conclusions. Clear Lakes has responded at length in its *Brief in Support of Challenge to Special Master's Recommendations* ("Brief") to the findings and conclusions in the Special Master's *Order*, and will not repeat all the facts and law which support its position in

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III. The Water Rights Can Be Administered Separately

As discussed in Clear Lakes' Brief, Clear Lakes has established through the unrefuted testimony of Sheri Chapman that Clear Springs' and Clear Lakes' water rights can be administered separately through the diversion structures already in place. For many years, water has been delivered to Clear Springs and Clear Lakes through the common diversion structure shown in Exhibit 1A. RT, p. 309, ln. 1 - p 313, ln. 5. Mr. Chapman testified that, after a percentage calculation based on the licensed quantity of the western and eastern stream water rights, adjustments could be made to that diversion structure to ensure proper delivery of Clear Springs' and Clear Lakes' western stream water rights. *Id.* *See also* RT, p. 331, ln. 15 - p. 332, ln. 6.

IV. Clear Lakes Did Not Divert Water From the Eastern Stream Under Water Right No. 36-02659

Clear Springs speculates that Clear Lakes must have diverted water from the eastern stream under water right no. 36-02659 because Ted Eastman testified that Clear Lakes diverted water from the eastern stream before it filed for permit no. 36-07004. C.S. Brief, p. 12. This, Clear Springs contends, demonstrates that Clear Lakes' predecessor considered the western and eastern streams as one source. This argument suffers from several errors.

First, Clear Springs mischaracterizes Mr. Eastman's testimony. In support of this argument Clear Springs cites the Reporter's Transcript page 404, line 3 to page 407, line 20, with specific reference to page 405, lines 17 to 23. Clear Springs' counsel first asked Mr. Eastman about Clear Lakes' initial construction, including construction of ponds. RT, p. 404, lns 3-19. Mr. Eastman testified that Clear Lakes' modifications occurred "in '66, '67, '68, '69." RT, p. 404, lns 7-8. The following are the portions of the colloquy between Clear Springs' counsel and Mr. Eastman relied

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COPY

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, 36-07201 and 36-07218
Case No. 39576	BRIEF IN SUPPORT OF CHALLENGE TO SPECIAL MASTER'S RECOMMENDATIONS

DESCRIPTION

This is Clear Lakes Trout Company, Inc.'s ("Clear Lakes") *Brief in Support of Challenge to Special Master's Recommendations* for water right numbers 36-02708, 36-07201 and 36-07218.

PROCEDURAL BACKGROUND

On November 2, 1992, the Director of the Idaho Department of Water Resources filed the *Director's Report for Reporting Area 3* recommending Clear Springs Trout Inc.'s ("Clear Springs") claim nos. 36-02708, 36-07201, and 36-07218. On April 30, 1993 Clear Lakes Trout Co. ("Clear Lakes") filed objections to those recommendations, in which Clear Lakes objected to the following aspects of IDWR's recommendations:

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has always had the same source and point of diversion as water right no. 36-02708. RT, p. 314, lns. 18-22; p. 386, ln. 21 - p. 387, ln. 6.

The construction of this dike was the subject of a lawsuit Clear Lakes filed against Clear Springs which alleged that Clear Springs' construction of the dike constituted a trespass. RT, p. 141, ln. 19 - p. 143, ln. 2; Ex. O, p. 1. In 1980, Clear Springs and Clear Lakes entered an agreement which resolved the dispute arising from construction of the dike. RT, p. 140, lns. 13-16; Ex. O. Clear Lakes agreed to allow the dike to remain on its property with modifications to raise water elevation and capture additional water, with a regulatory system to properly deliver water rights to each party. Ex. O, p. 4-5, ¶ 2. The agreement acknowledged Clear Lakes' water right no. 36-02659 as senior, and reserved for future resolution the issue presented in this case regarding the sources and priorities as between Clear Springs' water right no. 36-02708 and Clear Lakes' water right no. 36-07004. RT, p. 256, ln. 16 - p. 257,ln. 3; Ex. O, pp. 3-4, ¶ 1. The agreement provided that, until the dispute was resolved, when the total quantity available was less than the 375 cfs authorized by Clear Springs water right no. 36-02708 (200 cfs) and Clear Lakes water right nos. 36-02659 and 36-07004, water would be delivered to each facility in the proportion of its water right(s) to the total (i.e. 200/375 for Clear Springs, and 175/375 for Clear Lakes). Ex. O, p. 4, ¶ 1. The agreement specifically reserved to each party "the right to rely on conditions as they existed at the time Permits Nos. 36-7004 and 36-2708 were applied for in any determination of their relative priorities." *Id.*; RT, p. 272, ln. 14 - p. 273, ln. 7 (emphasis added).

Clear Springs made the modifications to the dike in 1980 or 1982. RT, p. 102, ln. 17 - p. 103, ln. 9. Clear Springs put in a new dike and constructed a common diversion structure in which

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collect springs which discharged into the eastern stream at a high enough elevation to divert the water through three pipes into hatchery building and fry ponds. *Id.* Like all of the water which formerly flowed through the eastern stream channel, Clear Lakes continued to divert this water under water right no. 36-07004. RT, p. 159, ln. 21 - p. 160, ln. 5.

5. Clear Lakes' facilities and diversions after construction of Clear Springs' dike

Exhibit H shows Clear Lakes facilities and diversions during the 1970s. By that time, Clear Lakes had constructed the lower raceways Mr. Hardy envisioned to replace the earthen ponds. P. 100, ln 23 - p. 101, ln. 1. An opening in the eastern end of Clear Springs' dike allowed water to continue to flow through the western stream to Clear Lakes' lower diversion. Ex. H. The dike changed the configuration of the western stream, but it did not change the source from which water was diverted to Clear Lakes' facility. RT, p. 127, lns. Lns 8-12. Clear Lakes continued to divert a portion of water right no. 36-02659 from the western stream at the location of its original lower diversion through pipes into additional raceways on the western portion of its property, and divert the remainder of that water right from the west dike, its second diversion, into the diversion pool. RT, p. 98, ln. 15 - p. 100, ln. 22; Ex. H.

6. Clear Lakes' present water sources and diversions

As previously discussed, Clear Lakes' lawsuit regarding Clear Springs' construction of the dike in the western stream was resolved by the 1980 agreement and Clear Springs' modification of the dike and installation of the common diversion structure pursuant to the agreement during the early 1980s. The location and configuration of Clear Lakes' diversion works after that construction have been as depicted in the 1997 aerial photograph. RT, p. 102, ln. 17 - p. 103, ln. 9; Ex. I. Clear Lakes'

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were it to occur. Similarly, a call on Clear Lakes' water right number 36-07004 to fill Clear Springs' water right number 36-02708 would also be futile. No water can nor has ever flown from the source for water right number 36-07004 into the source for water right number 36-02708. Therefore, even if water right number 36-07004 were shut off, water from its source could not physically contribute to the source for Clear Springs' water right number 36-02708. For this reason, any implication by the Special Master that "all water rights in the Snake River Basin are presumed connected" for purposes of administration is erroneous.

VIII. The Water Rights Can Be Administered With Separate Sources

Finally, the Special Master's conclusion that there is no method by which to administer the separate sources is erroneous. Mr. Chapman testified at length regarding the administration of the separate sources by using the variable blade weir through which Clear Springs' water right numbers 36-02708 and 36-07218 and a portion of Clear Lakes' water right number 36-02659 are delivered. RT pp. 307-312; RT pp. 331-332; RT pp. 339-341; RT p. 350. His testimony was uncontroverted.

CONCLUSION

The evidence at trial clearly establishes that the source for Clear Lakes' water right number 36-07004 has never contributed any water to the source for Clear Springs' water right numbers 36-02708 and 36-07218, and cannot now contribute water to the source for water right numbers 36-02708 and 36-07218. This fact, together with the other evidence discussed in this brief, prove by substantial evidence that the source for Clear Springs water rights is separate from the source for Clear Lakes' water right number 36-07004. This water right protects Clear Lakes priority as the only water right in that source. For this reason and for the other reasons stated above, the Presiding Judge

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Twin Falls, ID

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, 36-07201 and 36-07218
Case No. 39576	BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND SPECIAL MASTER'S RECOMMENDATIONS

DESCRIPTION

This is Clear Lakes Trout Company, Inc.'s ("Clear Lakes") *Brief in Support of Motion to Alter or Amend the Special Master's Recommendations* for water right numbers 36-02708, 36-07201 and 36-07218.

PROCEDURAL BACKGROUND

On November 2, 1992, the Director of the Idaho Department of Water Resources filed the *Director's Report for Reporting Area 3* recommending Clear Springs Trout Inc.'s ("Clear Springs") claim nos. 36-02708, 36-07201, and 36-07218. On April 30, 1993 Clear Lakes Trout Co. ("Clear Lakes") filed objections to those recommendations, in which Clear Lakes objected to the following aspects of IDWR's recommendations:

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water was diverted to Clear Lakes' facility. RT, p. 127, lns. Lns 8-12. Clear Lakes continued to divert a portion of water right no. 36-02659 from the western stream at the location of its original lower diversion through pipes into additional raceways on the western portion of its property, and divert the remainder of that water right from the west dike, its second diversion, into the diversion pool. RT, p. 98, ln. 15 - p. 100, ln. 22; Ex. H. An opening in the eastern end of Clear Springs' west dike allowed water to continue to flow through the western stream to Clear Lakes lower diversion. Ex. H. The eastern dam continued to divert the majority of water under water right no. 36-07004, with the remainder diverted through the pipes. RT, p. 100, lns. 18-22; Ex. H.

6. **Clear Lakes present water sources and diversions**

As previously discussed, Clear Lakes' lawsuit regarding Clear Springs' construction of the dike in the western stream was resolved by the 1980 agreement and Clear Springs' modification of the dike and installation of the common diversion structure pursuant to the agreement during the early 1980s. The location and configuration of Clear Lakes' diversion works after that construction have been as depicted in the 1997 aerial photograph. RT, p. 102, ln. 17 - p. 103, ln. 9; Ex. I. Clear Lakes' eastern dike continues to divert the majority of the eastern stream flow under water right no. 36-07004 into the Clear Lakes facility through the diversion pond, and the pipes continue to divert the remainder of that water into Clear Lakes' hatchery building and fry ponds. RT, p. 101, ln. 17 - p. 102, ln. 16; RT, p. 159, ln. 21 - p. 161, ln. 3. Clear Lakes diverts a portion of water right 36-02659 through one of the diversions in the common diversion structure, and the remainder is diverted by the western dike into the Clear Lakes facility through the diversion pool. RT, p. 103, ln. 17 - p. 105, ln. 21.

Mr. Chapman testified that the east pool is part of Clear Lakes' diversion works. RT, p.

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Dismissal, at 6. This conclusion is wrong for several reasons. First, legal descriptions of the quarter-quarter sections within which points of diversion are located do not specify that the points of diversion are the same; it merely specifies that they are within the same quarter-quarter section. Second, as already discussed, it is possible that points of diversion within the same quarter-quarter section can divert water from two separate sources. *See* fn. 3, *infra.* Third, if the premise for the Special Master's conclusion were correct: that the licenses for Clear Springs' water right numbers 36-02659 and 36-07004 describing the points of diversion as being within the same quarter-quarter sections means that the water rights are diverted from the same source, then the same rationale should be applied to the Clear Springs' water right licenses. The licenses for water right numbers 36-02708 and 36-07218 specify that the point of diversion for both rights is in T09S, R14E, Section 2, NWSE. Trial Exhibits 16C; 28. This point of diversion is in a separate quarter-quarter section than the points of diversion described in the licenses for Clear Lakes' water right numbers 36-02659 and 36-07004. Thus, under the reasoning in the *Dismissal*, the source for Clear Springs' water right numbers 36-02708 and 36-07218 is separate from the sources for Clear Lakes' water right numbers 36-02659 and 36-07004.

For these reasons, the Special Master should determine that Clear Lakes' permit to appropriate water right number 36-07004 entitles it to protection from attempted interference with the source of that water right by Clear Springs.

V. THE CONCLUSIONS OF LAW AND FACTUAL UNDERPINNINGS ON WHICH THE SPECIAL MASTER BASES HIS DECISION THAT THE SOURCES ARE SEPARATE ARE ERRONEOUS

In the *Dismissal*, the Special Master states several reasons for the conclusion that the source for water right numbers 36-02708 and 36-07218 is not separate from the source for water

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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 REPLY TO CLEAR SPRINGS FOODS' RESPONSE BRIEF IN OPPOSITION TO MOTION TO AMEND JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO RECONSIDER MEMORANDUM DECISION AND ORDER ON CHALLENGE

INTRODUCTION

Clear Lakes Trout Company, Inc. ("Clear Lakes") requests that the Court reconsider or amend its *Memorandum Decision and Order on Challenge* (hereinafter "*Memorandum Decision*") for the following reasons: (1) The Court's conclusion that the western and eastern streams are not separate sources is based on the erroneous and unsupported finding that "all" of the spring discharges along the canyon rim were collected or commingled in "one channel or common body of water"

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In its *Response Brief*, Clear Springs agrees with Clear Lakes' definition of separate sources, but fails to show that the eastern and western streams did not meet that definition. Moreover, Clear Springs did not even attempt to show that there was one channel into which all of the water was collected or commingled prior to forming separate eastern and western streams, and did not refute the historical existence of the separate eastern and western streams. Similarly, Clear Springs does not explain the 1980 agreement that both Clear Lakes and Clear Springs were entitled to "rely on conditions as they existed at the time Permits Nos. 36-7004 and 36-2708 were applied for in any determination of their relative priorities." Ex. O, ¶ 1. Instead, Clear Springs argues that there have been so many changes to the eastern and western streams that they are no longer separate.

Clear Springs and Clear Lakes agree that water diverted from the eastern and western streams is now commingled in a common diversion pool. However, none of the changes that were made to the diversion works after the appropriation of Clear Lakes' and Clear Springs' water rights from the separate streams, including the commingling of water diverted from the separate streams, altered conditions in a manner that affected the separate nature of the sources of Clear Springs' and Clear Lakes' water rights. In fact, the term "commingled" that is repeatedly used by Clear Springs necessarily presumes that the sources being so described were at one time separate.

It is undisputed that only Clear Lakes is entitled to the eastern stream and western stream water that is commingled in the eastern diversion pool. Thus, the western stream water to which Clear Springs is entitled is completely contained in the western diversion pool. If the diversion pools had not been constructed, and current conditions were the same as at the time of the original appropriations, Clear Springs would be entitled only to that flow of the western stream in excess of

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J. Charles Hepworth*
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*Member CA Bar

July 28, 1999

Copy:
Larry
Keith
Terry

Tim Hannifen
Clear Springs Foods, Inc.
P.O. Box 712
Buhl ID 83316

Re: Clear Springs Foods, Inc. - Adjudication
Our File No. 88-1-019.11

Dear Tim:

Enclosed for your information please find a copy of the decision I obtained from the court today.

Please call me regarding Clear Springs using all of our rights.

Very truly yours,

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: John C. Hepworth
John C. Hepworth

JCH/DCB

Enclosure

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II.

BRIEF PROCEDURAL BACKGROUND

Clear Springs Foods Inc. (hereinafter Clear Springs) filed for water rights 36-02708, 36-07201 and 36-07218. On November 2, 1992, the Director of the Idaho Department of Water Resources filed the *Director's Report for Reporting Area 3* recommending Clear Springs' claims 36-02708, 36-07201 and 36-07218. On May 3, 1993, Clear Lakes filed objections to those recommendations in which Clear Lakes objected to the following aspects of IDWR's recommendations:

A. Clear Springs' Water Rights 36-02708 and 36-07218 vs. Clear Lakes' Water Right 36-07004

Clear Lakes objected to both the "source" and "point of diversion" elements of IDWR's recommendations, stating that water rights 36-02708 and 36-07218 are diverted from a separate source than is Clear Lakes' water right 36-07004 and requesting language clarifying that fact in the decrees of water rights 36-02708 and 36-07218.

B. Clear Springs Water Right 36-07201 vs. Clear Lakes Water Right 36-02659

Clear Lakes objected to the "source," "point of diversion" and "remarks" elements of IDWR's recommendation of Clear Springs' water right 36-07201 stating that the recommendation did not specify that the source for Clear Springs' water right 36-07201 was part of the source for Clear Lakes' water right 36-02659, and requesting clarifying language in the decree of Clear Springs' water right 36-07201.

At the trial on the merits before the Special Master, Clear Lakes presented its case in chief through three witnesses: Earl Hardy, Sherl Chapman and Jess Eastman. Clear Springs then presented Jess Eastman as its first witness. After questioning Mr. Eastman, Clear Springs moved for an involuntary dismissal. The Special Master granted Clear Springs' *Motion for Involuntary Dismissal*, finding that there were not separate sources for Clear Springs' rights 36-02708, 36-07201 and 36-07218 and Clear Lakes' right 36-07004. *Reporter's Transcript of July 14, 1998,* pp. 471-474.

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three islands and of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. Exhibit AA. "But for" this one continuous structure, there would not be an eastern pool. (Tr., p. 327, Ll. 18-25). The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows.

6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. (Tr., p. 300, Ll. 8-15). Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. (Tr., p. 302, L. 20 - 303, L. 4). Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. (Tr., p. 330, Ll. 2-6).

7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. (Tr. p. 223, Ll. 17-21; p. 225, Ll. 4-8). There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. (Tr., p. 222, L. 19 - p. 223, L. 2). Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. (Tr., p. 332, Ll. 3-10).

8. There are two discharge points from the eastern pool. Part of water right 36-02659 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool. 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). State differently, the discharge points for water right 36-07004 are located to the west of the alleged historic dividing point.

9. In addition to the source element, Clear Lakes also objected to Mr. Chapman's point of diversion. At the start of the trial, Clear Lakes' attorney

stream for right 36-07004. See generally Reporter's Transcript of the July 13, 1998 hearing, pages 115 through 130.

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. Once in this channel, or natural water course [as defined in *Scott v. Watkins*, 63 Idaho 506, 517 (1942), and *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484 (1909)], because of some unknown underwater geological feature, the water in this course then "braided" or "divided" into separate streams, creating an island. 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. The streams then flowed again into a common body of water called Clear Lake. From Clear Lake, the water drained into the Snake River.

Essential to the understanding of the issue is a quick review of the priority dates of the respective claims. They are:

36-02659 (Clear Lakes), 100 cfs, June 23, 1966;
36-02708 (Clear Springs), 200 cfs, September 28, 1966;
36-07004 (Clear Lakes), 75 cfs, July 21, 1967;
36-07201 (Clear Springs), 10 cfs, August 4, 1971; and
36-07218 (Clear Springs), 75 cfs, January 24, 1972.

Clear Lakes' right 36-02659 and Clear Springs' rights 36-02708 and 36-07218 are diverted at the area of what was originally the "western" stream or from the western side of the pool. It is claimed that Clear Lakes' right 36-07004 is taken from what was originally the "eastern" stream, or from the east side of the pool. Clear Lakes' motive was characterized as:

> Clear Lakes seeks to have remarks added to Clear Springs' water rights describing their sources as separate from the source of Clear Lakes' water right no. 36-07004 to ensure that this water right is not subject to curtailment in times of water shortage to deliver Clear Springs' water rights.

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tributary to Clear Lake. This is misleading, however, because of the natural geologic conditions. Namely, the Brailsford Stream, or what is sometimes referred to as the "far western stream," which is the source of Clear Springs' right 36-07201, never ran into the channel or pool of water from which Clear Lakes' rights 36-02659 and 36-07004 and Clear Springs' rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights. For these reasons, Clear Lakes' challenge regarding Challenge Issue No. 8, the source of Clear Springs' right 36-07201, is granted; for purposes of administration, it is clearly from a separate "source" than the other four rights.

An additional point of clarification on this "source" issue may be useful. Clearly, "source" may have different meanings in different situations. As Mr. Hardy noted , the Snake River Aquifer is the source (singular) for all the relevant springs and stream flows (plural) involved in these subcases. The springs are discharged at various points across the north rim or wall of the Snake River Canyon. But because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

VII.

REVIEW OF THE CHALLENGES AND ALLEGED DEFICENCIES OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL MASTER REGARDING THE POINTS OF DIVERSION ISSUES

Clear Springs' Rights 36-02708 and 36-07218

Abandonment of these issues

Clear Lakes' Challenge issues 12, 13, 14 and 17 deal with claimed errors of the Special Master in regard to the point of diversion element for rights 36-02708 and 36-07218. The Special Master found Clear Lakes had abandoned their objections to point of diversion. The record in this case clearly supports that finding and this Court adopts the finding. Specifically, the following excerpts from the records unequivocally support this finding.

First, on June 29, 1998, Clear Lakes filed its *Pre-trial Memorandum*. That memorandum stated in relevant part as follows:

> (6) (A) The purpose of this litigation is to resolve **the issue of** whether the **source** for Clear Springs' water right nos. 36-02708 and 36-07218 are separate from the source for Clear Lakes' water right no 36-07004, and if so, to determine language to be placed in the decree of water right nos. 36-02708 and 36-07218 to assist the Idaho Department of Water Resources in the administration of water right nos. 36-02708, 36-07218 and 36-07004.
>
> (B) **Clear Lakes asserts** that Clear Springs' water right nos. 36-02708 and 36-07218 are diverted from **a separate source** than that from which water right no. 36-07004 is diverted. Thus Clear Lakes asserts that the water rights must be decreed with language assuring that IDWR will be able to administer the water separately. The basis on which Clear Lakes relies is the fact that water right no. 36-07004 was originally established and beneficially used from a completely different source with a different point of diversion than were water right nos. 36-02708 and 36-07218, and that Clear Lakes has continued to divert water right no. 36-07004 from that separate source with a different point of diversion than that from the through which Clear Springs' water rights are diverted.
>
> . . . .
>
> (E) **The issue of fact remaining to be litigated at trial is:** Whether Clear Lakes' water right no. 36-07004 is diverted from a separate **source** than that from which Clear Springs' water right nos. 36-02708 and 36-07218 is diverted.
>
> (F) **The issues of law remaining to be litigated at trial are:** (1) Whether Clear Springs can maintain that the **source** for water right nos. 36-02708 and 36-07218 is "springs" when Clear Springs neither owned nor had specific permission to appropriate water right nos. 36-02708 and 36-07218 from springs on those lands as required by law (2) The appropriate language to insert as remarks in water

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CLEAR SPRINGS FOODS
Received
AUG 22 2000

August 21, 2000

Copy to:
Larry
Keith
Terry
8-22-00

Tim Hanifen
CLEAR SPRINGS FOODS, INC.
P.O. Box 712
Buhl ID 83316

RE: **Clear Lakes v. Clear Springs** \ File #88-1-019.11

Dear Tim:

Enclosed is a copy of Judge Wood's decision on Clear Lakes' motion to alter or amend judgment. The same is self-explanatory but should you have any questions, feel free to call me.

I anticipate an appeal will be filed based upon what we are hearing from Hardy's attorneys.

Thank you.

Very truly yours,

HEPWORTH, LEZAMIZ & HOHNHORST

By: John C Hepworth
John C. Hepworth

\cb
Enc.
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immaterial). However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. • • Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be "futile." Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. *See United States v. Haga*, 276 F. 41, 43 (D. Idaho 1921)(holding appropriator on main channel can complain of diversion from tributary when tributary, if not interfered with, would make contribution to main channel). Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. *See e.g., Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9-10, 154 P.2d 507, 515-16 (1944)(citing *Crockett v. Jones*, 47 Idaho 497, 277 P. 550; *Morris v. Bean*, 146 F. 42)(holding a subsequent appropriator has a vested right to a continuance of conditions as they existed when he made his appropriation). In essence, the junior is protected by the respective location of the diversion works on the common source.

In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. However, this issue is addressed administratively pursuant to IDWR's procedures for making a "delivery call," and not through the SRBA. The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.

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Clear Lakes would first have to establish which particular springs fed the particular channel from which Clear Lakes was diverting. The record would not support the conclusion that only certain springs fed a particular channel, the evidence is to the contrary. Since the water co-mingled prior to, and contemporaneously with, the formation of the two channels, the respective channels more accurately constitute different points of diversion along a common source as opposed to independent sources. If the underwater division creating the two streams still existed today, as in the above hypothetical, Clear Lakes might in all likelihood be insulated from a delivery call by Clear Springs because both parties diverted downstream of the underwater division. As a result, cutting off Clear Lakes' water supply at the historical point of diversion would not increase the water supply to Clear Springs. The source is the same, the difference is that Clear Lakes would have been protected by the respective points of diversion in relation to the natural conditions in existence prior to the stream alterations. Clear Lakes would also be protected by the "no injury rule" in the event Clear Springs attempted to move its point of diversion above the underwater division. However, once Clear Lakes consented to the modification of the stream and the diversion works, any protections afforded by the historical stream conditions were eliminated. Following the stream modifications, cutting off Clear Lakes' water supply may well increase Clear Springs' water supply in times of shortage. However, this process is an administrative determination and not an issue to be decided in the SRBA.

Mr. Honsinger: The point at which the streams were separated was under water, yes, Your Honor. But eastern water flowed to the east. Western water flowed to the west. It wasn't co-mingled. It flowed to the east and west around the island.

Tr., at pp. 19 and 20.

Clear Lakes' position does not make sense. Clearly, the above description of the historical conditions argued by counsel indicates that some of the water was co-mingled (i.e., the factual description is inconsistent with the conclusion). Thus the springs are tributary to the respective channels. However, even if the water was not co-mingled, the historical conditions are no longer in existence and as the conditions exist today the water is co-mingled. Since there is no evidence in the record about the historical flows down the respective channels, even if the Court concluded the channels were in fact derived from independent sources, the Court would have no way of determining the scope of the respective rights. The evidence does not show which particular springs fed each channel.

that each can be administered accordingly. The respective quantities which flowed down the two channels during seasonal fluctuations and dry years would have to be determined. Suppose during dry years 75% flowed down the west channel and 25 % flowed down the east channel. The administration of the respective rights would have to take these factors into consideration. Since there is very little evidence of the historical conditions, the Court would have no way of making these determinations. There is a complete failure of proof as to these factors.

Lastly, even if Clear Lakes' partial decree indicated a different source than Clear Springs' partial decree, the source element contained in the partial decree would not necessarily be dispositive as to whether Clear Springs could make a call. Clear Lakes' may be able to hold up its decree indicating a separate source as a starting point for a defense, but Clear Springs could still demonstrate that its senior right was being affected by Clear Lakes' diversion. Again, this is determined administratively.

D.

THE TESTIMONY OF JEFF EASTMAN DOES NOT SUPPORT THE CLAIM OF INDEPENDENT SOURCES.

Clear Lakes also argues that this Court failed to consider the testimony of Jeff Eastman. Clear Lakes argues that Mr. Eastman's testimony "unequivocally establishes that the eastern stream and its tributary springs have never been part of the source for Clear Springs' water rights." Important to the Court's decision was the historical conditions in existence prior to the modifications. The Court found the testimony of Earl Hardy to be the most probative and illustrative of the historical conditions. The testimony of Mr. Eastman is consistent with the testimony of Mr. Hardy in that Mr. Eastman's testimony also established factually that the water flowing from the series of springs flowed around various islands prior to flowing into the separate channels. *Tr.* pp. 401-402. Mr. Eastman also testified that the source for both streams was the Snake River Aquifer, which he considered to be one source. *Tr.* pp. 400-401. Thus, Mr. Eastman's

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Samuel Kaufman (1921-1986)

May 2, 2002

BY HAND DELIVERY

Karl Dreher
Director
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83706

Re: Administration of Water Rights Nos. 36-02708, 36-07218, and 36-07004

Dear Karl:

Thank you for the opportunity to provide information as you prepare instructions on administration of Clear Springs' water right nos. 36-02708 and 36-07218 and Clear Lakes' water right no. 36-07004. In response to your April 11, 2002 letter and the extension of time you graciously allowed us to submit information, the enclosed memorandum with attachments provides information that is essential to the Department's administration of water rights through the shared diversion works in the western diversion pool located to the north of the Clear Lakes hatchery.

Based on our discussion yesterday, Clear Lakes understands that your development of instructions to the Water District 130 watermaster on administering water rights nos. 36-02708, 36-07218 and 36-07004 was initiated in response to a verbal communication from John Simpson during which he asked you how the Department will administer these water rights. Clear Springs has not formally, informally, verbally, in writing or otherwise: asked the Department to curtail Clear Lakes' diversion of water (i.e. made a delivery call specific to Clear Lakes); asked the Department to deliver 200 cfs without reference to curtailment of other rights (i.e. made a general delivery call); or asked the Department to render a decision that such curtailment will occur in the event that Clear Springs makes such a delivery call. You do, however, anticipate that Clear Springs will make a delivery call seeking curtailment of Clear Lakes' diversion of water. As discussed in my April 30, 2002 letter to you, before John Simpson contacted you in March, he and Larry Cope unambiguously advised us of Clear Springs' intention to pursue curtailment of Clear Lakes' diversion through the shared diversion works in the western diversion pool.

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455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342

In response to John Simpson's question about administration and in anticipation of a delivery call against Clear Lakes water right no. 36-07004, you have determined that the Department has jurisdiction through Water District 130 to administer water diversions of spring water through the shared diversion works in the western diversion pool to the north of the Clear Lakes facility, and you are preparing instructions to the Water District 130 watermaster that will address whether to curtail Clear Lakes' diversion of water through the shared diversion works in the event such a call is made. It is apparent from your April 11, 2002 letter that you have not listed Clear Lakes' water right no. 36-02659 as one of the rights subject to administration because it is the most senior right from the spring source and is not, therefore, subject to curtailment or adjustment to satisfy any of the other water rights.

You and Phil Rassier are wondering about the effect of the 1980 settlement agreement between Clear Lakes and Clear Springs in the Department's administration of these water rights. The effect of the agreement is discussed more fully later in this letter. At the outset, however, of your consideration of administration of the water rights, it is important to understand that the 1980 agreement continues in effect, and that the compromise division of water in the agreement has not been usurped by the SRBA court's decision. The SRBA decision in Clear Springs Subcase Nos. 36-02708 and 36-07218 which was affirmed by the Supreme Court, found that Clear Lakes' and Clear Springs' water rights are diverted from a common spring source. The SRBA court has issued partial decrees for Clear Lakes' and Clear Springs' water rights identifying the springs as the source. Neither the SRBA decision, nor the Supreme Court's Decision constitute a legal determination as to how the water rights should be apportioned. In his last decision in the Clear Springs subcase, Judge Wood stated that administration of the water rights is to be determined by the Department, not in the SRBA. There has been no final agreement between Clear Lakes and Clear Springs and no legal determination that replaces the compromise division of water in the 1980 agreement.

It is with the understanding summarized above that we submit the enclosed information. Please advise me if you require any further information or have any questions regarding the enclosed information. I also request that you advise me of any verbal or written information that your permit or that Clear Springs seeks to submit in response to the enclosed information, and that you provide Clear Lakes an opportunity to reply. Thank you again for your consideration in this matter.

Yours very truly,

Charles L. Honsinger

Enclosures

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MAY 17 2002

cc: Clear Lakes Trout Company
John Simpson

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LETTER TO KARL DREHER FROM CHARLES L. HONSINGER DATED MAY 2, 2002

MEMORANDUM

To: Karl Dreher, Director, Idaho Department of Water Resources
From: Clear Lakes Trout Company
Re: Administration of water right nos. 36-02659, 36-02708 and 36-07004
Date: May 2, 2002

This memorandum is submitted in response to your April 11, 2002 letter which provides Clear Lakes Trout Company (Clear Lakes) and Clear Springs Foods (Clear Springs) an opportunity to submit additional information for your consideration as you develop instructions to the watermaster for Water District 130 on administration of Clear Lakes' water right no. 36-07004 and Clear Springs' water right nos. 36-02708 and 36-07218. We understand that you are developing instructions in response to a Clear Springs' inquiry and that much of the information you have reviewed to date has been provided by Clear Springs. Clear Lakes greatly appreciates this opportunity because it is clear from your letter that you have not received sufficient information to evaluate the water rights and issue instructions for administration of the diversions.

Summary

We understand that, thus far, you have determined that the Department has jurisdiction to administer water rights diverted through the shared diversion works you viewed during your April 2, 2002 visit, and that those works are the only means of regulating diversions by Clear Lakes and Clear Springs. By omission, your letter also recognizes that Clear Lakes' first priority water right no. 36-02659 is not subject to regulation in order to supply water to the junior water rights from the common spring source. Clear Lakes agrees with these conclusions.

However, your letter indicates that you assume that Clear Lakes' water right no. 36-07004 is diverted through the shared diversion works located in the western diversion pool known as the "Western Pool," so that this water right may be regulated by adjusting the adjustable gate in the portion of the diversion structure through which Clear Lakes diverts water. This assumption is incorrect. The information discussed in and provided with this memorandum, including, the Partial Decrees for Clear Lakes water rights and Special Master Haemmerle's Findings of Fact in the Clear Springs subcase for water right nos. 36-02708 and 36-07218, establishes that the only Clear Lakes' water right that is diverted through the Western Pool and can be regulated by the shared diversion works is Clear Lakes' first priority right no. 36-02659. As your April 11, 2002 letter implicitly recognizes, the prior appropriation doctrine does not allow regulation or curtailment of a senior water right in order to increase the water supply to a junior water right in times of shortage. Therefore, the shared diversion works cannot be adjusted to reduce Clear Lakes' diversion of water through the Western Pool in response to a delivery call by Clear Springs.

Clear Lakes' Partial Decrees and Special Master Haemmerle's Findings of Fact also establish that Clear Lakes' water right no. 36-07004 is diverted through the adjacent diversion pool known as the "Eastern Pool" and through pipes that divert spring discharges that are tributary to the Eastern

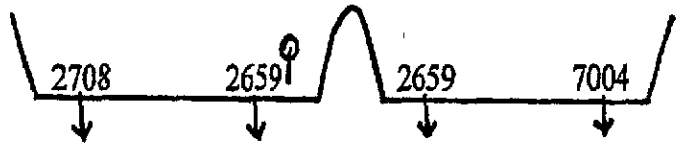
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Pool (the Eastern Pool and the pipes are hereinafter sometimes referred to collectively as the Eastern Pool). Diversion of spring water through the Eastern Pool and the pipes does not affect the [flow of spring water available for] diversion through the Western Pool. There have never been any gates or other works that could be adjusted to reduce Clear Lakes diversion of water through the Eastern Pool or the pipes. Even if there were such works, it is not physically possible to increase the flow of water available for diversion through the Western Pool by curtailing Clear Lakes diversion of water through the Eastern Pool and the pipes. Any request for such administration would constitute a futile call.

Clear Springs' testimony before the Special Master and its briefing to the Idaho Supreme Court establish that Clear Springs' diversion pursuant to water right nos. 36-02708 and 36-07218 has never extended beyond the Western Pool, and that Clear Springs has never claimed, attempted to divert, or sought access to any of the water that is diverted through the Clear Lakes' Eastern Pool and pipes. Under Idaho law, the "no injury rule" protects Clear Lakes' water right no. 36-07004 from any effort to extend Clear Springs' diversion of water to intercept or include spring discharges that are diverted through Clear Lakes' Eastern Pool and pipes.

Clear Lakes constructed the Eastern Pool in 1969 to collect all the spring discharges that formed the historic Eastern Stream and a portion of the spring discharges that formed the historic Western Stream. By approximately 1970 to 1971, Clear Lakes had completed construction of the Eastern Pool and the pipes, and from that time to the present has diverted all of water right no. 36-07004 through the Eastern Pool and pipes, and has diverted water right no. 36-02659 through the Eastern Pool and the Western Pool simultaneously.

The following diagram depicts the Western and Eastern Pools and the water rights that are diverted through each pool (the depiction of the diversion for water right no. 36-07004 includes Clear Lakes diversion through the pipes).



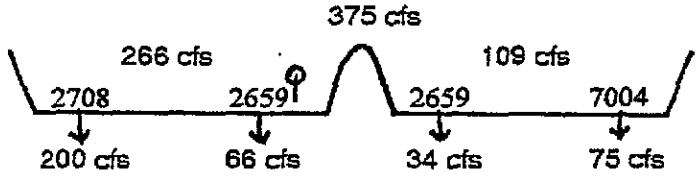
After Clear Lakes completed the Eastern Pool, Clear Springs in 1971 extended its diversion works in the historic Western Stream by constructing a dike from its diversion works to the north and east to a point just east of the Eastern Pool to dramatically increase its diversion of water from the Western Stream pursuant to water right no. 36-02708. Clear Springs constructed this dike on land leased by Clear Lakes without notice to or consent from Clear Lakes in a manner that interfered with Clear Lakes' diversion of water from springs that fed the Western Stream pursuant to water right no. 36-02659. Clear Lakes filed a lawsuit, which was resolved by the 1980 settlement agreement. The 1980 agreement is premised on Clear Springs' diversion of water exclusively through the Western Pool. Clear Lakes agreed to allow Clear Springs to increase the height of the dike and to extend it west to the outside edge of the Eastern Pool to "include an area where the

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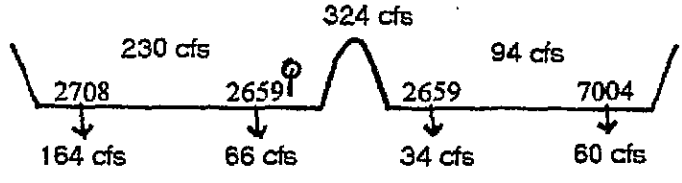
natural spring outlets, which have been and are presently being used by Lakes." Pursuant to the agreement, Clear Lakes and Clear Springs agreed to construction of the shared diversion works to regulate the diversion of water through the newly-constructed Western Pool to Clear Springs and to Clear lakes.

Having entered the agreement, Clear Lakes and Clear Springs are bound by the location or configuration of the Western Pool. The Western Pool and the Eastern Pool are each located and configured to collect water from a certain portion of the springs that discharge from the canyon rim. Neither can be extended or modified without conflicting with the 1980 agreement and the no injury rule.

Dave Shaw's attached analysis of spring flows since 1993 establishes that spring discharges collected by the Western Pool and the Eastern Pool rise and fall proportionately. (This explains why the shared diversion works has never been adjusted to achieve the agreed-upon division of water.) Measurements also establish that, at spring flows of 375 cfs, flows sufficient to fill the first three priority water rights, the Western Pool collects 266 cfs and the Eastern Pool collects 109 cfs. By deduction and by measurement, at 375 cfs Clear Lakes first priority water right no. 36-02659 diverts 66 cfs from the Western Pool and 34 cfs from the Eastern Pool. The following diagram illustrates the diversions at 375 cfs.



Consistent with the Partial Decrees and the other information discussed above, the prior appropriation doctrine, futile call, and the no injury rule, the junior right in each pool is subject to reduction in order to deliver the portion of the senior right diverted through each pool. In times of shortage, water right 36-02659 will continue to receive 66 cfs through the Western Pool and 34 cfs through the Eastern Pool, while diversion pursuant to water right nos. 36-02708 and 36-07004 will be reduced, as in the following diagram illustrating diversions under the recently measured total flows of 324 cfs (86.4% of the 375 cfs required to fill all rights).



These essential points and the supporting information are addressed in greater detail in the discussion and the attachments that follow. A discussion of the SRBA proceedings in the Clear Springs and the Clear Lakes subcases, and a photographic synopsis of the development of the subject water rights and diversion structures is also provided.

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DISCUSSION

In response to your request for information to assist you in developing instructions to the Watermaster that will detail the administration of water right nos. 36-02659, 36-02708 and 36-07004, we provide the following numbered attachments and documents which are referred to herein. Other documents referenced in this memorandum are contained in IDWR's SRBA and water right records. However, Clear Lakes will supply any of the documents referenced upon request.

1. Decrees for water right nos. 36-02659, 36-02708 and 36-07004.
2. Standard Forms Five in Clear Lakes Subcases.
3. Portion of Trial Transcript from SRBA Subcases 36-02708, 36-07201 and 36-07218, *Clear Springs Foods, Inc. v. Clear Lakes Trout Company* (hereinafter "Tr.").
4. May 2, 2002 letter with attachments from David Shaw to Dan Steenson and Charlie Honsinger.
5. Development of Hatcheries Summary

I. SRBA Proceedings

Clear Lakes filed objections in the SRBA to IDWR's recommendations of its own water right nos. 36-02659 and 36-07004. As stated by Clear Lakes in those objections, the recommendations did not "accurately describe and identify the location and configuration of the diversion works," and that with only the information in the recommendations, the "watermaster will not have sufficient instructions for distributing water without a more accurate description and identification of the diversion works." Therefore Clear Lakes requested that the Director "clarify . . . remarks as may be necessary to show that the diversion works for 36-07004 are not used to divert water for 36-02708" and to show that "only a part of the water used under 36-02659 is diverted through the same point of diversion as is used for 36-07004."

Clear Lakes also filed an objection in the SRBA to IDWR's recommendation of the point of diversion and source for Clear Springs' water right no. 36-02708. The purpose for this objection, was to ensure that the decree expressly noted that the source of water for water right no. 36-07004 "was physically separated, by natural geographical conditions, from the source of water for " water right no. 36-02708.

At trial in the Clear Springs subcases, Clear Lakes was permitted to pursue its objection to the source of water right no. 36-02708, but was not permitted to pursue its objection to the point of diversion for water right no. 36-02708. However, in his decision on the source issue, even though Clear Lakes' objection to Clear Springs' point of diversion was not decided at trial, Special Master Haemmerle made the findings of fact essential to establish the configuration and location of the diversion works for Clear Lakes' water rights. Those essential findings of fact are as follows:

> As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. . . . The result of this diversion

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structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows.

* * *

Any water that flowed east is currently contained in the eastern pool.

* * *

Part of water right 36-02659 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool.

Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal - Source, at p. 4, Subcase Nos. 36-02708, 36-07201 and 36-07218 (Dec. 31, 1998).

The Presiding Judge affirmed Special Master Haemmerle's findings of fact on Clear Lakes' Challenge to the "separate source" decision. In fact, the Presiding Judge set forth the findings of fact made by Special Master Haemmerle verbatim in the decision on Clear Lakes' Challenge. *Memorandum Decision and Order on Challenge*, at pp. 15 - 18, SRBA Subcases 36-02708, 36-07201 and 36-07218 (July 9, 1999). The Idaho Supreme Court subsequently affirmed the SRBA District Court. *Clear Springs Foods, Inc., v. Clear Lakes Trout Company*, 2002 WL 63543, __ Idaho__, 40 P.3d 119, (Jan. 18, 2002).

As discussed above, Clear Lakes has been pressing its position that the decrees must properly describe the configuration and location of diversion works to ensure proper administration of the water rights since it first filed its SRBA objections. Therefore, after the "source issue" was decided, Clear Lakes pursued its objections to the recommendations of water right nos. 36-02659 and 36-07004 by seeking remarks in those water rights precisely describing the configuration and location of its diversion works. The findings of fact made by Special Master Haemmerle and affirmed by Judge Wood provided the basis for the remarks requested by Clear Lakes. After IDWR and Clear Lakes signed and filed Standard Forms Five agreeing to the elements of water right nos. 36-02659 and 36-07004 (including the requested remarks), the SRBA District Court issued decrees for those water rights which contained the remarks necessary to properly administer all water rights diverting from the common spring source.

Clear Springs apparently desires that IDWR administer these water rights pursuant to the Idaho Supreme Court's decision in *Clear Lakes Trout Company*. However, the Supreme Court simply affirmed the SRBA District Court's decision on the "separate source" issue. Neither the Supreme Court's, nor any of the SRBA District Court's, decisions addressed administration of the water rights. In fact, in his last decision on the issue, Judge Wood specifically pointed out that it was IDWR, not the SRBA court that dealt with administration of the water rights. *Order on Motion to Alter or Amend Judgment*, at p. 7, SRBA Subcases 36-02708, 36-07201 and 36-07218 (August 15, 2000). Therefore, there is no decision (Supreme Court or otherwise) on the "separate source" issue which can be used as a complete guide to administration.

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Moreover, simply administering in priority any water rights diverted from a common source (as Clear Springs apparently desires in this case) is an oversimplistic approach to a complex problem. For example, although all water rights diverted from the Snake Plain Aquifer are presumed to have the same "common source," simply shutting down water rights diverted from the aquifer according to their priority will not necessarily provide the water needed to fill a given senior's water right. Instead, the impact that administering a specific water right may have must be determined by examining the relationship between senior and junior water rights and the works through which they divert. The same is true with the proposed administration of Clear Lakes' and Clear Springs' water rights.

II. Relationship Between the Water Rights and the Eastern and Western Pools

There are two pools through which the common spring source feeding water right nos. 36-02659, 36-02708 and 36-07004 are diverted - the Eastern Pool and the Western Pool. The following table summarizes the diversion pool(s) through which each of the three water rights is diverted.

Water Right No.	Priority Date	Pool(s) Through Which Diverted
36-02659	Jun. 23, 1966	West and East Pools
36-02708	Sep. 28, 1966	West Pool only
36-07004	July 21, 1967	East Pool only

A. Water Right No. 36-02659

The Partial Decree for water right no. 36-02659 issued by the SRBA District Court establishes that it is diverted through both the Western and Eastern Pools. This Partial Decree is based upon the Findings of Fact issued by the Special Master in SRBA subcase nos. 36-02708, 36-7201 and 36-07218 as affirmed by the Presiding Judge on Challenge, and upon the Standard Form Five signed by Clear Lakes and IDWR. Because portions of 36-02659 are diverted through each pool, it is the senior water right in both pools.

The portion of water right no. 36-02659 that is diverted through the Western Pool is delivered through diversion works that Clear Lakes shares with Clear Springs. Clear Springs' water right no. 36-02708 is also diverted through the shared diversion works. The only headgate in those shared diversion works which can be adjusted is that through which water right no. 36-02659 is delivered. The headgate has not been adjusted since it was set in 1988 to ensure that Clear Lakes and Clear Springs each received water diverted from the common spring source in quantities specified in the 1980 Agreement. The portion of water right no. 36-02659 that is diverted through the Eastern Pool is delivered to the Clear Lakes hatchery together with all of water right no. 36-07004.

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B. Water Right No. 36-02708

Water right no. 36-02708 is diverted only through the Western Pool using the diversion works it shares with the portion of Clear Lakes' water right no. 36-02659 that is diverted through the Western Pool. It is obvious from observing contemporary aerial photographs and the actual configuration of the facilities themselves, that water right no. 36-02708 can be and is diverted only through the West Pool, and that it is physically impossible for water right no. 36-02708 to divert water either through or from the Eastern Pool. As explained in his attached letter, Dave Shaw confirmed this fact by determining that the surface elevation of the Western Pool is higher than that of the Eastern Pool, and that there is no means by which water can be conveyed from the Eastern Pool to the Western Pool.

In the Brief submitted by Clear Springs to the Supreme Court in *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, Clear Springs stated that

> "Clear Springs is not seeking any points of diversion which are not presently in place. Clear Springs' present diversion works have been in place since 1980 or 1982. R. p. 421, l. 18 - p. 423, l. 8; Exhibits L(1) - (4). The points of diversion recommended by IDWR and declared by the SRBA district court reflect the diversion works as they presently exist." *Respondent's Brief*, p. 24.

The testimony of Jess Eastman in the "source issue" trial (cited by Clear Springs as support for its statements in the language from *Respondent's Brief* quoted immediately above), together with Exhibits L(1) - (4) (also cited by Clear Lakes as support for its statements regarding its diversion works) conclusively establishes that Clear Springs has always diverted its water only from the Western Pool (or the "Western Stream") and never from the Eastern Pool (or "Eastern Stream"). *See* Exhibit 4, Tr. p. 408, ln. 22 - p. 424, ln. 14; Exhibit 5, Exhibits L(1) - (4).

Pursuant to the 1980 Agreement between Clear Springs and Clear Lakes, Clear Springs was allowed to construct the Western Pool in such a manner as "to include the area where the waters flow from the natural spring outlets which have been and are presently being used by" Clear Lakes. According to the Agreement, Clear Springs was also required to incorporate into the Western Pool "a sufficient regulatory system . . . in order to properly apportion" both parties' water rights, whether such apportionment was made as specified in the 1980 Agreement, or "as may be finally agreed upon or legally determined." Clear Springs constructed the Western Pool and the shared diversion works as specified in the Agreement. As constructed by Clear Springs, the Western Pool collects water flows from certain springs that discharge water from the canyon rim, and does not collect water from springs discharging into the Eastern Pool.

Pursuant to the briefing it submitted to the Supreme Court, the testimony of its Chairman at trial, and the 1980 Agreement, Clear Springs (as well as Clear Lakes) is bound by the location and configuration of both the Western Pool and the shared diversion works through which water right nos. 36-02659 and 36-02708 are diverted.

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C. Water Right No. 36-07004

The Partial Decree for water right no. 36-07004 issued by the SRBA District Court establishes that it is diverted through only the East Pool. This Partial Decree is based upon the Findings of Fact issued by the Special Master in SRBA subcase nos. 36-02708, 36-7201 and 36-07218 as affirmed by the Presiding Judge on Challenge, and upon the Standard Form Five signed by Clear Lakes and IDWR.

A portion of water right no. 36-02659 is also diverted through the Eastern Pool. The Eastern Pool is configured such that it collects water from a certain portion of springs discharging water from the canyon rim, and does not collect water from springs discharging into the Western Pool.

As discussed by Dave Shaw in the attached letter, the east and west pools are physically separated such that all water flowing into the Eastern Pool is diverted through Clear Lakes' facility, whereas all water flowing into the Western Pool is distributed between Clear Lakes' and Clear Springs' facilities by diversion works they share. There is no conduit or channel between the two pools, and the surface elevation of the Eastern Pool is lower than that of the Western Pool. Thus, it is physically impossible to deliver water from the Eastern Pool to the Western Pool. Moreover, any attempt to create a structure or works to deliver water from the Eastern Pool to the Western Pool would constitute a violation of the "no injury rule", because Clear Springs has never claimed, attempted to divert, or sought access to water that is either diverted through the Eastern Pool or is tributary thereto.

Conclusions Regarding the Relationship Between the Water Rights and the East and West Pools

Given the established facts summarized, illustrated and discussed above, the following conclusions are necessarily true:

A. Adjustment of the gate in the Western Pool through which water right no. 36-02659 flows to the Clear Lakes facility would result in administration and curtailment of the senior water right no. 36-02659. Administration and curtailment of a senior priority water right to satisfy the needs of a junior water right is abhorrent to, and precluded by, the prior appropriation doctrine. Therefore, the headgate through which the portion of water right no. 36-02659 diverted through the Western Pool flows cannot be adjusted to supply water to Clear Springs' junior priority water right no. 36-02708.

B. It is not physically possible to curtail the diversions of water through the Eastern Pool pursuant to water right no. 36-07004 and thereby increase the supply of water at the point of diversion for water right no. 36-02708 located in the Western Pool. Therefore, any call by Clear Springs on Clear Lakes water right no. 36-07004 is "futile."

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C. There is no possible legal administration or curtailment of Clear Lakes' water rights that would result in additional water to supply Clear Springs' water right no. 36-02708 in times of shortage.

III. Proper Administration of Water Rights Diverted From the Common Spring Source

Although water right no. 36-02659 cannot legally be curtailed to supply water to water right no. 36-02708, and although any call by water right no. 36-02708 as against water right no. 36-07004 is futile, administration is necessary to properly distribute water between water right nos. 36-02659 and 36-07004.

A. IDWR's Replacement of the Current Distribution of Water Rights from the Common Spring Source Constitutes a Legal Determination

Currently, the three water rights are distributed according to the compromise settlement in the 1980 Agreement between Clear Springs and Clear Lakes. That Agreement provides that, as spring flows decline from the "full flows" of 375 cfs on a percentage basis, all three water rights take the same percentage reduction in flows to which they would otherwise be entitled if the flows were "full." Under this current distribution of water rights, all three water rights are assumed to have equal priority, and the senior-most water right (no. 36-02659) is not, in contradiction to the prior appropriation doctrine, being filled prior to the distribution of water to the junior water rights. IDWR, by creating and issuing instructions to the watermaster which will detail adjustments to be made in the event of a call, is making a legal determination that it is going to replace the current distribution of water rights detailed in the 1980 Stipulation.

B. The Senior Water Right in Both the East and West Pools Must be Filled at All Times

The portions of water right no. 36-02659 diverted through both the East and West Pools are senior to the other water rights diverted through those pools. Therefore, when total spring flows from the common source are below the "full flows" (375 cfs) at which all three water rights are filled, it is necessary to first fill the portions of water right no. 36-02659 that are respectively diverted through each pool. Only after the senior water right is filled can the quantities available for the junior water right that is diverted through the East Pool (no. 36-07004), and the junior water water right that is diverted through the West Pool (no. 36-02708) be determined. See Attached Letter from Dave Shaw. The analysis and facts necessary to determine the quantities diverted pursuant to water right nos. 36-02708 and 36-07004 are discussed in the Attached May 2, 2002 letter from Dave Shaw, but are summarized as follows:

(1) At "full flows" of 375 cfs, all three water rights are filled.

When 375 cfs of water is diverted from the common spring source through both Clear Springs' and Clear Lakes' facilities (whether under the current distribution of water rights or any distribution of those water rights that is implemented in the future), water right nos. 36-02659 (100

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cfs), 36-02708 (200 cfs), and 36-07004 (75 cfs) are all being filled. This conclusion is supported by the parties' 1980 Stipulation, which is premised upon that fact, and by the 1988 Brockway Report.

(2) The spring flows decrease and increase proportionately as between those diverted through the West Pool and those diverted through the East Pool.

Clear Springs' and Clear Lakes' joint historical measurements of the quantity of water diverted through Clear Springs' are summarized in the table attached to Dave Shaw's May 2, 2002 letter entitled Historical Diversion Data For Clear Lakes and Clear Springs Hatcheries Taken From Water Measurement Forms After Brockway & Anderson 1988, and in the graph attached to the letter entitled Percentages of East and West Pool Contribution to Total Clear Lakes and Clear Springs Diversions (the actual measurement sheets used for the tabular and graphic summaries can be provided upon request). As can readily be seen by examining the table and the graph, the percentages of the total spring flows diverted through the Western and Eastern Pools have been essentially constant for the historical period measured. The average percentage of total historical flows diverted through the Eastern Pool is 29% and the average percentage of total historical flows diverted through the Western Pool is 71%. Therefore, as concluded by Mr. Shaw in his letter, the total spring flows from the common source increase and decrease proportionately.

(3) Diversions From Each Pool at 375 cfs

As explained by Mr. Shaw, his calculations establish that, at total spring flows of 375 cfs, approximately 266 cfs (or 71% of the total spring flows) is flowing through the Western Pool, and approximately 109 cfs (or 29% of the total spring flows) is flowing through the Eastern Pool. From this point, it is simple math to determine the quantities of water being diverted by each water right.

Western Pool: Total flows of 266 cfs - 200 cfs (36-02708) = 66 cfs (36-02659)
Eastern Pool: Total flows of 109 cfs - 75 cfs (36-07004) = 34 cfs (36-02659)

(4) Water Right no. 36-02659 Must Receive its Entitlement through Each Pool

As discussed by Mr. Shaw, the on-the-ground physical conditions of the common source and diversion pools are such that approximately 66 cfs of water right no. 36-02659 must be delivered through the Western Pool at all times, and approximately 34 cfs of water right no. 36-02659 must be delivered through the Eastern Pool at all times. As spring flows from the common source fluctuate, administration would entail that the headgate through which Clear Lakes diverts the portion of its water right received through the Western Pool be adjusted to ensure that 66 cfs of water is flowing to Clear Lakes from the Western Pool at all times. Because Clear Lakes is entitled to all water diverted through the Eastern Pool, the administration of water rights diverted through that pool is self-regulating. In other words, as spring flows decline, the quantity of water diverted pursuant to water right no. 36-07004 is reduced, whereas the quantity of water diverted pursuant to water right no. 36-02659 remains constant at 34 cfs. Table 2 attached to Mr. Shaw's letter of April 2, 2002 shows what the distribution of historical flows through the Eastern and Western Pools would have

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been had they been administered as discussed above.

The quantity of water diverted through each pool at various flows can readily be determined by dividing the total spring flows at any given time by the "full flows" of 375 cfs, and multiplying the resulting decimal by the quantities of water diverted through each pool at "full flows" - 266 cfs in the Western Pool, and 109 cfs in the Eastern Pool. Then, by simply subtracting from that result the portions of water right no. 36-02659 diverted through each pool, the quantities available for the junior rights in each pool are determined. The following table illustrates the proper distribution of water at various flows. The row in which the quantity is listed at 230 cfs (86.4%) is the distribution that would occur under flows as actually measured by Mr. Shaw on April 22, 2002.

Total Flows	Total West	02708	02659(West)	Total East	02659(East)	07004
375 (100 %)	266 cfs	200 cfs	66 cfs	109 cfs	34 cfs	75 cfs
356.25 (95%)	252.7 cfs	186.7 cfs	66 cfs	103.5 cfs	34 cfs	69.5 cfs
337.5 (90%)	239.4 cfs	173.4 cfs	66 cfs	98.1 cfs	34 cfs	64.1 cfs
324 (86.4%)	230 cfs	164 cfs	66 cfs	94 cfs	34 cfs	60 cfs
300 (80%)	212.8 cfs	146.8 cfs	66 cfs	87.2 cfs	34 cfs	53.2 cfs

CONCLUSION

The Partial Decrees for water right nos. 36-02659, 36-02708 and 36-07004, together with the prior appropriation doctrine, the doctrine of futile call and the "no injury rule" mandate a determination that the headgate through which the portion of water right no. 36-02659 that is diverted through the Western Pool flows cannot be adjusted to supply additional water to water right no. 36-02708; and that water right no. 36-07004 cannot be curtailed or administered to supply additional water to water right no. 36-02708. The administration necessary to ensure proper delivery of the water rights is that which will ensure that the portions of the senior water right (36-02659) that are diverted through each pool are filled.

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ATTACHMENT 1

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2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	**ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 & 36-02659**
Case No. 39576	)	

I.
PROCEDURAL BACKGROUND

A *Special Master's Report and Recommendation* was filed on March 3, 1998, in the above captioned subcases. On April 28, 1998, a *Motion to Alter or Amend* was filed on the issue of facility volume. Claimant Clear Lakes Trout Company, Inc. ("Clear Lakes"), filed a *Motion to Alter or Amend* on May 8, 1998, regarding the issues of General Provision 5 and points of diversion.

On December 29, 1999, the SRBA District Court issued a decision on ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue.*** Partial decrees were issued in the above-captioned subcases but were subsequently rescinded because of the remaining *Motion to Alter or Amend* filed by Clear Lakes. Clear Lakes was the only remaining party to the subcase.

On April 15, 2002, the Special Master issued an ***Amended Order Granting in Part Clear Lakes Motion to Alter or Amend and Second Amended Special Masters Report.***

On April 16, 2002, Clear Lakes filed a *Motion to Expedite Issuance of Partial Decrees* seeking to have the partial decrees issued on an expedited basis to have the partial decrees issued prior to the organizational meeting for a water district affecting the subject rights. In furtherance of the *Motion* Clear Lakes waived its right to file a Notice of Challenge.

On April 22, 2002, a hearing was held on the *Motion* to determine whether the remark contained in the point of diversion element regarding the source for the water rights was consistent with the holding in subcases 36-02708 and 36-07218 involving water rights owned by Clear Springs Food, Inc. ("Clear Springs"). In subcases 36-02708 and 36-07218 the SRBA

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District Court held, and the Idaho Supreme Court affirmed, that the above–captioned claims and Clear Springs' water rights 36-02708 and 36-07218 shared a common source for purposes of administration. At the hearing, the Court inquired of a representative of the Idaho Department of Water Resources, as the Court's independent expert, whether based on the existing conditions of the diversion works, the remark regarding point of diversion and source is consistent with the holding regarding Clear Springs' water rights.

II.

FINDINGS

THEREFORE, based on the foregoing, the Court makes the following findings:

1. That Clear Lakes is the only party to subcases 36-02004 and 36-02659.

2. That because a ***Special Master's Report and Recommendation*** was previously issued further parties are precluded from entering the subcases by filing a *Motion to Alter or Amend* to the April 15, 2002, *Amended Recommendation*. ***SRBA AO1 Rules of Procedure*** § 13 b. ("no second Motion to Alter or Amend may be filed on the decision granting or denying a Motion to Alter or Amend").

3. That Clear Lakes has waived its right to file a Challenge in the above-captioned subcases.

4. That the partial decrees herein issued are not inconsistent with this Court's prior holding in subcases 36-02708 and 36-07218.

5. That pursuant to I.R.C.P. 53(e)(2) and *AO1*, § 13 f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

III.

ORDER

Therefore, IT IS ORDERED that water rights 36-07004 and 36-02659 are hereby decreed as set forth in the attached *Amended Partial Decrees* Pursuant to I.R.C.P. 54(b).

DATED 4-22-02

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

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Apr-26-02 12:39p Bill Ringert 366-7994 2003 P.02
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CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 AND 36-02659** was mailed on 4/22/02 with sufficient first-class postage to the following:

Clear Lakes Trout
Represented by:
William F Ringert
PO Box 105
Hammett, ID 83627

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Bobbin Wiles
Deputy Clerk

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JUL 17 2003

Apr-26-02 12:40p Bill Ringert 886-7994 p.03

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

AMENDED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 36-07004

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 75.00 CFS

PRIORITY DATE: 07/21/1967

POINT OF DIVERSION: T09S R14E S02 LOT 05 (SWSENE) Within Gooding County
LOT 05 (SESENE)

THIS WATER RIGHT IS DIVERTED THROUGH A SPRING-FED DIVERSION POOL KNOWN AS THE "EASTERN POOL," AND THROUGH PIPES WHICH DIVERT WATER FROM SPRINGS THAT ARE TRIBUTARY TO THE EASTERN POOL, ALL OF WHICH ARE LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. A PORTION OF WATER RIGHT NO. 36-2659 IS ALSO DIVERTED THROUGH THE EASTERN POOL. ALL WATER DIVERTED IS FROM THE SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	75.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

MICRO

Apr-26-02 12:40P Bill Ringert 366-7994 P.04
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED

In Re SRBA
Case No. 39576

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 36-02659

2002 APR 22 PM 4:12

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within Gooding County
LOT 05 (SESENE)
LOT 05 (SWSENE)

THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S 1/2 SESWNE AND THE S 1/2 SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL" LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURSE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	100.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

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DEC 17 2003

Apr-26-02 12:40P Bill Ringert 366-7994 P.05

2000 APR 10 AM 10:17
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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)	**ORDER OF PARTIAL DECREE**
)	
Case No. 39576)	**For Water Right 36-02708**
)	

The Notice of Challenge filed in the above subcase having been heard and ruled upon, IT IS THEREFORE ORDERED that water right 36-02708 is hereby decreed as set forth in the attached *Partial Decree Pursuant to I.R.C.P. 54(b).*

IT IS SO ORDERED.

DATED APR 10 2000.

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APR 12 2000
RINGERT CLARK

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

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APR 17 2000

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

2000 APR 10 AM 10:19

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
Case No. 39576	)	Water Right 36-02708

NAME & ADDRESS: CLEAR SPRINGS FOODS INC
THE PROSPECT CO
PO BOX 712
BUHL ID 83316

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

SOURCE IS ALSO KNOWN AS CLEAR SPRINGS.

QUANTITY: 200.00 CFS
144540.0 AFY

PRIORITY DATE: 09/28/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within GOODING County
LOT 5 (SWSENE)
NENWSE

MULTIPLE POINTS OF DIVERSION LOCATED IN T09S, R14E, S02, LOT 5 (SWSENE), SESWNE, NENWSE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	01-01 12-31	200.00 CFS 144540.0 AFY

PLACE OF USE: FISH PROPAGATION Within GOODING County
T09S R14E S02 NWSE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

MICRO

DEC 12 2003

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ATTACHMENT 2

MICRO

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 11 2002
By _____ Clerk
Deputy Clerk

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 No.: 36-7004**
Case No. 39576	**STANDARD FORM 5**
	STIPULATED ELEMENTS OF A WATER RIGHT

This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right.

The parties agree that the Snake River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

The parties and IDWR agree and stipulate that the elements of this water right should be described per the attached. The parties and IDWR have further indicated their concurrence by initialing each of the attached pages.

Charles J. Honsinger 4/11/02
Attorney for Clear Lakes Trout Co. Date

D. L. Tuttle 4/11/02
IDWR Concurrence Date

Nicks Spencer 4-11-02
Approved as to form Attorney for IDWR Date

COPY
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DEC 1 / 2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 36-7004

NAME AND ADDRESS: CLEAR LAKES TROUT CO INC
1301 VISTA AVE
BOISE ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 75.000 CFS

PRIORITY DATE: 07/21/1967

POINT OF DIVERSION:

T09S R14E S2 SWSENE Lot 5 Within GOODING County
T09S R14E S2 SESENE Lot 5 Within GOODING County
THIS WATER RIGHT IS DIVERTED THROUGH A SPRING-FED DIVERSION POOL KNOWN AS THE "EASTERN POOL," AND THROUGH PIPES WHICH DIVERT WATER FROM SPRINGS THAT ARE TRIBUTARY TO THE EASTERN POOL, ALL OF WHICH ARE LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. A PORTION OF WATER RIGHT NO. 36-2659 IS ALSO DIVERTED THROUGH THE EASTERN POOL. ALL WATER DIVERTED IS FROM THE SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

NBS Dec C.2.7.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	1/01 12/31	75.000 CFS

PLACE OF USE: FISH PROPAGATION Within GOODING County

T09S R14E S02 Lot 5 SENE T09S R14E S02 Lot 6 NESE
T09S R14E S02 Lot 8 NESE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.

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CERTIFICATE OF SERVICE

I certify that on Apr. 11, 2002, I caused to be served true and correct copies of this Standard Form 5, to the following persons, in the manner indicated and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

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STANDARD FORM 5

MICR... SEP 17 2003

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

APR 11 2002

By _____ Clerk
Deputy Clerk

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 No.: 36-2659**
Case No. 39576	**STANDARD FORM 5**
	STIPULATED ELEMENTS OF A WATER RIGHT

This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right.

The parties agree that the Snake River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

The parties and IDWR agree and stipulate that the elements of this water right should be described per the attached. The parties and IDWR have further indicated their concurrence by initialing each of the attached pages.

Charles L. Honsinger 04/11/02
Attorney for Clear Lakes Trout Co. Date

Donald R. Tuthill 4/11/02
IDWR Concurrence Date

Nicole Spencer 4-11-02
Approved as to form Date
Attorney for IDWR

COPY
MICR... APR 1 7 2002

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 36-2659

NAME AND ADDRESS: CLEAR LAKES TROUT CO INC
1301 VISTA AVE
BOISE ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.000 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION:

T09S R14E S2 SESWNE Within GOODING County
T09S R14E S2 SWSENE Lot 5 Within GOODING County
T09S R14E S2 SESENE Lot 5 Within GOODING County
THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S1/2SESWNE AND THE S1/2SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL," LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

NBS DM C2.7

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
FISH PROPAGATION	1/01 12/31	100.000 CFS

PLACE OF USE: FISH PROPAGATION Within GOODING County

T09S R14E S02 Lot 5 SENE T09S R14E S02 Lot 6 NESE
T09S R14E S02 Lot 8 NESE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.

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CERTIFICATE OF SERVICE

I certify that on Apr. 11, 2002, I caused to be served true and correct copies of this Standard Form 5, to the following persons, in the manner indicated and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

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Charles L. Honsinger
Ringert Clark
P.O. Box 2773
Boise, ID 83702

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Signature of person or attorney mailing the form

STANDARD FORM 5

MICAC

DEC 17 2003

ATTACHMENT 3

MICRO
DEC 17 2003

IN THE SUPREME COURT OF THE STATE OF IDAHO

****

2000 OCT 16 PM 2:38

DISTRICT-SRBA
TWIN FALLS CO., IDAHO
LODGED
FILED

IN RE SRBA CASE NO. 39576.	
CLEAR SPRINGS FOODS, INC., Claimant-Respondent, vs. CLEAR LAKES TROUT COMPANY, Objector-Appellant.	Supreme Court Case No. 26925 Transcript

T R A N S C R I P T O N A P P E A L

Fifth Judicial District, Twin Falls County

HON. R. BARRY WOOD, District Judge (SRBA)

A-p-p-e-a-r-a-n-c-e-s:

RINGERT CLARK CHARTERED, Attorneys at Law, P. O. Box 2773, Boise, Idaho, appearing for Objector-Appellant.

HEPWORTH, LEZAMIZ & HOHNHORST, Attorneys at Law, P. O. Box 389, Twin Falls, Idaho, appearing for Claimant-Respondent.

****

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DEC 17 2003

S.C. Title & Index

A. September 1, 1966.
Q. And describe for me, if you would, the development work you did with respect to water rights beginning in September 1996 at the Clear Springs facility.
A. We built a concrete dam across from our property, across a stream that was still on it to an island on our property. And that's where we diverted the water, first water.
Q. When was that? What year was that dam constructed?
A. 1966.
Q. Was there any other structure that you constructed in addition to the dam?
A. Just the flume that let it to the raceways.
Q. I'm going to hand you photographs that have been enlarged that are marked as Exhibit L. There are four.
THE COURT: Let's go off the record.
(DISCUSSION HELD OFF THE RECORD)
THE COURT: We are on the record.
Q. (BY MR. STEENSON) Mr. Eastman, can you look at the photographs marked as Exhibit L1, L2, L3 and L4?
MR. STEENSON: Excuse me, can we go off the

record a moment.
THE COURT: Yes.
(DISCUSSION HELD OFF THE RECORD)
THE COURT: On the record.
Q. (BY MR. STEENSON) Okay, we have Exhibits L1, L2, L3 and L4. Could you please review each of those photographs and tell me if you recognize them?
A. Yes.
Q. Do you recognize these to be photographs that you marked with a red pen?
A. Yes.
Q. And do you recall that that was done during your deposition?
A. Yes.
Q. Okay. I'll try to save some time in drawing by using these photographs, Mr. Eastman. Looking at Exhibit L1, you drew a red circle around the Clear Springs' Clear Lakes facility, do you recall that?
A. Yes.
Q. And does that circle indicate the outline of the property that Clear Springs' Clear Lakes facility owns?
A. That was the best of my knowledge. I think I mentioned that.
Q. Okay. And there is a, there are the

letters DS with an arrow to a circle on L1. Do you recall that?
A. Yes.
Q. Does that indicate the Clear Springs, Clear Lakes diversion structure for the facility?
A. The arrow is pointed toward the bridge of the canal. The arrow that -- to the right, it says "DS," and this arrow is pointed to the diversion structure. It's a little arrow to the right of the circle.
Q. Okay, the arrow above the letters DS, does -- DS stands for diversion structure, does it not?
A. Right.
Q. And does the arrow point to the circle indicating that that's the diversion structure?
A. That is not -- I made a mistake. The diversion structure is the arrow to the right. That is the bridge crossing the canal right there.
Q. Okay. And is the diversion structure actually indicated by the arrow pointing to the structure just to the north of the bridge?
A. That's right.
Q. Okay. And what water rights are diverted through that diversion structure at the time of this photograph L1?

A. Part of the water that we had filed on and were entitled to.
Q. Okay. And that's under water right number 36-2708, is it not?
A. Yes, sir.
Q. Okay. And you drew a circle around an area --
THE COURT: Mr. Steenson, I'll go up there and you stay at the podium.
MR. STEENSON: Okay.
Q. (BY MR. STEENSON) At the upper right-hand portion of the page, you wrote the word "Source" with an arrow down to the circle?
A. Yes.
Q. That's your indication, is it not, of the source for water right number 36-2708?
A. Yes, part of the source. Part of the water.
Q. At the time of this photograph -- the circle you drew, the word you used and the arrow you drew indicated the source at the time of this photograph, is that correct?
A. True.
Q. Then you used the word "Stream" and drew an arrow to a body of water flowing past the Clear Springs facility. That's the western stream, is it not, that

the -- that Mr. Hardy has been describing?
A. True.
Q. And on the other side of the island, you wrote the word "Stream" and drew an arrow to a water body. That's the eastern stream, is it not, that Mr. Hardy has been referring to?
A. Yes.
Q. And for the -- and in Exhibit L1 in the upper right-hand portion of the photograph, that's the Snake River Trout Company facility, is it not?
A. Yes.
Q. And you wrote the word "Pipe," and you also wrote the word "Pool" and drew arrows indicating the location of those structures?
A. Yes.
Q. Isn't that correct? Okay. And at the time of the 1968 photograph, these were the only diversion structures in that location for the Snake River Trout Company, isn't that correct?
A. Yes.
Q. Now I'd like to turn your attention, if I may, to Exhibit L2. Now, working from the left-hand part of the photograph to the right-hand part of the photograph, you drew a circle around the Clear Springs property. That's an indication of the property

boundaries of the Clear Springs' Clear Lakes facility, is it not?
A. Yes, to the best of my knowledge.
Q. And in the upper left-hand part of the photograph, you wrote the letters "PD 2" with a circle, do you see that?
A. Yes.
Q. And that was the second point of diversion for one of Clear Springs' water rights, was it not?
A. I probably should have said it was a source, but I think they indicated maybe point of diversion and source could mean the same thing. It was one of the sources.
Q. Okay, and can you tell me which water right that was the source for?
A. It was part of water right 36-2708.
Q. Now, as we move to the right, there are the letters "CD" with an arrow to that same concrete diversion structure and bridge. Do you see that?
A. Yes.
Q. Now, that is the -- that is a diversion structure, is it not, for water right 36-2708?
A. That is the word "Source" with "PD" below it and an arrow pointing to a circle, and the "PD" has been scratched out.

Q. Okay.
A. And same as the one, the previous exhibit that was source. The same place.
Q. I think we are talking about a little -- somewhat different things. What you just described as the source with an arrow pointing to a circle, that's the source, is it not, for water rights 36 -- for water right 36-2708?
A. Yes.
Q. And down below it, if you look just south of there, there's a circle and it has a line drawn to it that says "CD," do you see that?
A. (Witness indicates.)
Q. Okay. And you need to speak your answer.
A. Yes.
Q. And is that the diversionworks for water right 36-2708?
A. Yes.
Q. Okay. Now, moving to the right of the photograph, you drew a circle around what is indicated as the Thousand Trout Company, do you see those words there?
A. Yes.
Q. That's the same as the Snake River Trout Company, is it not?

A. Yes.
Q. And you drew a circle around the property with an arrow to it. That line, that circle indicates the property boundary, does it not?
A. At that time.
Q. Okay, at that time. Now, you also used the word "Source" in the upper right-hand part of the photograph and drew a line down to a circled area, is that correct?
A. Yes.
Q. And is that the source of water for the Snake River Trout Farm?
A. Yes.
Q. At that time, is that correct?
A. Yes.
Q. And you have also indicated on the picture "PD" with an arrow down to a location. Is that the same diversionworks that we see in the prior photograph, L1?
A. It says "PD Fountain," and the circle seems to be on the roadway.
Q. Yeah, there's a --
A. That is not the same diversion.
Q. Yeah, there's a circle there at the fountain, and that would indicate the location of a

fountain on the roadway as you drive by, correct?
A. (Witness indicates.)
Q. Okay.
MR. HEPWORTH: Your answer is?
THE COURT: Your answer is? You have to speak up.
A. Yes. Excuse me.
Q. (BY MR. STEENSON) Now, in 1969 when this photograph L2 was taken, was there any difference in the diversionworks for the Snake River Trout Company than there was in 1968?
A. Repeat that question.
Q. Yeah, were the diversionworks the same in 1968 and 1969 for the Snake River Trout Company?
A. Yes.
Q. Okay. Now, looking at L1, the photograph we just got done talking about, because of the enlargement, it's faded out at the top of it, but this source area for your water rights, do you know who owned that property?
A. The Idaho Power Company, I believe.
THE COURT: For the record, you are pointing to the source in the upper left-hand corner of Exhibit L1?
A. Yes.

arrow and circled the area that's circled in red, isn't that correct?
A. Yes.
Q. Okay. And you are indicating there that the source of water for Clear Springs' facility under water right 36-2708 as of the time of the photograph was that area, isn't that correct?
THE COURT: Mr. Steenson, there are two "Source" pictures here. Which one are you referring to?
MR. STEENSON: We are talking to the one that's immediately west of the word "Pool."
Q. (BY MR. STEENSON) Are you with me, Mr. Eastman?
A. Yes.
Q. So that source, the one that's closer to the middle of the page that you have drawn there, that's the -- that was the source for Clear Springs' water right 36-2708 as of the date of this photograph, isn't that correct?
A. What was the date of the photograph?
Q. Good question. 1977.
A. Yes.
Q. Okay. And you indicate "PD" down at the bottom part of the circled area for source?

Q. (BY MR. STEENSON) And that is the source -- that area is the source for water right 36-2708?
A. Just a partial of that water right.
Q. But this is the total source in 1968, is that correct?
A. Yes.
Q. Okay. And if we move to L2, the same area where you have written the word "Source," drawn an arrow down to the circle just north of the Clear Springs facility, that's the source for water right 36-2708. Did Idaho Power own that land at that time in 1969?
A. To my knowledge.
Q. Okay. Okay, could you turn, please, to L --
MR. STEENSON: Could we go off the record, briefly?
THE COURT: Yes.
(DISCUSSION HELD OFF THE RECORD)
Q. (BY MR. STEENSON) L3. Do you see where the word "Pool" is, Mr. Eastman? It's not in red.
A. Yes.
Q. Now, as you move immediately west of that, do you see the word "Source"?
A. Yes.
Q. Now, you wrote the word "Source" and drew an

A. Yes.
Q. With an arrow to a small circled area, correct?
A. Yes.
Q. And that is the point of diversion for water right 36-2708 as of 1977, the date of the photograph, correct?
A. Yes.
Q. Okay. And moving further to the west, to the left part of the page, you have written the words "7201 Source," and below it there's a circle with an arrow from the circle to the word "Source." Do you see that?
A. Yes.
Q. You indicated by that marking that as of 1977, the exclusive source for 7201 was in the area circled, is that correct?
A. Yes.
Q. Okay. Now, since 1977, has Clear Springs added any diversionworks -- Let me strike that and back up. Beneath this circle below "7208 Source," you have some indications, "PD" and then an arrow drawing to it, correct?
A. Yes.
Q. Is there one or more than one point of

diversion in that area that you indicated?
A. It could be that it's o[illegible] will explain that, if you want.
Q. Certainly, please do.
A. Below this source, below the road, we built a concrete diversion. And we also built a concrete collection box. And we brought the higher part of the spring into the collection box, which was what would -- which goes to the processing plant holding ponds. That's why I put "PD" and pointed to that one -- that arrow to that place on the right.
The lower one on the concrete dam, there's a pipe that goes down, is a point of diversion to a pumping station that pumps water for domestic use and clean-up and so forth for the processing plant.
Q. Okay.
A. I don't know if you'd call that two points of diversion or not.
Q. Might it be either two points of diversion or maybe a point of rediversion? But in any event, that's the area where the water right is diverted, correct?
A. True.
Q. Then you have written the word "Flow" with an arrow. What does that word "Flow" with the arrow

indicate?
A. I don't recall. Probably just the flow of the stream.
Q. And is that the flow of the stream after water was diverted under 7201?
A. Yes, the remaining part of the stream.
MR. STEENSON: I see you looking at your watch.
THE COURT: Are you going to go to your next exhibit now?
MR. STEENSON: I can go to the next. That would be a good place to finish.
THE COURT: Stop before the next exhibit or go with the next exhibit.
MR. STEENSON: Right after the next exhibit. I'll finish with it first.
THE COURT: Okay.
Q. (BY MR. STEENSON) Mr. Eastman, could you turn to Exhibit L4. There you wrote the word "Source" with the initials "PD" next to it. Do you see that?
A. Yes.
Q. Do you see the circled area?
A. Yes.
Q. And do you recall that this is a contemporary photograph, 1997?

A. Yes.
Q. And [illegible] you indicated by using the word "Source" and drawing the arrow to the circled area, you indicated, did you not, that that area is the source for water right 36-2708?
A. Yes.
Q. Okay. And the point of diversion you indicated there, a little bit covered up, but that is the point of diversion, is it not, for 36-2708?
A. I need to know the date of this.
Q. 1997.
A. (No response.)
Q. Then I will show you, as well, Exhibit 13 and Exhibit I to give you some assistance in identifying that diversion.
A. Yes, that diversion is the present weir that is there now.
Q. And that is the diversion for water right 36-2708, correct?
A. True.
Q. Now, the sources and diversions that you have identified for 36-2708, they are all the same as the sources and diversions for 36-7218, are they not?
A. Yes.
Q. Okay, so in other words, 36-2708 and 36-7218

have at all times had the same source, correct?
A. True.
Q. And 36-2708 and 36-7218 have at all times had the same point or points of diversion, correct?
A. Yes. They have been changed, but they have had the same.
Q. And they have been changed, as you indicated on these photographs, correct?
A. Yes.
MR. STEENSON: It would be an appropriate time to break.
THE COURT: Okay. You referred to Exhibit 13. It has not been admitted. L1 through 4 have not been admitted.
MR. STEENSON: I'll offer them at this time.
THE COURT: Any objection?
MR. HEPWORTH: I haven't seen them.
MR. STEENSON: 13 is a Clear Springs exhibit, and L is --
MR. HEPWORTH: I have L. No objection.
THE COURT: Without objection, L1 through 4 and Exhibit 13 are admitted. Let's break, come back at a quarter after 2:00.
(Clear Springs Exhibit 13 and Clear Lakes Exhibits L1 through L4 ADMITTED)

(NOON RECESS)
THE COURT: Let's go [redacted] record. Mr. Eastman, we are back on the record. You have resumed the witness stand. I remind you you are still under oath. Mr. Steenson.
MR. STEENSON: Your Honor, we admitted before the break Exhibits L and 13, is that correct?
THE COURT: Correct.
MR. STEENSON: Okay.
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.
Q. Now, I just want to review these exhibits one more time to make sure we are clear before we finish. L1 is a 1968 photograph on which you have made a variety of markings, is that correct?
A. True.
Q. And have we reviewed all these markings today during your testimony?
A. I don't think we reviewed them all.
Q. Okay, in Exhibit L1, which markings did we not discuss?
MR. HEPWORTH: Objection, I didn't know this

was a memory contest. Mr. Steenson surely knows which exhibits or what markings have not been inquired about.
THE COURT: Mr. Steenson, the witness has testified that -- I believe all the markings on all L1 through 4.
MR. STEENSON: Right. But I want to make sure that he has had the opportunity to explain each marking on each exhibit, that he feels he's had that opportunity.
THE COURT: Do you believe you have gone over all the markings that you believe are relevant? I recall going through all the points of diversion and the sources on the L1 through 4, and which water rights are diverted through each one.
MR. STEENSON: I believe I have. I was just trying to be fair to the witness, but I'll withdraw the question.
THE COURT: I recall the testimony. Next question.
Q. (BY MR. STEENSON) Now, Mr. Eastman, if you could look, please, at Exhibit Number L3. Can you see on that exhibit the location of the diversion structures for the Snake River Trout Company facility?
A. Yes.

MICRO

Q. Had those [redacted]ctures changed between the time of the phot[redacted]h in L2, 1969 and the time of this photograph in L3, 19 --
MR. HEPWORTH: Asked and answered. Objection. It was asked and answered before lunch. His answer was no.
MR. STEENSON: What was asked and answered was whether there had been changes between '68 and '69 to those structures. I did not ask about any future time frame -- any additional time frame.
THE COURT: Overruled, get on with it.
Q. (BY MR. STEENSON) Mr. Eastman, any change to those structures at the Snake River Trout Company facility between 1969 and 1977?
A. No.
Q. Okay. The same question with respect to 1977 and 1997. Any changes to the diversion structures to the Snake River Trout Company facility between 1977 and 1997?
A. Yes.
Q. Okay, what changes are you aware of between 1977 and 1997?
A. Well, part of this so-called pool I had marked on one exhibit, and I see on this one has been filled and water has been piped to another piece of

ground that was acquired since we acquired Snake River Trout Farm.
Q. Did that change have the effect of taking water from a different source than had been taken prior to the change?
A. It was taken from the same spring system, the same source, yeah.
Q. And to clarify: When you said it was taken from the same spring system, is that the source you have marked on Deposition Exhibit L2 in the upper right-hand portion of the photograph above the Snake River Trout Company facility? There's the word "Source" with an arrow down to it and a circle around to an area. Is that the spring system you mean?
A. That's the source.
Q. And is that the same spring system that you discussed in your prior answer?
A. Yes.
MR. STEENSON: That's all I have, Your Honor.
THE COURT: Mr. Hepworth.
****
CROSS EXAMINATION
BY MR. HEPWORTH:
Q. Mr. Eastman, you are known by Ted, are you not?

ATTACHMENT 4

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DEC 17 2003

ERO Resources Corp.
1106 N. Cole Rd., Suite C
Boise, ID 83704-8661
(208) 373-7983
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Denver • Boise

www.eroresources.com
oboise@eroresources.com

May 2, 2002

Dan Steenson
Charlie Honsinger
Ringert Clark Chartered
P.O. Box 2773
Boise, ID 83701-2773

Dear Dan and Charlie:

This letter reports the measurements and analysis completed for the Clear Lakes Hatchery (Clear Lakes) water supply. The site was visited twice on April 5 and April 22, 2002. The Clear Lakes' supply flume from the west diversion pool was current metered on both visits, the west diversion pool staff gage was read on both visits and the Clear Lakes' discharge weirs were read on both visits. The results of the weir measurements are attached as Attachments 1 and 2 on the form taken from the December 1988 Brockway and Anderson Report on Measurement and Distribution Prepared for Clear Lakes Trout Company and Clear Springs Trout Company (Brockway Report). The discharge of the Clear Lakes' west diversion pool supply flume was measured to be 56.2 cfs on April 5 and 55.8 cfs on April 22. Water surface elevations of the east and west diversion pools and of the west diversion pool weir blades were measured during the second visit.

The discharge of the 22 and 10 foot weirs supplying the Clear Springs Hatchery can be determined from the reading of the staff gage in the west diversion pool and the weir tables in the Brockway Report. There was no apparent way to measure the Clear Lakes' water supply from the west diversion pool. I contacted Dr. Brockway and he could not recall how the weirs measuring the Clear Lakes' discharge from the west diversion pool were to be read.

The Clear Lakes' weirs consist of an 8 foot fixed weir and a 6 foot adjustable weir. Measuring the elevations of the 6 foot and 8 foot weir blades in the west diversion pool provided the bases to relate the discharge through those weirs to the existing staff gage in the west diversion pool. Even though the 6 foot weir is adjustable, I understand it has not been adjusted since Brockway and Anderson completed their work in 1988. Since the 6 foot weir may be adjusted in the future, a relationship to the existing staff gage and the weir blade elevation as determined by the height of the gate stem above the adjusting wheel nut was developed. The relationship of the Clear Lakes' west diversion pool weirs to the existing staff gage is shown on Attachment 3 of this letter.

The total water supply for Clear Lakes is measured at the discharge weirs as described in the Brockway report. Assuming the 6 foot weir has not been adjusted since 1988, the above analysis allows the Clear Lakes' water supply from the west diversion pool to be determined based upon the same gage height used to determine the water supply to Clear Springs Hatchery. The gage readings for April 5 and April 22 were used to

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SEP 17 2003

determine the discharge through the 6 and 8 foot weirs and were compared to the current meter measurements of those same dates. The weirs display characteristics of both contracted and suppressed rectangular weirs. The discharge through the weirs based upon the contracted weir formula more closely matched (less than 1 ½% variation) the measured discharge than the suppressed weir formula. The tables in Attachment 3 are based upon the contracted weir formula.

The Brockway report refers to a combined diversion of 375 cfs as sufficient to satisfy the three water rights, 36-2659, 36-2708, and 36-7004. The total combined diversion rate for these three water rights is 375 cfs.

The next part of my analysis was to determine, if possible, how the water from the east and west diversion pools had been applied to these water rights. Copies of quarterly measurements similar to Attachments 1 and 2 were provided for the period January 1993 to April 2002, except the January 1996 and January 1997 data, which are missing.

Table 1 shows my analysis of the data. The columns titled "Gage Height", "Clear Lakes Discharge", and "Clear Springs Diversion" along with the date were taken directly from the data sheets of measurements taken jointly by staff from Clear Lakes and Clear Springs Hatcheries. Data in the column titled "Clear Lakes West Diversion" were computed using the reported gage height and the relationship in Attachment 3. The column "Clear Lakes East Diversion" was computed as the difference between the "Clear Lakes West Diversion" and "Clear Lakes Discharge." "Total Diversion" in the chart was computed as the sum of "Clear Lakes Discharge" and "Clear Springs Diversion" but was also reported on the data sheets. The computed values were compared to the data sheets as a check.

The percentage portion of the total diversion by each pool was then computed from the data in the table. The west pool percentage is the sum of the "Clear Springs Diversion" and the "Clear Lakes West Diversion" divided by the "Total Diversion." Likewise, the east pool percentage is the "Clear Lakes East Diversion" divided by the "Total Diversion."

Chart 1 shows these percentages to be nearly constant throughout the period of this data. If one recalls the percentages are based upon measurements that may include ±5% variation, I believe the percentages can be considered constant and have done so in the remainder of my analysis. The average percentage of water from each diversion pool used for the remainder of this analysis is 71.0% from the west pool and 29.0% from the east pool as shown near the bottom of Table 1.

On April 22 I examined the division point between the east and west pool as well as the pool outlet elevations. Water from the springs divides into the two pools around rocks that have been in place for a number of years. There is no conduit or channel between the two pools and the water surface elevation at the outlet of the east pool is about 0.4 foot lower than the water surface elevation upstream from the weirs in the west pool. The water from the springs that enters the east pool goes exclusively to the east side of the Clear Lakes facility. Water from the springs that enters the west pool is divided by the weirs into the Clear Springs diversion and the Clear Lakes West Diversion.

There is an additional catchment above the east pool that captures spring water for use by Clear Lakes. The water enters a pipe from the catchment and is carried into the Clear Lakes facility through the pipe. The discharge from this pipe is measured through

the Clear Lakes discharge weirs and in Table 1 is combined in the Clear Lakes East Diversion quantity.

Based on the analysis of water supply from the two diversion pools and the physical relationship of the two pools, an analysis of water delivery by priority among the three above referenced water rights was completed. The historical water supply of 71% from the west pool and 29% from the east pool can be used to determine the relative quantities for a full water supply from the two diversion pools. For the west pool, 71% of 375 is 266.25 cfs and for the east pool, 29% of 375 is 108.75 cfs. For a full supply, water right 36-2708 will receive 200 cfs from the west pool and 36-7004 will receive 75 cfs from the east pool. This leaves 66.25 cfs for water right 36-2659 from the west pool and 33.75 cfs for 36-2659 from the east pool for a total of 100 cfs for 36-2659, the senior water right.

Even though the actual division of water right 36-2659 into the east and west pools has not been done in the past, I believe that division is essential to make priority delivery of the water diverted by the east and west pools. Water right 36-2659 is the senior right in each pool and the quantity of water diverted by that right through each pool will determine how much water will be received by the junior right through each pool.

Table 2 shows the division of water to the three water rights for the period in which data are available. Chart 2 shows the historical water supply for the two hatcheries and the water supply that would be available if priority delivery were to be made.

As noted above, the diversion for the senior water right is held constant from each pool. The junior right in each pool is then impacted as the spring flows decline below 375 cfs.

Please let me know if you need additional information or have questions about any of this material.

Yours truly,

Dave

David B. Shaw
Project Manager

DBS:sw

Encl.

LETTER TO DAN STEENSON FROM DAVID B. SHAW DATED MAY 2, 2002

DEC 17 2003

ATTACHMENT 1

CLEAR SPRINGS-CLEAR LAKES FLOW DISTRIBUTION

A. CLEAR SPRINGS DISCHARGE

1.	Combined 22- and 10-ft weirs gage 1.41 ft	175.3 cfs
2.	Hatchery and seep pipes (1.0 cfs if flowing)	1.0 cfs
3.	Wet lab weir gage _____ ft (or 0.5 cfs)	0.5 cfs
	Total Clear Springs Discharge	176.8 cfs

B. CLEAR LAKES DISCHARGE

1. East Weirs

No. 1 gage	0.80 ft	24.3 cfs
No. 2 gage	0.77 ft	22.9 cfs
No. 3 gage	0.76 ft	22.4 cfs
No. 4 gage	0.85 ft	26.6 cfs
No. 5 gage	0.74 ft	21.5 cfs
No. 6 gage	0.78 ft	23.3 cfs
Total of six east weirs		141.0 cfs

2.	West weir gage 1.01 ft	10.7 cfs
3.	Hatchery pipe (0.2 cfs if flowing)	_____ cfs
	Total Clear Lakes Discharge	151.7 cfs

C. TOTAL COMBINED DISCHARGE (Clear Springs plus Clear Lakes) 328.5 cfs

D. ALLOWABLE DISCHARGES UNDER "AGREEMENT"

1.	Clear Lakes Trout Co. Total Combined Discharge x 0.4667 (maximum 175 cfs allowable)	153.3 cfs
2.	Clear Springs Trout Co. Total Combined Discharge minus allowable Clear Lakes Trout Co. discharge	175.2 cfs
3.	Difference between Clear Lakes measured and allowable discharge (if 5 cfs or less, do not adjust flow)	<1.67 cfs

E. DISCHARGE ADJUSTMENT (IF REQUIRED)

1.	Clear Lakes adjustable weir gage _____ ft	_____ cfs
2.	Correction required (+ or - from D.3 above)	_____ cfs
3.	New adjustable weir gage needed _____ ft	_____ cfs

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ATTACHMENT 2 April 22, 02

CLEAR SPRINGS-CLEAR LAKES FLOW DISTRIBUTION

A. CLEAR SPRINGS DISCHARGE

1.	Combined 22- and 10-ft weirs gage 1.40 ft	173.4 cfs
2.	Hatchery and seep pipes (1.0 cfs if flowing)	1.00 cfs
3.	Wet lab weir gage _____ ft (or 0.5 cfs)	0.50 cfs
	Total Clear Springs Discharge	174.9 cfs

B. CLEAR LAKES DISCHARGE

1. East Weirs

No. 1 gage	0.80 ft	24.26 cfs
No. 2 gage	0.76 ft	22.43 cfs
No. 3 gage	0.75 ft	21.98 cfs
No. 4 gage	0.86 ft	27.09 cfs
No. 5 gage	0.74 ft	21.54 cfs
No. 6 gage	0.77 ft	22.80 cfs

Total of six east weirs: 140.1 cfs

2.	West weir gage 0.90 ft	9.11 cfs
3.	Hatchery pipe (0.2 cfs if flowing)	_____ cfs
	Total Clear Lakes Discharge	149.2 cfs

C. TOTAL COMBINED DISCHARGE
(Clear Springs plus Clear Lakes) 324.1 cfs

D. ALLOWABLE DISCHARGES UNDER "AGREEMENT"

1. Clear Lakes Trout Co.
   Total Combined Discharge x 0.4667
   (maximum 175 cfs allowable) 151.3 cfs

2. Clear Springs Trout Co.
   Total Combined Discharge minus allowable
   Clear Lakes Trout Co. discharge 172.8 cfs

3. Difference between Clear Lakes measured and allowable discharge
   (if 5 cfs or less, do not adjust flow) <2.1> cfs

E. DISCHARGE ADJUSTMENT (IF REQUIRED)

1.	Clear Lakes adjustable weir gage _____ ft	_____ cfs
2.	Correction required (+ or - from D.3 above)	_____ cfs
3.	New adjustable weir gage needed _____ ft	_____ cfs

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CLEAR LAKES

FORMULAS FOR READING WEIRS DISCHARGING FROM WEST POOL

The 8 feet wide fixed weir and 6 feet wide movable (adjustable) weir that discharge to the Clear Lakes hatchery can be read using the existing staff gage on the Clear Springs' side of the structure and the formulas below. These formulas are necessary to correct for the difference in elevation between the Clear Lakes 8 feet wide weir and Clear Springs' 22 feet and 10 feet wide weirs, and to make a proper determination of the discharge through the Clear Lakes 6 feet wide movable weir.

Two readings are necessary for the measurement. First the staff gage (GH) on the Clear Springs side of the structure must be read. Second, the height of the gate stem (SH) above the adjusting wheel nut on the Clear Lakes movable weir must be measured. The units for both readings must be in feet. The readings are then applied to the formulas below to determine the adjusted gage height (GH_A) for use in the weir tables to determine discharge into the Clear Lakes hatchery.

Eight Feet Wide Weir

$$GH_A = GH - 0.60$$

$$GH_A = \_\_\_\_\_ - 0.60 = \_\_\_\_\_$$

From 8 foot weir table Q= _____ cfs

Six Feet Wide Movable Weir

$$GH_A = GH - SH + 0.64$$

$$GH_A = \_\_\_\_\_ - \_\_\_\_\_ + 0.64 = \_\_\_\_\_$$

From 6 foot weir table Q=_____ cfs

Total Q=_____cfs

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Clear Lakes – 8 Ft Contracted Weir

Discharge in CFS adjusted for velocity of approach and weir elevation

Length = 8 Velocity Head = 0.00000

Gage Reading	0.00	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	2.29	2.46	2.65	2.83	3.02	3.22	3.41	3.61	3.82	4.03
0.3	4.24	4.46	4.68	4.90	5.13	5.36	5.59	5.82	6.06	6.31
0.4	6.55	6.80	7.05	7.31	7.56	7.82	8.09	8.35	8.62	8.89
0.5	9.17	9.44	9.72	10.00	10.29	10.58	10.86	11.16	11.45	11.75
0.6	12.05	12.35	12.65	12.96	13.27	13.58	13.89	14.21	14.53	14.85
0.7	15.17	15.49	15.82	16.15	16.48	16.81	17.15	17.49	17.83	18.17
0.8	18.51	18.86	19.20	19.55	19.90	20.26	20.61	20.97	21.33	21.69
0.9	22.05	22.42	22.79	23.15	23.52	23.90	24.27	24.65	25.02	25.40
1.0	25.78	26.17	26.55	26.94	27.33	27.72	28.11	28.50	28.90	29.29
1.1	29.69	30.09	30.49	30.90	31.30	31.71	32.11	32.52	32.94	33.35
1.2	33.76	34.18	34.60	35.01	35.44	35.86	36.28	36.71	37.13	37.56
1.3	37.99	38.42	38.85	39.29	39.72	40.16	40.60	41.04	41.48	41.92
1.4	42.36	42.81	43.26	43.70	44.15	44.60	45.06	45.51	45.96	46.42
1.5	46.88	47.34	47.80	48.26	48.72	49.18	49.65	50.12	50.58	51.05
1.6	51.52	52.00	52.47	52.94	53.42	53.90	54.37	54.85	55.33	55.82
1.7	56.30	56.78	57.27	57.75	58.24	58.73	59.22	59.71	60.20	60.70
1.8	61.19	61.69	62.19	62.68	63.18	63.68	64.19	64.69	65.19	65.70
1.9	66.20	66.71	67.22	67.73	68.24	68.75	69.26	69.78	70.29	70.81
2.0	71.32	71.84	72.36	72.88	73.40	73.92	74.45	74.97	75.50	76.02

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Clear Lakes -- 6 Ft Contracted Weir
Discharge in CFS adjusted for velocity of approach and weir elevation

Length = 6 Velocity Head = 0.00000

Gage Reading	0.00	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	1.84	1.98	2.12	2.26	2.40	2.55	2.70	2.86	3.01	3.17
0.3	3.33	3.50	3.66	3.83	4.00	4.18	4.35	4.53	4.71	4.90
0.4	5.08	5.27	5.46	5.65	5.84	6.04	6.24	6.44	6.64	6.84
0.5	7.05	7.26	7.47	7.68	7.89	8.11	8.33	8.54	8.77	8.99
0.6	9.21	9.44	9.67	9.90	10.13	10.36	10.60	10.83	11.07	11.31
0.7	11.55	11.79	12.04	12.28	12.53	12.78	13.03	13.28	13.53	13.79
0.8	14.04	14.30	14.56	14.82	15.08	15.35	15.61	15.88	16.14	16.41
0.9	16.68	16.95	17.23	17.50	17.78	18.05	18.33	18.61	18.89	19.17
1.0	19.46	19.74	20.03	20.31	20.60	20.89	21.18	21.47	21.76	22.06
1.1	22.35	22.65	22.95	23.25	23.55	23.85	24.15	24.45	24.76	25.06
1.2	25.37	25.67	25.98	26.29	26.60	26.92	27.23	27.54	27.86	28.17
1.3	28.49	28.81	29.13	29.45	29.77	30.09	30.41	30.74	31.06	31.39
1.4	31.72	32.04	32.37	32.70	33.03	33.37	33.70	34.03	34.37	34.70
1.5	35.04	35.38	35.71	36.05	36.39	36.73	37.08	37.42	37.76	38.11
1.6	38.45	38.80	39.15	39.49	39.84	40.19	40.54	40.89	41.25	41.60
1.7	41.95	42.31	42.66	43.02	43.38	43.74	44.09	44.45	44.81	45.17
1.8	45.54	45.90	46.26	46.63	46.99	47.36	47.72	48.09	48.46	48.83
1.9	49.20	49.57	49.94	50.31	50.68	51.06	51.43	51.80	52.18	52.56
2.0	52.93	53.31	53.69	54.07	54.45	54.83	55.21	55.59	55.97	56.36

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ATTACHMENT 3

Table 1

Historical Diversion Data For Clear Lakes and Clear Springs Hatcheries Taken From Water Measurement Forms After Brockway & Anderson 1988

Date	Gage Height	Clear Lakes Discharge	Clear Springs Diversion	Clear Lakes West Diversion[1]	Clear Lakes East Diversion	Total Diversion	Percent Total West Diversion	Percent Total East Diversion
1/7/93	1.45	158.07	184.34	59.75	98.32	342.41	71.3%	28.7%
4/14/93	1.43	155.34	180.54	58.35	96.99	335.88	71.1%	28.9%
7/14/93	1.45	155.73	184.34	59.75	95.98	340.07	71.8%	28.2%
10/21/93	1.49	164.45	192.00	62.59	101.86	356.45	71.4%	28.6%
1/13/94	1.45	161.18	184.34	59.75	101.43	345.52	70.6%	29.4%
4/13/94	1.44	153.02	182.44	59.05	93.97	335.46	72.0%	28.0%
7/12/94	1.42	154.73	178.65	57.66	97.07	333.38	70.9%	29.1%
10/4/94	1.50	164.00	193.94	63.30	100.70	357.94	71.9%	28.1%
1/17/95	1.46	160.56	186.24	60.46	100.10	346.80	71.1%	28.9%
4/18/95	1.42	153.21	178.65	57.66	95.55	331.86	71.2%	28.8%
7/19/95	1.44	153.57	182.44	59.05	94.52	336.01	71.9%	28.1%
10/23/95	1.48	165.39	190.08	61.87	103.52	355.47	70.9%	29.1%
1/ /96								
4/16/96	1.44	151.16	182.44	59.05	92.11	333.60	72.4%	27.6%
7/18/96	1.45	157.10	184.34	59.75	97.35	341.44	71.5%	28.5%
10/15/96	1.50	166.18	193.94	63.30	102.88	360.12	71.4%	28.6%
1/ /97								
4/9/97	1.45	162.82	184.34	59.75	103.07	347.16	70.3%	29.7%
7/8/97	1.46	163.59	186.24	60.46	103.13	349.83	70.5%	29.5%
10/23/97	1.52	176.02	197.82	64.74	111.28	373.84	70.2%	29.8%
1/8/98	1.49	166.46	192.00	62.59	103.87	358.46	71.0%	29.0%
6/4/98	1.46	161.51	186.24	60.46	101.05	347.75	70.9%	29.1%
10/20/98	1.52	170.22	197.82	64.74	105.48	368.04	71.3%	28.7%
1/14/99	1.49	164.69	192.00	62.59	102.10	356.69	71.4%	28.6%
4/15/99	1.46	166.09	186.24	60.46	105.63	352.33	70.0%	30.0%
7/7/99	1.46	163.16	186.24	60.46	102.70	349.40	70.6%	29.4%
10/19/99	1.51	171.21	195.87	64.02	107.19	367.08	70.8%	29.2%
1/13/00	1.48	162.12	190.08	61.87	100.25	352.20	71.5%	28.5%
4/18/00	1.44	155.89	182.44	59.05	96.84	338.33	71.4%	28.6%
7/12/00	1.44	161.98	182.44	59.05	102.93	344.42	70.1%	29.9%
10/10/00	1.51	168.09	195.87	64.02	104.07	363.96	71.4%	28.6%
1/11/01	1.46	165.84	186.24	60.46	105.38	352.08	70.1%	29.9%
4/4/01	1.45	166.03	184.34	59.75	106.28	350.37	69.7%	30.3%
7/17/01	1.42	158.66	178.65	57.66	101.00	337.31	70.1%	29.9%
10/17/01	1.44	155.09	182.44	59.05	96.04	337.53	71.5%	28.5%
1/16/02	1.43	154.95	180.54	58.35	96.60	335.49	71.2%	28.8%
4/16/02	1.41	153.74	176.77	56.96	96.78	330.51	70.7%	29.3%
					Average		71.0%	29.0%

[1] Assumes a gate stem height of 0.46 feet as measured on 4/22/02

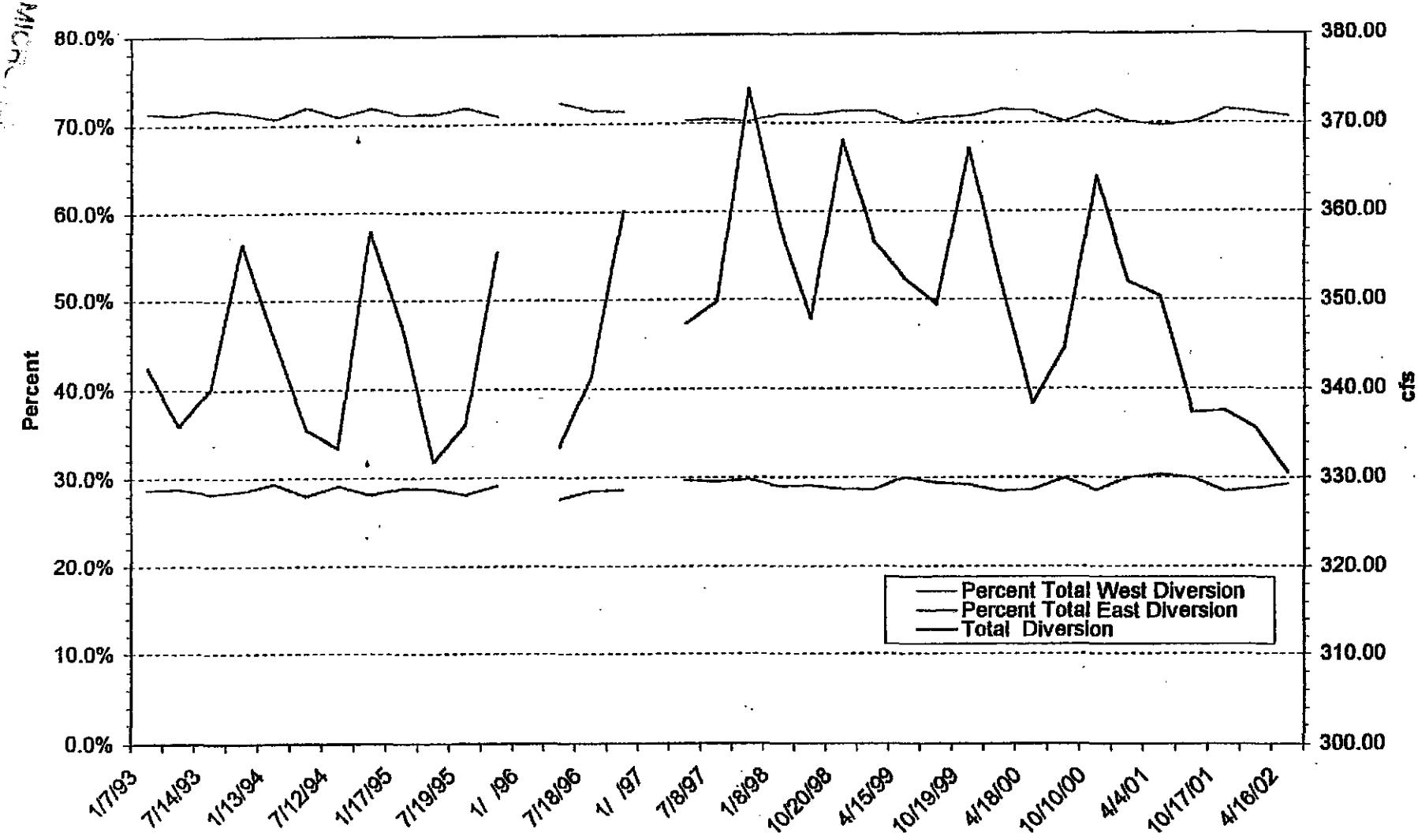
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Chart 1

ATTACHMENT 3

Percentages of East and West Pool Contribution to Total Clear Lakes and Clear Springs Diversions



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Table 2

Proposed Distribution of Historical Flows Holding Diversions for Water Right 36-2659 Constant Gage Height Data Taken From Forms After Brockway & Anderson, 1988

Date	Gage Height	Total Diversion	Percent Full Supply[2]	36-7004 Entitlement[3]	36-2659 Delivery East Pool[1]	36-2659 Delivery West Pool[1]	Proposed Clear Lakes Delivery	Historical Clear Lakes Delivery	Proposed Clear Springs Delivery	Historical Clear Springs Delivery
1/7/93	1.45	342.41	91.3%	64.57	33.75	66.25	164.57	158.07	177.84	184.34
4/14/93	1.43	335.88	89.6%	63.24	33.75	66.25	163.24	155.34	172.64	180.54
7/14/93	1.45	340.07	90.7%	62.23	33.75	66.25	162.23	155.73	177.84	184.34
10/21/93	1.49	356.45	95.1%	68.11	33.75	66.25	168.11	164.45	188.34	192.00
1/13/94	1.45	345.52	92.1%	67.68	33.75	66.25	167.68	161.18	177.84	184.34
4/13/94	1.44	335.46	89.5%	60.22	33.75	66.25	160.22	153.02	175.24	182.44
7/12/94	1.42	333.38	88.9%	63.32	33.75	66.25	163.32	154.73	170.06	178.65
10/4/94	1.50	357.94	95.4%	66.95	33.75	66.25	166.95	164.00	190.99	193.94
1/17/95	1.46	346.80	92.5%	66.35	33.75	66.25	166.35	160.56	180.45	186.24
4/18/95	1.42	331.88	88.5%	61.80	33.75	66.25	161.80	153.21	170.06	178.65
7/19/95	1.44	336.01	89.6%	60.77	33.75	66.25	160.77	153.57	175.24	182.44
10/23/95	1.48	355.47	94.8%	69.77	33.75	66.25	169.77	165.39	185.70	190.08
1/ /96										
4/16/96	1.44	333.60	89.0%	58.36	33.75	66.25	158.36	151.16	175.24	182.44
7/18/96	1.45	341.44	91.0%	63.60	33.75	66.25	163.60	157.10	177.84	184.34
10/15/96	1.50	360.12	96.0%	69.13	33.75	66.25	169.13	166.18	190.99	193.94
1/ /97										
4/9/97	1.45	347.16	92.6%	69.32	33.75	66.25	169.32	162.82	177.84	184.34
7/8/97	1.46	349.83	93.3%	69.38	33.75	66.25	169.38	163.59	180.45	186.24
10/23/97	1.52	373.84	99.7%	77.53	33.75	66.25	177.53	176.02	196.31	197.82
1/8/98	1.49	358.46	95.6%	70.12	33.75	66.25	170.12	166.46	188.34	192.00
6/4/98	1.46	347.75	92.7%	67.30	33.75	66.25	167.30	161.51	180.45	186.24
10/20/98	1.52	368.04	98.1%	71.73	33.75	66.25	171.73	170.22	196.31	197.82
1/14/99	1.49	356.69	95.1%	68.35	33.75	66.25	168.35	164.69	188.34	192.00
4/15/99	1.46	352.33	94.0%	71.88	33.75	66.25	171.88	166.09	180.45	186.24
7/7/99	1.46	349.40	93.2%	68.95	33.75	66.25	168.95	163.16	180.45	186.24
10/19/99	1.51	367.08	97.9%	73.44	33.75	66.25	173.44	171.21	193.64	195.87
1/13/00	1.48	352.20	93.9%	66.50	33.75	66.25	166.50	162.12	185.70	190.08
4/18/00	1.44	338.33	90.2%	63.09	33.75	66.25	163.09	155.89	175.24	182.44
7/12/00	1.44	344.42	91.8%	69.18	33.75	66.25	169.18	161.98	175.24	182.44
10/10/00	1.51	363.96	97.1%	70.32	33.75	66.25	170.32	168.09	193.64	195.87
1/11/01	1.46	352.08	93.9%	71.63	33.75	66.25	171.63	165.84	180.45	186.24
4/4/01	1.45	350.37	93.4%	72.53	33.75	66.25	172.53	166.03	177.84	184.34
7/17/01	1.42	337.31	90.0%	67.25	33.75	66.25	167.25	158.66	170.06	178.65
10/17/01	1.44	337.53	90.0%	62.29	33.75	66.25	162.29	155.09	175.24	182.44
1/16/02	1.43	335.49	89.5%	62.85	33.75	66.25	162.85	154.95	172.64	180.54
4/16/02	1.41	330.51	88.1%	63.03	33.75	66.25	163.03	153.74	167.49	176.77

[1] Assumes a gate stem height of 0.46 feet as measured on 4/22/02.

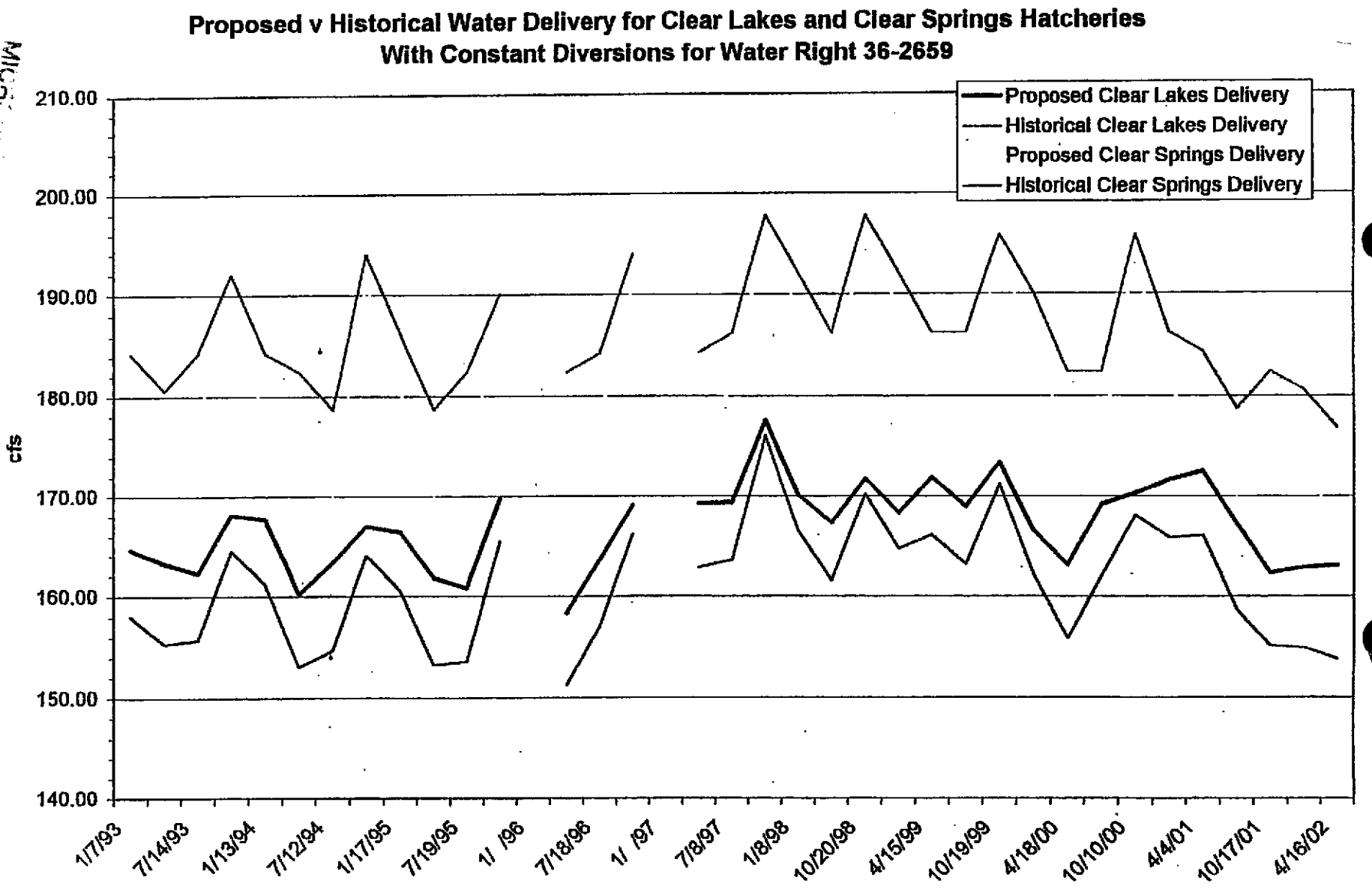
[2] Full supply based upon the availability of 375 cfs for both hatcheries.

[3] 36-7004 entitlement is the East Pool water supply minus 33.75 cfs for 36-2659 East Pool Entitlement

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Chart 2

ATTACHMENT 3



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ATTACHMENT 5

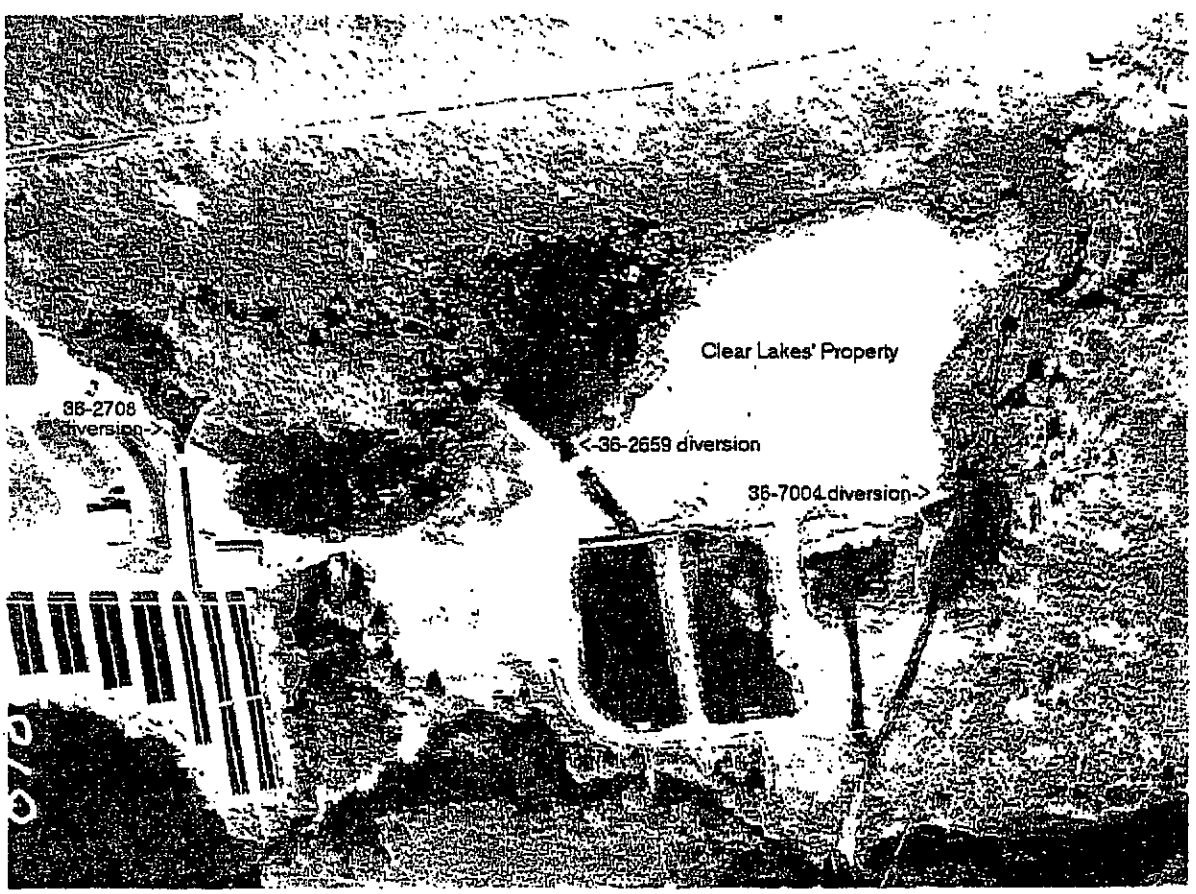
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Development of the Hatcheries, Diversions and Water Rights

Understanding how the facilities and water rights were developed provides useful background in understanding the diversion of water rights through the pools. The following chronology of events is undisputed, and has been established through photographs and the testimony of Clear Lakes' former President, Earl Hardy, and Clear Springs' Chairman of the Board, Jess Eastman in the Clear Springs Subcases.

Before Clear Springs and Clear Lakes began building their respective fish hatcheries and diverting water, numerous spring discharges from the Snake River canyon rim formed several streams which flowed south to Clear Lake. Clear Lakes' property was bracketed by the eastern stream on the east and the western stream on the west. The adjacent Clear Springs property was similarly bracketed by the western stream on the east. These streams were physically separated by the natural features and contours of the land below the canyon rim so that diversion of water from one stream did not affect the flow of water in the other.

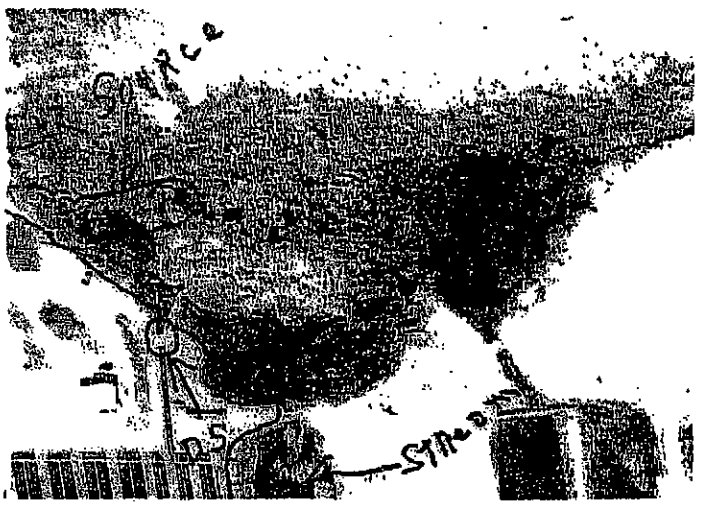
Clear Lakes obtained a permit for water right no. 36-02659 to divert 100 cfs, Clear Springs obtained a permit for water right no. 36-02708 to divert 200 cfs, and Clear Lakes obtained a permit for water right no. 36-07004. The initial diversions for each of these water rights is shown in the following 1968 photograph.



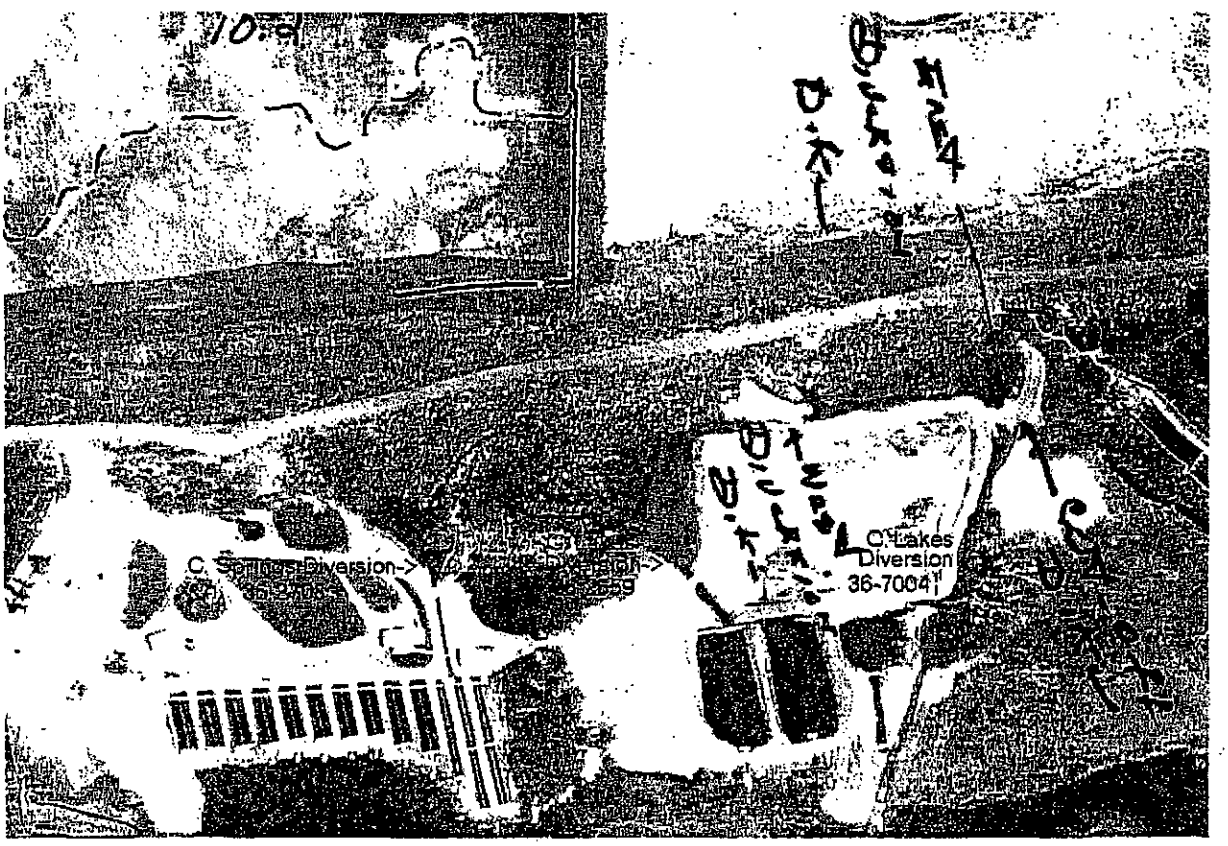
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ATTACHMENT 5

Mr. Eastman marked the following 1968 photograph (Trial Exhibit L1) to show Clear Springs point of diversion ("D.S."), and the spring source (marked as "Source) from which Clear Springs diverted water.



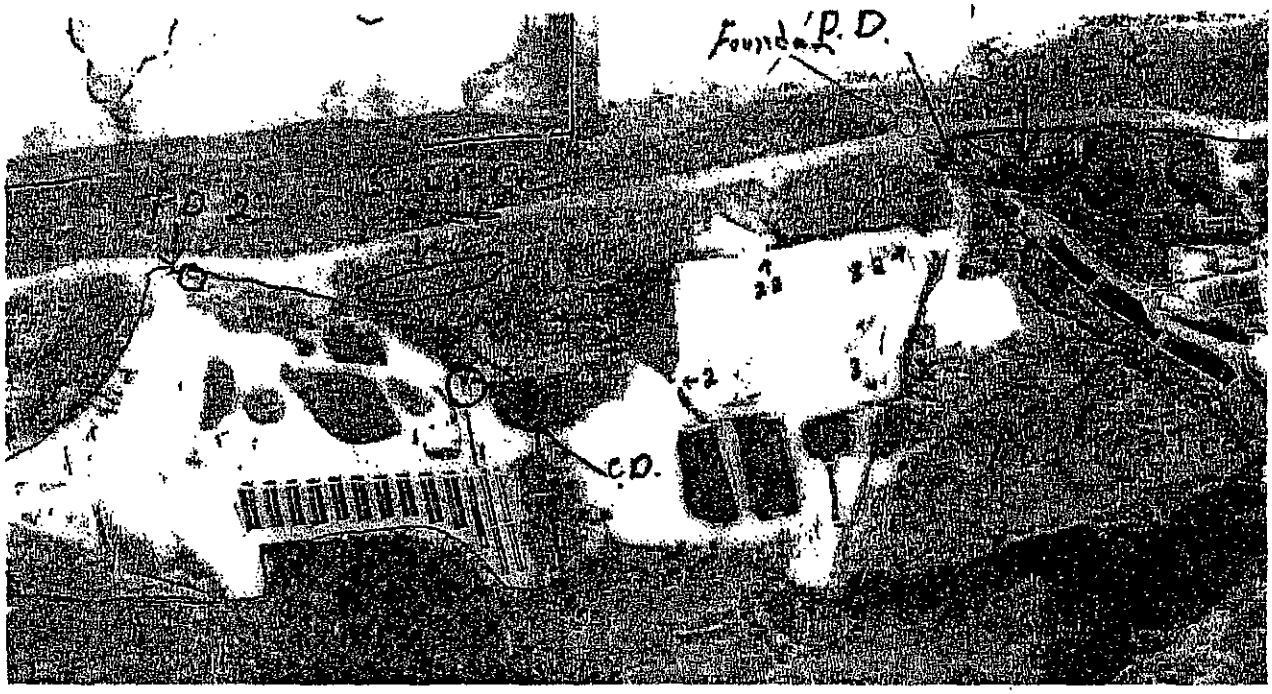
During its next phase of development, in 1969, Clear Lakes modified its property and constructed new diversions upstream of the original diversions at the northern portion of its property to increase Clear Lakes' production capability. These changes are shown in the following copy of photographic exhibit D, which Mr. Hardy marked in red.



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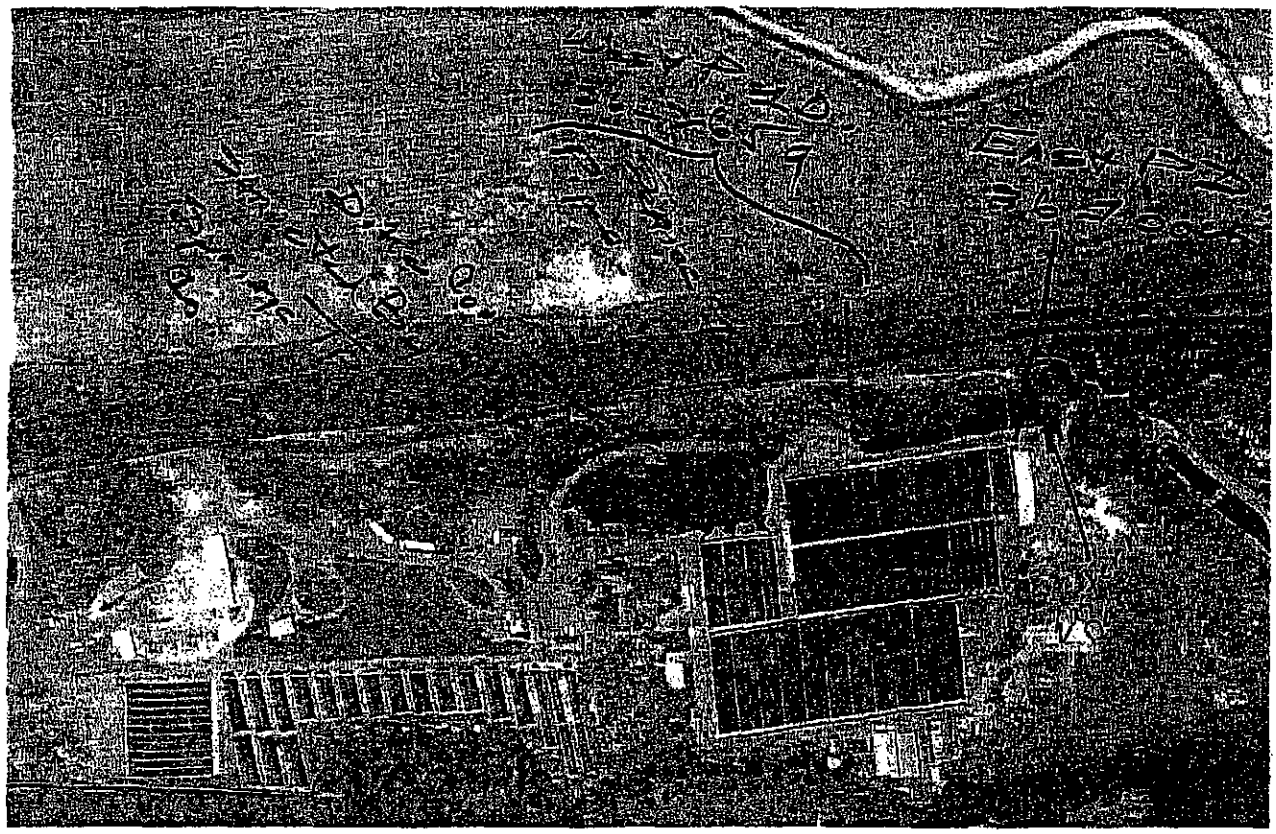
Clear Lakes constructed the "East Diversion Dike" and "Cut-off Dike" pursuant to its permit for water right no. 36-07004, and constructed the "West Diversion Dike" pursuant to its permit for water right no. 36-02659. Until construction was completed, Clear Lakes left open gates in these upper dikes so that water could flow down the western and eastern streams to Clear Lakes' original points of diversion.

Mr. Eastman marked the 1969 photograph (Exhibit L2) to show Clear Springs' diversion works ("C.D.") and the spring source ("Source") for water right 36-02708 at that time. He similarly showed a discrete and separate water source for the Snake River Trout Company adjacent to the Clear Lakes Property (upper left hand portion of the photograph, located northeast of Clear Lakes' upper diversion for water right no. 36-07004.



The following photograph, taken in 1977, shows Clear Lakes' hatchery and diversions after the raceways and the diversions were completed in 1970 or 1971. The temporary gates in the East Dike (also identified by Mr. Hardy as the "Eastern Dam") and the West Dike were permanently closed, completing the construction of the dikes and creating the Eastern Pool. Water flows through pipes and flumes in the southern boundary of the pool into the upper portion of the Clear Lakes' raceways. Clear Lakes installed pipes in springs that discharged into the eastern pool to convey water into Clear Lakes hatchery and fry pond buildings. At this time Clear Lakes, simultaneously diverted part of water right no. 36-02659 into the Eastern Pool, and part of the water right from what remained of the Western Stream through pipes into its uppermost raceways on the west side of its property. Clear Lakes diversions were measured at two points of discharge into Clear Lake. Clear Lakes submitted proof of beneficial use on September 9, 1977 for water right nos. 36-02659 and 36-07004, and received licenses for the full permitted quantities.

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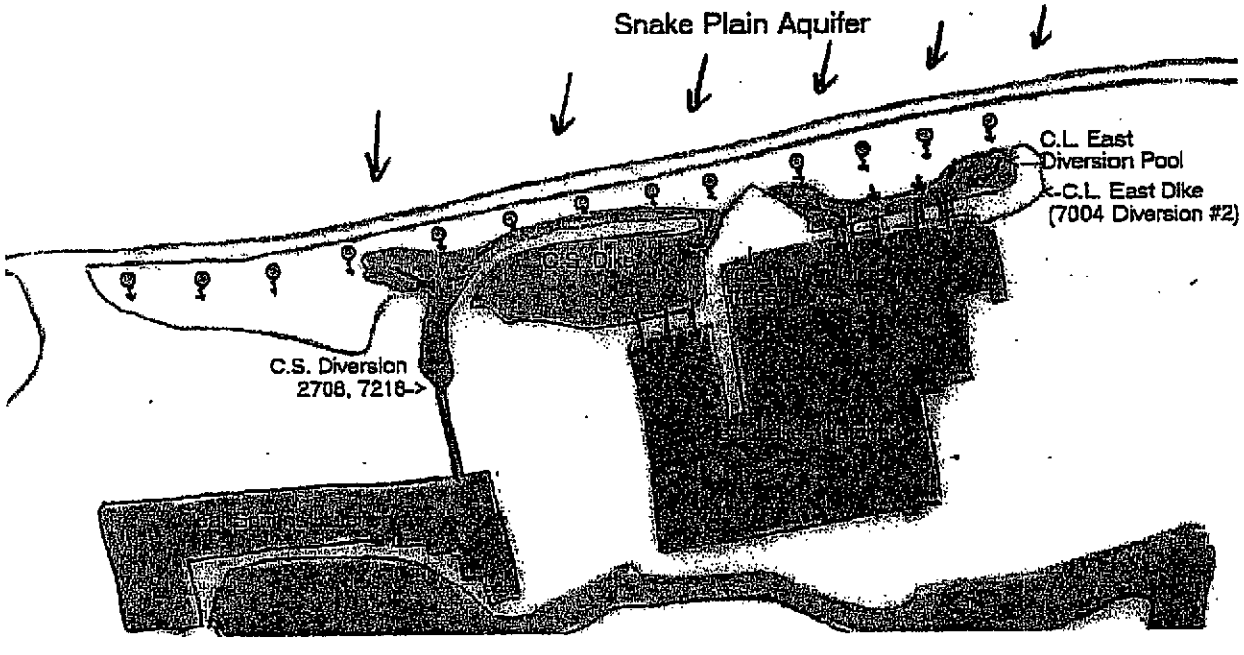
The photograph also shows the dike Clear Springs constructed in 1971 in the western stream to divert more water through Clear Springs flume. Clear Springs constructed this dike on land that Clear Lakes' leased from Idaho Power Company without notice to Clear Lakes or Clear Lakes consent. As is apparent from the photograph and the following drawing, the dike was constructed above Clear Lakes' diversion works in a manner that interfered with Clear Lakes diversion of water pursuant to its senior water right no. 36-02659. In March of 1972, Clear Springs filed an application for permit for water right no. 36-07218 for 51.55 cfs to authorize its increased diversion of water from the springs feeding the western stream - water that Clear Lakes had the prior right to divert and had diverted pursuant to water right no. 36-02659. (It does not appear that there has ever been a sufficient water supply from the springs or through the Western Pool to deliver this water to Clear Springs, unless Clear Lakes is prevented from diverting water pursuant to 36-02659.)

On the following 1977 photograph (Exhibit L3), Mr. Eastman showed the Clear Springs' diversion works for water right no. 36-02708 and the source of water for that right. Construction of the dike dramatically increased spring discharges Clear Springs could divert. Still, Clear Springs could not and did not claim the right to divert any water diverted by the Eastern Pool.

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The following diagram illustrates the flows and diversions of spring water at the time of the 1977 photograph.



ATTACHMENT 5

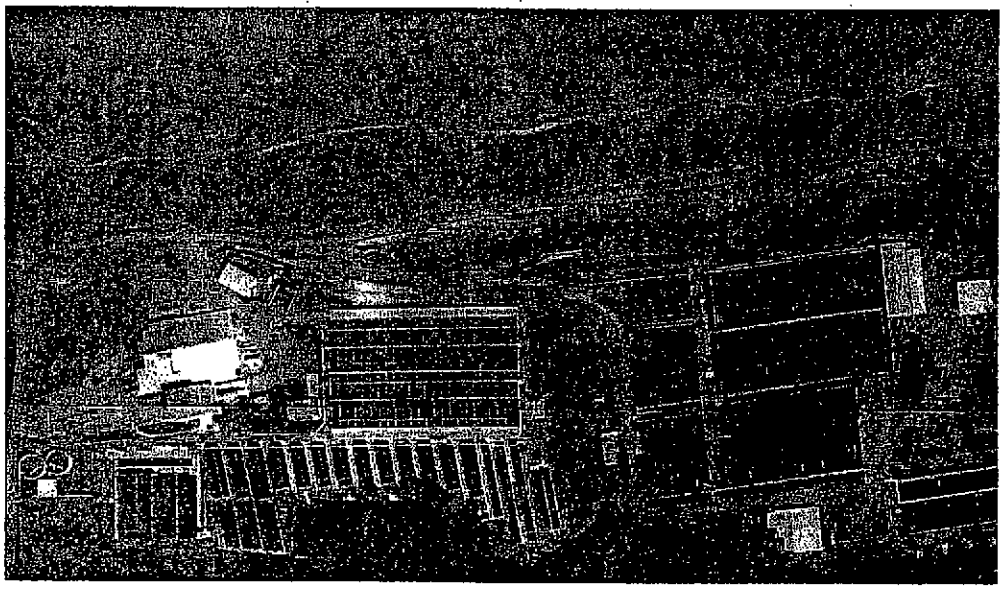
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Clear Lakes sued Clear Springs over construction of the dike. As an interim settlement, sufficient water was allowed to pass by the eastern tip of the dike to provide water to the western portion of Clear Lakes' hatchery. The litigation ultimately resulted in the 1980 settlement agreement in which Clear Lakes agreed to allow Clear Springs to complete the dike by increasing its height and extending to "include an area where the waters flow from the natural springs outlets, which a have been and are presently being used by [Clear] Lakes. 1980 Settlement Agreement, p. 2. Clear Lakes and Clear Springs agreed to share the spring water on a percentage basis, without regard to priorities or the points of diversion, until a different apportionment is "finally agreed upon or legally determined."

The agreement provided for the construction of diversion works by subsequent agreement of the parties to apportion the water rights. Clear Lakes and Clear Springs did subsequently agree to the construction of the shared diversion works. The Brockway and Anderson Report which you have reflects that subsequent agreement and describes how diversions through the shared works are to be adjusted to deliver water pursuant to the compromise. To date, the works have never been adjusted, establishing that spring flows collected by the Western and the Eastern Pools rise and fall proportionately.

Under the agreement, Clear Lakes and Clear Springs each have the continuing right to access the shared works, and have the mutual right to operate the works, whether diversions through the Western Pool continue to be delivered pursuant to the compromise in the 1980 agreement or pursuant to some other legal determination or agreement.

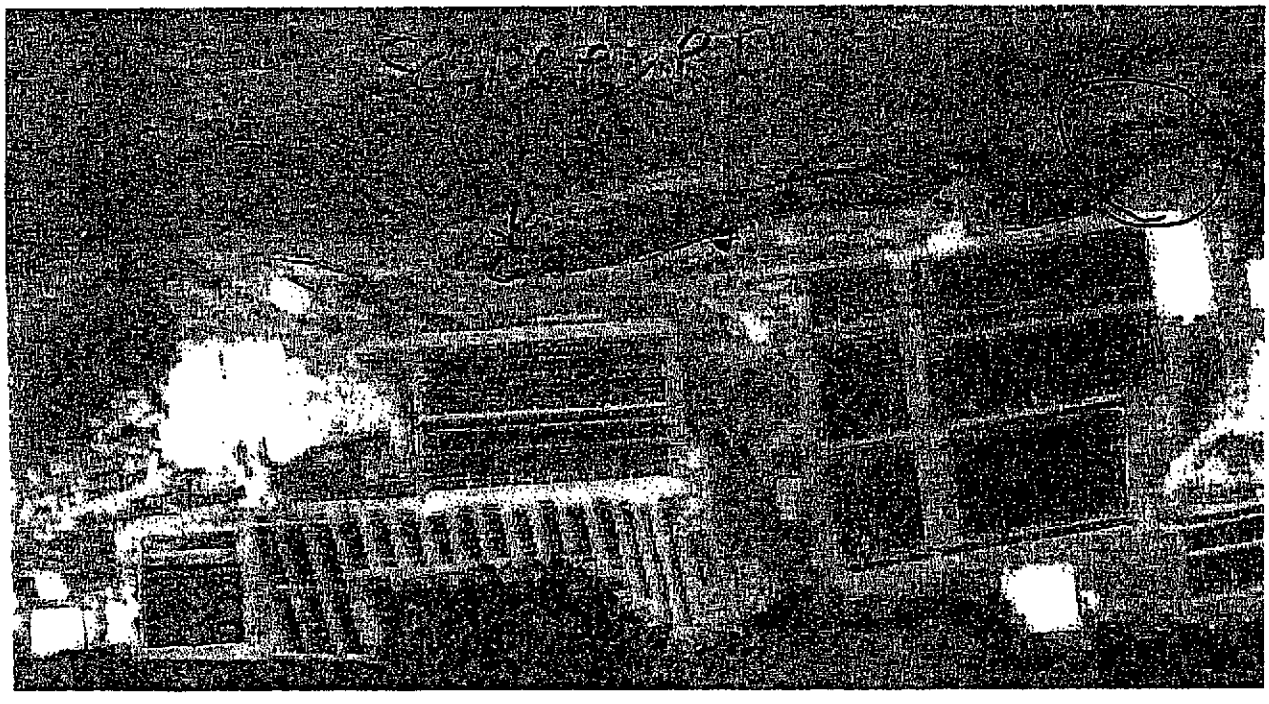
Finally we come to the present, as shown in the following 1997 photograph marked by Mr. Hardy. These photographs show the Western Pool, created by completion of the dike as provided in the 1980 settlement agreement, and the shared diversion works in the middle of that pool through which Clear Springs diverts water right no: 36-02708 and Clear Lakes diverts a portion of water right no. 36-02659.



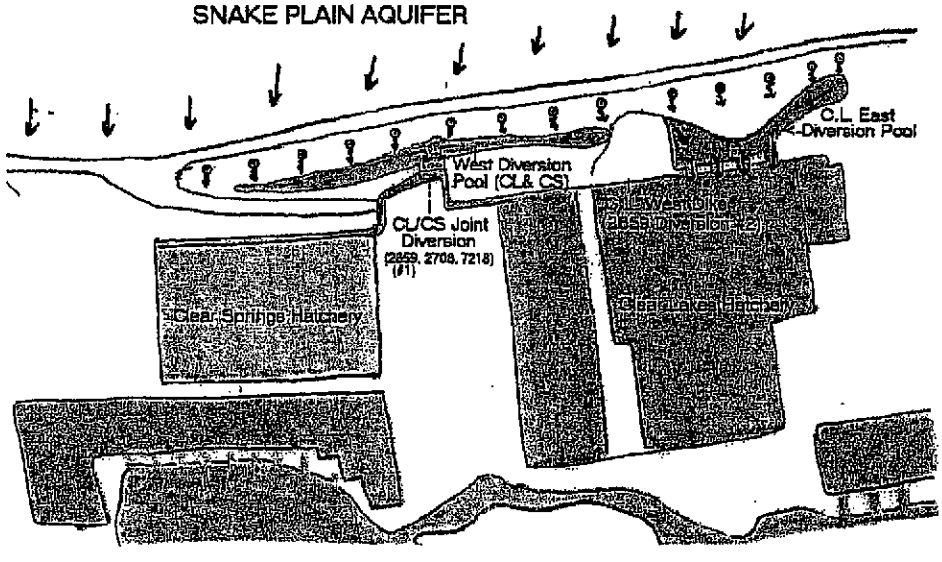
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On the following photograph (Trial Exhibit L4), Mr. Eastman showed the springs collected by the Western Pool as the only source of water for Clear Springs water rights. At no time has Clear Springs ever attempted, or claimed the right, to divert or water collected by Clear Lakes Eastern Pool. Clear Lakes' relied upon these facts when it executed the 1980 agreement, permitting the completion of the dike and installation of the shared diversion works. For this reason, and the others discussed in the memorandum (futile call, no injury rule), Clear Springs cannot now claim any right to spring flows diverted through the eastern pool pursuant to water right no. 36-07004.

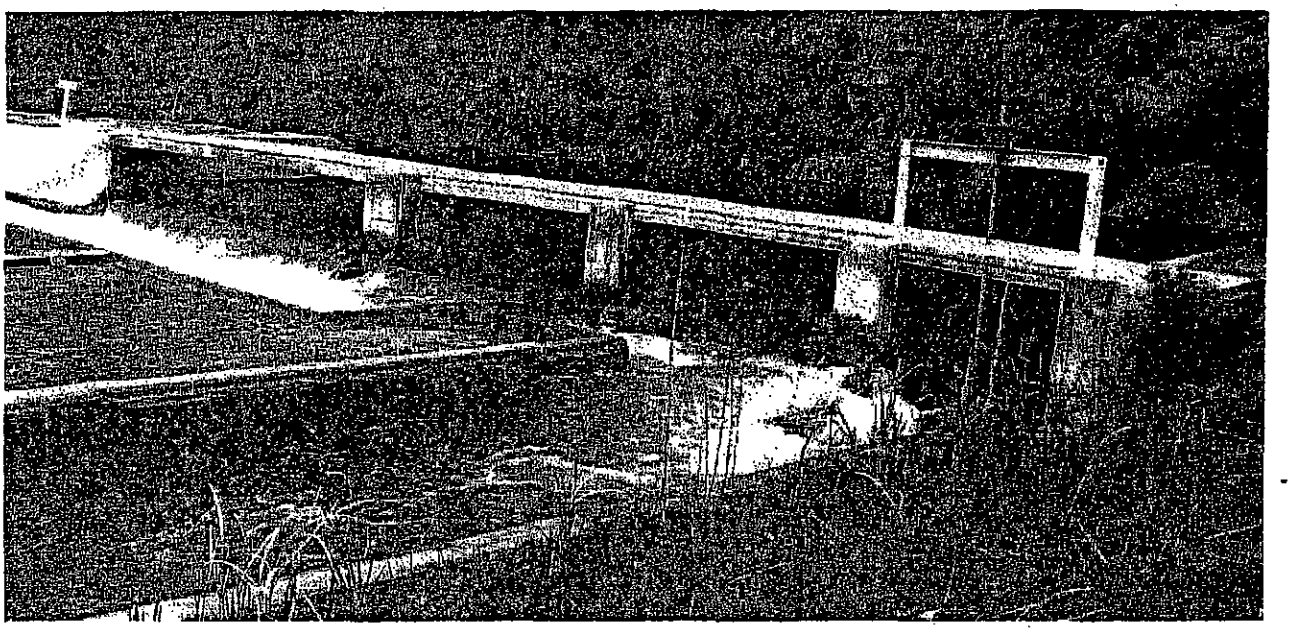


The following diagram illustrates the flow of water through the Western and Eastern Pools.



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The following photograph is included for the benefit of Department personnel who have not had an opportunity to observe the shared diversion works on site.



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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

June 10, 2002

Kay Hardy
Clear Lakes Trout Co.
c/o Daniel V. Steenson and Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, ID 83701-2773

VIA FACSIMILE TO (208) 342-4657

Re: Watermaster Instructions for Distribution of Water
Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218

Dear Kay:

While we were meeting on Friday afternoon, Clear Springs faxed a written call for distribution of water to water right no. 36-2708. I have enclosed is a copy of Clear Springs' call for your information and reference.

Regardless of having received this written call, I will complete the additional review that I committed to last Friday on the basis for the water master instructions. To provide for the additional review, the watermaster instructions that I issued last Wednesday, June 5, will be temporarily suspended for a short period of time (expected to be less than 1 week). During this period of suspension, I will again consider the following:

1. Agreement between Clear Lakes Trout Company and Clear Springs Trout Company dated March 13, 1980, and signed by Earl M. Hardy and John C. Hepworth, respectively.

2. Order Granting In Part, Denying in Part, Motion [To] Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source), Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218), District Court of the Fifth Judicial District In Re SRBA, dated December 31, 1998.

3. Memorandum Decision and Order On Challenge, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218), District Court of the Fifth Judicial District In Re SRBA, dated July 9, 1999.

4. Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge (Clear Lakes v. Clear Springs / Separate Source), Case No. 39576

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(Subcases 36-02708, 36-07201, and 36-07218), District Court of the Fifth Judicial District In Re SRBA, dated August 15, 2000.

5. Idaho Supreme Court 2002 Opinion No. 17, In Re SRBA Case No. 39576; Clear Springs Foods, Inc. v. Clear Lakes Trout Company; Filed January 18, 2002.

6. Order Granting In Part Clear Lakes Motion To Alter Or Amend and Amended Special Master Report, Case No. 39576 (Subcases 36-02659 and 36-07004), District Court of the Fifth Judicial District In Re SRBA, dated April 12, 2002.

7. Memorandum and attachments on administration of water right nos. 36-02659, 36-02708, and 36-07004, submitted by Clear Lakes Trout Company on May 2, 2002, and amended on May 7, 2002.

8. Letter from John K. Simpson Re: Administration of Water Rights Nos. 36-02708, 36-07004, and 36-07218, submitted on behalf of Clear Springs Foods, Inc., on May 2, 2002.

As I discussed with you last Friday, the objective of this additional review is to ensure that I correctly apply the law and the facts primarily regarding two central issues: (1) whether diversions from the eastern and western diversion pools (which are physically two separate pools) are to be administered separately, from which Clear Lakes concludes a delivery call for Clear Springs' water right no. 36-02708 against Clear Lakes' water right no. 36-07004 is futile, even though the SRBA court as affirmed by the Idaho Supreme Court has decreed water rights no. 36-02659, 36-02708, and 36-07004 as being from the same source; and (2) whether as the holder of the most senior water right of the three rights (no. 36-02659), Clear Lakes can demand that a specific portion of the water diverted under this right be diverted from the western diversion pool. While I believe that I have thoroughly considered these issues, after I complete this additional review I will amend the watermaster instructions as appropriate.

Sincerely,

Karl J. Dreher
Director

Enclosure

c (w/o enclosure) to: Cindy Yenter – Water District No. 130 – Facsimile (208) 736-3037
Allen Merritt – IDWR – Facsimile (208) 736-3037
Tim Luke – IDWR
Larry Cope – Clear Springs Food – Facsimile (208) 543-5608
Mic John Simpson - Barker Rosholt & Simpson – Facsimile (208) 344-6034

DEC 1 7 2003



CLEAR SPRINGS FOODS, INC.
General Office P.O. Box 712, Buhl, Idaho 83316
Phone 208 543-4316
Sales 800 535-8211
Fax 208 543-5608
www.clearsprings.com

June 7, 2002

Karl Dreher
Director, Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

RECEIVED
JUN - 7 2002
Department of Water Resources

Via Fax: 208-327-7866

RE: Water Delivery Call

Dear Director:

In response to the Department's issuance of Water District 130 Watermaster Instructions No. 02-01, Clear Springs hereby requests the distribution of water to water right no. 36-02708. This request is premised upon instructions nos. 2-6 regarding notification to and subsequent investigation by the watermaster.

The last flow measurements performed jointly by the Clear Lakes Trout Farm and Clear Springs personnel recorded on April 16, 2002 indicate that the total flow from the common source available to water rights 36-02659, 36-02708, 36-07004 and 36-02718 was 330 cfs at that time. The present adjustable weir setting is delivering approximately 173 cfs to Clear Springs. This quantity does not satisfy Clear Springs' 36-02708 right of 200 cfs. Clear Springs can and will put the additional water to beneficial use upon delivery. Documented measurements are available for review and Clear Springs is immediately available to answer any questions regarding either measurements or operations at the Clear Springs facility.

Additionally, Clear Springs would welcome the opportunity to discuss with the watermaster the schedule for flow documentation and distribution of water in question. If you have any further questions, please do not hesitate to call and thank you for your attention to this matter.

Sincerely,

Larry W. Cope
President and CEO

cc. Cindy Yenter
Water District 130 Watermaster

L:\Admin\Water\IDWR Water Call 060702.doc

EXHIBIT D

RINGERT CLARK
CHARTERED LAWYERS

Laura E. Burri
Jeffrey R. Christenson
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
Patrick D. Furey
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney

Samuel Kaufman (1921-1986)

June 13, 2002

BY HAND DELIVERY

Karl Dreher
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

Re: Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218

Dear Karl:

Clear Lakes has received your June 10, 2002 letter in which you enclose Mr. Cope's written call for distribution of water to water right no. 36-02708, and you discuss the additional review of your basis for the watermaster instructions you issued on Wednesday, June 5th.

Your statement of the "two central issues" mischaracterizes or ignores key facts, Clear Lakes' positions and the issues Clear Lakes has presented in the materials it submitted on May 2, 2002, and during our meeting last Friday. You incorrectly assume that the SRBA court's determination that water right nos. 36-02708 and 36-07004 divert water from the same source is a sufficient justification for curtailing 36-07004. If this were the case there would be no futile call doctrine, and no reason for you to delay curtailment of all junior ground water pumpers from the hydrologically connected Eastern Snake Plain Aquifer. In his last decision on this matter, Judge Wood disclaimed your interpretation of his decision, stating that resolution of a futile call defense is a matter to be resolved through administration, not the SRBA.

Further consideration of the issues as you have stated them will not address the real issues, and it will not be possible for you "to ensure that [you] correctly apply the law and the facts." Clear Lakes' positions are fully supported by the facts, the SRBA court's decisions and decrees, and Idaho water law. Clear Lakes is entitled to have your responses to the positions and the issues it has raised. These are:

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1. Clear Springs' call for delivery of water to water right no. 36-02708 is futile as to Clear Lakes' water right 36-07004 because diversion of spring water pursuant to 36-07004 does not affect the supply of water available to Clear Springs at its point of diversion for 36-02708. It is not possible to increase the supply of water available to Clear Springs at its point of diversion for 36-02708 by curtailing Clear Lakes' diversion of 36-07004.

2. Since Clear Lakes' diversion of water pursuant to 36-07004 does not affect the supply of water available to Clear Springs at its point of diversion for water right no. 36-02708, Clear Lakes' diversion of water does not injure Clear Springs. You have clearly and repeatedly stated that a determination of injury is a precondition to curtailing a junior water right in order to satisfy a senior.

3. Adjusting and manipulating Clear Lakes' diversion and use of its senior water right no. 36-02659 to increase the supply and beneficial use of water for Clear Springs junior water right no. 36-02708 violates the prior appropriation doctrine, ("first in time is first in right,") and injures Clear Lakes' established senior right and beneficial use of water.

4. Forcing Clear Lakes to reduce its diversion of water through the western diversion pool pursuant to water right no. 36-02659 deprives Clear Lakes of its established point of diversion and beneficial use of water.

5. The no injury rule entitles the junior rights in this case to maintenance of conditions as of the time the appropriations were made. This rule protects Clear Lakes from any attempt to provide Clear Springs access to water diverted through the eastern diversion pool pursuant to water right no. 36-07004. This rule also limits the quantity of water Clear Lakes can divert through the western diversion pool to the maximum historical entitlement and use (i.e. 66 cfs).

6. Your proposed redistribution of water deprives Clear Lakes of its private property interest in the appropriate water diverted from the springs into the eastern diversion pool, and in the portion of the water Clear Lakes diverts into the western diversion pool pursuant to water right no. 36-02659.

7. In response to Clear Springs' call, IDWR must first curtail water rights from the Eastern Snake Plain Aquifer that are junior to Clear Lakes' rights. Curtailing a senior right while junior rights continue to divert water violates the prior appropriation doctrine.

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In addition to failing to directly address these issues, you have not acknowledged the key facts that must be addressed. These facts are summarized below for the benefit of your additional review of your decision.

1. Futile Call (36-02708 vs 36-07004). You have yet to address Clear Lakes' position that a call by Clear Springs' against Clear Lakes' water right no. 36-07004 is futile. Clear Springs call is futile as to 36-07004 because:

a. The source of Clear Lakes' water right nos. 36-02659 and 36-07004 and Clear Springs' water right nos. 36-02708 and 36-07218 has been decreed as "***springs***," which constitute a single source. These springs discharge from the rim of the Snake River Canyon north of the Clear Lakes and Clear Springs facilities.

b. Spring water discharging from the canyon rim is diverted into two physically separated diversion pools: the western diversion pool and the eastern diversion pool. The supply of water from the Eastern Snake Plain Aquifer determines how much water is collected by each diversion pool. There are no works to adjust the amount of spring water that is diverted into each pool. It is not possible for water diverted into one pool to flow into the other. The only adjustment that can be made is by turning the adjustable gate in the shared works in the western diversion pool. This gate can be adjusted to ensure that Clear Lakes receives the quantity of water it diverts into the western diversion pool pursuant to water right no. 36-02659, and Clear Springs receives the quantity of water it diverts into the western diversion pool pursuant to water right no. 36-02708.

c. Clear Springs' water right no. 36-02708 is diverted from springs ***exclusively*** into the western diversion pool and Clear Lakes' water right no. 36-07004 is diverted from the same spring source ***exclusively*** into the eastern diversion pool and pipes that divert water that is tributary to the eastern diversion pool (collectively referred to as the eastern diversion pool).

d. Diversion of water through the eastern diversion pool does not affect the supply of water to the western diversion pool and vice versa.

e. Diversion of water pursuant to Clear Lakes' water right no. 36-07004 has no effect upon the supply of water available to Clear Springs' diversion works for water right no. 36-02708.

f. It is not possible to increase the supply of water to Clear Springs' diversion works for water right no. 36-02708 by curtailing Clear Lakes' diversion of water pursuant to water right no. 36-07004.

Therefore, as to water right no. 36-07004, Clear Springs call for water is absolutely futile.

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Adjusting Clear Lakes' diversion works for its senior water right no. 36-02659 in response to a call for delivery of water to Clear Springs' junior water right no. 36-02708 violates the constitutional prior appropriation doctrine "first in time is first in right." There is no legal authority for manipulating the diversion and use of a senior water right in order to increase the supply of water to a junior water right.

4. Forcing Clear Lakes to reduce its diversion of water through the western diversion pool pursuant to water right no. 36-02659 deprives Clear Lakes of its established point of diversion and beneficial use of water. Your proposed administration eviscerates Clear Lakes' established point of diversion through the western diversion pool and its beneficial use of water in its raceways. As you know, point of diversion is an essential element of every water right. Clear Lakes diverts water right no. 36-02659 ***simultaneously*** through the western diversion pool and the eastern diversion pool. These have never been "alternate" points of diversion as you suggested last Friday. Execution of the 1980 Agreement, the construction of the eastern pool and the western diversion pool, the construction of Clear Lakes' raceways before and after the 1980 agreement, and Clear Lakes' beneficial use of water are all premised upon Clear Lakes' continuing diversion of water simultaneously through the western diversion pool pursuant to water right no. 36-02659.

We have shown you that the pools were constructed so that Clear Lakes diverts 66 cfs into the western diversion pool and 34 cfs into the eastern diversion pool pursuant to water right no. 36-02659. The only circumstance in which you will allow Clear Lakes to continue to divert water in this way is when spring flows are at 375 cfs. Below 375 cfs, you will reduce the delivery of water from the western diversion pool to Clear Lakes' senior water right no. 36-02659 to increase the delivery of water from the pool to Clear Spring's junior water right no. 36-02708. Administratively, on paper, you will treat 36-02659 as receiving its water through the eastern diversion pool. If flows decline to 300 cfs, you will completely curtail the delivery of water from the western diversion pool to Clear Lakes, and, administratively, treat 36-02659 as diverted entirely through the eastern pool, thereby completely depriving Clear Lakes of the use of one of its decreed points of diversion. This extreme circumstance highlights the injurious effect of your decision on the diversion point element of Clear Lakes' senior water right 36-02659.

Moreover, administration of water in this manner results in the constant shifting of water right no. 36-02659 back and forth between the western and eastern diversion pools as spring flows rise and decline. The ultimate result will be that Clear Lakes will never be able to count on a consistent quantity of water pursuant to its senior water right from the western diversion pool. This type of administration is inherently inconsistent with the prior appropriation doctrine, and can only result in injury to Clear Lakes, the senior water right holder. In contrast, in virtually all other foreseeable situations (excluding those where total flows fall below 300 cfs), the junior water right holder, Clear Springs, will be assured of a continued flow of at least 200 cfs at its point of diversion.

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Clear Lakes' water right no. 36-02659, as licensed and as decreed by the SRBA court, and as beneficially used for 35 years, entitles Clear Lakes to divert a portion of its water right no. 36-02659 through the western diversion pool, subject only to the rights of prior water right holders and the constraints of the no injury rule (discussed below). IDWR has no authority, and Clear Springs has no right, to deprive or limit Clear Lakes' established right to continue its use of the western diversion pool to divert water right no. 36-02659.

5. Application of the No Injury Rule. The "no injury rule" provides that junior water rights are entitled to maintenance of conditions existing at the time of their appropriations. At the time Clear Springs perfected water right no. 36-02708 to divert spring water through the western diversion pool, the existing conditions included the fact that Clear Lakes diverted a portion of its senior water right no. 36-02659 through the western diversion pool. Clear Lakes' diversion works, its facility, and its beneficial use were configured for continued, simultaneous diversion of water pursuant to water right no. 36-02659 through the western diversion pool and the eastern diversion pool. Clear Lakes' execution of the 1980 agreement and its agreement to the construction and configuration of the western diversion pool were premised on this continued delivery of water pursuant to water right no. 36-02659.

The no injury rule prevents Clear Springs from extending or adding to its diversion works in a manner that injures Clear Lakes water right no. 36-07004. Clear Springs could not, for example, extend its diversion works for 36-02708 to the east to intercept spring water that Clear Lakes diverts into the eastern diversion pool. If the theory of your proposed administration is that by manipulating Clear Lakes' diversion of its senior water right no. 36-02659 you are somehow providing Clear Springs access to water that would otherwise be diverted by water right no. 36-07004 through the eastern diversion pool, your proposed administration violates the no injury rule. Clear Springs has never claimed nor attempted to divert any of the water that is diverted by the eastern diversion pool. Providing Clear Springs access to that water surreptitiously by manipulating the diversion and use of a senior right, violates the no injury rule.

The holder of a water right with multiple points of diversion is entitled to determine how much water to divert from each point, up to the full quantity of his right, subject to the rights of prior appropriators and the no injury rule. Clear Springs' diversion of water right no. 36-02708 from the springs through the western diversion pool is subject to Clear Lakes' prior right to divert water from the springs through the same diversion pool. The no injury rule entitles Clear Springs to limit Clear Lakes' diversion through the western diversion pool to the maximum quantity Clear Lakes has historically diverted through that pool pursuant to water right no. 36-02659. In the materials we provided you on May 2, 2002, we have shown you that this quantity is 66 cfs. This is one of the fundamental conditions existing at the time of Clear Springs appropriation of water pursuant to 36-02708.

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EXHIBIT E DEC 1 7 2003

The same principle also protects 36-07004 from an increase in the amount of water that is diverted through the eastern diversion pool pursuant to 36-02659. We have shown you that this quantity is 34 cfs. The diversion of 34 cfs through the eastern diversion pool pursuant to water right no. 36-02659 is one of the fundamental conditions existing at the time of Clear Lakes appropriation of water pursuant to 36-07004. When spring flows decline below 375 cfs, Clear Lakes must accept that fact that the prior right (36-02659) diverts 34 cfs through the eastern diversion pool, just as Clear Lakes must accept the fact that the prior right diverts 66 cfs through the western diversion pool. However, as with any other junior appropriator, including Clear Springs' water right no. 36-02708, Clear Lakes' water right no. 36-07004 is entitled to limit the diversion of 36-02659 through the eastern pool to the quantity which by design, construction, and historic use, has been diverted from the springs into the pool. The application and protection of the no injury rule is not diminished by the fact that Clear Lakes owns both water rights. Certainly, if 36-07004 were owned by a third party, neither IDWR nor Clear Springs would attempt force that third party to reduce its diversion through the eastern diversion pool in order to increase the diversion of 36-02659 above the quantity diverted at the time the appropriation was made. Of course, this manipulation of the diversions could occur if Clear Lakes agreed to it, just as a third party could voluntarily agree to divert less than his full entitlement of water (as happens with rotation agreements for example). However, as you know, Clear Lakes does not agree to your proposed manipulation of its senior water right no. 36-02659 in order to increase the supply of water to Clear Springs' junior water right no. 36-02708.

Thus, your proposed administration injures the diversion and use of both of Clear Lakes water rights.

6. Deprivation of Clear Lakes' Property Rights. As you know, once water is diverted from a public water supply, it is no longer subject to appropriation by others and becomes the property of the appropriator. This is the case with the water in the western diversion pool and the eastern diversion pool that has been diverted from the springs. All the water in the eastern diversion pool belongs to Clear Lakes after diversion pursuant to water right nos. 36-02659 and 36-07004. IDWR cannot redistribute the water that is in the eastern diversion pool through administration. Part of the water in the western diversion pool is diverted from the springs by Clear Lakes pursuant to 36-02659 and belongs to Clear Lakes, and part of the water in that pool is diverted by Clear Springs pursuant to 36-02708 and therefore belongs to Clear Springs. IDWR has no authority to redistribute the water among Clear Lakes and Clear Springs once it has been diverted from the springs. If the 1980 Agreement is no longer in effect, Clear Lakes diverts 66 cfs into the wester diversion pool and the gate must be adjusted to deliver this quantity through the pool to Clear Lakes' facility. IDWR cannot, however, reallocate the water between the parties after it has become their property in the pools.

7. More Junior Rights Must be Curtailed First. Clear Springs' call requests "the distribution of water to water right no. 36-02708." You are well aware of numerous more junior water rights diverting water from the ESPA that must be curtailed before Clear Lakes' more senior

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rights are subject to curtailment. Your response to Clear Springs' call should be to provide a plan for administration and curtailment of those junior rights. In addition, if you maintain your position that senior rights are subject to adjustment in response to a call by a junior water right, as you propose here, your plan should identify all senior water rights whose diversions and beneficial uses of water you will manipulate to increase flows to Clear Springs.

Clear Lakes expects that, during your additional review, you will evaluate each of the positions and issues Clear Lakes has presented, as summarized above, and that your decision on this matter will discuss and reflect such consideration. We have not found any legal support for your novel approach to administration. Under this new scheme for administering water rights in Idaho, junior water right holders can require that senior water right holders modify their diversions in order to increase water supply to junior diversions. As Kay told you, junior water rights become the "gatekeepers," with the ability to require manipulation of a senior's diversions, regardless of the impact of such manipulation upon the senior. This is particularly troublesome when, as we have demonstrated to you, the 1980 agreement between Clear Lakes and Clear Springs, the planning, configuration, construction and operation of the Western Diversion Pool, the construction of Clear Lakes' raceways, and Clear Lakes' SRBA decrees, all were premised upon Clear Lakes' right and need to divert a portion of its senior water right no. 36-02659 through the Western Diversion Pool. As we have shown you, depriving Clear Lakes of its diversion of water through the Western Diversion Pool will dramatically diminish and injure its beneficial use of water pursuant to its senior water right no. 36-02659.

Sincerely,

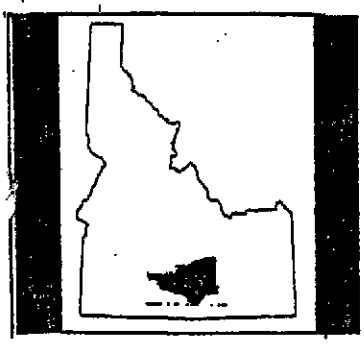


Daniel V. Steenson

cc: Clear Lakes
Cindy Yenter
Allen Merritt
Tim Luke
Larry Cope
John Simpson

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DEC 12 2002

EXHIBIT E



STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 19, 2002

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

FACSIMILE – followed by mailed original

HAND DELIVERED

RE: Notice of Intent to Redistribute Flows

Dear Kay and Larry:

On June 7, 2002, Clear Springs Foods, Inc (Clear Springs) submitted a written call for priority distribution of water under right no. 36-2708 from springs tributary to Clear Lakes. The call indicated that the flow from the common source available for water right nos. 36-2659, 36-2708, 36-7004 and 36-2718 was insufficient to fill all of the rights and that water was being diverted under Clear Lakes Trout (Clear Lakes) right no. 36-7004 while the more senior Clear Springs right no. 36-2708 for 200 cfs was not being filled.

Pursuant to amended Watermaster instructions issued June 13, 2002, by IDWR Director Karl Dreher, Tim Luke and I met with the parties at the diversions for the above listed rights on June 18. The purpose of this meeting was to 1) determine available flows and the present distribution of water to the above listed rights, 2) establish that water is needed under the senior priority water right making the call, and 3) confirm that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right.

From our measurements yesterday, Clear Lakes is receiving a measured flow of 147.6 cfs from its combined diversions, and Clear Springs is receiving a measured flow of 173.0 cfs from its main diversion and minor contributing pipelines. Based on these measurements, there is a total of 320.6 cfs available from the source, and Clear Springs is not receiving a full complement of water under the right no. 36-2708. Additional flow distributed under this right would be put to beneficial use at Clear Springs by activating and using 4 raceways which are currently dry and not being used.

EXHIBIT F

Pursuant to the Watermaster instructions, a 14-day notice shall be provided to the holder of the junior water rights prior to any reduction in distributed flows through adjustment of the 6-foot weir. In this case, the junior right affected is Clear Lakes right no. 36-7004. ***Notice is hereby given*** that the distribution of water to right no. 36-7004 will be reduced by approximately 27 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On **July 3, 2002,** I will re-confirm available flows from the springs and confirm again whether or not right nos. 36-2659 and 36-2708 are being filled in order of priority. If right no. 36-2659 is being filled and water is also being diverted under right no. 36-7004 while right no. 36-2708 is not being filled, I will also confirm that Clear Springs can make beneficial use of any additional water distributed to right no. 36-2708. If Clear Springs can put additional water to beneficial use under its right 36-2708, I will make an adjustment to the 6-foot adjustable weir at the shared diversion, in order that the total spring flows are distributed in the following manner: the first 100 cfs to Clear Lakes Trout right no. 36-2659, the next 200 cfs to Clear Springs right no. 36-2708, and the balance of flows (up to 75 cfs) to Clear Lakes Trout right no. 36-7004. After that time, I will make weekly visits to the diversions to measure available flows, confirm that beneficial use is being made under the respective rights, and make necessary adjustments to the 6-foot adjustable weir.

Representatives from both Clear Lakes and Clear Springs are invited to be present during the July 3 measurement. Since the adjustment wheel for the 6-foot adjustable weir is locked, I will require access to that device on June 3, and will need to have a key provided to me or be allowed to place a Water District lock on the chain at that time.

If you wish to contest this action, you 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). However, such petition may not stay the above action. If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Norm Young and Allen Merritt, IDWR
Harold Johnson, Clear Lakes Trout Co.
Charles Honsinger
Terry Huddleston, Clear Springs Foods, Inc.
John Simpson

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EXHIBIT F
DEC 17 2019

Exhibit J

EXHIBIT J

MICHIGAN
DEC 17 2003

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

CLEAR LAKES TROUT COMPANY, INC., Plaintiff, vs IDAHO DEPARTMENT OF WATER RESOURCES; KARL J. DREHER, Director of the Idaho Department of Water Resources; and CINDY YENTER, Watermaster for Water District 130, Defendants.	Case No. CV 0200377 VOLUME II

DEPOSITION OF KARL J. DREHER

NOVEMBER 1, 2002

BOISE, IDAHO

Patricia M. Blaska
CSR

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DEC 17 2003

DEPOSITION OF KARL J. DREHER

BE IT REMEMBERED that the deposition of Karl J. Dreher was taken by the attorney for Plaintiff, at the offices of Ringert CLark Chartered, located at 455 South Third, Boise, Idaho, before Patricia M. Blaska, a Court Reporter (Idaho Certified Shorthand Reporter Number 83) and Notary Public in and for the County of Ada, State of Idaho, on Friday, the 1st day of November, 2002, commencing at the hour of 9:35 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff: RINGERT CLARK CHARTERED
By: Daniel V. Steenson
And: Charles L. Honsinger
455 south Third
Post Office Box 2773
Boise, Idaho 83701

For Defendant: IDAHO DEPARTMENT OF WATER RESOURCES
By: Phillip J. Rassier
Deputy Attorney General
1301 North Orchard Street
Post Office Box 83720
Boise, Idaho 83720-0098

For Intervenor Clear Springs Food: BARKER, ROSHOLT & SIMPSON
By: John K. Simpson
205 North Tenth Street
Suite 520
Post Office Box 2139
Boise, Idaho 83701-2139

Also Present: Kay Hardy
Gregory Kaslo

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By: Mr. Steenson 161

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34B Agreement in Principle dated August 30, 2001, 4:30 pm (JBeeman) 161
34C Agreement in Principle dated August 30, 2001 Revised JKS 8/31/01 @11:00 a.m. 161
34D Interim Stipulated Agreement for IDWR Administrative Basin 36 from Clive Strong 161
34E Interim Stipulated Agreement from Beeman & Associates, P.C., dated September 21, 2001 161
34F Interim Stipulated Agreement with handwritten date of September 24, 2001, 5:30 161
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Whereupon the deposition proceeded as follows:

(Deposition Exhibits 34A through 34G and Exhibits 42 through 47 were marked prior to the start of the deposition.)

KARL J. DREHER

a witness having been previously sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

MR. RASSIER: Dan, before we get going I just wanted to have on the record Karl's comment before we started that his time is somewhat limited today, and he has a meeting that he can't avoid at 1:30. And so we'll be available until 1:00 today.

MR. STEENSON: Appreciate that.

EXAMINATION

BY MR. STEENSON:

Q. Karl, regarding this case, there are certain aspects that were unprecedented or have been unprecedented or fairly novel. One of those is that this case involved the first issuance of watermaster instructions in Water District 130. Isn't that correct?

A. It involved the issuance of the first set of final instructions. We had provided drafts of more general instructions earlier.

Q. Okay. And was this the first occasion in which, in your recollection, the Department has issued instructions for a watermaster in any part of Idaho regarding administration of particular water rights?

A. No.

Q. Okay. And the action taken to adjust the gate at the Clear Lakes facility was the first curtailment in Water District 130; wasn't it?

A. I believe that's correct.

Q. Okay. And the adjustment that you made, is it -- was it the first instance in which a, to your knowledge, in which a senior water right has been administered or adjusted in a response to a call by a junior?

A. The senior water right was not adjusted.

Q. Okay. I think we, during our prior meeting, we did recognize that the gate that was adjusted was a diversion for water right 2659; correct?

A. Correct.

Q. Okay. And to the extent that the diversion of water under 2659 was shifted from the western diversion pool over to the eastern pool, to that extent, it was -- that water right was adjusted; correct?

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response to the Clear Lakes versus the IDWR case to seek clarification on this very point as to its use in regard to watermaster instructions and calls?

A. Yes and no. Yes the Department is proposing legislative clarification. No, it's not in response to the Clear Lakes case.

There apparently is some disagreement about the general application of 1701. And to the extent that that has been a problem here or in other cases, we're seeking clarification to try to help people understand that this is available to them.

Q. Sure. Are you aware that Norm Young at the last Water District 130 meeting advised people that an amendment to this statute was being sought in response to the Clear Lakes sub case?

A. No.

Q. And you mentioned disagreements that you're aware of that are the basis for the amendment that you're seeking. Can you describe any of those disagreements for me?

A. Well, certainly the most recent ones have been with you and Charlie. I mean, you raised this point with us before, as to the applicability of this statute. And we have informed you verbally that we believe it's applicable. But to the extent that you and others, in similar

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situations or different situations, feel it's ambiguous than we ought to address it. Because I think this is a significant remedy that's available to people.

Q. And who else feels it's ambiguous? You mentioned others. Who else are you referring to other than Charlie -- I take it you mean Chuck Honsinger and me?

A. Right. Well, as Phil and I reviewed this we both agreed that there's some ambiguity there.

Q. Okay. Okay. You mentioned Ms. Yenter's watermaster instructions. And I'll ask you to turn to Exhibit No. 11.

A. Would you like this back?

MR. STEENSON: Actually this -- can we go off the record.

(Discussion off the record.)

BY MR. STEENEON:

Q. Back on the record.

Now, Exhibit No. 11 is your first iteration, first of two iterations, of the watermaster instructions for the Clear Lakes/Clear Springs water rights; isn't that correct?

A. Correct.

Q. Okay. And you recall that representatives of Clear Lakes, Kay Hardy, Chris Kaslo, Charlie, myself, and perhaps Dave Shaw, met with you after receiving this draft

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on June 7th?

A. I don't recall the exact date, but I do remember meeting with you; yes.

Q. Okay. Do you recall that during that meeting, among other things, we expressed our reaction and concern about your instructions?

A. Yes.

Q. Okay. And we raised this question of -- do you recall during that meeting we raised this question of the process, what is our potential remedy. Do you recall that?

A. I don't recall exactly what you asked, but I would expect that you would have asked something along those lines, yes.

Q. Okay. And during this discussion do you recall advising us that if we disagreed with these instructions, that we could certainly seek a court's opinion as to whether or not the action was valid or not?

A. I don't recall exactly what I said, but that's consistent with m view, yes.

Q. Yeah. And do you recall that your attorney, Mr. Rassier, was at that meeting?

A. Yes.

Q. And he advised us that an avenue that came to his mind was seeking an injunction?

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A. I don't recall that, no.

Q. Okay. And it was on this same day, coincidently, that you, the Department, while you were meeting with us, received a written call from Clear Springs; isn't that correct?

A. That's correct.

Q. Okay. And that written call is part of Exhibit No. 12. It's the very last page.

That is the document by which Clear Springs submitted its call for water pursuant to these same instructions we've been talking about; isn't that correct?

A. That's correct.

Q. Okay. So there's no question that at this time on June 7, 2002, by this letter, Clear Springs was making a water delivery call?

A. Correct.

Q. And that was a call made under the instructions that we've referenced directed to curtailment of Clear Lakes water rights; correct?

A. Well, it's a call that was made in response to the instructions that I issued to the watermaster.

Q. Correct. And your instructions, the essence of your instructions, was that if Clear Springs' water right number 2708 was short of water, that there would be curtailment of Clear Lakes' water right 7004; isn't that

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correct?
A. Only if Clear Lakes' right 2659 was being filled.
Q. Okay. And under any scenario Clear Lakes' water right 2659 had to be filled; did it not? Since it's the senior right?
A. Correct.
Q. So under any scenario under which Clear Springs would make a call, 2659 would have to be filled?
A. Correct. But those directions also dealt with at least the potential that 2659 was not being filled.
Q. Sure.
A. And Clear Springs was continuing to divert. Under those circumstances Clear Springs' right was subject to reduction.
Q. But Clear Springs wasn't submitting a written call to seek full delivery of 2659, was it?
A. Of course not.
Q. Okay. Now, did you -- strike that.
In this letter you committed in the second paragraph on the first page --
A. Which letter?
Q. I'm sorry. The letter to Kay Hardy that is part of the Exhibit No. 12.
In the second paragraph you committed to

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complete additional review consistent with the conversation that occurred Friday. This date, June 10, I believe is a Monday.
A. Correct.
Q. Okay. And what did you do during that additional review?
A. I went back and reviewed all of the factual materials that I had. I reread the various court decisions pertaining to this matter that come out of the SRBA. I also asked my legal staff to look for additional support or conflict from any case law that was available. In other words, was there case law that would indicate that the instructions I had prepared were in error or not.
Q. And did -- did your counsel find any conflicting case law?
A. No.
Q. And did you counsel indicate to you that -- was that Phil Rassier?
A. Yes.
Q. Did he indicate to you that he had done a thorough review of all pertinent case law and found nothing in the case law that would support Clear Lakes' position?
A. I can't characterize what the thoroughness of his review was. I asked him to look at anything he could find. And his representation to me was there was nothing.

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Q. And the extent of what he found, I take it from the amended instructions that were eventually issued, was the Parker versus Wallentine case, and the Schodde case; is that correct?
A. Those two cases involved principles which appeared to be supportive of the action we were taking.
Q. Were there any other cases that were supportive of the action that you were taking?
A. Not that were given to me.
Q. Okay. So the extent of the support then was Packer versus Wallentine and Schodde; correct?
A. In terms of additional cases. But, again, in rereading all of the factual material and the decisions that had come out of the SRBA, there was nothing in those, in the SRBA actions, that would conflict with the instructions that I had prepared.
Q. Okay. Okay. Now, this additional review occurred over the course of three days; is that correct?
A. That's correct. I spent almost the entire time of those three days working on this.
Q. And that additional review resulted in the amended instructions that are contained in Exhibit No. 14 that you issued on the 13th; isn't that correct?
A. Correct.
Q. And at the end of the first paragraph the

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sentence reads; although I've added approximately five additional pages of analysis, my previous conclusions regarding how these water rights should be administered are unchanged.
Of course, the decision that -- the action reflected in this document is consistent with the action that was reflected in the prior version of the instructions; correct?
A. Correct. There were some adjustments in how the watermaster was supposed to determine the measured amounts of water that were being delivered.
Q. Okay. And so you were, at this point, you were, after having performed this additional review as you say thoroughly reviewed all pertinent information, particularly the governing court decisions to date, you were confident in your decision; were you not?
A. Yes.
Q. Okay. Now, under 1701A(3), the review that you think might have been available to Clear Lakes with regard to these instructions, would involve asking you to review your own decision; isn't that correct?
A. No. I don't -- I wouldn't characterize it that way. The remedy that was available was to seek a formal contested case with a hearing before the Department.
Q. And the responsibility for that hearing lies

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ultimately with you; does it not?
A. Correct.
Q. Okay. The ultimate decision making lies with you does; it not?
A. Correct.
Q. Okay. So in effect then, this avenue that you suggest was available, was to ask you to change your own mind with regard to a matter that you are confident that you had made a correct conclusion on?
A. I understand why you would view it that way, but it's -- it would have been an opportunity to create a formal record on which you could seek judicial review.
Q. Okay. But other than the opportunity to make a record, we were simply paving the way to end up in court anyway; weren't we?
A. Unless you had additional facts that you believed I had failed to consider. That would have been an appropriate avenue to use to bring those facts forward.
Q. And you recognize that after submitting two detailed memos to you, and meeting with you on two different occasions, that Clear Springs/Clear Lakes, had made a concerted effort to present facts to you; correct?
A. Correct.
Q. Okay. Then on -- five days later, if you'll turn to Exhibit No. 15. On June 18th, Tim Luke -- and this

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is reflected in the second paragraph of Cindy Yenter's June 19th letter. Tim Luke and Cindy, pursuant to your instructions, met on site with representatives of Clear Springs and Clear Lakes; correct?
A. Correct.
Q. Okay. And then the very next day she issued a notice of intent to redistribute flows; correct?
A. I believe so. I don't see her letter off hand.
Q. I'm sorry. I think this is the very letter that you're looking at. If you look at the --
A. Oh, I'm sorry. Okay. Yes.
Q. Now, what this letter reflects is simply an implementation of the instructions that you had prepared for Cindy; correct?
A. Correct. And it represents a second action that -- for which a hearing could have been sought under 1701.
Q. Sure. And that is the first time in this process that the Department had advised in the last paragraph of this letter, of it's suggestion that Clear Lakes seek a hearing, if it wished to, under 42-1701A(3); isn't' that correct?
A. It's the first time we put it in writing. However, I believe that we had verbally expressed this to

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both you and Charlie previously.
Q. Okay. And do you recall when it was that you had expressed, or do you know who?
A. I don't know. I know that it's something that Phil and I had talked about. I don't know if he expressed it to you directly or if I did. I do recall that at the hearing for the preliminary injunction I verbally expressed this to Charlie in the courtroom.
Q. Sure. And in your review with your counsel was this the only statute or rule under which you found an avenue for administrative review of this particular action?
A. Yes, because of the nature that it took. You know, there are other situations where we have issued watermaster instructions through use of a preliminary order. Had we -- had we used that vehicle in this particular instance, then under the APA someone aggrieved by that could seek review, or let it become a final order and go directly to court.
Q. Why didn't you do that here?
A. The nature of it was different. Typically when we simply issue a preliminary order, it's doesn't involve the complexity of the set of facts that exist in this instance. It's more of a question of law.
For example, either this year or last year, or maybe both, we issued a preliminary order finding that a

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futile call had been made in the Big Lost Basin, and instructed the watermaster to no longer attempt to deliver water to the senior rights down stream.
Q. Why would the complexity of the matter auger, or argue in favor of not issuing a preliminary order? I'm not sure I follow your rationale for not doing that in this case?
A. Oh, we could have. We could have.
Q. And chose not to simply because the matter was complex; is that correct?
A. Well, the matter was complex. And the end product was directed more to the watermaster than to the water users.
Q. Okay. And the first thing then, I guess that, from what you're saying, I take it was directed to the water users was Cindy's June 19th letter that we're looking at here in Exhibit 15?
A. Correct.
Q. Okay.
A. Another process that we could have used, but didn't, would have been on my own initiative to create a contested case. But I chose to try to get both sides of this issue to submit all of their facts informally, in an effort to try to consume less time and less cost.
Q. So do you think that you could have initiated

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a contested case in response to Mr. Simpson's phone calls to you asking how you might administer the water rights?
A. Not in response to his phone calls. On my on initiative.
Q. At what point do you think you could have, or would have, initiated a contested case?
A. I could have done it as soon as the partial decrees were issued.
Q. You mean you could have -- you think you could have initiated a contested case as soon as SRBA court issued its decrees or Clear Lakes and Clear Springs rights?
A. Yes.
Q. Whether or not either of the parties holding those rights contacted the Department in any fashion?
A. Correct.
Q. And what would have been the basis for doing that?
A. It would have been an alternate way of developing the facts on which to base watermaster instructions.
Q. So then theoretically you could do that for any water right in the state of Idaho for which there is a partial decree issued?
A. Correct.
Q. Okay. And in this letter, Exhibit No. 15, at

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page two, the first paragraph.
A. Okay.
Q. The first paragraph, last sentence reads in bold, quote; notice is hereby given -- and that's the end of the bold -- that the distribution of water to right number 36-7004 will be reduced by approximately 27 cfs to fill the more senior Clear Springs right No. 36-2708 for 200 cfs, close quote.
This clearly defines the curtailment action that is the subject of this notice; correct?
A. Correct.
Q. Now, it then in the next paragraph says that on July 3rd, that the watermaster will reconfirm available flows, confirm the Clear can make beneficial use of the water -- any additional water distributed under 36-2708, and if upon making that confirmation, there is a sentence which reads, quote; if Clear Springs can put additional water to beneficial use under its right No. 36-2708 I will make an adjustment to the six foot adjustable weir at the shared diversion in order that the total springs flows are distributed in the following manner. And then it outlines how they're to be distributed.
So the action for which notice is provided by this letter, was to take place on July 3rd; correct?
A. Correct.

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Q. Okay. Now, the -- and that was, July 3rd was, as indicated by the watermaster instructions, just 14 days from the notice?
A. Correct.
Q. Okay. So the action -- well, the final paragraph of this letter identifies a 15-day period in which to file a petition for review; correct?
A. Correct.
Q. Okay. So the action was scheduled to take place before the 15-day period for seeking review expired; correct?
A. I haven't counted the days.
Q. Fifteen is more than fourteen; correct?
A. Yes.
Q. Okay.
A. Yes it is. But I didn't count from June 19th to July 3rd to see if it was 14 or 15.
MR. STEENSON: Off the record.
(Discussion off the record.)
BY MR. STEENSON:
Q. Mr. Dreher, can you turn to Exhibit 45, which should be in your pile. Again, I think, it seems to me, that without counting you can see that the instructions give a 14-day notice for -- between, from notice to curtailment. And also, and that's mentioned up in the

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first paragraph on the second page.
A. Correct.
Q. And then the same letter mentions a -- refers to the 15-day period referenced in 42-1701A(3); correct?
A. Correct.
Q. Okay. If it helps to look at Exhibit No. 45, why don't you go head and do what you just suggested, count the days?
A. Okay.
Q. Okay. So it in fact the case, that the action was proposed to be taken before the 15-day period had expired; correct?
A. Correct. One day before.
Q. Okay. And in addition to referring to the 15-day period in the final paragraph of Exhibit No. 15 on page two, there is a -- there is a note. There is a sentence which says, quote; however, such petition may not stay the above action, close quote.
A. Correct.
Q. Was this sentence included in response to our asking about, prior to receiving this letter, whether and how we might postpone or stay the curtailment pending some kind of review of your decision?
A. No. And it was -- it was simply to clarify that, that if you sought to initiate a contested case with

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a hearing, that certainly you could simultaneously seek a stay. And depending upon what the factual or the legal basis for your basis for seeking a stay, it may or may not be granted.

So it was simply to provide, to alert you to the fact that a stay was an option but it wasn't -- wouldn't be guaranteed.

Q. That's interesting how you characterize that. Why doesn't it say; may or may not. Why does it only refer to the one possibility that it may not be granted? Is it because there was an inclination not to grant a stay if it were asked?

A. No. I think the word may means may or may not.

Q. The word may is followed, by the way, with the not; correct?

A. Yes.

Q. Okay. And so if the Department decided not to grant a stay, then Clear Lakes was faced with a situation where on July 3rd, it was going to have to have moved a significant amount of fish. You're aware of that, aren't you?

A. I am.

Q. Okay. So if the Department decided not to grant the stay, Clear Lakes only option was to seek some

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kind of postponement of the action from a court; correct?

A. If Clear Lakes decided not to seek a stay with the Department, I think that's accurate. The only other option would be to seek an injunction.

Q. I'm sorry. You've rephrased the premise to my question.

A. Okay. I didn't understand your premise.

Q. If the Department decided not to grant a stay, not whether Clear Lakes decided not to seek one, but if the Department has indicated the possibility here by the sentence, decided it would not grant the stay, then the only way for Clear Lakes to postpone this action, which would have such a dramatic effect on its operations, was to seek an injunction from the court; isn't that correct?

A. That is correct. But Clear Lakes didn't seek a stay with the Department.

Q. Now, with regard to the -- at what point in the process, let me ask you this. At what point in the process had you and Phil, given your ambiguity in 1701A(3), decided to suggest 1701A(3) as the avenue for review? Prior to this letter when did the Department decide that that was an avenue you would suggest to Clear Lakes?

A. I don't recall a specific time, but it -- you know, I know that we did, on several occasions, talk about 1701 as providing an avenue of review well in advance of

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the watermaster's letter going out.

Q. Okay. But after your issuance of your amended instructions?

A. No. We talked about it prior to that.

Q. Why did you fail to mention the possibility of review under 1701A(3) in your watermaster instructions then?

A. Because the watermaster instructions were issued to the watermaster. The watermaster can't seek a review under 1701.

Q. I see. I think I understand your answer. Why would the watermaster be seeking review of instructions issued to her?

A. Correct.

Q. Okay. Okay. Now, in -- have you given --had you given thought at this time, or have you since, to the subject matter and the process for conducting the hearing that might have occurred under 1701A(3) in your view?

A. The process is laid out in the Administrative Procedures Act. So I didn't give any thought to it beyond that. I mean, it's a pretty well prescribed process.

Q. Okay. And with regard to -- let me back up.

Is the process defined in any departmental rule or guidance other that what we see in 1701A(3) in the statute itself?

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A. There may be some description of the process in the Department's rules.

Q. Okay. And with regard to -- let me refine my question as to subject matter. The watermaster instructions were issued to Cindy, Cindy Yenter, and why would she be appealing instructions that were written to her.

Is it then the case that the subject matter of the 1701A(3) hearing would be whether Cindy was correctly implementing the instructions you issued to her?

A. It could have been that. Or it could have been whether the instructions were proper in the first place.

Q. Okay. But this was an opportunity for hearing on Cindy's action implementing your instructions; correct?

A. Correct.

Q. Okay. And since you were the decision maker in this case, having made a decision, I'll say twice, with your two sets of instructions, what could you have done to address the weight that would be accorded your judgment in such a hearing? How could you have addressed the fact that the Director of the Department -- the decision being reconsidered, reviewed, was a decision of the Director of the Department after all?

A. Uhhh. One thing that I likely would have

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Exhibit K

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

June 13, 2002

Clear Springs Foods, Inc.
c/o John K. Simpson
Barker Rosholt & Simpson LLP
205 North 10th, Suite 520
P. O. Box 2139
Boise, ID 83701-2139

Facsimile: (208) 344-6034

Clear Lakes Trout Co.
c/o Daniel V. Steenson and
Charles L. Honsinger
Ringert Clark
455 South 3rd
P. O. Box 2773
Boise, ID 83701-2773

Facsimile: (208) 342-4657

VIA FIRST FACSIMILE AND FIRST CLASS MAIL

Re: Amended Watermaster Instructions for Distribution of Water
Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218

Dear John, Dan, and Charles:

Today, I issued amended watermaster instructions for distributing water among water rights 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218, a copy of which is enclosed. As I committed to Clear Lakes, I have again thoroughly reviewed all of the pertinent information of which I am aware, particularly the governing court decisions to date. Although I have added approximately 5 additional pages of analysis, my previous conclusions regarding how these water rights should be administered are unchanged.

These watermaster instructions are written to the watermaster, not to either of your clients. In the original instructions issued June 5, I included less analysis because only the basis for the instructions needed to be communicated to the watermaster, not a justification. The circumstances surrounding the Clear Lakes and Clear Springs water rights are complex, and the current instructions, as amended, are extraordinary in the analysis and detail included. This was done to demonstrate to both Clear Lakes and Clear Springs, that all of the complexities, pertinent information, and the law have been thoroughly considered. Thus the enclosed memorandum is not a decision arising from a contested case nor is it the model or form for future watermaster instructions.

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EXHIBIT 000168
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The written call filed by Clear Springs on June 7 will now be handled in accordance with the enclosed instructions. Please contact either myself or Norm Young if you have any questions.

Sincerely,

Karl J. Dreher
Director

Enclosure

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MEMORANDUM

To: Cindy Yenter
Water District 130 Watermaster

Date: June 13, 2002

From: Karl J. Dreher

cc: Clear Springs Foods, Inc.
Clear Lakes Trout Co.
Norm Young
Allen Merritt
Tim Luke

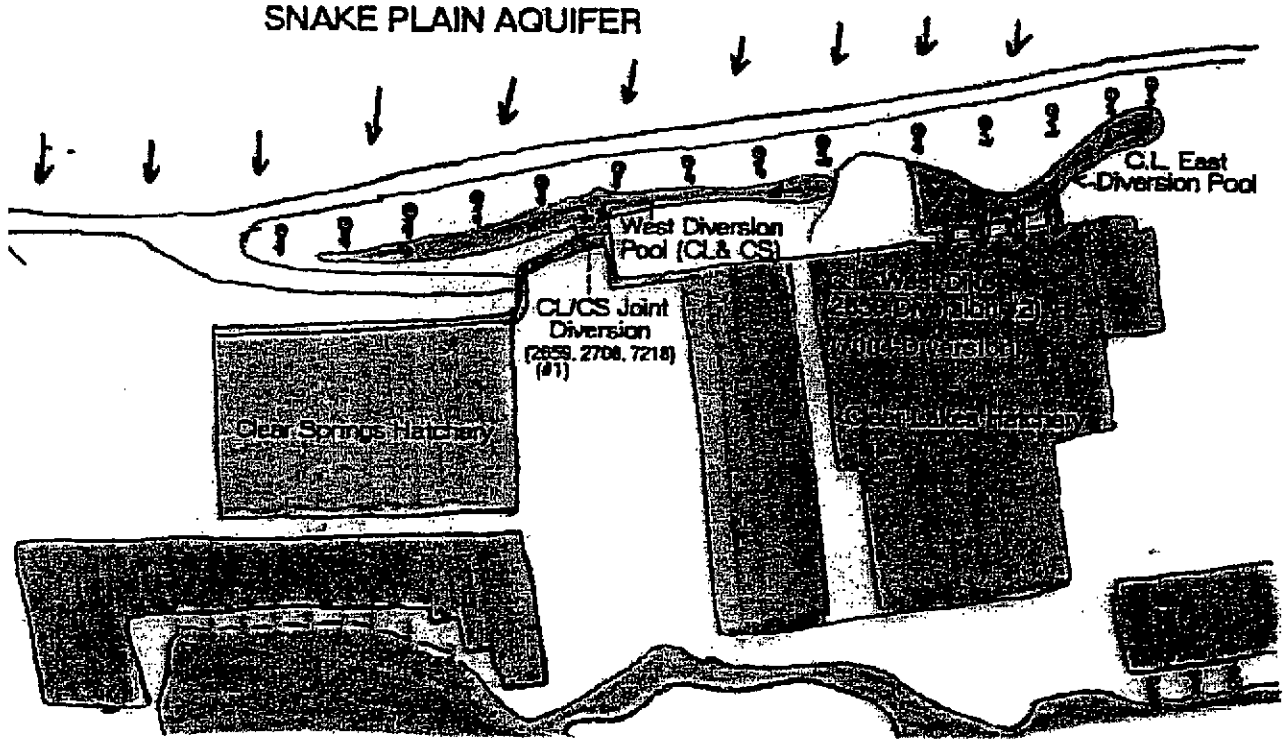
Subject: Amended Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218

Background Summary

Clear Springs Foods, Inc. (aka Clear Springs Trout Company or "Clear Springs") and Clear Lakes Trout Company ("Clear Lakes") separately own and operate adjacent fish hatcheries located below the rim of the Snake River canyon north of Buhl, Idaho. During the development of the hatcheries in the 1960s and 1970s, both Clear Springs and Clear Lakes filed applications with IDWR for permits to appropriate water from springs flowing from the Eastern Snake Plain Aquifer, and five water rights were established as follows: 36-02659 (Clear Lakes, 100 cfs, 06/23/1966); 36-02708 (Clear Springs, 200 cfs, 09/28/1966); 36-07004 (Clear Lakes, 75 cfs, 07/21/1967); 36-07201 (Clear Springs, 10 cfs, 08/04/1971); and 36-07218 (Clear Springs, 51.55 cfs, 01/24/1972). The current layout of the adjoining hatcheries and water right diversion points (except for water right no. 36-07201) are shown on the next page.

On March 13, 1980, Clear Springs and Clear Lakes entered into an agreement settling disputes regarding property ownership, access, operation and maintenance of common facilities, and the responsibilities of both parties. The 1980 agreement also provided for allocation of water between water rights nos. 36-02659, 36-02708, and 36-07004, when the amount of water flowing from springs and available under these three water rights is less than 375 cfs. The agreement provided that:

> Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permits Nos. 36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available to [Clear] Lakes and [Clear] Springs under their respective permits, goes below



375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between [Clear] Springs and [Clear] Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to [Clear] Springs and 47% to [Clear] Lakes. All water being used by [Clear] Springs and [Clear] Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by [Clear] Springs under Permit No. 36-7201. *Agreement*, pp. 3 – 4.

On November 2, 1992, IDWR filed the ***Director's Report for Reporting Area 3*** including it's recommendations for decreeing Clear Springs' water rights nos. 36-02708, 36-07201, and 36-07218. The "source" recommended by IDWR for all three Clear Springs water rights was springs tributary to Clear Lake(s). Clear Lakes filed objections to both the "source" and "point of diversion" elements of IDWR's recommendations for Clear Springs' water rights 36-02708 and 36-07218 alleging that these rights are diverted from a separate source than is Clear Lakes' water right no. 36-07004. Clear Lakes also filed objections to both the "source" and "point of diversion" elements of IDWR's recommendation for Clear Springs' water right 36-07201 alleging that Clear Lakes "has a water right [no. 36-02659] that diverts from the [same] source that supplies this water right [no. 36-07201]."

The Special Master for **In Re SRBA, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218)** issued ***Findings of Fact and Conclusions of Law on Involuntary Dismissal*** (August 21, 1998); ***Special Master's Report and Recommendations*** (August 28, 1998); and ***Order***

Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) (December 31, 1998). Among other determinations, the Special Master concluded that "The source element for each water right [of Clear Springs] shall be reported as stated in the Director's Report for each water right" and that "the point of diversion for all the rights [of Clear Springs] shall be decreed as recommended in the Director's Report." Clear Lakes subsequently filed Notice of Challenge and after arguments, the Presiding Judge for the SRBA issued ***Memorandum Decision and Order on Challenge*** dated July 9, 1999. The Presiding Judge overruled and denied Clear Lakes' challenges to the Special Master's recommendation in all respects except one: the source for Clear Springs' water right no. 36-07201. Clear Lakes then filed Motion to Alter or Amend Judgment, and the Presiding Judge issued ***Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*** on August 15, 2000, denying Clear Lakes' motion.

The SRBA court issued partial decrees for Clear Springs' three water rights on April 10, 2000. After Clear Lakes' Motion to Alter or Amend judgment was denied by the SRBA court, Clear Lakes appealed to the Idaho Supreme Court. ***Idaho Supreme Court 2002 Opinion No. 17*** was filed on January 18, 2002, affirming the SRBA court ***Memorandum Decision and Order on Challenge***.

Following an inquiry from Clear Springs regarding how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call, both Clear Springs and Clear Lakes were asked to submit any additional information that either entity believed to be pertinent in developing watermaster instructions for administering these water rights. Both Clear Springs and Clear Lakes submitted information on May 2, 2002, although Clear Springs asserted that it believed IDWR already possessed all the necessary information to develop watermaster instructions.

In its May 2 submittal, *Memorandum Re: Administration of water right nos. 36-02659, 36-02708 and 36-07004*, as amended on May 7, Clear Lakes concludes that: (1) adjustment of the 6-ft adjustable weir from the west diversion pool through which water right 36-02659 is distributed to Clear Lakes would result in reducing the quantity of water distributed to the Clear Lakes' senior water right 36-02659 in favor of Clear Springs' junior water right 36-02708, which is precluded by Idaho law because Clear Lakes' senior water right would be injured; and (2) it is physically impossible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to increase the quantity of water available for Clear Springs' relatively senior water right 36-02708, making any call by Clear Springs to distribute water to Clear Springs' water right 36-02708 against Clear Lakes' water right 36-07004 futile.

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Basis for Watermaster Instructions - Administration of Water Rights 36-02659, 36-02708, 36-07004, and 36-07218

Seven of the nine Findings of Fact set forth by the Special Master in ***Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)*** (December 31, 1998), adopted by the Presiding Judge in ***Memorandum Decision and Order on Challenge*** (July 9, 1999), and affirmed by the Idaho Supreme Court in ***Idaho Supreme Court 2002 Opinion No. 17*** (January 18, 2002) that are the most pertinent to the administration of water rights nos. 36-02659, 36-02708, 36-07004, and 36-07218 are as follows:

> 2. The place of use for both Clear Springs and Clear Lakes is located in the Snake River Canyon north of Buhl, Idaho. All the water used by both Clear Lakes and Clear Springs originates from springs flowing from the Snake River Plain Aquifer. Prior to development of the rights, the water from all the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Springs Lake, and then ultimately emptied into the Snake River. [citations omitted]
>
> 3. Earl Hardy participated in the development of Clear Lakes' water rights. Mr. Hardy testified that prior to any development of water rights 36-02659 and 36-07004, there were two stream flows from the original stream channel. Mr. Hardy testified that there was an underwater division point in the stream channel creating a "western" and "eastern" flow. ... [citations omitted]
>
> 4. After the close of Clear Lakes' case, the historic dividing point between the eastern and western flows remained unclear. According to Mr. Hardy, the historic dividing point was located 80 feet from the gate on the western dyke. Clear Lakes' expert hydrologist, Sheryl [sic] Chapman, gave several opinions on the historic dividing point. One estimate was that the historic dividing point was located 30-40 feet to the east of where Mr. Hardy estimated the historic dividing point (110-120 feet from the gate on the western dyke). Mr. Chapman's other estimate was that the dividing point was located somewhere between the "highest western flow" and the "highest eastern flow" ... [citations omitted]
>
> 5. When water rights 36-02659 and 36-07004 were first developed, Clear Lakes created two pools, a western and an eastern pool. The result of this construction was the elimination [of] one of the three islands and one of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. "But for" this one continuous structure, there would not be an eastern pool. The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows. [citations omitted]

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> 6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. [citations omitted]
>
> 7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. [citations omitted]
>
> 8. There are two discharge point[s] from the eastern pool. Part of water right 36-0259 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool. 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. Stated differently, the discharge points for water right 36-07004 are located to the west of the alleged historic dividing point. [citations omitted]

Given these findings, particularly findings 6 and 7, it is clear that the SRBA court has determined that Clear Springs' water rights 36-02708 and 36-7218 together with Clear Lakes' water rights 36-02659 and 36-07004 divert water commingled from various springs which constitute a single, non-segmentable, source. Regarding the administration of Clear Lakes' water right 36-07004, the Special Master determined the following conclusion of law:

> The undisputed facts are that the source of water for water right 36-07004 uses water from both the western and eastern flows, and that the current discharge point for that water right is on the western side of the historic dividing point. The result is that water right 36-07004 uses water from both the western and eastern flows; the same western water that historically was the source for all of Clear Springs' rights. Because of these simple facts, there is no way to administer water right 36-07004 as [being from] a separate source from the Clear Springs rights. *Order Granting in Part, Denying in Part, Motion [to] Alter or Amend*, p.7.

The Presiding Judge for the SRBA court did not disturb this conclusion, and the Idaho Supreme Court affirmed after stating: "The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court." *Idaho Supreme Court 2002 Opinion No. 17*, p. 4. In his ***Order on Motion to Alter or Amend Judgment*** dated August 15, 2000, the Presiding Judge discussed the administration of two hypothetical water rights with differing priority dates in a setting the judge described as being analogous to the setting between the Clear Springs and Clear Lakes water rights:

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> An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel. [Note that the judge uses the terms "stream" and "channel" synonymously.] Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. [citations omitted] However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be futile. Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. [citations omitted] Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels [other than the lawful removal of stream channel obstructions] to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. [citations omitted] In essence, the junior is protected by the respective location of the diversion works on the common source.
>
> In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. ... The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.
>
> In taking a variation to the above example, suppose both the junior and senior decide to modify their respective diversion works by altering the natural course of the stream and constructing a reservoir from which both intend to divert. **The modifications again eliminate the protection afforded the junior** by the natural fork in the stream [emphasis added]. The source is the same and the junior has permitted the senior to change his point of diversion despite the potential for injury. This is what occurred between Clear Lakes and Clear Springs in the instant case – the natural flow of the stream has been altered. *Order on Motion to Alter or Amend Judgment*, pp. 6 – 8.

In its May 2 memorandum, Clear Lakes concedes that the "source" element for water rights 36-02659, 36-02708, and 36-07004 has been decreed to be the same source (springs tributary to Clear Lake or Lakes). Clear Lakes, however, in essence contends that because: (a) water right 36-02708 is only diverted out of the western diversion pool and does not have a point of diversion out of the eastern diversion pool; and (b) water right 36-07004 is only diverted out of the eastern diversion pool and does not have a point of diversion out of the western pool; then

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reducing the amount of water diverted under Clear Lakes' right 36-07004 will not make water available for Clear Springs' right 36-02708, and the amount of water diverted from the western pool under Clear Lakes' right 36-02659 can not be reduced to make water available for Clear Springs' right 36-02708, since right 36-02659 is the senior right. While the decrees for water rights 36-02708 and 36-07004 clearly recognize separate points of diversion from the western and eastern pools, respectively, the practical result of Clear Lakes' premise would be that Clear Springs' water right 36-02708 and Clear Lakes' water right 36-07004 would be administered as if they were from separate sources. However, the Presiding Judge for the SRBA court, as quoted above, has in effect concluded that the modifications to the diversions for the Clear Lakes and Clear Springs water rights has "eliminated the protection" afforded Clear Lakes' water right 36-07004.

Clear Lakes' conclusion that adjustment of the 6-ft adjustable weir from the west diversion pool, through which water right 36-02659 is distributed to Clear Lakes, would result in reducing the quantity of water distributed to the Clear Lakes' senior right 36-02659 in favor of Clear Springs' junior right 36-02708 is not correct. When the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the west diversion pool. Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.

The full amount of water under the most senior right, Clear Lakes' right 36-02659, must be available for that right. When Clear Springs' water right 36-02708 is also in priority, this requires that more of the water diverted under Clear Lakes' right 36-02659 be diverted from the eastern diversion pool than has historically been the case when spring flows fell below 375 cfs. Clear Lakes alleges that causing it to divert more water from the eastern diversion pool under its senior right 36-02659 injures that right. But absent a basis for Clear Lakes being able to rely on diverting a specific portion of the water under its senior right 36-02659 from the western diversion pool, there is no injury to Clear Lakes' senior right 36-02659 so long as the right is fully satisfied and the extent of beneficial use made under right 36-02659 is not diminished. As the holder of the junior priority right 36-07004, Clear Lakes is obviously affected by this distribution of water since the amount of water diverted under its junior priority right 36-07004 and the extent of the beneficial use under that right are both reduced. However, this does not constitute injury to Clear Lakes' senior right 36-02659.

So the question becomes: "Does Clear Lakes have a legal basis for relying on diverting a specific portion of the water under its right 36-02659 from the western diversion pool?" Under the 1980 agreement, Clear Lakes and Clear Springs agreed that "until a legal determination is

made or agreement made regarding Permits Nos. 36-7004 and 36-2708," that when spring flows into the eastern and western diversion pools fall below 375 cfs, Clear Lakes had the right to use a total of 47 percent of the spring flows under its rights 36-02659 and 36-07004, and Clear Springs had the right to use 53 percent of the spring flows under its right 36-02708. This allocation essentially results in the distribution of water between rights 36-02659, 36-02708, and 36-07004 as if all three rights were equal in priority, even though Clear Springs recognized Clear Lakes' right 36-02659 as the senior right. Issuance of the partial decrees for these rights by the SRBA court is clearly a "legal determination", and the allocation of spring flows under the 1980 agreement is no longer binding on either Clear Lakes or Clear Springs. Clear Lakes presumably agrees because in its May 2 memorandum, it asserts that when spring flows into the eastern and western pools fall below 375 cfs, the proper administration of rights 36-02659, 36-02708, and 36-07004 under the partial decrees is to distribute the first 34 cfs out of the eastern diversion pool and the first 66 cfs out of the western diversion pool to the senior Clear Lakes right 36-02659, with the remaining flow from the eastern pool going to Clear Lakes' right 36-07004 and the remaining flow from the western pool going to Clear Springs' right 36-02708. The quantities of 34 cfs and 66 cfs, are the amounts historically diverted by Clear Lakes from the eastern and western pools, respectively, when spring flows into the pools totaled at least 375 cfs. Therefore, as the holder of the most senior right diverting from either pool, Clear Lakes asserts that it has the right to divert a specific portion of the water under its right 36-02659 (66 cfs) from the western diversion pool.

The partial decree issued by the SRBA court is the first reference for determining whether Clear Lakes has a legal right to divert a specific portion of the water under its right 36-02659 from the western pool. The amended partial decree for water right 36-02659 contains the following remark under the legal description for its two points of diversion:

> This water right is diverted through a combination of two adjacent spring-fed diversion pools: (1) a diversion pool known as the "western pool" located in the S ½ SESWNE and the S ½ SWSENE, T09S, R14E, Section 2; and (2) a diversion pool known as the "eastern pool" located in a portion of Government Lot 5 known as the SWSESENE and SESWSENE, T09S, R14E, Section 2. Both pools divert water from the common source identified in the source element of this water right ...

While this remark clearly recognizes that Clear Lakes' water right 36-02659 is "diverted through a combination" of the western and eastern diversion pools, there is no recognition in the decree that Clear Lakes has the right to determine how much water is diverted from each pool under right 36-02659. Under Idaho law, the holder of a water right senior in priority to a junior priority right diverting from the same source clearly has the right to divert water ahead of the junior right provided water diverted under the senior right is reasonably needed and used for the beneficial use and in accordance with other provisions defined in a permit, license superceding the permit, or finally a decree for the right. However, the courts have found that diversion and use of water under a senior priority is not an unrestricted right and is subject to reasonableness.

For example, in *Schodde v. Twin Falls Land and Water Co.*, 161 F. 43 (1908), affirmed 224 U.S. 107 (1912), the plaintiff brought an action against the defendant and alleged damages caused by

the defendant's construction of Milner Dam. The plaintiff had appropriated water from the Snake River to irrigate farmland and provide water for a small mining operation. *Id.* The plaintiff's historic means of diversion was to use water wheels to lift the water out of the river. *Id.* The plaintiff also constructed wing dams in the river to confine the flow of the river so that the current would drive the water wheels and cause them to carry the water to the necessary height. *Id.* The defendant subsequently constructed a dam to form a reservoir, raising the water level behind the dam about 40 feet, for the purpose of supplying water for irrigation and domestic purposes to settlers on about 300,000 acres of land situated below defendant's dam. *Id.* at 44. The plaintiff alleged that the defendant's dam backed water up to and beyond the plaintiff's premises making it impossible for the water wheels to work and sued for damages. *Id.* The court did not deny the plaintiff's right to divert water and the plaintiff did not argue that his appropriation was not present after the construction of the dam. *Id.* at 45. The plaintiff claimed that he could no longer divert water by the means he first adopted and that the defendant deprived him of the right to the current of the river, which, prior to the erection of the dam, "rendered his means of diversion available." *Id.* The court found that "the current of the river was no part of plaintiff's water location, and that he has no cause of action against the defendant for destroying his current." *Id.* at 47. The court then held that "[t]he claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is...untenable" and that "it is immaterial to the state what particular method is used." *Id.* at 47. The court then stated "[t]he method adopted cannot be said to have attached as appurtenant to the appropriation as against other [junior] appropriators of water from the same stream." *Id.*

In *Schodde*, it seems clear that the court was not concerned with the method of diversion as long as the holder of a senior priority water right was able to continue full use of the right without unreasonably excluding the use of water under a junior priority water right from the same source. Clear Lakes is correct in its assertion that Idaho law does not allow regulation or curtailment of a senior water right in order to increase the water supply to a junior water right in times of shortage, or otherwise. However, if it is possible for Clear Lakes' senior water right 36-02659 to be fully satisfied and also allow for the next water right in priority from the same source to be exercised (Clear Springs' right 36-02708), then Clear Lakes is not correct in claiming that it has a right to the historical method of diversion or the historical allocation between alternative diversion points. Such method or allocation would diminish the amount of water available for the next water right in priority held by Clear Springs, and allow Clear Lakes to proceed to divert water under an even more junior right from the same source (Clear Lakes' right 36-07004) when the more senior right 36-02708 has not been satisfied.

A similar conclusions results from *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). In *Parker*, the defendant drilled a well on his property in Bear Lake County to a depth of 200 feet "for the purpose of providing irrigation for a 64 acre field." *Id.* at 507, 650 P.2d at 649. The well was located approximately 125 to 150 feet from a domestic well owned by the plaintiff, which was drilled to a depth of 71 feet. *Id.* After a pump test was conducted on the defendant's well, the plaintiff discovered that his domestic well had ceased to produce water. The following morning the well did produce water, but the water was muddy and continued to be so for several days. *Id.* The plaintiff filed suit against the defendant and obtained a temporary restraining

order that prohibited the defendant from operating his pump. *Id.* at 507-08, 650 P.2d at 649-50. The district court then granted a permanent injunction against the use of the irrigation well. *Id.* The defendant appealed the injunction and asserted that allowing one shallow domestic well to block the development of all irrigation wells in a given area is inconsistent with the policy of optimum development of water resources in the public interest. *Id.* at 511, 650 P.2d at 653. The court stated that the assertion had merit and held that the defendant "has a right to divert any surplus subterranean waters provided and so long as his diversion of such waters does not deprive Parker of his use of the water." *Id.* at 514, 650 P.2d at 656. The court then explained that Parker would not be deprived of any right to his use "if water can be obtained for Parker by changing the method or means of diversion." *Id.* The court then stated that the expense of changing the method or means of diversion must be paid by the subsequent appropriator. *Id.*

Although the *Parker* case dealt with ground water, its principles apply to administration of the Clear Lakes and Clear Springs water rights. When the spring flows into and out of the western and eastern pools have been at least 375 cfs, Clear Lakes claims to have historically received 66 cfs from the western pool and 34 cfs from the eastern pool to satisfy its senior priority water right 36-02659. Clear Lakes now claims that as the holder of the most senior priority water right diverted from the western and eastern pools, that this water right 36-02659 must receive 66 cfs from the western pool even if the next right in priority from the same source, Clear Springs' right 36-02708, is not satisfied while the more junior water right from the same source, Clear Lakes' right 36-07004, continues to divert water from the eastern pool and is insulated from the more senior Clear Springs' right diverted out of the western pool. However, if there is another reasonable means of diversion to satisfy Clear Lakes' senior priority right 36-02659 (i.e., diverting more of the water under right 36-02659 from the eastern pool), then Clear Lakes would not be deprived of using water under its senior priority right. This is the principle articulated in *Parker*. Full diversion of 100 cfs under Clear Lakes' right 36-02659 can be achieved by diverting more of the right out of the eastern pool and decreasing the amount of water diverted out of the western pool, while still providing for diversion and use of the full amount of water under the right. This would allow more water to be diverted under the next right in priority from the same source, Clear Springs' right 36-02708. If expenses are incurred by Clear Lakes in diverting water from the eastern pool under the senior right 36-02659, not the junior right 36-07004, then under *Parker*, Clear Springs may be responsible for those costs. However, since the eastern pool already has the diversion capacity for the full 100 cfs diversion under right 36-02659, it does not appear that Clear Springs would be obligated to pay anything.

Therefore, there is no known legal basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004. Thus a call from Clear Springs' right 36-02708 against the junior Clear Lakes' right 36-07004 is not futile.

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Consequently, when the amount of water flowing from the springs is equal to or greater than 375 cfs, then both of Clear Lakes' water rights 36-02659 and 36-0704 as well as Clear Springs' water right 36-02708 can be filled, along with part or all of Clear Springs' water right 36-07218 when spring discharges exceed 375 cfs. But until and unless there is either a legal determination or a subsequent agreement between Clear Lakes and Clear Springs that provides for Clear Lakes diverting a specified portion of water under its right 36-02659 from the western pool, when the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights in priority as being from a single source. The "source" element for water rights 36-02659, 36-02708, 36-07004, and 36-07218, is springs tributary to Clear Lake(s). For the purposes of adminstering these water rights, the eastern and western diversion pools are inextricably linked to the springs whose discharge is collected in the pools. Water rights 36-02659, 36-02708, and 36-07004 must not be administered in the manner set forth by Clear Lakes in its May 2 memorandum as though the rights were from separate sources.

Basis for Watermaster Instructions - Administration of Water Right 36-07201

In ***Memorandum Decision and Order on Challenge*** dated July 9, 1999, the Presiding Judge for the SRBA court concluded the following (p. 29):

> ... the Brailsford Stream, or what is sometimes referred to as the "far western stream," which is the source of Clear Springs' right 36-07201, never ran into the channel or pool of water from which Clear Lakes' rights 36-02659 and 36-07004 and Clear Springs' rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights.
>
> ... because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Based on the clear language in the Presiding Judge's Decision and Order, Clear Springs' water right 36-07201 is to be administered as being from a source separate and distinct from the source for rights 36-02659, 36-02708, 36-07004, and 36-07218.

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Watermaster Instructions

1. Water for Clear Springs' water right 36-07201 is to be distributed separately as being from a separate "source" from the "source" for water rights 36-02659, 36-02708, 36-07004, and 36-07218.

2. The watermaster is not to adjust the 6-ft adjustable weir unless Clear Lakes calls for distribution of water to its senior priority water right 36-02659 or Clear Springs calls for distribution of water to its water right 36-02708, which is next in priority. Such calls must be in writing to either IDWR or the watermaster.

3. If the watermaster receives a written call for distribution, the watermaster is to notify IDWR's Regional Manager in Twin Falls, or alternatively the Manager of the Water Distribution Section of the Water Management Division in the event the Regional Manager is unavailable.

4. IDWR and the watermaster must determine that when a call is made, water is needed under the senior priority water right making the call and that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right. To accomplish this determination, the watermaster is to contact representatives of both Clear Lakes and Clear Springs to schedule a time for accessing Clear Lakes and Clear Springs properties, as soon as possible after a call is made, to ascertain the amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), as well as the need to distribute water among these rights based on priority.

5. As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights with 14-day notice by personal service to the water right holder, or the facility manager for the water right holder, and by mail or facsimile, if available, that the watermaster will adjust the 6-ft adjustable weir so as to distribute water to the calling senior right, reducing or curtailing the distribution of water to the remaining water right(s) in the order of the most junior priority of the remaining right(s) being reduced or curtailed first.

6. At expiration of the 14-day notice, the watermaster is to re-confirm the amount of water flowing from springs and available under water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), based on priority, and to adjust the 6-ft adjustable weir as necessary to distribute water to the rights in order of priority.

7. The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.

8. To determine the amount of water flowing from springs and available to the above water rights, the watermaster must add together the quantities of water flowing to the Clear Lakes and Clear Springs hatcheries. To determine the amount of water flowing to the Clear Lakes hatchery (subject to further confirmation)[1]:

   (a) Read staff gage above the 40-inch west weir near the Clear Lakes hatchery holding ponds;

   (b) Determine discharge through the west weir from attached table for Clear Lakes west weir discharge;

   (c) Read staff gages on each of the six 10-ft Clear Lakes east weirs;

   (d) Determine discharge through each of the six Clear Lakes east weirs from the attached table for Clear Lakes east weirs;

   (e) Add 0.20 cfs to account for flow in the hatchery holding ponds through the perforated PVC pipe (if operating);

   (f) Add discharge from the west weir, each of the six east weirs, and the hatchery pipe to determine the total amount of water flowing to the Clear Lakes hatchery.

   To determine the amount of water flowing to the Clear Springs hatchery (subject to further confirmation)[2]:

   (g) Read staff gage in west diversion pool above 22-ft weir;

   (h) Determine discharge through the 22-ft and 10-ft weirs from attached table for Clear Springs combined weirs;

   (i) Add one (1) cfs to account for discharge of pipe into Clear Springs holding ponds and minor flow from pipes into headrace (if pipes are flowing);

   (j) Read weir measuring the discharge from the wet lab at the Clear Springs Research Laboratory.

   (k) Determine discharge for the wet lab effluent from the table for the Clear springs wet lab weir, or use the average flow which is estimated to be 0.5 cfs;

[1 & 2] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988.

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(l) Add discharge from the 22-ft and 10-ft weirs, the pipes into the holding ponds and headrace, and the wet lab, to determine the total amount of water flowing to the Clear Springs hatchery.

The total amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218, is equal to the sum of (f) and (l).

8. If the total flow is equal to or greater than 375 cfs (± 5 cfs) then the amount of spring flows to Clear Lakes, 7.(f), should be 175 cfs with all the remaining flow to Clear Springs up to 251.55 cfs.

9. If the total flow is less than 375 cfs (± 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)[3]:

(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).

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[3] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988; and from letter report to Dan Steenson and Charlie Honsinger, Ringert Clark Chartered, from Dave Shaw, ERO Resources Corporation, May 2, 2002.

(g) Repeat (a) through (f), if necessary, after allowing sufficient time for the change in flows to stabilize through the hatcheries.

Attachments (9 pages)

CLEAR LAKES – 10-Ft. (East) Weirs

DISCHARGE (CFS)

(Corrected For Velocity Of Approach)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.3	5.49	5.77	6.05	6.34	6.63	6.93	7.23	7.53	7.84	8.16
0.4	8.48	8.80	9.12	9.45	9.79	10.13	10.47	10.81	11.16	11.52
0.5	11.88	12.24	12.60	12.97	13.35	13.72	14.10	14.49	14.87	15.26
0.6	15.66	16.06	16.46	16.86	17.27	17.68	18.10	18.52	18.94	19.36
0.7	19.79	20.22	20.66	21.10	21.54	21.98	22.43	22.88	23.34	23.80
0.8	24.26	24.72	25.19	25.66	26.13	26.61	27.09	27.57	28.06	28.55
0.9	29.04	29.53	30.03	30.53	31.04	31.54	32.05	32.57	33.08	33.60
1.0	34.12	34.65	35.17	35.70	36.24	36.77	37.31	37.85	38.40	38.95
1.1	39.50	40.05	40.61	41.16	41.73	42.29	42.86	43.43	44.00	44.57
1.2	45.15	45.73	46.32	46.90	47.49	48.08	48.68	49.27	49.87	50.47
1.3	51.08	51.69	52.29	52.91	53.52	54.14	54.76	55.38	56.01	56.64
1.4	57.27	57.90	58.54	59.18	59.82	60.46	61.11	61.75	62.41	63.06
1.5	63.72	64.37	65.04	65.70	66.36	67.03	67.70	68.38	69.05	69.73

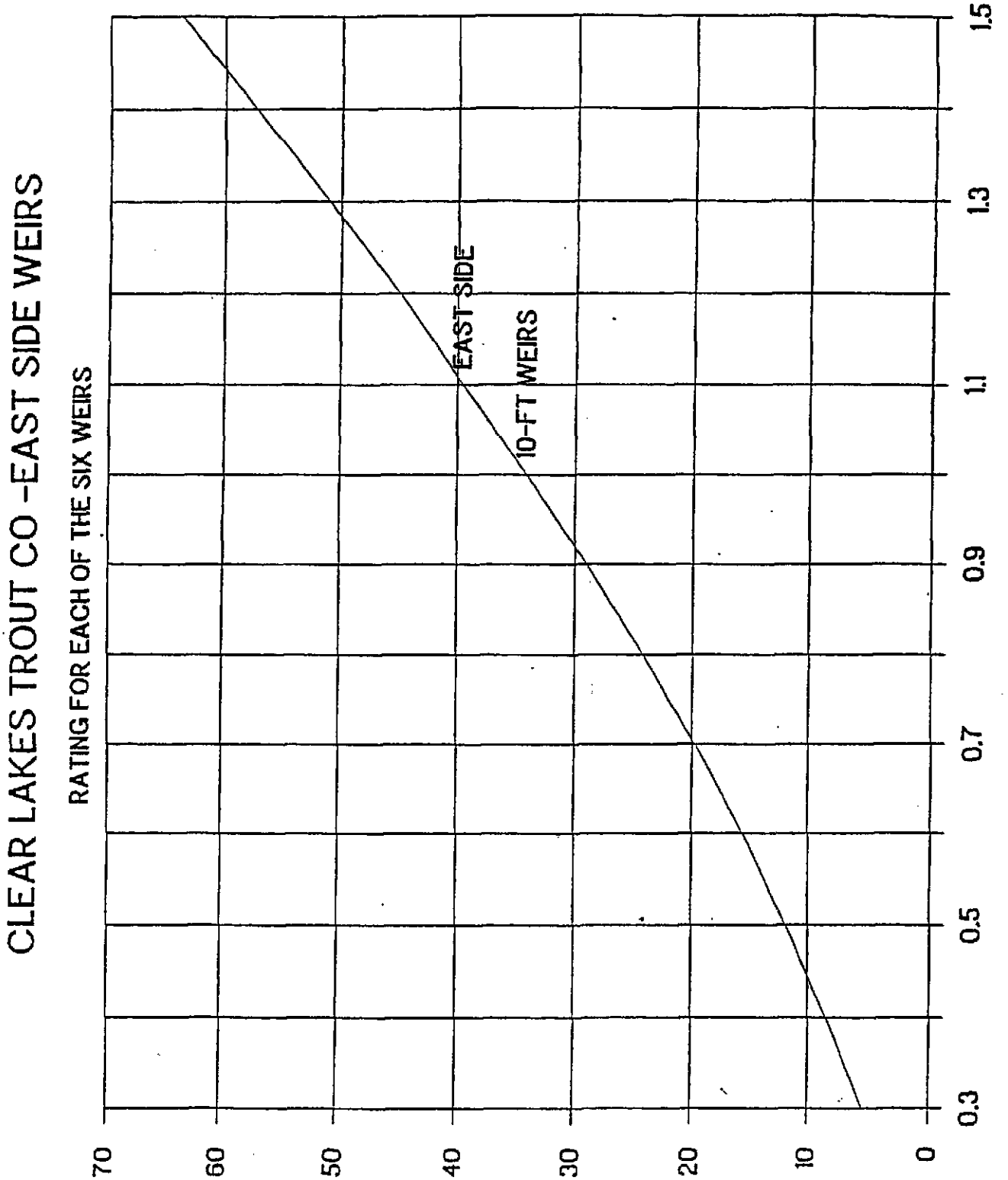
CLEAR LAKES – 40-In. (West) Weir

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.5	3.92	4.03	4.15	4.26	4.38	4.50	4.61	4.73	4.85	4.97
0.6	5.09	5.22	5.34	5.46	5.59	5.72	5.84	5.97	6.10	6.23
0.7	6.36	6.49	6.62	6.75	6.89	7.02	7.15	7.29	7.42	7.56
0.8	7.70	7.84	7.98	8.11	8.26	8.40	8.54	8.68	8.82	8.97
0.9	9.11	9.25	9.40	9.55	9.69	9.84	9.99	10.14	10.28	10.43
1.0	10.58	10.73	10.89	11.04	11.19	11.34	11.50	11.65	11.81	11.96
1.1	12.12	12.27	12.43	12.59	12.74	12.90	13.06	13.22	13.38	13.54
1.2	13.70	13.86	14.02	14.19	14.35	14.51	14.68	14.84	15.00	15.17
1.3	15.33	15.50	15.67	15.83	16.00	16.17	16.34	16.50	16.67	16.84
1.4	17.01	17.18	17.35	17.52	17.69	17.87	18.04	18.21	18.38	18.56
1.5	18.73	18.90	19.08	19.25	19.43	19.60	19.78	19.96	20.13	20.31
1.6	20.49	20.66	20.84	21.02	21.20	21.38	21.55	21.73	21.91	22.09
1.7	22.27	22.45	22.64	22.82	23.00	23.18	23.36	23.55	23.73	23.91
1.8	24.09	24.28	24.46	24.65	24.83	25.02	25.20	25.39	25.57	25.76
1.9	25.94	26.13	26.32	26.50	26.69	26.88	27.06	27.25	27.44	27.63
2.0	27.82	28.01	28.19	28.38	28.57	28.76	28.95	29.14	29.33	29.52

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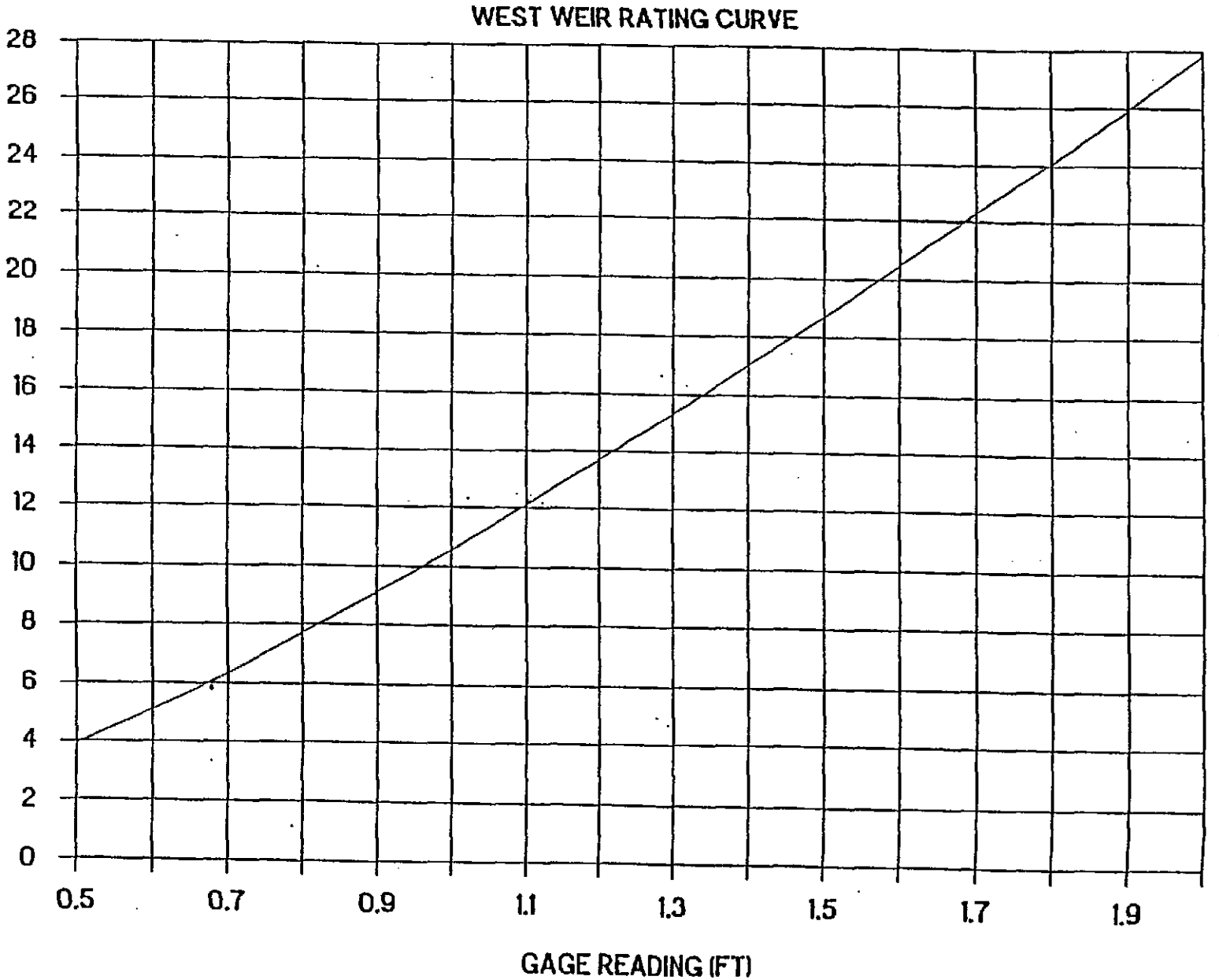
LETTER TO CINDY VENTER FROM KARL J. DREHER DATED 12 2002



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LETTER TO CINDY YENTER FROM KARL J. DREHER DATED 13, 2002

CLEAR LAKES TROUT COMPANY



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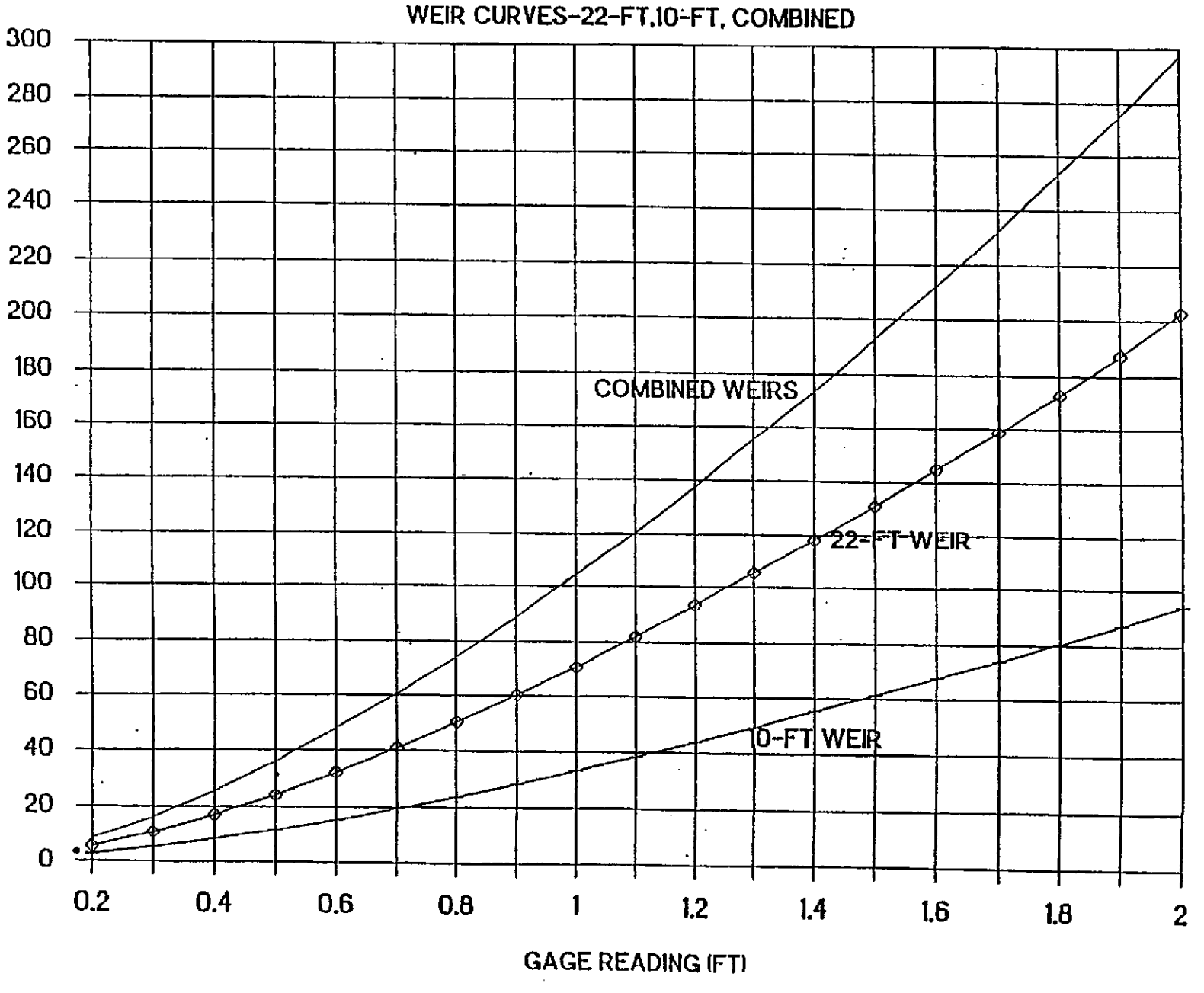
CLEAR SPRINGS – Combined Weirs

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	8.58	9.28	10.00	10.73	11.48	12.25	13.04	13.84	14.65	15.49
0.3 :	16.33	17.20	18.07	18.96	19.87	20.79	21.72	22.67	23.63	24.60
0.4 :	25.59	26.59	27.60	28.62	29.66	30.71	31.77	32.84	33.93	35.02
0.5 :	36.13	37.25	38.38	39.52	40.67	41.83	43.01	44.19	45.39	46.60
0.6 :	47.81	49.04	50.28	51.52	52.78	54.05	55.32	56.61	57.91	59.22
0.7 :	60.53	61.86	63.19	64.54	65.89	67.26	68.63	70.01	71.40	72.80
0.8 :	74.21	75.63	77.05	78.49	79.93	81.39	82.85	84.32	85.80	87.28
0.9 :	88.78	90.28	91.80	93.32	94.84	96.38	97.93	99.48	101.04	102.61
1.0 :	104.19	105.77	107.37	108.97	110.58	112.19	113.82	115.45	117.09	118.74
1.1 :	120.39	122.05	123.72	125.40	127.09	128.78	130.48	132.18	133.90	135.62
1.2 :	137.35	139.08	140.83	142.58	144.34	146.10	147.87	149.65	151.44	153.23
1.3 :	155.03	156.83	158.65	160.47	162.29	164.13	165.97	167.82	169.67	171.53
1.4 :	173.40	175.27	177.15	179.04	180.94	182.84	184.74	186.66	188.58	190.50
1.5 :	192.44	194.37	196.32	198.27	200.23	202.20	204.17	206.14	208.13	210.12
1.6 :	212.11	214.12	216.12	218.14	220.16	222.19	224.22	226.26	228.30	230.35
1.7 :	232.41	234.47	236.54	238.62	240.70	242.79	244.88	246.98	249.08	251.19
1.8 :	253.31	255.43	257.56	259.69	261.83	263.98	266.13	268.28	270.45	272.61
1.9 :	274.79	276.97	279.15	281.34	283.54	285.74	287.95	290.16	292.38	294.60
2.0 :	296.83	299.07	301.31	303.56	305.81	308.06	310.33	312.59	314.87	317.15

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CLEAR SPRINGS TROUT COMPANY



LETTER TO CINDY YENTER FROM SCOTT REHER DATED 13, 2002

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CLEAR SPRINGS – 22-Ft. Weir

DISCHARGE (CFS)

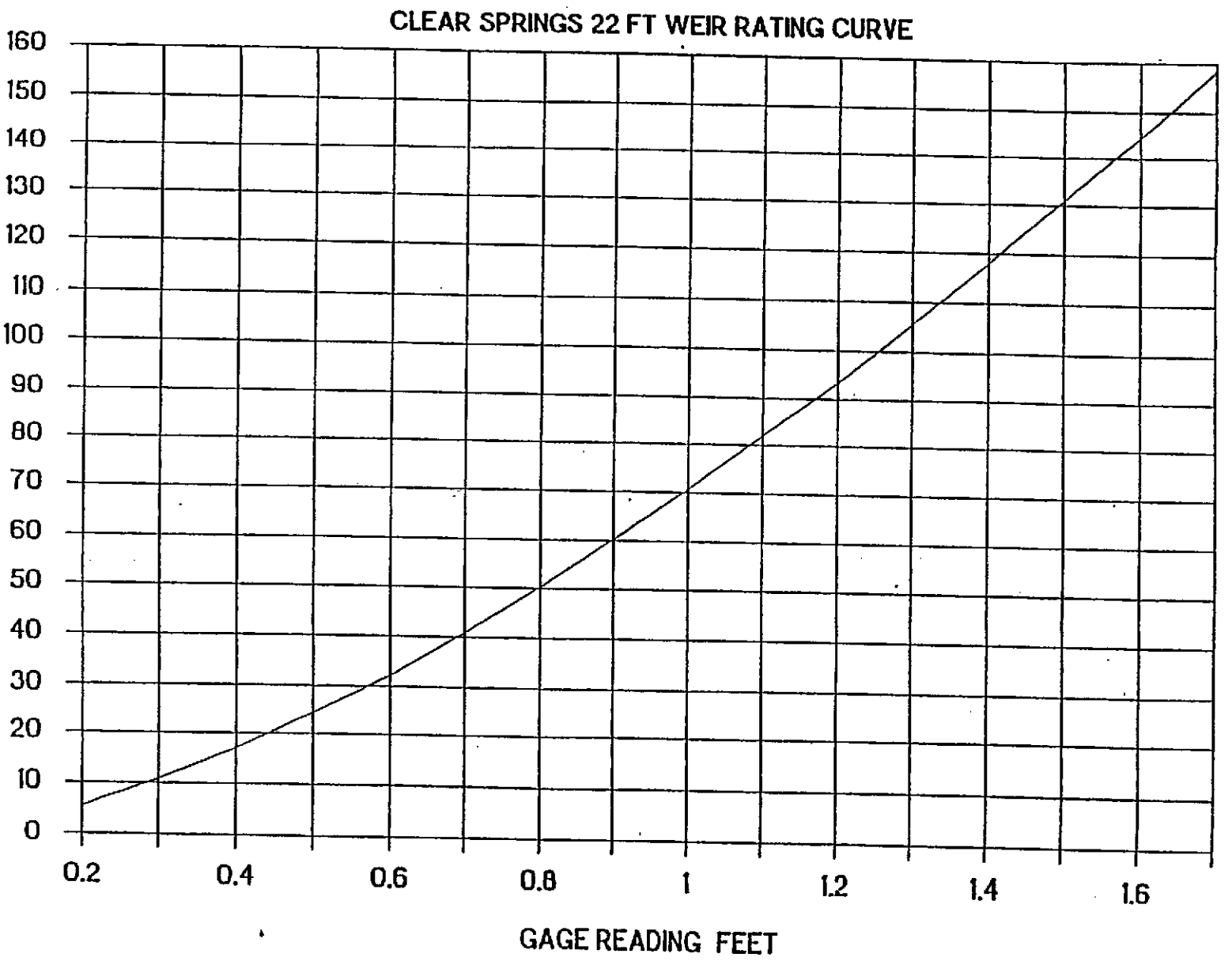
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	5.60	6.07	6.55	7.05	7.56	8.08	8.61	9.16	9.71	10.27
0.3 :	10.85	11.44	12.03	12.64	13.25	13.88	14.51	15.16	15.81	16.48
0.4 :	17.15	17.83	18.52	19.21	19.92	20.64	21.36	22.09	22.83	23.58
0.5 :	24.33	25.10	25.87	26.64	27.43	28.22	29.03	29.83	30.65	31.47
0.6 :	32.30	33.14	33.99	34.84	35.70	36.56	37.43	38.31	39.20	40.09
0.7 :	40.99	41.90	42.81	43.73	44.65	45.58	46.52	47.46	48.42	49.37
0.8 :	50.33	51.30	52.28	53.26	54.25	55.24	56.24	57.24	58.25	59.27
0.9 :	60.29	61.32	62.35	63.39	64.44	65.49	66.54	67.60	68.67	69.74
1.0 :	70.82	71.90	72.99	74.09	75.19	76.29	77.40	78.52	79.64	80.76
1.1 :	81.90	83.03	84.17	85.32	86.47	87.63	88.79	89.96	91.13	92.31
1.2 :	93.49	94.67	95.87	97.06	98.26	99.47	100.68	101.90	103.12	104.34
1.3 :	105.57	106.81	108.05	109.29	110.54	111.79	113.05	114.31	115.58	116.85
1.4 :	118.13	119.41	120.69	121.98	123.28	124.58	125.88	127.19	128.50	129.82
1.5 :	131.14	132.46	133.79	135.13	136.46	137.81	139.15	140.50	141.86	143.22
1.6 :	144.58	145.95	147.32	148.70	150.08	151.47	152.86	154.25	155.65	157.05
1.7 :	158.45	159.86	161.28	162.69	164.12	165.54	166.97	168.40	169.84	171.28
1.8 :	172.73	174.18	175.63	177.09	178.55	180.02	181.49	182.96	184.44	185.92
1.9 :	187.40	188.89	190.38	191.88	193.38	194.88	196.39	197.90	199.42	200.94
2.0 :	202.46	203.99	205.52	207.05	208.59	210.13	211.67	213.22	214.77	216.33

CLEAR SPRINGS – 10-Ft. Weir

DISCHARGE (CFS)

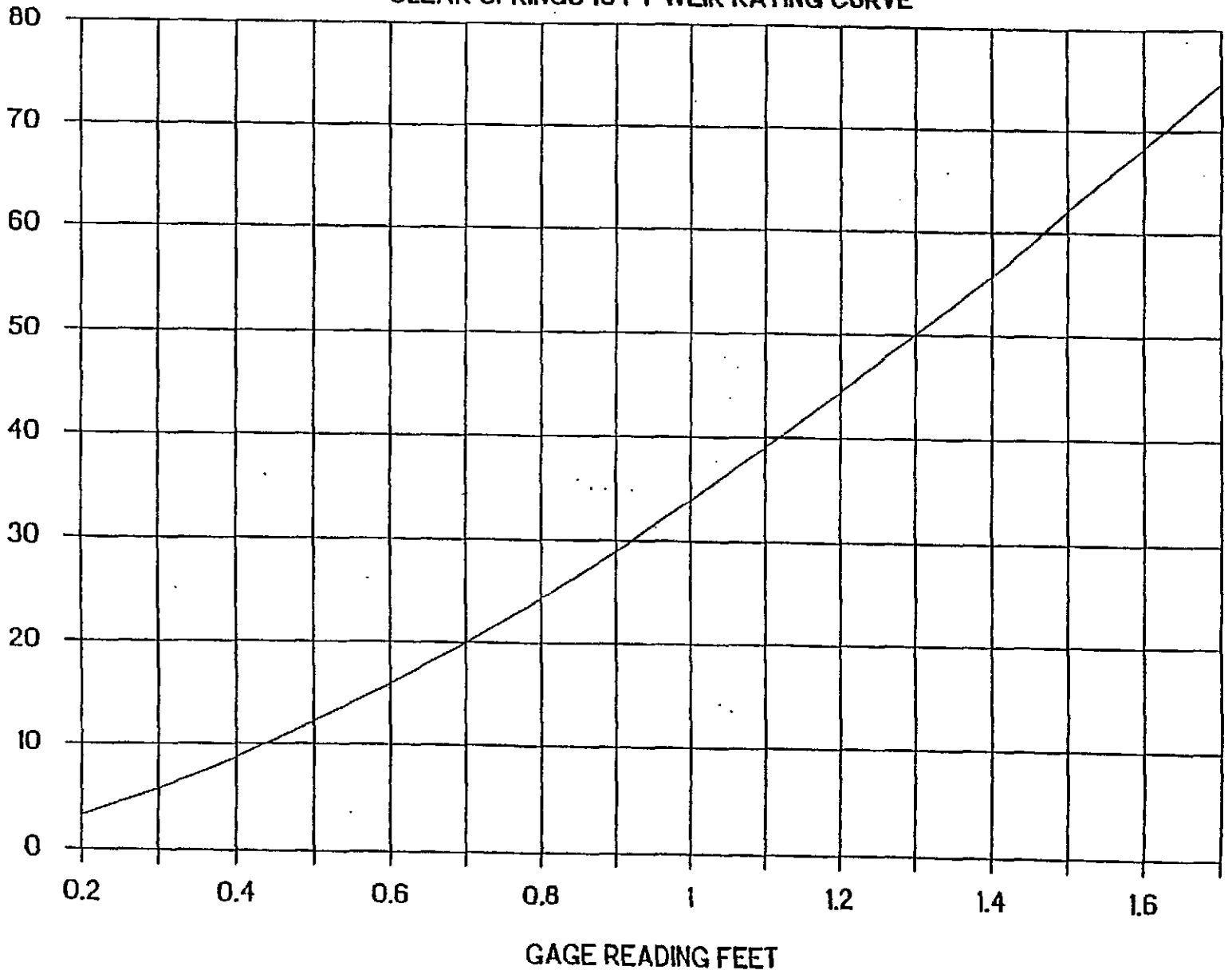
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	2.98	3.21	3.44	3.68	3.92	4.17	4.42	4.68	4.94	5.21
0.3 :	5.48	5.76	6.04	6.33	6.62	6.91	7.21	7.51	7.82	8.13
0.4 :	8.44	8.76	9.08	9.41	9.74	10.07	10.41	10.75	11.10	11.44
0.5 :	11.80	12.15	12.51	12.87	13.24	13.61	13.98	14.36	14.74	15.12
0.6 :	15.51	15.90	16.29	16.68	17.08	17.49	17.89	18.30	18.71	19.12
0.7 :	19.54	19.96	20.38	20.81	21.24	21.67	22.11	22.54	22.99	23.43
0.8 :	23.88	24.32	24.78	25.23	25.69	26.15	26.61	27.08	27.54	28.02
0.9 :	28.49	28.97	29.44	29.93	30.41	30.90	31.38	31.88	32.37	32.87
1.0 :	33.37	33.87	34.37	34.88	35.39	35.90	36.41	36.93	37.45	37.97
1.1 :	38.49	39.02	39.55	40.08	40.61	41.15	41.69	42.23	42.77	43.31
1.2 :	43.86	44.41	44.96	45.52	46.07	46.63	47.19	47.75	48.32	48.89
1.3 :	49.46	50.03	50.60	51.18	51.76	52.34	52.92	53.50	54.09	54.68
1.4 :	55.27	55.87	56.46	57.06	57.66	58.26	58.86	59.47	60.08	60.69
1.5 :	61.30	61.91	62.53	63.15	63.77	64.39	65.01	65.64	66.27	66.90
1.6 :	67.53	68.16	68.80	69.44	70.08	70.72	71.36	72.01	72.66	73.31
1.7 :	73.96	74.61	75.27	75.92	76.58	77.24	77.91	78.57	79.24	79.91
1.8 :	80.58	81.25	81.93	82.60	83.28	83.96	84.64	85.32	86.01	86.70
1.9 :	87.39	88.08	88.77	89.46	90.16	90.86	91.56	92.26	92.96	93.67
2.0 :	94.37	95.08	95.79	96.51	97.22	97.94	98.65	99.37	100.09	100.82

CLEAR SPRINGS TROUT COMPANY



LETTER TO CINDY YENTER FROM KARL J. DREHER DATED 13, 2002 000490

CLEAR SPRINGS TROUT COMPANY



LETTER TO CINDY YENTER FROM KARL J DREHER DATED 13, 2002 DISCHARGE CFS

RECEIVED
DEC 17 2002

Clear Lakes -- 6 Ft Contracted Weir
Discharge in CFS adjusted for velocity of approach and weir elevation

Length = 6 Velocity Head = 0.00000

Gage Reading	0.00	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	1.84	1.98	2.12	2.26	2.40	2.55	2.70	2.86	3.01	3.17
0.3	3.33	3.50	3.66	3.83	4.00	4.18	4.35	4.53	4.71	4.90
0.4	5.08	5.27	5.46	5.65	5.84	6.04	6.24	6.44	6.64	6.84
0.5	7.05	7.26	7.47	7.68	7.89	8.11	8.33	8.54	8.77	8.99
0.6	9.21	9.44	9.67	9.90	10.13	10.36	10.60	10.83	11.07	11.31
0.7	11.55	11.79	12.04	12.28	12.53	12.78	13.03	13.28	13.53	13.79
0.8	14.04	14.30	14.56	14.82	15.08	15.35	15.61	15.88	16.14	16.41
0.9	16.68	16.95	17.23	17.50	17.78	18.05	18.33	18.61	18.89	19.17
1.0	19.46	19.74	20.03	20.31	20.60	20.89	21.18	21.47	21.76	22.06
1.1	22.35	22.65	22.95	23.25	23.55	23.85	24.15	24.45	24.76	25.06
1.2	25.37	25.67	25.98	26.29	26.60	26.92	27.23	27.54	27.86	28.17
1.3	28.49	28.81	29.13	29.45	29.77	30.09	30.41	30.74	31.06	31.39
1.4	31.72	32.04	32.37	32.70	33.03	33.37	33.70	34.03	34.37	34.70
1.5	35.04	35.38	35.71	36.05	36.39	36.73	37.08	37.42	37.76	38.11
1.6	38.45	38.80	39.15	39.49	39.84	40.19	40.54	40.89	41.25	41.60
1.7	41.95	42.31	42.66	43.02	43.38	43.74	44.09	44.45	44.81	45.17
1.8	45.54	45.90	46.26	46.63	46.99	47.36	47.72	48.09	48.46	48.83
1.9	49.20	49.57	49.94	50.31	50.68	51.06	51.43	51.80	52.18	52.56
2.0	52.93	53.31	53.69	54.07	54.45	54.83	55.21	55.59	55.97	56.36

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DEC 17 2003

Exhibit L

MICHAEL
DEC 17 2003

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

DISTRICT COURT
GOODING CO. IDAHO
FILED
'02 JUN 20 PM 1 14
GOODING COUNTY CLERK
BY: R. Tonner
DEPUTY

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

CLEAR LAKES TROUT COMPANY, INC.

Plaintiff,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130

Defendants.

Case No. CV-02-00377

VERIFIED COMPLAINT

COMES NOW the plaintiff in the above entitled matter, by and through its attorneys of record, Ringert Clark, Chartered, and hereby alleges and complains as follows:

NATURE OF CASE

This cause of action arises from Defendants' June 19, 2002 Notice of Intent to Redistribute Flows which, if implemented, will curtail and reduce Plaintiff's diversion and use of water pursuant to its senior established water right. See Exhibit A. Curtailment and reduction of Plaintiff's diversion and use of water pursuant to the above referenced notice violates the prior appropriation doctrine and

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other principles of Idaho water law, violates Plaintiff's established water rights, and denies Plaintiff's constitutional rights to equal protection and due process. Given that the Notice provides that the scheduled July 3, 2002 curtailment and reduction will not be stayed even if it is administratively contested, there is no plain, speedy and adequate remedy in the ordinary course of the law to protect Plaintiff. Therefore, Plaintiff seeks injunctive relief to prevent the Defendants from curtailing and reducing Plaintiff's water rights.

ALLEGATIONS

1. Plaintiff is an Idaho Corporation that owns and operates a fish hatchery located in Gooding County, Idaho, adjacent to the Snake River, north of Buhl, Idaho (Plaintiff and/or Plaintiff's fish hatchery are hereinafter referred to as "Clear Lakes").

2. Defendant Idaho Department of Water Resources (hereinafter "IDWR") is an agency of the state of Idaho which administers the water resources of the state pursuant to Title 42, Idaho Code.

3. Defendant Karl J. Dreher is the Director of IDWR (hereinafter the "Director").

4. Defendant Cindy Yenter is the Watermaster (hereinafter the "Watermaster") for Water District 130. The Watermaster is responsible for the distribution of water within Water District 130 in accordance with the prior appropriation doctrine pursuant to the provisions of chapter 6, title 42, of the Idaho Code.

5. Clear Lakes diverts water from springs that discharge from the northern rim of the Snake River Canyon. The spring source of Clear Lakes' water rights is included within Water District 130. Clear Lakes uses the diverted water to raise trout in its fish hatchery for commercial sale. Clear Lakes is entitled to divert a total of 175 cfs from the springs pursuant to two water rights:

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DEC 17 2002

water right no. 36-02659, for 100 cfs, with a priority of June 23, 1966, and water right no. 36-07004, for 75 cfs, with a priority date of July 21, 1967. The Snake River Basin Adjudication (SRBA) district court has issued partial decrees for these water rights, which are attached hereto as **Exhibit B**.

6. Clear Lakes' diversion works consist of two adjacent diversion structures known as the "Western Pool" and the "Eastern Pool." Clear Lakes' water right no. 36-02659 is diverted simultaneously through the Eastern Pool and the Western Pool. Clear Lakes' water right no. 36-07004 is diverted exclusively through the Eastern Pool and through pipes that divert water that is tributary to the Eastern Pool (the pipes and the Eastern Pool are hereinafter collectively referred to as the Eastern Pool). See Exhibit B.

9. Since 1967, Clear Lakes has diverted water from the west side of its property pursuant to water right no. 36-02659, and has relied upon that diversion of water to build and utilize a significant portion of its production capacity on the western side of its property.

10. Clear Lakes created the Eastern Pool by constructing dikes. See the 1969 aerial photograph attached hereto as **Exhibit C**. The western dike was constructed as an additional point of diversion for water right no. 36-02659 to divert a portion of that water right into the Eastern Pool. The eastern dike was constructed to divert all of 36-07004 into the Eastern Pool. When Clear Lakes' water rights are fully satisfied, the Eastern Pool diverts 109 cfs from the springs: 34 cfs pursuant to water right no. 36-02659 and 75 cfs pursuant to water right no. 36-07004.

11. Clear Lakes constructed raceways on the western side of its property to receive the 66 cfs of water diverted through the Western Pool pursuant to water right no. 36-02659. See the 1977 aerial photograph attached hereto as **Exhibit D**, and the 1997 aerial photograph attached hereto as **Exhibit E**.

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12. Clear Lakes shares the use of the Western Pool to divert spring water with Clear Springs Foods, Inc. (hereinafter "Clear Springs"). Clear Springs owns and operates a fish hatchery located to the west of Clear Lakes' hatchery. Clear Springs diverts water right no. 36-02708, for 200 cfs, with a priority date of September 28, 1966, exclusively into the Western Pool. The Western Pool includes a structure through which water is delivered from the pool to both Clear Lakes and Clear Springs. See **Exhibit F**. The only manner by which the quantities of water distributed from the Western Pool to Clear Lakes and Clear Springs can be changed is by adjustment of the adjustable weir in the common diversion structure through which only Clear Lakes' senior water right no. 36-02659 is delivered.

13. Clear Springs has never claimed nor sought the right to use any of the spring water that is diverted into the Eastern Pool.

14. The Eastern and Western Pools are physically separated such that water diverted through the Eastern Pool cannot be diverted into or through the Western Pool, and such that diversions of water through the Eastern Pool do not impact flows into or through the Western Pool. Thus any call for water by Clear Springs pursuant to its water right no. 36-02708 is futile as to Clear Lakes' water right no. 36-07004.

15. In 1980, an agreement was entered into by and between Clear Lakes and Clear Springs. The 1980 agreement is attached hereto as **Exhibit G** and is incorporated herein as if set forth in full hereat. The agreement provided for the construction of the Western Pool and the distribution of water from the springs between the parties. Water has been distributed between the parties pursuant to the 1980 agreement from 1980 to the present.

16. As determined by the SRBA District Court in a prior proceeding, Clear Lakes' water

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right nos. 36-02659 and 36-07004 and Clear Springs' water right nos. 36-02708 and 36-07218 all have "springs" as their common source. The determination by the SRBA District Court is not the subject of this litigation and is not at issue herein.

17. On June 19, 2002, Plaintiff received a Notice of Intent to Redistribute Flows from Defendants. See Exhibit A. Pursuant to that Notice, Defendants intend to adjust the diversion structure for Clear Lakes senior water right no. 36-02659 on July 3, 2002 such that Clear Lakes' diversion of water from the Western Pool pursuant to its senior water right no. 36-02659 is reduced and curtailed by 27 cfs. The Notice specifically provides that Defendants' adjustment of Plaintiff's diversion structure will not be stayed even if Plaintiff administratively contests Defendants' actions.

18. Defendants' actions violate the prior appropriation doctrine, violate the doctrine of futile call, violate Plaintiff's established water rights, and deny Plaintiff its constitutional rights to equal protection and due process.

COUNT ONE - INJUNCTION

19. Clear Lakes realleges paragraphs 1 through 18 as though fully set forth hereat.

20. Unless restrained and enjoined from redistributing water flows as set forth in Exhibit A attached hereto, Defendants will permanently deprive Plaintiff of its right to fully exercise its decreed water right nos. 36-02659 and 36-07004.

21. Plaintiff has no adequate remedy at law.

22. Plaintiff is entitled to an injunction preventing Defendants from curtailing or reducing the flows of water diverted pursuant to either water right no. 36-02659 or water right no. 36-07004.

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REQUEST FOR ATTORNEY'S FEES

As to all Counts in this Complaint, Plaintiff is entitled to its reasonable attorney's fees incurred in the prosecution hereof pursuant to the relevant state statutes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that upon the filing of this complaint, this Court advance this case on the docket and order a speedy hearing of same and upon said hearing this Court:

1. Issue a permanent injunction enjoining defendants and each of them their agents, employees and successors and all persons in active concert and participation with them from curtailing or reducing Plaintiff's diversions of water pursuant to water right nos. 36-02659 and 36-07004.

2. That Plaintiff have such other, additional or alternative relief as may appear to the Court to be equitable.

3. Grant Plaintiff all costs and reasonable attorney fees incurred herein.

Dated this 20th day of June, 2002.

RINGERT CLARK, CHARTERED

By: Charles L. Honsinger

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VERIFICATION

State of Idaho)
) ss
County of Ada)

Kay Hardy, being first duly sworn on oath, deposes and says:

That she is the President of the plaintiff corporation above named. That she has read the above and foregoing Complaint, knows the contents thereof, and hereby verifies that the facts therein stated are true and correct to the best of her knowledge.

Kay Hardy

Kay Hardy

Sworn to and subscribed before me this 20th day of June, 2002.

Shannon L Sucher

Notary Public for Idaho
Residing in Boise, Idaho
My Commission Expires: 5-17-08

My Commission Expires On
May 17, 2008

SHANNON SUCHER
Notary Public
State of Idaho

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EXHIBIT A

STATE OF IDAHO
WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
TELEPHONE NUMBER (208) 736-3033

IDWR DIRECTOR
KARL J. DREHER

June 19, 2002

Anita Kay Hardy
Clear Lakes Trout Co.
1301 Vista Ave
Boise ID 83705

Larry Cope
Clear Springs Foods, Inc
PO Box 712
Buhl ID 83316

FACSIMILE – followed by mailed original

HAND DELIVERED

RE: Notice of Intent to Redistribute Flows

Dear Kay and Larry:

On June 7, 2002, Clear Springs Foods, Inc (Clear Springs) submitted a written call for priority distribution of water under right no. 36-2708 from springs tributary to Clear Lakes. The call indicated that the flow from the common source available for water right nos. 36-2659, 36-2708, 36-7004 and 36-2718 was insufficient to fill all of the rights and that water was being diverted under Clear Lakes Trout (Clear Lakes) right no. 36-7004 while the more senior Clear Springs right no. 36-2708 for 200 cfs was not being filled.

Pursuant to amended Watermaster instructions issued June 13, 2002, by IDWR Director Karl Dreher, Tim Luke and I met with the parties at the diversions for the above listed rights on June 18. The purpose of this meeting was to 1) determine available flows and the present distribution of water to the above listed rights, 2) establish that water is needed under the senior priority water right making the call, and 3) confirm that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right.

From our measurements yesterday, Clear Lakes is receiving a measured flow of 147.6 cfs from its combined diversions, and Clear Springs is receiving a measured flow of 173.0 cfs from its main diversion and minor contributing pipelines. Based on these measurements, there is a total of 320.6 cfs available from the source, and Clear Springs is not receiving a full complement of water under the right no. 36-2708. Additional flow distributed under this right would be put to beneficial use at Clear Springs by activating and using 4 raceways which are currently dry and not being used.

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JUN 27 2002

LETTER TO
ANITA KAY HARDY AND LARRY COPE FROM CINDY YENTER DATED JUNE 19, 2002

Pursuant to the Watermaster instructions, a 14-day notice shall be provided to the holder of the junior water rights prior to any reduction in distributed flows through adjustment of the 6-foot weir. In this case, the junior right affected is Clear Lakes right no. 36-7004. *Notice is hereby given* that the distribution of water to right no. 36-7004 will be reduced by approximately 27 cfs, to fill the more senior Clear Springs right no. 36-2708 for 200 cfs.

On July 3, 2002, I will re-confirm available flows from the springs and confirm again whether or not right nos. 36-2659 and 36-2708 are being filled in order of priority. If right no. 36-2659 is being filled and water is also being diverted under right no. 36-7004 while right no. 36-2708 is not being filled, I will also confirm that Clear Springs can make beneficial use of any additional water distributed to right no. 36-2708. If Clear Springs can put additional water to beneficial use under its right 36-2708, I will make an adjustment to the 6-foot adjustable weir at the shared diversion, in order that the total spring flows are distributed in the following manner: the first 100 cfs to Clear Lakes Trout right no. 36-2659, the next 200 cfs to Clear Springs right no. 36-2708, and the balance of flows (up to 75 cfs) to Clear Lakes Trout right no. 36-7004. After that time, I will make weekly visits to the diversions to measure available flows, confirm that beneficial use is being made under the respective rights, and make necessary adjustments to the 6-foot adjustable weir.

Representatives from both Clear Lakes and Clear Springs are invited to be present during the July 3 measurement. Since the adjustment wheel for the 6-foot adjustable weir is locked, I will require access to that device on June 3, and will need to have a key provided to me or be allowed to place a Water District lock on the chain at that time.

If you wish to contest this action, you 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). However, such petition may not stay the above action. If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Norm Young and Allen Merritt, IDWR
Herold Johnson, Clear Lakes Trout Co.
Charles Honsinger
Terry Huddleston, Clear Springs Foods, Inc.
John Simpson

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DEC 17 2003

LETTER TO ANITA KAY HARDY AND LARRY COPE FROM CINDY YENTER DATED JUNE 19, 2002

EXHIBIT B

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RECEIVED
APR 26 2002
RINGERT CLARK

02 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

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	)	**ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 & 36-02659**
Case No. 39576	)	

I.
PROCEDURAL BACKGROUND

A *Special Master's Report and Recommendation* was filed on March 3, 1998, in the above captioned subcases. On April 28, 1998, a *Motion to Alter or Amend* was filed on the issue of facility volume. Claimant Clear Lakes Trout Company, Inc. ("Clear Lakes"), filed a *Motion to Alter or Amend* on May 8, 1998, regarding the issues of General Provision 5 and points of diversion.

On December 29, 1999, the SRBA District Court issued a decision on ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue.*** Partial decrees were issued in the above-captioned subcases but were subsequently rescinded because of the remaining *Motion to Alter or Amend* filed by Clear Lakes. Clear Lakes was the only remaining party to the subcase.

On April 15, 2002, the Special Master issued an ***Amended Order Granting in Part Clear Lakes Motion to Alter or Amend and Second Amended Special Masters Report.***

On April 16, 2002, Clear Lakes filed a *Motion to Expedite Issuance of Partial Decrees* seeking to have the partial decrees issued on an expedited basis to have the partial decrees issued prior to the organizational meeting for a water district affecting the subject rights. In furtherance of the *Motion* Clear Lakes waived its right to file a Notice of Challenge.

On April 22, 2002, a hearing was held on the *Motion* to determine whether the remark contained in the point of diversion element regarding the source for the water rights was consistent with the holding in subcases 36-02708 and 36-07218 involving water rights owned by Clear Springs Food, Inc. ("Clear Springs"). In subcases 36-02708 and 36-07218 the SRBA

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366-7994
P.01
Apr-26-02 12:39p B411 Ringert
000505

District Court held, and the Idaho Supreme Court affirmed, that the above–captioned claims and Clear Springs' water rights 36-02708 and 36-07218 shared a common source for purposes of administration. At the hearing, the Court inquired of a representative of the Idaho Department of Water Resources, as the Court's independent expert, whether based on the existing conditions of the diversion works, the remark regarding point of diversion and source is consistent with the holding regarding Clear Springs' water rights.

II.

FINDINGS

THEREFORE, based on the foregoing, the Court makes the following findings:

1. That Clear Lakes is the only party to subcases 36-02004 and 36-02659.

2. That because a ***Special Master's Report and Recommendation*** was previously issued further parties are precluded from entering the subcases by filing a *Motion to Alter or Amend* to the April 15, 2002, *Amended Recommendation*. ***SRBA AO1 Rules of Procedure*** § 13 b. ("no second Motion to Alter or Amend may be filed on the decision granting or denying a Motion to Alter or Amend").

3. That Clear Lakes has waived its right to file a Challenge in the above-captioned subcases.

4. That the partial decrees herein issued are not inconsistent with this Court's prior holding in subcases 36-02708 and 36-07218.

5. That pursuant to I.R.C.P. 53(e)(2) and *AO1*, § 13 f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

III.

ORDER

Therefore, IT IS ORDERED that water rights 36-07004 and 36-02659 are hereby decreed as set forth in the attached *Amended Partial Decrees* Pursuant to I.R.C.P. 54(b).

DATED 4-22-02

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

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Apr-26-02 12:39p B111 Ringert 866-7994 P.02
000506

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER OF AMENDED PARTIAL DECREE FOR WATER RIGHTS 36-07004 AND 36-02659** was mailed on 4/22/02 with sufficient first-class postage to the following:

Clear Lakes Trout
Represented by:
William F Ringert
PO Box 105
Hammett, ID 83627

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Robbin Watts
Deputy Clerk

Apr-26-02 12:40P Bill Ringert 366-7994 P.03
000507

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

AMENDED

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 36-07004

2002 APR 22 PM 4:12
DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 75.00 CFS

PRIORITY DATE: 07/21/1967

POINT OF DIVERSION: T09S R14E S02 LOT 05 (SWSENE) Within Gooding County
LOT 05 (SESENE)

THIS WATER RIGHT IS DIVERTED THROUGH A SPRING-FED DIVERSION POOL KNOWN AS THE "EASTERN POOL," AND THROUGH PIPES WHICH DIVERT WATER FROM SPRINGS THAT ARE TRIBUTARY TO THE EASTERN POOL, ALL OF WHICH ARE LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. A PORTION OF WATER RIGHT NO. 36-2659 IS ALSO DIVERTED THROUGH THE EASTERN POOL. ALL WATER DIVERTED IS FROM THE SOURCE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	75.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

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366-7994

Apr-26-02 12:40P Bill Ringert P.04

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

AMENDED

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 36-02659

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DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: CLEAR LAKES TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: SPRINGS TRIBUTARY: CLEAR LAKES

QUANTITY: 100.00 CFS

PRIORITY DATE: 06/23/1966

POINT OF DIVERSION: T09S R14E S02 SESWNE Within Gooding County
LOT 05 (SESENE)
LOT 05 (SWSENE)

THIS WATER RIGHT IS DIVERTED THROUGH A COMBINATION OF TWO ADJACENT SPRING-FED DIVERSION POOLS: (1) A DIVERSION POOL KNOWN AS THE "WESTERN POOL" LOCATED IN THE S 1/2 SESWNE AND THE S 1/2 SWSENE, T09S, R14E, SECTION 2; AND (2) A DIVERSION POOL KNOWN AS THE "EASTERN POOL" LOCATED IN A PORTION OF GOVERNMENT LOT 5 KNOWN AS THE SWSESENE AND SESWSENE, T09S, R14E, SECTION 2. BOTH POOLS DIVERT WATER FROM THE COMMON SOURSE IDENTIFIED IN THE SOURCE ELEMENT OF THIS WATER RIGHT, LISTED ABOVE.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Fish Propagation	01-01 TO 12-31	100.00 CFS

PLACE OF USE: Fish Propagation Within Gooding County
T09S R14E S02 LOT 05 (SENE) LOT 06 (NESE)
LOT 08 (NESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

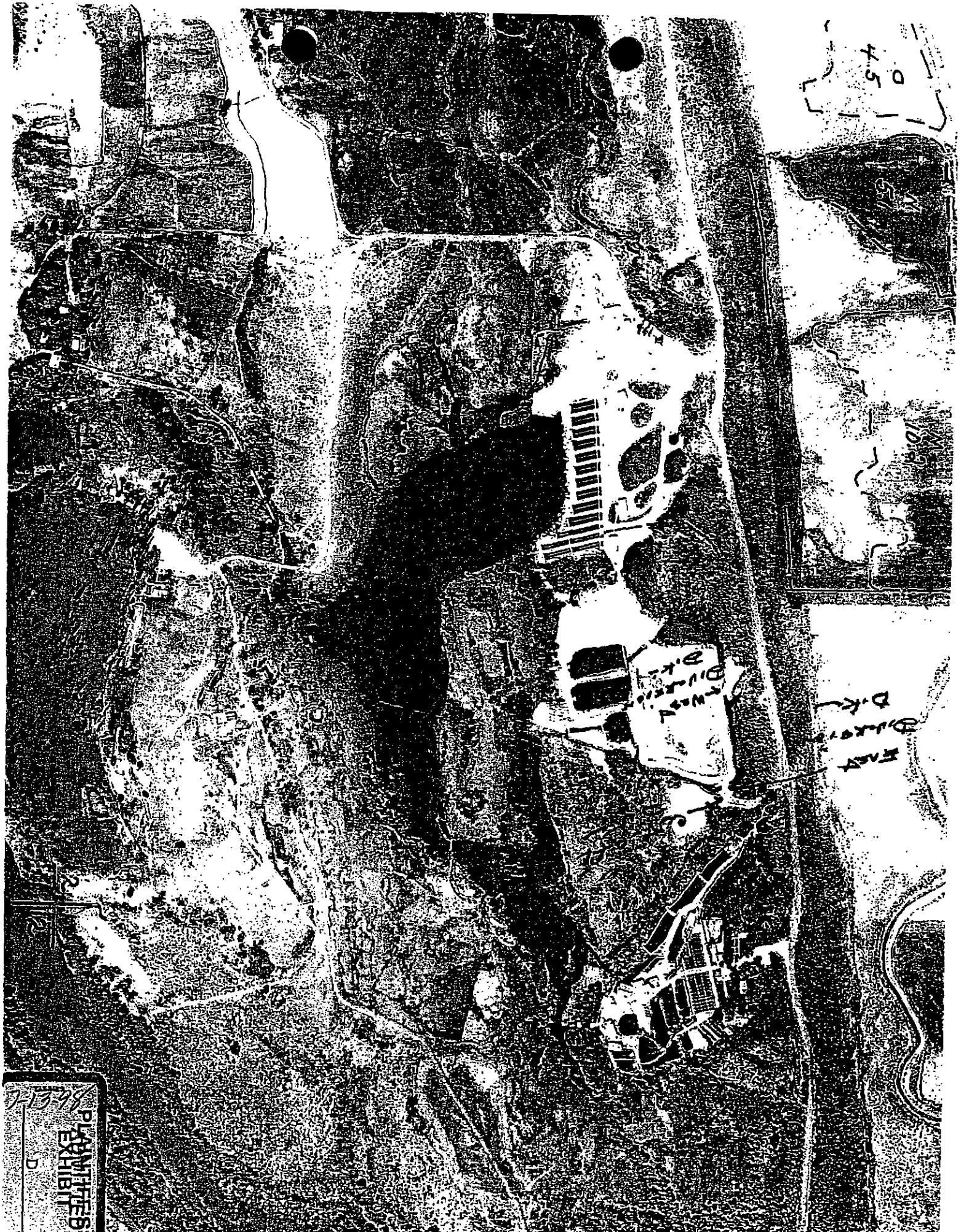
Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

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EXHIBIT C

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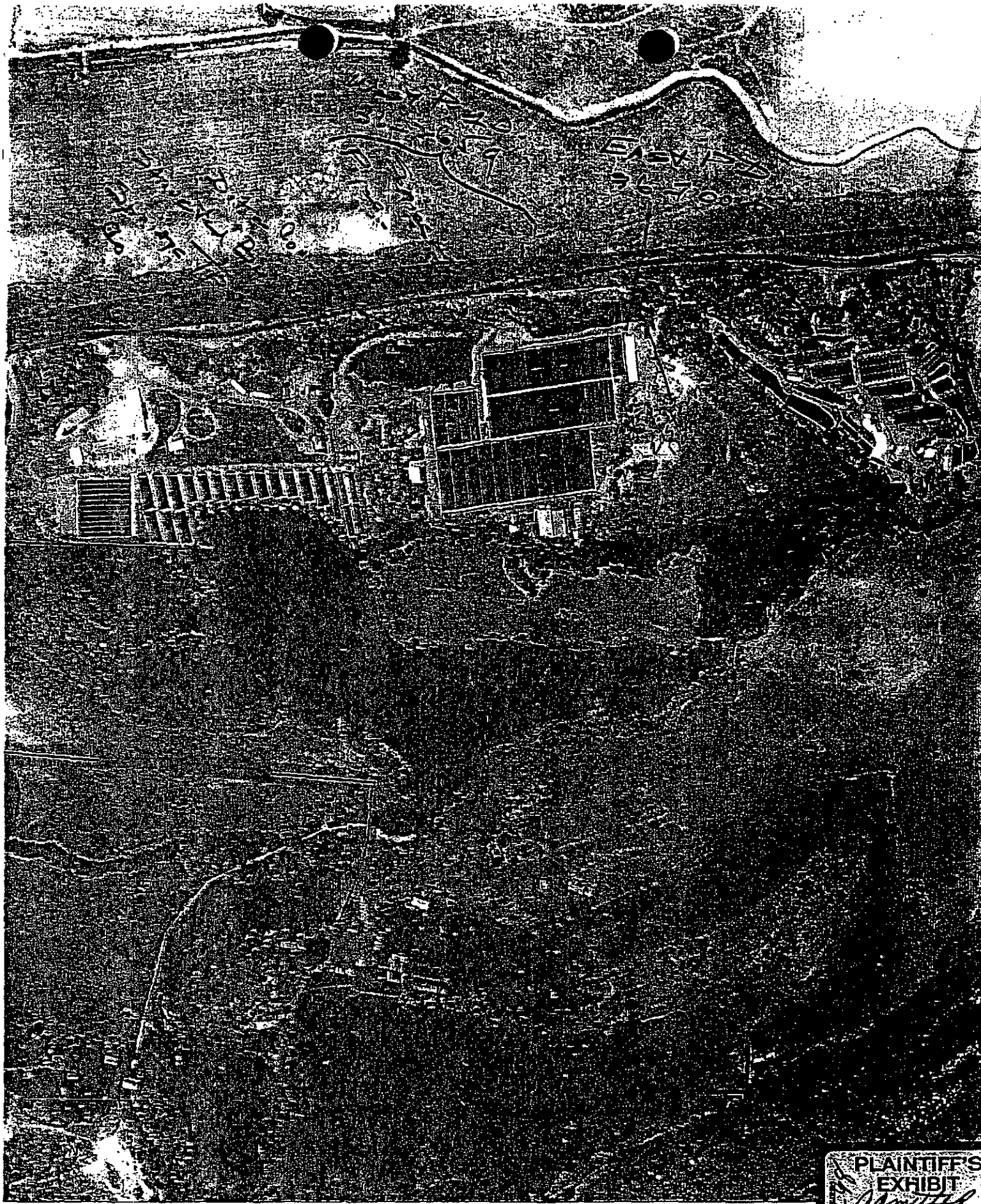


PLAINTIFF'S EXHIBIT D

EXHIBIT C

EXHIBIT D

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PLAINTIFF'S EXHIBIT Admitted H

EXHIBIT D

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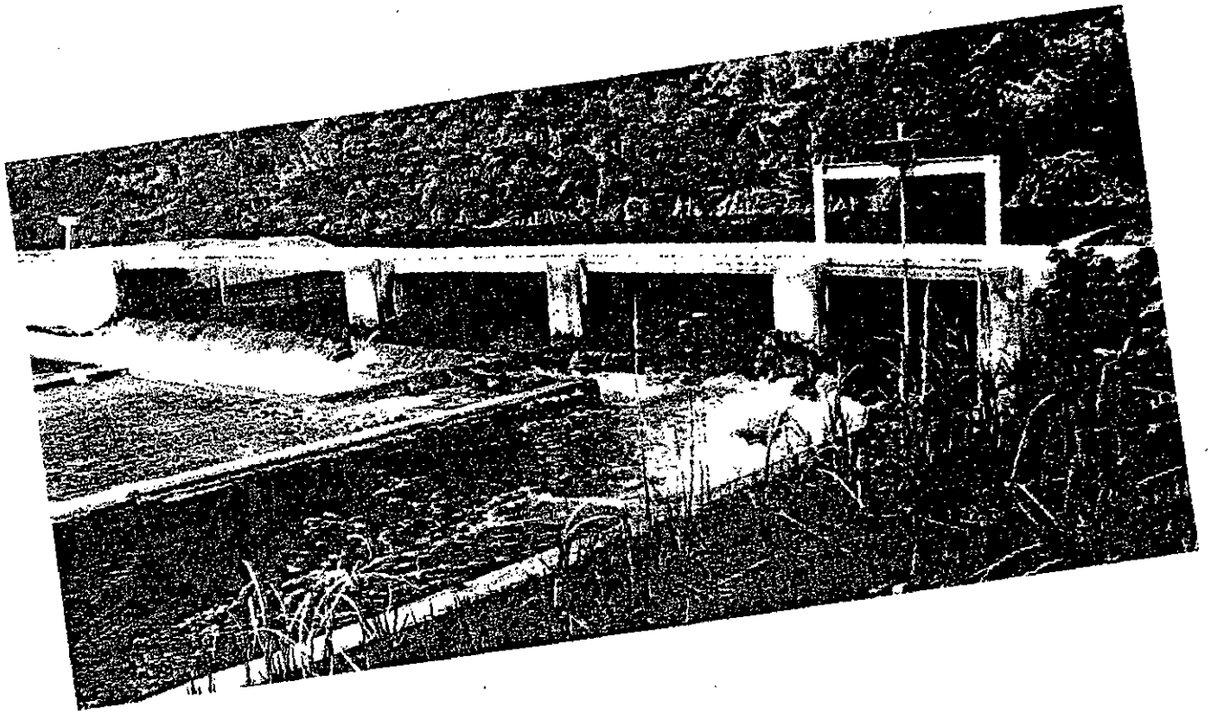
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EXHIBIT G

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II - Corporation, Agreement - Clear Lake Trout Co. To
A
1-5

AGREEMENT

THIS AGREEMENT, Made and entered into this 13th day of March, 1980, by and between CLEAR LAKES TROUT COMPANY, an Idaho corporation, with its principal place of business in Idaho, hereinafter called "Lakes," and CLEAR SPRINGS TROUT COMPANY, an Idaho corporation, with its principal place of business in Gooding County, Idaho, hereinafter called "Springs."

WITNESSETH:

WHEREAS, the parties hereto are neighbors by reason of real property interests in the Clear Lakes area north of Buhl, Idaho, which properties are located in Section 2 of Township 9 South, Range 14 East, Boise Meridian, Gooding County, Idaho; and

WHEREAS, previous hereto Lakes has filed an action against Springs regarding certain diversion works constructed on land leased by Lakes from Idaho Power Company; and

WHEREAS, Springs has filed a counterclaim against Lakes regarding a certain pond located on land leased by Springs from Idaho Power, which said counterclaim also asks for a decree of condemnation and relates to certain other matters; and

WHEREAS, the parties desire to settle all disputes between them and dismiss said actions with prejudice; and

WHEREAS, by this agreement the parties wish to hereafter set forth their respective rights as to water usages, real property, access, the maintenance operation of common facilities and the future responsibilities of each; and

WHEREAS, Lakes owns applications for Permits No. 36-7176/36-2659 and No. 36-7004 for 100 and 75 cubic feet per second, respectively, to be utilized for the purposes of fish propagation; and

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EXHIBIT G

WHEREAS, Springs owns Permits No. 33281/36-2708 and No. 36-7218 for 200 and 75 cubic feet per second, respectively; and

WHEREAS, there is some conflict regarding the relative priorities between Permit No. 36-7004 and Permit No. 36-2708; and

WHEREAS, Springs desires to increase the height of the present diversion works as high as feasibly possible at Springs' cost, which will benefit both Springs and Lakes and which will also include extending and constructing the diversion works to include an area where the waters flow from the natural springs outlets, which have been and are presently being used by Lakes; and

WHEREAS, Springs further desires to change the location of the road providing ingress and egress to the property being leased and owned by Lakes to a location and in a manner agreeable to both parties at Springs' cost; and

WHEREAS, Springs is utilizing a portion of the property owned by Earl M. Hardy and/or Box Canyon Trout Company known as "Box Canyon" for transmittal of water within a flume for fish propagation at the plant owned by Springs, known as "Box Canyon Hatchery"; and

WHEREAS, said water so being transmitted by Springs is by virtue of Permit No. 36-7040; and

WHEREAS, Earl M. Hardy and/or Box Canyon Trout Company are the owners of Permits No. 36-7334, 36-7175 and 36-7091; and

WHEREAS, Springs has no objection to Earl M. Hardy's and/or Box Canyon Trout Company's utilizing the same portion of the Box Canyon property for purposes of transmitting water for fish propagation, except that Earl M. Hardy and/or Box Canyon Trout Company shall have no right to utilize the flume

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owned by Springs except with Springs' consent for such purpose; and.

WHEREAS, there is presently pending before the Idaho Department of Water Resources an application for amendment of Permit No. 36-7066 by Cold Springs, Inc., for additional points of diversion and places of use under said Permit No. 36-7066; and

WHEREAS, Springs acknowledges and agrees that neither it nor John C. Hepworth is making any claim either now or in the future to any of the waters covered by Permit No. 36-7066 or to use such waters on any of the places of usage set out in said permit and application for amendment, including any properties owned by Springs or John C. Hepworth; nor have they made any agreement nor will make any agreement with the owner of Permit No. 36-7066 regarding the water or usage thereof; and, further, that Springs agrees to not use or permit the use of its diversion works, flume or other property being used by Springs located in Box Canyon for carrying any water under Cold Springs, Inc., Permit No. 36-7066, except that claimed by Earl M. Hardy and/or Box Canyon Trout Company, in excess of the 300 cubic feet per second that Springs is entitled to under Permit No. 36-7040;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

1. Water Rights and Usages: It is understood and agreed that the parties hereto acknowledge as prior the 100 cubic feet per second right of Lakes under Permit No. 33176/36-2659 with priority date of June 24, 1966. Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permits Nos.

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36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available to Lakes and Springs under their respective permits, goes below 375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between Springs and Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to Springs and 47% to Lakes. All water being used by Springs and Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by Springs under Permit No. 36-7201. For example: The flow reduces to 350 cubic feet per second. Lakes would have a right to 350 x 47%, or 164.5 cubic feet per second; and Springs would have a right to 350 x 53%, or 185.5 cubic feet per second. Either party may seek action at any time to determine the relative priorities and rights between Permit No. 36-7004 and Permit No. 36-2708.

It is understood and agreed that none of the terms and conditions set out in this agreement are intended nor do they waive or change in any way the right of either party to rely on conditions as they existed at the time Permits Nos. 36-7004 and 36-2708 were applied for in any determination of their relative priorities.

2. Diversion Facilities: It is further understood and agreed that the diversion facilities presently located on the leased property of Lakes placed there by Springs shall be allowed to remain and that a sufficient regulatory system subject to the approval of both parties shall be incorporated into said diversion works in order to properly apportion the water rights of each, as more specifically set out in Paragraph 1 above and as may be finally agreed upon or legally

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determined. If the parties cannot agree on the regulatory system to be incorporated, then such system shall be determined by a qualified engineer from the Department of Water Resources or by the University of Idaho licensed hydrologist. Each party hereto shall have access to said diversion and the mutual right to operate said facility so that water distributions can be made as set forth in Paragraph 1 above.

Springs shall increase as high as feasibility allows the height of the diversion works and shall also extend such works to include the area where the waters flow from the natural springs outlets which have been and are presently being used by Lakes. Such costs to be borne by Springs. Further, prior to any work being commenced, Springs shall go over the construction plans with Lakes for Lakes' approval. Such works shall be commenced as soon as reasonably possible hereafter. Lakes agrees that during the construction period Lakes will at its cost divert Lakes' water for delivery to Lakes' ponds.

3. Roadway: The parties mutually agree that the existing roadway on the property leased by Springs shall be maintained in its present position, except that same may be moved as set out hereafter, and that Springs does hereby grant to Lakes a right to utilize such roadway for ingress and egress and will never deny Lakes the use of said roadway. Further, maintenance costs for said roadway shall be shared proportionately by each, dependent upon usage.

Springs is given the right to move said roadway to a point along the northerly portion of the property being leased by Springs, subject to approval by Lakes of the final location and construction specifications. The intent of the move as understood by both parties is to prevent interference with new ponds to be constructed by Springs.

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4. Pond: As to the pond which has been allowed to back up onto the land of Springs, same may be retained in its present location by Lakes until such time as the additional diversion facilities referred to previously are completed by Springs after which time Lakes, upon request of Springs and as soon as reasonably possible, shall take steps to remove same from the property of Springs.

5. Acquisition of Leased Land: Both leases entered into by the parties hereto with Idaho Power Company provide for an option to purchase at a price to be determined when said leases terminate some years hence. If said option is exercised by either Lakes or Springs, the right of Springs to have access to the diversion works, as more specifically set out in this agreement, shall remain so long as Springs has any necessity for utilization of said diversion works for its fish propagation farm. If said option is exercised by Springs, Springs agrees that the right of Lakes to have ingress and egress over and across the existing roadway or roadway that may be constructed and the other rights enumerated regarding said roadway set out in this agreement to remain in full force and effect and that all necessary documents to implement this agreement to be executed by the parties hereto. After said purchase, the covenants and agreements herein contained shall control as to the rights and property ownerships respecting said property and water entitlements.

6. Box Canyon: As to the property located in Box Canyon owned by Earl M. Hardy and/or Box Canyon Trout Company and over which Springs has constructed a flume to carry 300 cubic feet per second of water under its Permit No. 36-7040 from its diversion point at the dam site, it is acknowledged and agreed that the said property, other than the flume itself, unless consented to by Springs, may be utilized by

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Earl M. Hardy and/or Box Canyon Trout Company for the purpose of constructing a diversion works including but not limited to a diversion facility at the dam site with pipelines and/or flume for transmission of water in excess of the 300 cubic feet per second that Springs is entitled to under Permit No. 36-7040. That the actual transmission line contemplated to be constructed by Earl M. Hardy and/or Box Canyon Trout Company may run along either or both sides of the existing flume and pipes and may cross over the existing flume or over or under the existing pipelines of Springs for transmission of water from said diversion points.

Earl M. Hardy and/or Box Canyon Trout Company may also cross over or under the pipelines of Springs for transmission of water from other diversion points located in the Box Canyon downstream from the existing dam site.

7. Access Road: Earl M. Hardy and/or Box Canyon Trout Company intend to construct a fish propagation facility upon their property located in Blind Canyon and/or Box Canyon, and, accordingly, the present access road being utilized by Springs for access to the dam, flume, pipeline and other facilities of Springs may, of necessity, have to be relocated. That Earl M. Hardy and/or Box Canyon Trout Company are given the right at their cost to so relocate said road as necessary, so long as reasonable ingress and egress to the diversion facilities of Springs is maintained.

8. Permit No. 36-7040: That Springs and John C. Hepworth agree to make no claim, either now or in the future, to any waters covered by Permit No. 36-7066 and further agree to not use or allow the use of the waters covered by Permit No. 36-7066 on any properties owned by them nor enter into any agreements regarding said permit or the use of any waters

EXHIBIT G

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permit and including any additional points of diversion or places of use that might be allowed as a result of the pending application on said permit. Accordingly, Springs agrees that its diversion works in Box Canyon, including transmission lines and other property being used by Springs, shall not be used for the transmission of any water covered by Permit No. 36-7066.

9. That upon execution of this agreement, both parties agree to execute a dismissal with prejudice of the pending lawsuit, both as to the original complaint and the counterclaims filed by Springs.

10. The parties to this agreement shall cooperate with the others to implement the intent and purpose of this agreement.

This agreement shall bind the parties hereto and their successors and assigns forever.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the date first above written.

CLEAR LAKES TROUT COMPANY,
an Idaho corporation

By _____
President

ATTEST:

_____
Secretary

CLEAR SPRINGS TROUT COMPANY,
an Idaho corporation

By _____
Vice President

ATTEST:

_____
Secretary

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DEC 17 2003

APPROVED AND AGREED TO:

Earl M. Hardy

BOX CANYON TROUT COMPANY,
an Idaho corporation

By _____
President

ATTEST:

_____
Secretary

John C. Hepworth

STATE OF IDAHO }
} ss.
County of Ada }

On this 13th day of March, 1980, before me, the undersigned, a Notary Public in and for said state, personally appeared Earl M. Hardy and _____, known to me to be the President and Secretary, respectively, of CLEAR LAKES TROUT COMPANY which executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

_____
Notary Public for Idaho
Residence: Boise, Idaho

STATE OF IDAHO }
} ss.
County of Twin Falls }

On this 20th day of March, 1980, before me, the undersigned, a Notary Public in and for said state, personally appeared Larry Cope and John C. Hepworth, known to me to be the Vice President and Secretary, respectively, of CLEAR SPRINGS TROUT COMPANY which executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

_____
Notary Public for Idaho
Residence: Twin Falls, Ida.

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EXHIBIT G

STATE OF IDAHO)
) ss.
County of Ada)

On this 13th day of March, 1980, before me, the undersigned, a Notary Public in and for said state, personally appeared EARL M. HARDY, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first hereinabove written.

Randall C. Fredrick
Notary Public for Idaho
Residence: Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 13th day of March, 1980, before me, the undersigned, a Notary Public in and for said state, personally appeared Earl M. Hardy and Anita Kay Hurt, known to me to be the President and Secretary, respectively, of BOX CANYON TROUT COMPANY which executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Randall C. Fredrick
Notary Public for Idaho
Residence: Boise, Idaho

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Exhibit M

EXHIBIT M

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DEC 17 2003

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

CLEAR LAKES TROUT COMPANY, INC. **Plaintiff,**	)	**CASE NO. CV-02-00377**
vs.	)	
IDAHO DEPARTMENT OF WATER RESOURCES, Karl J. Dreher, Director of the Idaho Department of Water Resources, and Cindy Yenter, Watermaster for Water District 130 **Defendants**	)	**ORDER GRANTING INTERVENTION; AND DENYING MOTION FOR PRELIMINARY INJUNCTION**
and	)	
CLER SPRING FOODS, INC. **Intervenor.**	)	

I.

PROCEDURAL BACKGROUND

On July 2, 2002, this Court heard argument on the *Motion for Preliminary Injunction* filed by Plaintiff Clear Lakes Trout Company, Inc. ("Clear Lakes") in this action. Also before the Court was the *Motion to Intervene* filed by Clear Springs Foods, Inc. ("Clear Springs"). For the convenience of the Court, the matter was heard at the Twin Falls County Courthouse.

Appearing for Clear Lakes were James G. Reid and Charles L. Honsinger of the firm Ringert Clark, Chatered; appearing for the Defendant Idaho Department of Water Resources ("IDWR") was Phillip J. Rassier, Deputy Attorney General; and appearing for Clear Springs was John K. Simpson of the firm Barker, Rosholt & Simpson LLP.

At the start of the hearing, the Court informed the parties that it was approving Clear Springs' *Motion to Intervene* in the lawsuit pursuant to Idaho Rule of Civil Procedure ("I.R.C.P.") 24. The Court determined that Clear Springs had demonstrated a right to intervene under I.R.C.P. 24(a). The Court also informed the parties that even though an order to show cause had been served upon Defendant IDWR, the Plaintiff Clear Lakes would proceed first as the moving party under its motion for preliminary injunction and bear the burden of persuasion in the proceeding.

The parties apprised the Court that they would not present further evidence or testimony at the hearing and would rely upon their previously submitted affidavits and briefs. The parties presented oral argument on the motion for preliminary injunction. Following presentation of argument by counsel, the Court recessed for a time before reconvening to render the following ruling from the bench on the *Motion for Preliminary Injunction*.

II.

COURT DENIES MOTION FOR PRELIMINARY INJUNCTION

First, the Court agrees with Clear Lakes that it is not making a ruling on the ultimate issue of whether Clear Lakes has the right to demand the proportional amount of water that will be delivered out of the eastern or western pools under its partial decree for water right no. 36-02659. However, an examination of that issue is relevant for determining whether Clear Lakes has a likelihood of ultimately prevailing on that issue under I.R.C.P. 65(e) in order to grant a preliminary injunction. Under the Court's reading of *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984), an examination of the likelihood of prevailing should be taken into account when granting or denying a preliminary injunction regardless of whether the injunction is issued under subsection (1) or subsection (2) of I.R.C.P 65(e). Under I.R.C.P. 65(e)(1), Clear Lakes has the burden to show its right to dictate what portion of water right no. 36-02659 will be delivered out of either pool. For purposes of this hearing only, the Court finds that Clear Lakes did not meet this burden.

For purposes of this hearing the Court has reviewed the partial decree for water right no. 36-02659 and determined that it is silent as to the quantities that can be delivered out of the respective pools to satisfy water right no. 36-02659.

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The decree states only that the right is "diverted through a combination of two spring-fed diversion pools." Thus, it appears that IDWR, in administering the partial decrees, has the authority to allocate the diversions out of the pools in a manner that first satisfies the senior right (water right no. 36-02659) and then the junior rights in ranking order. Based upon the pleadings, and statutory interpretation, IDWR's method of administering these rights appears consistent with the law and within IDWR's administrative authority. For purposes of this hearing, Clear Lakes has not met its burden under I.R.C.P. 65(e)(1) as to the likelihood of prevailing on the merits.

Clear Lakes also has the burden under I.R.C.P. 65(e)(2) to show irreparable injury. In the Court's opinion, the injury resulting from reduced water supply is the same for Clear Lakes or Clear Springs because both would suffer from an inability to run their respective hatcheries at full design capacity. Clear Lakes has taken the position that if injury is occasioned upon Clear Springs, the damages can be redressed in monetary terms through the posting of a bond, but if the injury is placed upon Clear Lakes, it is irreparable. The Court disagrees with this position and finds that Clear Lakes has not met its burden of showing irreparable injury under I.R.C.P. 65(e)(2).

III.

ORDER

Pursuant to I.R.C.P. 24(a) concerning intervention, and pursuant to I.R.C.P. 65(e) providing grounds for preliminary injunction, and based upon the pleadings, briefs and argument of counsel, and the comments and rulings of the Court at the July 2, 2002, hearing:

IT IS HEREBY ORDERED that Clear Springs Foods, Inc.'s *Motion to Intervene* in this lawsuit is **granted**.

IT IS FURTHER ORDERED that for the foregoing states reasons Clear Lakes' *Motion for Preliminary Injunction* is **denied**. All parties shall bear their own costs and fees.

Dated 7-22-02

R Burdick

ROGER S. BURDICK
Administrative District Judge

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING INTERVENTION; AND DENYING MOTION FOR PRELIMINARY INJUNCTION was mailed on July 22, 2002, with sufficient first-class postage to the following:

James G. Reid
Charles L. Honsinger
Ringert Clark
PO Box 2773
Boise, ID 83701-2773

Phillip J. Rassier
PO Box 83720
Boise, ID 83720-0098

John K. Simpson
Barker Rosholt
PO Box 2139
Boise, ID 83701-2139

Deputy Clerk

Exhibit N

Karl

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

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

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130 Defendants.	Case No. CV-02-00377 MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

COMES NOW, Plaintiff Clear Lakes Trout Company, Inc. (hereinafter "Clear Lakes"), by and through its attorneys of record, Ringert Clark, Chartered, and hereby submits this Memorandum in Support of Motion for Preliminary Injunction. This Memorandum is supported by the Affidavit of Harold Johnson on file herein.

NATURE OF CASE

This lawsuit arises from Defendant Cindy Yenter's June 19, 2002 Notice of Intent to Redistribute Flows (hereinafter "Notice") pursuant to instructions issued by Defendant Karl Dreher - the Director of the Idaho Department of Water Resources. According to Defendant Yenter's Notice,

COPY

she intends to curtail and reduce by 27 cfs Clear Lakes' diversion and use of water by adjusting the headgate through which only Clear Lakes' senior water right no. 36-02659 is diverted on July 3, 2002. *See* Exhibit A to Complaint. Curtailment of Clear Lakes' diversion and use of water pursuant to Defendant Dreher's instructions will cause immediate and permanent irreparable injury to Plaintiff, will violate the prior appropriation doctrine and other principles of Idaho water law, will violate Plaintiff's established water rights, and will deny Clear Lakes its constitutional rights to equal protection and due process. The Defendants have not identified or provided an opportunity for a hearing prior to the scheduled July 3, 2002 curtailment (or in fact, any meaningful opportunity for a hearing). Because Clear Lakes has no plain, speedy and adequate remedy available to it in the ordinary course of the law, it seeks preliminary injunctive relief to prevent the Defendants from curtailing and reducing its diversion of water during the course of these proceedings.

A. Clear Lakes' Water Rights and Diversions

Clear Lakes diverts water from springs that discharge from the northern rim of the Snake River Canyon. The spring source of Clear Lakes' water rights is included within Water District 130 (Defendant Yenter is the Watermaster for Water District 130 and is responsible for the distribution of water within Water District 130 in accordance with the prior appropriation doctrine pursuant to the provisions of chapter 6, title 42, of the Idaho Code). Clear Lakes uses the diverted water to raise trout in its fish hatchery for commercial sale. Clear Lakes is entitled to divert a total of 175 cfs from the springs pursuant to two water rights: water right no. 36-02659, for 100 cfs, with a priority of June 23, 1966, and water right no. 36-07004, for 75 cfs, with a priority date of July 21, 1967. *See* Exhibit B to Complaint. The diversion works for these water rights consists of two adjacent diversion structures known as the "Western Pool" and the "Eastern Pool." *See* Exhibit E to

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Complaint. The design and construction of Clear Lakes' hatchery is based on the continuous diversion of relatively consistent quantities of water through the Eastern and Western Pools.

Clear Lakes' water right no. 36-02659 is diverted simultaneously through the Eastern Pool and the Western Pool. Clear Lakes' water right no. 36-07004 is diverted exclusively through the Eastern Pool and through pipes that divert water that is tributary to the Eastern Pool (the pipes and the Eastern Pool are hereinafter collectively referred to as the Eastern Pool). *See* Exhibit B to Complaint. No other water rights are diverted through the Eastern Pool. All water diverted through the Eastern Pool is delivered into Clear Lakes' hatchery. When Clear Lakes' water rights are fully satisfied, the Eastern Pool diverts 109 cfs from the springs: 34 cfs pursuant to water right no. 36-02659 and 75 cfs pursuant to water right no. 36-07004.

Clear Lakes shares the use of the Western Pool to divert spring water with Clear Springs Foods, Inc. (hereinafter "Clear Springs"). Clear Springs owns and operates a fish hatchery located to the west of Clear Lakes' hatchery. *See* Exhibit E to Complaint. Clear Springs diverts water right no. 36-02708, for 200 cfs, with a priority date of September 28, 1966, exclusively through the Western Pool. When Clear Lakes' water rights and Clear Springs' water right no. 36-02708 are fully satisfied, the Western Pool diverts 266 cfs from the springs: 66 cfs pursuant to water right no. 36-02659 and 200 cfs pursuant to water right no. 36-02708.

B. The 1980 Agreement

The Western Pool was constructed in 1988 pursuant to an agreement between Clear Lakes and Clear Springs (the "1980 agreement") that resolved pending litigation over Clear Springs' attempt to take water used by Clear Lakes pursuant to water right no. 36-02659. *See* Exhibit G to Complaint. After construction of the Western Pool, both Clear Lakes and Clear Springs were able

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to expand their facilities to areas formerly covered by water. (*Compare* Complaint Exhibits D and E). Under the 1980 agreement, Clear Lakes' water right no. 36-02659 is recognized as the senior water right among those held by the parties. As to the distribution of water between water right nos. 36-02708 and 36-07004, Clear Lakes and Clear Springs agreed to disagree pending the ultimate determination of that issue. Until that ultimate determination, the parties agreed to distribute water in times of shortage (when total spring flows were below 375 cfs), proportionately among the water rights, without regard to priority. Clear Lakes and Clear Springs have at all times from 1988 to the present received water according to the percentages in the 1980 agreement.

C. SRBA Objections and Litigation

Clear Lakes filed objections in the SRBA to IDWR's recommended descriptions for both Clear Springs' and Clear Lakes' water rights. Clear Lakes' position was that (1) Clear Springs' water right no. 36-02708 and Clear Lakes' water right no. 36-07004 are diverted from separate sources so that water right no. 36-07004 was not subject to Clear Springs' prior right; and (2) whether the sources are separate or not, Clear Lakes' diversion of spring water pursuant to water right no. 36-07004 has no effect upon the supply of water to water right 36-02708 because of the location and configuration of the diversion works for these water rights. Therefore any demand by Clear Springs that Clear Lakes decrease its diversion of water pursuant to water right no. 36-07004 to increase Clear Springs' supply of water for water right no. 36-02708 would be "futile".

The SRBA district court determined that Clear Lakes' water right nos. 36-02659 and 36-07004, and Clear Springs' water right no. 36-02708 are all diverted from a common spring source. The Idaho Supreme Court affirmed the SRBA District Court in *Clear Springs Foods, Inc., v. Clear Lakes Trout Company*, ___ Idaho__, 40 P.3d 119, (Jan. 18, 2002).

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The decision did not resolve Clear Lakes' position that a call on water right no. 36-07004 for delivery of water to Clear Springs' water right no. 36-02708 is futile. Clear Lakes' concern regarding the description of Clear Springs' point of diversion for water right no. 36-02708 was resolved by Clear Springs' judicial admission in briefing to the Idaho Supreme Court that it claimed only the Western Pool as its single point of diversion. Clear Lakes' objection to the description of the diversions for water right nos. 36-02659 and 36-07004 was resolved by the inclusion of clarifying language in their decrees. *See* Exhibit B to Complaint. As stated in the Special Master's Order recommending Clear Lakes' water rights for decree (which was adopted in whole by the SRBA District Court Presiding Judge), this language was "necessary for administration of the water rights."

D. IDWR's Attempted Administration

In April, 2002, the Director notified Clear Lakes that he would develop instructions to the Watermaster for Water District 130 for the distribution of water among right nos. 36-02708, 36-07004 and 36-07218. In response, Clear Lakes advised the Director that any call for distribution of water to Clear Springs' right no. 36-02708 is futile as to Clear Lakes' water right no. 36-07004, and that any adjustment of the headgate in the Western Pool to increase the supply of water to Clear Springs water right no. 36-02708 curtails and manipulates Clear Lakes' senior water right no. 36-02659 in violation of the prior appropriation doctrine ("first in time is first in right").

Subsequently, the Director issued instructions in which he determined that IDWR has authority to manipulate Clear Lakes' diversion of its senior water right no. 36-02659 to increase the supply of water to Clear Springs' junior water right no. 36-02708. Although the Director agreed that "Idaho law does not allow regulation or curtailment of a senior water right in order to increase the water supply to a junior water right in times of shortage, or otherwise," he nevertheless concluded

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that he could alter Clear Lakes' diversion of water from the Western Pool pursuant to water right no. 36-02659 (the senior water right diverting from the Western Pool) to increase the supply of water available to Clear Springs' junior water right no. 36-02708. Shortly after the Director issued instructions, Defendant Yenter visited the site and subsequently issued the Notice which resulted in the initiation of this lawsuit.

STANDARD

I.R.C.P. 65(e) provides in part that:

> A preliminary injunction may be granted . . . (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

The Idaho Supreme Court has held that "Water rights are real property, I.C. § 55-101, and as such may be protected by injunction . . . when threatened by irreparable injury." *Olson v. Bedke*, 97 Idaho 825 (1978). The Court has also held that preliminary injunctions are to be granted when "the right is very clear and it appears that irreparable injury will flow from its refusal." *Harris v. Cassia County*, 106 Idaho 513 (1984). Plaintiff meets the requirements of I.R.C.P. 65(e)(2) because it owns clearly defined water rights, and because it will certainly be irreparably injured by the curtailment and reduction of those water rights. Thus, this Court should enter an order preliminarily enjoining defendants from illegally and wrongfully curtailing Plaintiff's supply of water.

ARGUMENT

As this Court has jurisdiction over this matter, it must prevent the Defendants' reduction or curtailment of Plaintiff's diversions through the Western Pool during these proceedings because Plaintiff will otherwise be permanently and irreparably injured.

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I. The Defendants' Actions will Cause Irreparable Injury

As established by the Affidavit of Harold Johnson, Defendants' curtailment and reduction of Clear Lakes' diversion of 27 cfs of water from the Western Pool under its senior water right no. 36-02659 will cause Plaintiff irreparable injury in several instances. Clear Lakes will be forced to permanently dry up a number of fish raceways so that there is sufficient water in the remaining raceways for it to continue raising fish. Because of the loss of water and the loss of use of a portion of its facility, Clear Lakes will lose the ability to produce approximately 680,000 pounds of fish annually. Clear Lakes will be forced to construct permanent alterations to its hatchery, because the hatchery as designed is dependent upon continued sufficient flows of water from the Western Pool. Clear Lakes will be unable to use its current delivery system to supply the quantity of fish necessary to operate its processing plant at its capacity. Clear Lakes will be required to move fish throughout its system, and to other facilities to prevent the loss of large quantities of trout. It will be more difficult for Clear Lakes to provide small fish for sale to other fish producers with whom it has existing contracts, and more difficult to provide small stock to other fish farms which it operates. Clear Lakes will also lose the opportunity to have these fish returned to for processing and subsequent sale. Finally, as a result of all of the foregoing, Clear Lakes will be forced to incur additional costs, and will lose significant revenues and the opportunity to make a profit thereon.

II. Gooding County District Court Has Jurisdiction Over this Matter

Idaho's Administrative Procedure Act provides that Clear Lakes is entitled to judicial review of Defendants' actions. I.C. §67-5270. The Act also provides part that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies in this chapter." I.C. §67-5271. However, the doctrine of exhaustion of administrative remedies is

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subject to limitations and exceptions. *Bohemian Breweries v. Koehler*, 80 Idaho 438 (1958). Idaho Courts do not follow the doctrine either "where the interests of justice so require or where the agency acts outside its authority." *Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903 (1972). For example, compliance is excused where "arbitrary action by the agency" will cause "irreparable injury." *Id.* Other "circumstances which require an exception to the exhaustion doctrine include: (1) where resort to administrative procedures would futile; (2) where the aggrieved party is challenging the constitutionality of the agency's actions . . .; or (3) where the aggrieved party has . . . no opportunity to exercise the administrative review procedures." *Peterson v. City of Pocatello*, 117 Idaho 234, 236 (Idaho App. 1990). Each of these circumstances is applicable in this case.

A. Clear Lakes Cannot Exercise the Administrative Review Procedures Suggested by Defendants

Defendants' Notice states that Clear Lakes "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)." Unfortunately, Defendants' statement that they are providing an administrative remedy to Clear Lakes does not create such a remedy. I.C. § 42-1701A(3) provides an opportunity for a hearing only "to contest [the Director's] denial or conditional approval" of an application or other form of permission issued by the Director. Defendants' Notice is neither a "denial" nor a "conditional approval" of any type of permission issued by the Director. Moreover, the post-action procedures listed in I.C. § 42-1701A(3) are suitable for contesting the Director's decision on a permit application or transfer (as is clearly contemplated by the statute); not for contesting an action which (as in this case) will result in physical alteration of, and injury to a party's facility. For these reasons, the procedure established by I.C. § 42-1701A(3) is not applicable. Accordingly, this Court has jurisdiction over this matter.

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B. **Defendants' Actions are Unconstitutional**

Even if the procedure set forth in I.C. § 42-1701A(3) were applicable, Idaho law exempts Clear Lakes from exhaustion because curtailment and reduction of its diversion from the Western Pool denies Clear Lakes certain constitutional rights.

First, Defendants' actions will result in a deprivation of Clear Lakes' real property right (the Western Pool point of diversion for water right no. 36-02659) without a prior hearing. Such a pre-hearing deprivation violates Clear Lakes' right to due process guaranteed by the United States and Idaho Constitutions.

Second, the Director has consistently taken the position that he will not reduce junior groundwater diversions to satisfy senior surface water rights unless a showing is made that the junior diversions are impacting or injuring the seniors. Here Defendants did not determine whether Clear Lakes' diversion of water pursuant to its junior water right no. 36-07004 was impacting or causing injury to Clear Springs' water right no. 36-02708 (in fact, it is impossible for diversions under water right no. 36-07004 to in any way affect diversions under water right no. 36-02708). Additionally, although the Director has previously determined that diversions under groundwater rights that are junior to Clear Lakes' water right no. 36-07004 impact the spring source for Clear Springs' and Clear Lakes' water rights, he has not taken any action to curtail these more junior ground water rights. Therefore, to Clear Lakes' clear detriment, the Defendants are treating it differently than junior groundwater right owners. As a result, Clear Lakes is denied the equal protection of the laws guaranteed by the United States and Idaho Constitutions.

C. **Defendants' Actions are Arbitrary**

Defendants' actions in curtailing and reducing Clear Lakes' diversions are arbitrary. For

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example, Defendants' Notice makes clear that Clear Lakes' diversion of water from the Western Pool will be curtailed before any appealable administrative record supporting such action is created. Moreover, Defendants' actions are outside of their authority, because, as discussed above, curtailment of Clear Lakes' diversion from the Western Pool will result in a deprivation of Clear Lakes' constitutionally guaranteed rights. The doctrine of exhaustion of administrative remedies "does not apply unless the administrative agency acts within its authority," and district courts will "interfere by injunction to protect the litigant where it is made to appear that irreparable injury will result from further pursuit of the administrative process." *Bohemian Breweries, supra* at 446.

D. The Process Contemplated by IDWR Would be Futile

Requiring Clear Lakes to resort to the administrative procedure suggested by IDWR would be futile. It is quite obvious that the Defendants have made up their minds as to this issue. They intend to curtail Clear Lakes' diversions even if Clear Lakes avails itself of the procedures provided by I.C. § 42-1701A(3). Moreover, the instructions leading to the Watermaster's Notice were drafted and issued by the Director himself. The hearing provided for by to I.C. § 42-1701A(3) would also be before the Director. The Director would not be in any way inclined to rescind either the Notice, or the faulty instructions which he himself issued and on which the Notice is based.

CONCLUSION

The Defendants intend to reduce and curtail Plaintiff Clear Lakes' diversion of water from the Western Pool pursuant to its senior water right no. 36-02659 on July 3, 2002. Defendants' actions will result in irreparable harm to Clear Lakes. Because this Court has jurisdiction under several exceptions to the doctrine of exhaustion of administrative remedies, Clear Lakes respectfully requests that it issue an injunction preventing Defendants from taking the actions specified in their Notice

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during the pendency of this proceeding.

Dated this 28th day of June, 2002.

RINGERT CLARK, CHARTERED

By: Charles L. Honsinger

CERTIFICATE OF SERVICE

I certify that on June 28, 2002, I served copies of this document, including all attachments by U.S. Mail to the following:

Director Karl Dreher
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83712

Watermaster Cindy Yenter
C/O IDWR
1341 Fillmore St., Suite 200
Twin Falls, ID 83301-3380

Person serving documents

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Exhibit O

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JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130 Defendants, and CLEAR SPRINGS FOODS, INC., Intervener/Defendant.	Case No. CV-02-00377 CLEAR LAKES' MEMORANDUM IN OPPOSITION TO IDWR'S MOTION FOR SUMMARY JUDGMENT AND CLEAR SPRINGS' MOTION TO DISMISS

COMES NOW, the Plaintiff, CLEAR LAKES TROUT COMPANY (hereinafter referred to as "Clear Lakes") by and through its attorneys of record, RINGERT CLARK, CHARTERED and submits this Memorandum opposing Defendants Motion for Summary Judgment filed herein by the Idaho Department of Water Resources (hereinafter referred to as "IDWR"), Karl J. Dreher

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(hereinafter the "Director"), and Cindy Yenter. This Memorandum is also responsive to, and opposes the Motion to Dismiss filed herein by Clear Springs Foods, Inc. (hereinafter referred to as "Clear Springs"). This Memorandum is supported by the Affidavits of Gregory Kaslo, Anita Kay Hardy and Daniel V. Steenson filed concurrently herewith, and by the record herein.

SUMMARY

On October 22, 2002, this Court issued a bench order setting for hearing the issue of exhaustion of administrative remedies raised by IDWR in its Motion for Summary Judgment. The other issues raised by IDWR's Motion for Summary Judgment are not being addressed at the November 26, 2002 hearing on the exhaustion issue. Clear Springs also raised issues in its Motion to Dismiss which are to be addressed at the November 26, 2002 hearing. IDWR's arguments regarding exhaustion are flawed in that they fail to recognize that the exceptions to the exhaustion doctrine are applicable in this case. Clear Springs' arguments regarding the alleged lack of subject matter jurisdiction show a lack of understanding of the doctrines of primary jurisdiction, and exhaustion of administrative remedies. Moreover, at a minimum, the facts applicable to IDWR's and Clear Springs' arguments are disputed. Therefore, this Court should determine both that there are material issues of fact and that as a matter of law, neither summary judgment nor dismissal can be granted.

FACTS

The following is a discussion of facts related to the theory that Clear Lakes was required to petition the Director for a hearing pursuant to I.C. § 42-1701A(3) prior to filing this action.

The administrative activities which culminated in curtailment of Clear Lakes' diversion began

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in March of 2002, when Clear Springs' attorney contacted the Director to ask "how the Department intended to administer these various water rights . . . in the event there was a delivery call." Steenson Affidavit, Exhibit A, Deposition of Karl Dreher (hereinafter "Dreher depo.), pp. 25-26. Mr. Simpson did not indicate who might make the call.

The Director did not understand, and did not treat, Mr. Simpson's inquiry to be a call for water, or an informal or formal petition for either declaratory ruling or rule making. *Id.*, p. 164, lns 1-13. He characterized Mr. Simpson's inquiry as "an informal inquiry for clarification as to what the Department intended to do." *Id.*, lns 19-20. The Director did not consider the process or the actions by which he developed instructions for the Watermaster as a contested case or a rule making. *Id.*, p. 165, lns. 5-13. There is no established administrative procedure in the Idaho Code or IDWR's rules for the process by which he developed the instructions. *Id.*, p. 165, ln 15 - p. 166, ln. 6, p. 34, ln. 21- p. 35,ln. 7.

Clear Lakes became aware that Clear Springs had contacted the Director regarding administration of the water rights in late March of 2002. Kaslo Affidavit, ¶ 2, p. 2. On April 2, 2002, the Director met with representatives of Clear Springs and Clear Lakes at the location of their diversion works. *Id.*, pp. 27, lns 4-10, p. 29, ln. - p. 31, ln. 16; Kaslo Affidavit,¶ 2, p. 2. During the April 2nd meeting, the Director discussed his intention to develop instructions for the Watermaster, and Clear Springs submitted written information to the Director. Kaslo Affidavit, ¶3, p. 2.

In an April 11, 2002 letter, the Director advised Clear Springs and Clear Lakes that he intended to develop instructions to the Watermaster based on the information Clear Springs provided on April 2nd. He also allowed Clear Lakes and Clear Springs to submit additional information for him

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to consider. Dreher Depo., p. 32, lns 7-12, Exhibit 6. During his deposition, the Director described his actions at this point as "informal gathering of all pertinent information" to develop instructions for the Watermaster, rather than as any type of administrative process. *Id.* p. 34, lns. 5-25.

After Clear Lakes and Clear Springs submitted information on May 2, 2002, the Director issued watermaster instructions for distribution of their respective water rights in a memorandum dated June 5, 2002. Dreher Depo., Exhibit 11. In explaining the Director's basis for the instructions, the memorandum rejects or ignores the information Clear Lakes submitted on May 2nd. Kaslo Affidavit, ¶5, p. 2. The instructions provide that, if Clear Springs submits a written call for distribution of water to water right no. 36-02708 when the spring source supplies less than 375 cfs, the Watermaster is to confirm that Clear Springs needs the water, and increase Clear Springs' diversion by reducing Clear Lakes' diversion of water through the western diversion pool pursuant to Clear Lakes' senior water right no. 36-02659. The instructions require the Watermaster to provide a 14-day notice of such an intended adjustment. Dreher Depo., Exhibit 11, p. 6, ¶5.

The Director recognized that his instructions could have a significant effect on Clear Lakes' and Clear Springs' water rights. *Id.*, p. 35, lns 8-12. However, the Director's June 5, 2002 memorandum does not provide or mention any opportunity for Clear Lakes to seek administrative or judicial review of the Director's instructions.

On June 7, 2002, representatives of Clear Lakes met with the Director and his legal counsel, Phil Rassier, to discuss the Director's June 5, 2002 memorandum. Kaslo Affidavit, ¶ 4, p. 2; Dreher Depo., p. 172, ln. 23 - p. 173, ln. 3. During the meeting, Clear Lakes' representatives expressed their extreme disappointment with the Director's instructions and his explanation for them. Kaslo

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Affidavit, ¶ 5, p. 2; Dreher Depo., p. 173, lns. 4-7. Clear Lakes explained its position during the meeting and asked what remedy would be available to Clear Lakes for administrative or judicial review to change or overturn the Director's instructions. Kaslo Affidavit, ¶ 5, p. 2. The Director "repeatedly stated that he understood Clear Lakes' position and recognized that [Clear Lakes] disagreed with his decision, and that, if [Clear Lakes] wanted a different answer we should seek one from a court." Kaslo Affidavit, ¶ 5, p. 2; Dreher Depo., p. 173, lns. 8-20. Mr. Rassier then stated that he thought Clear Lakes could seek an injunction from a court. Kaslo Affidavit, ¶ 5, pp. 2-3. Neither the Director nor Mr. Rassier mentioned any opportunity for an administrative hearing. Kaslo Affidavit, ¶ 5, p. 3. Mr. Dreher did agree to temporarily suspend his instructions for further consideration. *Id.*

While Clear Lakes met with the Director on Friday, June 7th, Clear Springs faxed to the Director a written call for distribution of water to water right no. 36-02708 pursuant to the Director's June 5, 2002 watermaster instructions. Dreher Depo., p. 174, lns. 2-21, Exhibit 12.

On Monday, June 10, 2002, the Director faxed a copy of Clear Springs' written water delivery call to Clear Lakes with a letter in which he advised Clear Lakes that he would temporarily suspend his June 5th watermaster instructions "for a short period of time (expected to be less than 1 week)" to "complete the additional review that [he] committed to last Friday on the basis for the watermaster instructions." Dreher Depo., Ex. 12; Kaslo Affidavit, ¶6, p. 3, Ex. D. In the last paragraph of the Director's June 10th letter he mischaracterized the issues presented by Clear Lakes and then stated that " I believe that I have thoroughly considered these issues."

Convinced by these statements that the Director would not reconsider his decision, Clear

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Lakes submitted a second letter on July 13, 2002 in an attempt to further explain its position. Kaslo Affidavit, ¶6, p. 3, Exhibit E.

That same day, the Director issued Amended Watermaster Instructions, just 3 days after his June 10th letter in which he committed to perform additional review of the basis for his instructions. Dreher Depo., p. 177, lns. 21-24, Ex. 14; Kaslo Affidavit, ¶7, p. 3. These were the first watermaster instructions issued in Water District 130. Dreher Depo., p. 161, ln. 21 - p. 162, ln. 2.

The June 13, 2002 cover letter that accompanied the Director's amended watermaster instructions clearly states the Director's conviction regarding his decision:

> I have again thoroughly reviewed all the pertinent information of which I am aware, particularly the governing court decisions to date. Although I have added approximately 5 additional pages of analysis, my previous conclusions regarding how these water rights should be administered are unchanged. . . . [T]he current instructions, as amended, are extraordinary in the analysis and detail included. This was done to demonstrate to both Clear Lakes and Clear Springs, that all of the complexities, pertinent information, and the law have been thoroughly considered.

Dreher Depo., p. 177, ln. 25- p. 178, ln. 11, Ex. 14.

Several of the 5 pages that the Director added to his memorandum discussed two Supreme Court cases that Mr. Rassier found to support the Director's action. Mr. Rassier did not find any conflicting case law. *Id.*, p. 176, ln. 14 - p. 177, ln. 9. At this point the Director was confident in his decision, and he was clear in his mind that he had not made a mistake. Dreher Depo., p. 178, lns 12-17, p. 191, lns. 10-12.

The June 13th cover letter also states: "These watermaster instructions are written to the watermaster, not to either of your clients. . . . Thus the enclosed memorandum is not a decision arising from a contested case nor is it the model or form for future watermaster instructions." As

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with the Director's June 5, 2002 memorandum, the June 13th memorandum and cover letter do not mention any opportunity for Clear Lakes to seek administrative or judicial review of the Director's instructions. The Director explained the omission of any reference to the opportunity for a hearing provided by I.C. § 42-1701A(3):

Q. Why did you fail to mention the possibility of review under 1701A(3) in your watermaster instructions then:
A. Because the watermaster instructions were issued to the watermaster. The watermaster can't seek a review under 1701.
Q. I see. I think I understand your answer. Why would the watermaster be seeking review of instructions issued to her?
A. Correct.

Dreher Depo., p. 189, lns. 5-14.

The Director recognized that in any hearing on his watermaster instructions conducted pursuant to I.C. § 42-1701A(3), Clear Lakes would, in effect, be asking him to change his own mind on a matter that he was confident he had decided correctly. The Director testified: "I understand why you would view it that way, but it's – it would have been an opportunity to create a formal record on which you could seek additional review." *Id.*, p. 179, lns 3-12.

On June 18, 2002, the Watermaster met on site with representatives of Clear Springs and Clear Lakes to prepare to redistribute flows as provided in the Director's Amended Instructions. Dreher Depo., p. 179, ln. 24 - p. 180, ln. 5; Kaslo Affidavit, ¶8, p. 3. The next day, on June 19th the Watermaster sent a letter captioned "Notice of Intent to Redistribute Flows" to Clear Lakes and Clear Springs. Dreher Depo., p. 180, lns 6-12; Kaslo Affidavit, ¶9, p. 4, Ex. F. The letter implements the Director's instructions. Dreher Depo., p. 180, lns. 13-16.

The Watermaster's letter gave 14-day notice that the Watermaster would reduce Clear Lakes'

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diversions by 27 cfs 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)." This was the first time since April, 2002, when the Director began gathering information to prepare watermaster instructions in response to Clear Springs' inquiries, that IDWR provided Clear Lakes notice of an opportunity for an administrative hearing. Dreher Depo., p. 180, ln. 19 - p. 181, ln. 8. The period for filing a petition would expire on the July 4th holiday, so that, presumably, the period would be extended to July 5th. Thus, the Watermaster intended to reduce Clear Lakes' diversion of water before Clear Lakes would have any opportunity for an administrative hearing, and before the time for filing a petition for a hearing had expired. Dreher Depo., p. 184, ln. 12 - p. 186, ln. 13.

While the Director believes I.C. § 42-1701A(3) provides an opportunity to initiate a contested case and seek a hearing on any IDWR action, including his watermaster instructions and the Watermaster's Notice of Intent to Distribute, the Director is not aware of any instance in which anyone has filed a petition under the statute. Dreher Depo., pp. 169, lns 4-9, p. 170, lns 7-11. He acknowledges that his instructions to the watermaster did not constitute a denial or conditional approval as contemplated by the statute. *Id.*, p. 168, ln. 21 - p. 169, ln. 3. In fact, IDWR is proposing legislation to amend the statute to ensure that it provides an opportunity for an administrative hearing in regard to watermaster instructions and calls. *Id.*, p. 170, ln. 24 - p. 171, ln. 6. He testified that:

> There apparently is some disagreement about the general application of 1701. And to the extent that has been a problem here or in other cases, we're seeking clarification to try to help people understand that it is available to them.

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Id., p. 171, lns 7-11.

> Q. And you mentioned disagreements that you're aware of that are the basis for the amendment that you're seeking. Can you describe any of those disagreements for me?
> A. Well, certainly the most recent ones have been with you and Charlie. I mean, you raised this point with us before, as to the applicability of this statute. And we have informed you verbally that we believe it's applicable. But to the extent that you and others, in similar situations or different situations, feel it's ambiguous that we ought to address it. Because I think this is a significant remedy that's available to people.
> Q. And who else feels it's ambiguous? You mentioned others. Who else are you referring to other than Charlie – I take if you mean Chuck Honsinger me and me?
> A. Right. Well, as Phil and I reviewed this we both agreed that there's some ambiguity there.

Id., p. 171, ln. 17 - p. 172, ln. 8.

The curtailment required Clear Lakes to remove 268,520 pounds of trout from its raceways idle approximately 17% of its hatchery, both of which took several days to arrange and complete. Kaslo Affidavit, ¶ 9, p. 4. The Watermaster's letter also advised Clear Lakes that filing a petition "may not stay the above action." This sentence was included to warn Clear Lakes that the Director may not grant a stay. Dreher Depo., pp. 186, ln. 24 - p. 187, ln. 7, p. 188, lns. 8-15. The Director understood that the curtailment would have a dramatic impact on Clear Lakes' operations. *Id.*, pp. 187, lns. 18-23, 188 lns. 8-15. He acknowledged that if IDWR denied a stay, then the only way Clear Lakes could postpone the curtailment to avoid the severe consequences to its operations would be to seek an injunction from a court. *Id.*, p. 188, lns. 8-15.

The content and tone of the Watermaster's letter and the Director's prior statements regarding his instructions convinced Clear Lakes that the Director would not grant a stay, and that asking him to change his mind through a hearing would be futile. Kaslo Affidavit, ¶ 9, p. 4. It was not possible for Clear Lakes to file a petition seeking a stay, obtain the Director's answer, and file a court action

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seeking an injunction before Clear Lakes had to make firm arrangements to move fish from its facility. *Id.* Clear Lakes decided to file this court action for an injunction as recommended by the Director and Mr. Rassier on June 7th as the only effective and timely available remedy. *Id.*, ¶10 , p. 4.

On July 5, 2002, the Watermaster adjusted the adjustable weir in the western diversion pool to reduce Clear Lakes' diversion of water in response to Clear Springs' call. Kaslo Affidavit, ¶11, p. 4. This is the first and only curtailment that has occurred in Water District 130. Dreher Depo., p. 51, ln. 24 - p. 52, ln. 10, p. 162, lns. 10-12.

Clear Springs' June 7, 2002 call for distribution of water sought curtailment and reduction of Clear Lakes' water rights in order supply water to Clear Springs' water right no. 36-02708. The Director's position is that, in response to Clear Springs' call, the Watermaster has curtailed Clear Lakes' diversion of its junior water right no. 36-07004. Dreher Depo., p. 51, ln. 9 - p. 52, ln. 10. Clear Springs' call violates the "safe harbor" provision in paragraph 2.8 of the Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36 (Stipulated Agreement) signed by Clear Springs and Clear Lakes. Dreher Depo., Exhibit 34; Hardy Affidavit, ¶2, Exhibit A The Watermaster's curtailment of Clear Lakes' diversion in response to that call violates the Director's responsibility to enforce the provisions of the Stipulated Agreement pursuant to the Director's February 19, 2002 Final Order Creating Water District No. 130. Dreher Depo., Exhibit 35, Conclusions of law, ¶10.c., p. 5. The safe harbor provision of the Stipulated Agreement provides:

> 2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 **the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction,** other than as provided in paragraph 2.7, **of any junior water rights held by or represented by the undersigned** within Basin 36 for the term of this agreement.

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Dreher Depo., Exhibit 34, p. 3 (emphasis added).

Clear Springs signed the agreement on November 16, 2001 (p. 11) and Clear Lakes signed the agreement on January 17, 2002 (p. 13). Hardy Affidavit, ¶2, page 2. Pursuant to this provision, holders of senior priority water rights who sign the agreement, including Clear Springs, clearly and unambiguously agree not to seek to curtail or reduce "any junior water rights held by the undersigned," including Clear Lakes. The following recital in paragraph 1.5 of the Stipulated Agreement sets the stage for the safe harbor provision: "The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of **ground water or surface water under junior priority water rights** within Basin 36 pending the completion of the new ESPA Ground Water Model." *Id.*, p. 1 (emphasis added).

IDWR and the State of Idaho urged Kay Hardy, as President of Clear Lakes, to sign the Stipulated Agreement. Hardy Affidavit, ¶3, p. 2. Kay Hardy understood the safe harbor provision protected Clear Lakes from a call by any party that signed the agreement, including Clear Springs. Hardy Affidavit, ¶¶4,5, p. 2. The safe harbor provision was essential to induce Clear Lakes to enter the Stipulated Agreement because Clear Lakes understood that, by entering the agreement, it was forgoing its right to seek curtailment of any junior water right holders that signed the agreement in order to increase the supply of water to the Clear Lakes facility. Hardy Affidavit, ¶6, p. 2. In other words, Clear Lakes would be exposed to a call by Clear Springs with no recourse to increase Clear Lakes' supply of water. Kay Hardy would not have signed the Stipulated Agreement if Clear Lakes was not protected from a call by the safe harbor provision. *Id.*, ¶7, p. 2.

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STANDARDS

Motions for summary judgment are governed by IRCP 56 which provides in pertinent part that judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court must liberally construe the facts in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

The standard for reviewing a motion to dismiss for failure to state a claim upon which relief can be granted is the same as the summary judgment standard. *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P. 2d 757 (1989). The nonmoving party is entitled to have all inferences from the record viewed in his favor. Id. It is only after construing all facts in favor of the nonmoving part that the court may address the question of whether a claim for relief has been stated. Id. For a complaint to be dismissed for failure to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992). Therefore, where there are genuine issues of material fact, a motion to dismiss cannot be granted. *Ernst v. Hemenway & Moser, Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

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In appropriate circumstances, a District Court may enter summary judgment in favor of the nonmoving party. *Miner v. Farmers Insurance Co. of Idaho*, 116 Idaho 656, 659, 778 P.2d 778 (1989). Those circumstances include situations where both parties submit affidavits, make oral argument, and have an opportunity to show whether a genuine issue of material fact exists. *Juker v. American Livestock Ins. Co.*, 102 Idaho 644, 645, 637 P.2d 792 (1981).

ARGUMENT

In support of its Motion to Dismiss, Clear Springs argues that because IDWR has primary authority for the distribution of water within Idaho, the District Court has no jurisdiction over water distribution until after IDWR has made a "final determination" as to all disputes over such distribution. Clear Springs also argues that because Clear Lakes did not avail itself of certain statutory and regulatory processes to address IDWR's actions, its complaint must be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Finally, Clear Springs argues that Clear Lakes' request for an injunction must be dismissed pursuant to I.R.C.P. 12 (b)(6) because Clear Lakes had an adequate remedy at law - the right to "appeal" IDWR's Notice to the Director. IDWR, in support of its Motion for Summary Judgment, argues that Clear Lakes failed to exhaust its administrative remedies, and that none of the exceptions to that doctrine are applicable here.

A. Clear Lakes' Remedy in Response to IDWR's Actions Has Always Been Unclear

It is important in the context of these arguments that the Court recognize that Clear Lakes never knew, and does not to this day know, exactly what its remedies were with respect to the Watermaster Instructions. The Director acknowledged that the watermaster instructions directly

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affected Clear Lakes' rights. Dreher depo, p. 35, lns. 8 - 12. However, the watermaster instructions contain no reference to Clear Lakes' remedy. The Director explained that he could have initiated a contested case regarding the instructions, but chose not to do so. *Id.*, p. 182, ln. 20 - p. 183, ln. 15. The Director opined that he could have issued the instructions through the use of a preliminary order, but again chose not to do so because "the matter was complex. And the end product was directed more to the watermaster than the water users." *Id*, p. 181; ln. 12 - p. 182, ln. 13. The Director also explained that the reason he did not include a provision in the watermaster instructions providing for their review under I.C. §42-1701A(3), was that the watermaster instructions were issued to the watermaster, and that the watermaster could not seek review of the instructions. *Id*, p. 189, lns. 5 - 14. Rather than specifying remedies in the instructions, the responses of the Director and his counsel, when questioned by Clear Lakes about its remedies, were to initiate litigation and seek an injunction.

The only notice Clear Lakes ever had with respect to any remedy it might have was in the June 19, 2002 Notice of Intent to Redistribute Water, which gave Clear Lakes 15 days to petition the Director for a hearing under I.C. §42-1701A(3), but specified that the curtailment would occur in 14 days, and stated that any petition submitted "may not" stay the redistribution - forcing Clear Lakes to immediately begin moving its fish to prevent massive losses when the curtailment occurred. There simply was no opportunity offered by IDWR to address the issues prior to the proposed curtailment. Clear Lakes' only reasonable remedy (and that which the Director and his counsel advised Clear Lakes to pursue) was to seek an injunction in district court to prevent the irreparable damage wrought by curtailment of Clear Lakes' water supply.

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B. **This Court has Subject Matter Jurisdiction over this Case**

Clear Springs, through the vehicles of the doctrines of primary jurisdiction and exhaustion of administrative remedies, and the argument that Clear Lakes had an adequate remedy at law for the Director's and watermaster's actions, attempts to show that this Court does not have subject matter jurisdiction over this case. Clear Springs' arguments are erroneous and misplaced. The Court initially addressed the issue of jurisdiction in chambers with Clear Lakes' counsel when Clear Lakes was seeking the Order to Show Cause. The Court's concerns led to the inclusion of a section in Clear Lake's Brief in Support of its Motion for Preliminary Injunction which addressed jurisdiction. No party raised the issue of jurisdiction at the hearing on the Motion for Preliminary Injunction. Moreover, since that time, the Court has exercised its jurisdiction with respect to several orders it has issued. Beyond these facts, Clear Springs' arguments themselves cannot withstand scrutiny.

Clear Springs erroneously argues that the doctrine of primary jurisdiction requires that only IDWR can make a final decision as to this dispute, and that the Court's role is limited to that of review. However, "[th]e doctrine of primary jurisdiction . . . is not a doctrine that governs judicial review of administrative action." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068 (1978). Rather, the doctrine "governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." *Id.* (Emphases in original). Moreover, the doctrine of primary jurisdiction is not jurisdictional. *Grever v. Idaho Tel. Co.*, 94 Idaho 900, 902-903, 499 P.2d 1256, 1258- 1259 (1972). The purpose of the doctrine is to allow agencies "equipped to handle such problems" to make the initial decision regarding disputes within their authority. *Id.* The application of the doctrine "will attain uniformity

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of regulatory laws and will result in orderly coordination between the agencies and the courts." *Id.* In this case, the agency has already made the *initial* decisions in this case- whether and how to administer Clear Lakes' water rights, and Clear Lakes disputes those decisions. Consequently, the purpose of the doctrine of primary jurisdiction has already been satisfied, and Clear Springs' argument must fail because the doctrine is inapplicable.

Clear Springs next argues that the court does not have subject matter jurisdiction over this case because Clear Lakes failed to exhaust its administrative remedies. However, Idaho does not treat the doctrine of exhaustion of administrative remedies "as one depriving a court of jurisdiction over the subject matter." *Granata, supra*, at 628. In fact, "[t]he statement the courts so often repeat in their opinions - that judicial relief must be denied until administrative remedies have been exhausted - is seriously at variance with the holdings . . .. The law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not." *Granata, supra* at 627 *citing* 3 K. Davis, Administrative Law Treatise 56-57 §20.01 (1958). Thus, Clear Springs' attempt to make a black and white argument that Clear Lakes' complaint must be dismissed because it did not first exhaust all available administrative remedies is without merit. Instead, under Idaho law, there are numerous exceptions and circumstances which are applicable to the doctrine and which will be discussed further below.

Finally, Clear Springs makes an argument that Clear Lakes could not seek its equitable remedy - an injunction - because it had an "adequate remedy at law" - an "appeal" to the Director. This argument is duplicative of Clear Springs' argument that Clear Lakes was required to exhaust its remedies prior to filing a court action. Moreover, it is obvious from the facts of the case that the

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administrative remedy Clear Springs' argues that Clear Lakes should have initiated was simply not "adequate." The Director made it clear in his deposition testimony that further consideration by him would not result in any changing of his position. Clear Lakes' opportunity to arrest the curtailment of its water did not run until after the curtailment was scheduled to occur, and the Notice of Intent to Redistribute makes it clear that even if Clear Lakes had submitted a petition, any stay of IDWR's curtailment actions "may not" be granted. The only remedy Clear Lakes had which is in any way "adequate" was to initiate this action - as suggested by the Director and his legal counsel.

C. <u>The Doctrine of Exhaustion of Administrative Remedies Does Not Preclude Clear Lakes From Bringing this Action</u>

Idaho's Administrative Procedure Act provides for judicial review of agency actions. I.C. §67-5270. The Act also provides in part that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies in this chapter." I.C. §67-5271; *see also Grever, supra* at 903. In Idaho, the doctrine of exhaustion of administrative remedies is subject to limitations and exceptions. *Bohemian Breweries v. Koehler*, 80 Idaho 438 (1958). Idaho Courts do not follow the doctrine either "where the interests of justice so require or where the agency acts outside its authority." *Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903 (1972). For example, compliance with the doctrine is excused where "arbitrary action by the agency" will cause "irreparable injury." *Id.* Other "circumstances which require an exception to the exhaustion doctrine include: (1) where resort to administrative procedures would futile; (2) where the aggrieved party is challenging the constitutionality of the agency's actions . . .; or (3) where the aggrieved party has . . . no opportunity to exercise the administrative review procedures." *Peterson v. City of Pocatello*, 117 Idaho 234, 236 (Idaho App. 1990). The exceptions to the doctrine are applicable in this case.

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1. **IDWR Acted Outside its Authority**

Clear Springs' July 7, 2002 call for distribution of water sought curtailment and reduction of Clear Lakes' water rights in order supply water to Clear Springs' water right no. 36-02708. Clear Springs' call violates the "safe harbor" provision in paragraph 2.8 of the Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36 (Stipulated Agreement) signed by Clear Springs and Clear Lakes. Dreher Depo., Exhibit 34; Hardy Affidavit, ¶2, Exhibit A. The Watermaster's curtailment of Clear Lakes' diversion in response to that call violates the Director's responsibility to enforce the provisions of the Stipulated Agreement pursuant to the Director's February 19, 2002 Final Order Creating Water District No. 130. Dreher Depo., Exhibit 35, Conclusions of law, ¶10.c., p. 5.

The safe harbor provision of the Stipulated Agreement provides:

> 2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 **the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction,** other than as provided in paragraph 2.7, **of any junior water rights held by or represented by the undersigned** within Basin 36 for the term of this agreement.

Dreher Depo., Exhibit 34, p. 3 (emphasis added).

Clear Springs signed the agreement on November 16, 2001 (p. 11) and Clear Lakes signed the agreement on January 17, 2002 (p. 13). Hardy Affidavit, ¶2, page 2. In this provision holders of senior priority water rights who sign the agreement, including Clear Springs, clearly and unambiguously agree not to seek to curtail or reduce "any junior water rights held by the undersigned," including Clear Lakes. The following recital in paragraph 1.5 of the Stipulated Agreement sets the stage for the safe harbor provision: "The parties desire to avoid the need for

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litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of **ground water or surface water under junior priority water rights** within Basin 36 pending the completion of the new ESPA Ground Water Model." Id., p. 1 (emphasis added).

The Agreement also specifies that the parties "understand that interim administration will include . . . enforcement of the provisions of the stipulated agreement," and "[t]he parties understand that the Director will issue an administrative order approving this Agreement, which will include the elements of interim administration identified in paragraph 2.10." Dreher Depo., Exhibit 34, ¶¶ 2.10, 2.12.

The Director approved the Agreements on January 18, 2002." Dreher Depo. Exhibit 35, ¶ 4, p. 2. On February 19th, 2002, the Director issued his Final Order Creating Water District No. 130 (hereinafter the "Order"). The Order directed the watermaster for Water District 130 to "[e]nforce the provisions of stipulated agreements approved by the Director." *Id*, at p. 5, ¶ 10.c.

IDWR and the State of Idaho urged Kay Hardy, as President of Clear Lakes, to sign the Stipulated Agreement. Hardy Affidavit, ¶3, p. 2. The safe harbor provision was essential to induce Clear Lakes to enter the Stipulated Agreement because, by entering the agreement, Clear Lakes was forgoing its right to seek curtailment of any junior water right holders that signed the agreement. Hardy Affidavit, ¶6, p. 2. In other words, Clear Lakes would be exposed to a call by Clear Springs with no recourse to replace Clear Lakes' supply of water. Kay Hardy would not have signed the Stipulated Agreement if Clear Lakes was not protected from a call by the safe harbor provision. Id., ¶7, p. 2.

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The Director agrees that he is responsible, pursuant to the terms of the Order, for enforcing the provisions of the Agreement. Dreher Depo., p. 223, lns. 13 - 17. However, by curtailing Clear Lakes diversion of water in response to Clear Springs' delivery call, the Director failed to enforce the provisions of the Agreement as required by his own Order Creating Water District No. 130.

The Director recognizes that "the undersigned" in the phrase "any junior water rights held by or represented by the undersigned" unambiguously and clearly refers to both Clear Lakes and Clear Springs. Dreher Depo., p. 195, lns 3-14. He agrees that there is no other language in the Stipulated Agreement that contradicts or makes impermissible the plain language of paragraph 2.8 which extends safe harbor to junior surface water right owners. Id., p. 221, lns 11-18. In fact he acknowledges that "the undersigned" is "all encompassing," including within its meaning all junior water rights held by all signatories to the agreement. Id., p. 217, lns 10-23. He acknowledges that the reference in first sentence of paragraph 1.5 of the Stipulated Agreement, quoted above, reflects the concept that the safe harbor provision applies to junior priority surface water rights. Id., p. 219, lns. 7-17. He also acknowledges that the second sentence of paragraph 2.12 also reflects the concept that the safe harbor provision protects holders of junior surface water rights. Id., p. 219, ln. 18 to p. 221, ln. 8.

"Where a statutory or contractual provision is unambiguous, the interpretation is governed by the plain meaning of the words." *Ahles v. Tabor*, 136 Idaho 393, 34 P.3d 1076 (2001). "Construction of the meaning of a contract begins with the language of the contract. If the contract's terms are clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001). (Citations omitted). "[W]here a contract is clear and unambiguous, not involving any absurdities or contradictions, it is the best evidence of the intent of the parties and hence a

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determination of its meaning and its legal effect are a question of law. *Madrid v. Roth*, 134 Idaho 802, 805, 10 P.3d 751, 754 (Ct. App. 2000).

As the Director acknowledges, the "safe harbor" language of paragraph 2.8 of the Agreement plainly and clearly provides that no signator to the contract will seek curtailment or reduction of any junior Basin 36 water rights held by any other signator to the contract. There are no absurdities or contradictions which can even be implied from the language of the Agreement. Accordingly, the Agreement is unambiguous, and any interpretation of it must rely only upon the language therein. *Albee v. Judy*, *supra*.

The clear, plain meaning of the language of the Agreement is that it provides "safe harbor" to Clear Lakes from Clear Springs' call. Because he was responsible for enforcing the Agreement, and because nothing in that Agreement provides otherwise, the Director was without authority to curtail Clear Lakes water supply in response to Clear Springs' call. However, rather than enforcing the Agreement by refusing to honor the call made by Clear Springs, the Director instead administered the call by reducing and curtailing Clear Lakes' water rights. Accordingly, Clear Lakes is not precluded by the doctrine of exhaustion of administrative remedies from bringing this action because the Director curtailed Clear Lakes' water supply without authority to do so.

2. The Administrative Review Procedures Suggested by IDWR Would Be Futile

Defendants' Notice states that Clear Lakes "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)." However, even the Director agrees that I.C. § 42-1701A(3) does not unambiguously provide such a remedy for Clear Lakes. Even if a hearing were held pursuant to I.C. § 42-1701A(3), it would be before the Director, or, at a minimum, any order resulting from such a hearing would be subject to final review by the Director - the same person who drafted and issued the Watermaster instructions which led to the Watermaster's Notice of Intent to Redistribute and the subsequent curtailment of Clear Lakes' water supply. It is overtly apparent from the Director's statements in his deposition that

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he has no intent whatsoever of either rescinding the curtailment, or the faulty instructions on which it is based. Additionally, even the Director admits that there will likely be no further administrative record created. Thus, IDWR's argument that it should hear the case administratively first in order to create such a record is specious. Accordingly, any recourse to the administrative procedures is futile, and this Court has jurisdiction over this matter. *Peterson, supra.*

The Notice also makes it clear that Clear Lakes' diversion of water from the Western Pool was to be curtailed before IDWR created an appealable administrative record supporting such action. Thus, the actions that IDWR, the Director and the Watermaster did take in curtailing and reducing Clear Lakes' diversions were in fact arbitrary - another circumstance in which strict adherence to the doctrine of exhaustion of administrative remedies is excused. *Id.*

3. Defendants' Actions are Unconstitutional

Even if the procedure set forth in I.C. § 42-1701A(3) were applicable, Idaho law exempts Clear Lakes from exhaustion because curtailment and reduction of its diversion from the Western Pool denies Clear Lakes certain constitutional rights. *Peterson, supra.*

First, Defendants' actions resulted in a deprivation of Clear Lakes' real property right (the Western Pool point of diversion for water right no. 36-02659) without a prior hearing. Such a pre-hearing deprivation violates Clear Lakes' right to due process guaranteed by the United States and Idaho Constitutions.

Second, the Director has consistently taken the position that he will not reduce junior groundwater diversions to satisfy senior surface water rights unless a showing is made that the junior diversions are impacting or injuring the seniors. However, although the Director has previously determined that diversions under groundwater rights that are junior to Clear Lakes' water right no. 36-07004 impact the spring source for Clear Springs' and Clear Lakes' water rights, and although both Clear Lakes and the junior groundwater users are protected by the Interim Stipulated Agreement (discussed hereinabove) which the Director has the responsibility to enforce, he has failed to take any

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action to curtail these more junior ground water rights. Therefore, to Clear Lakes' clear detriment, the Director and IDWR are treating it differently than junior groundwater right owners. As a result, Clear Lakes is denied the equal protection of the laws guaranteed by the United States and Idaho Constitutions, and it was not required to exhaust its administrative remedies prior to initiating this action. *Peterson, supra.*

D. Even if the Court Determines that Summary Judgment is Appropriate, Clear Lakes is Entitled to Other Remedies

In the event that the Court decides to grant either the Motion for Summary Judgment, or the Motion to Dismiss, it must remand the case to the Director for an evidentiary hearing pursuant to I.C. § 42-1701A(3). When Clear Lakes filed its Complaint and its Motion for Preliminary Injunction, the fifteen day period within which it could request an administrative hearing on the watermaster's Notice of Intent to Redistribute had not run. The Court took jurisdiction of the matter and held a hearing on the Motion for Preliminary Injunction prior to the expiration of that fifteen day period. Clear Lakes has filed Motions in this case and the Court ruled on the same. Similarly the Defendants have filed their pending Motions, and presumably the Court will rule on them as well. All of these actions by the Court, including the Court's initial exercise of jurisdiction, have led Clear Lakes to understand that the Court is the proper forum for this dispute. A dismissal of Clear Lakes' Complaint without giving it recourse in an administrative hearing would unfairly deprive Clear Lakes of any evidentiary hearing because Clear Lakes assumed that it had raised these issues in the proper forum, and that it would receive that evidentiary hearing in this forum. Therefore, to the extent that the Court determines that Clear Lakes did not properly exhaust its administrative remedies, it must remand this matter back to the Director for an administrative hearing on the same.

Finally, under Idaho law, "where administrative action reviewable under the APA is challenged by complaint rather than by a petition for judicial review, the proper court response is not to dismiss the complaint but to treat it as a petition governed by the APA." *St. Benedict's Hospital v. County of Twin Falls*, 107 Idaho 143, 146, 686 P.2d 88, 91 (Ct. App. 1984). Thus, in the event

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that the Court believes that summary judgment or dismissal is appropriate, and determines that it will not remand the matter back to the Director for a hearing under the Administrative Procedure Act, the Court must treat Clear Lakes Complaint as a Petition for Judicial Review under Administrative Procedure Act, and hear the same, rather than dismissing the Complaint in its entirety.

CONCLUSION

Clear Lakes was not required to exhaust its administrative remedies prior to initiating this judicial action because IDWR acted arbitrarily and without authority to do so when it curtailed Clear Lakes' water supply. Any attempt by Clear Lakes' to resort to the statutory administrative remedy suggested by IDWR (which even the Director admits is ambiguous as to its applicability in this case) would have been (and still will be) futile. Clear Lakes is also challenging the constitutionality of the agency's actions. Therefore, the doctrine of exhaustion of administrative remedies is inapplicable to this case. The jurisdictional arguments raised by Clear Springs' Motion to Dismiss are likewise inapplicable. Accordingly, this Court should deny both Clear Springs' and Clear Lakes' Motions, and if the Court deems it appropriate, grant Clear Lakes summary judgment on the basis that the Director is without authority to order curtailment of Clear Lakes' water rights.

Dated this 12th day of November, 2002.

Charles L. Honsinger
Ringert Clark, Chartered
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I certify that on November 12, 2002, I served copies of this document, including all attachments by facsimile and by U.S. Mail to the following:

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Idaho Department of Water Resources
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Charles 2. Honsinger
Person serving documents

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Exhibit P

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DISTRICT COURT
GOODING CO. IDAHO
02 DEC 12 AM 10 47
GOODING COUNTY CLERK
BY: DEPUTY

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

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130 Defendants, and CLEAR SPRINGS FOODS, INC., Intevener/Defendant.	Case No. CV-02-00377 ORDER DISMISSING COMPLAINT PURSUANT TO STIPULATION FOR DISMISSAL

On December 10, 2002, this Court heard argument on the issue of whether dismissal of Plaintiff's Complaint in the above-captioned litigation should be granted pursuant to the terms of the Stipulation for Dismissal jointly filed on December 9, 2002 by Plaintiff Clear Lakes Trout Company and Defendants Idaho Department of Water Resources, Karl Dreher and Cindy Yenter.

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Having heard the arguments of the parties, having reviewed the record, and being fully informed as to the issues raised, this Court hereby ORDERS that Plaintiff's Complaint be dismissed in its entirety with prejudice pursuant to the terms of the December 9, 2002 Stipulation for Dismissal.

Dated this 12 day of December, 2002.

Barry Wood
District Judge

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CERTIFICATE OF SERVICE

I certify that on the 12 day of December, 2002, I served copies of this document, including all attachments by U.S. Mail to the following:

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C.R. EAGLE-ERVIN

Clerk [illegible]N P. ED[illegible]

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Exhibit Q

EXHIBIT Q

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COPY

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

CLEAR LAKES TROUT COMPANY, INC.,

Plaintiff,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES; KARL J. DREHER, Director of the Idaho Department of Water Resources; and CINDY YENTER, Watermaster for Water District 130,

Defendants,

and

CLEAR SPRINGS FOODS, INC.,

Intervenor.

Case No. CV-02-00377

REPORTER TRANSCRIPT

DATE: Tuesday, December 10, 2002

TIME: 11:05 a.m.

BEFORE: HON. BARRY WOOD, District Judge

PLACE: Gooding County Courthouse

HEARING: Motion to Dismiss

LINDA LEDBETTER
OFFICIAL REPORTER
CSR NO. 26

MICRO
REPORTER TRANSCRIPT
7 2003

THE COURT: Okay, we'll take up Clear Lakes Trout versus IDWR, CV-02-00377; and Clear Springs has been admitted in as an intervenor. Today was the time and place set for a motion for summary judgment filed by IDWR.

Then when I got here this morning -- we were in Jerome all day yesterday -- I got here this morning and saw that IDWR and Clear Lakes had stipulated to dismiss this action on certain terms and conditions. And then on that was a Post-It note that Clear Springs objected to that procedure.

So for the record, we have Mr. Dan Steenson here of Ringert Clark for Clear Lakes; Mr. Phil Rassier here for IDWR; Mr. John Simpson here for Clear Springs. So how do you want to start?

MR. RASSIER: Your Honor, it was the department's motion for partial summary judgment that was motioned up. As you indicated, the department did enter into a stipulation for dismissal of Clear Lakes' action, based on certain terms. The department and Clear Lakes are parties to that stipulation, and Clear Springs is not.

The department's position is that if the -- if the court approves dismissal of the action in accordance with these terms, that is acceptable to the

department, and there's no reason to proceed with argument on our motion for partial summary judgment. I would defer to Mr. Steenson to present the terms of the stipulation to the court; and if the court has any questions of the department, I'll be happy to respond to those.

THE COURT: Well, why don't we start with Mr. -- Let me find something here for a minute. Why don't we start with Mr. Simpson and find out what the problem with dismissal is, having just less than a month and a half ago filed your own motion to dismiss the action.

MR. SIMPSON: Thank you, Your Honor. John Simpson here on behalf of Clear Springs. And, Your Honor, we were not a party to, apparently, some settlement discussions that went on between Clear Lakes and the department that resulted in a stipulation that was signed yesterday and filed yesterday.

We became aware of it, that it had been signed and filed yesterday afternoon; and just had an opportunity to review it last night, Your Honor. And just a brief background: We became involved in the lawsuit for -- to intervene for a number of reasons.

One being that there were allegations in

the complaint that either explicitly or implicitly stated that the watermaster instructions that were governing administration of water were flawed, number one. Number two, that the department and the watermaster's actions in carrying out those instructions were either beyond its authority or beyond some other provision of law, Your Honor.

And because we had a number of water rights down there, one of which comes under the administration under these watermaster instructions, we were concerned, and we needed to protect our interests.

Also, because of the fact that this -- these issues have been the subject of the SRBA litigation, we felt it necessary to try to get involved in the suit, which we did. Through our involvement, we had hoped to get some finality on the watermaster instructions, certainty as to the scope and the authority of the department's actions.

That is, that the department's actions in carrying out those final watermaster instructions were within its authority and were appropriate, Your Honor. And we wanted to be in a position where those issues were brought to completion and done, there was finality and there would be no further appeals,

Your Honor, of those watermaster instructions.

The stipulation, as I have reviewed it, Your Honor, contains no degree of certainty that those issues have been resolved. In fact, we did file a motion to dismiss 60 days ago, 45 days ago to attempt to resolve those issues before this court under theories of exhaustion of remedies, primary jurisdiction, and adequate remedy at law.

Again, the stipulation doesn't address that. If the court were so inclined, which we believe the court has the authority to do, to modify the stipulation to indicate that the watermaster instructions are final, that the court's -- excuse me, the department's and the watermaster's actions to date have been appropriate, and to the extent that they carry out those watermaster instructions, Your Honor, we can move forward with that stipulation.

But to date, those concerns that we had when we came into this lawsuit have not been addressed. And those issues were up for a motion to dismiss, and would have been considered by this court under our motion that's presently pending for hearing today, Your Honor. And with that, it's --

In addition, Your Honor, in reviewing that stipulation, it's also our position that that

stipulation provides for an action that is not allowable by law. That is, the stipulation provides that Clear Lakes, if it files a petition, is guaranteed a hearing.

Without knowing what that hearing is, what that petition contains, how can the department determine whether or not they have a right to hearing on certain subjects, such as the watermaster instructions or the department's actions. Again, Your Honor, we believe those issues are final, beyond review, because of the period that has happened prior, at the point in time that they were issued by the department.

So because of those reasons, Your Honor, we're unable to at this point agree with the stipulation, the stipulation for dismissal; and without modification of it, would be at a point where we believe that we would ask the court for the opportunity to go forward with our hearing.

THE COURT: Tell me, Mr. Rassier, what do the IDAPAs provide relative to IDWR's rules on administration? In other words, is there a contested case proceeding? I haven't had a chance to look at the IDAPAs as it relates to what's going on here or in this kind of a case. Can you tell me?

MR. RASSIER: Your Honor, I think IDAPA

recognizes that a party can bring a contested case to challenge any action. You know, any order of an agency or any action of an agency. And I think that actions by the department in administering water rights could be viewed as actions under the -- under the IDAPA, and a party could petition for -- for hearing or relief in response to that action.

THE COURT: Well, were they so viewed that way in this case?

MR. RASSIER: Yes, Your Honor. The notice of intent to redistribute flows that was issued by the watermaster, that is the document that contained the information that described how Clear Lakes, if they wanted to challenge that watermaster action, should proceed. And that was by requesting a hearing under -- under the department statutes, 42-1701A(3).

THE COURT: Capital A?

MR. RASSIER: Yes, Your Honor. And that is the hearing that was not requested. Instead of requesting that hearing, Clear Lakes filed their action with the district court for injunctive relief, for preliminary injunctive relief, and then for permanent injunctive relief.

And that was the basis for the department's

motion for partial summary judgment, that Clear Lakes had not exhausted those required administrative remedies that were available to it. Instead, went directly to court.

THE COURT: So how does the department answer Mr. Simpson's concerns?

MR. RASSIER: The stipulation, as it's understood by the department, does acknowledge that the actions that have been taken to date are final. That the watermaster's action which was not challenged by --

THE COURT: Say that again.

MR. RASSIER: I say the department's position under this stipulation is that --

THE COURT: Refer me to the paragraph.

MR. RASSIER: It would be the paragraph that provides that the matter is dismissed with prejudice, paragraph number 2, Your Honor. "Upon the court's approval of the stipulation for dismissal, the court may order the above-captioned action dismissed with prejudice."

THE COURT: Now, does that take care of your concern, Mr. Simpson?

MR. SIMPSON: Your Honor, in paragraph 3, reading paragraph 3, the department acknowledges Clear

Lakes' right to file a petition seeking review and modification of the instructions and the actions taken in accordance with those instructions under the watermaster's June 19th, 2002 notice.

I mean that in itself would -- is vague, in my view, as to whether or not, one, the watermaster instructions are final; and two, the actions taken to date are final and beyond -- beyond appeal. I mean in our view, the provided time for appealing either one of those actions has run, administratively. They were not appealed to the department. They're final actions.

THE COURT: Mr. Rassier, what's your response?

MR. RASSIER: Your Honor, the response is that we agree that those are final actions. The petition that's provided for under paragraph 3 is a new petition. It's the initiation of a new contested case to modify the instructions that -- by the director and the action taken by the watermaster.

MR. SIMPSON: So Your Honor, if I understand Mr. Rassier right, it would be a petition based upon new information that would modify, from that point forward, the department's actions; not going back in time, retroactively, and seeking to

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either invalidate the instructions as they stand now, or to determine that the department's actions in carrying out the watermaster instructions pursuant to the June 19th letter were somehow inappropriate.

THE COURT: What I hear him saying, if I got it right, is that this action is dismissed with prejudice. Then the watermaster's instructions that were adopted in 2002 stand until such time, if and when, in the future they are changed by a contested case proceeding. Is that right?

MR. RASSIER: That is correct, Your Honor.

THE COURT: So in other words, that goes back to one of my original questions to Mr. Rassier, is whether or not there's a specific chapter in the IDAPAs under IDWR that deals with administration of water rights in the sense of like other IDAPAs, you know, if you want a permit, you go to this chapter, and you follow these rules. You know, so forth.

MR. RASSIER: Your Honor, there is no specific provisions in the water administration statutes or an IDAPA that specifically addresses procedure to be followed with water administration such as watermaster actions. But it is, nevertheless,

an action of an agency, and I think it is subject to being challenged by a contested case.

THE COURT: With respect to your comment about whether or not old evidence can be reviewed, it would be my thought that it would necessarily have to be reviewed to show what existed for the purpose of the present set of rules; and then if there's some substantial change or whatever, how that would allow or justify a new set of rules.

MR. SIMPSON: Certainly, Your Honor. But to -- I think my point is that issues that were addressed in the original instructions -- that is, futile call, that is, common source -- issues that were raised and addressed in those watermaster instructions should not be readdressed in a future petition.

If new information comes up as to future agreements, such as between certain parties, that would change how administration in accordance with those instructions would go forward, that's obviously something that could be heard. But issues that had been raised and resolved in the instructions that were not appealed through the administrative process should be final. And that's, again, what is unclear, from our reading of the document, of the finality of those

instructions.

THE COURT: Mr. Rassier, anything else that you can clarify for Mr. Simpson?

MR. RASSIER: Your Honor, the arguments that Mr. Simpson raises on behalf of Clear Springs are arguments, I think, that will be available for Clear Springs to make before the agency in this hearing. All the department is agreeing to under this stipulation, if it's approved by the court, is that we will provide or make that hearing available to Clear Lakes. The stipulation does not assure or guarantee what the outcome of that hearing will be.

THE COURT: Mr. Steenson, what would you like to say?

MR. STEENSON: Thank you, Your Honor. We're here on a motion to dismiss for failure to exhaust administrative remedies. We're here on a motion for summary judgment for failure to exhaust administrative remedies. Essentially, the same pleading.

And the complaint of -- the criticism of Clear Lakes filing the action is that Clear Lakes failed to pursue an available remedy and allow for the agency to make a final decision.

Now, with respect to the watermaster

instructions, Clear Springs itself characterizes those instructions as arguably not reviewable. Instructions from the director to an employee, there was no clear remedy provided with regard to the issuance of the instructions.

That was -- that's one action we're concerned about. The other action we're concerned about is the notice of intent to redistribute flows. That notice did contain a reference to 1701A(3). No reference to any provisions of the IDAPA. And so both of these parties are asking for dismissal.

We think we found a resolution to that issue to dismiss the action. And then as -- as with other cases of which I'm sure the court is aware in which an action is dismissed for failure to exhaust administrative remedies, the party is then free to go back to the agency to pursue any and all available remedies.

So in addition, when Clear Springs objects because it wants some kind of finality, wants to have some kind of a decision, I guess, from this court, finding that the watermaster's instructions were appropriate, finding that the watermaster's action was appropriate, that presumes that you retain jurisdiction and we have a trial -- or a summary

judgment proceeding on those issues.
So what Clear Springs is arguing here for is in conflict. It seems to me that we have found a way to avoid the necessity of litigation at this time; to go back, as these parties say should have happened in the first place, and have the administrative review that they are seeking. And if I may --
THE COURT: What he's saying is that because you didn't timely appeal it, you're forever barred from raising it, is what I think he's trying to say.
MR. STEENSON: I understand that, Your Honor. With regard to that, again, there are two items here. And a third, which is referenced in the stipulation. One is the watermaster instructions.
There was no clear remedy provided in WILLIAMS versus STATE. You'll find, in that case, a holding that it is necessary to provide in an order, if the instructions have the effect of an order, what your remedy is.
So with regard to the instructions that were the basis for raising futile -- the context in which futile call and other issues were raised, there was no clear remedy. There was no 15-day period that ran, okay, with regard to the notice of intent to

redistribute flows, okay.
That notice did provide for a hearing within 15 days; but if the court will recall, Clear Lakes was in a position then, "15 days, you can have 15 days to file a petition for a hearing. But in 14 days, we're going to take your water away."
Which put Clear Lakes in the position of within 7 days, Clear Lakes had to figure out how to move what turned out to be upwards of 260,000 pounds of fish; and we had what we interpreted to be pretty clear indications from the department that it would not grant the stay, okay.
So we were faced with an imminent problem, which is what can we do, what is our best avenue, what is perhaps our only available avenue to seek to enjoin this action that's going to have some -- a detrimental and dramatic effect on the company.
And this came after being advised by the department, during discussions with the department, that we should seek an injunction from the court, okay. And so Clear Lakes pursued, pursued what appeared to it at the time to be the only available expedient remedy.
Of course, the court denied the petition for preliminary injunction. And now it seems -- it just

seems to make too much sense to say all right, if the agency is agreeable to provide what it says it wanted to provide in the first place, which is a hearing on these issues, we should take the opportunity to do that. Thank you, Your Honor.
MR. SIMPSON: Well, simply, Your Honor, I think it does make sense. But I mean the provisions are there, 15 days. They were provided notice. In the documentation provided to the court is an admission by counsel for Clear Lakes that they understood they had 15 days.
They requested the full 15 days to make a determination prior to moving the fish. They chose not to. There's a July 3rd letter from counsel for Clear Lakes to the director saying "we want the full 15 days, provide it to us."
Instead of taking that opportunity, they continued -- This was after the preliminary injunction was denied by the court. They made a conscious decision, Your Honor, not to pursue their administrative remedies.
So at that point, Your Honor, under the rule, it's very clear that they cannot four months later, five months later come back and say "okay, everybody's now decided that we should have gone to the department

and appealed, okay, we'll go ahead and do that." I mean they had their bite at the apple.
Now we're going to give them another bite? Your Honor --
THE COURT: I don't know that that's what's being said here. At least what I hear Mr. Rassier saying. Correct me if I'm wrong.
They can file a contested case after -- or petition for contested case after petition for contested case forever. Whether or not the department will entertain it, or whether or not there in fact is a contested case, or whether or not what you're concerned about here is not still available as a defense, doesn't that remain at the time if and when Clear Lakes files --
MR. SIMPSON: You're right, Your Honor. That defense will still be available to Clear Springs at the time that petition, if it's filed, is filed.
THE COURT: What I'm saying is if this case is dismissed with prejudice, it's dismissed with prejudice. Whatever flows from that flows from that, right?
MR. SIMPSON: Yes.
THE COURT: The statement in here in paragraph 3 that "IDWR acknowledges Clear Lakes' right

under applicable statutes and rules to file a petition with IDWR initiating an administrative contested case," I could go file one. It doesn't mean that the department's going to entertain it or I'm going to win.

MR. SIMPSON: Correct. It's simply, Your Honor, that we were here and had -- I believe have an opportunity to bring to finality those instructions, those actions that were taken prior to -- as a part of this dismissal, if that's the direction we're going to go, so that we don't have to go back through the administrative process and have that argument raised again.

And it's obvious to me that it is going to be raised again. Even after the 15 days. So we go back, they create a petition, it's either denied for these very reasons in whole or in part, then it's appealed back.

It's appealed back to the director, then it's appealed back to the district court on the very issues that we have here in this lawsuit that we filed our motion to dismiss on. This is an opportunity to ensure that when we go back through the administrative process that it's a clean record.

THE COURT: Well, wait a minute. Maybe

I'm missing something here. You have Cindy Yenter's instructions, the watermaster's instruction, right?

MR. SIMPSON: Right.

THE COURT: That's what Mr. Steenson challenged, correct?

MR. STEENSON: Correct, Your Honor. There are the instructions that we're concerned about, and there's the action to redistribute flows. There are two things.

THE COURT: Okay. But as and for -- what we are talking about here, isn't it Yenter's instructions, the administration?

MR. STEENSON: Implement the instructions, yes.

THE COURT: All right. If the case is dismissed, then don't the instructions stand; and aren't those the instructions until, if and when, sometime in the future they're changed?

MR. SIMPSON: Yes.

MR. STEENSON: Yes, Your Honor. And one of the things that the department is recognizing here is that it has continuing jurisdiction over administration of water rights in the water district.

And the IDAPA does provide for, under the generic headings of petitions, filing petitions for

modification of orders; or as Mr. Rassier suggested, actions. So that would be one of the avenues available to Clear Lakes.

THE COURT: And so what seems to me is that once the dismissal's entered, those instructions stand until they're changed. And if Clear Lakes or anybody else can successfully get those changes on whatever basis, I guess they can try to do that.

Or whatever preclusive effect, if any, is offered by a dismissal -- or I mean is afforded by a dismissal, you still have the benefit of. Isn't that what you're saying, Mr. Rassier?

MR. RASSIER: That's my understanding of the stipulation, Your Honor, yes.

MR. SIMPSON: Well, Your Honor, I guess at this point, I'm still -- I think I have heard from the department, that they -- in their belief, the watermaster instructions are final.

THE COURT: Is that right, Mr. Rassier?

MR. RASSIER: That is right, Your Honor.

MR. SIMPSON: And so I fully understand the intent of paragraphs 2 and 3, so that there's, at some later point in time, not this argument about whether those instructions are final, I'm uncertain as to whether the other party to the stipulation and

Clear Lakes also believes those instructions are final.

MR. STEENSON: Your Honor, I'm uncertain as to what Clear Springs believes on this issue. They have themselves complained that the instructions were nothing more than initial. That they were not final. But they never became final. That they could not become final until the director acted. That's --

You will see that again and again in each of the briefs they have filed. In addition, they have suggested that the watermaster instructions did not constitute an action which could become final. So the status of those instructions, as opposed to the notice of intent to redistribute flows, the status of those instructions is very much at issue in Clear Springs' own briefing to this court.

MR. SIMPSON: Your Honor, let me clarify. The instructions were incorporated into the actions of the department when it issued its notice of intent to redistribute, the June 19th letter. Those, the actions to be taken by the department by the watermaster instructions, by the watermaster were in accordance with the instructions.

So those -- those actions coincided with the instructions. Thereby, both the actions of the

department and sending the -- having the instructions developed, delivered to the watermaster, the watermaster's notice of intent to redistribute are all -- were all final actions, actions which could be appealed pursuant to the notice provided, 15 days.

And it is those actions which we believe are final. And if this stipulation is a stipulation -- or recognized that, then we are fine with the stipulation. And again, I'm just seeking that clarification from the parties.

THE COURT: Does it, Mr. Rassier?

MR. RASSIER: My reading of the stipulation is it does recognize the -- particularly, the action or the notice of the watermaster to redistribute flows as a final action. Mr. Steenson points out that the instructions that the director issued did not contain directions as to how to challenge those.

The department viewed those as instructions to a watermaster, not an order being issued to a party, and so we didn't include specific directions as to how to challenge those instructions.

But I also agree that when a party challenges the action that was taken by the watermaster which was based on the instructions, I think the instructions

were -- would be at issue in such an action. So my view is that, yes, the action of the watermaster, based on the instructions of the director, are final.

And what the director and what the department is agreeing to in this stipulation is to entertain a petition, if Clear Lakes elects to file such a petition. We would entertain that petition.

And I think the only thing that the department is conceding in the stipulation that Clear Lakes wouldn't automatically have a right to is -- is a hearing. I mean it's potentially possible that the department would dismiss a petition out of hand, saying "this party's not entitled to file this petition."

And in this stipulation, the department is saying "we will proceed to the next step and provide a hearing on that petition."

THE COURT: Well, it seems to me what I'm being asked here to do is to determine the conclusive effect of this order sometime down in the future, a future ruling. And also a future ruling on what may or may not come out of the administrative proceeding, if there is one. Or if it's even entertained.

He said, Mr. Rassier said from the department's

position, it's final. Whatever flows from the -- this case being dismissed with prejudice flows from it. I can't do any more than dismiss the case with prejudice, even if we granted the summary judgment. I can't direct Clear Lakes, in the future, "You will never file another administrative hearing -- I mean administrative proceeding." I can't do that.

MR. SIMPSON: Nor are we asking you to do that, Your Honor. Simply, our motion to dismiss was based upon the fact those actions taken by the department were final, weren't appealed, and therefore beyond appeal at this point.

And that's all -- that's all we're asking for. That's all we were asking for in our motion. Nothing more. Not that they are precluded in the future from filing a petition with the department, seeking some sort of modification. But simply that modification is not to go back and rehash issues that have already been determined by the department's actions and were the subject of this lawsuit before the court.

THE COURT: All right, you have heard what Mr. Rassier had to say. I'm going to grant the order dismissing it, as requested by Clear Lakes and IDWR. And whatever preclusive effect it has, this dismissal with prejudice, it has. You have heard him

say it's final.

Okay, so do you have the order?

MR. STEENSON: I don't have a order. I can prepare one and get it to you.

THE COURT: All right. Let's take a brief recess, then.

(End of proceedings.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss
County of Twin Falls)

I, LINDA LEDBETTER, duly appointed, qualified and acting official reporter of the Fifth Judicial District of the State of Idaho, DO HEREBY CERTIFY that I reported in stenotype the proceedings adduced in the above and foregoing cause December 10, 2002; and that the said stenotype notes were thereafter reduced to print under my direction; and that the within and foregoing constitutes and is a true and correct copy of the transcript of said requested proceedings, said transcript consisting of pages 1 through 27, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of February, 2003.

Linda Ledbetter

LINDA LEDBETTER, Idaho CSR Cert. No. 26
P. O. Box 611, Twin Falls, Idaho

Exhibit R

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the MHHD, also testified that the MHHD had enough room within its right-of-way to place a barricade. He also testified that a "Road Closed" sign could have been erected within the MHHD's right of way. This testimony constituted substantial evidence to present this issue to the jury.

Because of the presence of evidence indicative of negligence on the part of the MHHD, we find that the district court did not err when it failed to direct a verdict in favor of the Dachlet.

IV.

CONCLUSION

The district court did not abuse its discretion in allowing the introduction of the results of the blood alcohol test into evidence. The district court did not err by allowing the State to present testimony as to why it believed it had "abandoned" the section of road at issue and when it refused to direct a verdict in favor of Dachlet. Additionally, a new trial is not warranted because of the fact that the jury heard testimony regarding the settlement reached between Dachlet and the MHHD. The district court's decision is affirmed. Costs to Respondent.

Chief Justice TROUT, Justices SCHROEDER, WALTERS, and EISMANN CONCUR.



136 Idaho 761

In re SRBA Case No. 39576.

CLEAR SPRINGS FOODS, INC., Claimant–Respondent,

v.

CLEAR LAKES TROUT COMPANY, Defendant–Appellant.

No. 26925.

Supreme Court of Idaho, Twin Falls, November 2001 Term.

Jan. 18, 2002.

Fish hatchery owner filed objections to recommendations by the Idaho Department of Water Rights (IDWR) regarding adjacent fish hatchery's water right claims. After special master granted adjacent hatchery's motion for involuntary dismissal, objecting owner filed notice of challenge, and the Snake River Basin Adjudication (SRBA) District Court, R. Barry Wood, J., denied challenge and issued partial decrees for adjacent hatchery's water rights. Objecting owner appealed. The Supreme Court, Walters, J., held that: (1) evidence did not support objecting owner's claim that its water rights derived from a separate and distinct source from adjacent hatchery's water rights, and (2) objecting owner was estopped from arguing about point of diversion of water by adjacent hatchery.

Affirmed.

1. Waters and Water Courses ⇐152(10)

In conducting a trial without jury on a water right objection, the trial court may appoint a special master in any general adjudication and shall specify the powers and duties in the order of reference. I.C. § 42–1412.

2. Reference ⇐99(3)

Special master's conclusions of law are not binding upon the trial court, although they are expected to be persuasive.

3. Reference ⇐100(6)

Special master's conclusions of law which are adopted by the trial court are treated as the conclusions of the trial court.

4. Appeal and Error ⇐842(2)

Appellate court freely reviews the trial court's conclusions of law.

5. Waters and Water Courses ⇐152(8)

Evidence did not support objecting fish hatchery owner's claim that its water rights derived from eastern stream, which was a separate and distinct source from western stream from which adjacent hatchery's water rights derived; there was no testimony con-

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clusively establishing the historical dividing point of the two streams, there was testimony that dividing point no longer existed because construction of dams resulted in both streams flowing into eastern pool, and record showed that it would be difficult to determine how much water was from eastern or western stream.

6. Waters and Water Courses ⇐152(8)

Fish hatchery owner, as the objecting party to Idaho Department of Water Resources (IDWR) director's report finding that parties' water rights derived from same source, was required to present substantial evidence that source of eastern stream was different than western stream in order to overcome presumption created by director's report; "substantial evidence" is such relevant evidence as a reasonable mind might accept to support a conclusion, and it is more than a scintilla, but less than a preponderance.

7. Trial ⇐382

Trier of fact has the primary responsibility for weighing the evidence and determines whether the required burden of proof on an issue has been met.

8. Appeal and Error ⇐1010.1(6)
Reference ⇐100(6)

Appellate court determines whether the findings of fact by the special master and the trial court are supported by substantial, competent evidence.

9. Appeal and Error ⇐846(6), 1010.1(1)

Review of a trial's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law.

10. Appeal and Error ⇐931(1), 994(3), 1011.1(2)

A trial court's findings of fact in a court-tried case will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact; it is the province of the trial judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses.

11. Appeal and Error ⇐1011.1(5)

If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal.

12. Appeal and Error ⇐842(2)

Appellate court exercises free review over the trial court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found.

13. Compromise and Settlement ⇐17(1)

Objecting fish hatchery owner was estopped from arguing about point of diversion of water by adjacent hatchery in light of agreement between parties over construction of a new dike by adjacent hatchery, as agreement listed certain disputes that could be raised in the future, but point of diversion was not one of them, and agreement appeared to dispose of any disputes over point of diversion by allowing adjacent hatchery to keep diversion works with changes that benefitted objecting owner.

14. Trial ⇐406

Objecting fish hatchery owner waived its point-of-diversion argument in dispute with adjacent owner, in light of objecting owner's repeated statements in pre-trial memorandum, trial brief, and opening argument at trial that source was the only issue to be decided.

Ringert, Clark Chtd, Boise, for appellant. Daniel V. Steenson argued.

Hepworth, Lezamiz & Hohnhorst, Twin Falls, for respondent. Robyn M. Brody argued.

WALTERS, Justice.

This is an appeal from the Snake River Basin Adjudication ("SRBA") district court where Clear Lakes Trout Company, Inc. ("Appellant") challenged the water rights of Clear Springs Foods, Inc. ("Respondent"). Appellant objected to the Idaho Department of Water Resources' ("IDWR") recommendation by arguing its water right derives from a separate water source distinct from the Re-

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spondent's water rights and therefore, even though filed subsequent to the Respondent's water right, has priority. The SRBA district court found that the water rights of the parties derive from the same source and denied Appellant's challenge. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant and Respondent separately own and operate adjacent fish hatcheries located below the rim of the Snake River canyon near Buhl, Idaho. During the development of the hatcheries in the 1960's, both entities staked claims to water by filing water right permits to discharges from numerous springs in the canyon rim and walls above the hatcheries. The springs eventually flow into Clear Lake, which in turn empties into the Snake River.

Appellant has two water rights in the springs that flow into Clear Lake and asserts that each of the rights derives from a separate source. The first has a priority date of June 23, 1966, and is claimed to be from the western stream that flowed in between the parties' properties. The second has a priority date of July 21, 1967, and is claimed to be from the controversial eastern stream that flowed to the east around Appellant's property. Respondent also has two water rights at issue with priority dates of August 28, 1966, and January 24, 1972, both claimed to be from the western stream. Diversion works have been built by the parties and any historical dividing point between the streams no longer exists.

In 1988, Respondent filed its water right claims with the SRBA. On November 12, 1992, the IDWR filed its recommendations with regard to Respondent's water rights. Appellant filed an objection to IDWR's recommendations and requested that language be added to the report stating that the source of water for Respondent's right was "separate and distinct from the source of water" for the Appellant's right. In addition, Appellant objected to IDWR's recommendations concerning the legal descriptions of the Respondent's points of diversion. Respondent generally denied all of Appellant's objections. IDWR found that the parties' water rights "are all diverted from the same complex of hydrologically-connected springs tributary to Clear Lakes [sic]."

The issues were tried before the special master on July 13–14, 1998, in a bifurcated trial. The first phase of the trial was to determine the source of the water rights and if Appellant's water right was found to be from a separate source, the second phase would then determine the quantity of Appellant's water right. Following Appellant's presentation of its case-in-chief on the issue of source, Respondent moved for involuntary dismissal. The special master granted the motion and determined that Appellant's water rights were not from a separate water source. The special master recommended that partial decrees be entered for Respondent's water rights consistent with the IDWR report. Appellant filed a motion to amend the special master's recommendation. The special master issued an order amending certain findings of fact and conclusions of law, but did not disturb his ultimate rulings with respect to the source or points of diversion.

Appellant filed a notice of challenge to the special master's amended findings of fact and conclusions of law with the SRBA district court. Following oral arguments on the challenge, the SRBA district court issued a memorandum decision and order denying Appellant's challenge. The SRBA district court then issued partial decrees for Respondent's water rights. Appellant filed a motion to alter or amend judgment, which the SRBA district court denied. This appeal followed.

ISSUES PRESENTED ON APPEAL

1. Did the SRBA district court err by finding the parties' water rights all derived from the same water source?

2. Did the SRBA district court err by finding Appellant's water rights have multiple points of diversion?

3. Should attorney fees be awarded on appeal?

STANDARD OF REVIEW

[1] Idaho Code § 42–1412(5) allows the SRBA district court or special master to

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conduct a trial without a jury on any water right objections pursuant to the Idaho Rules of Civil Procedure. "The district court may appoint a special master in any general adjudication and shall specify the powers and duties in the order of reference." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997).

[2–4] The special master's findings of facts, which are adopted by the SRBA district court, are considered to be the findings of the SRBA district court. I.R.C.P. 52(a); *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001). "In an action to be tried without a jury the court shall accept the master's findings of fact unless they are clearly erroneous." I.R.C.P. 53(e)(2). "The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive." *Hagerman Water Right Owners*, 130 Idaho at 740, 947 P.2d at 413. The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court. *McCray*, 135 Idaho at 513, 20 P.3d at 697. This Court freely reviews the SRBA district court's conclusions of law. *Id.*

DISCUSSION

I.

Water Source

[5] Appellant contends that the SRBA district court erred by finding the parties' water rights derived from the same source. Appellant objected by arguing that its water right derives from the eastern stream, which has been historically and is currently a separate and distinct source from the western stream where Respondent's water rights derive. Further, the eastern stream does not affect the flow of the western stream and therefore, Appellant's water right should have priority in the eastern stream.

This Court has held

> when a defendant moves for an involuntary dismissal at the close of the plaintiff's presentation in a non-jury case, the court sits as a trier of fact and is not required to construe all evidence and inferences to be drawn therefrom in the light most favorable to the plaintiff. Thus, in rendering a judgment pursuant to the defendants' motion for dismissal under I.R.C.P. 41(b), the trial court is not as limited in its evaluation of the plaintiff's case as it would be in a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead, it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.

Keenan v. Brooks, 100 Idaho 823, 825, 606 P.2d 473, 475 (1980).

[6] Idaho Code § 42–1411(4) provides that the IDWR director's report is prima facie evidence of the nature and extent of the water rights under state law. *See Hagerman Water Right Owners*, 130 Idaho at 745–46, 947 P.2d at 418–19. Appellant, as the objecting party, had "the burden of going forward with evidence to establish any element of a water right which is in addition or inconsistent with the description in a director's report." I.C. § 42–1411(5); *see also Hagerman Water Right Owners*, 130 Idaho at 746, 947 P.2d at 419 ("The director's report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption."). Accordingly, Appellant was required to present substantial evidence that the source of the eastern stream was different than the western stream in order to overcome the presumption created by the director's report. *See Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986). In this regard, substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

In this case, both the special master and SRBA district court found that Appellant had not met its burden of proof to overcome the director's determination as to the source of the respective water rights, and thereby concluded that Respondent's motion for involuntary dismissal should be granted. The spe-

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cial master found that "[a]fter the close of the [Appellant's] case, the historic dividing point between the eastern and western stream remained unclear." The special master then found that there initially may have been two separate stream flows but the current diversion structures created by the Appellant have eliminated the eastern flow. The special master wrote:

> Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. Based on the development of [Appellant's water rights], Mr. Chapman conceded that whatever dividing point which may have existed does not exist today.
>
> As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. There is no way to determine whether [Appellant's water right] uses water only from the eastern source, or that [Respondent's water right] uses only water from the western source. Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water.

The SRBA district court found "[t]he source of all four of the subject water rights [ ] is the common water channel before it divides into the respective streams. The source is not defined by which side of the common channel the water is diverted or from which braid of the common channel water is diverted."

[7–12] Essentially, the Appellant's arguments simply contest the findings of fact made by the special master and SRBA district court. The trier of fact has the primary responsibility for weighing the evidence and determines whether the required burden of proof on an issue has been met. *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000). This Court determines whether the findings of fact by the special master and SRBA district court are supported by substantial, competent evidence. *Id.*

> Review of the lower court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. A trial court's findings of fact in a court tried case will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact. It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. However, we exercise free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found.

Conley v. Whittlesey, 133 Idaho 265, 985 P.2d 1127 (1999) (citations omitted).

Initially, we observe that there is no testimony conclusively establishing the historical dividing point of the two streams. In the record, Appellant presented testimony that the dividing point was eighty feet east of the western gate, testimony that the dividing point was thirty to forty feet east of that estimate, and testimony that the dividing point was somewhere between the highest western flow and the highest eastern flow. However, there was also other testimony that this dividing point no longer exists because the construction of dams results in both streams flowing into the eastern pool. The record further shows that it would be difficult to determine how much water is from the eastern or the western stream.

Testimony was presented to show the separate nature of the eastern and western streams, however there was also testimony to the contrary. Appellant argued that the streams separated underwater in a common channel, however, the water did not commingle. Rather, the water from the eastern stream water flowed to the east and the western stream water flowed toward the west. Appellant asserted that the testimony of Mr. Eastman was ignored. Even though Mr. Eastman testified that Respondent had not used or attempted to divert from the eastern stream, Mr. Eastman also testified

that both streams were from the same source, the Snake River Aquifer.

Appellant had the burden of presenting substantial evidence that the eastern and western streams at issue were from different sources. The SRBA district court determined that Appellant failed to meet this burden. Although there is some conflicting testimony and evidence, neither the SRBA district court by affirming nor the special master by granting the motion for involuntary dismissal pursuant to IRCP 41(b) following Appellant's presentation of evidence erred. The special master looked at the evidence presented and determined that Appellant had not met its burden to overcome the director's report. The SRBA district court after reviewing the evidence and hearing oral arguments came to a similar conclusion. The findings of fact as to the source of the contested water rights are supported by substantial, competent evidence.

This Court affirms the SRBA district court's grant of Respondent's motion for involuntary dismissal.

II.

Point of Diversion

[13, 14] The parties entered into an agreement in 1980 to resolve litigation initiated by Appellant over the construction of a new dike by Respondent; Appellant alleged that Respondent's construction of the dike constituted a trespass. The agreement allowed the dike to remain on Appellant's property with modifications to raise the water elevation and to capture additional water, which benefited Appellant. The dike also included a regulatory system to apportion the respective water rights to each party. The agreement further permitted the parties to dispute priorities of their respective water rights.

Appellant contends that the SRBA district court erred by finding this agreement estopped Appellant from asserting its claims as to the changes in the points of diversion by Respondent. Appellant asserts that it only consented to the diversion works by Respondent that occurred on the western stream and its consent does not extend to the eastern stream.

Appellant further argues that the SRBA district court erred by finding that it had waived its objections to Respondent's points of diversion. Appellant asserts that the special master and SRBA district court took an assertion out of context when in the opening statement Appellant represented that the sole issue in dispute between the parties was a question of source of their water rights. Appellant contends the points of diversion recommended by IDWR and the SRBA district court do not reflect the present location of Respondent's diversions. Appellant argues that the points of diversion listed in the water rights should reflect the points of diversion presently in place.

The special master found

> In addition to the source element, [Appellant] also objected to point of diversion. At the start of trial, [Appellant's] attorney unequivocally stated that source was the only element in dispute. Furthermore, any and all disputes regarding point of diversion were settled by the parties in an agreement dated March 13, 1980. In that agreement, [Appellant] acknowledged the validity of [Respondent's] points of diversion.

The special master then discussed why Appellant's argument would have failed even if Appellant had not been estopped from arguing about the point of diversion. The SRBA district court affirmed the special master's finding after reading the agreement entered into by the parties. The SRBA district court also found that Appellant had abandoned or waived the point of diversion argument by noting that Appellant in its pre-trial memorandum, trial brief and opening argument at trial specifically stated that the sole issue was a question of source.

The agreement between the parties allows for certain disputes to be raised as to the respective priorities of the parties, however, point of diversion is not listed as a dispute that can be raised in the future. The agreement appears to dispose of any disputes over the point of diversion by allowing Respondent to keep its diversion works with changes that benefit Appellant. Further, the

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record shows that Appellant repeatedly stated that source was the only issue to be decided in the first phase of the bifurcated trial.

Substantial evidence in the record supports the SRBA district court's conclusion that Appellant is estopped and waived its point of diversion argument. This Court agrees and holds that the special master and SRBA district court did not err by prohibiting Appellant from submitting evidence at trial concerning the point of diversion.

III.

Attorney Fees

Respondent requests attorney fees on appeal pursuant to I.C. § 12–121. Having considered the arguments presented in this case, this Court is not left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably or without foundation. *See Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979). Accordingly, this Court declines to award attorney fees on appeal to respondent.

CONCLUSION

This Court holds that the special master and SRBA district court's finding that the parties' water rights derive from the same source is supported by substantial, competent evidence and accordingly, affirms the SRBA district court's grant of Respondent's motion for involuntary dismissal. This Court, further, holds that the SRBA district court did not err in finding that Appellant was estopped from raising an objection as to the point of diversion. The orders denying Appellant's challenge and issuing partial decrees for Respondent's water rights are affirmed.

Costs on appeal are awarded to Respondent, Clear Springs Food, Inc. No attorney fees are awarded.

Chief Justice TROUT, Justices SCHROEDER, KIDWELL and McDERMOTT, pro tem., CONCUR.



136 Idaho 767

Jesus MEDRANO, Claimant–Respondent,

v.

Steve NEIBAUR, Non–Insured Employer, Defendant–Appellant.

No. 27449.

Supreme Court of Idaho,
Boise, November 2001 Term.

Jan. 18, 2002.

Employer appealed from order of the Industrial Commission awarding attorney fees to employee. The Supreme Court, Kidwell, J., held that Industrial Commission abused its discretion in awarding attorney fees.

Reversed.

Eismann, J., dissented and filed opinion.

1. Workers' Compensation ⇐1939.1, 1939.4(4)

When reviewing Industrial Commission decisions, the Supreme Court exercises free review of the Commission's legal conclusions, but will not disturb findings of fact if they are supported by substantial and competent evidence.

2. Workers' Compensation ⇐1981

Industrial Commission abused its discretion by awarding attorney fees to employee who missed deadline for submitting memorandum of costs and supporting affidavit by six months with no explanation for delay. I.C. § 72–210.

3. Workers' Compensation ⇐1936

A three-part test is used when reviewing whether the Industrial Commission abused its discretion; the Supreme Court determines (1) whether the Commission correctly perceived the issue as one of discretion, (2) whether the Commission acted within the outer boundaries of its discretion and consis-

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Exhibit S

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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
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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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 36-07004 and 36-02659
Case No. 39576	MOTION TO EXPEDITE ISSUANCE OF PARTIAL DECREES

DESCRIPTION

This is Clear Lakes Trout Company, Inc.'s (hereinafter "Clear Lakes"), *Motion to Expedite Issuance of Partial Decrees* filed in subcase numbers 36-07004 and 36-02659. This *Motion* is made pursuant to I.R.C.P. 7, and is based upon the statements and discussion below.

DISCUSSION

Clear Lakes makes this *Motion* because of the pending creation and organization of Water District 130 (the organizational meeting for the Water District is currently scheduled for April 23, 2002). The organization of Water District 130 will result in the administration of all water rights whose priorities have been adjudicated. See I.C. § 42-604. However, because Clear Lakes' water

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Master's Recommendations of the subject water rights.

Additionally, no party other than Clear Lakes has any right to file *Challenges* to the Special Master's Recommendations for these water rights. *See* SRBA AO1 Rules of Procedure, §13, ¶ a ("Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the Special Master's Recommendation shall constitute a waiver of the right to challenge it before the Presiding Judge"). However, as mentioned above, the subcases have already been resolved as Clear Lakes desires. Therefore, Clear Lakes does not wish to Challenge the current Special Master's Recommendations of its water rights that are attached to the *2nd Amended Report*, and hereby waives its right to file a *Notice of Challenge* in these subcases.

In summary, because no party other than Clear Lakes is entitled to file either a *Motion to Alter or Amend* the *Special Master's Recommendations* of water right nos. 36-02659 and 36-07004, or a *Notice of Challenge* to the same, and because Clear Lakes hereby waives its right to file either a *Motion to Alter or Amend* or a *Notice of Challenge* in these subcases, water right nos. 36-02659 and 36-07004 can and should now be decreed as recommended by the Special Master. Therefore, Clear Lakes respectfully requests that the Presiding Judge immediately issue *Partial Decrees* for these water rights which contain the elements and language specified in the *Special Master's Recommendations* attached to the *2nd Amended Report*.

DATED this 16th day of April, 2002.

RINGERT CLARK, CHARTERED

Charles L. Honsinger
Attorney for Clear Lakes Trout Farms, Inc.

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CERTIFICATE OF MAILING

I certify that on April 16, 2002, I served by facsimile and by U.S. 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

Person faxing and mailing documents

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Exhibit T

EXHIBIT T

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RINGERT CLARK

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
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Facsimile: (208) 342-4657

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

CLEAR LAKES TROUT COMPANY, INC.

Plaintiff,

vs.

CLEAR SPRINGS FOODS, INC.

Defendant.

Case No. CV-02-00803

VERIFIED COMPLAINT

COMES NOW the plaintiff in the above entitled matter, by and through its attorneys of record, Ringert Clark, Chartered, and hereby alleges and complains as follows:

ALLEGATIONS

1. Plaintiff is an Idaho Corporation that owns and operates a fish hatchery located in Gooding County, Idaho, adjacent to the Snake River, north of Buhl, Idaho (Plaintiff and/or Plaintiff's fish hatchery are hereinafter referred to as "Clear Lakes").

2 Defendant Clear Springs Foods, Inc. (hereinafter "Foods") is an Idaho Corporation that owns and operates fish hatcheries located immediately to the east and west of Plaintiff's fish hatchery

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3. The Idaho Department of Water Resources (hereinafter "IDWR"), is an Idaho state agency responsible for the administration and distribution of water pursuant to the mandate of Title 42, Chapter 6, Idaho Code.

4 Both Clear Lakes and Foods own water rights entitling them to divert water from springs through their fish hatcheries for fish production purposes.

5 Between November of 2001 and February of 2002, an Interim Stipulated Agreement was entered into by and between Clear Lakes and Foods, amongst other parties. A true and accurate copy of that agreement is attached hereto as Exhibit A.

6. Pursuant to Paragraph 2 8 of the Interim Stipulated Agreement, Foods agreed "not to seek either judicially or administratively the curtailment or reduction . . of any junior water rights held by or represented by the undersigned within Basin 36 for the term of" the Interim Stipulated Agreement.

7. As a signator to the Interim Stipulated Agreement, Clear Lakes was protected from any attempt by Foods seeking the curtailment or reduction of Clear Lakes' junior water rights.

COUNT ONE - BREACH OF CONTRACT

8 Clear Lakes realleges paragraphs 1 through 7 as though fully set forth hereat.

9 On June 7, 2002, Foods contacted IDWR in writing and demanded that IDWR deliver Foods water pursuant to water right no 36-02708. A true and accurate copy of Foods' written call is attached hereto as Exhibit B

10 The June 7, 2002 Foods' call for the delivery of water was in clear violation of paragraph 2 8 of the Interim Stipulated Agreement, and resulted in a breach of that agreement.

11 As a result of Foods' breach of the Interim Stipulated Agreement as hereinbefore

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alleged, Clear Lakes suffered consequential and incidental damages in an amount to be proven at the time of trial.

12. After receiving Foods' written call for water, despite the Interim Stipulated Agreement between the parties preventing such a call, on or about July 5, 2002, IDWR responded to said call by adjusting Clear Lakes' diversion facilities such that a portion of the water formerly received by Clear Lakes was diverted to Foods. Since July 5, 2002 to the present, Foods has continued to receive a portion of the water formerly delivered to Clear Lakes.

13. Clear Lakes is entitled to an order nullifying Foods' call for water.

REQUEST FOR ATTORNEY FEES

Clear Lakes has been required to retain the services of attorneys to prosecute this action, have retained the firm of Ringert Clark, Chartered, and have agreed to pay said attorneys a reasonable attorneys fee. Foods is responsible for the payment of Clear Lake's attorneys fees pursuant to Idaho Code §§ 12-120 and/or 12-121.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Clear Lakes prays for judgment against Defendant Foods as follows:

1 For an award of damages in favor of Clear Lakes in an amount to be proven at the time of trial;

2. For an order nullifying Defendant Foods' wrongful call for water;

3. For an award of reasonable attorneys fees and costs in an amount to be determined by the Court;

4 For such other and further relief as the Court deems just

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DATED this 10th day of December 2002.

RINGERT CLARK CHARTERED

By Charles L. Honsinger

Charles L. Honsinger
Attorneys for Clear Lakes Trout Company, Inc.

VERIFICATION

State of Idaho)
) ss
County of Ada)

Kay Hardy, being first duly sworn on oath, deposes and says:

That she is the President of the plaintiff corporation above named. That she has read the above and foregoing Complaint, knows the contents thereof, and hereby verifies that the facts therein stated are true and correct to the best of her knowledge.

Kay Hardy

Kay Hardy

Sworn to and subscribed before me this 10th day of December, 2002.

KIMI A. WHITE NOTARY PUBLIC STATE OF IDAHO

Kimi A. White

Notary Public for Idaho
Residing in Boise, Idaho
My Commission Expires: 8/01/04

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EXHIBIT A

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INTERIM STIPULATED AGREEMENT FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36

This Interim Stipulated Agreement (Agreement) is entered into between the undersigned ground water users and surface water users, or their representatives, in consideration of the promises stated in this Agreement. The term of the Agreement shall extend until to December 31, 2003.

1. This Agreement is made in reference to the following facts:

1.1 The Director of the Idaho Department of Water Resources (Director) stated his intent to entirely curtail diversions under certain water rights for ground water beneath portions of Basin 36, an administrative sub-basin. The Director's intent was based upon his findings, set forth in his administrative order designating the Thousand Springs Ground Water Management Area dated August 3, 2001, that diversions of ground water under such rights cause significant reductions in spring flows tributary to the Thousand Springs reach of the Snake River, and that those reductions will further reduce the diminished water supply available to satisfy senior priority surface water rights during current drought conditions.

1.2 The parties are unable to agree to the extent of interconnection of ground water and surface water sources in the Snake River Basin and any alleged injury to surface water rights as a result of the diversion of water from the Eastern Snake Plain Aquifer (ESPA);

1.3 The Idaho Department of Water Resources (IDWR) has committed to complete reformulating and recalibrating the ESPA Ground Water Model by December 31, 2003, contingent on continued funding from the Idaho Legislature and other entities;

1.4 The new ESPA Ground Water Model is expected to provide the parties with additional information regarding the alleged impacts of ground water diversions from the ESPA on spring discharges and flows in defined reaches of the Snake River; and

1.5 The parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36 pending the completion of the new ESPA Ground Water Model. The parties understand that this agreement and IDWR administrative actions described in this agreement may include water rights in areas immediately adjacent to Basin 36 as necessary to respect geohydrologic characteristics and water user organization boundaries. All subsequent references to Basin 36 in the agreement include this qualification.

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2. Interim Stipulated Agreement:

2.1 Upon the payment of necessary advances by North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD), Northside Canal Company (NSCC), shall apply annually in 2002 and 2003 for up to 40,000 acre feet of water from rental pools above Milner for diversion into the NSCC canal at such times and in such manner as NSCC agrees. NSGWD agrees to pay the necessary advances for up to 25,000 acre feet of water, and MVGWD agrees to pay the necessary advances for up to 15,000 acre feet of water. The separate obligations of NSGWD and MVGWD to pay for storage shall be based upon their proportionate share as described above. The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC system by entities other than the NSGWD and MVGWD.

2.2 The replacement water will be used to enhance the spring flows in the Thousand Springs reach by 40,000 A.F. The NSGWD members will, to the maximum extent possible, use storage water or canal company shares delivered through the Northside Canal and use Northside Canal Company waste water in lieu of pumping ground water. To the extent that the full 40,000 A.F. is not used for irrigation in lieu of groundwater pumping, the unused portion of the 40,000 A.F. will be used to enhance the spring flows in the Thousand Springs reach. Periodic reports will be prepared describing how the replacement water has been used pursuant to this Agreement.

2.3 NSCC agrees to rebate any monies provided by ground water users that are not used to acquire storage water required by paragraph 2.1.

2.4 Those parties providing replacement water agree to equitably apportion any costs associated with delivery of the water provided pursuant to paragraph 2.1. NSCC agrees to forego conveyancing costs for delivery of such water provided NSGWD uses its best efforts to use the water identified in paragraph 2.5.3. NSCC agrees to use its best efforts to minimize any other costs associated with the delivery of such water.

2.5 Those parties providing replacement water agree to, in good faith, explore the feasibility, funding and implementation of the following measures:

.1 NSGWD members who are shareholders in NSCC will make best efforts to use their NSCC shares on appurtenant lands before using ground water, unless the NSCC water is not available.

.2 NSGWD members within the NSCC service area will make best efforts to use the storage water described in paragraph 2.1 in lieu of pumping a similar amount of ground water. (Use existing NSCC headgates.)

.3 NSGWD members who are also NSCC shareholders within the NSCC service area will make best efforts to use water pumped from NSCC sediment ponds and other waste water in lieu of ground water.

.4 NSGWD will make periodic reports describing the actions being investigated and undertaken pursuant to paragraph .

2.6 NSGWD and Buckeye agree to use their best efforts to provide twelve (12) CFS of water to Buckeye from Riley Creek by the 2002 irrigation season as contemplated in the July 2001 letter to NSGWD.

2.7 The following provision will apply during the irrigation season in any year in which the following conditions occur, unless otherwise agreed by the parties: If by April 1 in any year none of the 40,000 acre feet of water identified in paragraph 2.1 is provided either by this agreement or by other replacement water, the undersigned holders of ground water rights agree that their diversion and use of ground water irrigation water rights will be ten (10) percent less than their base of ground water irrigation use, based on power and fuel consumption records, or other basis acceptable to the Director. If by April 1, some but not all of the 40,000 acre feet identified in paragraph 2.1 is provided (by this agreement and/or other replacement water) an adjustment to ground water reductions shall be made in proportion to the percentage of the 40,000 acre feet provided. In lieu of individual reductions, ground water districts may achieve reductions on a district wide basis. The parties agree to meet and establish a procedure for determining the base upon which any reductions in ground water use will be determined.

2.8 Safe Harbor: In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction, other than as provided in paragraph 2.7, of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

2.9 By providing replacement water or, in the alternative, agreeing to a reduction in ground water irrigation diversions and use, the undersigned holders of ground water rights and their representatives do not concede that diversions of ground water are causing injury to senior priority surface water rights, nor do the undersigned holders of senior priority surface water rights and their representatives concede that the amount of replacement water accepted under this stipulated agreement compensates for the extent of the injury they allege.

2.10 The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in Basin 36. The parties understand that interim administration will include: (1) enforcement of the provisions of the stipulated agreement; (2) curtailment of illegal diversions (i.e.

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any diversion without a water right or in excess of the elements of a water right); (3) measurement and reporting of diversions of water rights; and (4) curtailment of out-of-priority diversions found by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director. The parties reserve the right to file motions to participate or submit other pleadings to participate in proceedings on the motion as they deem appropriate.

2.11 The parties agree to work collaboratively with the Director to expeditiously create a water district or water districts and to formulate initial instructions to the associated watermaster(s) to administer water rights of the water district or water districts. Such instructions shall include the elements of administration identified in paragraph 2.10. The parties agree not to oppose the Director's initial instructions to these watermaster(s) that are jointly developed through this collaborative process.

2.12 The parties understand that the Director will issue an administrative order approving this Agreement, which will include the elements of interim administration identified in paragraph 2.10. Holders of water rights within the area subject to interim administration under this agreement who are not party to this or another stipulated agreement, either directly or as a member of a party to this Agreement, shall not be entitled to the benefits of the safe harbor provided by paragraph 2.8. The parties agree to request that the Director notify water right holders in Basin 36 who are not party to this or another stipulated agreement, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

2.13 Other junior water right holders not members of NSGWD or MVGWD who desire the safe harbor protections of this agreement may join this agreement upon agreeing to pay a proportionate share of the costs and to be bound by all other terms of this agreement.

3. Process for Future Conflicts:

3.1 The undersigned parties agree to develop a process for ascertaining the extent of any injury caused by ground water diversions in the Basins under junior priority water rights to senior priority surface water rights, for sharing of information and for the development of any mitigation plans subsequently required.

3.2 For the term of this Agreement, the parties agree to use their best efforts to ensure completion of the reformulation and recalibration of the ESPA Ground Water Model and to continue discussions regarding a long-term agreement, including:

.1 The ESPA Model capabilities.

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.2 Adoption of statewide water management rules to govern IDWR's overall administration of water rights from surface and ground water sources.

.3 Formalization of administrative structure for and administration of connected ground water and surface water uses in accordance with the prior appropriation doctrine.

.4 Adoption of conjunctive administration rules based on the results from the new ESPA ground water model and other necessary information to more specifically govern IDWR's administration of water rights from connected sources of surface and ground water within the ESPA.

.5 Consideration of a mechanism to account for changes in the use of water rights since the commencement of the SRBA and development of a means to administer water rights in the context of such changes.

4. Enforcement:

4.1 The parties understand the Director intends to approve this stipulated agreement in lieu of issuing curtailment orders under Idaho Code § 42-233b, and that in the event this Agreement is breached, any party may petition the Director, or the Director on his own initiative, may seek an appropriate remedy.

4.2 Upon the SRBA District Court issuing an order for interim administration of water rights within Basin 36 and related areas, this Agreement will be enforced through such administration.

5. Disclaimers:

5.1 This Agreement represents a settlement of disputed issues regarding the administration of water rights from interconnected ground water sources and surface water sources within portions of the Snake River Basin. The undersigned are unable to agree on the extent and locations of interconnections of ground water and surface water sources in the Snake River Basin along the reach of the Snake River along and above the Thousand Springs reach of the Snake River and the extent of injury, if any, to senior priority surface water rights as a result of ground water diversions from the ESPA under junior priority water rights. In order to avoid litigation of these issues at this time, the undersigned have entered into this Agreement. Because this Agreement does not fully resolve the issues, the parties agree that this Agreement shall not be construed or interpreted so as to waive or prejudice any contention by any party regarding the legal or factual relationship between water rights from surface and ground water sources in the Snake River Basin along and above the Thousand Springs reach of the Snake River.

5.2 This Agreement has been reached as the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceedings.

6. Dismissal or Stay of Pending Actions:

6.1 Based upon the foregoing and the parties' understanding that the Director will stay further administrative proceedings regarding his Order In The Matter of Designating the Thousand Springs Ground Water Management Area, and unless this Agreement is breached, the parties agree as follows:

6.2 The Idaho Ground Water Appropriators, Inc., and other plaintiffs agree to secure voluntary dismissal, without prejudice, of their Petition for Judicial Review and Complaint for Preliminary Injunction, Writ of Mandate, and for Declaratory Relief that they previously filed in the Sixth Judicial District Court.

6.3 Representatives of the holders of surface water rights agree to withdraw their July 2001 petitions seeking the establishment of ground water management areas, and the holders of ground water rights agree to withdraw their pleadings filed in response to the same.

7. General Provisions:

7.1 The provisions of this Agreement are not severable.

7.2 This Agreement shall bind and inure to the benefit of the respective successors of the parties.

7.3 This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

7.4 Headings appearing in this Agreement are inserted for convenience and reference and shall not be construed as interpretations of the text.

7.5 This Agreement is executed in triplicate. Each of the three (3) Agreements with an original signature of each party shall be an original.

7.6 This Agreement shall be effective from October 11, 2001.

7.7 The parties to this Agreement may extend the term of this Agreement beyond 2003 by mutual consent on an annual basis.

The parties have executed this Agreement the date following their respective signatures.

Date: Nov. 9, 2001

North Snake Ground Water Dist.
North Snake Ground Water District

by Mike L. Faulkner

Chairman

Date: 12 November, 2001

Dale H. Maughan Chairman
Magic Valley Ground Water District

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Date: 11-9-01, 2001

North Side Canal Company

Date: _____, 2001 _____

Blue Lakes Trout Company

Date: _____, 2001 _____

Pisces Investments

Date: December 17, 2001 _____ 550 #576

Attorney for Pristine Springs Inc.

Pristine Springs

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JAN 2 2 2002

Date: November 16, 2001

Jerry M. Cox, President & CEO
Clear Springs Foods, Inc.

Date: 1/9, 2002

Buckeye Farms

INTERIM STIPULATED AGREEMENT

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Date: January 14, 2002 Gerald Key Harvey, President
Clear Lakes Trout Company
Clear Lakes Trout Company

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Department of Water Resources

Date 1-10-02, 2001

Blue Lakes Trout Company

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EXHIBIT B

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CLEAR SPRINGS FOODS, INC.
General Office P.O. Box 712, Buhl, Idaho 83316
Phone 208 543-4316
Sales 800 635-8211
Fax 208 543-5608
www.clearsprings.com

June 7, 2002

Karl Dreher
Director, Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

RECEIVED
JUN - 7 2002
Department of Water Resources

Via Fax: 208-327-7866

RE: Water Delivery Call

Dear Director:

In response to the Department's issuance of Water District 130 Watermaster Instructions No. 02-01, Clear Springs hereby requests the distribution of water to water right no. 36-02708. This request is premised upon instructions nos. 2-6 regarding notification to and subsequent investigation by the watermaster.

The last flow measurements performed jointly by the Clear Lakes Trout Farm and Clear Springs personnel recorded on April 16, 2002 indicate that the total flow from the common source available to water rights 36-02659, 36-02708, 36-07004 and 36-02718 was 330 cfs at that time. The present adjustable weir setting is delivering approximately 173 cfs to Clear Springs. This quantity does not satisfy Clear Springs' 36-02708 right of 200 cfs. Clear Springs can and will put the additional water to beneficial use upon delivery. Documented measurements are available for review and Clear Springs is immediately available to answer any questions regarding either measurements or operations at the Clear Springs facility.

Additionally, Clear Springs would welcome the opportunity to discuss with the watermaster the schedule for flow documentation and distribution of water in question. If you have any further questions, please do not hesitate to call and thank you for your attention to this matter.

Sincerely,

Larry W. Cope
President and CEO

cc. Cindy Yenter
Water District 130 Watermaster

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LETTER TO KARL DREHER FROM CLEAR SPRINGS FOODS DATED JUNE 7, 2002

Exhibit U

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

February 20, 2002

Re: Final Order Creating Thousand Springs Area Water District No. 130

Dear Water Right Holder:

The records of the Idaho Department of Water Resources ("IDWR") show that you are the holder of one or more water rights with points of diversion within the Eastern Snake Plain Aquifer (ESPA) and IDWR administrative basins 36 and 43. This area was one of two proposed water district areas described in the Department's Notice of Order Authorizing Interim Administration and Notice of Hearings Regarding Creation of Water Districts dated January 14, 2002. A copy of this notice was sent to all water right holders within the proposed districts except owners of small domestic and stock water rights. The Director of IDWR held two separate hearings concerning creation of the two water districts on February 4, 2002 in Blackfoot and Jerome, Idaho. A ten-day written comment period was provided after the hearings as required by law.

Enclosed please find a copy of the Final Order Creating the Thousand Springs Area Water District No. 130. Also enclosed is an informational sheet that explains options for responding to final orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

The earliest potential dates for scheduling the 2002 water district meeting will be from about April 22 to April 26. The water district meeting is necessary to elect a watermaster, select an advisory committee and adopt a budget for the operation of the district. The Department will send separate notice to announce the date, time and place for the water district meeting.

Please contact this office or the IDWR regional offices in Twin Falls if you have any questions concerning this matter.

Sincerely,

Timothy J. Luke

Tim Luke
Manager, Water Distribution Section

Enclosures
LETTER TO WATER RIGHT HOLDER FROM TIM LUKE DATED FEBRUARY 20, 2002

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CREATING THE THOUSAND SPRINGS AREA WATER DISTRICT, DESIGNATED AS WATER DISTRICT NO. 130, FOR THE ADMINISTRATION OF RIGHTS TO THE USE OF GROUND WATER AND SPRINGS DISCHARGING FROM THE EASTERN SNAKE PLAIN AQUIFER IN ADMINISTRATIVE BASINS 36 AND 43.	**FINAL ORDER CREATING WATER DISTRICT NO. 130**

The Director of the Idaho Department of Water Resources ("Director") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

FINDINGS OF FACT

1. On August 3, 2001, the Director established the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the Thousand Springs GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the Thousand Springs GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. On August 31, 2001, the Director was advised by representatives of holders of

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junior priority ground water rights and holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what would have resulted from the intended curtailment of certain junior ground water diversions within the Thousand Springs GWMA.

3. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs GWMA, provided the agreements in principle were implemented through detailed written agreements.

4. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into detailed written stipulated Agreements with representatives of most holders of senior priority surface water rights. The Agreements were submitted to the Director for approval. The Director approved the Agreements on January 18, 2002.

5. 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. In the event the replacement water cannot be provided, the Agreements require an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

6. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

7. Under the Agreements, the parties requested that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other similar agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

8. On November 19, 2001, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the Eastern Snake Plain Aquifer ("ESPA") in the Thousand Springs area.

9. On November 19, 2001, the SRBA District Court issued an order setting the State's motion for order authorizing interim administration for hearing on January 8, 2002. The Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State of Idaho served copies of the Court's November 19, 2001, order and the State's motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on November 26, 2001.

10. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code, based upon a

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determination that such interim administration is necessary to protect senior water rights.

11. On January 14, 2002, the Director mailed notice, by regular mail, of the proposed action creating a water district in the Thousand Springs area within the ESPA in Administrative Basins 36 and 43, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water user in the proposed district affected by the creation of the water district (herein established as Water District No. 130). The notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held on February 4, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

12. In addition, the Director published notice of the proposed action creating the water district once a week for two (2) weeks in the following newspapers having general circulation within the area covered by the proposed district: *The Times News* of Twin Falls on January 17 and 24, 2002; the Burley *South Idaho Press* on January 17 and 24, 2002; and the *Minidoka County News* of Rupert on January 16 and 23, 2002.

13. The Director conducted the hearing concerning the proposed creation of the water district at the Jerome High School Auditorium in Jerome, Idaho, at 7:00 pm on February 4, 2002. Approximately fifty-five people attended the hearing.

14. Prior to commencing the hearing, the Director made a presentation and answered questions for approximately ninety minutes addressing the reasons for creation of the proposed water district and how the district would operate.

15. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through February 14, 2002, for the submission of written comments.

16. Only one person presented an oral statement for the record at the Jerome hearing. No one testified in opposition to the creation of the proposed water district. Jeff Martin presented a statement on behalf of the North Snake River Ground Water District in support of the establishment of a water district to administer ground water in accordance with the prior appropriation doctrine and State law.

17. Mr. Roger Ling, attorney for the A & B Irrigation District, stated that the questions he had were addressed by the Director during the presentation and discussion that occurred prior to going on the record.

18. The Director received no written comments from affected ground water users objecting to the creation of the proposed water district prior to the close of the February 14, 2002, comment period. Comments were received from Clear Springs Foods, Inc. of Buhl, Idaho, suggesting that water rights included within Water District 36-A (Billingsley and Riley Creeks and tributary springs) should be combined into the same water district or subdistrict with ground water rights so that the parties may continue to work together under the same watermaster. Water District 36-A submitted comments requesting that it remain autonomous

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at this time while retaining the option of joining the newly formed water district in the future. The United States Fish and Wildlife Service submitted comments relating to future arrangements that may be made for the measuring and reporting of ground water usage at its affected facilities.

19. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

20. The available water supply in all or portions of Administrative Basins 36 and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

21. The administration of ground water rights within the portion of Administrative Basins 36 and 43 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. Idaho Code § 42-226.

2. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed

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with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

District Creation

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer water rights within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of stipulated agreements approved by the Director; and

d. 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. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and

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the Director's best professional judgment.

12. The Director concludes that the water district created by this order shall include the following organizational features:

a. Election and appointment of a single watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts and irrigation districts, or as otherwise determined by the Director.

c. Selection of Water District Advisory Committee that includes, but need not be limited to, representation from boards of directors of ground water districts and irrigation districts.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Water rights not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

ORDER

IT IS ORDERED that:

1. The Thousand Springs Area Water District, designated as Water District No. 130, is hereby created to include all ground water rights and all rights to divert from springs discharging from the ESPA that are not already included in Water District No. 36-A, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference.

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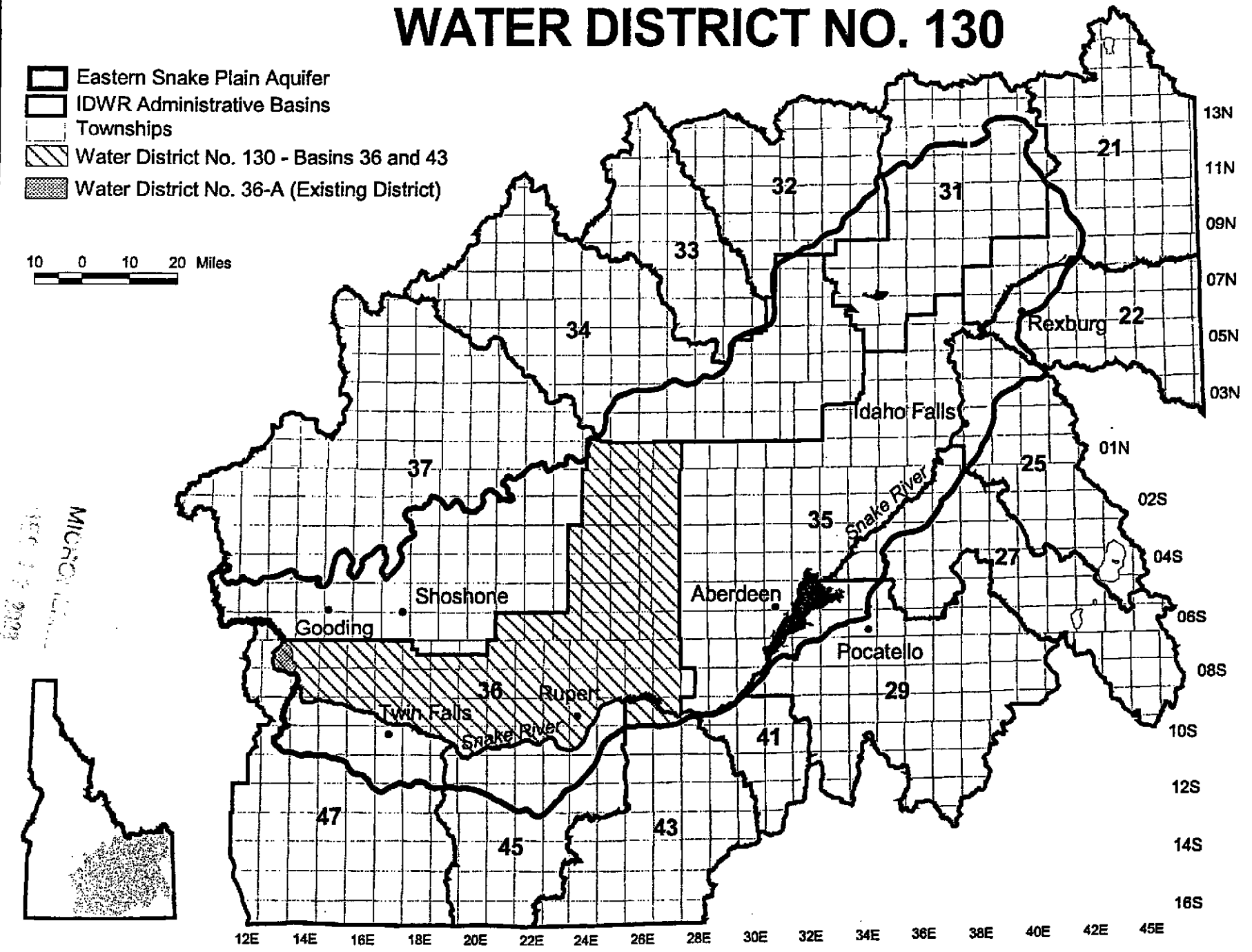
2. For 2002, the water right holders within the Thousand Springs Area Water District No. 130 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 19th day of February 2002.

KARL J. DREHER
Director

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THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



ATTACHMENT A

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) the petition for reconsideration is disposed of; or

(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

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(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a 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(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

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HEARING INFO FOLDER 4

RECEIVED
JAN 16 2004
Department of Water Resources

Jeffrey C. Fereday [ISB No. 2719]
Michael C. Creamer [ISB No. 4030]
Deborah E. Nelson [ISB No. 5711]
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Telephone No. (208) 388-1200
Fax No. (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.
S:\CLIENTS\3915\56\IGWA Response to January 9th Briefing.DOC

BEFORE THE DIRECTOR OF THE

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02659, 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-07004, 36-07080, 36-07167, 36-07176, 36-07725, 36-07731 and 36-08089	**IGWA'S RESPONSE TO THE JANUARY 9, 2004 BRIEFING**

I. INTRODUCTION

Idaho Ground Water Appropriators, Inc. ("IGWA")[1] submits this Response to briefing filed on January 9, 2004 by parties in the above-captioned matter in compliance with the December 12, 2003 Order issued by the Director of the Idaho Department of Water Resources ("Department") Granting Petitions to Intervene and Prehearing Order ("December 12 Order"). The December 12 Order requested that the parties submit briefing by January 9, 2004 on two issues: (1) the effect of the district court case titled *Rim View Trout Company et al. v. Dreher, et al.*, (4th Jud. Dist., Ada Co. Case No. CV OC 0307551D) "(*Rim View* case") on whether a stay

[1] IGWA's members include North Snake Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, American Falls-Aberdeen Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Southwest Irrigation District, City of Blackfoot, City of American Falls, United Water Idaho Inc., Anheuser-Busch, Inc., Jerome Cheese Company, and City of Jerome.

should be granted in this matter; and (2) the effect on this proceeding of the expiration of the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36."

The parties' January 9, 2004 briefing demonstrates a fundamental reality about this and related pending matters: The issues presently facing the Department and parties are complex. Even among those parties supporting a stay of this matter, there is disagreement about what the relationship is between this matter and the *Rim View* case pending in state district court. Idaho Power Company (incorrectly) suggests that the *Rim View* case is a judicial review action of a Department ruling in this matter and, therefore, that the Department lacks jurisdiction to continue to hear this matter pending that appeal. *Idaho Power Company's Brief on the Issues Set Forth in the Director's Order of December 12, 2003*, p. 4. Clear Lakes et al., on the other hand, argues that the *Rim View* case is not a judicial review action but, rather, is separate action seeking an order of mandate and raising a constitutional challenge to the Conjunctive Management Rules. *Memorandum Re: Petitioner's Request for Stay, and Effect of Expiration of Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36*, p. 8 ("[I]t is obvious that the lawsuit is not an appeal from an IDWR administrative proceeding.").

Multiple factors give rise to the level of complication involved in this and other pending matters. These factors include:

1. The Department's decision not to allow other parties to participate in this and other pending delivery calls until after issuing an order on the calls which has led to delayed development of an administrative record and uncertainty about the judicial review process.

2. To date, the Department's only stated basis for any curtailment of ground water diversion in the Eastern Snake Plain Aquifer stems from a 2001 Ground Water Management Area ("GWMA") designation in which the Director found that unnamed spring water rights in the Thousand Springs reach were experiencing injury to an undetermined level.

3. The Interim Settlement Agreement entered into by many surface and ground water users to provide 40,000 acre feet of replacement water in response to the Department's GWMA designation expired by its own terms on December 31, 2003.

4. The Preliminary Mitigation Plan proposed by IGWA members North Snake Ground Water District and Magic Valley Ground Water District precedes Department determinations of material injury to specific water rights but is filed in anticipation of possible ordered curtailment.

5. The Conjunctive Management Rules only rarely have been used and thus present many new issues with little to no precedent to follow.

6. Significant scientific uncertainty exists as to the degree and timing of the hydrologic connection between surface and ground water uses and as to the effect of curtailment of certain uses.

These complicating factors affect the issues presented in this and other pending matters before the Department. This is precisely why IGWA has asked the Department to consolidate this case with the pending *Application for Approval of Preliminary Mitigation Plan* and other pending delivery calls.

IGWA simply believes the most efficient means of proceeding is for the Department to develop a complete administrative record, with all necessary parties present and all relevant issues considered, in a single proceeding. *See* arguments in *Applicants' and IGWA's Joint Motion to Consolidate Contested Cases and Brief in Support* (filed in this matter on December 16, 2003). However, should the Department decide to not consolidate these matters or decides to stay this matter pending district court resolution of the *Rim View* case, then IGWA members North Snake Ground Water District and Magic Valley Ground Water District ("the Districts") will proceed expeditiously with their *Application for Approval of Preliminary Mitigation Plan*. A primary purpose in submitting the Preliminary Mitigation Plan was to proactively consider and address water right concerns between senior surface water users in the Thousand Springs reach

and nearby junior ground water users before any curtailment might be ordered. This purpose remains a pressing concern that cannot be delayed.

II. ARGUMENT

A. The Department retains jurisdiction over this case and must exercise it.

The *Rim View* case does not affect the Department's jurisdiction and responsibility to reach a final agency decision in this matter. This contested case has only just begun. Not only is there no final decision, there has been no hearing and there exists no administrative record. Until the parties exhaust all administrative remedies by pursuing such a final decision, the Department has primary jurisdiction with respect to all issues raised by the delivery call and must exercise it to develop the record that is necessary for possible effective judicial review. The Administrative Procedure Act, Idaho case law, and public policy all require this order of operation. Further, meaningul judicial review of Rim View's challenge to the constitutionality of the Conjunctive Management Rules requires a complete administrative record demonstrating how the various provisions of the Rules work together and how the agency has applied and interpreted them. No such record currently exists.[2] *See* argument in *IGWA's Response To The Director's December 12 Order*, pp. 4-9 (January 9, 2004).

Were the Department to abdicate its jurisdictional responsibility to proceed with this contested case until a final decision is reached, it would serve no purpose. The *Rim View* case cannot resolve the issues pending before the Department because the district court does not have before it any final decision or administrative record regarding the application of the Conjunctive

[2] Twin Falls Canal Company and Clear Springs Foods continue to misunderstand the doctrine of "primary jurisdiction". *Twin Falls Canal Company's and Clear Springs Foods, Inc.'s, Consolidated Brief in Support of Stay of Contested Case*, pp. 4-5. This doctrine does not award "primary jurisdiction" to a district court but, instead, directs the district court to recognize when a case remains subject to the primary jurisdiction of an administrative agency and thus should not yet be considered by the court. A case remains subject to the primary jurisdiction of an administrative agency when, as is the case here, the expertise of the relevant administrative agency has not yet been applied to the controversy.

Management Rules to Rim View and the Hardy Estate, including the extent of any material injury or the adequacy of current proposed mitigation (i.e., the portion of the administrative record that IGWA is entitled to develop in defense to the delivery call). Regardless of how the district court rules on the pending motion to dismiss, the Department is faced with issues in this case and in the pending *Application for Approval of Preliminary Mitigation Plan* that require prompt resolution.

The Department can and should proceed to a final decision in this case.

B. The expiration of the Interim Agreement does not allow immediate action to curtail junior water users.

Contrary to the position asserted by Clear Lakes et al, the expiration of the Interim Agreement does not require the Department to immediately seek curtailment of junior ground water rights because the Department has yet to make findings of fact as to material injury or the adequacy of the Districts' Preliminary Mitigation Plan in mitigating any such injury. Before the Department may take any action to recognize or enforce a delivery call against ground water users, IGWA and its members are entitled to present their evidence and defenses to curtailment. Specifically, they are entitled to develop an evidentiary record concerning the nature of the Hardy water rights and the extent of material injury, if any, together with the adequacy of the proposed Mitigation Plan.

Not only have there been no findings that Clear Lakes' rights are being materially injured, but the Districts' proposal to provide40,000 acre feet of replacement water contained in their Preliminary Mitigation Plan is consistent with the Department's current understanding and preliminary determination in this case, based on the best available hydrologic data. Absent specific findings based on new evidence that material injury is occurring to Clear Lakes, et al.

and that continuing to provide 40,000 acre feet of replacement is not adequate mitigation, no curtailment can be contemplated.

Both the expiration of the Interim Agreement and the pending application of the Interim Agreement's successor—the Districts' Preliminary Mitigation Plan—reinforce the need for the Department to proceed to a final decision in this matter, based on a full evidentiary record and participation by all relevant parties. The district court does not have a record before it that will enable it to consider the effect of the expiration of the Interim Agreement or the adequacy of the new pending mitigation. These issues instead fall on the Department to resolve with expediency.

DATED this 16th day of January 2004.

GIVENS PURSLEY LLP

By: _____

Jeffrey C. Fereday
Michael C. Creamer
Deborah E. Nelson
Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Karl J. Dreher, Director Idaho Department of Water Resources 1301 N. Orchard Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Facsimile _____ Overnight Mail __X__ Hand Delivery
Daniel V. Steenson Charles L. Honsinger RINGERT CLARK CHTD. 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
John K. Simpson BARKER, ROSHOLT & SIMPSON 205 N. 10th Street, Ste. 520 P.O. Box 2139 Boise, ID 83701-2139	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
James S. Lockhead Wayne F. Forman Avra O. Morgan BROWNSTEIN, HYATT & FARBER 410 17th Street, 22nd Floor Denver, CO 80202	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
John A. Rosholt Travis L. Thompson BARKER, ROSHOLT & SIMPSON 233 2nd Street North, Ste. D Twin Falls, ID 83301	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery
J. Dee May MAY, SUDWEEKS & BROWNING 516 2nd Street East P.O. Box 1846 Twin Falls, ID 83303-1846	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery

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Michael C. Creamer

Rec'd in Southern Region on 3/4/03 JG

John K. Simpson, ISB # 4242
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Attorneys for Clear Springs Foods, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	AFFIDAVIT OF LARRY W. COPE

STATE OF IDAHO)
)ss
County of Ada)

Larry W. Cope being first duly sworn on oath, deposes and says:

1. I am the President and Chief Executive Officer of Clear Springs Foods, Inc. (hereinafter "Clear Springs") of Buhl, Idaho. I have been employed by Clear Springs for approximately 29 years and have held my present position since 1982. On behalf of Clear Springs I was and am directly involved in water matters in Basin 36 and Water District 130.

2. That Clear Springs is the holder of certain water rights, Nos. 36-02708 and 36-07218, which share as a common source certain water rights held by Clear Lakes Trout Company Inc. ("Clear Lakes"), Nos. 36-02659 and 36-07004, the administration of

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which is governed by certain watermaster instructions issued by the Department of Water Resources.

3. That in 1980 Clear Springs and Clear Lakes entered into a settlement agreement resolving litigation, which controlled the administration of water until the Snake River Basin Adjudication entered partial decrees for the water rights identified above.

4. That on January 18, 2002 the Idaho Supreme Court issued a decision affirming the SRBA Court's decision regarding the common source and diversion point issues as between the water rights of Clear Springs and Clear Lakes at the Clear Springs / Clear Lakes facilities, thereby resolving over ten years of litigation.

5. The springs, which are the common source of Clear Springs' and Clear Lakes' water rights, have been in decline over the last 20 years. Presently, there is approximately 325 cfs, sufficient to fill the 100 cfs senior water right of Clear Lakes and the next senior 200 cfs water right of Clear Springs. Clear Lakes' next in priority water right of 75 cfs is partially filled pursuant to the partial decrees and watermaster instructions. Clear Springs' junior water right No. 36-07218 has not been filled for years.

6. That as a result of the declining spring flows in July of 2001 Clear Springs did petition the Idaho Department of Water Resources for the designation of a ground water management area directly adjacent to the Thousand Springs Reach of the Snake River.

7. That on or about August 3, 2001 the Director of Water Resources did designate the Thousand Springs Reach a ground water management area.

8. That as a result of that designation certain parties, primarily Clear Springs, Northside Canal Company and North Snake Ground Water District, did enter into negotiations, which ultimately led to an Agreement in Principle. The sole purpose of those negotiations was to provide an arrangement whereby the groundwater users in and adjacent to the designated groundwater management area would provide through replacement water or curtailment, an equivalent quantity of water to satisfy the Director's order. This replacement water had to appear in the Thousand Springs reach at the time, amount and location as specified by the Director. Following an initial set of meetings, which included numerous surface and groundwater parties, Clear Springs was the sole spring user that expressed an interest in participating in those negotiations. The negotiating parties did not negotiate what amount of water would have been necessary to mitigate for the fulfillment of senior water rights. Nor did the parties negotiate or intend to negotiate water administration issues outside of the groundwater management area. These issues were left for future long-term resolution.

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9. That Agreement in Principle did form the basis for requesting that the Director not carry out curtailment of groundwater rights pursuant to the August 2001 ground water management area designation.

10. That the Agreement in Principle delivered to the Director and consented to by certain parties, including Clear Springs and Clear Lakes, enabled the Director to forego enforcement of the ground water area designation order.

11. That the Director in response to the numerous requests of the parties did forego enforcement of the groundwater management order

12. That at no time during either the negotiations of the agreement in principle or the ultimate negotiations between Clear Springs and North Snake Ground Water District in the drafting of the Interim Stipulated Agreement did any party raise the issue of the safe harbor provision being applicable to parties other than those providing mitigation in the form of either replacement water or curtailment of groundwater rights.

13. That during the negotiations of the Interim Stipulated Agreement, Clive Strong of the Attorney General's office did participate and facilitate discussions between Clear Springs and North Snake Ground Water District. At no point in time did Mr. Strong identify, draft or suggest an alternative intent or application of the safe harbor provision. Following those negotiations, which resulted in an agreement between North Snake and Clear Springs, additional discussions occurred between the Attorney General's Office and other water users in an effort to encourage participation in the agreement. Groundwater user groups and individuals were encouraged to participate in the mitigation provision in order to realize the protections of the safe harbor provision of paragraph 2.8 of the Interim Stipulated Agreement. Spring users were encouraged to participate in order to ensure that the replacement water would be provided and to avoid a curtailment call as against groundwater interests.

14. That the Agreement in Principle did provide the basis and understanding for moving forward with Interim Stipulated Agreement and at no time during the negotiations in which I participated, was the Agreement in Principle modified, changed or revised.

15. That at no time during the negotiations was it the intent of Clear Springs to enter into an agreement, which would have precluded administration of water rights within Water District 130. The intent of the Interim Stipulated Agreement was to enable groundwater users to avoid curtailment by either the Director's actions or as a result of an administrative call by surface spring water users for a period of two years.

16. That at no time during the negotiations was it the intent of Clear Springs in negotiating the Interim Stipulated Agreement to provide a safe harbor for anyone other than those parties designated as a mitigating party pursuant to the provisions of 2.1 through 2.7 of the Interim Stipulated Agreement.

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17. At no time during the period following Clear Springs negotiations with North Snake Ground Water District and before subsequent approval of the Agreement by the Director, did Clear Springs have any substantive discussions regarding the Interim Stipulated Agreement and the intent of the Safe Harbor provision with other surface spring water users. On one occasion following the completion of negotiations of the Agreement and prior to receiving signatures from other surface water users, I was visited by representatives of Clear Lakes, Pristine Springs Trout Farm and Blue Lakes Trout Company. The purpose of their visit was to learn from me why Clear Springs was agreeing to the provisions of the agreement. I explained that we were committed to finding long-term solutions to the continual decline of the spring flows and believed this could best be achieved by working constructively with the ground water users in Basin 36 through the framework of the Stipulated Agreement. I further explained that I believed the ground water users shared our commitment and were prepared to provide mitigation under sections 2.1 through 2.7 in return for safe harbor from a call on water from the surface water users signing the agreement. I further encouraged the parties to become participants in the agreement.

18. That at no point in time during negotiations with North Snake or in discussions in the Attorney General's Office did any party assert or demand that the safe harbor provision either precluded administration as between surface water users or protect surface waters from a call. In fact discussions focused on the need for administration in the form of a water district and interim administration. The safe harbor provision of the Basin 36 Interim Stipulated Agreement is unique and separate from Basin 35 because of the relative priorities of the parties. In light of the fact that there exists a number of groundwater rights which have priorities senior in time to some of the spring user water rights, including Clear Springs' water rights, Clear Springs agreed to modify the safe harbor provision to accurately reflect the priorities of the parties. The modifications removed the specific references to the ground or surface identifier to a particular water right. Instead, the language became generic. However, all modifications made to the safe harbor provision did not in any way modify the intent of the provision as described herein.

19. That following the Director's order approving the Stipulated Agreement and the creation of Water District No. 130, which encompassed the Thousand Springs Reach, Clear Springs did inquire with the Department of Water Resources into how administration of Clear Springs' water rights would occur.

20. That following the request the Director did inspect the diversion structures of both Clear Springs and Clear Lakes and request that the parties submit any information which the parties determined pertinent to the administration of water from the common source through the issuance of watermaster instructions.

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21. That at no time during discussions or submittals on the development of watermaster instructions did Clear Lakes state or argue that administration of the water rights from the common source was not subject to administration and that the Interim Stipulated Agreement prevented or precluded administration of the Clear Springs water rights and Clear Lakes water rights.

22. That during the negotiations of the Interim Stipulated Agreement, Clear Springs and Clear Lakes were involved in a water administration dispute before the Idaho Supreme Court. That dispute involved the priorities to water flowing from the common springs source near the parties' facilities. At no time did any party or Clive Strong raise the issue of resolving that dispute in the negotiations. Further, after nearly ten years of litigation involving the dispute between Clear Springs and Clear Lakes, and the pending decision by the Idaho Supreme Court, Clear Springs would not have been willing to discuss this water dispute in the context of the negotiations of this agreement.

Further you Affiant sayeth naught.

Larry W. Cope

STATE OF IDAHO)
)ss.
County of Ada)

On this 3rd day of March, 2003, before me, the undersigned, a Notary Public, in and for said State, personally appeared LARRY W. COPE, known to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

KAREN JOY EDWARDS NOTARY PUBLIC STATE OF IDAHO

Notary Public for State of Idaho
Residing at: Meridian, Idaho
My commission expires: 8/2/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2003, I caused to be served a true and correct copy of the foregoing *AFFIDAVIT OF LARRY W. COPE* via to the following by U.S. Mail, postage prepaid:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

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James G. Reid
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Ringert Clark
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Southern Regional Office
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Travis L. Thompson

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EXHIBIT 1

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Basin 36 Mitigation

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July 13, 2001

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

Re: **Groundwater Management Area – Basin 36**

Dear Karl:

Clear Springs Foods, Inc., has asked that we request your designation of Basin 36 as a Groundwater Management Area pursuant to I.C. § 42-233(b).

Water measurements on Thursday, July 12, 2001 at some Clear Springs facilities are the lowest the company has ever experienced.

Such a designation would provide a mechanism for the Department to facilitate some level of administration in the remainder of 2001 and future years as the State's water management template is being fine tuned.

Respectfully,

BARKER, ROSHOLT & SIMPSON, LLP
Attorneys for Clear Springs Foods, Inc.

By: John A. Rosholt
JOHN A. ROSHOLT

JAR/jl
cc: Clear Springs Foods, Inc.
Phil Reberger

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jl\jar\letters\Dreher 9

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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	REPLY TO CLEAR SPRINGS INC.'S RESPONSE TO CLEAR LAKES TROUT COMPANY'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys of record, Ringert Clark, Chartered, and hereby submits this Reply to Clear Springs Foods, Inc.'s Response to Clear Lakes Trout Company Inc.'s Motion for Summary Judgment on file in the above captioned matter. This Reply is filed pursuant to, and in compliance with, the Hearing Officer's February 11, 2003 Scheduling Order.

SUMMARY

Clear Springs' Response to Clear Lakes' Motion for Summary Judgment rests entirely upon one premise: that the language of the Interim Stipulated Agreement which protects junior surface water users from curtailment and reduction to satisfy senior water rights must be completely ignored.

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Clear Springs sets forth a variety of reasons for its argument, almost all of them supported by various kinds of extrinsic evidence. The Hearing Officer must completely disregard all of Clear Springs' arguments for the simple reason that the language of the Interim Stipulated Agreement cannot be interpreted to do anything other than what it says.

Paragraph 2.8 of the Interim Stipulated Agreement clearly and unambiguously states that parties holding senior surface water rights "agree not to seek either judicially or administratively the curtailmentor reduction, other than as provided in paragraph 2.7, of any junior water rights" held by parties to the agreement. The Director of the Idaho Department of Water Resources agrees that the language of Paragraph 2.8 clearly provides protection from curtailment to Clear Lakes. *See Affidavit of Charles L. Honsinger*, Exhibit H (Deposition of Karl J. Dreher, Volume II, (hereinafter "Dreher Depo.") p. 195, lns. 3 - 14; p. 217, lns. 10 - 23; p.219, ln. 7 - p. 222, ln. 4. From an examination of the draft agreements preceding the Interim Stipulated Agreement, one can see that the "safe harbor" language was specifically changed from providing protection from curtailment or reduction only to junior groundwater users, to providing such protection to all junior water rights. *See* Dreher Depo., Exhibit D, ¶¶ 1.6, 2.7; Exhibit E, ¶¶ 1.5, 2.7; Exhibit F, ¶¶ 1.5, 2.8, *Affidavit of Charles L. Honsinger* Exhibit C, ¶¶ 1.5, 2.8. As Clear Lakes explained in its Motion for Summary Judgment, the reason for providing safe harbor to all water rights was that surface water users (such as Clear Lakes) could not be expected to forgo the priority of their water rights if more senior surface water users could attempt to force the juniors to curtail their diversions of surface water with no recourse against more junior water rights. See *Motion for Summary Judgment*, at p. 9. The Director himself acknowledged the importance of this accomodation. Dreher Dep., p. 221, ln. 22 - p. 222, ln. 4. Clear Lakes has

previously argued that because the Director understands the language of the Interim Stipulated Agreement to protect junior surface water users from curtailment, he has a duty to administer water rights in accordance with that language. Motion for Summary Judgment, pp. 6 - 10.

Clear Springs also knows that the language of the Interim Stipulated Agreement provides protection to Clear Lakes from Clear Springs' actions to curtail or reduce Clear Lakes' junior water right. This is exactly why Clear Springs attempts to fashion an entirely "new" Interim Stipulated Agreement (which does not provide protection from curtailment or reduction to junior surface water users) out of what it calls the "Agreement in Principle" and the Director's thoughts regarding the Interim Stipulated Agreement. Clear Springs also conveniently ignores and misconstrues certain provisions in the Interim Stipulated Agreement to support its argument. In essence, Clear Springs wants the hearing officer to consider everything it submits except for the "safe harbor" language itself.

I. The Changes Made to the "Agreement in Principle" Support the Clear and Unambiguous Safe Harbor Language of the Interim Stipulated Agreement

The document referred to by Clear Springs as the "Agreement in Principle" was in fact not an "agreement" at all, but was merely a letter (containing an attached draft document entitled "Agreement in Principle") from counsel for Clear Springs to the Director explaining that the parties were negotiating an agreement which would postpone the Director's curtailment of certain groundwater diversions. *See* Exhibit B to *IDWR Staff Memorandum*.[1] Other parties, including Clear Lakes also submitted letters to the Director at this time explaining that the parties were in the process

[1] The "Agreement in Principle" should not even be considered by the hearing officer because it is extrinsic evidence offered to interpret the clear and unambiguous language of the Interim Stipulated Agreement. *Bilow v. Preco, Inc.*, 132 Idaho 23, 28, 966 P.2d 23, 28 (1998). (No outside information is necessary to assist in the interpretation of a clear and unambiguous agreement.)

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of negotiating an agreement. *See Affidavit of John K. Simpson*, Exhibits C, D. The "Agreement in Principle" was specifically changed through this negotiation and drafting process to provide "safe harbor" not only to North Snake Ground Water District, but to all junior and surface water users. *See* Dreher Depo. Exhibits D, E, F. The result of the drafting process was the Interim Stipulated Agreement itself, which, in contrast to the "Agreement in Principle," specifically provides "safe harbor" to junior groundwater users and junior surface water users. Thus, Clear Springs' reference to the "Agreement in Principle" actually supports Clear Lakes' position that the Interim Stipulated Agreement was specifically drafted to provide junior surface water users "safe harbor" from calls by senior surface water users.

Clear Springs is so desperate to avoid the "safe harbor" language of the Interim Stipulated Agreement that it must refer to the initial correspondence between the parties and the Director in an attempt to support its argument. The hearing officer should simply ignore Clear Springs' arguments regarding the "Agreement in Principle" first because extrinsic evidence is not admissible nor needed to interpret or construe the Interim Stipulated Agreement, and second, because the changes made to the "Agreement in Principle" negate all of Clear Springs' arguments that the intent of the Interim Stipulated Agreement was not to protect junior surface water users.

II. The Director's Position as to the Meaning of the Interim Stipulated Agreement is Irrelevant

Clear Springs spends much of its Brief explaining what the Director "thought" regarding the Interim Stipulated Agreement. However, what the Director thought about the Interim Stipulated Agreement is irrelevant because the clear and unambiguous language of the Agreement needs no extrinsic evidence for its interpretation. The Director is not a party to the Agreement, as he has

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repeatedly stated. Dreher Depo. p. 198, lns. 13 - 17; p. 199, lns 6 -7; p. 200, lns. 4 - 5. Therefore, what the Director thinks about the intent of the Interim Stipulated Agreement has no bearing upon its interpretation. *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, ___, 53 P.3d 330 , 333 (2002) ("The primary objective in interpreting a contract is to discover and give effect to the intent of the parties") (emphasis added). Moreover, Clear Springs never discusses the Director's testimony regarding the language of the Interim Stipulated Agreement; obviously because that testimony contradicts Clear Springs' position.

However, to the extent that the Director's interpretation of the Interim Stipulated Agreement is in any important, his testimony regarding the meaning of the "Safe Harbor" provision is consistent with its clear and unambiguous language. The Director acknowledges that he had little input into the Interim Stipulated Agreement. Dreher Depo. p. 195, ln. 15 - p. 196, ln. 8; p. 206, lns. 13 - 15. He also states that he cannot "speak to the context" of the Interim Stipulated Agreement because he was not involved in these negotiations," Dreher Depo., p. 210, lns. 13 - 16, and "wasn't drafting the language." Dreher Depo, p. 207, lns 1- 2. Thus his understanding of the language of the Interim Stipulated Agreement arises exclusively from that language itself. The Director does recognize that "the agreement is what the agreement is," Dreher Depo. p. 196, ln. 8, and that the "Safe Harbor" language provides protection from curtailment to groundwater users and surface water users. Dreher Depo., p. 209, ln. 19 - p. 210, ln. 19; p.217, lns. 10 - 23; p. 221 , lns. 3 - 8. Accordingly, to the extent that the Director's opinion is even relevant to the interpretation of the Interim Stipulated Agreement, he does not in any way contend that the language of the "Safe Harbor" provision does anything other than provide protection from curtailment to both junior groundwater users and surface

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water users.

III. The Language of the Interim Stipulated Agreement Clearly and Unambiguously Protects Clear Lakes From a Call by Clear Springs

Paragraph 2.8 of the Interim Stipulated Agreement provides that signators holding senior priority surface water rights (including Clear Springs) "agree not to seek either judicially or administratively the curtailment or reduction . . . of any junior water rights held by . . . the undersigned" (including Clear Lakes). *See* Exhibit C to *Affidavit of Charles L. Honsinger*. Clear Springs does not deny that the language says exactly that. However, before it even discusses the language of the Interim Stipulated Agreement at the very end of its brief, Clear Springs spends almost its entire Response Brief arguing that events and evidence outside the Interim Stipulated Agreement determine the effect and interpretation of that Agreement.

Clear Springs has its analysis exactly backwards. There simply can be no dispute that the interpretation of the Interim Stipulated Agreement must start with the language of that agreement. *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001). When it finally begins to discuss the language of the Interim Stipulated Agreement, Clear Springs does not argue that Paragraph 2.8 means something different than what it actually says. Instead, Clear Springs seems to argue that the clear and unambiguous language of Paragraph 2.8 should be ignored in favor of what it alleges is the "real" intent of the Interim Stipulated Agreement (as derived from extrinsic evidence and from provisions of the Agreement selected by Clear Springs): to protect only junior ground water users from calls by senior surface water users.

Clear Springs' complete disregard of the language of Paragraph 2.8 directly contradicts the statement of the law in Clear Springs' own brief that "a contract must be construed so as to give

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effect to every part of it, if at all possible." *Response to Motions for Stay and for Summary Judgment* at p. 38 *citing Insurance Associates Corp. v. Hansen*, 111 Idaho 206, 208 (Ct. App. 1986). Clear Springs' interpretation of the Interim Stipulated Agreement gives no effect whatsoever to the language providing "safe harbor" for junior surface water users. Accordingly, Clear Springs' attempt to entirely "wipe out" the language must be dismissed.

IV. No Language in the Interim Stipulated Agreement is in Conflict With the Provision of Safe Harbor for Junior Surface Water Right Holders

Clear Springs states that Clear Lakes attempts to read the "safe harbor" language of Paragraph 2.8 "in isolation." *Response to Motions for Stay and for Summary Judgment* at p. 38. However, it is Clear Springs which reads language of the Interim Stipulated Agreement in isolation by focusing only on those provisions of the Interim Stipulated Agreement which support its position that safe harbor applies only to groundwater users. In fact, Clear Springs' argument makes no sense because Clear Lakes does not in any way attempt to separate the "safe harbor" language from the rest of the Interim Stipulated Agreement. The Paragraph 2.8 "safe harbor" language is entirely consistent, and is not in conflict, with the rest of the Agreement.

The Interim Stipulated Agreement language which Clear Springs alleges that Clear Lakes ignores is still effective when read in conjunction with the language of Paragraph 2.8 providing safe harbor both for groundwater users and surface water, and does not conflict with the intent of the "entire agreement as a whole." The meaning of the Agreement is obvious - it does exactly what it says - it protects junior water right holders from actions by senior water right holders taken to curtail or reduce the junior's water rights.

Clear Springs' argument that Paragraph 2.8 does not provide "safe harbor" to junior surface

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water users fails not only under the language of Paragraph 2.8 itself, but also when examined in the light of Paragraph 1.5 of the Interim Stipulated Agreement. That paragraph provides in relevant part that

> [t]he parties desire to avoid the need for litigation at this time on the nature and extent of the alleged injury to senior priority surface water rights caused by diversions of ground water or surface water under junior priority water rights within Basin 36.

Exhibit C to Affidavit of Charles L. Honsinger, ¶1.5 (emphasis added). The parties to the Interim Stipulated Agreement obviously intended to avoid litigation by protecting junior surface water rights from curtailment both because they stated they intended to do so (¶1.5 of the Interim Stipulated Agreement), and because they in fact did protect junior surface water rights from curtailment (¶2.8 of the Interim Stipulated Agreement). In response to the language of ¶1.5, Clear Springs cites extrinsic evidence of what it alleges was the intent of the parties, and then makes the extremely weak argument that the language "does not change the fundamental basis underlying the agreement." Clear Springs' Response at p. 40.

According to Clear Springs, the basis of the agreement is shown by the "commitments" and "obligations" regarding mitigation. Clear Springs' Response at pp. 42-43. The theory apparently is that because Clear Lakes is not obligated to provide mitigation under the Interim Stipulated Agreement, the intent of the parties could not have been to provide it the "safe harbor" that was also provided those who were obligated to mitigate. However, the best evidence of the intent of the parties is provided by the language of the Interim Stipulated Agreement itself. *USA Fertilizer, Inc. v. Idaho First National Bank*, 120 Idaho, 271, 273, 815 P.2d 469, 471 (1991). If the parties had not intended to provide "safe harbor" to Clear Lakes, the Interim Stipulated Agreement would not have

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so clearly and unambiguously done exactly that.

Clear Springs argues that the first paragraph identifies two "sets" of parties, and that the Interim Stipulated Agreement could be "between" only those two "sets" of parties. This argument is quite a stretch: nothing in the agreement defines that the parties are on opposite "sides." Rather, the language states that the agreement is "between" the parties - some of whom are groundwater users, and some of whom are surface water users. These parties made promises to each other, one of which was that senior surface water right holders would not seek curtailment of either junior groundwater diversions or junior surface water diversions. Whether there were two "sets" of parties or not, this "safe harbor" language is not simply washed away just because Clear Springs believes that certain selected parties to the Interim Stipulated Agreement cannot make promises to each other.

Clear Springs argues that the only invalid provision of the Interim Stipulated Agreement is that portion of Paragraph 2.8 which affords safe harbor to junior surface water users. However, Paragraph 7.1 of the Interim Stipulated Agreement states that the provisions are "not severable." Thus if one portion of the Interim Stipulated Agreement (such as Paragraph 2.8) is found to be invalid, the entire agreement is invalid. "The rule is that where a contract is capable of two constructions, the one making it valid, and the other void, the first ought to be accepted." *Durant v. Snyder*, 65 Idaho 678, 686, 151 P.2d 776 (1944). It is difficult to conceive that Paragraph 2.8 is in any way capable of two different interpretations. However, if it is, the Hearing Officer must interpret the contract so as to preserve its validity.

There is simply no valid argument that Paragraph 2.8 of the Interim Stipulated Agreement means anything other than what it says. Accordingly, Clear Springs' assertions to the contrary should

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be dismissed, and the Hearing Officer should grant summary judgment to Clear Lakes.

V. There Was Mutual Assent Between the Parties to the Interim Stipulated Agreement

" The primary aim in interpreting all contracts is to ascertain the mutual intent of the parties at the time their contract was made. That intent should, if possible, be ascertained from the language of the agreement, as the words used by the parties are deemed to be the best evidence of their intent. Thus, where the parties' intention is clear from the language of their contract, its interpretation and legal effect are to be resolved by the court as a matter of law." *Farnsworth v. Dairymen's Creamery Association*, 125 Idaho 866, 876 P.2d 148 (Ct. App. 1994) (citations omitted).

The mutual intent of the parties to the Interim Stipulated Agreement is clearly expressed in the language of that Agreement. However, despite the clear language of the Agreement, Clear Springs argues that the "heart of the bargain" was the mitigation provided by ground water users in lieu of their curtailment (as established by extrinsic evidence such as the Agreement in Principle, and certain letters to the Director of the Idaho Department of Water Resources); that the provision of "safe harbor" to surface water users does not go that "heart of the bargain;" and that nothing indicates Clear Lakes and Clear Springs' mutual assent to the safe harbor afforded Clear Lakes junior surface water right. Unfortunately for Clear Springs, as a matter of law, the only evidence that can be considered in determining whether there was mutual assent - the language of the Interim Stipulated Agreement itself - establishes that it was clearly the parties' intent to provide "safe harbor" to junior surface water users.

Furthermore, when one examines the "mutuality of assent" argument it is not even supported by the case law Clear Springs quotes. Clear Springs quotes *Hansen v. State Farm Mutual*

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Automobile Insurance Co., 112 Idaho 663 (1987) for the proposition that mutuality of assent applies only to "the heart of the bargain," and apparently (according to Clear Springs' somewhat muddled argument) those provisions that are not part of the "heart of the bargain" may simply be ignored. Clear Springs' Response at p. 46. In actuality however, the facts in *Hansen* were that a District Court had found that an arbitration clause in an insurance contract was unenforceable due to a lack of mutual assent. *Hansen*, at 665 - 666. The Idaho Supreme Court held that the District Court's application of the "mutuality of assent" doctrine to only one of many provisions in the contract was a misapplication of the doctrine, and stated that:

> Mutuality of assent refers to the heart of the bargain. That is, the question of mutuality of assent goes to the formation of a contract as a whole. It does not refer to a single term of a contract unless that term goes to the heart of the bargain as represented by the contract as a whole.

Id, at 669. The Supreme Court then went on to state that "[i]f we were dealing with a contract which had as its primary purpose the arbitration of a disputed issue, the existence or nonexxistence of mutual assent might be a pertinent point of inquiry." *Id.* Obviously, mutuality of assent goes to the contract as a whole. Clear Springs is not arguing that there was no mutuality of assent as to what it alleges to be the "heart of the bargain." Therefore, according to the very case that Clear Springs quotes, lack of mutual assent as to the provision of safe harbor for surface water users simply cannot be raised as an argument.

VI. There was Consideration for the Promises in the Interim Stipulated Agreement

Clear Springs argues that there is no consideration between Clear Springs and Clear Lakes, and that therefore, no contract exists between them. Clear Springs' Response at p. 47. However, it is indisputable that both Clear Lakes and Clear Springs signed the Interim Stipulated Agreement.

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The Interim Stipulated Agreement itself constitutes presumptive evidence of consideration. I.C. §29-103. Clear Springs bears the burden of showing a lack of consideration sufficient to support the Agreement. I.C. §29-104. However, instead of producing any evidence whatsoever, Clear Springs simply alleges a lack of consideration, entirely failing to meet its burden.

Even if Clear Springs had produced any evidence, however, the argument of lack of consideration would have failed. In Idaho, an agreed-to forebearance is sufficient consideration to support a contract. *Eastern Idaho Production Credit Association v. Placerton, Inc.*, 100 Idaho 863, 867 (1980). In this case, Clear Lakes agreed to forebear taking any actions to curtail any water rights (whether groundwater or surface water) that were junior to it.

Consideration may also take the form of a "detriment to the promisee or a benefit to the promisor." *Rule Sales and Service, Inc. v. U.S. Bank National Association*, 133 Idaho 669, 674 (Ct. App. 1999). Here, both Clear Lakes and Clear Springs were accorded a benefit and a detriment under the Interim Stipulated Agreement in that both hold junior surface water rights which would be protected from curtailment or reduction under Paragraph 2.8, and both agreed to refrain from taking any action to curtail or reduce other junior water rights.

A benefit to a third person is also sufficient consideration for a promise. *Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co.*, 240 P. 186, 191 (Idaho, 1925). Here, Clear Lakes not only made a promise to Clear Springs that it would not act to curtail or reduce Clear Springs' junior surface water right, it also promised the same to other parties.

Finally "[w]here a promise is made for the benefit of several persons, it is not essential to a recovery thereon that each of such persons should have contributed to the consideration." *Id.* Thus,

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even if Clear Lakes had not given any consideration for Clear Springs' promise to take no action to curtail or reduce Clear Lakes' surface water rights, consideration sufficient to support the Interim Stipulated Agreement exists. Because Clear Springs has not in any way met its burden to show lack of consideration, and because, in any case, there is clearly consideration to support the Interim Stipulated Agreement, Clear Springs' argument regarding lack of consideration should be disregarded.

VII. Clear Lakes Has Never Argued that the Language of the Interim Stipulated Agreement is Ambiguous

Finally, Clear Springs alleges that the terms of the Interim Stipulated Agreement are ambiguous because Clear Lakes has already created an issue of "material fact" by citing to and discussing earlier drafts of the Interim Stipulated Agreement. This is simply not true. Clear Lakes has never argued that either the Interim Stipulated Agreement as a whole, or the language of Paragraph 2.8 specifically are ambiguous. Instead, it has merely cited the earlier drafts of the Interim Stipulated Agreement to establish the Director's understanding of the Agreement, and to establish the Director's acknowledgement of the accomodation given by Clear Lakes. Moreover, whether Clear Lakes has or has not argued that the prior drafts of the Interim Stipulated Agreement are important to assist in its interpretation has no bearing whatsoever on the legal determination of whether or not the Agreement is ambiguous.

Clear Springs cites evidence outside the Interim Stipulated Agreement as support for its argument that language in the Agreement protecting surface water users from curtailment should be ignored. However, the Hearing Officer cannot look to any evidence outside the Interim Stipulated Agreement unless he determines that the language of the Agreement is ambiguous.

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Because the language of the Interim Stipulated Agreement itself clearly and unambiguously protects Clear Lakes from a call by Clear Springs, the Hearing Officer should enter summary judgment in favor of Clear Lakes. The Motion for Summary Judgment can only be denied if the Hearing Officer determines that the Interim Stipulated Agreement is ambiguous. In that case, this matter must be set for an evidentiary hearing to determine the meaning of the Agreement.

CONCLUSION

For the reasons discussed above and in Clear Lakes' prior briefing, Clear Lakes is entitled to Summary Judgment as to the meaning and applicability of the Interim Stipulated Agreement. Accordingly, Clear Lakes hereby respectfully requests that the Hearing Officer enter an order granting Clear Lakes summary judgment.

Dated this 11th day of March, 2003.

Ringert Clark, Chartered

By: Charles L. Honsinger
Attorneys for Clear Lakes Trout Company

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2003, a true and correct copy of the foregoing was served upon all parties listed below by United States Mail.

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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	RESPONSE TO CLEAR SPRINGS INC.'S MOTION TO DISMISS

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys of record, Ringert Clark, Chartered, and hereby responds to Clear Springs Foods, Inc.'s (hereinafter "Clear Springs") Motion to Dismiss filed on March 3, 2003 in the above captioned matter. This Response is supported by the record herein and by the *Second Affidavit of Charles L. Honsinger* filed herewith.

SUMMARY

Clear Springs raises several issues in its Motion to Dismiss, all of which can be addressed by an examination of the Stipulation for Dismissal filed by IDWR and Clear Lakes in the Gooding County District Court case no. CV-02-00377. In light of that Stipulation, it was clearly the parties' intent that Clear Lakes would bring this action, and that the issues raised by Clear Lakes would be

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heard by the independent hearing officer. Additionally, Clear Springs' arguments contain fallacies and in many cases, do not even make sense. Accordingly, the Motion to Dismiss must be disregarded.

I. Standard of Review

Clear Springs bases its Motion to Dismiss on Rules 12(b)(1) and 12(b)(6) of the Idaho Rules of Civil Procedure. At least some of its arguments are improperly raised in the context of a Motion to Dismiss pursuant to Rule 12(b). Regardless, no equivalent applicable rule to I.R.C.P. 12(b) exists in the Idaho Department of Water Resources' rules for Practice and Procedure, IDAPA 37.01.01. Clear Springs did not set forth a standard by which its Motion to Dismiss should be evaluated in its brief. However, in support of its motion, Springs relied upon facts and documents outside the pleadings. In such a case, I.R.C.P. 12(b) requires that the motion to dismiss be treated as a motion for summary judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure. Therefore, regardless of whether Clear Springs appropriately moved for dismissal under I.R.C.P. 12(b), the appropriate standard under which the issues raised in Clear Springs' Motion to Dismiss should be the same standard set forth in Clear Lakes' Motion for Summary Judgment filed on January 10, 2003.

FACTS

In Gooding County District Court case no. CV-02-00377, Clear Lakes Trout Company, Inc. v. Idaho Department of Water Resources *et. al.*, prior to dismissal of Clear Lakes' action against IDWR, Clear Springs had filed a Motion to Dismiss, and IDWR had filed a Motion for Summary Judgment. See *Second Affidavit of Charles L. Honisnger*, Exhibits B,C. The court scheduled these procedural arguments for a summary judgment hearing. By failing to state the procedural nature of these motions, Springs' memorandum in the case at bar disingenuously implies that these "dispositive

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motions" presented substantive issues on the merits. Contrary to Springs' implication, the court did not hear any "dispositive motion" on any substantive issue on the merits presented by the pleadings.

In its response, Clear Lakes presented several arguments that it was not precluded from proceeding with the original action in district court by the doctrines of primary jurisdiction or exhaustion of administrative remedies. In one of these arguments, Clear Lakes relied upon the common law exception that the exhaustion doctrine does not apply where an agency acts outside its authority. Clear Lakes argued that IDWR was required to administer water rights in Water District 130 in accordance with the Interim Stipulated Agreement, and therefore, IDWR had no authority to curtail Lakes' diversions.

Prior to the hearing on these procedural issues, Clear Lakes and IDWR reached an agreement to avoid litigating the issues presented by Clear Lakes' complaint in district court. As advocated by IDWR and Clear Springs in their "dispositive motions," Clear Lakes agreed to pursue the issues raised by its complaint through administrative proceedings before IDWR, rather than through an original action in district court. This agreement was formalized in a *Stipulation for Dismissal* between IDWR and Lakes. *Second Affidavit of Charles L. Honsinger,* Exhibit A. Clear Springs refused to enter the *Stipulation*. In the following provisions of the *Stipulation*, IDWR acknowledged Lakes' right to administrative review, and committed to provide an administrative hearing or hearings through an independent hearing officer:

> 3. IDWR acknowledges Clear Lakes' 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 Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201 and 36-07218 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 implement IDWR's ongoing responsibility to

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administer the water rights, with 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.

5. The Director of IDWR commits to assign an independent hearing officer who is not an employee of the Idaho Department of Water Resources to preside over the administrative hearing on the petition referred to in paragraph 3 above.

Second Affidavit of Charles L. Honsinger, Ex. A, p. 2.

Based upon these commitments that Clear Lakes would be able to pursue the issues raised in its Complaint through administrative proceedings before an independent hearing officer, Clear Lakes agreed that "the Court may order the above-captioned action dismissed with prejudice." *Id*, ¶ 2. The Stipulation further provides that: "The parties shall only be bound by these stipulated terms if the Court enters an Order of Dismissal consistent with the terms of this Stipulation for Dismissal." *Id.*

On December 10, 2002, the district court heard argument on the *Stipulation for Dismissal*. Clear Springs objected to the stipulated dismissal because it understood that a dismissal based on the stipulation would not constitute a decision on the merits which would preclude Clear Lakes from seeking relief from IDWR's actions through administrative proceedings, or from Clear Springs' actions through the action currently before this court. *See Affidavit of John K. Simpson,* Exhibit Q, p. 6, ln. 2 - P. 7, ln. 4. Clear Springs argued that it would be prejudiced by the dismissal because, in its view, the dismissal would not resolve or provide "finality" or "certainty" as to the substantive issues presented by Clear Lakes' Complaint. Id. The court found that there was no justification for denying the dismissal, since it was stipulated by the Plaintiff and the Defendant, and ordered "that

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Plaintiff's Complaint be dismissed in its entirety with prejudice pursuant to the terms of the December 9, 2002 Stipulation for Dismissal." *Simpson Affidavit*, Ex..P, p. 2.

As provided in the *Stipulation for Dismissal*, on December 17, 2002, Lakes' filed its *Petition to Initiate Contested Case* with IDWR.

ARGUMENT

I. The Director's Interpretation of the Interim Stipulated Agreement is Not Entitled to Deference

Clear Springs raises the issue of "deference" that should be accorded the Director in the context of a Motion to Dismiss pursuant to I.R.C.P. 12(b)(6). Essentially, Clear Springs alleges that Clear Lakes has failed to state a claim upon which relief can be granted because the Director must somehow be given "deference" for his failure to administer Clear Lakes' and Clear Springs' water rights pursuant to the terms of the Interim Stipulated Agreement. *Clear Springs' Motion to Dismiss*, pp. 22 - 25. The argument seems to be that because the Director's February 19, 2002 Order Creating Water District No. 130 was a "final order" for purposes of appeal, the Director can interpret and enforce the Interim Stipulated Agreement, as required by the terms of that Order, in any way he chooses, and that no party to the Interim Stipulated Agreement may ever challenge the Director's enforcement or interpretation of that Agreement. This argument is simply ridiculous.

First, the Director's January 18, 2002 Order Approving Stipulated Agreements provides that it is the Director's duty to "enforce the provisions of the [Interim Stipulated Agreemment]' and that

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"[i]n the event of a breach of [the Interim Stipulated Agreement], any party to that Agreement may petition the Director for appropriate relief." *Affidavit of Charles L. Honsinger*, Exhibit D, Conclusions of Law, ¶¶ 4, 7. Obviously, the January 18, 2002 Order provides for a Petition such as that submitted by Clear Lakes in this action when a breach of the Interim Stipulated Agreement such as that committed by Clear Springs occurs.

Second, the February 19, 2002 Final Order Creating Water District No. 130 also provides that the Director will enforce the provisions of the Interim Stipulated Agreement. *Affidavit of Charles L. Honsinger*, Exhibit E, ¶ 10.c. The Director himself agrees that enforcement of the provisions of the Interim Stipulated Agreement is exactly what is contemplated by his February 19, 2002 Order. *Affidavit of Charles L. Honsinger*, Exhibit G, p. 223, lns. 13 - 17 (hereinafter "Dreher Depo."). It is patently ridiculous to argue that the Director has "enforced" the terms of the Interim Stipulated Agreement when he has curtailed Clear Lakes' junior water right that is so clearly and unambiguously protected from curtailment or reduction by the "safe harbor" language of that Agreement.

Third, Clear Springs argues that the Director should be given "deference" in a proceeding that is before the director on review. The case law that Clear Springs cites in support of its "deference" argument is applicable to judicial review of an agency's interpretation of that agency's rules, not the agency's review of the Director's interpretation of an agreement to which he was not even a party. In essence, Clear Springs is requesting that the Director give himself "deference" for his own improper interpretation of the terms of an agreement that he had a duty to enforce - a clearly ridiculous argument.

Fourth, the interpretation of a clear and unambiguous contract is a question of law. *State v. Barnett*, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999). The Director's interpretation of this

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contract cannot in any way rest on an allegation that this is "a matter peculiarly within the agency's field of expertise" or one which "concerns internal agency matters" as is alleged by Clear Springs. Accordingly, the Director's interpretation of the contract is not afforded any deference.

Finally, the Director is not a party to the Interim Stipulated Agreement, as he has repeatedly stated. Dreher Depo. p. 198, lns. 13 - 17; p. 199, lns 6 -7; p. 200, lns. 4 - 5. Therefore, what the Director thinks about the intent of the Interim Stipulated Agreement has no bearing upon its interpretation. *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, ___, 53 P.3d 330 , 333 (2002) ("The primary objective in interpreting a contract is to discover and give effect to the intent of the parties") (emphasis added). However, to the extent that the Director's interpretation of the Interim Stipulated Agreement is in any way important, his testimony regarding the meaning of the "Safe Harbor" provision is consistent with its clear and unambiguous language. The Director acknowledges that he had little input into the Interim Stipulated Agreement. Dreher Depo. p. 195, ln. 15 - p. 196, ln. 8; p. 206, lns. 13 - 15. He also states that he cannot "speak to the context" of the Interim Stipulated Agreement because he was not involved in these negotiations," Dreher Depo., p. 210, lns. 13 - 16, and "wasn't drafting the language." Dreher Depo, p. 207, lns 1- 2. Thus his understanding of the language of the Interim Stipulated Agreement arises exclusively from that language itself. The Director does recognize that "the agreement is what the agreement is," Dreher Depo. p. 196, ln. 8, and that the "Safe Harbor" language provides protection from curtailment to groundwater users and surface water users. Dreher Depo., p. 209, ln. 19 - p. 210, ln. 19; p.217, lns. 10 - 23; p. 221 , lns. 3 - 8. Accordingly, to the extent that the Director's opinion is even relevant to the interpretation of the Interim Stipulated Agreement, he does not in any way contend that the language of the "Safe Harbor" provision does anything other than provide protection from

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curtailment to both junior groundwater users and surface water users. Accordingly, the Director's previous "interpretation" of the Interim Stipulated Agreement is entitled to no deference.

II. The Stipulated Dismissal of Clear Lakes' Action Against IDWR Does Not Preclude this Administrative Action

Clear Springs asserts that the stipulated dismissal of Clear Lakes' prior action to enjoin IDWR from curtailing Clear Lakes' water rights precludes Clear Lakes from bringing this administrative action. Springs asserts that this action is barred by both components of *res judicata*: claim preclusion and issue preclusion (collateral estoppel).

Before evaluating each of these defenses, it is important to understand the stipulated dismissal of Lakes' action against IDWR. In the "dispositive motions," IDWR and Springs filed in Lakes' original action against IDWR for an injunction, IDWR and Clear Springs each asserted that Clear Lakes' action should be dismissed on procedural grounds, because Clear Lakes was required to exhaust administrative remedies prior to seeking judicial review. *Second Affidavit of Charles L. Honsinger*, Exhibits B, C. In exchange for IDWR's agreement to provide Clear Lakes an opportunity for an administrative hearing before and independent hearing officer, Clear Lakes agreed to dismiss its action for an injunction in the *Stipulation for Dismissal* filed with the district court. *Second Affidavit of Charles L. Honsinger*, Exhibit A. Clear Lakes and IDWR agreed to dismiss the action "with prejudice" to preclude Clear Lakes from filing another original action for injunction against IDWR. *Id.* As clearly evidenced by IDWR's agreement to provide Lakes an opportunity for administrative review, this is the only preclusive effect of the Lakes' agreement to dismiss the action with prejudice. The court's order dismissing the action was specifically premised upon the *Stipulation*, which provided that it would not bind the parties if the action was not dismissed

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consistent with the *Stipulation*'s terms. *Affidavit of John K. Simpson*, Exhibit P.

In its motion and supporting memorandum, Clear Springs completely ignores the terms of the *Stipulation* between IDWR and Clear Lakes, and attempts to expand the meaning and effect of phrase "dismissal with prejudice" in the court's *Order of Dismissing Complaint Pursuant to Stipulation for Dismissal*. By its own terms, the language of the court's *Order* cannot be read in isolation of the Stipulation, nor can the phrase "dismissal with prejudice" be interpreted without reference to the agreement between IDWR and Clear Lakes which was the basis for the stipulated dismissal. *See Hughes v. Salo*, 203 Mont. 52, 60, 659 P.2d 270, 274 (1983). Clearly, the only preclusive effect intended by the parties and incorporated into the court's *Order* was to bar Clear Lakes from suing IDWR in a second original action for injunction to prevent IDWR's curtailment of Clear Lakes' water rights.

This is not at all inconsistent with the recognition in *Kawaii Farms Inc. v. Longstreet*, 121 Idaho 610, 826 P.2d 1322 (1922) of the *res judicata* effect of an unqualified stipulation for dismissal with prejudice. The stipulation between the parties in that case did not specifically provide for administrative review, as in this case. As explained by the Idaho Supreme Court: "The difference between a dismissal without prejudice and a dismissal with prejudice is that the former permits the plaintiff to refile the complaint as if it had never been filed, while the latter bars the refiling of the dismissed complaint." *Castle v. Hays* 131 Idaho 373, 957 P.2d 351 (1998). The use of either phrase does not, however, foreclose the inquiry into the effect of an order of dismissal. In *Rodriguez v. Dept. of Correction*, 136 Idaho 90, 29 P.3d 401 (2001) for example, the Idaho Supreme Court held that there was issue preclusion even though a dismissal without prejudice was entered, where the plaintiff had a full opportunity to argue the merits of his claim, and the district court entered a

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III. The Arguments of "Waiver" and Failure to Timely Appeal Are Not Applicable

Clear Springs also argues that because Clear Lakes did not avail itself of certain statutory and regulatory processes to address IDWR's actions, its complaint must be dismissed because Clear Lakes had an adequate remedy at law - the right to "appeal" IDWR's Notice to the Director.

A. Clear Lakes' Remedy in Response to IDWR's Actions Has Always Been Unclear

It is important in the context of these arguments that the hearing officer recognize that Clear Lakes never knew, and does not to this day know, exactly what its remedies were with respect to the Watermaster Instructions. The watermaster instructions directly affected Clear Lakes' rights. However, the watermaster instructions contain no reference to Clear Lakes' remedy. The Director explained that he could have initiated a contested case regarding the instructions, but chose not to do so. *Affidavit of John K. Simpson*, Exhibit J, p. 182, ln. 20 - p. 183, ln. 15. The Director opined that he could have issued the instructions through the use of a preliminary order, but again chose not to do so because "the matter was complex. And the end product was directed more to the watermaster than the water users." *Id*, p. 181, ln. 12 - p. 182, ln. 13. The Director also explained that the reason he did not include a provision in the watermaster instructions providing for their review under I.C. §42-1701A(3), was that the watermaster instructions were issued to the watermaster, and that the watermaster could not seek review of the instructions. *Id*, p. 189, lns. 5 - 14. Rather than specifying remedies in the instructions, the responses of the Director and his counsel, when questioned by Clear Lakes about its remedies, were to initiate litigation and seek an injunction.

The only notice Clear Lakes ever had with respect to any remedy it might have was in the June 19, 2002 Notice of Intent to Redistribute Water, which gave Clear Lakes 15 days to petition the Director for a hearing under I.C. §42-1701A(3), but specified that the curtailment would occur in

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decision addressing the claim. *Rodriguez*, 136 Idaho at 94.

A. The Judgment in the Gooding County District Court Action was Not on the Merits

Springs states that claim preclusion requires that the prior action be "between the same parties upon the same claim where there is a valid final judgment on the merits that was rendered by a court of competent jurisdiction." Springs Motion to Dismiss pp. 25 - 26. 7. However, Springs has failed to show that these requirements are met in this case.

As previously discussed, the Gooding County District Court's *Dismissal* must be construed in terms of the *Stipulation for Dismissal* between IDWR and Clear Lakes. The *Dismissal* precludes any future attempt by Clear Lakes to sue IDWR in district court, while expressly providing Clear Lakes an opportunity to for administrative review of the issues Clear Lakes raised. There was no hearing on the merits of the case, and, in fact, there was no hearing on the procedural issues raised in IDWR's and Springs' "dispositive motions."

B. Issue Preclusion Does Not Bar Clear Lakes' Issues in this Action

Collateral estoppel (issue preclusion) "bars relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." Id. at 661. "The contested issue must have been litigated and necessary to the judgment earlier rendered." Id.

This doctrine cannot be applied here. First, as discussed above, no issues were litigated in the earlier action. Rather, a stipulated dismissal was entered into short of actual litigation of the issues. That stipulated dismissal provided that Clear Lakes could raise the issues raised in the District Court Action through this administrative action. Issue preclusion cannot be applied where the issues were not actually decided in the earlier action. See Mastrangelo v. Sandstrom, Inc., 137 Idaho 844, ___, 55 P.3d 298, 302 (2002).

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14 days, and stated that any petition submitted "may not" stay the redistribution - forcing Clear Lakes to immediately begin moving its fish to prevent massive losses when the curtailment occurred. There simply was no opportunity offered by IDWR to address the issues prior to the proposed curtailment. Clear Lakes' only reasonable remedy (and that which the Director and his counsel advised Clear Lakes to pursue) was to seek an injunction in district court to prevent the irreparable damage wrought by curtailment of Clear Lakes' water supply.

CONCLUSION

Clear Springs' Motion to Dismiss is premised upon its allegation that "deference" must be given to the Director for his failure to enforce the Interim Stipulated Agreement, upon its allegation that Clear Lakes is precluded from bringing this action pursuant to the Dismissal with Prejudice of Clear Lake's action for injunction against IDWR in Gooding County District Court, and its allegation that Clear Lakes has failed to timely appeal the Notice of Intent to Redistribute. All of these arguments contain fallacies, but the one common thread among them is that all are countered by the fact that the Gooding County District Court's Order of Dismissal must be read in conjunction with the Stipulation for Dismissal. When the Stipulation for Dismissal is examined it is obvious that the intent between IDWR and Clear Lakes was that Clear Lakes would be able to raise any issues it had previously raised in the District Court proceeding in its Petition. Clear Lakes has done exactly what was contemplated by the Stipulation. Accordingly, Clear Springs' Motion to Dismiss must be disregarded, and this action must proceed forward.

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Dated this 11th day of March, 2003.

Ringert Clark, Chartered

By: Charles L. Honsinger
Attorneys for Clear Lakes Trout Company

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2003, a true and correct copy of the foregoing was served upon all parties listed below by United States Mail.

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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	SECOND AFFIDAVIT OF CHARLES L. HONSINGER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss
COUNTY OF ADA)

CHARLES L. HONSINGER, being first duly sworn upon his oath, deposes and says that:

1. I am the attorney for Clear Lakes Trout Company, the Plaintiff in the above-entitled action, and make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. Attached hereto as Exhibit "A" is a true and accurate copies of the Stipulation for Dismissal filed in Gooding County District Court case no. CV-02-00377, Clear Lakes Trout Company, Inc. v. Idaho Department of Water Resources *et. al.*

3. Attached hereto as Exhibit "B" is a true and accurate copy of the Motion to Dismiss

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filed by Clear Springs Trout, Inc. in Gooding County District Court case no. CV-02-00377, Clear Lakes Trout Company, Inc. v. Idaho Department of Water Resources *et. al.*

4. Attached hereto as Exhibit "C" is a true and accurate copy of the Motion for Summary Judgment filed by the Idaho Department of Water Resources in Gooding County District Court case no. CV-02-00377, Clear Lakes Trout Company, Inc. v. Idaho Department of Water Resources *et. al.*

Further your affiant sayeth naught.

Dated this 11th day of March, 2003.

Charles L. Honsinger

Sworn to and subscribed before me this 11th day of March, 2003.

Notary Public for Idaho
Residing in Boise, Idaho
My Commission Expires: 2/20/08

KATIE R. MOSER NOTARY PUBLIC STATE OF IDAHO

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2003, a true and correct copy of the foregoing was served upon all parties listed below by United States Mail.

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Exhibit A

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DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

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

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130 Defendants, and CLEAR SPRINGS FOODS, INC., Intevener/Defendant.	Case No. CV-02-00377 STIPULATION FOR DISMISSAL

COME NOW the Plaintiff, CLEAR LAKES TROUT COMPANY ("Clear Lakes"), and the Defendants IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER and CINDY YENTER (jointly "IDWR"), and stipulate, pursuant to the provisions of I.R.C.P. 41(a)(1), that the Court may order the dismissal of the above-captioned action in accordance with the following stipulated terms:

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STIPULATION

The undersigned parties, through their respective counsel of record, hereby stipulate and agree as follows:

1. The parties enter into this Stipulation for Dismissal in order to avoid the need for further litigation before the Court in the above-captioned action.

2. Upon the Court's approval of this Stipulation for Dismissal, the Court may order the above-captioned action dismissed with prejudice, each of the parties hereto to bear its own costs and attorney fees.

3. IDWR acknowledges Clear Lakes' 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 Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218 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 implement 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.

5. The Director of IDWR commits to assign an independent hearing officer who is not an employee of the Idaho Department of Water Resources to preside over the administrative hearing on the petition referred to in paragraph 3 above.

6. The parties shall only be bound by these stipulated terms if the Court enters an Order of Dismissal consistent with the terms of this Stipulation for Dismissal.

Based upon the foregoing, Clear Lakes and IDWR hereby respectfully request that the Court enter an Order of Dismissal consistent with the terms and conditions set forth in this Stipulation for Dismissal.

Dated this 9th day of December, 2002.

Daniel V. Steenson
Ringert Clark, Chartered
Attorneys for Plaintiff Clear Lakes Trout Company

Dated this 9th day of December, 2002.

Philip J. Rassier
Office of the Attorney General
Attorneys for Defendants Idaho Department of Water Resources, Karl Dreher and Cindy Yenter

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CERTIFICATE OF SERVICE

I certify that on December 9, 2002, I served copies of this document, including all attachments by facsimile and by U.S. Mail to the following:

Phil Rassier
Deputy Attorney General
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83706
Fax: (208)327-7866

Mr. John Simpson
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139
Fax: (208)344-6034

Person serving documents

Exhibit B

EXHIBIT B

MICRO

John K. Simpson, ISB # 4242
Travis L. Thompson, ISB # 6168
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Clear Springs Foods, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF GOODING

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, v. IDAHO DEPARTMENT OF WATER RESOURCES, Karl J. Dreher, Director of the Idaho Department of Water Resources, and Cindy Yenter, Watermaster for Water District 130 Defendants.	Case No. CV-02-00377 CLEAR SPRINGS FOODS, INC.'S MOTION TO DISMISS

Intervenor CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through counsel of record, hereby moves this Court for an order dismissing the complaint filed by Clear Lakes Trout Company ("Clear Lakes") pursuant to I.R.C.P. 12(b). The grounds for this motion are as follows:

1. IDWR has "primary jurisdiction" over this dispute and therefore Clear Lakes' complaint must be dismissed pursuant to I.R.C.P. 12(b)(1).

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2. Clear Lakes has failed to exhaust all administrative remedies and therefore the complaint must be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

3. Clear Lakes had an adequate remedy at law therefore the complaint and request for extraordinary relief must be dismissed pursuant to I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

4. This motion is further supported by the *Memorandum in Support of Motion to Dismiss* and accompanying records and files in this matter.

5. Clear Springs respectfully requests oral argument on this motion, preferably prior to, or concurrent with the hearing on IDWR's motion for summary judgment.

DATED this 22nd day of October, 2002.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

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CERTIFICATE OF SERVICE

I certify that on October 22nd 2002, copies of this *Clear Springs Foods, Inc.'s Motion to Dismiss* were sent via United States mail to the following:

Original:

Gooding County Court Clerk
624 Main
P.O. Box 417
Gooding, Idaho 83330

Copies:

Phil Rassier
Deputy Attorney General
Idaho Department of Water Resources
1301 North Orchard
Boise, Idaho 83720-0098

Mr. Charles L. Honsinger
Ringert Clark
455 S. Third Street
P.O. Box 2773
Boise, Idaho 83701-2773

Travis L. Thompson

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Exhibit C

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EXHIBIT C ... 2003

ALAN G. LANCE
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

PHILLIP J. RASSIER (ISB #1750)
JOHN W. HOMAN (ISB #3927)
GARRICK L. BAXTER (ISB #6301)
Deputy Attorneys General
Department of Water Resources
1301 N. Orchard
P. O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 327-7900
Facsimile: (208) 327-7866

Attorneys for Defendants

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OCT 0 7 2002
RINGERT CLARK

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

CLEAR LAKES TROUT COMPANY, INC. Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES, KARL J. DREHER, Director of the Idaho Department of Water Resources, and CINDY YENTER, Watermaster for Water District 130, Defendants, and CLEAR SPRINGS FOODS, INC., Intervenor.	Case No. CV-02-00377 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Pursuant to Idaho Rule of Civil Procedure 56(b), Defendants, the Idaho Department of Water Resources, Karl J. Dreher, Director of the Idaho Department of Water Resources, and Cindy Yenter, Watermaster for Water District 130, move the court for an order granting summary judgment in favor of the Defendants because there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law.

This motion is supported by Defendants' *Memorandum in Support of Defendants' Motion For Summary Judgment*, the pleadings, and the file in this action.

The first issue presented on summary judgment is whether the action should be dismissed due to the failure of the Plaintiff Clear Lakes Trout Company, Inc. to exhaust its administrative remedies before the Department of Water Resources, in accordance with the requirements of the Idaho Administrative Procedure Act, prior to seeking judicial review of the agency's actions before the district court.

IDWR respectfully requests that the Court stay any further discovery proceedings in this case pending the Court's opportunity to address the preliminary issue regarding exhaustion of administrative remedies.

DATED this 4th day of October, 2002.

ALAN G. LANCE
Attorney General

Phillip J. Rassier

PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water Resources

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DEC 17 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 4th day of October, 2002.

Document Served: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Persons Served:

Daniel V. Steenson, Esq.
James G. Reid, Esq.
Charles L. Honsinger, Esq.
455 S. Third, P.O. Box 2773
P.O. Box 1118
Boise, Idaho 83701-2773

John Simpson, Esq.
Barker Rosholt & Simpson
P. O. Box 2139
Boise, ID 83701-2139

Phillip J. Rassier

PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water Resources

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DEC 17 2002

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MAR 11 2003
Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	MOTION TO STRIKE COPE AFFIDAVIT

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys of record, Ringert Clark, Chartered, and hereby moves the Hearing Officer to Strike the Affidavit of Larry W. Cope filed herein on March 3, 2003. This Motion is made pursuant to IDAPA 37.01.01.260 and IDAPA 37.01.01.600.

I. Standards

IDAPA 37.01.01.600 provides that although a hearing officer presiding over an Idaho Department of Water Resources proceeding is not bound by the Idaho Rules of Evidence, he may exclude evidence that is either irrelevant, or is not of a type commonly relied upon by prudent persons in the conduct of their affairs. IDAPA 37.01.01.600.

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II. Argument

The Cope Affidavit must be stricken from the record in its entirety because it is so defective as to render it completely useless to the hearing officer. The purpose of the Cope Affidavit is to set forth Mr. Cope's opinion regarding the meaning and applicability of the "Safe Harbor" provision in the Interim Stipulated Agreement. For example, Mr. Cope states that the "Agreement in Principle did provide the basis and understanding for moving forward with Interim Stipulated Agreement and at no time during the negotiations in which I participated, was the Agreement in Principle modified, changed or revised." Cope Affidavit, ¶ 14. Whether the "Agreement in Principle" was the basis for the Interim Stipulated Agreement, and whether it was modified, changed or revised is completely irrelevant to the meaning of the Interim Stipulated Agreement, which can be only be interpreted by reading its language.

Mr. Cope states that "[]he intent of the Interim Stipulated Agreement was to enable groundwater users to avoid curtailment." Cope Affidavit, ¶15. He also states that "at no time during the negotiations was it the intent of Clear Springs . . . to provide a safe harbor for anyone other than those parties designated as a mitigating party." Cope Affidavit, ¶ 16. Again, Mr. Cope's statements are in complete contradiction to the language of the Interim Stipulated Agreement itself. Mr. Cope's interpretation of the intent of the Interim Stipulated Agreement is irrelevant because that agreement is the only evidence of the parties' intent which can be considered.

The Cope Affidavit is replete with Mr. Cope's presumptions regarding other parties' intentions, and his own opinions regarding the Interim Stipulated Agreement. It also alleges facts which cannot be assumed from the evidence, such as his allegation that Clear Lakes consented to the document entitled "Agreement in Principle." Cope Affidavit, ¶ 10. Because Mr. Cope's Affidavit

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contains only irrelevant information which is not in any way helpful, and because it assumes facts not in evidence and presumes to speak for other parties, it is in no way the type of evidence "commonly relied upon by prudent persons in the conduct of their affairs." Accordingly, the Cope Affidavit must simply be stricken as completely unhelpful to the issues herein..

Dated this 11th day of March, 2003.

RINGERT CLARK, CHARTERED

By: _____

Charles L. Honsinger
Ringert Clark Chartered
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2003, a true and correct copy of the foregoing was served upon all parties listed below by United States Mail.

John K. Simpson
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701-2139
Fax: (208)334-6034

_____
Person mailing document

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MAR 11 2003
Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708 36-07004, 36--7201, AND 36-07218	AFFIDAVIT OF ANITA KAY HARDY

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

ANITA KAY HARDY, being first duly sworn upon his oath, deposes and says that:

1. I am President of Clear Lakes Trout Company (Clear Lakes), the Petitioner in the above-entitled contested case, and make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. On January 17, 2002, I signed the Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36 ("Interim Stipulated Agreement") as President of Clear Lakes Trout Company. In paragraph 2.8 of the Interim Stipulated Agreement, labeled "Safe Harbor," all "undersigned holders of senior priority surface water rights" agreed "not to seek either judicially or administratively the curtailment or reduction . . . of any junior water rights held by or represented by

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the undersigned within Basin 36 for the term of this agreement." This plain and unmistakable language of the Safe Harbor provision protects Clear Lakes from a call by all "undersigned" senior surface water right holders, and prevents Clear Lakes from making a call against any undersigned junior priority right holders. This protection was necessary to induce Clear Lakes to enter the Interim Stipulated Agreement, because Clear Lakes understood that by entering the Agreement, it was giving up its right to make a call on other junior water right holders. I would not have signed the Interim Stipulated Agreement if the Safe Harbor provision did not protect Clear Lakes from calls by senior water right holders.

3. Pristine Springs Inc. is a commercial aquaculture facility that signed the Interim Stipulated Agreement. Attached hereto as **Exhibit A** is a true and correct copy of a letter signed by Pristine Springs' attorney, Jason R. Miciak (who signed the Interim Stipulated Agreement for Pristine Springs), to James Carlson, a deputy attorney general for the State of Idaho, in which Mr. Miciak states Pristine Springs' understanding of the Safe Harbor provision of the Agreement. Mr. Miciak provided a copy of this letter to us in the course of discussions with the Idaho Department of Water Resources (IDWR) regarding its refusal to enforce the Interim Stipulated Agreement.

4. Blue Lakes Trout Farm Inc. is a commercial aquaculture facility that signed the Interim Stipulated Agreement. Attached hereto as **Exhibit B** is a true and correct copy of a letter signed by Blue Lakes' President, Michael Greene (who signed the Interim Stipulated Agreement for Blue Lakes), to Clive Strong, a deputy attorney general for the State of Idaho, in which Mr. Greene states Blue Lakes' understanding of the Safe Harbor provision of the Agreement. Mr. Greene provided a copy of this letter to us in the course of discussions with IDWR regarding its refusal to enforce the Interim Stipulated Agreement.

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5. The North Snake Ground Water District is a signatory to the Interim Stipulated Agreement. On several occasions, Josephine Beeman, attorney for the North Snake Ground Water District, advised me that she participated in drafting the Agreement, and that she incorporated language into the Safe Harbor provision and in other portions of the Agreement to make sure that it protected holders of junior surface water rights who signed the agreement from calls for water by holders of senior surface water rights who signed the agreement. These changes are reflected in a September 21, 2001 draft of the Agreement. She also advised me that, during negotiations in drafting the agreement, she discussed the changes to the language with John Simpson, the attorney for Clear Springs Foods, Inc. She advised me that she told Mr. Simpson that she believed the provision would actually protect Clear Springs from a call by Clear Lakes to fill Clear Lakes' senior water right no. 36-02659.

6. Orlo Maughan signed the Interim Stipulated Agreement on behalf of Magic Valley Ground Water District. After a meeting in IDWR's office in Twin Falls, Idaho on November 21, 2002, Mr. Maughan advised me that he understood that, under the Safe Harbor provision of the Interim Stipulated Agreement, no party to the agreement could make a call against any other party to the Agreement.

7. Rangen Inc., headquartered in Buhl, Idaho, is the major manufacturer of feed for trout hatcheries in the Magic Valley, a large producer of various agricultural commodities, and owner of a hatchery on Billingsley Creek, tributary to the Snake River in the Thousand Springs reach. Attached hereto as **Exhibit C** is a true and correct copy of a letter signed by Thorleif Rangen, President of Rangen Inc, to Clive Strong, in which Mr. Rangen states his understanding of the Safe Harbor provision of the Agreement. Although Rangen Inc. was not a signatory to the agreement, as

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DEC 17 2003

Mr. Rangen states in the attached letter, Rangen Inc., like many others in the Magic Valley, is relying on their understanding that the Interim Stipulated Agreement protects all junior priority water right holders from calls for water by senior surface water right holders.

8. The North Snake Ground Water District and the Magic Valley Ground Water District represent all holders of ground water rights that signed the interim stipulated agreement. As discussed above, I have learned that these entities understand the Safe Harbor provision of the Interim Stipulated Agreement as I do. The surface water users who signed the agreement are Pristine Springs, Inc., Clear Springs Foods, Inc., Clear Lakes Trout Company, and Blue Lakes Trout Company. Of these, only Clear Springs claims that the Safe Harbor provision of the Interim Stipulated Agreement does not protect junior surface water users who signed the Agreement from calls for water by senior surface water users who signed the Agreement.

Further your affiant sayeth naught.

Dated this 11th day of March, 2003.

Anita Kay Hardy

Sworn to and subscribed before me this 11th day of March, 2003.

Notary Public for ~~Idaho~~ MASSACHUSETTS
Residing in BOSTON, ~~Idaho~~ MASSACHUSETTS
My Commission Expires:
OCTOBER 17, 2008

JAMES H. CAREY JR.

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CERTIFICATE OF SERVICE

I certify that on March 11, 2003, I served copies of this document, including all attachments by facsimile and by U.S. Mail to the following:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

Mr. John Simpson
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139
Fax: (208)344-6034

Person serving documents

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Exhibit A

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JASON R. MICIAK, P.C.

Attorney at Law

139 River Vista Place, Suite 102
P.O. Box 2632
Twin Falls, Idaho 83303-2632

Phone: (208) 734-5444
FAX: (208) 734-5605
Email:jmiciak@yahoo.com

December 3, 2002

James Carlson
Civil Litigation Division
Office of the Attorney General
State of Idaho
Len B. Jordan Building, Lower Level
Boise, Idaho 83720-0010
Fax No. (208) 334-2830

RECEIVED
DEC 0 5 2002
RINGERT CLARK

RE: Water District 130 Stipulated Agreement; Clear Lakes Trout Co. v. Idaho Department of Water Resources

Dear Mr. Carlson,

This is Pristine Springs' letter in support of Clear Lakes' position with respect to the 2001 Stipulated Agreement. Pristine Springs is acutely interested in the resolution of this matter because Pristine Springs also shares a spring resource with other users, some of which have senior water rights to some of Pristine Springs' rights. It is Pristine Springs' position that the Department of Water Resources' interpretation of the interim agreement allowing Clear Springs to "make a call" against Clear Lakes' junior surface right is in direct violation of the stipulated agreement and defeats the underlying principle that is the foundation of the agreement.

First, the language of the agreement is without question unambiguous. This language was intentionally specific because it encompasses much of the incentive included to secure surface users consent to enter the agreement. In essence, surface water users were required to relinquish their seniority for a two-year period. The agreement to relinquish seniority was universal, applicable to both surface and groundwater users. If it were an exclusive concession to groundwater users the agreement creates serious jeopardy for surface water users. Surface water users would be subject to a call by other surface users and yet would be left with no remedy because their seniority over groundwater users was bargained away in the agreement. This serious concern is every bit as applicable among groundwater users and their rights against each other. The above fundamental principle necessitated the clear unambiguous language in the agreement. Any interpretation otherwise vitiates the entire agreement rendering it irrelevant.

COPY

The meeting on November 21, 2002 is legally irrelevant to the States' decision however as a practical matter the agreements value depends largely on the perception of the signatories. Every lawyer who opined on the meaning of the relevant language reaffirmed that the language unambiguously precluded any call by a senior against another surface water user. At the meeting, every party other than Larry Cope of Clear Springs expressed serious concern about the integrity of the agreement if the Department's decision is allowed to stand.

I would strongly recommend that the Attorney General's Office reconsider its support of the Director's initial decision, which even the director admits was not fully informed. There remains an opportunity to reverse the decision and restore the confidence of every signatory other than Clear Springs. To the extent I can be on any assistance in your endeavor I would encourage you to call.

Sincerely,

Jason R. Miciak, P.C.
General Counsel
Pristine Springs Inc.

JRM/anc

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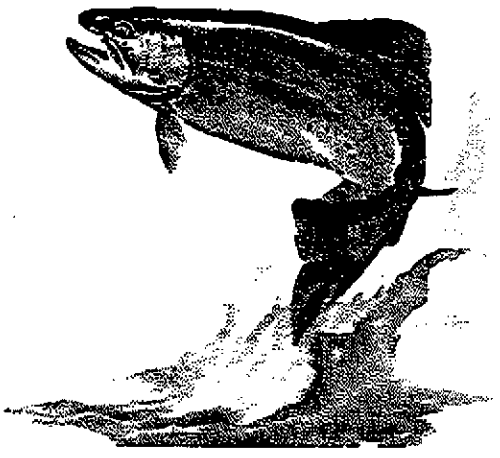
DEC 17 2003

LETTER TO JAMES CARLSON FROM JASON R. MICIAK DATED DECEMBER 3, 2002

Exhibit B

EXHIBIT B

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DEC 17 2019



BLUE LAKES TROUT FARM, Inc.

P.O. BOX 1237 (208) 733-4631
TWIN FALLS, IDAHO 83303-1237
TELEFAX: 208-733-0325

November 19, 2002

Clive Strong
Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 4449
Boise, Idaho 83711

Re: Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36

Dear Mr. Strong:

I am the President of Blue Lakes Trout Company. I signed the Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36 for our company on January 10, 2002. Today, Kay Hardy told me that you will be seeking confirmation of my understanding of the "Safe Harbor" provision (paragraph 2.8) of the Agreement.

My understanding was and is that the Safe Harbor provision protects each company that signed the Interim Stipulated Agreement from a call for distribution of water by every other company that signed the agreement. This protection applies equally to owners of ground water rights and surface water rights. The purpose of the Agreement was and is to provide a two year period without curtailment of water rights held by those who signed the Agreement, to allow the parties and IDWR to work together to develop long term solutions for the declining spring flows from the Eastern Snake Plain Aquifer. Providing "safe harbor" for all parties to the Agreement was essential to encouraging them to sign it and participate in the collective effort to increase water supplies for senior water rights, without curtailments that might put people out of business. To make this work, each party to the Agreement agreed not to seek the curtailment or reduction of any junior water right held by any other party to the Agreement.

Yours very truly,

Michael G. Greene

cc: Kay Hardy

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LETTER FROM BLUE LAKES TROUT FARM INC TO CLIVE STRONG
DATED NOVEMBER 19, 2002

Exhibit C

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DEC 17 2003

Rangen, Inc.
P.O. Box 706 • Buhl, Idaho 83316 • Phone (208) 543-6421
rangen.com
CONNATURAL PRODUCTS

December 3, 2002

Clive Strong
Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 4449
Boise, Idaho 83711

Re: Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36

Dear Mr. Strong:

I am extremely disappointed to learn that, since the meeting in Twin Falls on November 21st, the Idaho Department of Water Resources (IDWR) has done nothing to enforce the Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36. The meeting left no doubt that Clear Springs' call for water and IDWR's curtailment of Clear Lakes' water rights violate the unmistakable language of the Interim Stipulated Agreement. It should also be absolutely clear to IDWR that, with the apparent exception of Larry Cope, the parties to the Agreement understood that it provides "Safe Harbor" to everyone who signed it, including Clear Lakes. I am writing to notify you that I expect IDWR to immediately enforce the Agreement by returning to Clear Lakes' the water which was taken from it in response to Clear Springs' call. This is the only way to restore confidence in the Agreement and in IDWR's administration of water rights in Water District 130.

The implications of Clear Springs' call and IDWR's failure to protect Clear Lakes' right to "Safe Harbor" under the Agreement have far reaching implications for everyone in Basin 36, including Rangen, Inc. Our company is directly involved with spring water users and ground water users in Water District 130. We manufacture feed for trout hatcheries and produce various agricultural commodities. We also own a hatchery on Billingsley Creek. If the Agreement does not provide "Safe Harbor" for Clear Lakes, it does not provide Safe Harbor for anyone. This puts our customers, our neighbors, and us at the very risk the Interim Stipulated Agreement was written to avoid. It is very difficult for people at risk to work cooperatively to solve problems.

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Although our company did not sign the Interim Stipulated Agreement (we were not asked to do so), we are counting it to provide the basis for cooperation among water users in addressing our water supply problems. Because of the Agreement, we are forgoing our right to make a call for delivery of water from Billingsley Creek. Like us, many others who are not technically bound by the Agreement are forgoing their right to seek curtailment of junior water rights. This community-wide restraint is essential to avoiding the chaos that will result if the Safe Harbor provision of the Interim Stipulated Agreement is not enforced.

Clear Springs and IDWR have made a grave mistake that undermines what we are trying to accomplish in Water District 130. IDWR must correct this mistake immediately to avoid any further erosion of confidence in the Interim Stipulated Agreement and in IDWR's administration of water rights in Water District 130.

Yours very truly,

Thorleif Rangen

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DEC 17 2002

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

RECEIVED
MAR 11 2003
Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708 36-07004, 36--7201, AND 36-07218

AFFIDAVIT OF GREGORY KASLO

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

GREGORY KASLO, being first duly sworn upon his oath, deposes and says that:

1. I am vice-president of Clear Lakes Trout Company (Clear Lakes), the Petitioner in the above-entitled contested case, and make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. Watermaster Cindy Yenter's June 19, 2002 "Notice of Intent to Redistribute Flows" advised us that she would reduce Clear Lakes' diversion by 27 cfs in 14 days, on July 3, 2002. This required Clear Lakes to remove 268,520 pounds of trout and idle approximately 17% of the hatchery, which took several days to complete prior to the actual curtailment.

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3. On July 5, 2002 Watermaster Yenter curtailed Clear Lakes' diversion as proposed in her June 19, 2002 Notice.

4. At the time of the July, 2002 curtailment of Clear Lakes' water rights, the stocking density for the hatchery was approximately 10,000 pounds of trout per cfs. This figure represents a minimum stocking density, and it is likely that Clear Lakes' stocking density at the time of any future curtailments would be much greater than 10,000 pounds of trout per cfs, which would have to be prematurely moved, sold or destroyed in the event of additional curtailments of Clear Lakes' water rights.

5. It is unlikely that Clear Springs Foods, Inc. (Clear Springs) needs additional water from the spring source that supplies Clear Lakes with water in order to produce additional fish at this time. Market conditions are such that production within the trout rearing industry has been, at best, flat. Clear Lakes is aware of numerous other commercial operations for which production has remained static or has declined. We have been informed that Clear Springs instituted a reduction at its trout rearing facilities last summer, at the same time that it made its call to curtail Clear Lakes' water rights. We are also aware that, beginning last December, Clear Springs has reduced processing fish at its processing facility from five days per week to four days per week, indicating that Clear Springs is producing fewer fish to process.

Further your affiant sayeth naught.

Dated this 11th day of March, 2003.

Gregory Kaslo

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Sworn to and subscribed before me this 11th day of March, 2003.

Notary Public for Massachusetts
Residing in Boston, Massachusetts
My Commission Expires:
OCTOBER 17, 2008

JAMES H. CAREY JR.

CERTIFICATE OF SERVICE

I certify that on March 11, 2003, I served copies of this document, including all attachments by facsimile and by U.S. Mail to the following:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

Mr. John Simpson
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139
Fax: (208)344-6034

Person serving documents

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DEC 17 2003

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
JAMES G. REID (ISB #1372)
CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708 36-07004, 36--7201, AND 36-07218	CLEAR LAKES REPLY TO CLEAR SPRINGS RESPONSE TO MOTION TO STAY

INTRODUCTION

Lakes' *Petition to Initiated Contested Case ("Petition")* seeks (1) an expedited determination that IDWR's curtailment of Lakes' water rights violates IDWR's duty to administer water rights in Water District 130 in accordance with the *Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36 ("Interim Stipulated Agreement")*, and (2) a hearing to review IDWR's June 13, 2002 *Amended Watermaster Instructions for Distribution Among Water Rights Nos. 36-02659, 36-02708, 37-07004, 36-07201 and 36-07218* ("*Instructions*"). Lakes' *Petition* requested expedited review of the *Interim Stipulated Agreement* "because the Agreement terminates in October, 2003, the issue is not complex, and it can be decided independently of the other issues pertaining to the Director's *Instructions* and the curtailment of Lakes' water rights pursuant to those instructions." The more complex issues pertaining to the Director's *Instructions* will require more

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factual development and briefing, and will address how Lakes' and Springs' water rights should be administered if and when the *Interim Stipulated Agreement* expires. The filing and scheduling of Lakes' *Motion for Summary Judgment* effectively bifurcates administrative review of the *Interim Stipulated Agreement* from review of the Director's *Instructions*.

The Hearing Officer noted during the February 11, 2003 status conference and in his *Scheduling Order*, that the issues presently before him are framed by Lakes' *Motion for Summary Judgment*, and that Lakes' *Motion to Stay Further Curtailments of Clear Lakes' Water Rights* ("*Motion to Stay*") is subsumed within that motion, making a separate hearing on the motion for stay unnecessary. The *Motion to Stay* is mooted if the Hearing Officer grants Lakes' *Motion for Summary Judgment*. If the Hearing Officer denies Lakes' summary judgment motion, the Hearing Officer must decide whether to stay any further curtailments of Lakes' water rights pending the outcome of an administrative hearing on the meaning of the "Safe Harbor" provision of the *Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36* ("*Interim Stipulated Agreement*"). At a future date, depending on the Hearing Officer's decision on the *Interim Stipulated Agreement*, and whether and when the *Agreement* expires, it may be necessary for the Hearing Officer to determine whether a stay is appropriate during administrative review of issues pertaining to the Director's *Instructions*.

ARGUMENT

> Lakes filed its *Motion to Stay* pursuant to IDAPA 37.01.01.780, which provides:
> Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion.

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Springs attempts to engraft onto this rule the standards for preliminary injunction contained in I.R.C.P. 65(e) so that Springs can then argue that those standards are not met. Springs argues that the Hearing Officer should apply the preliminary injunction standards "[b]ecause Idaho law and the Director's June 13, 2002 instructions require the watermaster to reduce Clear Lakes' junior priority right 36-07004." By "Idaho law," Springs means that IDWR's only duty is "to administer decreed water rights according to priority" without regard to any other legal principle or fact. The Hearing Officer should reject each of these fallacious predicates of Springs' argument.

If, however, the Hearing Officer accepts Springs' invitation to apply the standards for preliminary injunction to IDAPA 37.01.01.780, a stay is appropriate because of irreparable injury to Lakes, and/or because Lakes' is likely to succeed on the merits after a hearing to determine the meaning of the *Interim Stipulated Agreement*.

1. **The Standards for Preliminary Injunction do not Apply to a Motion for Administrative Stay**

Springs' invitation to engraft the standards for preliminary injunction onto IDAPA 37.01.01.780 begins with its suggestion that the rule is analogous to I.R.C.P. 65(e). Springs' analogy is apparently based on its perception that the effect of an agency's stay of its own actions is similar to the effect of a district court's preliminary injunction of a defendant's actions. While it is true that an agency's stay and a district court's injunction each affect behavior by suspending action, this similarity does not extend further and does not justify imposing the standards of I.R.C.P. 65(e) upon IDAPA 37.01.01.780.

The distinctions between an administrative stay and a district court injunction are apparent from the language and operation of these rules. The only criterion in IDAPA 37.01.01.780 is that

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a person seeking a stay must be "affected by" the order. I.R.C.P. 65(e), on the other hand, contains four alternative grounds upon which a preliminary injunction may be granted. A district court issues a preliminary injunction to restrain the behavior of a party to litigation, whereas IDWR may issue an injunction under IDAPA 37.01.01.780 to suspend its own actions. This contested case is an administrative appeal of IDWR's curtailment of Lakes' water rights and the Director's instructions to the Watermaster. I.R.C.P. 65(e) applies only to original actions filed in district court.

If the standards or burdens associated with a petition to IDWR for a stay are to be inferred from "analogous" provisions of statues or rules, it is far more instructive to consider statutes or rules pertaining to stays of administrative actions and stays pending appellate review. The 1992 Idaho Administrative Procedures ACT (APA) simply states that filing a petition for judicial review "does not itself stay the effectiveness or enforcement of the agency action." "The agency may grant, or the reviewing court may order, a stay upon appropriate terms." I.C. § 67-5274. This provision is discussed in a comprehensive explanation and analysis of the APA appearing in the 1994 APA "Special Edition" of the Idaho Law Review in an article entitled *"The Idaho Administrative Procedure Act: A Primer For The Practitioner."* 30 Idaho L. Rev. 273-367 (1994). The Primer was prepared by Deputy Attorney General Michael S. Gilmore and University of Idaho law professor Dale D. Goble. Mr. Goble drafted the APA and Mr. Gilmore prepared a model set of rules or practice and procedure for Idaho administrative agencies. Larry Echohawk, *Introduction to Administrative Procedure Act Issue* 30 Idaho L. Rev. 261 (1994). IDAPA 37.01.01.780 was adopted in 1993, one year after the new APA was passed in 1992, presumably pursuant to the model rules of practice and procedure prepared by Mr. Gilmore.

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The *Primer* explains why the APA does not provide for an automatic stay of an agency action pending appeal:

> Although filing a petition for judicial review foes not in and of itself stay the effectiveness or enforcement of the agency action, either the agency or the reviewing court may grant a stay. There are good reasons not to provide an automatic stay upon the filing of a petition for review. Some agency actions such as the seizure of adulterated food or the quarantine of diseased animals are taken to protect the public health. If a person subject to such an order could stay the order simply by filing a petition for judicial review, the person would be able effectively to lift the seizure or quarantine, and there would be no way to protect the public health. Therefore, instead of an automatic stay of an agency action, each petition for a stay must be individually determined.

30 Idaho L. Rev. at 352.

Thus, according to the drafters of the APA and the model rules of practice and procedure, a stay pending appeal is not automatic under the APA to allow for a determination of whether the "public health" or the public welfare would be adversely affected by the stay. The examples given by the drafters indicate that the adverse affect must be fairly significant to justify failing to grant a stay. There is absolutely no mention in the APA, IDAPA 37.01.01.780, or the *Primer* of any of the preliminary injunction standards.

Therefore, Lakes must show that it is affected by further curtailments of its water rights, and such curtailments should be stayed unless the stay will adversely affect the public welfare. Clearly, Lakes will be affected by curtailment of its water rights. The June 5, 2002 curtailment of 27 cfs of Lakes' water rights forced Lakes to remove 268,520 pounds of trout and idle approximately 17% of its hatchery. Affidavit of Gregory Kaslo, ¶ 2. Lakes would have to prematurely remove, sell or destroy a minimum of 10,000 pounds for each cubic foot per second of additional curtailment. *Id.*

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There is no adverse effect upon public welfare from staying any further curtailments until the issues presented in Lakes' *Petition* are resolved. No one, not even Springs, will be deprived of any water that they have historically relied upon for beneficial use, or required to prematurely remove, sell or destroy existing fish or other production. A stay will not adversely affect anyone's existing operations or production. On the other hand, if Lakes' diversion of water is curtailed further it would have to prematurely remove, sell or destroy fish that are currently being reared in its hatchery.

In fact, Lakes is informed and believes that, if IDWR further curtails Lakes' water rights to supply Springs with more water, Springs could not make additional beneficial use of the water to produce more fish. Due to market conditions, commercial trout production has been flat or has declined. Kaslo Affidavit, ¶ 5. Indications of Springs' own declining production include a decrease in its processing of fish and its institution of a reduction in trout production at its trout rearing facilities last summer, at the same time that it made its call to curtail Clear Lakes' water rights. Under these circumstances, it is unlikely that Springs can demonstrate that it needs the water, as required by paragraphs 4 and 5 of the Director's *Instructions* to the Watermaster for Water District 130. Even if Springs could demonstrate that it would be adversely affected, this is not the type of "public" effect which would prevent a stay.

2. Priority is not the only "Idaho Law" Applicable to IDWR's Administration of Water Rights

Springs argues that I.R.C.P. 65(e) standards apply to Lakes' *Motion for Stay* "because Idaho law and the Director's June 13, 2002 instructions require the watermaster to reduce Clear Lakes' junior priority water right no. 36-07004 in order to satisfy Clear Springs' senior water right no. 36-02708 in times of shortage." There are several errors in this statement.

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First, the Director and IDWR have curtailed Lakes' diversion of its senior water right no. 36-02659 in order to provide more water to Springs' more junior right no. 36-02708, in direct contravention of the prior appropriation doctrine.

Second, the Director has singled out Lakes' water rights for curtailment in response to Springs' call, in contravention of his obligation to administer that call as against all junior water rights from connected sources.

Third, the district court for the Snake River Basin Adjudication (SRBA) rejected Springs' position that priority is the sum and substance of Idaho law applicable to IDWR's administration of water rights in its *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* in SRBA Subcase No. 91-00005, denominated "Basin-Wide Issue 5."

> The prior appropriation doctrine as developed in Idaho does not require that water rights sharing a given source be administered according to strict priority. The prior appropriation doctrine also recognizes various principles that protect junior water rights which should be incorporated into the administration of water rights. For example, the concept of 'futile call' prevents the curtailment of a junior right on the same source if curtailment would not provide water to the senior in sufficient quantity to apply to a beneficial use. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976); citing *Albion - Idaho Land Co v. NAF Irrigation Co.*, 97 F.2d 439, 444 (10th cir. 1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). The relative location of the points of diversion on a given source gives rise to this concept.

One of the primary errors in the Director's *Instructions* and IDWR's alleged curtailment of Lakes' junior water right no. 36-07004 is the failure to recognize that Springs call against 36-07004 is absolutely futile.

Thus, Springs' assertion that "Idaho law" requires the watermaster to reduce Lakes' water rights is false and is the subject of this contested case. A false or disputed legal position is not a

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predicate for applying the standards of I.R.C.P. 65(e) to an administrative stay. Similarly the Director's *Instructions* do not mandate the application of I.R.C.P. 65(e) standards, or any other standards for that matter.

3. If Applicable, Lakes' Can Demonstrate both Irreparable Injury and Likelihood of Succeeding on the Merits

If, as Springs suggests, the standards for preliminary injunction pursuant to I.R.C.P. 65(e) are applicable to an administrative motion for stay, Lakes can show that two of the alternative circumstances justifying a preliminary injunction are met.

a. Irreparable Injury

First, as discussed previously, the injury to Lakes from any further curtailment is indisputable. Lakes will have to prematurely remove, sell or destroy a minimum of 10,000 pounds of trout for every cubic foot per second of curtailment. Springs argues that the Hearing Officer should deny Lakes' motion for stay for the same reasons the district court denied Lakes' motion for preliminary injunction. The district court did not dispute that Lakes' would suffer injury from curtailment of its water rights. Instead, the district court equated the injury to Lakes to Springs' inability to run its hatchery at its full design capacity. The district court appeared to reason that the damages to Lakes was not "irreparable" because those damages could be "redressed in monetary terms."

Obviously, forcing Lakes to prematurely remove, sell or destroy 268,520 pounds of trout and idle approximately 17% of its hatchery that it has historically used cannot be equated to what amounts to Springs' speculative lost opportunity to raise additional fish by taking water that Lakes has been diverting and using for more than three decades. There is simply no comparable injury to Springs. IDWR has no authority to adjudicate monetary damages or require the posting of a bond, and,

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therefore, this second apparent rationale of the district court's decision regarding irreparable injury simply doesn't apply in this contested case. Compounding the inappropriateness of equating Lakes' injury to Springs' speculative lost opportunity is the information that Springs cannot demonstrate that it actually needs the water it would take from lakes to produce more fish.

If the irreparable injury standard of I.R.C.P. 65(e) is applicable to lakes' *Motion to Stay*, it is clearly satisfied.

b. Likelihood of Success on the Merits

The issue presently before the Hearing Officer is whether IDWR's curtailment of Lakes' water rights violates the *Interim Stipulated Agreement*. Lakes asserts that the plain and unambiguous language of paragraph 2.8, the "Safe Harbor" provision of the *Agreement*, protects Lakes from a call for water by Springs during the term of the agreement. If the Hearing Officer denies Lakes' *Motion for Summary Judgment*, Lakes will be able to show at hearing that its interpretation of the *Agreement* is consistent with the intention of the parties.

The agreement was signed by the North Snake Ground Water District and the Magic Valley Ground Water District on behalf of their respective members. Collectively, they represent all the ground water users who are parties to the agreement. The attorney for the North Snake Ground Water District, Josephine Beeman, incorporated language into the Safe Harbor provision and other portions of the *Agreement* to ensure that it protected holders of junior surface water rights who signed the *Agreement* from calls for water by holders of senior surface water rights who signed the *Agreement*. Affidavit of Anita Kay Hardy, ¶ 5. During negotiations in drafting the agreement, Ms. Beeman discussed the changes to the language with Springs' attorney, John Simpson, advising him that she believed the provision would protect Springs from a call by Lakes' to fill Lakes' senior water

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right no. 36-02659. *Id.* Orlo Maughan signed the *Agreement* on behalf of Magic Valley Ground Water District. He too understands that the Safe Harbor provision of the *Agreement* protects junior water right holders, including Clear Springs, from curtailment. *Id.* ¶ 6.

The surface water users who signed the *Agreement* are Pristine Springs, Inc., Clear Springs Foods, Inc., Clear Lakes Trout Company, and Blue Lakes Trout Company. Of these parties to the *Agreement,* only Springs claims that the Safe Harbor provision does not protect junior surface water users who signed the *Agreement* from calls for water by senior surface water users who signed the *Agreement*. *Id.* ¶ 2, 3, 4, 8, Exhibits A and B. In addition, Rangen Inc., a party with substantial interests and arguably a third party beneficiary of the *Agreement,* has the same understanding as Lakes, Pristine Springs, Blue Lakes Trout, North Snake Ground Water District, and Magic Valley Ground Water District.

Of the parties to the *Agreement*, Springs stands alone in its defiance of the *Agreement*'s plain and unambiguous language. Springs' reliance on Director Dreher's interpretation of the *Agreement* is unavailing for several reasons. As he ardently stated in his deposition, the Director is not a party to the *Agreement*, was not involved in negotiating the terms of the *Agreement*, and bases his understanding of the Agreement entirely and exclusively on the words of the *Agreement*. His opinion has no bearing on the interpretation of the *Agreement*. Even if his interpretation were somehow relevant, he clearly admitted during his deposition that the words of the Safe Harbor provision and several other related paragraphs of the *Agreement* clearly and unambiguously protect Lakes and other junior surface water right holders from calls for curtailment by senior water right holders, including Springs. Because his understanding of the Agreement is based entirely upon its language, and he

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understands that the language protects Lakes, the Director cannot assert any contrary interpretation of the Agreement an has an unqualified duty to administer water rights in Water District 130 consistent with that protection.

Dated this 11th day of March, 2003.

Charles L. Honsinger
Ringer Clark Chartered
Attorneys for Plaintiff Clear Springs
Trout Company

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CERTIFICATE OF SERVICE

I certify that on March 11, 2003, I served copies of this document, including all attachments by facsimile and by U.S. Mail to the following:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

Mr. John Simpson
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139
Fax: (208)344-6034

Person serving documents

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RINGERT CLARK
CHARTERED LAWYERS

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Department of Water Resources

Laura E. Burn
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D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
Daniel V. Steenson
Allyn L. Sweeney

William F. Ringert, of Counsel
Samuel Kaufman (1921-1986)

March 12, 2003

The Honorable D. Duff McKee
P.O. Box 941
Boise, Idaho 83701

Re: In the Matter of Petition to Modify/Recind Amended Watermater Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201 and 36-07218

Dear Judge McKee:

I was informed today by the Department of Water Resources that some of the documents which we filed on March 11, 2003, did not have your name on the Certificate of Service. I am sure that we sent copies of the documents filed to you but, I am providing additional copies along with this letter for verification. A list of the documents enclosed is below:

1. Reply to Clear Springs Inc.'s Response to Clear Lakes Trout Company's Motion for Summary Judgment;
2. Response to Clear Springs Inc.'s Motion to Dismiss;
3. Second Affidavit of Charles L. Honsinger in Support of Motion for Summary Judgment; and
4. Motion to Strike Cope Affidavit.

Also enclosed is a copy of the Response to IDWR Staff Memorandum which was filed on February 27, 2003.

Please call me if you have any questions or comments regarding this matter.

Sincerely,

Kimi White
Assistant to Charles L. Honsinger

cc: Debbie Gibson, IDWR
John Simpson
MICHAEL

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455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342-4657

John K. Simpson, ISB # 4242
Travis L. Thompson, ISB # 6168
BARKER ROSHOLT & SIMPSON LLP
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Telephone: (208) 336-0700
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Attorneys for Clear Springs Foods, Inc.

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Department of Water Resources
Southern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	SECOND AFFIDAVIT OF JOHN K. SIMPSON

STATE OF IDAHO)
) ss.
County of Ada)

JOHN K. SIMPSON, being first duly sworn upon his oath, deposes and states that:

1. I am one of the attorneys for Clear Springs Foods, Inc., the respondent in the above-captioned matter, and make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. At the status conference conducted on February 11, 2003, the Hearing Officer provided that if either party found that as result of the briefing and documents submitted, there were factual issues raised which demanded further discovery, a party could request an opportunity to conduct further discovery.

3. As a result of the Petitioner's Reply and specifically, the Affidavit of Kay Hardy together with the Exhibits attached, factual issues not previously

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raised in the Petitioner's Motion for Summary judgment or Brief in Support have been raised.

4. Due to the Hearing Officer's scheduling order, the Respondent has not had an opportunity fully address the new facts raised.

5. Further, attached hereto as Exhibit no. is a true and correct copy of the Deposition of Karl Dreher in Case No CV-02-00377.

Further, your Affiant sayeth naught.

DATED this 13th day of March 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson

SUBSCRIBED AND SWORN to before me this 13 day of March 2003.

BRENDA L. HINNENKAMP NOTARY PUBLIC STATE OF IDAHO

Brenda L. Hinnenkamp
Notary Public for Idaho
Residing at: Boise, Idaho
Commission Expires: 9/11/2004

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2003, I caused to be served a true and correct copy of the foregoing *SECOND AFFIDAVIT OF JOHN K. SIMPSON* via to the following by U.S. Mail, postage prepaid:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

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James G. Reid
Charles L. Honsinger
Ringert Clark
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Boise, Idaho 83701-2773

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore St., Suite 20
Twin Falls, Idaho 83301

Travis L. Thompson

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Department of Water Resources

EXHIBIT A

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Department of Water Resources
Southern Region

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

CLEAR LAKES TROUT COMPANY, INC., Plaintiff, vs. IDAHO DEPARTMENT OF WATER RESOURCES; KARL J. DREHER, Director of the Idaho Department of Water Resources; and CINDY YENTER, Watermaster for Water District 130, Defendants.	Case No. CV-02-00377 VOLUME I

DEPOSITION OF KARL J. DREHER

OCTOBER 9, 2002

BOISE, IDAHO

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EXHIBIT A

DEPOSITION OF KARL J. DREHER

BE IT REMEMBERED that the deposition of Karl J. Dreher was taken by the attorney for the Plaintiff at the law offices of Ringert Clark Chartered located at 455 South Third, Boise, Idaho, before Lynda C. Habel, a Court Reporter (Idaho Certified Shorthand Reporter Number 137) and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 9th day of October, 2002, commencing at the hour of 9:03 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff: RINGERT CLARK CHARTERED
By: Daniel V. Steenson
And: Charles L. Honsinger
455 South Third
Post Office Box 2773
Boise, Idaho 83701

For the Defendants: IDAHO DEPARTMENT OF WATER RESOURCES
By: Phillip J. Rassier
Deputy Attorney General
1301 North Orchard Street
Post Office Box 83720
Boise, Idaho 83720-0098

For Intervenor Clear Springs Food: BARKER, ROSHOLT & SIMPSON
By: John K. Simpson
205 North Tenth Street
Suite 520
Post Office Box 2139
Boise, Idaho 83701-2139

Also Present: Kay Hardy
Gregory Kaslo

1 Aerial photograph and diagram 7 10
2 Aerial photograph and diagram 7 12
3 Aerial photograph and diagram 7 13
4 Aerial photograph and diagram 7 9
5 Ground level photo 7 9
6 Fax dated April 11, 2002, Gibson to Steenson, with attachment letter 7 32
7 Letter dated April 30, 2002, Steenson to Dreher and Young 7 --
8 Letter dated May 2, 2002, Honsinger to Dreher 7 --
9 Memorandum dated May 2, 2002, Clear Lakes Trout Company to Dreher, with attachments 7 10

10 Letter dated May 2, 2002, Simpson to Dreher, with attachments 7 --
11 Fax dated 6/5/2002, Dreher to Steenson and Honsinger, with attachments 7 --
12 Fax Transmittal Cover Sheet dated June 10, 2002, Dreyer (sic) to Honsinger, with attachments 7 --
13 Letter dated June 13, 2002, Steenson to Dreher 7 --
14 Letter dated June 13, 2002, Dreher to Simpson, Steenson, and Honsinger, with attachments 7 8
15 Letter dated June 19, 2002, Yenter to Hardy and Cope 7 --
16 Application For Permit (Identification Number 36-7218), with attachments 7 --
17 Agreement (made and entered into the 13th of March, 1980, by and between Clear Lakes Trout Company and Clear Springs Trout Company) 7 21
18 In Re SRBA, Case Number 39576, Findings of Fact and Conclusions of Law on Involuntary Dismissal, Subcases 36-02708, 36-07201, and 36-07218 7 --
19 In Re SRBA, Case Number 39576, Special Master's Report, Findings of Fact and Conclusions of Law For Water Right Subcase 36-07201, with attachments 7 --
20 In Re SRBA, Case Number 39576, Order Granting in Part, Denying in Part, Motion Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal - Source), Subcases 36-02708, 36-07201, and 36-07218 7 --
21 In Re SRBA, Case Number 39576, Memorandum Decision and Order on Challenge, Subcases 7 --

22 In Re SRBA, Case Number 39576, Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge (Clear Lakes v. Clear Springs/Separate Source) [Bates Stamp Numbers 267 throug 7 --
23 In Re SRBA, Case Number 39576, Order of Partial Decree For Water Right 36-07004, with attachments 7 --
24 Document headed "136 Idaho Reports," Pages 760 through 767 7 --
25 Document headed "161 Federal Reporter," Pages 42 through 49 7 --
26 Document headed "Supreme Court of the United States," Pages 686 through 693 7 --
27 Document headed "103 Idaho Reports," Pages 506 through 515 7 127
28 Report on Water Measurement and Distribution Prepared for Clear Lakes Trout Company and Clear Springs Trout Company, Buhl, Idaho, by C. E. Brockway, P.E. and Keith Anderson, P.E., December 1988, with attachments 7 --
29 In Re SRBA, Case Number 39576, Amended Order Granting In Part Clear Lakes' Motion to Alter or Amend and 2nd Amended Special Master Report, Subcases 36-02659 and 36-07004, Clear Lakes Trout Company, Inc., with attachments 7 --
30 Verified Company, Case Number CV-02-00377, with attachments 7 --
31 Answer, Case Number CV-02-00377 7 --
32 Affidavit of Karl J. Dreher, Case Number CV-02-00377 7 --
33 Affidavit of Cindy Yenter, Case Number CV-02-00377 7 --

34 Document headed "Interim Stipulated Agreement For Areas Within and Near IDWR Administrative Basin 36," Pages 1 through 6 — 7

35 Final Order Creating Water District Number 130, Pages 1 through 7, with attachment — 7

36 Letter dated July 10, 2002, Steenson to Rassier — 7

37 Defendant Karl Dreher's Answers and Responses to Clear Lakes Trout Company's First Set of Interrogatories and Requests For Production, Case Number CV-02-00377 — 7

38 Letter dated June 18, 2002, Dreher to Water Right Holder, with attachments — 47 47

39 Hand-drawn Sketches labeled A, B, C, and D — 75 75

Whereupon Exhibits 1 through 37 were previously marked for identification, and the deposition proceeded as follows:

KARL J. DREHER,
a witness having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION
BY Mr. STEENSON:

Q. Would you please state and spell your name for the record.

A. It's Karl Dreher. Karl is spelled with a K. Last name, Dreher, is D-r-e-h-e-r. Middle initial is J.

Q. And you, of course, are the director of the Idaho Department of Water Resources; is that --

A. Yes.

Q. -- right?

Mr. Dreher -- and I may slip sometimes and call you "Karl."

A. Sure.

Q. I don't m[illegible] --

A. It doesn't matter.

Q. -- to be offensive.

I'd like to ask you to turn your attention to the exhibit book, and turn to Exhibit Number 14.

A. (Witness complied.)

Q. And in this exhibit, of course, there's a June 13th letter with an accompanying memorandum with the same date. Is this a memorandum that you prepared regarding the matter that is the subject of the litigation that we're involved in?

A. Yes.

Q. Okay. And does this memorandum contain the last and most current analysis by you, or by anyone at the Department, of the basis for the watermaster instructions that you issued and that Cindy Yenter has followed in administering the Clear Lakes and Clear Springs water rights?

A. Yes.

Q. So this memorandum has not been amended and there has been no subsequent analysis prepared? This is no s- --

A. It has not been amended; there is no subsequent analysis.

Q. Okay. And I understand that you're familiar with the Clear Lakes and the Clear Springs facilities that are involved in the administration?

A. Yes.

Q. Okay. Turning your attention back to Exhibit Number 4, I'll represent to you that this is a 1997 aerial photograph. And do you recognize what is depicted in the photograph to represent the current configuration of the Clear Lakes and Clear Springs facilities and what has been referred to as the Western Diversion Pool and the Eastern Diversion Pool?

A. Well, I -- I recognize the Western Pool; I recognize the Eastern Pool. I recognize the layout of the Clear Lakes facilities, the layout of the Clear Springs facilities.

But, you know, I -- to imply that there has been detailed changes since then, I wouldn't -- wouldn't know.

Q. Okay. Turning your attention to Exhibit Number 5, do you recognize the structure that's depicted in Number 5 --

A. Yes.

Q. -- to be what's been referred to as the "common diversion works" in the Western Diversion Pool?

A. Yes.

Q. Okay. Now, you understand, don't you, that the facilities that are depicted in Exhibits 4 and 5 were constructed over a rather long period of time to

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their present configuration?
A. That's my understanding.
Q. Okay. And turning back to Exhibit Number 1, I'll represent to you that this is a 1968 photograph; one that has been submitted to you with Exhibit Number 9, which is a memorandum -- previously submitted to you, which is a memorandum of May 2nd, 2002, from Clear Lakes. It's a 1968 photograph showing the early configuration of the facilities.
Do you recognize this as something that you have received and reviewed in evaluating the Clear Springs call for water?
A. I -- Yeah, I reviewed it as part of reading the May 2nd memorandum that you sent.
Q. Okay. And with respect to this particular photograph, you understand, don't you, that what is depicted here -- what is shown here in this photograph includes earth and ponds at the time owned by Clear Lakes; correct?
A. I don't recall exactly what the ownership was. And the reason I say that is because at some point Idaho Power had some underlying ownership interest. And I don't recall the dates of that and how that was resolved.
Q. Or what, in particular, Idaho Power may have

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had an ownership interest in?
A. That's correct.
Q. But you recognize the points of diversion, do you not, for Clear Lakes' Water Rights -2659 and -7004?
A. Yes.
Q. And the point of diversion at this time for Clear Springs' Water Right -2708; correct?
A. Yes.
Q. Okay. And you understand that these diversion points and facilities were in place and being utilized at this time pursuant to permits that were issued to Clear Springs on the one hand and Clear Lakes on the other?
A. Yes.
Q. Now, with respect to the situation that you see in 1968, it's true, isn't it, from this view, that diversion of water pursuant to 36-7004 has no effect on the diversion of water pursuant to 36-2708?
A. Now, you worded that in the present context.
Q. Let me put it in a historical context.
At the time of this photograph, in looking at this photograph and understanding what you do about the water rights, it's true that at the time -- in 1968 -- the diversion of water, pursuant to -7004, could not affect the diversion of water pursuant to 36-2708?

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A. On the surface, that's what it would appear. But I don't know how all of these springs, and pools, and streams may or may not be interconnected. I wasn't there when this photo was taken, and I can't tell what the connections may or may not be, so ...
Q. But based on what you can see in this photograph and recognizing that Special Master Haemmerle found two separate stream flows at this time, it's apparent, is it not, that the diversion of water pursuant to -7004 at this point of diversion would have no effect on the availability of water at the point of diversion for 36-2708?
A. I'm not sure I'd say it's "apparent"; it appears that it would.
Q. Okay. Now, moving on to Exhibit Number 2, I'll represent to you that this is a 1969 photograph. You can see, can't you, the further development of the facilities of the diversion works that was taking place at this time with regard to the Clear Lakes' property where the earth and ponds are located?
A. I'm not sure in this picture I can identify where the -- where the two ponds are.
Q. Okay. Do you recall reviewing Special Master Haemmerle's Findings of Fact in the Clear Lakes/Clear Springs matter?

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A. Yes.
Q. Okay. And do you recall Special Master Haemmerle's discussion of Clear Lakes' construction of an eastern dike --
A. Yes.
Q. -- and a western dike?
A. Yes.
Q. And you see these in this photograph, don't you?
A. Yes. I see what's labeled in this photograph as the eastern dike and the western dike, yes.
Q. Okay. And you recall, don't you, that Special Master Haemmerle explained that Clear Lakes' construction of these dikes created what is currently referred to as the "Eastern Pool"?
A. Correct.
Q. Okay. Turning, then, again to Exhibit Number 3 -- and I'll represent to you that this is a 1977 photograph -- do you recognize the further evolution of the Eastern Pool depicted in this photograph?
A. I see the Eastern Pool marked. I'm not sure that I could tell what exactly the further evolution was.
Q. Okay. Turning back to Exhibit Number 2, and referring you to what is marked in this photograph as

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the "Cut-Off Dike" -- Do you see that marked in red?
A. Yes.
Q. You understand, don't you, that that was a second point of diversion installed -- constructed pursuant to Water Right 36-07004?
A. That's my understanding. Yes.
Q. Okay. And with regard to the "West Diversion Dike," you understand that that's the second point of diversion constructed pursuant to Water Right 36-02659?
A. Yes.
Q. So that by the time we get to 1977, looking at Exhibit Number 3, all of the water impounded in the Eastern Pool and diverted by the Eastern Pool is water diverted by Clear Lakes exclusively for Clear Lakes' use?
A. Yes.
Q. Now, with regard to the 1977 photograph, as well, there is a notation and a -- an arrow pointing to a ditch constructed by Clear Springs Trout. Do you see that ditch -- or, I'm sorry, not ditch; dike.
A. I see the notation, yes.
Q. And do you see the dike that it's pointing to (indicating)?
A. I see the notation, yes.
Q. Okay. And you understand, don't you, that the

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construction of this dike occurred pursuant to Clear Springs' Water Right 37-02708 (sic)?
A. Yes.
Q. And furthermore at this time, at this stage in the development of the facilities, you can see, can't you, that Clear Lakes is diverting water, as well, at this point; at locations below the dike in the westernmost portion of its facility?
A. I'm not sure I understood what you meant.
Q. Okay. And I'll help by pointing you to a notation regarding a series of pipes (indicating.) Do you see that?
A. Yes, uh-huh.
Q. And you recognize that that's pointing to a portion of the Clear Lakes facility --
A. Yes.
Q. -- as it existed in 1977?
A. It's what the notation shows.
Q. Okay. So you recognize, don't you, that with regard to -- that Clear Lakes was at this time, as it had in the past, utilizing water from the west side of the western dike; correct?
A. Yes, uh-huh.
Q. From the area which would subsequently become the Western Pool?

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A. It appears that way, yes.
Q. Okay. And there's a diagram with the photograph in Exhibit Number 3. Could you turn to that?
A. (Witness complied.)
Q. Does this diagram correctly depict your understanding of the diversion facilities and the diversion of water rights at the time of this 1977 photograph?
A. Well, again, I mean, I -- I accept that that's what you're representing. But I wasn't there in 1977, so ...
Q. Recognizing that you weren't there, but as far as you have been able to ascertain, based on your review of the materials that you have been presented with, this diagram represents correctly, does it not, the water flows, and the diversion works, and the diversion of water by Clear Lakes and Clear Springs at the time?
A. It -- It represents my understanding as you have presented it to me.
Q. Okay. And do you have any reason to take issue with this representation?
A. No.
Q. Now, turning to Exhibit Number 4 -- and I'm referring first to the Western Pool -- you understand that both Clear Lakes and Clear Springs divert water

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from the spring source into the Western Pool; that's correct, isn't it?
A. Both Clear Lakes and Clear Springs divert collected spring flow out of the Western Pool.
Q. Okay. You're making a distinction with the manner in which I described it in my question?
A. Well, the pools collect the springs. I don't know that at that point anybody has diverted it. They're collected into the pool, and then the distribution is made out of the pools.
Q. Okay. You understand, don't you, that, as we discussed before, the Eastern Diversion Pool is a facility -- was a facility constructed -- was and is a facility constructed by Clear Lakes?
A. Yes.
Q. And you understand also, don't you, based on a review of the materials you've been presented, that the Western Pool is a diversion facility, as well, constructed by Clear Lakes or Clear Springs in a joint fashion pursuant to the 1980 Agreement with Clear Lakes?
A. Correct. The Western Pool was, in part, formed by this dike that's at the west end of the Eastern Pool. There's a -- a dike that separates the two pools. And my understanding is that that dike was constructed by Clear Lakes.

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Q. Right. And you can see in the 1977 photograph the early construction of the dike that eventually became the southern portion of the Western Pool; correct?
A. You mean the eastern portion of the Eastern Pool?
Q. I mean, this -- If you look at the 1977 photograph --
A. Yes.
Q. In this finger-like dike that you can see, --
A. Yes.
Q. -- it is an early version of the southern portion of this Western Pool; correct?
A. Yes.
Q. Okay. And you understand that after Clear Springs constructed this dike, Clear Lakes filed a lawsuit, which resulted in a 1980 Agreement, which provided for the further construction of the East- -- of the Western Pool, --
A. Yes.
Q. Okay.
-- which included the installation of the common structure that divides the water between Clear Lakes and Clear Springs?
A. Correct. But the 1980 Agreement, as I

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understand it, was -- stemmed from lawsuits filed by both parties against each other; not just Clear Springs.
Q. In any event, you understand that it did settle litigation --
A. Yes.
Q. -- concerning, in part, the construction of this dike; correct?
A. Yes.
Q. So that just as the Eastern Pool is a constructed diversion works, so is the Western Pool a constructed diversion works --
A. Yes.
Q. -- that divert spring flows; correct?
A. Uh-huh.
Q. Okay.
THE REPORTER (To the Witness): "Yes"?
WITNESS: Yes.
Q. (BY MR. STEENSON) Yes. I'm sorry, Mr. Dreher. I know you've testified before, so I didn't go through the preliminaries.
A. Not a problem.
Q. The court reporter needs for our statements not to overlap in terms of your answers and my questions. And nods of the head and "uh-huhs" and "huh-uhs" are difficult for the court reporter to

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transcribe.
A. I understand.
Q. Now, you understand, then, that the location and configuration of these diversion pools are conditions that were created and have since existed -- Let me strike that.
-- that the construction of these pools are conditions that existed during the perfection of the Clear Lakes and Clear Springs water rights. That's correct, isn't it?
A. Yes.
Q. Okay. Now, in addition, with Exhibit Number 4, there is a diagram depicting the diversion works, and the Eastern and Western Pools, and the diversion points for the water rights as of the time of the 1997 photograph, which is consistent with the works as they exist today?
A. Yes, except that on this -- this diagram the diversion locations for -7004 are not shown.
Q. Correct. And you understand the diversion location for -7004 -- the diversion structure for -7004 to be that Eastern Pool --
A. That's my understanding.
Q. -- in conjunction with pipes that take water from springs immediately north of the Eastern Pool?

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A. Yes.
Q. Okay. Now, turning to the next photograph, I know you've personally viewed this structure. You recognize, don't you, that it is not -- with the configuration of this diversion works, it's not possible to completely shut off Clear Lakes' diversion of water and -- delivery of water through the Western Pool?
A. That's correct.
Q. And you understand that this structure was constructed pursuant to the 1980 Agreement between Clear Lakes and Clear Springs --
A. Yes.
Q. -- and that that agreement provided that the structures to be installed would have to be installed with the approval of both Clear Lakes and Clear Springs?
A. Well, the agreement provided for the construction of the -- of the structures.
Q. And you have reviewed the 1980 Agreement, in your review in preparing instructions for the watermaster for Water District 130, have you not?
A. Yes.
Q. Okay. Could you turn, please, to Exhibit Number 17?
A. (Witness complied.)
Q. And you recognize that to be the 1980

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Agreement, do you not?
A. Yes.
Q. Okay. Could you turn, please, to Page 4 of the agreement?
A. (Witness complied.)
Q. And there is a paragraph with the heading of "Diversion Facilities," and I will read it.
"It is further understood and agreed that the diversion facilities presently located on the leased property of Lakes placed there by Springs shall be allowed to remain and that a sufficient regulatory system subject to the approval of both parties shall be incorporated into said diversion works in order to properly apportion the water rights of each, as more specifically set out in Paragraph 1 above and as may be finally agreed upon or legally determined."
Do you understand that this paragraph is referring to what we've just discussed; the installation of that common diversion works, that –
A. Yes.
Q. -- common structure? Okay.
Turning back in the agreement to Page 2, the third "WHEREAS" paragraph reads: "WHEREAS, Springs desires to increase the height of the present diversion works as high as feasibly possible at Springs' cost,

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which will benefit both Springs and Lakes and which will also include extending and constructing the diversion works to include an area where the waters flow from the natural springs outlets, which have been and are presently being used by Lakes."
Now, you understand, then, this to refer to the intention of Clear Springs with regard to further construction of the Western Pool subsequent to its configuration; that 1977 photograph that we looked at. Is that correct?
A. Yes.
Q. Okay. And then you see there, don't you, the recognition that the springs that were discharging west of the western dike that Clear Lakes constructed in part to form the Eastern Pool, that those springs were recognized to have been used and being used by Clear Lakes; correct?
A. That's what the words would say, yes.
Q. Okay. And you can see in the photographs that that was, in fact, occurring; correct?
A. It appears to be, yes.
Q. Okay. Now, turning back to Exhibit Number 5, it follows, then, does it not, that the parties -- Clear Lakes and Clear Springs -- in entering into the 1980 Agreement and in constructing these works could not have

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contemplated -- could not have intended for Clear Lakes' diversion of water pursuant to -2659 to ever be completely curtailed through the Western Diversion Pool?
A. Well, that's correct. It's the most (inaudible) right, so --
THE REPORTER: I'm sorry. "It's the most" what?
WITNESS: -- the most senior priority right, so it would be filled first.
Q. (BY MR. STEENSON) Okay. And with the manner in which these works are constructed, it's not physically possible -- in addition to not being legally permissible, it's not physically possible to completely curtail Clear Lakes' diversion of spring water through the Western Diversion Pool, is it?
A. Well, you're saying physically impossible under any conditions. I assume that there could be modifications made; temporary stop logs or such not put in that could achieve that end.
Q. But as the works exist in this photograph and today, without stop logs or some modification, it's not possible to completely shut off Clear Lakes' diversion of water through the Western Pool, is it?
A. No. That's correct.
Q. And you recognize that the 1980 Agreement provided that any modification of these facilities

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required the mutual agreement of Clear Lakes and Clear Springs?
A. Any physical modification, yes.
Q. Such as stop logs or something else; correct?
A. Yes.
Q. Okay. Now I'm going to turn to a series of documents and a series of events that range in date from April of this year through the summer of this year. And I'll first ask you when and how you first learned of Clear Springs' desire to have these common diversion works adjusted.
A. Well, that question was never put to me that way.
Q. Okay.
A. The first contact regarding this issue occurred during a telephone conversation that -- the specific date of which I don't recall, but during which the question was posed by Mr. Simpson, representing Clear Springs, as to how the Department intended to administer these various water rights, now that they -- at that time, since they had been partially decreed, in the event there was a delivery call without indicating who the call might come from.
Q. Presumably it would be coming from whoever Mr. Simpson might represent?

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A. It could be -- It could come from whoever the senior right in priority at the time was. So that could be Clear Lakes, or it could be Clear Springs.
Q. Can you give me a date or an approximate date of this telephone conversation?
A. The best I can do, Dan, is -- is it was in the early springtime.
Q. Okay. Certainly prior to the April 2nd, 2002, meeting, which both you and I attended, at the facilities?
A. That is correct.
Q. Okay. Was it some days or weeks prior to that meeting?
A. It would have been weeks prior to the meeting.
Q. In March sometime, then?
A. Correct. Could have even been in February.
Q. And in response to Mr. Simpson's inquiry, did you discuss further action or further discussions concerning the matter?
A. No further discussion. I don't recall if it was my suggestion; I believe that it was. I -- You know, I knew nothing about what the facilities looked like and I -- Before I made any determination, I wanted an opportunity to go out and visit the site, because at that point in time it wasn't clear to me that the

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watermaster would necessarily be authorized to make adjustments at these diversion works to deliver water. I -- I didn't -- It wasn't clear to me that it was.
Q. And what was your next experience with this matter after that February or March conversation?
A. There were several telephone calls back and forth trying to schedule a time when I could go out and inspect the facilities.
Q. And with whom were these telephone calls?
A. With Mr. Simpson.
Q. And at any time during these telephone calls was there a discussion of who Mr. Simpson represented?
A. Well, I knew he represented Clear Lakes.
Q. Was there any discussion of Clear Springs' intentions --
A. Or, excuse me, I knew he represented Clear Springs.
Q. Clear Springs.
Was there any discussion of Clear Springs' intentions?
A. No.
Q. So the only discussion regarding the matter was: How would IDWR administer these water rights in the event of a call by the owner of one of them?
A. Correct.

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Q. Now, in relation to the interim Stipulated Agreement that both Clear Springs and Clear Lakes are parties to and your Order creating the Water District on February 19th of 2002, it sounds like these conversations must have taken place after the execution of that agreement and the -- your issuance of the Order creating a water district.
A. I don't remember the dates. The Stipulated Agreement was signed -- Actually, the time for that Stipulated Agreement, the signatures occurred over a prolonged period of time; some of them were signed as early as November, I believe.
And then the last signatories probably didn't occur until February.
Q. So by the time Mr. Simpson, on behalf of Clear Springs, was making these inquiries, you had ordered the formation of the Water District?
A. That is correct.
Q. Okay. So then turning -- Well, let me back up.
Was your first meeting in person with anyone regarding this matter on April 2nd in 2002 in Hagerman at lunch at the --
MS. KAY HARDY: Snake River Grill. It used to be Frogs Landing.

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Q. (BY MR. STEENSON) At the Snake River Grill?
A. No. That was not the first meeting concerning the matter. I did have lunch at the Snake River Grill, and mention was made of the visit the following afternoon.
But really, the first meeting per se was at the site of the diversion structure.
MS. KAY HARDY: Is it permissible to interrupt, Dan?
MR. STEENSON: No.
(Whereupon there was a private discussion between Mr. Steenson and Ms. Kay Hardy.)
Q. (BY MR. STEENSON) Okay. And at the Snake River Grill, with whom did you meet that discussed the administration of the Clear Lakes and Clear Springs rights?
A. Again, I don't recall that we discussed the administration of the rights at the meeting. We talked about the upcoming meeting at the diversion works.
But there were a number of us that were having lunch together. I know Larry Cope was there. I believe John Simpson was there. And there were others from the Thousand Springs area, ground and surface water users, that had been participating in -- in a negotiation session.

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Q. Okay. What was the sum and substance of the conversation as it related to Clear Lakes and Clear Springs?
A. When?
Q. During this lunch.
A. Only that it was -- it was good that we were going to meet at the site. I don't -- You know, again, I can't recall all of the particulars, but likely there was something said along the lines that this matter had gone on for a long time, and -- but we didn't talk about any particulars about how the water rights should or should not be administered.
Q. Okay. And wasn't it later that day -- that same day that the meeting took place out on site?
A. Yes.
Q. Okay. And from your on-site visit -- during your on-site visit, and as a result of your visit, what information did you obtain, and what understanding did you gain regarding the Clear Lakes and Clear Springs facilities?
A. Well, I gained an understanding of the general layout of the diversion facilities, both the Western Pool and the Eastern Pool. I could visually observe how distribution of water to the Clear Lakes rights could be adjusted, using the adjustable weir.

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You certainly could observe that there were overflow weirs on which at that time there were no controls, so that water would -- some of that water would automatically go to Clear Lakes.
Also, at that meeting -- You know, I don't recall when I asked for this, but I -- I did ask both Clear Lakes and Clear Springs for information that they felt was pertinent to determining watermaster instructions.
Larry Cope at the meeting brought with him a package of documents that he gave me at the meeting, which I subsequently listed in the letter asking for more information. And it may be that -- during the lunch meeting that you referred to earlier, I may have asked him for those documents at that time, if he -- if he had them.
Q. Okay. And by the end of the meeting out on site, you understood, didn't you, that it was Clear Springs that intended to make a call for delivery of water and seek an adjustment of the diversion works in the Western Diversion Pool?
A. You could only surmise that by implication, because they never stated that intention.
Q. And as a result of this meeting on site, did you have an understanding of which water rights were

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diverted through the respective pools?
A. A preliminary understanding. But certainly that understanding was further developed with the information that both Clear Springs and Clear Lakes submitted, as well as with the -- the Court decisions that you have in your book here.
Q. Okay. Could you turn to Exhibit Number 6?
A. (Witness complied.)
Q. And do you recognize this to be the letter that you just referred to in which you identified the documents that had been provided to you by Larry Cope?
A. Yes.
Q. And do you see in the heading and in the text of the document that the discussion pertains to administration of water rights, and there is a -- I believe, a typographical error. 36-02708, 36-07004, and 36-07218.
And do you see there that Clear Lakes' Water Right -2659 is not mentioned at all?
Now, that's because you understood at that point, as you just previously discussed, that -2659, being the senior right, would not be subject to administration in the event of a call?
A. That's incorrect. I had understood that -2659 was a senior right. And regardless of how these rights

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were administered, it needed to be filled first.
Q. Okay. As I'm looking at this right now, it reads "Administration of" three water rights. -2659 is not mentioned. Therefore, at this point you were not contemplating administration of -2659, were you?
A. It was the most senior right, and it needed to be filled first.
Q. Okay. But I take it by this, then, that you were not contemplating any adjustment in the diversion of -2659 in response to any call?
A. At this point in time, I don't think you could reach that conclusion. It was simply the senior right, and it needed to be filled first.
Q. Okay. But I'm trying to figure out why you're failing to mention it in this letter at all, at this point.
A. I don't think it's particularly significant that I didn't list it. I mean, it was the most senior right. It was -- It was the junior rights that were subject to potential reductions to fill the senior water rights.
Q. Reductions, or curtailment, or regulation?
A. Yes.
Q. Okay. And you'll recall, I think, from our conversation on site on the 2nd -- and as you'll see

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from subsequent correspondence -- Clear Lakes was concerned about the process that had been initiated, whatever it was. And we had conversations about: What is the nature of the process?

At the time of your writing this April 11th letter, what was your understanding of the nature of the administrative process that you were engaged in?

A. I was simply engaged in an informal gathering of all pertinent information. There was not a formal process that had been initiated.

Q. You were at this time -- April 11 -- in the process of developing instructions. In addition to gathering information, you were in the process of writing instructions for the watermaster; isn't that correct?

A. That's incorrect. I had not started writing the instructions at that point in time.

Q. Okay. But you were collecting information to evaluate -- to develop instructions for the watermaster?

A. That is correct.

Q. And what was your understanding of the nature of that process whereby you were developing instructions for the watermaster? Was it a rule-making, a contested case, or some other type of administrative process?

A. It was -- I wouldn't call it a "process." It

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was simply fulfilling what I believe my responsibilities to be under Chapter 6 of -- of 42, Idaho Code.

Clearly the watermasters work under my supervision. And to do that effectively, they have to have instructions on what they're intended to do. But there is no process identified in Chapter 6 for developing watermaster instructions.

Q. You recognized, didn't you, that your instructions, whatever they would eventually be, would have a significant effect on the rights of Clear Lakes and Clear Springs?

A. Potentially they -- they could have, yes.

Q. And at this point were you also engaged in developing instructions for the watermaster concerning administration of Water District 130 as a whole?

A. At this point in time, we had drafted some general instructions -- or an outline for general instructions. And that had been completed at this point in time.

Q. Okay. And have those instructions been issued?

A. They're being followed, even though they really haven't been issued in -- in a form like this. They're still ...

Q. Well, did you have other water right owners in

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Water District 130 at this time making requests similar to Clear Springs; in other words, asking you to develop instructions pertaining to the administration of a select number of water rights in the Water District?

A. No one was asking us to develop instructions for a select group of water rights. But the expectation was that there would be these draft instructions, that I referred to earlier, that would be finalized and issued to the watermaster.

Q. Was it the case that any water user in the district at this time could say, "I've got my partial decrees now, and I'm thinking about how the following two, or three, or four water rights will be administered; please advise me"?

Was Clear Springs the only water user in the district that was making such a request at that time?

A. They were the only ones that were that specific; however, the ground water users in Water District 130 -- they were concerned about how we were going to administer ground water rights that were not covered by the interim Stipulated Agreement.

So they were asking questions about administration, as well.

Q. Did you prepare instructions for them?

A. Not to this extent. We did prepare two

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letters that were sent out to water right -- ground water right holders that we determined were not covered by a Stipulated Agreement and whose diversion and use of ground water was potentially causing injury to senior priority rights.

Q. Now, ordinarily in a water district, if a water user makes a delivery call, such as the one Clear Springs eventually made, they're simply asking for distribution of water pursuant to the water right; correct?

A. Pursuant to the water right and other applicable provisions of law or rules.

Q. Sure. And so once the call is made, the charge -- under Chapter 6 of Title 42 to the Department and to the watermaster -- is to evaluate all water rights within the Water District that might be subject to curtailment to address the call; isn't that correct?

A. Yes.

Q. And the standard process, under the prior-appropriation doctrine, is to, once having identified water rights subject to curtailment, curtail the juniors first; isn't that correct?

A. That's correct.

Q. Okay. And so in this situation, however, you followed a very different process, didn't you, --

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A. No.
Q. -- whereby Clear Springs made a call, and in response to that call -- or, number one, Clear Springs asked, "Director, how will you administer a call if, by chance, somebody we're not going to mention happens to make one"?
And in response to that, you issued -- Let me back up.
And that inquiry related specifically to Clear Lakes' and Clear Springs' rights; correct?
A. Correct.
Q. And you issued instructions that pertained only to those rights?
A. Correct.
Q. Those instructions didn't mention any other right in the Water District at all, did it?
A. N- --
Q. Did it?
A. No.
Q. Okay. And the administration that follows from your instructions was not a process whereby the watermaster, in response to the call, evaluated all water rights that might be subject to curtailment?
That watermaster focused only on Clear Lakes' water rights; correct?

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A. Yes, because the Department had already made a determination on all of the other junior ground water rights the prior July and August.
Q. And what determination was that?
A. We did a detailed evaluation using the Department's ground water model, identifying those ground water rights that we could determine were causing injury to senior priority rights.
That's what led to the creation of the ground water management area, as you know. It also led to the stated intent to curtail junior priority ground water rights that were junior. And prior to July 21st, 1966 or 1967, whatever the date is, corresponds to the priority of one of Clear Lakes' water rights.
So we had already determined the class of -- the full class of junior priority rights that were subject to curtailment, because we could determine they were causing injury. That determination had already been made.
And those rights, then, were largely protected from a call, if you will, or insulated from a call through the Stipulated Agreements that were binding upon the parties that signed those Stipulated Agreements.
Q. Now, were there any water rights in the Water District that were not insulated by the interim

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agreements --
A. Yes.
Q. -- that could have been evaluated for curtailment in response to Clear Springs' call?
A. And those were evaluated and subsequently were informed that they were -- they were subject to curtailment, because they weren't protected from a Stipulated Agreement.
Q. They were evaluated for curtailment in response to Clear Springs' call?
A. No. They were evaluated for curtailment in general because we were still in a drought condition and we were concerned that injury was still occurring to senior priority rights.
Q. But there was no action seeking curtailment of any rights. No specific call for water within the Water District, other than Clear Springs' call; correct?
A. Incorrect. There was -- There were calls for distribution of water in Water District 36A. And so this determination of -- of injury was occurring.
That was in Water District 130, where these rights were, but it was in response to the delivery calls that were being made in Water District 36A.
Q. Then why, if there were other water rights within the purview of the Water District that were

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subject to curtailment, did your instructions not include any proposed action with respect to those other water rights?
A. The set of instructions that were issued in terms of the Clear Lakes/Clear Springs water rights did not include that because, as I've indicated, that p- -- addressing those other rights was being done outside of this.
Q. But my quandary here is that you're not following the ordinary process with regard to Clear Lakes'/Clear Springs' water rights whereby a call is made, and you look at not just one facility's water rights for potential curtailment; you look at all water rights that are subject to curtailment to respond to the call.
And you didn't do that here, did you?
A. Yes, we did. We had done it before we prepared the instructions for the watermaster.
Q. Then tell me which water rights, other than Clear Lakes, in Water District 130 had been curtailed in order to fill -- in response to Clear Springs' call.
A. In the end, the water rights that we issued notices of intent to curtail, they sought protection under the Stipulated Agreements by joining a ground water district or, upon further investigation, we

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determined that the wells were not op- -- were not currently operating.
So there was no class of junior ground water users left that were subject to curtailment, because they had already either been informed they were going to be curtailed, or they were covered by the Stipulated Agreement.
Q. Okay. Those that were informed that they were curtailed -- that class -- was there a group of them that did not join a ground water district?
A. All of the ones that were currently withdrawing water quickly joined a ground water district to come under the terms of the Stipulated Agreement.
Q. And this occurred before or after Clear Springs' call?
A. About the same time. We were -- We were pursuing this on both fronts simultaneously. We were looking at the Clear Springs/Clear Lakes situation and simultaneously looking at junior ground water rights that were not covered by the Stipulated Agreement.
Q. So at the time the call was made, and at the -- At the time you issued your instructions, there were still water rights out there that would be subject to curtailment; water users that hadn't yet joined the ground water district to get coverage under this interim

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agreement. Correct?
A. That is correct.
Q. And your instructions didn't address those more junior water rights to Clear Lakes' water rights at all, did they?
A. The instructions to the watermaster for that class of junior ground water rights were provided separately via copy of the letters that were sent to those right holders.
Q. But I'm talking about the instructions that you issued and that Cindy Yenter has followed in adjusting the works and Clear Lakes' works. Those made no mention of any other water rights whatsoever in the Water District?
A. Nor did they need to, --
Q. Okay.
A. -- because that was being handled separately.
Q. Now, what other water rights in the Water District have -- I take it from -- Strike that.
I take it from your answers, then, that Clear Lakes' water right is the only water right in Water District 130 that has been curtailed.
A. That is correct. We -- We did find in this process a use of ground water that was not covered by any water right and have subsequently pursued

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enforcement against that individual.
Q. The process by which ground water pumpers joined the ground water districts, they received letters in 2001 that they may be subject to curtailment; is that correct, or when -- when did those letters go out to the ground water users that you're talking about that later -- that late in the process joined ground water districts?
A. Initially they would have gone out in 2001 when the ground water management areas were formed. Subsequently -- and I don't have the date offhand. But in early 2002 we sent these people letters telling them that they were likely going to be subject to curtailment.
And this would have been well in advance of being contacted by Clear Springs. And then finally in early June of 2002 we sent the notices of intent to curtail.
Q. My recollection from the meetings that I had attended down in Buhl was that as of the spring you still had not sent out letters to this group of pumpers that you're talking about. There was some, you know, finite number that --
A. No, I think we did. If we pull out these letters that we sent in June, I can give you the date

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when the first letter went out.
(Whereupon the witness reviewed a document.)
WITNESS: On March 27th, 2002, the first letter went out notifying that they were not (inaudible) --
THE REPORTER: -- "that they were not" --
WITNESS: -- afforded the safe harbor of the Stipulated Agreement.
Q. (BY MR. STEENSON) May I see this letter?
(Whereupon the document was handed to Mr. Steenson.)
Q. (BY MR. STEENSON) This letter that you have handed me, that I will make a copy of and make a deposition exhibit --
MR. STEENSON: By the way, Phil, did you bring any other documents that pertain --
MR. RASSIER: I have the copy of the affidavit that Karl had submitted with our pleadings. But that's already in there (indicating).
Q. (BY MR. STEENSON) Now, these letters that you showed me are dated June 18th and June 20th of 2002. And who are to be the addressees of these letters?
A. The list is provided on the next page.
Q. And this list is comprised of ground water users, I take it?
A. The ground water users that held ground water

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rights within the impact area that we could determine were causing injury that were not covered by the safe harbor agreement.
Q. That were not covered by the safe harbor agreement as of June of 2002 after you had issued your initial set of instructions for the administration of the Clear Lakes rights; isn't that correct?
A. That's correct.
Q. Okay. So at the time you were developing these instructions, there were other water users that were subject to curtailment in response to the Clear Springs call; correct?
A. And we were simultaneously in the process of identifying who they were.
Q. And encouraging them to get protection from this call by joining the ground water district; correct?
A. I wouldn't say we encouraged them. We -- That isn't what we did. We gave them the option. We told them that was an option.
Q. Your letter says in the last couple of paragraphs: "Unless water supply conditions dramatically improve, I anticipate that curtailment will need to be" --
THE REPORTER: A little slower, please.

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MR. STEENSON: Sorry.
Q. (BY MR. STEENSON) -- "extended for all of next year's irrigation season. I regret that this action is likely to be necessary. You may want to consider joining one of the ground water districts that has signed a stipulated agreement as an alternative to having your use of ground water curtailed."
A. Yes.
Q. And the same language occurs in your June 20th letter.
MR. STEENSON: And I would like to make this as an exhibit; 38.
(Whereupon a discussion was had off the record, and then Exhibit 38 was marked for identification.)
Q. (BY MR. STEENSON) If two ground water pumpers up on the plain had approached you -- or if one of two ground water pumpers had approached you, as Clear Springs did, and said, "My neighbor's got water rights, and I think they affect me; I'd like you to consider how you're going to administer me and my neighbor," would you engage in the same process to issue instructions?
A. That question was actually posed by a number of ground water users. And we told them that, with the

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current information we had, we couldn't make a finer distinction among ground water users than we had. We could only evaluate the effects of ground water withdrawals in groups; not individuals.
Q. But that would be the effects of ground water withdrawals on springs; correct?
A. Springs, connected reaches of the river, and also potentially other groups of ground water users.
Q. So in other words, you would not have engaged in a similar process for any other water users in the district who may have, like Clear Springs, approached you for instructions specific to a subset of 130 rights?
A. That's incorrect. We would have if we had adequate information to do it.
Q. And I take it that you will in the future, if you had adequate information in the future?
A. That's correct.
Q. So in addition to the general water instructions for the operation of the water district, you may very well be issuing more specific instructions on administration of particular rights?
A. That's correct.
But I should clarify perhaps one aspect of this. You keep asking why the watermaster wasn't instructed to make this kind of evaluation. The answer

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is: The watermaster doesn't have the capabilities to make that kind of determination for ground water rights.
So we would not want a watermaster making an independent determination as to whether one ground water right was causing injury to another ground water right.
Q. But the ultimate obligation for administration of water rights in the Water District rests with the Department of Water Resources?
A. That's correct.
Q. As you have suggested that you knew -- the Department did and you personally knew of ground water rights that would be subject to curtailment, irrespective of what Cindy Yenter may have known.
A. Yes.
Q. The Department had information that there were water rights not protected by safe harbor in the Water District that would be subject to curtailment in response to Clear Springs' call; isn't that correct?
A. Yes.
Q. Okay.
A. And we took action against those water rights, as well.
Q. Had any of them been curtailed?
A. They subsequently either were not pumping -- It was determined that they were not pumping. One

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example was -- Jerome Recreation District, for example. They turned off -- Their well was turned off. They were told they could not turn it back on.
Q. Any of those that were pumping, have they been curtailed?
A. The rest of them that were subject to it joined ground water districts.
Q. They took your advice and got safe harbor?
A. They followed the alternative that was outlined in the letter.
Q. So as it stands in Water District 130, the only right -- the only right that has been subject to administration is Clear Springs' senior -- and by that, I mean senior to -2708, Senior Water Right -2659?
MS. KAY HARDY: Clear Lakes'.
WITNESS: Incorrect.
MR. STEENSON: Did I say "Clear Springs'"?
Q. (BY MR. STEENSON)? Clear Lakes' Senior Water Right -2659.
A. That's incorrect. All of these ground water rights that we've been talking about have been subject to administration.
Q. I'm sorry. That have actually -- Let me rephrase.
The only water right that has actually been

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curtailed, that has actually been administered by your department, is Clear Lakes' Water Right Number -2659?
A. Incorrect. It's Clear Lakes Water Right Number -7004.
Q. Okay. So are you telling me that -2659 has not been administered by the Department?
A. It's being filled. It's getting its full supply of water.
Q. Are you -- Is the Department regulating the manner in which Clear Lakes diverts -2659?
A. Yes.
Q. Okay. So in that sense, the Department is administering -2659; correct?
A. No. We're administering -7004.
Q. Okay. I take it, by administration, you only mean curtailment?
A. In this sense, I mean the reduction in deliveries that occurred.
Q. But you are affecting the manner in which Clear Lakes diverts water pursuant to -2659 by your administration, are you not?
A. We're affecting where Clear Lakes diverts the water for the -- for the senior rights.
Q. So, then, in your view, it is only -7004. In all of Water District 130, it's only -7004 that is being

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administered by the Department at this time?
A. It's the only one that's been reduced by the Department at this time. All of the other rights are subject to administration.
The limit -- The administration is limited by the terms of the Stipulated Agreement, and it's limited by the available information that we have.
Q. So just to be clear, the only right that's been curtailed in all of Water District 130 is -7004?
A. That's correct.
Q. Okay. And when you use the phrase "subject to administration" -- I just want to be clear -- you mean subject to reduction?
A. Well, reduction and limits on use that are otherwise provided by the water right, the Partial Decree, mitigation plans, Stipulated Agreement, whatever exists.
But all water rights -- All water rights within Water District 130 are subject to administration.
Q. I guess what I'm trying to get at is what -- I think you're drawing some fine distinctions in terms of what you mean by "administration."
You've said that the Department really is not administering -2659.
A. We're not reducing the quantity of water

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delivered to -2659.
Q. Okay. Is there a sense in which the Department is administering or regulating Clear Lakes' exercise of Water Right -2659?
A. We're affecting where Clear Lakes diverts -2659.
Q. And that action of affecting where Clear Lakes diverts, is that an aspect of administration?
A. Yes, it is.
Q. Okay. So you are administering -2659; correct?
A. In that sense, we are.
Q. Okay. Now, at this time of the April 11th letter and based on the information that you had presented, weren't you assuming that -2708, -7004, and -7218 were each diverted through both the Eastern and the Western Diversion Pools?
A. No. I made no such assumption. At this point in time, I didn't -- I didn't know all of the facts that I do today.
Q. Okay. And so it must be, then, that as you've just discussed, as of April 11th, you were not considering administering -2659. But subsequent thereto, at some point in time, you decide that the Department would engage in administering -2659?

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A. No. That's incorrect. -2659 was the senior right. It needed to be filled.
Q. But you have said that the Department is affecting the manner in which Clear Lakes exercises its right; -2659. Correct?
A. We're affecting where Clear Lakes diverts to -2659.
Q. And that is an aspect of administration?
A. That is correct.
Q. So you are currently administering -2659?
A. In that context, yes.
Q. Okay. So at some point between April 11th, when you didn't mention -2659 at all as one of those rights that would be administered, you must have, subsequently to this April 11th letter, decided, "Yes, the Department will administer" -- in the sense we've discussed -- "-2659"?
A. The fact that -2659 is not listed in the caption has no significance in terms of what the Department eventually determined needed to be done.
Q. I guess what I'm asking is what you are thinking at this time, not what you eventually determined.
A. I was thinking I needed more information. That's what I was thinking.

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Q. And you were thinking -- You must have been thinking -- reading this letter -- that on April 11th -2659 was not among the water rights you were going to administer?
A. -2659 was the senior right, and it needed to be filled first.
Q. And so the answer to my question is "yes," isn't it; that at this time of the April 11th letter, that you did not consider -2659 to be one of those water rights that the Department would be administering?
A. That's an incorrect statement, then.
Q. Okay. In what sense is it incorrect?
A. We had not determined -- As of the date of this letter, we had not determined what type of administration needed to occur.
Q. Sure. But you listed -- and I'm going to close on this, because I think we're dancing around each other here.
But again, I think -- and wouldn't you agree -- that any reasonable person reading this letter which says: "Re: Administration of Water Rights" -2708 -7004, -7218, and then look at the first full paragraph and read this sentence: "Based on the location of the shared diversion works in relationship to the locations for the various springs discharging into the pool

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regulated by the diversion works," --
MR. STEENSON (To the Reporter): Am I going too fast?
THE REPORTER: You're fine.
Q. (BY MR. STEENSON) -- "I believe that Water Rights" -2708, -7004, and -7218 "will be subject to administration through the watermaster for the new Water District No. 130."
Wouldn't a reasonable person reading this letter understand that -2659 was not, at this time, among the rights that you believed you would be administering?
A. We were not anticipating reducing deliveries to Water Right -2659 because it was the senior water right.
Q. Were you anticipating administering it as we've discussed in any other way at this time?
A. We weren't anticipating administering it in any particular way at this point in time. But it is in the Water District and subject to administration.
Q. Sure. But in that sense, you would be listing every water right in the district, wouldn't you?
A. Which wouldn't make sense.
Q. Exactly.
Okay. Now, after you sent the April 11th

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letter, what was -- Let me ask you: At this time, who at the Department was involved in this evaluation that you were conducting, other than yourself?
A. As of what date?
Q. As of April 11th?
A. As of April 11th, I believe I was the only one involved at that point.
Now, when -- As we gathered information, then I began to consult with Phil -- Phil Rassier, and had actually asked Phil Rassier to consider drafting part of the watermaster instructions.
Q. And then was the next step in the process for you to review information submitted by Clear Lakes and Clear Springs?
A. Between the time of the April 11th letter and the May 2nd submittal, I had begun to review the applicable Court decisions in the SRBA regarding these water rights.
Q. And did you draw any conclusions regarding the relationship of those Court decisions to this inquiry about administration during that time?
A. No, other th- -- I wouldn't say I'd drawn any conclusions. I was still gathering information.
Q. Okay. Clear Springs was advocating to you, was it not, that the SRBA Court's resolution of the

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source issue affirmed by the Supreme Court resolved any question regarding administration of these rights?
A. That is what they have consistently represented.
Q. Okay. And what is your opinion in that regard?
A. It's not quite as simple as that. And I guess the example I'd give you is that Clear Springs' Water Right -7218, the source element on that Partial Decree is the same as the other Clear Springs rights and the Clear Lakes rights that we're discussing, and yet Judge Wood clearly said that -7218 should be administered separately.
Q. Sorry, Karl. I think you mean -7201.
A. It's the Brailsford right.
Q. Yes. Correct. The one from the Brailsford stream.
A. Yeah. Excuse me.
Q. Yes. And so it is the case, then, that simply finding that water rights are diverted from the same source does not immediately lead to the conclusion that any particular water rights from that source are subject to any particular type of administration?
A. That's correct.
Q. In fact, this is what this fact -- Let me

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strike that.
In fact, it has been determined that ground water rights in the Eastern Snake Plain Aquifer divert water from the same source, --
A. That's correct.
Q. -- which is at least connected to the springs which Clear Lakes and Clear Springs divert from?
A. To varying degrees --
Q. "Varying" --
A. -- and various extents.
Q. "Varying degrees"; that -- that famous phrase.
And that if it were the case that simply having determined that ground water rights up on the plain are diverted from the same source, if that was enough, you would not need to model the aquifer at all in order to determine injury, would you?
A. If it was as simple as simply being from the same source, that's correct. But it's not that simple, of course.
Q. And the same applies to Clear Lakes' and Clear Springs' rights. In other words, the SRBA Court simply determining that -2659, -7004, -2708, and -7218 are all diverted from the same source, that does not immediately lead to the conclusion that junior water -- junior among those water rights will be curtailed to fill others?

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A. In my view, that's correct.
Q. That's correct. And the legal principle at issue here is something called a "Futile Call Doctrine"; isn't that correct?
A. That's part of the legal principle in play, yes.
Q. And also, that in order for a junior water right to be curtailed, it must be shown that diversion of that junior water right is injuring a senior --
A. Correct.
Q. -- that is seeking distribution of water pursuant to the senior right?
A. Correct.
Q. In other words, it must be shown that diversion of water pursuant to the junior affects the flow of water available to the senior; isn't that correct?
A. No. I'd say it slightly differently. Diversion under the junior right reduces the amount of water available to fill the senior rights.
Q. Sure. And reduction is an effect on the senior?
A. Yes, it is.
Q. In fact, it is because of the hidden nature of the aquifer and the difficulty in determining whether

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the diversion of some ground water rights -- whether and to what extent the diversion of some ground water rights interferes with, reduces the flow of water available to some senior spring users, that you have had to delay administration of all rights in the aquifer pending the completion of the model?
A. And pending completion of the adjudication.
Q. Sure. Now, you recognize that Judge Wood, himself -- at least on two occasions in his final opinion in the Clear Lakes/Clear Springs source issue -- specifically recognized that a futile call defense was not at issue in the SRBA; correct?
A. That's correct.
Q. Even though he decided to discuss the possibility of a futile call defense in various hypothetical situations, he was careful to make sure that he did not imply that he was rendering any decision as to the outcome of a futile call defense; isn't that correct?
A. That's correct.
Q. And are you familiar with the term "dicta"?
A. Yes.
Q. This is a classic example, then, of dictum, is it not?
A. Could be, yes.

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Q. Okay. And you understand that among the principal reasons Clear Lakes believes that its Water Right -27004 is not subject to administration in order to fill -2708 is because of the Futile Call Doctrine?
A. I think you meant "-7004."
Q. Yes. And let me make sure that's correct; that Clear Lakes believes that its Water Right -7004 is not subject to curtailment because a call against -7004 would be futile?
You understand --
A. I understand --
Q. -- that there's --
A. I understand that that's your position, yes.
Q. Okay. And that that issue was not resolved by either the Supreme Court or the SRBA Court?
A. Correct.
Q. Now, one of the fundamental principles at stake -- the fundamental principle at stake in any call is the prior-appropriation doctrine; isn't that correct?
A. Yes.
Q. And as we discussed, the operation of the prior-appropriation doctrine means that, in the event of a call by a water user, the Department's role is to look to junior water rights to see if curtailment of those

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rights would increase the flow to the senior?
A. Correct.
Q. So that in response to a call by a, let's say, 1950 priority water right, earlier-in-time prior rights are not subject to curtailment?
A. Correct.
Q. And they are not subject to administration?
A. Not necessarily.
Q. Okay. Describe for me the circumstance in which you think -- or circumstances in which you think a senior water right is subject to administration in response to a call for water by a junior.
A. If the -- I mean, in general principle, if the senior water right can be filled such that the junior water right can still divert, then that's what, in our law, is generally expected.
Q. And when you say "can be filled," what do you mean by that? Do you mean the --
A. Well, let me put it a different way for you. The senior water right, just because they're senior, does not have the right to insist on an unconditional diversion of its right such that it can exclude use of the source by a junior priority right.
Q. Could you explain for me what that means? I really don't understand it.

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A. Well, in this case, Clear Lakes' senior right has diversion points from two locations from the source. And there was nothing in the 1980 Agreement -- There was -- and more importantly, nothing in the Partial Decrees that defined the point of diversion for Clear Lakes' senior right in such a way that they were entitled to a specific portion -- diverting a specific portion of their senior right from either the Western Pool or the Eastern Pool.
Q. Okay. Let's talk about that. We're talking about a situation in which a water right owner has multiple points of diversion; correct?
A. (Witness nodded his head affirmatively.)
THE REPORTER: "Yes"?
WITNESS: Yes. Excuse me.
Q. (BY MR. STEENSON) And you recognize that the point of diversion is a fundamental element of a water right, a fundamental aspect of the property right represented by a water right; right?
A. Yes.
Q. Okay. And to deny a water right owner the use of a point of diversion affects his or her exercise of that property right?
A. That's correct. But in this event, Clear Lakes is not being denied use of the alternate point of

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diversion.
Q. Okay. And so generally, then, it is the case, is it not, that a water user with multiple points of diversion has the right to determine for him or herself how much water, unless there is some limitation how much water that water user diverts from either of both points?
A. Not if it results in the prohibition of use by a junior, particularly when the senior has undertaken actions to commingle the sources.
Q. I take it by that, that last statement, you believe, applies to the Clear Lakes/Clear Springs situation?
A. One of the findings of fact in the Special Master's decision was that the construction of dikes by Clear Lakes had captured a portion of what used to be the western stream and made it available to -7004, which prior to the construction of all those dikes the western stream -- water from the western stream had not been available to -7004.
Q. Well, let's talk about that for a second. When you're talking about commingling sources, I guess you mean the commingling of the western and the -- the source of western and eastern streams?
A. Correct.

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Q. But the SRBA Court, affirmed by the Supreme Court, determined that there were not separate sources.
A. In part, because they couldn't be separated anymore because of the construction of the dikes.
Q. And for other reasons stated by the Court; correct?
A. Primarily that reason.
Q. Well, there --
A. Based upon the findings of fact that are set forth in the Special Master's decision, that was primarily -- They couldn't separate the sources any longer because of the construction of the dikes.
Q. And so what the Court ultimately decided was that the source was springs --
A. Correct.
Q. -- irrespective of whether there ever was a western and eastern stream.
A. The Court recognized that there was an eastern and a western stream at one point.
Q. Sure. But its decree and its decision was that the source is the springs?
A. Correct.
Q. Okay. So what we have now, having had the source issue resolved in the manner that it was, we now have diversion of water from springs; correct?

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A. From the pools that collect the springs.
Q. No. We've talked about that. The Eastern Pool -- and you have recognized that the Eastern Pool is a constructed diversion works?
A. Yes, it is.
Q. That diverts water from the springs?
A. Yes.
Q. Okay. So the pools are not, themselves, sources? They are --
A. That's correct.
Q. Okay.
A. But I would say they're inextricably linked to the source.
Q. Just as any diversion works that extends its way into a stream is inextricably physically linked; correct?
A. Yes.
Q. But that doesn't render the Eastern Pool a source, and it doesn't render the Western Pool a source.
A. That's correct.
Q. The decrees tell us that the springs are the source?
A. Correct.
Q. Okay. So this concept of commingling no longer applies, does it?

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A. Well, the concept of commingling applies only to the extent that it was that commingling that the Court determined made -- I think, made these the same source. Had that commingling not occurred, I don't think we know what the Court would have said about the source issue.
Q. And again, there were various reasons that the Court reached the conclusion it did. But what we have, in terms of your job in administering, is a Western Pool and an Eastern Pool that divert water from springs?
A. The same source.
Q. And there is no commingling of separate sources because there are no separate sources?
A. It's all the same source.
Q. So the question of commingling of separate sources has no bearing on your administration of these water rights?
A. Well, it does. And I -- I guess I'd refer you to the hypothetical "dicta," as you characterized it, in Judge Wood's decision where he talks about two rights on various forks of a stream and, at least in dicta, discussed what would constitute a futile call and then specifically recognized that it was the actions of Clear Lakes that had moved the point of diversion into a portion of the supply -- I won't use the word "source";

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a portion of the water supply for the right on the other fork.
Q. But in terms of administration, that's really no more than historically interesting.
A. But it goes -- No, because it goes to the concept of whether -- It goes to the issue of whether the call is futile or not.
Q. Okay. And so what we were talking about was a limit -- what limits a water right holder's discretion to determine how much water they will divert from any and all of multiple points of diversion; correct?
A. Correct.
Q. Okay. And a water right -- There is nothing inherent in a water right that limits that discretion unless there are other factors at play?
A. You could say there's nothing that limits it, nor is there anything that gives it exclusive discretion.
Q. Sure. But unless there is -- Bottom line, unless a water right owner's exercise of discretion to determine how much water to divert from multiple points injures another water right, unless there is an injury in effect -- an injurious effect on another water right, there is no restriction on that water right owner's discretion to decide how much I'm going to divert from

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over here and how much I'm going to divert from over here when there are multiple points in --
A. That's incorrect. If that discretion results in the inability of a junior to use the source when the senior right can otherwise be filled by some other means, then that's not allowed; that exercise of unconditional discretion isn't allowed.
Q. I think we're saying the same thing.
You're saying the exercise of discretion that is inherent in the water right, the limit upon it is if that exercise of discretion when I'm deciding today rather than diverting 50/50 of a hundred, I'm going to divert 60/40, the only limitation upon that discretion is if, in exercising that discretion, I injure another water right owner's diversion of water.
You've used the word "prohibit."
"Injury" would encompass that concept, wouldn't it?
A. Not necessarily. The reason I've made that distinction is because generally you only think of "injury" in terms of senior priority right. And here, we're talking about a -- a restriction from access to the source by a junior right through exercise of the senior right.
Q. And that gets us to what's called, I believe,

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a "no-injury rule" where juniors have a right to rely upon conditions as they existed at the time their appropriations were perfected; correct?
A. Yes.
Q. So when we're talking about -- and I think I will try to get to illustrating this, what I think is an important point, by a diagram.
We're assuming there is a senior right with two points of diversion; correct?
A. Okay.
Q. And further, that there is a junior right with one point of diversion?
A. Yes.
Q. Okay. And I will draw it this way without regard to whether we're talking about a stream, or an aquifer, or whatever.
But let's assume that the senior having two points of diversion -- has two points of diversion, one of which is located closer to the point of diversion for the junior. Okay? And this senior has historically diverted 50/50.
And this was the manner in which this water right was diverted and exercised at the time the junior water right was perfected. Okay?
It sounds to me like what you're saying is

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this discretion that the senior ordinarily has to modulate or change the amount of water taken from each point is limited by how it will affect this junior water right.
In other words, if the senior were to decide today: "Rather than 50, I want to divert a hundred cfs from this point of diversion that is closer to the junior's point of diversion," that discretion may be limited if it has an injurious effect on the junior water right?
A. Maybe yes, maybe no. Again, it's always dangerous talking about hypotheticals. But what's the underlying license or decree for the senior right? It may be that the underlying license or decree conveyed to the senior the discretion to divert all of it here, or all of it here (indicating).
Q. Let's go back to that. Let's assume the senior water right -- We have a senior water right license or decree which makes no mention of how much water the senior diverts from each point.
A. Okay.
Q. In that situation, as we've discussed, the senior has the discretion to decide how much he or she diverts from each point of diversion unless that exercise of discretion injuriously affects the junior;

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isn't that correct?
A. Well, again, I have trouble with the word "injury" to a junior right. It's a -- It prohibits the junior from being able to utilize the source.
Q. And under the conditions as they existed at the time the appropriation was made. Because that's what the junior is entitled to, and nothing more.
A. That is generally correct, yes.
Q. And so, again, backing up -- I want to make sure we understand each other -- it sounds like you agree with me that a water right owner with multiple points of diversion, absent some limiting language in the water right, itself, has the discretion to decide how much water he or she diverts from multiple points -- each of multiple points.
The only limitation on that discretion, or on that right, is if, in exercising that discretion, changing the amount of water that is diverted from each point has an adverse impact or injures the junior in terms of the conditions that existed at the time the junior's appropriation was made, isn't it? We're in agreement on that, aren't we?
A. Generally, although the other condition you didn't mention is that exercise of this discretion could also potentially cause injury to a senior priority

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right.
Q. Sure.
A. And they wouldn't be allowed to do that.
Q. They wouldn't be allowed to do that, either.
And in this hypothetical where we have assumed that the senior has diverted, let's say, 50 cfs from each point of diversion and was diverting in that manner, at the time of 2's appropriation, it may very well be that increasing the diversion under the senior from the point that is closest to the junior to the full hundred subjects the junior to a condition that did not exist at the time the appropriation was made and, in that sense, injures the junior.
A. Again, I wouldn't use the word "injury" to a junior right.
Q. I guess what I'm --
A. It affects exercise of the junior right, certainly.
Q. Yes. But you agree with that proposition regardless of the term we use?
A. Yes.
Q. And you recognize that Judge Wood, in his decision when he was discussing these hypotheticals, discussed what he called the, quote, "no-injury rule"? That's his label?

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A. (Witness nodded his head affirmatively.) That's his label.
MR. STEENSON: We've been at this a while. It's 11:00. If you'd like to take a brief break, we can do that, or we can keep going.
WITNESS: Whatever you want to do.
MR. STEENSON: Anybody else?
(Whereupon a discussion was had off the record, followed by a recess.)
Q. (BY MR. STEENSON) Now, after some more discussion --
MR. STEENSON: I'm going to have this document marked as Exhibit 39.
(Whereupon Exhibit 39 was marked for identification.)
Q. (BY MR. STEENSON) Now, in this hypothetical situation in which we have two points of diversion for a senior water right represented by the circled 1s, and a junior water right with one point of diversion represented by the circled 2, what we've been talking about, just to summarize after the break, is that if there is no limitation on the face of the water right, the senior water right has the discretion to decide how much water to divert from each point, unless changing that amount from one point to another injuriously

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affects 2 in terms of the conditions that existed when 2 was appropriated; correct?
A. Again, I wouldn't use the word "injuriously." It restricts 2's ability to divert from the source.
Q. Sure. Now, it doesn't matter in this hypothetical, does it, whether the second water right is owned by someone different than the first water right or is owned by the same person?
A. Well, that's correct. And, you know, back to your prior statement, the other condition that you didn't mention is it can't cause injury to a senior right. It's just not represented here.
Q. Sure. So if the senior water right was owned by John and junior water right was owned by Phil, or if senior water right was owned by John and junior water right was owned by John, those different circumstances with regard to ownership don't change the analysis that we've just discussed?
A. No. But it ceases to make a lot of sense if the same person owns both rights.
Q. Sure. Now -- and I'm going to label this hypothetical as hypothetical "A."
Now, what if we suppose a different situation, which I'll label Hypothetical "B," where again we have two points of diversion for a senior water right and

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again we have a junior diversion with a single point close in proximity to one of those points, but now we have a junior -- a more junior water right close in proximity to the other of the points of diversion.
And we have a situation where there is not enough water to fill all the rights, and junior 2 calls for water. Are you with me so far?
A. Yes.
Q. Okay. And it is not physically possible to increase the flow of water to 2 by reducing the diversion of 3. Are you with me still?
A. Yes.
Q. Okay. So what 2 says is, "What I would prefer to do is, rather than have 1 divert as 1 has historically done, 50 of a hundred cfs right," let's suppose, "from each point, I wanted 1 to divert," let's say, "10 from the point of diversion closest to 2 and 90 from the point of diversion closest to 1."
And again, let's suppose these water rights are owned by three different people; let's suppose that first. Doesn't this injuriously affect -- You don't like that term, but doesn't this run afoul of the no-injury rule, as labeled by Judge Wood, just as we discussed with the first hypothetical labeled "A" as to 3?

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A. Maybe yes, maybe no. It -- It goes back to what the underlying authorization is for 1.
Q. Again, let me build into the hypothetical that 1, with respect to these three rights, is senior, has a hundred-cfs right, and has two points of diversion. And there is no limitation or definition on how much water one can divert from either of these points so that, as we previously discussed, 1 has the discretion to decide how much water to divert from each point on the face of the water right.
A. In that event, if one could make full beneficial use under its water right and receive a full supply of water under its water right by diverting at the location shown here on the right side, then it would be expected to do that.
Q. But my question is with regard to the effect of doing that on this junior. The conditions that the junior, like in the first hypothetical with regard to this junior 2 (indicating), the conditions on the stream when this junior perfected its water right did not include diversion of 90 here and 10 here (indicating).
A. Yes.
Q. Doesn't this run afoul of the no-injury rule with respect to this junior water right, just as we discussed with respect to the first hypothetical?

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A. No. I mean, I understand what you're trying to -- to portray, but what you haven't included in the hypothetical is the effect of a preexisting agreement between 1 and 2, and the effect of an intervening general stream adjudication that comes in and adjudicates all three water rights.
Q. Let's say they're all three adjudicated water rights.
A. Okay.
Q. How does that change the analysis?
A. Well, it would change it if in the Partial Decrees or the decree for Water Right 1 there was a recognition that there was -- the discretion could be exercised within set limits; that they had the discretion to take, you know, between 50 and a hundred percent at either point of diversion. If that was specifically recognized in the decree, then they're the senior, and they had the right to -- to that part of the water right.
Q. And what we've supposed is that the water right is silent as to the discretion. But we've agreed that inherent in the water right is the right to decide how much water you divert from each point.
Absent some injurious aspect -- you don't like the word "injurious," but absent changing the conditions

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that a junior water right holder -- that existed when a junior right holder's right was perfected. And doesn't this hypothetical in B do that, just like we agreed occurs with respect to this junior water right in 2, in the hypothetical labeled "A"?
A. But with this hypothetical, to the extent you're trying to relate it to the Clear Springs/Clear Lakes situation --
Q. Let's just treat it as a hypothetical and deal with it on the terms that I've discussed it.
A. Okay. Then let me answer it a different way, then, to avoid linking it at this point in time.
I think you would have to go behind -- not behind the decree, but you would want to look at all aspects of what constituted the historic conditions at the time that 3 was established.
Q. The same would be true in the first hypothetical, wouldn't it?
A. Sure.
Q. Okay. The only thing we've changed here is, we've changed the reason for pushing 1 around; that there is another water right. That's the only thing that's different here; right?
A. No. To me, it's -- it's not different. To me, the issue is: Can 1 take its water right at this

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location, make full beneficiary use under its water right, have a full supply of water so that 2 can have a supply of water. That's the issue.
Q. Without changing the condition in Hypothetical A under which 2's water right was perfected, as we've previously discussed; right?
A. Yes.
Q. Similarly, in B without changing the conditions under which 3's water right was perfected?
A. But under B, 3 doesn't have a right that is -- that supersedes that of 2.
Q. Sure. That's correct.
A. So in this hypothetical, if one can divert at this other location so that 2 can get a supply of water, even though it means that the supply of water available to 3 is reduced, it has the right to do that.
Q. How does the imposition of this right change the effect of, as I've said, modulating 1 on the junior? How does it change the analysis between A and B as to the effect on the junior water right, which is now being affected by a dramatically increased diversion of water proximate to its point of diversion?
A. Well, because in this event, the diversion under 3 would have to be reduced so that the diversion under 1 could realize its full right to allow diversion

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number 2 to occur.
Q. Right. And therein lies the problem. Therein lies the situation that the no-injury rule addresses itself to; isn't that correct?
A. I'm not sure what you mean by that.
Q. Well, if 1 -- Let's take another hypothetical. Let's talk about a transfer situation where 1 wants to add a point of diversion next to 3. So rather than a situation where you're increasing diversion, you are -- Let's say the new point of diversion is for 40. Okay?
A. (Witness nodded his head affirmatively.)
Q. So in C we have a situation where a new point of diversion is located right next to this junior. I'll put 2 in here, too, just for consistency. And unlike the situation that existed when 3 perfected its right, now it's got a neighboring point of diversion taking 40 cfs of water. You would deny that transfer, wouldn't you?
A. If it would cause injury to 3.
Q. Using that term "injury," that is difficult for us, is it not?
A. Well, because now the transfer is junior to 3.
Q. The right is senior to 3?
A. The right is senior, but the transfer is

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junior.
Q. Do you date -- I am not familiar with --
A. Well, the senior --
Q. -- the concept of --
A. Sure you are, because this --
Q. The transfers, themselves, have a priority date.
A. The transfers, themselves, don't have a priority date.
Q. Right.
A. But what the statute says is that a transfer cannot be approved, even for a senior priority water right, if, as of the date of the transfer, it would cause injury to any existing right.
Q. And here, that injury exists, because we've got 40 cfs that had never been taken before, taken from a location right next to the third right?
A. Correct.
Q. Similar to the situation where Water Right Number 1, when 3 was perfected, and since that time has diverted this amount of water; 50 cfs. Now, the Department says, "No," or the -- the water user says, "I'm going to change the way we divert water here, and we're going to increase by 40 cfs the amount of water that is diverted right next to your junior point of diversion."

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Doesn't that have just as much injurious effect as does a transfer for a new 40-cfs diversion located next to the junior right?
A. It may have an effect that is somewhat similar, but you can't say that it's the same thing. Because, in B, Right Number 1 established the alternate points of diversion. Whereas, in C, there is a change that's sought after 3 came into effect. Whereas under B, when 3 came into effect, 1 was already here (indicating).
Q. So what you're saying is, you would not view A as a potential injury to 2 situation?
A. I don't know what you mean by the question.
Q. Unlike we discussed before, because, again, in A what we're talking about is, we've got alternate points of diversion, but now Mr. Senior says, "I'm going to go from 50 at my left western point of diversion to a hundred."
A. Uh-huh.
Q. "And, Junior, you can suck air, because I'm entitled to that."
A. I don't think you can do that.
Q. Okay. Then why can it be done here? Why can the senior do what is essentially the same thing, but here the -- the reason for it is because 2 said, "I want

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more water"?
A. Because --
Q. Doesn't that have the same injurious effect on 3 that occurs here (indicating)?
A. But the difference between A and B -- In A, there is no 3.
Q. Right.
A. And in B, there is a 3. And 2 is entitled to the water first; same source.
Q. 2 is entitled to the water first, but what we've -- and maybe I didn't build this in, but we are not increasing the diversion of water to 2 by altering 3's diversion?
A. We are.
Q. The way we are getting there is, we are regulating 1.
A. We're administering 1 so that they take more of their right at this location (indicating) --
Q. Right.
A. -- to allow 2 to divert ahead of 3 in priority.
Q. Right. And when this right was perfected -- Having the right to rely on conditions as they existed at the time this right was perfected, how can you impose upon 3 this dramatic new increase in diversion; that 3's

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right to the protection of the no-injury rule is not abrogated by the fact that there is this intermediate priority water right?
A. Again, the difference between B and what we faced with the Clear Lakes/Clear Springs situation is, there was an agreement that set forth the historic condition and was subject to change.
Q. Yes. Now, that historic condition -- Let's bring it down to the real world, then. That condition that we've talked about when we look at the photographs -- particularly, Exhibit Number 5 -- conditions which, not only historic, but at least a major portion of which were created by agreement. So which should, therefore, be even more binding upon the parties; correct?
A. Well, you want to point to a picture showing a physical layout, and I think what you should be pointing to instead is the language in the agreement.
Q. Okay. And which language would you refer me to?
A. The language that says: "Until there is a legal determination," --
Q. Sure.
A. -- "this is how the water rights will be distributed."

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Q. Sure. But with respect to -- Not with respect to the apportionment. The agreement does various things.
A. Yes.
Q. It provided for a percentage-based apportionment.
What I'm talking about is the portion of the agreement that provided for the construction of these works, as you see them today.
A. Okay.
Q. This Western Pool as you see it today. This not only has existed since the time the water rights were perfected; it was done by agreement.
A. Yes.
Q. So wouldn't you say that even more so than the normal situation where historic conditions have occurred not by agreement but by conduct, not perfected by an agreement, where you have historic conditions that are the way they are, were the way they were, by agreement it has -- the juniors are even more entitled to rely upon them --
A. There's --
Q. -- than in a normal situation when the conditions were not created by agreement?
A. The juniors are entitled to rely upon the

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terms of that agreement that survived.
Q. Sure. Which -- and pursuant to that agreement, as we've discussed, this Western Pool was built the way it is today?
A. Yes.
Q. Okay. So in the hypothetical we're talking about here, we have the west pool, and we have the east pool.
And as you've seen in the diagram that I've drawn for you before, we have Clear Springs' second priority right diverted exclusively through the Western Pool; correct?
A. Correct.
Q. Clear Lakes' junior priority right diverted exclusively through the Eastern Pool in the pipes that are immediately north?
A. Correct.
Q. And Clear Lakes' senior priority right diverted through both pools. And now you recognize that at no time has Clear Springs ever attempted or established the right to divert any of the water that is diverted into the Eastern Pool?
A. I don't think that's accurate, because the Eastern Pool now contains part of what was the western flow that used to be available to Clear Springs' right.

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Q. The western flow doesn't exist anymore.
A. It doesn't exist; that's correct.
Q. And it is not -- It is immaterial as to any kind of administration, because the Court has said there's no separate sources. The Court -- Isn't that correct?
A. That is correct.
Q. And the Court in its decree has said: From now forward, you have to treat the springs as the source; correct?
A. Correct.
Q. Okay. So what we had, then, was a situation in which the Eastern Pool was constructed by Clear Lakes to divert, as we discussed, water from the springs?
A. Correct.
Q. Okay. And now I think you recognize, from being out on the site, that there is no way to -- that the water that the Eastern Pool diverts is diverted exclusively by gravity?
A. Correct.
Q. Okay. And I think -- and if you don't recall, it's from transcripts, and I'd be happy to point it out to you.
But Clear Springs has never -- So we have springs that are discharging, and Clear Springs has

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never claimed any diversion works or any point of diversion, other than this Western Pool; correct?
A. As far as I know, that's correct.
Q. They have no right to utilize any of the water diverted by the Eastern Pool; correct?
A. I'm not sure I'd go quite that far.
Q. Well, isn't there a right limited to what can be diverted to the Western Pool, since that is their only point of diversion?
A. But it's all the same source.
Q. It's all the same source, granted. But just like Nampa/Meridian can't assert the right to divert water down at Phyllis that's from the same source, neither can Clear Springs assert the right to divert water through Clear Lakes' diversion works.
A. Through Clear Lakes' diversion works.
Q. Right.
A. I would agree with that.
Q. Right. And once -- I think you recognize, too, the legal principle that once the water is diverted, it is no longer subject to appropriation?
A. Correct.
Q. And so once the water is in the Eastern Pool, it's not subject to any competing call by anybody, other than Clear Lakes; correct?

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A. No, because now you have to factor in the principles that we've been talking about before; that even in this setting where Clear Springs may have not exercised any claim to water from the Eastern Pool, if 1 -- if the Senior Right 1 can be fully filled and the full extent of beneficiary use under 1 can occur by diverting the water from the Eastern Pool, such that the next priority right can be filled, that's what needs to occur.
Q. Well, you're talking about something a little different than I am. What I'm trying to first establish is: Basically, who owns this water that's in the Eastern Pool? We've established that the Eastern Pool is a diversion works; correct?
A. Correct. And we've also -- I've made it clear that this diversion works in this case is inextricably linked to the source.
Q. But just like any other diversion works, it's connected to the --
A. Right.
Q. -- water volume?
A. But just the fact that the water is behind this dike, in my view, doesn't mean it's been diverted. It's been collected.
Q. Well, that's interesting, because we've --

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What's the distinction between collecting and diverting water?
A. Well, in this case, because we're talking about spring sources. I think there is a distinction. We're collecting the discharge from the spring, as opposed to building a structure at each individual spring, and diverting the spring discharge, as it occurs, to some use.
Q. But once it's collected, it's appropriated, isn't it?
A. In this case, they're nearly one and the same because of the method that's used to collect and distribute.
The distribution occurs in the Western Pool, in particular, by constructed works. That's the only means of distribution.
Q. Let's go back --
A. There is no other means of distribution.
Q. Let's go back to what I thought we had recognized through looking at the photographs and reviewing the agreement.
We clearly know, having looked at the photographs and reviewed the materials that we submitted as you have, that this Eastern Pool is a constructed works?

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A. It is.
Q. Okay. Constructed for the purpose of diverting water from springs?
A. Correct.
Q. And once -- and similarly, the Western Pool is a constructed works?
A. Yes.
Q. Not just the division structure, but the whole structure of the Western Pool is a constructed works?
A. Yes.
Q. So once the water is collected, or diverted, or however you want to put it -- Once it's in those pools, it's appropriated water. It is no longer in any natural body or stream of water; isn't that correct?
A. The natural source of water is still behind the dikes. And I wouldn't agree that the -- that the water has been collected and now reserved for those -- for those users. Otherwise, the watermaster wouldn't have any authority to regulate the Western Pool.
And in my view, the watermaster does have the authority to regulate the Western Pool, because the source is right there at the diversion point.
Q. Well, then, what is the distinction between a situation where you have a stream and a diversion works

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that reaches its arm out into the stream and collects it into a ditch and the water is diverted out through sublaterals and delivered down? Once that water is collected by the wing dam, it's no longer part of the natural course; isn't that correct?

A. I disagree. Once it's been removed from the natural course, it's no longer part of the natural course.

Q. Okay. Once it's been removed from the natural course. Okay? And here (indicating), once the water is in the Eastern Pool, it's no longer in a natural course; isn't that correct? It's in a constructed facility?

A. It's in a constructed facility, but it's -- it's more analogous to the water in a stream being behind the diversion dam in the stream. It's still in the -- It's still in the source.

Q. So if that's a correct analogy, then, would the Department, once the arm of the wing dam intercepts the water, have the authority to redistribute the water out of the wing dam?

A. Potentially, yes. And, in fact, that does happen. One example is Fort Hall Indian Tribe; time and point of diversion to -- to water rights, Indian water rights, non-Indian water rights. They're distributed from the same diversion dam.

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Q. Well, but that doesn't change the fact. I mean, it's common for -- It's not uncommon at all for various water rights to be diverted by the same works?

A. Not uncommon.

Q. Not uncommon. But just because they're multiple rights doesn't mean the multiple rights are any less diverted than if there were only one right diverted?

A. Once they're removed from the natural source. Here (indicating) they're collected in the natural source, if you will.

Q. Well, this -- You know, it seems to me what you're saying is entirely inconsistent with your prior recognition that the east -- as clearly established by the fact that the Eastern Pool is a constructed works.

A. And I recognize that.

Q. Just as the Western Pool is a constructed works?

A. And I still recognize that.

Q. I mean, water in a reservoir diverted for storage is in a constructed facility?

A. Correct.

Q. How is that really any different than what we're talking about here?

A. I'm not aware that diversion to storage is a

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use under any of these water rights.

Q. Not these. But I'm trying to -- But we're talking about what constitutes diversion.

A. If it's diverted to storage, even though the reservoir is sitting on the stream, that constitutes a diversion out of the stream.

Q. Okay. Distinguish the extent to which that is a diversion from the extent to which this is -- from your belief that this is not a diversion?

A. There is no use of water diversion to storage. The use is directly out of the springs.

Q. Well, the use, of course, under these rights occurs in facilities that are an arm's length away from the diversion ponds.

A. Correct. And the conveyance of water through that arm's length is analogous to what you've shown here as the ditch. The wing dam is analogous to what you've shown here as the dikes.

Q. And you don't believe wing dams are --

A. They're constructed works.

Q. You don't believe once a wing dam intercepts the water and changes it from its natural course, that the water is diverted?

A. Once it's removed from its natural course, it's diverted.

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Q. And here we've established that the source -- the source are the springs?

A. And what -- What I'm trying to say is, the source is the water upgradient from that -- from that all the way back to the springs. They're inextricably linked.

Q. So at what point would you say Clear Lakes and Clear Springs in their facilities are diverting water?

A. Once the water passes through the dike, it's removed.

Q. And at least --

A. Let me go back to this example here, Dan, where you've got the wing dam in the river and you've got the canal. If you've got a control works on the canal so that water is hitting the wing dam and passing around it, there has been no diversion. The diversion occurs when the wing dam -- when the control at the wing dam has opened up so that water can be removed from the source.

Q. Okay. Well, let us say -- I can see we're just not going to reach accord on this. But let us say that it can be demonstrated that, as a matter of law, the water in these pools is diverted. Okay? If that is the case, once diverted, the water is no longer subject to appropriation; correct?

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A. But here they're diverted into shared facilities; at least one of which is a shared facility.
Q. Okay. But if we were to assume that water in these pools is diverted -- okay? -- it is the property of these water right owners. It is no longer subject to appropriation by anybody else; correct?
A. That is correct.
Q. That would be correct. Okay.
In which case 3 would have no right to any of the water in the Western Pool; correct?
A. Well, you know, one of the facts that has not been established through any of this is, that I'm aware of, is that, you know, whether or not this -- this dike that separates the Western Pool from the Eastern Pool is, in fact, a total separation.
And the reason I bring that up is, if it's not a total separation, then it's possible, depending upon the water levels in these various pools, for water to flow from the Eastern Pool into the Western Pool, or vice versa.
Q. Well, let's assume that that doesn't occur.
A. But it may occur. I haven't seen any facts that say that it doesn't.
Q. Well, are you suggesting, then, that if water passes somehow through the dike from one pool to the

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next, then what -- then what is the implication of that?
A. It goes to the implication that you can't draw an arbitrary line in the pools and say, "Above that line, that's the springs. Below that line, it's captured water." That's what it goes to.
I think the only line that you can draw as to what represents captured water is what's controlled as it leaves the pools, because the pools are inextricably linked to the springs. Many of these springs are submerged in the pools.
Q. What evidence is there of that?
A. Well, that's -- Those were the statements that have been made by Clear Springs and, I believe, at Clear Lakes when I -- when I was out there in April. Some of the springs are submerged.
Q. Well, so how does this belief that you have that these pools do not constitute diversion works --
A. They are diversion works, but the diversion doesn't occur until the water leaves the pool.
Q. You understand that any facility that changes the natural course of the water is a diversion, don't you?
A. Yes.
Q. And we've recognized that that's what the dikes that Clear Lakes constructed, and the dike that

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Clear Springs constructed does. That's precisely what it does; correct?
A. Yes.
Q. In fact, you understand that Clear Lakes -- You've recognized these dikes as points of diversion, have you not?
A. Yes.
Q. Okay. So how can water that has been intercepted by point of diversion not be diverted?
A. Same way water flowing down the stream; when the ditch is closed off, it hits the dam. It's not diverted.
Q. And how does this affect the analysis with respect to the injurious effect of having the senior right change its amount of diversion -- the injurious effect of that on 3, as in the hypothetical with A?
A. Well, again, I think when you are talking about this "D," which now involves the two fish facilities, you have to look at the 1980 Agreement as being part of the historic condition under --
Q. Sure.
A. -- which 3 was established.
Q. Sure.
A. And that agreement is very clear, that the distribution of water between these rights is subject to

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a future legal determination.
Q. Okay. Let's talk about that. Do you think that legal determination has occurred?
A. Yes.
Q. And who made it?
A. The Snake River Basin Adjudication Court.
Q. Okay. Now, we've agreed, again, that the only thing that the Snake River Basin Adjudication decided in the Clear Lakes/Clear Springs matter was that the source of all these rights were springs; correct?
A. It decided priorities and quantities.
Q. Do you believe that there was ever any dispute between the parties as to priorities?
A. The 1980 Agreement, on its face, said there was some dispute about priorities.
Q. Well, did any of the parties object to either of the other parties' priorities in adjudication?
A. I don't know offhand.
Q. The answer is "no."
A. I don't know that.
Q. Okay. I mean, don't you understand that the issue in the 1980 Agreement between Clear Lakes and Clear Springs was how should water be distributed in times of shortage as between -2708 and -7004?
A. No. It included the senior Clear Lakes right,

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as well.
Q. Well, let's look at the 1980 Agreement. And that was that exhibit -- Where did we say? 17?
Yes, 17.
A. It's on Page 3, Paragraph 1.
Q. At the paragraph heading "1" at the bottom, in the first sentence of that paragraph it says: (Reading) It is understood and agreed that the parties hereto acknowledge as prior the 100-cfs second right of Clear Lakes under Permit Number 33176/36-2659 under the priority date of June 24th, 1966 (End reading).
How can you construe the 1980 Agreement as indicating there was some dispute between the parties about this right; -2659?
A. There was no dispute about the priority.
Q. Well, --
A. But it goes on to say: "Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permit Nos. 36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available" --
THE REPORTER: -- "which is available --
WITNESS: I'm sorry.
-- "which is available to Lakes and Springs

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under their respective permits, goes below 375 cubic feet per second," --
And that's the amount of water needed to fill all three rights.
-- "that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708," and then it goes on to specify the agreed-to reduction -- or distribution; 53 percent.
Q. (BY MR. STEENSON) What, in what you just read, indicates that there was any dispute between the parties about -2659?
A. I didn't say there was a dispute about -2659. But under the terms of this provision, the priority of -2659 was not exercised against the other rights.
They were -- In essence, these three rights -- -2659, -2708, -7004 -- were treated as if they had the same priority.
Q. Correct. Okay. So there was no need for any future legal determination as to -2659; correct?
A. -2659 was enjoined in the SRBA, and that does constitute a legal determination.
Q. Pursuant to this agreement, this agreement doesn't call for any future legal determination as to -2659, does it?
A. It must anticipate some future legal

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determination of some sort.
Q. Okay. And the concern here was how in times of shortage water would be distributed as between -2708 and -7004; correct?
A. No. The concern was how water would be distributed between -2659, -2708, and -7004 when it's less than 375 cubic feet per second.
Q. Okay. But we've recognized that -2659 is a senior right --
A. Yes.
Q. -- and will, as between those three rights, always be entitled to a hundred cfs so long as there is a minimum of a hundred cfs available; correct?
A. Not under this -- under the current terms of this agreement.
Q. Not under this interim agreement, but if there were a future legal determination, --
A. Yes.
Q. -- clearly -2659 would be decreed as senior, and parties recognize that?
A. Correct.
Q. So there was no question in the parties' minds -- There is no question indicated in this agreement as to how, in a future legal determination, -2659 would be resolved, because there was no issue to

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resolve with regard to -2659, was there?
A. No.
Q. Okay.
A. But similarly, there was no -- there was no declaration made as to how -2659 would be administered in the future.
Q. Okay. So what did the SRBA Court say -- What aspect of its decision resolved, in your opinion, the dispute between the parties regarding these water rights?
A. Well, the SRBA was a legal determination of what those water rights are.
Q. Okay. But we've agreed that the SRBA did not resolve how these water rights would be administered in the event of a call given the fact that you have issues, such as futile call, that would need to be addressed; correct?
A. Correct.
Q. Okay. So the SRBA did not constitute a legal determination of whether or not Clear Lakes had available to it a futile call defense; correct?
A. That's correct.
Q. So how is the 1980 Agreement relevant to the question of how these water rights are to be administered in the event of a call, other than that

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they're from the same source?
A. And other than the fact that the 1980 Agreement represents a historic condition under which 3 was perfected.
Q. Okay. And tell me about that. I'm not sure I understand what you mean by "the 1980 Agreement represents a historic condition under which 3 was perfected."
A. The 1980 Agreement set forth a method of distribution that clearly was subject to change after a future legal determination -- and call it what you want. Uncertainty.
The uncertainty associated with how that distribution was made existed when 3 was perfected. So there was -- You know, 3 may not have recognized the uncertainty, but the uncertainty was there.
Q. Uncertainty as to what?
A. How Right Number 1 would be exercised in the future.
Q. Well, that uncertainty exists with regard to any water right. No water right owner knows how another water right is going to be exercised --
A. Sure.
Q. -- in the future; correct?
A. Sure.

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Q. So again, what I'm trying to get at is: What is the historic condition created by the 1980 Agreement that, in your view, affects these water rights?
A. I believe I've said it. It's the uncertainty as to how 1 would be exercised in the future.
Q. Okay. And the parties recognized 1 as senior.
A. But the parties did not recognize, in this agreement, any predetermination of how much water 1 could divert from the Western Pool versus how much it could be expected to divert from the Eastern Pool.
Q. Correct. Nor would it have to; correct?
A. That's correct.
Q. Because that discretion, as we've discussed, is an aspect of the water right?
A. But the parties could have agreed at that point in time to a -- call it a "set distribution" between -- to the senior right from the Western Pool and the Eastern Pool, and they did not.
Q. Let's talk about what's apparent from the historic conditions in the 1980 Agreement, about what the parties did agree to and did understand.
The parties agreed to construct and share the use of the Western Pool only; correct?
A. Correct.
Q. The party did not agree to share the use of

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his Eastern Pool with Clear Springs, did he?
A. You are calling it "his Eastern Pool," and it's -- You know, I'd say it's "his diversion works." But, again, I have this question about the pool being inextricably linked to the source.
It's not a question. It's -- It's what my determination is.
Q. But as to whatever we want to call it -- whether it's like a wing dam, or diversion works, or whatever -- it is clear, is it not, that Clear Springs has never had any right to the use of this Eastern Pool to divert water into its facility?
A. Not directly.
Q. Okay. What do you mean by that?
A. Well, I already said that I'm not aware of any facts that conclusively show that water collected in the Eastern Pool under certain conditions can't flow through this dike into the Western Pool. And if it does that -- If that happens, that water then is shared between Clear Lakes and Clear Springs through the shared diversion works.
Q. Well, if that occurs, you're talking about seepage water that is collected by another water user. It doesn't change the nature of the diversion works, does it?

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A. It's not seep- -- You could say it's seepage water collected by another water user. But, again, where -- where is the line drawn? I'm drawing the line differentiating the source from the diversion works at the diversion works; that's where the line is.
Upstream from that I can't tell the difference between the source and what you call "diverted water." I don't think it's been diverted.
Now, Clear Springs never had the right to use these diversion works. I agree with that.
Q. Okay. Well, let's try to move on here.
You recognize that the only control works in these facilities is -- the adjustable control works is at the gate for Clear Lakes' senior point of diversion in the Western Pool; correct?
A. That's the only controlling works that seems to be operable. But when this dike -- this middle dike was first constructed, I -- I have seen photographs -- I don't have them; don't have copies of them, but I have seen photographs that show something that could be construed as a controlling works there.
Q. Well, let's look at that.
If you'd turn to Exhibit Number 2.
A. (Witness complied.)
This picture wouldn't be at a scale sufficient

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to show it.
Q. Okay. But if you look at the western diversion dike, --
A. Yes.
Q. -- you can see that water was flowing through the dike at this point in time; correct?
A. The western diversion dike ...
(Whereupon the witness reviewed the document.)
WITNESS: It appears that water is flowing through, but that doesn't mean there's no controlling works there.
Q. (BY MR. STEENSON) Okay. And if I represented to you that there were controlling works there at that time solely for the purpose of facilitating the construction of that dike and that once the dike was completely closed and rendered inoperable, never intended again to be used, that would mean, then, that the only works today available for affecting the distribution of water between Clear Lakes and Clear Springs is this gate?
A. I'll agree it appears to be the only operable controlling works.
Q. Okay. And, in fact, this is the controlling works that was constructed pursuant to the 1980 Agreement; correct?

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A. That's my understanding.
Q. So this works is the only way in which the parties provided for a redistribution of water through the Western Pool; correct?
A. Correct.
Q. Okay. Now, tell me why, in your view, administration whereby a call by Clear Springs -2708, which forces the senior right to divert more than it ever has through this pool, does not create conditions that 3 was not subject to when these works were created; conditions that are injurious to 3 in terms of the no-injury rule.
A. 3 may have never experienced those conditions. But that doesn't mean that, when you take into account the context of the 1980 Agreement, the ability on Clear Lakes' part through the Snake River Basin Adjudication to seek a decree as a separate source, which it was unable to do, and -- and certainly you could have sought a determination by the Court that Clear Lakes was entitled to divert a set amount from the west -- at this point of diversion and at this point of diversion (indicating).
None of that was done. And so, as a result, I'm left with the more general application of law represented by B or A.

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Q. Well, let's walk through this. Clear Springs makes a call for water pursuant to its Right -2708.
A. Okay.
Q. That's the first step in the process; correct?
A. Correct.
Q. Okay. Then the watermaster's principal job is to go out and determine if there are, as you said, junior water rights that are diverting water to the injury of the senior; correct?
A. No. That's the Department's job.
Q. Okay. That's the Department's job?
A. Correct.
Q. Okay. So then your next step would be to look at any junior right and determine if diversion pursuant to that right is depriving the senior of water that is available at the senior's point of diversion; isn't that correct?
A. No. I wouldn't limit it to being available at the senior's point of diversion. It could be made available under appropriate law at -- at that point of diversion.
Q. Well, the senior right here -- -2708 -- has no right to divert water from any source, other than through its established point of diversion; correct?
A. Correct.

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Q. In this case, that's the Western Pool; correct?
A. Correct.
Q. Okay. Now, it is absolutely a fact, is it not, that the diversion of water pursuant to -7004 is not depriving -2708 of any water that is collected by the Western Pool?
A. It is if it's exercised in such a way that it's the reverse of the argument you're trying to make. If 3 is exercised in a way that forces 1 to divert more water out of the Western Pool, then that does deprive 2 of water supply.
Q. I'm sorry. Say that again. If 3 is exercised in such a way that forces 1 to divert more water out of the Western Pool?
A. Correct.
Q. How could that occur?
A. Well, Clear Lakes is entitled to divert X amount of water under 3, and X amount under 1. So if, instead of taking the priority delivery under 1, it chooses to take -- to fill 3 first, then fill part of 1 here and fill what's left of 1 there (indicating), that's forcing 1 into the Western Pool.
Q. Let's go back to the analysis. The call is made by -2708.

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A. Right.
Q. Okay. And so the Department's job is to identify junior rights --
A. Yes.
Q. -- that are diverting water that would otherwise be available to 2?
A. Right.
Q. Okay. -7004's only method of diversion is here in the Eastern Pool (indicating); correct?
A. Correct.
Q. And none of the water that is physically diverted by the Western/Eastern Pool and these pipes is ever physically available to Clear Springs at the Western -- through the Western Pool?
A. Unless there's seepage between the two pools.
Q. Okay. And so the only situation in the statement I just made that's not correct is if there is seepage between the two pools?
A. Seepage or other form of leakage between -- through that dike, through whatever is there between the two pools.
Q. Okay. So in that sense, a call by 2 against 3 is futile?
A. No.
Q. Okay. Explain why that is not the case.

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Again, let me -- Let's review what we just established before you change it.
We've established that it is not possible to -- that the water diverted by 3 is not in any circumstance available for diversion by 2?
A. But it is available for diversion by 1.
Q. Okay. But you're changing -- You're answering a question I'm not asking you. Okay? The call is made by 2. You look at 3 as the junior.
A. Right.
Q. And we've just established that unless there is some seepage, as you say, between the pools, water diverted by 3 is not physically available to 2; correct?
A. Not directly. Correct.
Q. Okay. So the only way to get 2 more water -- The only way in this world to get 2 more water, since 2's point of diversion is this structure and this structure only -- Let's review that and make sure we're clear on that. The only diversion works for 2 is the Western Pool; correct?
A. Correct.
Q. Okay. So it is not possible for -2708 to divert water through some structure other than the Western Pool; correct?
A. Correct.

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Q. Okay. So that the only way in this world to increase the amount of water diverted by 2 is to reduce the amount of water that 1 diverts through the Western Pool; correct?
A. Other than putting more water in the aquifer for discharge through springs; that's correct.
Q. Okay. And this ability to do this method of administration to increase the water to 2 really is not related at all to curtailment of 3?
A. I disagree.
Q. Okay. What if there were no -7004 diverted to the Eastern Pool? You would still be forcing 1 to take more water through the Eastern Pool, wouldn't you?
A. Potentially, --
Q. Yes.
A. -- yes.
Q. So as a matter of fact, you're not really curtailing 3 in order to get more water to 2?
A. Sure we are. Because the only way that -- The only way we can get more water to 2 and fully fill 1 is by reducing 3.
Q. And there, what you're doing is, you are reducing 3 -- -7004 -- in order to continue to satisfy the senior right?
A. Correct.

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Q. Okay. Now, as I understand your analysis, you have -- and I think we should turn to Exhibit Number 14.
A. (Witness complied.)
Q. You have agreed with me here today -- and it seems to me you are recognizing in this analysis -- that ordinarily it's up to 1 where it diverts water.
A. Subject to not injuring senior rights and subject to not unreasonably prohibiting use of the source --
Q. Subject to not --
A. -- by a junior.
Q. Subject to not imposing upon a junior a condition that did not exist when the appropriation was made; right?
A. That's not what I said.
Q. No, but when we talk about injury, we're talking -- You know, the only sense in which we talk about injury by senior to a junior is if the senior is imposing upon the junior conditions that didn't exist at the time of the junior's appropriation; correct?
A. That's not what I said.
Q. Okay. But is my statement correct?
A. I don't believe so, unless you -- when you talk about the conditions at the time of appropriation, if you include the uncertainty created by the 1980

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Agreement.
Q. Okay. But I'm talking about, as a general proposition, getting back to what the no-injury rule as labeled by Judge Wood is; that is, that a junior is entitled to maintenance of conditions on the stream that existed at the time of the appropriation; correct?
A. Correct.
Q. Okay. And we've discussed that ordinarily the senior --
A. Excuse me for interrupting. Let me go back a second. There were limitations on that, as well.
A junior who is relying on a specific means of diversion is not necessarily entitled to rely on that means of diversion.
Q. Okay.
A. And the example I'd use would be a senior right for irrigation that, at the time the junior was established, was for flood irrigation. And now they've converted to sprinkler; it's reduced return fills.
The junior isn't -- can't say, "Wait a minute. That wasn't the condition that existed when I appropriated my water. You guys have to go back and do flood irrigation."
So there are some limitations.
Q. Yes. That has not so much to do with the

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means of diversion as it does the flows that existed at the time; correct?
A. It has to do with both; the means of diversion as well as the hydrologic conditions that existed at the time.
Q. Okay. But you have said that in the scenarios we've been talking about with regard to in the hypothetical labeled "D," that as between 1 and 3, 3 has to live with the fact that 1 has the discretion to decide how much water to divert at either point.
A. 3 has to live with the fact that 1 might divert more water out of the Eastern Pool.
Q. Doesn't 2 have to live with that, as well?
A. Yes and no.
Q. How is it any different with respect to 2 than it is with respect to 3?
A. Because 2 is senior in priority to 3.
Q. 2 is senior in priority to 3, but let's break this down and make sure we're more precise than we've been here.
We have said that, as we've discussed this, the senior right has the discretion, inherent in the right, to decide how much water to divert from either point.
A. Subject to the same two limitations; no injury

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to a senior right and no unreasonable limitation on the junior's right to avail itself of the source.
Q. Okay. But you have said that that last limitation does not relieve the most junior right from the possibility that 1, because it's inherent in the right, might decide to divert a whole lot more water from its point of diversion located next to 3?
A. Or might be required to divert more water.
Q. Okay. Now, doesn't, in this case, -2708 have to live with the same limitation? In other words, the senior right has the discretion to decide how much water to take from each point?
A. Not if it prevents 2 from -- from diverting water from the source, which in this case it would.
Q. Okay. But in the way you're administering water now, that's what's happening as between 1 and 3?
A. Because 3 --
Q. You cannot --
A. Because 3 is --
Q. Mr. Dreher, you can't have it --
A. Because 3 is junior to 2.
Q. You can't have it -- Well, you can't have it both ways, because 3 and -- and we've established that it is not possible; that none of the water diverted pursuant to 3 is available to 2.

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A. I understand that.
Q. You are using 1 as the go-between here, are you not?
A. We're reducing 3 to accommodate 1 so that 2 can access the source.
Q. No. Again, let's make sure we understand what you're doing. There is no way to reduce 3 -- to reduce the diversion of -7004 through this Eastern Pool or through these pipes in order to increase the flow of water to 2. We've established that. It's not physically possible; correct?
A. Well, then say it's legally possible. By reducing 3 to fill 1, we can then also fill 2.
Q. No, but what you are doing -- What you are doing is, you are regulating, manipulating, or modulating the way in which the senior right diverts its water. Your action, is it not, is directed primarily at -2659 in the way you're administering these water rights?
A. Our action is directed first to 3 -- to reduce it -- then to -2659, requiring that they take it out of the Eastern Pool so long as the right is fully filled.
Q. As I understand your analysis, you are saying that the Department can require a senior water right holder to change the way it diverts water if it is,

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quote/unquote, "unreasonable" pursuant to the Schodde and Parker versus Wallentine cases; isn't that correct?
A. Pursuant to the principles set forth in those cases.
Q. Okay. And using those principles -- Using those principles, you have gone ahead and adjusted the senior's gate?
A. While filling -- continuing to fill the senior right fully.
Q. Yes. But that's the action you've taken. Your action is directed against the senior right; isn't that correct?
A. It's not against the senior. I wouldn't -- Well, against -- I guess you could view it that way, but we're -- we're administering the senior right --
Q. In order to --
A. -- in such a way to provide water for the next junior in line.
Q. Right. Right. Your action is not directed at, in this case, -7004, the junior right?
A. It is, because 1 can't be filled unless 3 is reduced.
Q. But with respect to the call by Clear Springs -- With respect to the call by this -2708 right, the call by Clear Springs, your action affects the

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diversion of -2659 and tangentially affects the -7004 right; correct?
A. It only affects where the senior right is diverted. It does not affect whether or not the senior right is filled.
Q. Right. It does affect -- You're not disagreeing with my statement. You're answering a question I'm not asking again.
But it seems to me that you are agreeing that the Department's action under this rationale that supports your instructions is directed against the senior.
A. It affects where the senior diverts his right. It does affect that.
Q. Okay. And you have not -- The watermaster has not adjusted any diversion works for -7004 in order to respond to the call by -2708, has it?
A. There are none to adjust. I suppose, you know, alternatively if -- and we have not contemplated this. But hypothetically, the Department could consider requiring that some con- -- some conveyance from the Eastern Pool to the Western Pool be constructed, because they're the same source, alternatively. We had not done that.
Q. If your uncertainty about whether or not the

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water is diverted -- If that -- You could hypothetically do a lot of things; correct? But that really isn't one of them, is it?
A. I'm not so sure it isn't.
Q. Okay. Could you put a pump in the middle of the Clear Lakes facility and pump it right out of the raceways --
A. No.
Q. -- to get it over to Clear --
A. No.
Q. Okay. Where do you draw the line?
A. I drew the line at the dike; upstream of the dike.
Q. Why do you draw the line at this dike, and not here (indicating)?
A. I do. I include all the dikes, though. That's the line.
Q. Why isn't the line like this (indicating)?
A. Because it's not a separate source.
Q. That doesn't respond to the question. The springs are the single source; correct?
A. Correct.
Q. Okay. And the east pool diverts water from the source. We've established that; correct?
A. Correct.

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Q. Okay. So what does this statement about "separate source" have to do with anything?
A. There's -- There's no basis to draw the line here, or back here, or up here (indicating). The only place where we know the source -- where the separation occurs between the source and the use is at the dike. That's where we know the separation occurs. That's where the water is removed from the source.
Q. So it occurs all along every constructed dike; is that correct? That follows from what you just said, doesn't it?
A. Well, it does, although, you know, if this had -- You could -- I don't mind if you, you know, say this is the diversion works for the Eastern Pool and it goes clear back, and this is the diversion works for the Western Pool, and it goes clear back. That's fine. It doesn't change anything.
Q. Well, with respect to the Schodde case -- I assume you're familiar with it, because it's discussed in your June 13th, 2002, letter, which is Exhibit 17 -- how, in your view, is the Schodde case relevant to your instructions?
A. It's only the principle involved that a senior can be required to change his means of diversion to accommodate a junior right.

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Q. Did the Court and Schodde require anybody to change their means of diversion?
A. No.
Q. Then how does it support the proposition that you just --
A. Because the only way that the senior could continue to exercise its right was to change its means of diversion.
Q. Well, didn't the Schodde case -- wasn't the assertion in the Schodde case that an aspect of the water right was the current of the stream to run the water --
A. That was the -- the claim of the senior right.
Q. Sure.
A. That the current was part of its right.
Q. And the Court rejected that.
A. That's right.
Q. What does that have to do with this case?
A. Only that it's, again, the general principle that the senior is not entitled to rely on a specific means of diversion in order to preclude a junior access to the source.
Q. Okay. And the same -- And Parker versus Wallentine; you cite that case. Do you cite it for the same proposition?

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A. Yes.
Q. And none other?
A. Well, there's none other that's applicable to this case.
There -- There may be. I'm not going to say there aren't other portions of the Parker-Wallentine case that aren't applicable to other conditions. But in terms of the general principle we were applying here, it's applicable to that general principle.
Q. Okay. Now, the Parker case involved ground water rights; correct?
A. Yes.
Q. And the reasonable diversion limitation or qualification of the appropriate right was enacted by the Legislature; correct?
A. Correct.
Q. And as the Court recognized in Parker, absent an action by the Legislature, that limitation on the appropriate right would not have existed; correct?
A. I don't know that it went that far.
Q. Okay. Let's turn to that case. And that is Exhibit Number 27.
A. (Witness complied.)
Q. If you look at Page 511, at Headnotes 2 and 3, discussing the (Reading) 1953 amendment to Idaho Code,

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Section 42-226, which established the reasonable pumping level limitation on the doctrine of first in time is first in right (End reading), close quote.
And then at Page 512 under Headnote 6, second sentence, quote: "Prior to the enactment of the Ground Water Act, the doctrine of prior appropriation, i.e., First in time" --
A. Excuse me. Where are you reading from?
Q. I'm sorry. Headnote 6, at Page 512, second sentence. It's two, four, six lines down.
"Prior to the enactment of the Ground Water Act, the doctrine of prior appropriation, i.e., first in time" --
THE REPORTER: A little slower, please.
MR. STEENSON: I'm sorry.
Q. (BY MR. STEENSON) -- "first in time is first in right, governed the appropriation of ground water in the State of Idaho."
Now, do you think that the Parker versus Wallentine case stands for the proposition that the legislative enactment regarding reasonable pumping levels somehow applies to surface water rights and their means of diversion?
A. The Legislature's action simply became a -- a basis in law for making a determination. That

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particular basis in law isn't applicable. That doesn't mean the general principle isn't.
Q. Okay. But the Court has said that absent the action of the Legislature, the prior-appropriation doctrine is not limited by this principle. So how are you construing Parker versus Wallentine to apply that legislatively enacted principle as a limitation on a surface water right?
A. Because they didn't -- the Court didn't go so far as to say what would have been the determination had the Legislature not put in place a reasonable pumping level. It didn't say that.
Q. So somehow you are garnering from Parker versus Wallentine a reasonable means of diversion limitation on a surface water user's diversionary right?
A. Not strictly from Parker versus Wallentine, no.
Q. Okay.
A. Taking the body of law that we have as a whole, I believe there is a limitation.
Q. Okay. Other than Parker versus Wallentine and Schodde, what are the other parts to this body?
A. Well, those were the best specific examples we could find in Idaho. But there are other, I suppose, common-law doctrines that could be applied that aren't

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prohibited.
Common law can be excluded by Idaho law. That has not happened.
Q. Okay. Now, in Parker versus Wallentine, the reasonable means of diversion or the reasonable pumping levels addressed the method of diversion; correct?
A. Or you could view it as the location where the diversion occurred.
Q. That's not what Parker versus Wallentine addressed, though, is it?
A. They didn't use those words. I'm just saying you could view it as -- as addressing the location where the diversion occurred.
Q. Parker versus Wallentine decided that a senior pumper can be required to lower his pumping level to what would be determined as a reasonable means so long as the junior pays for it; correct?
A. Correct.
Q. Okay. That's changing the method of the -- the means of diversion; correct?
A. It's also changing the location from where the diversion occurs in the aquifer.
Q. And Schodde, likewise, had to do with a method -- a mechanism for diversion; a water wheel; correct?

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A. Uh-huh.
Q. So we're talking --
THE REPORTER (To the Witness): "Yes"?
WITNESS: Yes. I'm sorry.
Q. (BY MR. STEENSON) So in these cases we're talking about mechanisms for diverting water?
A. In general, we're talking about means for diverting water.
Q. Okay. The machinery by which water is diverted; correct?
A. And how it's diverted, and where it's diverted.
Q. Now, the point of diversion for a ground water right is not defined in terms of the number of feet below ground level, is it?
A. The point of diversion is defined by where the well is spatially.
Q. Spatially on the surface?
A. Sure.
Q. Okay. So neither Parker nor Schodde address location of points of diversion, do they?
A. In the general principle, I believe they do. You believe they don't.
Q. Can you show me where that is?
A. I just said in general principle. I can't

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show you the explicit words that talk about location.
Q. In either of these cases?
A. No. But the general principle is that the senior, so long as it doesn't -- the senior right can be filled, can be required to do something different than it has to allow the junior right access to the source.
Q. And other than the enactment of that principle to the Ground Water Act, what legislative enactment can you point me to that codifies that principle applying to surface water right?
A. I can't point to one, just as I can't point to one that says that's not the case.
Q. Okay. So in this case, what has the Department determined as unreasonable about the means of Clear Lakes' diversion?
A. Because exercising its discretion as between points of diversion for 1 would be done so that the most junior right could divert while the intermediate priority right couldn't. And that's the part that becomes unreasonable.
Q. Okay. But what we're talking about here, really, is no injury and futile call. What you're really talking about has to do with the no-injury rule and the futile call; not really with the means of diversion.

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Because if, as Clear Lakes has argued, a call by -2708 against -7004 is futile, then that is a defense to the operation of the prior-appropriation doctrine, just as a defense for the ground water pumpers that are protected by --
A. Right.
Q. -- the way water is administered in Water District 130?
A. If the call is determined to be futile, that's correct. Our determination is, it's not futile. A court may view it otherwise.
Q. Okay.
A. Or a court may not view it otherwise.
Q. Let me ask you this: If Clear Lakes didn't have Water Right -2659, would the call by -2708 be futile as against -7004?
A. If Clear Lakes did not have -2659 --
Q. If Clear Lakes didn't have -2659 with these two points of diversion, isn't it the case that a call by -2708 would be futile as against -7004?
A. I'm not sure I've considered that hypothetical. I just haven't considered that.
Q. Can you give me an answer to my question, even though you haven't considered it before?
A. Well, it would appear that unless there's --

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unless reducing 3 would change the levels in the pool such that more water -- such that water flows, presuming there's leakage, which factually is not clear whether there is or there isn't -- and if there is, to what extent; if reducing 3 would cause more water to flow into the Western Pool, then it would not be a futile call.

Q. And absent your speculation about seepage, reducing 3 does not put more water into the Western Pool?

A. Well, unless there was this authority -- this hypothetical that I raised before -- which, again, I haven't fully considered whether, through the Department's authority, to require an adequate means of diversion, we could require some sort of connection be constructed.

Q. You could require the diversion works to be modified to something that you would construe as reasonable?

A. Well, it would have to be consistent with my authority under the statute.

And like I say, just as I haven't fully considered the option you've presented, I haven't fully considered the other one, either.

Q. Okay. But absent seepage -- or absent some

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extraordinary authority to go in and modify people's diversion works in response to calls -- I mean, modify works that have been in place for 20, 30, 40, a hundred years -- absent that kind of extraordinary authority, if there were no -2659, a call by -2708 against -7004 would be absolutely futile, wouldn't it?

A. I wouldn't say -- Well, you could classify it as futile if -- if there was no authority. It could be used to require the modification of the facility so that water would flow from the Eastern Pool to the Western Pool, if there was no such authority.

And if the leakage or the hydraulic connection between the two pools wasn't sufficient, then it wouldn't be possible to deliver water to 2 by reducing 3.

Q. So then your assertion -- Under any known set of authorities or any known set of circumstances outside of seepage, your assertion that you are curtailing 3 depends entirely upon your ability to manipulate 1?

A. With the facilities as they're currently configured, that's correct.

Q. And if you really didn't have the authority to manipulate 1, this call would be futile, wouldn't it?

A. If I did not have the authority -- If there was some basis in law that allowed 1 to choose where it

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diverted its water absent these other legal principles that we've been discussing.

Q. Let's just revisit that. We've already agreed that absent some limiting language on the face of the right and absent injury, a senior -- any right with multiple points of diversion has the inherent discretion to determine how much water they take from each point; correct?

A. Again, it's subject to the two conditions we've already talked about; no injury to a senior and no unreasonable prohibition from the junior accessing the source.

Q. Sure. So if Parker versus Wallentine and Schodde, and your other beliefs about water law in general, do not provide you the authority to manipulate the diversion of 1 in order to increase the supply of water to 2, this call is futile; correct?

A. Only if this legal principle that the senior can't restrict access to the source for a junior, if -- if that's also incorrect.

You know, if you -- Let's go back to the hypothetical you raised whereas if there is no 1 -- and let's assume that the diversion works are as they are constructed currently. If they're constructed as they are concurrently, part of the water would flow from the

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Western Pool to serve 3 if there was no 1.

Q. How would that occur?

A. Well, to the extent 3 diverts other than these pipes through the Eastern Pool; if there's any other means of taking water under 3.

Q. I'm sorry. It sounds like you're suggesting that if there was no water at -2659, -7004 would be diverting water from the Western Pool.

A. If the diversion works are as they are currently constructed, just as we talked about earlier, some amount of water would flow to Clear Lakes anyway. And under that scenario, the Department, in my opinion, is authorized to instruct the watermaster to adjust this gate to reduce the amount of water flowing into the Eastern Pool.

Q. But that's assuming -- I mean, what I've asked you to assume is assume there is no right here (indicating).

A. Right.

Q. There would be no diversion works. There would be no -2659 and no point of --

A. You didn't ask me to assume there would be no diversion works.

Q. Well, if there's no right, there's no diversion.

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A. You didn't ask me to assume there would be no diversion.
Q. Okay. Well, assume, since there is no right, there is no diversion. If there is no right, the diversion would be illegal, and what you'd do --
A. There's still a diversion for 2.
Q. You shut it down.
A. Right. There's still a diversion for 2. To the extent that 3 could be reduced to supply water to 2, that's what we would do, to the extent that water would be supplied to 2.
Q. That couldn't occur. Again, if there was no 1 and there's no taking of water from the Western Pool over to Clear Lakes, --
A. Well, --
Q. -- then 2's call against 3 is futile; correct?
A. But for the authority that you believe would be extraordinary and whatever hydraulic connection may or may not exist.
Q. Correct. So the administration that you have proposed depends entirely upon this principle of being able to manipulate -- in response to a call by a junior, being able to manipulate diversion by a senior because of your determination that the senior's diversion is not, quote/unquote, "reasonable"; correct?

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A. And because the senior right can be filled by diverting it -- more of it from the east- -- The senior right can still be filled.
Q. But that's really just an adjunct of your concept of reasonableness. In other words, you're saying you --
A. No. The watermaster instructions are clear; that -2659 has to be filled first. Regardless of whether the water comes from the Western Pool or the Eastern Pool, it has to be filled first.
Q. But again, we have agreed that the water right owner with multiple points of diversion has the discretion to decide how much he or she diverts from each point?
A. Within the limitations we've previously discussed.
Q. Right. And the limitation that we've previously discussed that you are relying on, and what you've written, and what you're saying today, to change the way the senior diverts his water, is this broad concept of reasonableness of means of diversion; correct?
A. That's -- That's a fair summary.
Q. Now, I think there's been a mischaracterization or a misunderstanding of Clear

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Lakes' position regarding the division of water -- distribution of water if the 1980 Agreement is no longer in effect.
Do you understand that, first of all, Clear Lakes' position is that there has been no legal determination that you search the 1980 Agreement?
A. No, I didn't understand that.
Q. Okay. I mean, we've said so in what we've submitted to you.
A. Okay.
Q. Perhaps now you do understand it.
A. Yeah. I -- I mean, I -- I assumed that everyone agreed that the adjudication was, in fact, a legal determination of the rights.
Q. Yes. The adjudication is a legal determination of the rights. You and I have agreed that the adjudication did not resolve defenses available to Clear Lakes like futile call, --
A. Sure.
Q. -- which has a very significant effect on how these water rights are distributed.
A. Sure. I agree with that.
Q. So to that extent, we've agreed, I think, that the SRBA Court's decision does not usurp the 1980 Agreement, or direct, or dictate how the water rights

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will be administered; correct?
A. Correct.
Q. You're making that legal determination -- You have made that legal determination in response to Clear Springs' call; correct?
A. No. I've -- I've made this in response to the responsibilities I have to administer water rights that are pursuant to Chapter 6.
Q. Sure. But that's initiated by Clear Springs' call; correct?
A. It was, yes.
Q. Okay. Now, you have suggested that Clear Lakes has to show some entitlement on the face of its decree to the split of water that is suggested; correct?
A. Or some other surviv- -- either a surviving provision of the 1980 Agreement, or some other agreement, or some other legal basis for relying on the split that you proposed, which was 66 cfs out of the Western Pool and 34 cfs out of the Eastern Pool, period.
Q. Now, if, number one, you are deciding that the 1980 Agreement is no longer in effect, or your -- or water rights shall not be administered pursuant to it -- and apparently you've made that decision; correct?
A. Correct.
Q. Okay. Then water has to be administered

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somehow; in some alternative way. Correct?
A. Correct.
Q. If, as Clear Lakes asserts, Clear Springs' call is futile and you don't have authority to manipulate the diversion of 1, then the adjustment that the Department has made is not authorized; correct?
A. Well, I won't say it wasn't authorized, because it -- it was authorized, but whether it was the correct legal determination may be at issue.
Q. That's not correct. So then the question becomes: If the Department's proposed distribution of water is incorrect, what is the correct distribution of water? Fair enough?
A. Fair enough.
Q. And I think if you'll re-review the information that Clear Lakes submitted, Clear Lakes' position was that it's -- As we've discussed today, the 66/34 rough split that was suggested is not an entitlement but a limitation upon Clear Lakes' discretion to decide how much of its senior right to divert from each pool, because the junior rights, the 2 and 3 -- the -2708 and -7004 we discussed -- are entitled to rely upon conditions as they existed -- as they have existed and the conditions that were created under the 1980 Agreement.

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A. Uh-huh.
Q. Okay?
A. I understand that.
Q. Okay. You understand that that's the argument. So you understand, then, that Clear Lakes' position is not to establish, in the first instance, an entitlement to a 66-cfs/34-cfs split; it is rather that applying the no-injury futile call and the no-injury rule, that's where we end up.
The only other alternative would be to say Clear Lakes retains the unfettered discretion to decide how much of its senior right it takes from each pool.
A. I understand that.
Q. Okay. Because it seems to me that somewhere along the way it has been suggested in what you've prepared and perhaps suggested to the Court that Clear Lakes has to show this entitlement, whereas what we are really showing is that we understand that the diversion pursuant to the senior right may be limited by the no-injury rule and the other rights to divert from the same source.
Now, let me ask you one other question in another area. Your instructions direct the watermaster to make the determination that water is needed or that it will be beneficially used; correct?

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A. Correct.
Q. And I'll ask you to return to Exhibit Number 14.
A. (Witness complied.)
Q. And this is Page 12 of 15 that I'm now looking at. And I'm looking at Paragraphs 4 and 5.
My question is: What does this mean, that the watermaster must determine that the water is needed?
A. What we certainly would not want to have happen is for the holder of a senior priority right to exercise that priority against the junior, depriving the junior of water that could be beneficially used, simply to waste the water.
And so the criteria that was put in here -- the requirement in the form of an instruction -- was that the watermaster had to conduct some verification that if the water was redistributed to the more senior right -- in this case, -2708 -- and I understand that you won't agree with this characterization -- away from -7004, that the water would, in fact, be applied to beneficial use under the Right -2708.
I did not accompany the watermaster to the facility. She reported to me by phone that she went out and visually observed that there were dry raceways and that the commitment from Clear Springs was that if water

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was redistributed, they would put fish in the raceways that received additional water.
She went out -- I don't know how many days after that -- to verify that, in fact, that was the case.
And the report back to me was that, "Yes, that is the case. There are now fish in raceways, the previously gritty water."
Q. Okay. So it sounds to me like if someone is going to assert that they need the water, they have to show that their beneficial use with the water will increase over and above what it was without the water.
A. Correct.
Q. Okay. So that would mean, A, more fish?
A. More -- More fish, more raceways in combination.
Q. Okay. So the sole criterion for showing the need would be to raise -- in this instance, with the aquacultural facilities, would be raising more fish; is that correct?
A. Or raising fish with higher quality.
Q. Higher quality, or bigger, --
A. Right.
Q. -- but, in one way or the other, increasing production; correct?

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A. Correct.
Q. Okay. Now, has the Department done anything to verify the production that Clear Springs has, in fact, increased over and above what it was prior to the Department's administration?
A. Only the visual observations that I previously described by the watermaster.
Q. Have there been any requests to Clear Springs to verify what has been observed visually by any kind of reports or production numbers?
A. No.
Q. And why not?
A. Well, at this point we haven't felt that was necessary. We've been satisfied with the visual observations that there are more fish and there is more water.
Q. Do you have any idea of how many fish Clear Lakes had to move out of its facility?
A. I do not.
Q. Would it surprise you that it was in the thousands?
MS. KAY HARDY: Tens of thousands.
Q. (BY MR. STEENSON) Tens of thousands of fish that were moved out of the Clear Lakes facility in order to effectuate this redistribution of water?

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A. It would not. I -- I wouldn't have any basis for knowing -- I knew that there would be an impact. I didn't like the impact, but ...
Q. Okay. Now, let's say -- and let me make the example extreme -- Clear Lakes, in order to effectuate this redistribution of water, removes tens of thousands of fish from its facility.
Clear Springs raises a couple hundred more fish.
How would that kind of a situation affect the Department's determination to redistribute the water?
A. Well, 200 fish over what period of time? I mean, you know, just as it took time for Clear Lakes to ramp its production down, it would take time for Clear Springs to increase its production up to the full amount allowed by the water.
Our concern is: Is the water being wasted? That -- That's our concern.
Q. Well, it seems to me that the criterion you've called for here is need, not waste.
A. Well, if it's not needed, it would be wasted.
Q. Okay. And the principle in Parker versus Wallentine was based, in part, upon a theory of optimum development of water rights; optimum use, maximizing the use of ground water rights.

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A. Yes.
Q. And that, again, was a legislative determination; correct?
A. Correct.
Q. How would it comport with maximizing beneficial use or optimal development of water rights if, in fact, there was this tremendous imbalance between the production that Clear Lakes was deprived of in comparison to a potentially minor amount of production that Clear Springs was able to make with the water?
A. Well, again, you are dealing, as far as I'm concerned, with something that's hypothetical. And I'm not willing to make hypothetical judgments about -- hypothetical value judgments based upon a purely hypothetical scenario.
Q. It's hypothetical, then, because no records have been requested to verify what Cindy thinks she's seen; isn't that correct?
A. That -- That is correct. But I don't believe that the Department has the authority to request production records -- or insist that production records be provided.
Q. Okay. So what authority do you think the Department has to make this determination of need? Is it just to ask a question and if someone says, "I

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needed the water," then to --
A. No.
Q. Okay. How far should the Department go in making this determination?
A. They have to go as far as they can under the law to verify that the need is real and that the increased beneficial use occurred.
Q. Wouldn't you then have to request production records to --
A. We don't have the authority under the law to go that far, Dan.
Q. Do you mean that there is no provision in the statute that says you have that authority?
A. We have been challenged by that. And I'll give you the example, that, you know, when I first came to the Department, the water rights for dairies were unfortunately measured by the number of cows instead of the quantity of water.
We now measure it by the quantity of water. But we made an attempt to get cow numbers and we couldn't -- could not do it; could not prevail.
Q. Well, then, this is a hollow standard?
A. It's the standard that the law gives us to apply.
Q. Now you're saying different things. You're

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saying you can't seek production records, but the law requires you to apply a standard that would require production records.
A. No.
Q. Which way is it?
A. It -- It -- I don't think the law requires us to obtain production records. The law requires us to ensure that water is not being wasted.
Q. Okay. Now, you understand that Clear Springs is a large operation with many different facilities; correct?
A. It's irrelevant to me how big they are. It doesn't matter.
Q. Do you understand it to be the case whether it's relevant or not?
A. I -- I don't know how big they are, Dan. I really don't.
Q. Do you understand that they have more than one aquacultural facility?
A. I do -- I do know that.
Q. And do you understand that these facilities are operated by one single corporation?
A. I don't know what their corporate structure is.
Q. Let's suppose that, given market conditions, in

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order to increase production -- in order to make this call and show me an increased production at this particular facility, Clear Lakes takes raceways out of production at other facilities, just in order to make this call here justifiable.
A. Uh-huh.
Q. How would that affect a determination made by the Department?
A. The issue wasn't what does the right being called out have to do; the issue is if that right is called out, will the water be beneficially used. That's -- That's our concern.
Q. You have said that -- What you're talking about is an increase in production.
A. Correct.
Q. What if Clear Springs, in order to make this call, decides, "Well, we can't increase production because of market conditions right now. We've got fish stacked up in freezers that we can't sell, and so forth. But in order to effectuate this redistribution of water and take it away from Clear Lakes, what we'll do is, we'll, let's say, move fish from one facility to another."
Would that affect your evaluation of need?
A. Well, the fish would have had to come from

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someplace. I mean, they don't just appear. So it wouldn't surprise me if they temporarily move fish in and replenished them another way. We did not look at that.
Q. And do you think it would be relevant?
A. Not necessarily.
Q. Not necessarily. So if the owner of the water right does not increase production as an entity; shifts production around in order to make this call to -- and let me be blunt -- put a hurt on Clear Lakes, it would not be relevant to you at all?
A. I didn't say it wouldn't be; I say it wouldn't necessarily be.
I mean, we're interested in the facts in every single determination that we make, and so if there were relevant facts like that, then I would have expected Clear Lakes to have brought those forward.
Q. But you have -- and you don't feel you have any obligation to seek production information?
A. We don't have the legal authority to seek it.
Q. Well, so the extent of your legal authority is to ask a question and accept a verbal answer; is that --
A. No. We do have the authority to go onto private property for the purpose of administering water rights. And that would include ensuring that water is

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not being wasted and is being beneficially used under the rights.
Q. Did the Department make a count or determine poundage of production at the Clear Lakes facility prior to the redistribution of water?
A. No.
Q. So how could the Department make its own determination of whether more, bigger, or healthier fish are being raised at that facility today than prior to the administration of the water rights?
A. Visual observation only. That's the only means that we employed here.
Q. Do you think that's an effective means to determine --
A. If I had the authority to seek production records, I would have.
Q. Okay. So this authority that you believe you have, because you must believe you have some authority to have the watermaster determine need, extends no further than asking a question and looking on the ground?
A. That's correct.
Q. It does not extend to asking for a record?
A. Not if it's a record we're not legally entitled to.

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Q. And let me draw one further distinction. There is a difference between having authority to order the production of a record and the ability to ask for it.
A. I agree.
Q. Are you saying that you don't have the authority to order the production of a record?
A. That's correct.
Q. Are you saying that you don't have the ability to ask for a production record? You can't even ask the question?
A. No. We -- We could ask the question. I agree we could ask the question. But our practice is not to ask for things we're not legally entitled to. That is our practice.
Q. Again, there is a difference between being legally entitled to force someone to produce it --
A. Right.
Q. -- and having the legal ability to ask for something.
A. I agree there is a distinction. I'm just saying, as a matter of practice, we do not ask for information. Even though we could ask for information, we don't ask for information we're not legally entitled to.

MR. RASSIER: Excuse me, Dan. It is after 1:00 now.
MR. STEENSON: You need to get going?
MR. RASSIER: Yes.
MR. STEENSTON: Okay. I don't think I have much further to go, so we shouldn't take too much longer when we complete this.
(Whereupon the deposition recessed at 1:10 p.m., to be continued at a later time.)
(Signature requested.)

VERIFICATION

STATE OF _____)
) ss.
COUNTY OF _____)

I, KARL J. DREHER, being first duly sworn on my oath, depose and say:
That I am the witness named in the foregoing deposition taken the 9th day of October, 2002, consisting of pages numbered 1 to 155, inclusive; that I have read the said deposition and know the contents thereof; that the questions contained therein were propounded to me; the answers to said questions were given by me; and that the answers as contained therein (or as corrected by me therein) are true and correct.

_____
KARL J. DREHER

Subscribed and sworn to before me this _____ day of _____, 2002, at _____, Idaho.

_____
Notary Public for Idaho
Residing at _____, Idaho.
My Commission Expires: _____

REPORTER'S CERTIFICATE
STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, LYNDA C. HABEL, CSR (Idaho Certified Shorthand Reporter Number 137) and Notary Public in and for the State of Idaho, do hereby certify:
That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;
That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true, and verbatim record of said deposition.
I further certify that I have no interest in the event of the action.
WITNESS my hand and seal this 15th day of October, 2002.

_____
LYNDA C. HABEL
Idaho CSR No. 137, RPR and
Notary Public in and for
the State of Idaho.
My Commission Expires: 9-24-05

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MICRO

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

CLEAR LAKES TROUT COMPANY, INC., Plaintiff, vs IDAHO DEPARTMENT OF WATER RESOURCES; KARL J. DREHER, Director of the Idaho Department of Water Resources; and CINDY YENTER, Watermaster for Water District 130, Defendants.	Case No. CV 0200377 VOLUME II

DEPOSITION OF KARL J. DREHER

NOVEMBER 1, 2002

BOISE, IDAHO

Patricia M. Blaska
CSR

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In that long quote, you see in the second paragraph, three lines from the bottom.
A. Okay.
Q. Ellipses indicating the omission of a sentence.
A. Yes.
Q. Okay. Now, if you'll refer to Exhibit No. 22 -- we'll cross-reference documents again -- at page number 7. You'll see that the omitted sentence is the sentence at page 7, four lines up from the bottom which reads, quote; however, this issue is addressed administratively pursuant so IDWR's procedures for making a, quote, delivery call, close quote, and not through the SRBA.
That was the only sentence in this long quote which you just decided to omit.
Can you tell me why?
A. The only reason that it was omitted is because it didn't pertain to the Judge's description of the factual setting. It dealt with something outside of the factual setting.
Q. Something outside of what the Judge is actually deciding?
A. Correct.
Q. And as we discussed last time, the only thing

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that the judge was deciding was the source issue; correct?
A. Correct.
Q. Okay. In the next page, page 7, the last sentence.
A. Page 7 of what Exhibit?
Q. Same one. I'm sorry, I've got you at the wrong one. Of Exhibit No. 14, sorry.
Okay. The last sentence of the carry-over paragraph at the top roads, quote; However, the Presiding Judge for the SRBA court, as quoted above, has in effect concluded that the modifications to the diversions for the Clear Lakes and Clear Springs water rights has eliminated the protection afforded Clear Lakes' water right 36-07004, close quote.
But the prior sentence, which you deleted, clearly states that the judge was making no such conclusion; correct? That was to be determined in the future administrative proceeding.
A. No. I believe this sentence pertains to the source issue. And the reason it pertains to it is because if the judge had determined that these rights did have separate sources, then we wouldn't make the adjustment in the manner that we did.
Q. Okay. So this sentence relates only to the source issue then. This one at the end of this paragraph

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you wrote that says; however the Presiding Judge for SRBA, et cetera. It only relates to the source issue, it doesn't relate to protections afforded by the natural conditions of the stream or the points of diversion?
A. It doesn't relate to what? Say that again.
Q. Well, it doesn't relate to the question of futile call, or the no injury rule. Sounds to me like you're saying what you really meant by this sentence is that the conclusion that the judge in effect reached here related only to the source issue?
A. But it is related to the futile call in the sense that if there were different sources, then a call from one water right on one source, against a water right on another source, would in fact be futile.
Q. Futile call doesn't apply to different sources; does it?
A. Well, it would be a futile call. And normally that's not its application but it would be futile.
Q. Sure. And that's the extent of the meaning of this sentence here.
A. Yes.
Q. Okay. Fair enough.
Okay. Now, with regard to your theory that you can change the way in which a senior diverts water from multiple points of diversion, as you have here, in response

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to a junior's call; it seems to me from what you said previously is that what you do to the senior's diversion has to be -- have a neutral effect on that senior's beneficial use of water. It can't impair or interfere with the beneficial use of water by that senior; correct?
A. It can't impair with filling the right. The right has to be filled.
Q. Okay. And by that you mean, the right still has to get a 100 cfs?
A. Correct.
Q. In the context of this particular example.
A. Correct.
Q. Do you think that if, if changing the way the senior diverted water, diverts water -- let's be specific. If changing the way 2659 diverts water, by reducing its diversion 27 cfs from the western pool, if that has an effect on the manner in which Clear Lakes beneficially uses water at the place of use; can you do that or not?
A. I'm not sure what you mean, the manner which it beneficially uses water. Water under that right or water under all rights?
Q. Water under that right, beneficial use of water under that right.
A. No. The issue is whether or not the water right can divert the full quantity of water. And, I mean,

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it has to make beneficial use.
Q. Be able to make full beneficial use, correct?
A. I'm not sure what you mean by full beneficial use.
Q. Full beneficial use was a phrase you used in your last deposition. So I guess I'd ask you the question. When you -- well, we have covered that when we covered the definition -- referred to the definition of the state. But I guess my question is; sounds like number one, your administration of the senior, in response to a junior's call, can't diminish the quantity of water that the senior receives from the source; correct?
A. Correct.
Q. Whereas you could diminish the quantity of water a junior receives in response to a senior's call; correct?
A. Correct.
Q. Okay. Doesn't it follow that you're modifying the way the senior diverts water in response to a junior's call, can't have any other detrimental effect on the way the senior exercises its senior right, because quantity is not the only element?
A. Correct. It can affect how the senior uses the water. The question is; is the full quantity of water available and diverted under the right. And in my concept

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of full beneficial use, is all of that quantity of water being used to produce fish.
Q. Okay. So in your view, you don't look at whether the proposed administration has any adverse effect on the exercise of any other element of the right, other than quantity?
A. Well, I wouldn't say that. I mean, obviously the water has to be able to be used at the place of use. It has to be available during the season of use.
Q. Okay.
A. So the other elements of the water right have to be enforced or protected, if you will, sure.
Q. And in that sense I used the term neutral. The action has to be neutral or non-injurious to the water right owner's exercise of the various elements of the right?
A. It has to be non-injurious to the elements of the right.
Q. Sure. Is it your view that in administering the senior in response to a junior's call, it is permissible for such administration to force the senior to change the way he uses water at the place of use?
A. Well, again, I disagree with your characterization that we're administering the senior in response to the junior.

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Q. Okay.
A. That's not the proper characterization, to my view.
Q. Okay. Provide me the proper characterization.
A. We administered a junior right in response to a call from a senior priority, by adjusting the amount of water diverted under a more senior right at two points of diversion.
Q. Okay. I have no problem with that restatement. So can you answer the question?
A. Ask the question again, please.
Q. With that clarification, then, do you think that the -- what you do to the senior in response to the junior's call, that it's permissible for what you do, to change the way the senior uses water at the place of use?
A. I'm not sure what the point of your question is. I mean, let me try answering it in a hypothetical situation. If because of -- well, let's look at an irrigation water right. You've got a place of use for irrigation that has multiple rights. For simplicity purposes, two water rights.
Q. Sure.
A. That are used on that place of use. One's a relatively senior right, one's a relatively junior right. Both rights are needed to fully run the pivot. The junior

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right, when the junior right goes out of priority, the senior right can still be filled. But it may not be enough to run the pivot. And yes, that's permissible.
Q. Okay. Is it permissible to change to -- to change the place where -- within the place of use, let's say we have a permissible place of use.
A. Okay.
Q. Is it permissible in changing the way the senior diverts water, to by doing that, also change the way the senior uses that water at the place of use?
In other words, rather than irrigate this 40, I'm going to change your diversion so you could no longer irrigate this 40. You can irrigate another 40.
A. Within a permissible place of use.
Q. Within a permissible place of use. You just have to change. You just can't irrigate that 40 any more. Now you get to irrigate a different 40 in response to what we've done to change the diversion of the senior's right in response to a junior's call. Can you do that?
A. Again, the issue is; is the right being filled, are the elements of the water right affected, and is the water fully being used for its purpose. That's the extent of our authority.
Q. So is the answer to my question; yes or no?
A. I'm not sure what the question is, still.

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Q. The question is, again; a senior's got two points of diversion. He's got a ten inch right which can be used within any 20 acres. And historically he's irrigated these ten acres, right here, based on being able to utilize the points of diversion in a certain way.

You say, junior's made a call, I'm going to change the way you divert water. You're still going to get your ten inches but it's going to force you to change within the permissible place of use where, the land that you irrigate. You're now going to have to let this land go fallow and you can irrigate another ten acres. Is that okay?

A. When would that ever happen?

Q. I'm asking if it's permissible.

A. I can't envision it ever happening.

Q. Envision that it would happen. Envision that you're doing it.

A. Well, again --

Q. Can you do it?

A. You're asking a hypothetical question. It has no bearing here. I don't -- I have to answer questions about what I know.

Q. Well, you posed a hypothetical in response to my prior tangible question. So I'm trying to deal with the way you want to answer questions. Let's try it this way:

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Suppose at the Clear Lakes facility, we've got a western set of raceways that can only be filled by taking water out of the western diversion pool. With me so far?

A. Uh-huh.

Q. And you say in response to Clear Springs call, we're going to force you to take less from the western diversion pool, 27 cfs less, and take it to the eastern pool, which forces Clear Lakes to dry up all of those western raceways.

A. Uh-huh.

Q. In effect, the analogy, hypothetical analogy, drying up ten acres and irrigating another ten; drying up these raceways, and using another ten. Is that permissible?

A. Where the analogy breaks down is that the fish facility is the place of use, it's not a permissible place of use. So I don't think those two situations are comparable.

Q. Answer my question with regard to the Clear Lakes facility. Is it permissible for you to force a senior to dry up raceways that it has historically used -- where it has historically used water in response to a junior's call?

A. If that, if where in the facility water is used is a significant attribute of the right, then it

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should have -- it should have been decreed that way. I can't do anything about the way the court decreed the right. And the court -- the way administering the right in the way it's been decreed, I don't believe that that's a consideration I would make.

Q. So the answer to the question, I take it, is yes. That you believe the Department can, in administrating a senior's right in response to a junior's call, force the senior to divert water in a way such that it can no longer utilize a facility that it has historically always used, under the historic means of diversion, historic diversion of water. It sounds to me like the answer to that question is yes?

A. Yes. Depending upon on how the right was decreed. If the right was decreed in a manner that, in this case, would have recognized a right to divert a specific quantity of water to the western raceways, then that's the way we would have administered the water right.

Q. Okay. That is my question. And it is, it is really no different than the -- back to the analogy -- the farmer has a permissible place of use. The right recognizes that use for a ten inch right can occur anywhere within twenty acres; right?

A. I think there's a difference between the permissible place of use and place of use.

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Q. Explain the difference?

A. When there's a single place of use, the issue is; is water being used within that place of use. The issue isn't whether -- in a permissible place of use typically water can only be used on a part --

Q. Exactly.

A. -- of the facility.

Q. Sure.

A. And that's what's different here.

Q. Okay. But it sounds to me like, it sounds to me that by extension of your thinking with regard to Clear Lakes and Clear Springs, junior makes a call against a senior irrigator, he's got ten inches --

A. Junior makes a call against a --

Q. Junior makes a call for water. And the situation is similar to this one where you can get that junior more water by changing the way a senior diverts water from two point of diversion; okay?

A. Uh-huh.

Q. And in so doing, the irrigator that has 20 acres, and irrigates -- has historically irrigated ten of those within a permissible place of use, so that another ten is still within the place of use, you can say to that irrigator we're going to change the way you divert water. Stop irrigating those ten acres and irrigate another ten.

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A. It's not the same situation.
Q. The difference is what?
A. The difference is that the -- under the permissible place of use, the irrigator can only irrigate a portion.
Q. What difference does that make?
A. Well, it makes quite a bit of difference.
Q. How so?
A. Well, it would be a little difficult for an irrigator that had -- was irrigating under his water right, he's planned crops on 20 acres, however many acres you have to have in your analogy. It would be a little difficult in July, to say; oh, I've got to replant my crops and irrigate on a different 20.
Q. And how is that different than what you did the Clear Lakes here?
A. It's different in that Clear Lakes does not have such a permissible place of use. They have a place of use. And water can be used beneficially anywhere within that place of use.
Q. But you are, just as the analogy, calling the analogy, just as with the irrigator, you're saying to Clear Lakes mid July, coincidently, let those raceways go. Stop using those raceways. That part of your place of use, just so long as you're getting 100 cfs doesn't matter that that

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part of your place of use, authorized under the right, is no longer available to you and that you have to let that part of the investment in your company go.
How is that different than the effect that you just described of such a decision on an irrigator.
A. Under -- in the situation with the irrigator it would be difficult for that irrigator to make beneficial use. That's not the situation here. Water is being diverted, 100 cfs, to the fish facility and it's being utilized to raise fish.
Q. You're aware, aren't you, that Clear Lakes had to move and sell tens of thousands of fish in response to your action?
A. You know, I know they had to move a lot of fish. I don't know what they had to do, to do it. I mean, it was certainly not -- this was not an outcome driven decision. It was an application of the facts and the law.
Q. Okay. Now, when this interim agreement expires, as it will at the end of next year or thereabouts?
A. Yes.
Q. Two year term?
A. Yes.
Q. How will the Department administer Clear Springs call with respect to any ground water pumpers who no longer have protection under the interim agreement?

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A. How will the Department administer Clear Springs call?
Q. Yes.
A. Clear Springs call will expire at the time, if spring fulls return to 375 cfs, I guess the call would expire at that point.
Q. Let's say that doesn't happen. Is the Department going to take action against other juniors similar, just as it has taken action against Clear Lakes?
A. What -- assuming the stipulated agreements expire and there's no other replacement stipulated agreement, no other in-kind, in-place, in-time, mitigation then the remedy available to Clear Lakes is for them to make a delivery call.
Q. You're, again, you're answering questions I'm not asking.
What are you going to do in response to Clear Springs? What are you going to do when others are not protected, when you have a call, your administering Clear Lakes right.
A. That' right.
Q. Your obligation is not to single out one water user to satisfy another?
A. Correct.
Q. Your obligation is to look to all juniors?

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A. That's correct.
Q. When the interim agreement ceases to be in effect, if and when that happens, doesn't the Department have an obligation to look beyond the one that it has singled out, to the others, who are subject to curtailment?
A. Yes.
Q. I assume that will happen when the interim agreement -- if and when the agreement expires if there is not sufficient flow; correct?
A. Well, I'd have to go back and look at the, what the specifically was in Clear Springs delivery call. And at that point we might, as a condition of administering the call, they might have to amend their call so that it was against junior priority rights.
Q. You call for distribution of water and they didn't say take water away from some?
A. No. But that's what I would have to go back and look and see what the call says.
Q. Let me ask you, does it make a difference?
A. Sure. Because the call may be narrowly constructed within the context that these stipulated agreements were in place.
Q. Do you mean that the interim agreements are no longer in place, this is the assumption we're making. It's very likely to happen in the future.

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The call -- your administering water pursuant to the call. Are you telling me that the -- that the water right owner making the call has the, has the discretion to decide which water rights are going to be curtailed?
A. Of course not.
Q. That's up to you; is it not?
A. Well, it's not up to me, it's up to what the priorities are of the rights involved, and where we can determine the rights are causing injury.
Q. You make the decision; don't you?
A. That's correct.
Q. Okay. And when the pumpers that have received protection no longer have it, you're going to have to look at curtailing them under Clear Springs call, just like you looked at curtailing Clear Springs?
A. That is correct.
Q. Okay. Now, with regard to those June 18th and June 20th letters that you sent out to pumpers. And this I think is Exhibit No. 38. And attached to that is a list of several -- in certificates of service attached to the letter.
A. Okay.
Q. And there's a certificate of service attached to the June 18th letter and a certificate of service attached to the June 20th letter.

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Can you look at first the certificate of service attached to the June 18th letter in Exhibit 38 and tell me the status of each of these diversions at this time?
A. I can't. I'd have to go check with the water distribution section to see what the situation is.
Q. Does the Department have information as to which of these, which of these have joined a ground water district?
A. Yes, we do.
Q. And you just have to check your files to see?
A. Correct.
Q. Okay. Is your understanding that all of these have joined the ground water district, or some may have and some may not have?
A. I believe that some of these rights were not being used at the point in time. So, I mean, there's nothing to curtail. They weren't being used.
Q. And is Cindy checking these water rights on a frequent basis to make sure that they're not being used. Those that are not protected by --
A. She's checked each one of these rights. How often she's checked them I couldn't tell you today.
Q. And we will follow up on this information. But if, for example, Harry and Flora Bokma, if I'm saying

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that correctly, probably not, haven't joined the ground water district, but are pumping water today. Then pursuant to Clear Springs call, and your order creating the ground water -- the Water District 130, you need go out and curtail these folks, don't you?
A. Correct.
Q. So is there, do you know if Cindy's checking on a weekly basis, or a monthly basis as to these other water rights?
A. I don't.
MR. STEENSON: Off the record.
(Brief recess.)
BY MR. STEENSON:
Q. Now, in your watermaster, in the memorandum that accompanied your watermaster instructions in Exhibit 14, at page ten, the end of the second paragraph, second to the last sentence says, quote; if expenses are incurred by Clear Lakes in diverting water from the eastern pool under the senior right 36-02659, not the junior right 36-07004, then under Parker Clear Springs may be responsible for those costs, close quote.
Does the Department administer this issue if Clear Springs, Clear Lakes can show that it has incurred such costs, does Clear Lakes submit them to the Department and does the Department then order Clear Springs to pay, or

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hold a hearing? How does this aspect of the situation work?
A. Well, certainly the Department has no authority to collect such costs. And I would guess that if you believe costs have been incurred to divert in order to divert the senior right, then they would have to file a civil action to recover those costs.
Q. So that's an aspect of the Parker versus Wallentine case that the Department will not administer?
A. Correct.
Q. Now, at any time had you had the -- held the view that Clear Lakes had waived its right to make a call for water under its senior priority right 2659?
A. Only against the -- they waived their right by stipulation, to make a call against the holders of junior priority ground water rights that were signatories to the stipulated agreement.
Q. Okay. And there would be no other reason for you to believe that Clear Lakes would have waived the right to make a call against anybody else?
A. No.
Q. And there would be no reason, other than the interim stipulated agreement, to believe that Clear Lakes had waived its right to make a call against Clear Springs?
A. That's correct.

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Q. Have you discussed this case amongst any third parties, not your attorney or not party to this case, since it was filed?
A. Since what was filed?
Q. I'm sorry, since the Clear Lakes Complaint was filed?
A. You know, I've certainly stated that an action has been filed against the Department.
Q. Have you been involved in any discussions with any participants in Water District 130 regarding any aspect of this case?
A. Only that the action was filed. And, you know, certainly I have stated that we did issue watermaster instructions.
Q. Okay. Was there any discussion of any aspects of this case at a recent meeting of, I'll call them, technical consultants for Water District 130?
A. I don't know which recent meeting of technical consultants you're referring to. We had a recent, we had a meeting of technical consultants on Wednesday of this week. Is that the meeting you're referring to?
Q. Sure. Did any aspect of this case come up in conversation at that meeting?
A. Not at the meeting, no. I did talk to Mr. Strong.

Q. Okay.
A. I don't remember exactly the remarks but I did talk to Clive about this case at, not openly at the meeting, but associated with the meeting.
Q. He's not counsel for this case but he's --
A. Represents the State.
Q. Represents the State.
MR. STEENSON: Off the record for a moment.
(Brief recess.)
BY MR. STEENSON:
Q. Okay. I'll refer you to Exhibit No. 2, a 1969 photograph. I think you recognized it the other day when we were talking. I just want to make sure that in this circumstance, with the Clear Springs diversion as it was, it had no access to, and could not divert, any of the water that was being diverted by either of the Clear Lakes diversions?
A. I don't know what the date of this is. Tell me again.
Q. 1969.
A. Well, at this point in time -- I mean, I don't recall the specifics of your recount of the history in your memorandum, but at this point in time I thought Clear Springs was diverting out of the western source.
Q. Uh-huh.

A. I mean, that's what I recall. But I don't know where the water would be coming to Clear Springs if they weren't.
Q. Okay. And do you think at this time it would have been possible to curtail Clear Lakes diversions at either of its points of diversion to increase the flow to Clear Springs point of diversion for 2708?
A. I'm not sure that I have the sufficiency of facts at this -- in 1969 to know how we would have administered it in 1969.
Q. Okay. I guess I'm not even asking the sort of question on administration. But from what you can see, and if based on what you see you can't say, that's fine. But based on what you see, doesn't it appear to you that it's not possible, at this time, was not possible at this time to increase the flow to Clear Springs diversion works, by curtailing, by reducing the diversions at either of Clear Lakes diversion points?
A. I don't know.
Q. Okay. And then with regard to the 19 -- the following photograph in Exhibit No. 3, the 1977 photograph. And we discussed this last time. There's the construction of this finger-like dike by Clear Springs in order to increase its ability to divert spring water out of the western source.

A. Yes.
Q. Okay. And it's apparent to you, is it not, from this photograph that absent the construction of that dike, Clear Springs would not be able to divert any water that was diverted by Clear Lakes into the western portion of its facility?
A. Again, I don't know. I'd have to look and see what -- I just don't have enough facts to know.
Q. Okay. That's all I have.

(Deposition ended at 12:39 p.m.)
(Signature requested.)

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VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

I, Karl J. Dreher, being first duly sworn on my oath, depose and say:

That I am the witness named in the foregoing deposition taken the 1st day of November, 2002, consisting of pages numbered 158 to 262, inclusive; that I have read the said deposition and know the contents thereof; that the questions contained therein were propounded to me; the answers as contained therein (or as corrected by me therein) are true and correct.

_____
KARL J. DREHER

Subscribed and sworn to before me this _____ day of _____, 2002, at _____, Idaho.

_____
Notary Public for Idaho
Residing at _____, Idaho
My Commission Expires: _____

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, PATRICIA M. BLASKA, CSR, (Idaho Certified Shorthand Reporter #83) and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth:

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 3rd day of November, 2002.

_____
PATRICIA M. BLASKA
Idaho CSR No. 83,
Notary Public in and for the
State of Idaho.

My Commission Expires August 22, 2003.

MICROFILMED
DEC 17 2003

DEC 17 2003

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	CLEAR SPRINGS FOODS, INC.S' MOTION TO STRIKE THE AFFIDAVITS OF ANITA KAY HARDY AND GREGORY KASLO

COMES NOW, Respondent Clear Springs Foods, Inc. ("Clear Springs"), by and through counsel of record, and hereby files this *Motion to Strike the Affidavits of Anita Kay Hardy and Gregory Kaslo*. This motion is supported by the argument below.

ARGUMENT

The Idaho Department of Water Resources' (IDWR) rules of procedure provide the following with respect to evaluation of evidence:

> The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is the type commonly relied upon prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

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IDAPA 37.01.01.600.

Although the Hearing Officer is not "bound" by the Idaho Rules of Evidence, there is no administrative rule prohibiting the Hearing Officer from applying I.R.E. in evaluating the admissibility of evidence in a contested case proceeding. Furthermore, applying such rules is entirely consistent with applying the Idaho Rules of Civil Procedure in this matter.

Since Clear Lakes filed its *Motion for Summary Judgment* pursuant to I.R.C.P. 56, it should be required to submit affidavits in conformance with I.R.C.P. 56(e). That rule provides the following:

> Supporting and opposing affidavits shall be made on ***personal knowledge***, shall set forth such facts as would be ***admissible in evidence***, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

I.R.E. 56(e)(emphasis added).

The requirements of I.R.C.P. 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge. *Smith v. Board of Corrections*, 133 Idaho 519, 523 (1999); *State v. Shama Resources, Ltd.*, 127 Idaho 267, 271 (1995).

The affidavits of Anita Kay Hardy and Gregory Kaslo (including the exhibits) are irrelevant and demonstrate an attempt to have inadmissible evidence, under the Idaho Rules of Evidence, introduced into this proceeding.

I. Affidavit of Anita Kay Hardy

Ms. Hardy's affidavit contains numerous examples of the type of evidence that is excluded by Idaho courts pursuant to the rules of evidence. First, in paragraph two, Ms. Hardy simply repeats her counsel's legal arguments and does not offer any facts. These statements are conclusory and read more like legal argument than a person's testimony as to facts. Accordingly

paragraph two is unduly repetitious and should be stricken since the statements are not admissible.

Next, Ms. Hardy testifies to and offers letters from Jason Miciak (on behalf of Pristine Springs), Mike Greene (on behalf of Blue Lakes Trout Farm), and Thorlief Rangen (on behalf of Rangen, Inc.). *See Affidavit of Anita Kay Hardy* at 2-3, ¶¶ 3, 4, and 7, and Exhibits A, B, and C. First, since Rangen, Inc. was not a party to the Interim Stipulated Agreement there is no question Mr. Rangen's understanding and interpretation of that agreement is irrelevant. After all, if Mr. Rangen's interpretation is relevant, any member of the general public's interpretation should be offered and considered as well. While the Director of IDWR was not a party to the Interim Stipulated Agreement, his interpretation of his February 19, 2002 Order providing for its enforcement is relevant for purposes of this proceeding. Second, these letters are irrelevant because they are raised for the first time after the agreement was negotiated and after the Director enforced his February 19, 2002 Order. These letters are also hearsay and violate fundamental rules of evidence. Ms. Hardy's assertions regarding these parties' (and non-party's) understanding of the Interim Stipulated Agreement violates I.R.E. 402, 602, 802 and I.R.E. 901. The statements in the letters are irrelevant and are not based upon Ms. Hardy's personal knowledge. Furthermore, the statements (letters) of the other parties are being offered for the truth of the matter asserted and are not authenticated.

These letters contrast to the letters that were submitted as exhibits to the *Affidavit of John K. Simpson*. *See* Exhibit C and D to the *Affidavit of John K. Simpson*. Those letters are part of the administrative record and Department's files with respect to the negotiations and the stay of curtailment of junior ground water rights in the Thousand Springs Ground Water Management Area, as well as the record regarding the Director's January 18, 2002 Order approving the

Interim Stipulated Agreement. In other words, these letters properly represent part of "the agency's experience . . . and specialized knowledge" that may be used in evaluation of evidence in this proceeding. IDAPA 37.01.01.600. On the other hand, the letters submitted by Ms. Hardy are communications to the State of Idaho's Attorney General's office (James Carlson and Clive Strong) in the course of the Basin 36 mediation.

Finally, Ms. Hardy offers several discussions she had with other parties or their attorneys regarding the Interim Stipulated Agreement. *See Aff. of Anita Kay Hardy* at 3-4, ¶¶ 5, 6, and 8. Such assertions violate the hearsay rule embodied in I.R.E. 802. Statements allegedly made by Jo Beeman to Ms. Hardy, by John Simpson to Jo Beeman, and by Orlo Maughn to Ms. Hardy are hearsay for which no exception to the rule applies. In addition, Ms. Hardy's statement that she has "learned that" the North Snake Ground Water District and the Magic Valley Ground Water District "understand the Safe Harbor provision of the Interim Stipulated Agreement as I do" is also inadmissible hearsay.

Ms. Hardy's statements in her affidavit are strikingly similar to the statements in an affidavit found to be invalid under I.R.C.P. 56(e) in *Sammis v. MagneTek, Inc.*, 130 Idaho 342, 350 (1997). In *Sammis*, the following statements were offered in an affidavit of an "expert" witness:

> 6. On February 27, 1995, I called Defendant Gould, Inc. to inquire about their motor division. ***I was informed that*** the Defendant Gould had at one time owned Century Electric of St. Louis, Missouri, which was their motor division. . . . I telephoned Defendant MagneTek in St. Louis . . . In addition, ***I was informed that . . .***
>
> 7. Upon further investigation, ***I have learned that . . .***

130 Idaho at 350 (emphasis added).

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The Idaho Supreme Court found these statements to be inadmissible, as they constituted hearsay. *Id.* Similarly, Ms. Hardy's affidavit contains numerous assertions about other parties' statements and information that she "learned" from the two ground water districts. These statements are hearsay and should be stricken. Accordingly, the above referenced statements and paragraphs in Ms. Hardy's affidavit and the letters attached as exhibits should be stricken and excluded from this proceeding.

Alternatively, if the Hearing Officer allows Ms. Hardy's affidavit and the attached letters to be considered in this proceeding, Clear Springs requests the opportunity to obtain affidavits, take depositions, or conduct further discovery to inquire into the statements made by the other parties to the Interim Stipulated Agreement to members of the Attorney General's Office, Mr. Clive Strong in particular, pursuant to I.R.C.P. 56(f). The communications with Mr. Strong, who acted as a facilitator or mediator during and after the negotiations of the Interim Stipulated Agreement could have been considered privileged if not for Clear Lakes' offered submittal into this record. Given the submittal with Ms. Hardy's affidavit and the facts alleged by Clear Lakes' in its reply, Clear Springs requests the opportunity to obtain testimony from Mr. Strong regarding the scope and intent of the Interim Stipulated Agreement. Additionally, Clear Lakes' submittal clearly draws into question what the Director was told or understood at the time he began enforcing his February 19, 2002 Order for the administration of water rights within Water District No. 130. This enforcement, by the terms of that Order, would have included administration of the Interim Stipulated Agreement. Specifically, when questioned by Clear Lakes about the Interim Stipulated Agreement in a prior deposition, the Director noted:

> Q. So it's quite possible, it's sounds like, since you're saying you were not involved in the drafting of this agreement, and you had a focused view of the issue, that you may have misinterpreted this agreement; correct? In this respect that we're talking about.

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A. No. If someone felt I had misinterpreted the agreement, then why wouldn't they raise the issue when I issued the order approving the agreement?

Dreher Depo. p. 215 – 216, lns. 24 – 6. *See* Exhibit A to the *Second Affidavit of John K. Simpson.*[1]

Further discovery into what information was available to the Director prior to and at the time of enforcement is not only relevant but also necessary should the Hearing Officer consider the affidavit of Ms. Hardy and her attached exhibits.

II. Affidavit of Gregory Kaslo

Mr. Kaslo's affidavit also contains statements that are irrelevant, redundant, and not based on personal knowledge which are prohibited by I.R.E. 402 and 602.

Clear Lakes' "stocking density" in July 2002 and the fact that it is "likely" to have a greater stocking density in the future in the event of future curtailments has no relevance upon this proceeding. Furthermore, Mr. Kaslo's statements that "it is unlikely that Clear Springs Foods, Inc. (Clear Springs) needs additional water . . ." is speculative, conclusory, and not based upon personal knowledge. Furthermore, Mr. Kaslo's statements about Clear Springs' production of fish is likewise speculative and irrelevant for this proceeding. Paragraphs four and five of Mr. Kalso's affidavit are therefore inadmissible and should also be stricken and excluded from this proceeding pursuant to the Idaho Rules of Evidence.

CONCLUSION

For the foregoing reasons Clear Springs respectfully requests the Hearing Officer to strike the *Affidavit of Anita Kay Hardy* and the *Affidavit of Gregory Kaslo*. The statements in, and the exhibits to the affidavits of Ms. Hardy and Mr. Kaslo violate fundamental rules of

[1] Given the numerous citations to the transcript of the deposition of Karl J. Dreher, the entire transcript is provided for the Hearing Officer's review. *See* Exhibit A to *Second Aff. of John K. Simpson.*

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evidence and are irrelevant for purposes of this proceeding. As such, they should be stricken and excluded from the record.

Alternatively, if the Hearing Officer allows the affidavits of Ms. Hardy and Mr. Kaslo, including the attached exhibits, Clear Springs specifically requests the opportunity to conduct Rule 56(f) depositions of various individuals, including Mr. Clive Strong if necessary.

DATED this 12th day of March, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson

Attorneys for Clear Springs Foods, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2003, I served a true and correct copy of the foregoing *CLEAR SPRINGS FOODS, INC.S' MOTION TO STRIKE THE AFFIDAVITS OF ANITA KAY HARDY AND GREGORY KASLO* upon the following by the method indicated:

Original by facsimile and U.S. Mail, postage prepaid:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies by facsimile and United States Mail, postage prepaid:

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Department of Water Resources
South Region

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MAR 18 2003
Department of Water Resources

March 14, 2003

VIA HAND DELIVERY

Hon. D. Duff McKee
P.O. Box 941
Boise, Idaho 83701

RE: Exhibit A to the *Second Affidavit of John K. Simpson*

Dear Judge McKee:

Please find enclosed Exhibit A to the *Second Affidavit of John K. Simpson* to be submitted *In the Matter of Petition to Modify/Rescind Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-7201 and 36-07218.* The exhibit was mistakenly omitted from the mailing that went out yesterday on behalf of Clear Springs Foods, Inc. In addition, the reference to the exhibit in paragraph 5 on page two of Mr. Simpson's affidavit was inadvertently left out. The reference should read "Exhibit A." Please excuse these errors. We are mailing copies of the exhibit to Mr. Honsinger and Mr. Merritt today as well.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Enc.

cc: Charles L. Honsinger
Allen Merritt

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	RESPONSE TO CLEAR LAKES' MOTION TO STRIKE THE AFFIDAVIT OF LARRY W. COPE

COMES NOW, Respondent Clear Springs Foods, Inc. ("Clear Springs"), by and through counsel of record, and hereby responds to Clear Lakes Trout Company, Inc.'s ("Clear Lakes") *Motion to Strike Cope Affidavit.*

ARGUMENT

Clear Lakes asserts that the *Affidavit of Larry W. Cope* is "defective" and "completely useless" to the Hearing Officer. Clear Lakes also characterizes the *Affidavit of Larry W. Cope* as setting forth "Mr. Cope's opinion" regarding the Safe Harbor provision and interpretation of the Interim Stipulated Agreement in order to provide support for its motion to strike. Although the legal basis for Clear Lakes' motion is not entirely clear, Clear Springs can only deduct that Clear Lakes' argument is that Mr. Cope's affidavit is not relevant.

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To the contrary, the *Affidavit of Larry W. Cope* sets forth critical factual background information relevant to several issues in this proceeding. First, Mr. Cope explains the context for the Interim Stipulated Agreement in the first place, and sets forth the facts with respect to the Agreement in Principle and the subsequent negotiations culminating in the Interim Stipulated Agreement. To that effect Mr. Cope testifies as to the intentions and understandings of Clear Springs during this process. Clear Springs was one of the first parties to participate in negotiating an agreement with the junior ground water users and was involved from the beginning back in the late summer of 2001. Clear Springs also played a pivotal role in convincing other spring users to sign on to the Interim Stipulated Agreement. Clear Springs was present and participated in several negotiation sessions during the fall of 2001.

Mr. Cope testifies to all of these facts that surrounded the negotiations of the Agreement in Principle and the Interim Stipulated Agreement. Mr. Cope, as President and Chief Executive Officer, also testifies to the understanding and intention of ***Clear Springs Foods, Inc.*** when it entered into the Agreement in Principle and Interim Stipulated Agreement between itself and the groundwater users in the North Snake Ground Water District. In other words, Mr. Cope's affidavit provides important context for the purpose of the entire Interim Stipulated Agreement, rather than just information about one isolated provision. Mr. Cope's affidavit and Clear Springs' interpretation is consistent with the Interim Stipulated Agreement and is intended to explain the agreement in its entirety.

Next, Mr. Cope's affidavit is important to respond to extrinsic evidence offered by Clear Lakes in conjunction with its motion for summary judgment. Although Clear

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Lakes contends that the language of the Safe Harbor provision is all that matters in this proceeding, it nonetheless opens the door and relies upon the Director's former testimony (*See Clear Lakes' Motion for Summary Judgment* at 6, 8, and 9) and cites to prior drafts of the Interim Stipulated Agreement (*See id.* at 9-11). Accordingly, it was incumbent upon Clear Springs to provide testimony to put this evidence in proper context and explain the history of the agreement and the "bargain" that was made. In addition, it was necessary to respond to the other materials submitted by Clear Lakes in support of its motion. *See Affidavit of Charles L. Honsinger.*

Additionally, if the Hearing Officer determines the agreement to be ambiguous as it operates between Clear Lakes and Clear Springs, Mr. Cope's affidavit is relevant for the purposes of demonstrating the lack of mutual assent and the lack of consideration between the parties.

Finally, Clear Lakes motion to strike assumes that such evidence regarding the formation of the agreement and its interpretation is not relevant or can be considered by the Hearing Officer. As explained in *Clear Springs' Response*, such information is not only relevant, it is critical for understanding the intentions of the parties when the Interim Stipulated Agreement was entered into between senior surface water users and junior ground water users. Clear Lakes continues to assert that Clear Springs' intentions and understandings with respect to the Interim Stipulated Agreement are not "helpful" nor necessary for the Hearing Officer to consider while at the same time offering its own affidavits and extrinsic evidence to explain the purpose and meaning of the Interim Stipulated Agreement. Clear Lakes cannot have it both ways.

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Accordingly, the facts set forth in the *Affidavit of Larry W. Cope* are relevant and the "type commonly relied upon by prudent persons in the conduct of their affairs." IDAPA 37.01.01.600. For these reasons the Hearing Officer should deny Clear Lakes' motion to strike.

DATED this 13th day of March, 2003.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson

Attorneys for Clear Springs Foods, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2003, I served a true and correct copy of the foregoing *RESPONSE TO CLEAR LAKES' MOTION TO STRIKE AFFIDAVIT OF LARRY W. COPE* upon the following by the method indicated:

Original by facsimile and U.S. Mail, postage prepaid:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
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Travis L. Thompson

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- HEARING ROSTER OF ATTENDANCE-

CLEAR LAKES PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER RIGHTS 36-2659, 36-2708, 36-7004, 36-7201, AND 36-7218 IN W.D. 130

March 17, 2003

NAME	ADDRESS	REPRESENTING
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John Simpson	P.O. Box 2139 Boise	Clear Springs Foods.
Harry W. Cope	P.O. Box 712, Buhl, ID 83316	Clear Springs Foods, Inc
Dan Steenson	P.O. 2773, Boise 83701	Clear Lakes
Charles Honsinger	P.O. Box 2773 Boise 83701	Clear Lake Trout Co.
Kay Harvey	1301 Vista Ave. Boise 83705	Clear Lakes Trout Co.
Gregory Kasko	1201 Vista Ave Boise, ID	Clear Lake T.

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Department of Water Resources
Southern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHT NOS. 36-02659, 36-02708, 36-7004, 36-7201 AND 36-7218 IN WATER DISTRICT NO. 130	AFFIDAVIT OF LARRY W. COPE

STATE OF IDAHO)
)ss
County of Ada)

Larry W. Cope being first duly sworn on oath, deposes and says:

1. I make the following statements based upon my personal knowledge. I am the President and Chief Executive Officer of Clear Springs Foods, Inc. (hereinafter "Clear Springs") of Buhl, Idaho. I have been employed by Clear Springs for approximately 29 years and have held my present position since 1982. On behalf of Clear Springs I was and am directly involved in water matters in Basin 36 and Water District 130.

2. That Clear Springs is the holder of certain water rights, Nos. 36-02708 and 36-07218, which share as a common source certain water rights held by Clear Lakes Trout

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Company Inc. ("Clear Lakes"), Nos. 36-02659 and 36-07004, the administration of which is governed by certain watermaster instructions issued by the Department of Water Resources.

3. That in 1980 Clear Springs and Clear Lakes entered into a settlement agreement resolving litigation, which controlled the administration of water until the Snake River Basin Adjudication entered partial decrees for the water rights identified above.

4. That on January 18, 2002 the Idaho Supreme Court issued a decision affirming the SRBA Court's decision regarding the common source and diversion point issues as between the water rights of Clear Springs and Clear Lakes at the Clear Springs / Clear Lakes facilities, thereby resolving over ten years of litigation.

5. The springs, which are the common source of Clear Springs' and Clear Lakes' water rights, have been in decline over the last 20 years. Presently, there is approximately 325 cfs, sufficient to fill the 100 cfs senior water right of Clear Lakes and the next senior 200 cfs water right of Clear Springs. Clear Lakes' next in priority water right of 75 cfs is partially filled pursuant to the partial decrees and watermaster instructions. Clear Springs' junior water right No. 36-07218 has not been filled for years.

6. That as a result of the declining spring flows in July of 2001 Clear Springs did petition the Idaho Department of Water Resources for the designation of a ground water management area directly adjacent to the Thousand Springs Reach of the Snake River.

7. That on or about August 3, 2001 the Director of Water Resources did designate the Thousand Springs Reach a ground water management area.

8. That as a result of that designation certain parties, primarily Clear Springs, Northside Canal Company and North Snake Ground Water District, did enter into negotiations, which ultimately led to an Agreement in Principle. The sole purpose of those negotiations was to provide an arrangement whereby the groundwater users in and adjacent to the designated groundwater management area would provide through replacement water or curtailment, an equivalent quantity of water to satisfy the Director's order. This replacement water had to appear in the Thousand Springs reach at the time, amount and location as specified by the Director. Following an initial set of meetings, which included numerous surface and groundwater parties, Clear Springs was the sole spring user that expressed an interest in participating in those negotiations. The negotiating parties did not negotiate what amount of water would have been necessary to mitigate for the fulfillment of senior water rights. Nor did the parties negotiate or intend to negotiate water administration issues outside of the groundwater management area. These issues were left for future long-term resolution.

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9. That Agreement in Principle did form the basis for requesting that the Director not carry out curtailment of groundwater rights pursuant to the August 2001 ground water management area designation.

10. That the Agreement in Principle delivered to the Director and consented to by certain parties, including Clear Springs and Clear Lakes, enabled the Director to forego enforcement of the ground water area designation order.

11. That the Director in response to the numerous requests of the parties did forego enforcement of the groundwater management order

12. That at no time during either the negotiations of the agreement in principle or the ultimate negotiations between Clear Springs and North Snake Ground Water District in the drafting of the Interim Stipulated Agreement did any party raise the issue of the safe harbor provision being applicable to parties other than those providing mitigation in the form of either replacement water or curtailment of groundwater rights.

13. That during the negotiations of the Interim Stipulated Agreement, Clive Strong of the Attorney General's office did participate and facilitate discussions between Clear Springs and North Snake Ground Water District. At no point in time did Mr. Strong identify, draft or suggest an alternative intent or application of the safe harbor provision. Following those negotiations, which resulted in an agreement between North Snake and Clear Springs, additional discussions occurred between the Attorney General's Office and other water users in an effort to encourage participation in the agreement. Groundwater user groups and individuals were encouraged to participate in the mitigation provision in order to realize the protections of the safe harbor provision of paragraph 2.8 of the Interim Stipulated Agreement. Spring users were encouraged to participate in order to ensure that the replacement water would be provided and to avoid a curtailment call as against groundwater interests.

14. That the Agreement in Principle did provide the basis and understanding for moving forward with Interim Stipulated Agreement and at no time during the negotiations in which I participated, was the Agreement in Principle modified, changed or revised.

15. That at no time during the negotiations was it the intent of Clear Springs to enter into an agreement, which would have precluded administration of water rights within Water District 130. The intent of the Interim Stipulated Agreement was to enable groundwater users to avoid curtailment by either the Director's actions or as a result of an administrative call by surface spring water users for a period of two years.

16. That at no time during the negotiations was it the intent of Clear Springs in negotiating the Interim Stipulated Agreement to provide a safe harbor for anyone other than those parties designated as a mitigating party pursuant to the provisions of 2.1 through 2.7 of the Interim Stipulated Agreement.

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17. At no time during the period following Clear Springs negotiations with North Snake Ground Water District and before subsequent approval of the Agreement by the Director, did Clear Springs have any substantive discussions regarding the Interim Stipulated Agreement and the intent of the Safe Harbor provision with other surface spring water users. On one occasion following the completion of negotiations of the Agreement and prior to receiving signatures from other surface water users, I was visited by representatives of Clear Lakes, Pristine Springs Trout Farm and Blue Lakes Trout Company. The purpose of their visit was to learn from me why Clear Springs was agreeing to the provisions of the agreement. I explained that we were committed to finding long-term solutions to the continual decline of the spring flows and believed this could best be achieved by working constructively with the ground water users in Basin 36 through the framework of the Stipulated Agreement. I further explained that I believed the ground water users shared our commitment and were prepared to provide mitigation under sections 2.1 through 2.7 in return for safe harbor from a call on water from the surface water users signing the agreement. I further encouraged the parties to become participants in the agreement.

18. That at no point in time during negotiations with North Snake or in discussions in the Attorney General's Office did any party assert or demand that the safe harbor provision either precluded administration as between surface water users or protect surface waters from a call. In fact discussions focused on the need for administration in the form of a water district and interim administration. The safe harbor provision of the Basin 36 Interim Stipulated Agreement is unique and separate from Basin 35 because of the relative priorities of the parties. In light of the fact that there exists a number of groundwater rights which have priorities senior in time to some of the spring user water rights, including Clear Springs' water rights, Clear Springs agreed to modify the safe harbor provision to accurately reflect the priorities of the parties. The modifications removed the specific references to the ground or surface identifier to a particular water right. Instead, the language became generic. However, all modifications made to the safe harbor provision did not in any way modify the intent of the provision as described herein.

19. That following the Director's order approving the Stipulated Agreement and the creation of Water District No. 130, which encompassed the Thousand Springs Reach, Clear Springs did inquire with the Department of Water Resources into how administration of Clear Springs' water rights would occur.

20. That following the request the Director did inspect the diversion structures of both Clear Springs and Clear Lakes and request that the parties submit any information which the parties determined pertinent to the administration of water from the common source through the issuance of watermaster instructions.

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21. That at no time during discussions or submittals on the development of watermaster instructions did Clear Lakes state or argue that administration of the water rights from the common source was not subject to administration and that the Interim Stipulated Agreement prevented or precluded administration of the Clear Springs water rights and Clear Lakes water rights.

22. That during the negotiations of the Interim Stipulated Agreement, Clear Springs and Clear Lakes were involved in a water administration dispute before the Idaho Supreme Court. That dispute involved the priorities to water flowing from the common springs source near the parties' facilities. At no time did any party or Clive Strong raise the issue of resolving that dispute in the negotiations. Further, after nearly ten years of litigation involving the dispute between Clear Springs and Clear Lakes, and the pending decision by the Idaho Supreme Court, Clear Springs would not have been willing to discuss this water dispute in the context of the negotiations of this agreement.

Further you Affiant sayeth naught.

Larry W. Cope

STATE OF IDAHO)
)ss.
County of Twin Falls)

Subscribed and sworn to me this 19 day of March, 2003.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Notary Public for State of Idaho
Residing at: Buhl, Idaho
My commission expires: 12-23-03

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2003, I caused to be served a true and correct copy of the foregoing *AFFIDAVIT OF LARRY W. COPE* to the following by U.S. Mail, postage prepaid:

Original:

The Honorable D. Duff McKee
Hearing Officer
P.O. Box 941
Boise, Idaho 83701

Copies:

Daniel V. Steenson
James G. Reid
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Ringert Clark
455 S. Third Street
Boise, Idaho 83701-2773

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore St., Suite 20
Twin Falls, Idaho 83301

for Travis L. Thompson

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Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
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Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO MODIFY/RESCIND AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201 AND 36-07218	PETITION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION

PETITION

COMES NOW, Petitioner, Clear Lakes Trout Company, Inc., (hereinafter "Clear Lakes") by and through its attorneys of record, Ringert Clark, Chartered, and hereby petitions the hearing officer in the above captioned matter to reconsider the Hearing Officer's *Decision, Recommendation for Order, and Statement of Available Procedure* (hereinafter the "*Decision*") issued herein on April 13, 2003. This *Petition* is filed pursuant to I.C. §67-5243, IDAPA 37.01.01.720, and the *Statement of Available Procedure* issued with the *Decision* by the Hearing Officer. The grounds for this *Petition* are that the *Decision* contains errors of fact and law necessitating a reversal, as discussed further below. This *Petition* is supported by the argument below, and the record herein.

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MEMORANDUM

The *Decision* recommends that the Director deny Clear Lakes' *Motion for Summary Judgment* and *Motion for Stay*, and grant Clear Springs Foods Inc.'s (hereinafter "Clear Springs") *Motion to Dismiss* based upon erroneous factual conclusions and erroneous analysis of two issues.

First, the *Decision* correctly recognizes that the clear, unambiguous wording of the Interim Stipulated Agreement entered into by both Clear Lakes and Clear Springs protects Clear Lakes from a call for water by Clear Springs. However, the *Decision*, by erroneously interpreting the Director's January 18 *Order Approving Stipulated Agreements* (hereinafter "January 18 *Order*"), and his February 19, 2002 *Final Order Creating Water District No. 130* (hereinafter "February 19 *Order*"), holds that the Director "reserved the ability to limit or qualify the enforcement of the Interim Stipulated Agreement." *Decision*, p. 13. The Director did not have the authority to qualify, limit or modify the Interim Stipulated Agreement, nor did his *Orders* operate to qualify, limit or modify the Interim Stipulated Agreement. Nonetheless, based upon this erroneous interpretation of the Director's *Orders*, the Hearing Officer concludes that the "intent of the parties to the Interim Stipulated Agreement"- to protect junior surface water users from calls for water by senior surface water users - "is immaterial" because the "Director had the authority to do exactly what he did in limiting his recognition of the safe harbor language."[1] *Decision*, pp. 14 - 15. The conclusions of the Hearing Officer are impermissible under the constitutions of the United States and the State of Idaho. Because Clear Lakes' property interest in the Interim Stipulated Agreement is protected by the Contract and the Due Process Clauses, the Interim Stipulated Agreement cannot be limited, qualified,

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[1] The *Decision* does not cite to any authority supporting this proposition.

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modified or selectively enforced by the Director. No party to the Interim Stipulated Agreement ever received notice that it would be limited, qualified or modified such that safe harbor would not be afforded to junior surface water users. Thus, any such selective enforcement or modification violates both the Contract and Due Process Clauses of the Constitution.

Second, the *Decision* gives no weight whatsoever to the language in the *Stipulation for Dismissal* filed by IDWR and Clear Lakes in the Gooding County District Court litigation committing IDWR to providing Clear Lakes this administrative proceeding to address substantively the very issues which the Hearing Officer has now recommended be dismissed. Instead, the *Decision* narrowly focuses only on the words "with prejudice" in the *Stipulation for Dismissal* and the *Order* dismissing the litigation to find that Clear Lakes is precluded from raising these issues in this proceeding. The *Decision*'s holding ignores the fact that IDWR moved to dismiss Clear Lakes' District Court action on the grounds that Clear Lakes failed to exhaust its administrative remedies. Thus, the hearing contemplated by the *Stipulation for Dismissal* was to be provided by the very defendant in the Gooding County District Court case which had complained that the administrative hearing should have preceded the litigation. Because IDWR has the authority to grant Clear Lakes its hearing, and because it has a jurisdiction distinct from that of the District Court, assigning a preclusive effect to the words "with prejudice" such that the hearing contemplated by the *Stipulation* is foreclosed results in the District Court's impermissible usurpation of IDWR's jurisdiction and authority.

I. The Director and the State Participated in the Process Which Led to the Interim Stipulated Agreement

At the outset, it is important to understand that the Director and the State of Idaho were directly involved in the negotiation and development of the Interim Stipulated Agreement. IDWR

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was intensely interested in execution of an agreement that would enable IDWR to avoid curtailing the junior ground water users. *Second Affidavit of John K. Simpson*, Ex A., Dreher Deposition (hereinafter "*Dreher Depo.*"), p. 197, ln. 20 - p. 198, ln 2. The Director explained that, when he announced his intended curtailment of junior priority groundwater rights, he "also stated that we would, the State would, be available to work with the parties." *Id.*, p. 194, lns 9-15.

The Director described himself and Clive Strong (Deputy Attorney General for the State of Idaho, Natural Resources Division) as mediators in the negotiations. *Id.*, p. 201, lns 5-12. However, IDWR and the State of Idaho were so interested in the Interim Stipulated Agreement and so involved in the negotiations that they were included as parties to the agreement in correspondence and at least the first four drafts of the agreement. *Dreher Depo.* p. 198, lns. 11 - 25; p. 199, ln. 23 - p. 200, ln. 5; *Dreher Depo.* Exs. 34A, 34B, 34C, 34D, 34E, and 34F. Numerous provisions of the Interim Stipulated Agreement defining actions to be taken by IDWR and the State did not change after IDWR and the State were removed from the signature page of the Interim Stipulated Agreement.

Mr. Strong was directly involved in the negotiations, and prepared drafts reflecting those discussions. *Dreher Depo.* Ex. 34D. The Director reviewed drafts of the agreement showing the State of Idaho and IDWR as parties, and recognized that people were circulating those drafts, but did nothing to remove IDWR from the lists of parties in the correspondence, or from the signature pages. *Dreher Depo.*, p. 197, ln 1 - p. 199, ln. Throughout the negotiations, the Director and/or Mr. Strong had ample opportunity to advise the parties if there were aspects of the proposed Interim Stipulated Agreement that were contrary to State policy, the public interest, or would not for any other reason be approved by the Director.

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The Interim Stipulated Agreement identifies several assurances by the Director that played a critical role in inducing the parties to sign the agreement, in exchange for which the Interim Stipulated Agreement contains several concessions by the parties to assist the Director and the State of Idaho in achieving administrative objectives. This is one of the reasons the Director could not cherry pick some provisions of the Interim Stipulated Agreement to approve and enforce, and others to disregard, modify, limit or qualify. This is not a circumstance in which private parties present an agreement they negotiated on their own to an agency or court for approval. The Director and the State of Idaho solicited and promoted participation in the Interim Stipulated Agreement, were intimately familiar with every provision of the agreement, led the parties through the negotiation process, and expressly benefitted from it.

With this involvement in the development of Interim Stipulated Agreement, the Director could not and did not attempt to disregard, modify, limit or qualify the intentions of the parties or any provision of the Interim Stipulated Agreement in his any of his orders either approving or referencing the Interim Stipulated Agreement. If he had, all the administrative actions which were based on the Interim Stipulated Agreement would be invalidated, and an incurable taint of bad faith would undermine any continued cooperative effort to address water supply issues affecting water users who depend upon the Eastern Snake Plain Aquifer.

II. The Director *Did Not* Limit or Qualify Enforcement of the Interim Stipulated Agreement

The Hearing Officer's *Decision* turns on the language of the Director's January 18, 2002 and February 19, 2002 *Orders* because these *Orders* establish and define the Director's actions. Another important factor is that, through his *Orders*, the Director notifies affected parties of his actions. The

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focus must therefore be on the express language and actual effect of the orders, rather than the Director's unexpressed, subjective understanding or intention. At the same time, the foundation of these orders was the *Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36* (Interim Stipulated Agreement), and due consideration must be given to the relationship between these orders and the Interim Stipulated Agreement.

Nothing in the Director's January 18, 2002 *Order* or his February 19, 2002 *Order* limits or qualifies any aspect of the Interim Stipulated Agreement. The January 18, 2002 *Order Approving Stipulated Agreements*[2] is the order which approved the Interim Stipulated Agreement. It states:

> ***IT IS HEREBY ORDERED that*** the "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35," and "***Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36,***" and the Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 26," ***are approved***. [Emphasis added.]

This statement of Directorial action approves the Interim Stipulated Agreement in whole, without modification, limitation or qualification. Conclusion of law 7 is the only provision in the January 18, 2002 *Order* which defines IDWR's mandate and authority to enforce the Interim Stipulated Agreement. It does so clearly and succinctly, with no limiting or qualifying language:

> Under the supervision of the Director, ***the duties of the watermaster(s) for the new water districts will be to***: (1) curtail illegal diversions (i.e. any diversion without a water right or in excess of the elements or conditions of a water right; (2) measure and report the diversions under water rights; (3) ***enforce the provisions of the Agreements***; and (4) curtail out of priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director. [Emphasis added.]

As to the question of what will be enforced, this paragraph clearly and conclusively answers: "the

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[2]This order approved two Stipulated Agreements: one for Basin 35 and one for Basin 36. The agreement for Basin 36 is the subject of this contested case.

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provisions of the Agreements." Nothing in this paragraph suggests that the Director has modified, limited, or qualified any provision of the Interim Stipulated Agreement.

The Director's February 19, 2002 *Final Order Creating Water District No. 130* does not purport to approve the Interim Stipulated Agreement, to modify any aspect of the Director's January 18, 2002 *Order Approving Stipulated Agreements*, or take any other action affecting the Interim Stipulated Agreement's terms or IDWR's enforcement of the Interim Stipulated Agreement. To the contrary, the February 19 *Order* reiterates that the Water District 130 watermaster will enforce the previously approved Interim Stipulated Agreement:

> 10. The Director concludes that ***the watermaster of the water district***, created by this order, ***shall*** perform the following duties in accordance with the guidelines, direction, and supervision provided by the Director:
>
> c. ***Enforce the provisions of the stipulated agreements approved by the Director***; and ... [Emphasis added].

The phrase "approved by the Director," is simply a statement of reference identifying the stipulated Agreements to be enforced as those the Director approved by his January 18 *Order*. This phrase does not reserve to the Director <u>any</u> discretion to limit or qualify enforcement of the Interim Stipulated Agreement, so that he can pick and choose from the Interim Stipulated Agreement the provisions he wishes to recognize and enforce.

The Director's January 8, 2003 *Final Order Revising the Boundaries of Water District No. 130* (attached hereto as Attachment 1) states: "The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the ***terms of the Agreements***." [Emphasis added.] In paragraph 10(c) of the conclusions of law, the January 8, 2003 Order states:

> 10. The Director concludes that ***the watermaster of the water district***, as revised

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pursuant to this order, ***shall*** perform the following duties in accordance with the direction and supervision of the Director:

c. ***Enforce the provisions of the stipulated Agreements***; and ... [Emphasis added.]

If the Director had intended the phrase "approved by the Director" in his February 19, 2003 *Order* to have any limiting, qualifying or other substantive effect on his obligation to enforce the Interim Stipulated Agreement, he would have included this phrase in his January 8, 2003 *Order*.

Conclusion of law 7 of the January 18, 2002 *Order,* which is reiterated in the February 19, 2002 and January 8, 2003 *Orders* creating and revising Water District 130, is taken nearly verbatim from, and is substantively identical to, paragraph 2.10 of the Interim Stipulated Agreement, which states:

> The parties agree not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication requesting authority for the Director to implement interim administration of water rights in Basin 36. The parties understand that ***interim administration will include***: (1) ***enforcement of the provisions of the stipulated agreement***; (2) curtailment of illegal diversions (i.e. any diversions without a water right or in excess of the elements of a water right); (3) measurement and reporting of diversion of water rights; and (4) curtailment of out-of-priority diversions found by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plans approved by the Director. [Emphasis added.]

During the negotiations the parties were assured that the Director would approve and administer water rights in accordance with the Interim Stipulated Agreement. This assurance is reflected in paragraph 2.12 of the Interim Stipulated Agreement:

> The parties understand that the Director will issue an administrative order ***approving this Agreement, which will include the elements of interim administration identified in paragraph 2.10***. [Emphasis added.]

The Interim Stipulated Agreement sets out the administrative actions that would follow its

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execution: obtaining authorization from the Snake River Basin Adjudication (SRBA) court for interim administration; creating a water district to administer water rights, and preparing instructions for the watermaster(s). Just as the Director needed the parties' agreement to postpone administration of water rights according to priority, the Director and the State of Idaho wanted the parties' cooperation in these succeeding administrative actions. The parties entered the Interim Stipulated Agreement and, in the Interim Stipulated Agreement, agreed to cooperate with the Director and the State of Idaho in these administrative steps based on the assurance that IDWR would enforce the provisions of the Interim Stipulated Agreement. In paragraph 2.10, this assurance is the basis for the parties' agreement not to oppose the State of Idaho's motion to the SRBA court for interim administration. In the next paragraph, 2.11, this assurance is the basis upon which the Director and the State of Idaho obtained the parties' agreement to cooperate in the creation of the water district and formulation of watermaster instructions:

> The parties agree to work collaboratively with the Director to expeditiously create a water district or water districts and to formulate initial instructions to the associated watermaster(s) to administer water rights of the water district or water districts. ***Such instructions shall include the elements of administration identified in paragraph 2.10.*** The parties agree not to oppose the Director's initial instructions to these watermaster(s) that are jointly developed through this collaborative process. [Emphasis added.]

Enforcement of the Interim Stipulated Agreement is addressed separately in section 4 of the Interim Stipulated Agreement. Consistent with paragraphs 2.10, 2.11 and 2.12, section 4 reiterates the assurance that the Director would enforce the Interim Stipulated Agreement:

> 4. Enforcement:
>
> 4.1 The parties understand the ***Director intends to approve this stipulated agreement*** in lieu of issuing curtailment orders under Idaho Code § 42-244b,

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and that in the event ***this Agreement*** is breached, any party may petition the Director, or the Director on his own initiative may seek an appropriate remedy.

4.2 Upon the SRBA District Court issuing an order for interim administration of water rights within Basin 36 and related areas, ***this Agreement will be enforced through such administration***. [Emphasis added.]

During his deposition, the Director acknowledged IDWR's obligation to enforce the Interim Stipulated Agreement:

> Q. . . . And this order reflects [the] decision . . . that the Department through you, would be under 10(c) enforcing the provisions of this [referring to the Interim Stipulated Agreement]; correct?
>
> A. Correct.
>
> * * *
>
> Q. Okay. Now, whether or not Clear Lakes chose at a particular time to raise this issue of the interim agreements, doesn't change what they say; correct?
>
> A. Correct.
>
> Q. It doesn't change the binding nature of the agreement; correct?
>
> A. Correct.
>
> Q. It doesn't change your obligation to enforce the agreements?
>
> A. Correct. *Dreher Depo.*, p. 223, ln. 13 - p. 224, ln. 10.

The Hearing Officer correctly states that the Safe Harbor provision of the Interim Stipulated Agreement "operates to protect 'any junior water rights' held by a party to the agreement." *Decision*, p. 6. During his deposition, the Director also recognized that the plain and unambiguous language of the Safe Harbor provision protects all junior water right holders that signed the Interim Stipulated Agreement, including Clear Lakes. *Dreher Depo.*, p. 195, lns. 3-14; pp. 206-220. The

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Hearing Officer concludes that in the Director's January 18, 2002 and February 19, 2002 *Orders*, the Director made and communicated a conscious choice to disregard the clear language of the Interim Stipulated Agreement. The Hearing Officer finds this choice in the contrast between the language of the Safe Harbor provision and the following finding of fact in Director's *Orders*:

> Under the agreements, the represented holders of senior priority surface rights agreed 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.

Decision, p. 6. Whereas the pivotal Safe Harbor provision of the Interim Stipulated Agreement protects junior surface water users from curtailment, the Hearing Officer states that "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." *Decision*, p. 6 [bold emphasis added]. In other words, the Hearing Officer interprets the Director's observation as exclusive, finding that the ***only*** forbearance in the Safe Harbor Provision protects ***only*** junior ground water rights. During his deposition, the Director disavowed this interpretation of his observation in the finding of fact:

> Q. Okay. Now, in your order creating Water District 130 -- this is Exhibit No. 35, paragraph 5 . . . at page two reads, quote; under the agreement the represented holders of senior priority surface water rights agree not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments; et cetera. That is certainly true; correct?
>
> A. Correct.
>
> Q. It does not say that there was no commitment and no Safe Harbor to protect junior surface water right owners from a call by senior surface water right owners. It didn't say that; does it?
>
> A. That's correct. *Dreher Depo.*, p. 222, lns 16-20.

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The Hearing Officer aptly describes this finding of fact as an observation concerning the Interim Stipulated Agreement. It is a descriptive paraphrase of certain aspects of the Interim Stipulated Agreement. It is not a conclusion of law, a pronouncement in an order, a directive, or an announcement of agency action. It merely states what the Director observes to be the case: that in the Interim Stipulated Agreement, senior priority surface water rights agreed not to seek curtailment of junior priority ground water rights in exchange for replacement water. By contrast, conclusion of law 7 in the January 18, 2002 *Order* is directive, and definitive, stating that the watermaster(s)' duties "will be to . . . enforce the provisions of the agreements." The first paragraph under the heading "Order" describes the action of approving the Interim Stipulated Agreement without qualification or limitation. In the finding of fact referenced by the Hearing Officer, there is no statement indicating that the Director is accepting, adopting, approving, rejecting, denying, limiting, qualifying, modifying or deciding to enforce or not to enforce anything at all. It is simply an observation.

More importantly, the observation does not purport to be exclusive. By describing certain aspects of the Interim Stipulated Agreement, it does not exclude others. As an example, if persons A, B and C are in a room, and D observes the next day that A was in the room without mentioning B and C, D's statement is true, but it does not exclude the fact that B and C were in the room as well. D's observation could not be construed as an explicit or implicit statement that only A was in the room. In this case, the true fact, as recognized by the Hearing Officer, is that the Safe Harbor provision of the Interim Stipulated Agreement protects any junior water rights held by any party to the agreement. It would be a false or incorrect statement of fact to say that it protects only some of the junior water rights held by parties to the agreement, or conversely, that it does not protect other

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parties with junior water rights. The Director's finding of fact does not make this mistake. His observation is incomplete as to every aspect of the Interim Stipulated Agreement or even the Safe Harbor provision, rather than exclusive. The Director's findings of fact fail to mention many of the provisions of the Interim Stipulated Agreement. This does not mean, however, that the failure to mention them constitutes a finding that they do not exist, much less a finding that the Director will not enforce them, particularly in view of the unqualified language of conclusion of law 7 and the first paragraph of the Order.

Judging by his deposition testimony, the Director's subjective understanding of the Interim Stipulated Agreement appears to have been that it provided safe harbor only for holders of junior ground water rights. His subjective understanding, however, is not relevant, because it is his orders that define and provide notice of his actions. The Director's subjective opinion appears to have been the result of his familiarity with earliest drafts of the Interim Stipulated Agreement or when it was denominated as an "Agreement in Principle," which did not contain language that extended safe harbor to all parties with junior water rights. It is clear, however, that the Interim Stipulated Agreement that was signed by the parties did provide this protection. In addition, the Director testified that his obligation was to enforce the Interim Stipulated Agreement, and he recognized, after reading the Safe Harbor provision and the Interim Stipulated Agreement drafts showing how it was changed, that the Interim Stipulated Agreement, as written extends safe harbor to all holders of junior water rights.

It is true that obtaining agreement from Clear Lakes and other surface water users not to seek curtailment of junior ground water rights was the driving objective of the Director and the ground

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water users. However, it is also true that, in order to obtain this forbearance, it was essential that the forbearing surface water right owners be protected from curtailment as well. Without this protection, junior surface water users would be subject to curtailment and left without recourse against junior ground water rights. Clear Lakes would not have signed the Interim Stipulated Agreement without this protection. Without this protection, there would be no Interim Stipulated Agreement and no forbearance to enable the Director to refrain from performing his statutory duty to administer all water rights in Water District 130 according to priority to satisfy senior water rights. Having ardently solicited Clear Lakes' participation in the Interim Stipulated Agreement, the Director could not deny Clear Lakes and other junior surface water right holders the essential protection which was necessary to induce Clear Lakes to sign it and, by signing, forgo the priority of water rights.

III. The Supreme Court's *Clear Springs v. Clear Lakes* Decision did not Affect Implementation and/or Enforcement of the Interim Stipulated Agreement

The Hearing Officer states that the Idaho Supreme Court's Decision in *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761 (2002) resolved the "issues of water allowances between Clear Springs and Clear Lakes." *Decision*, p. 15. The Hearing Officer goes on to state that "[t]here 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 [sic] in danger of curtailment by the Director's actions." *Id.* Apparently, the Hearing Officer believes that the Supreme Court's decision both resolved all issues of administration as between Clear Springs and Clear Lakes, and somehow prevented the Director from recognizing that the safe harbor provision of the Interim Stipulated Agreement should be applied to Clear Lakes. The decision in *Clear Springs v. Clear Lakes, supra* simply upheld the SRBA

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District Court's decision that there are not separate sources for Clear Lakes' and Clear Springs' water rights. *Id*, at 124. Neither the Supreme Court, nor the SRBA District Court either did or could determine how the water rights would be distributed. That determination was an issue for administration of the water rights, not a determination of the elements of those water rights in the SRBA District Court as it was affirmed by the Supreme Court. Moreover, whether the Supreme Court's decision was imminent or released at approximately the time of the execution of the Interim Stipulated Agreement is immaterial. The parties still could have, and did, enter into an agreement resolving issues of administration, the terms of which IDWR must enforce.

IV. The Director Cannot Affect Agreements Between Private Water Users Which Result in Subordination of Priorities

The Interim Stipulated Agreement, in which the parties agreed to forebear from making a call for water under the priority of their water rights, is similar to, if it is not in fact, a "subordination" agreement. "A subordination agreement is one in which the holder of an otherwise senior water right consents to stand in order of priority behind another person or persons holding a junior water right." *Board of County Commissioners of County of Arapahoe v. Crystal Creek Homeowners' Association*, 14 P.3d 325, 329, fn. 1 (Colo. 2000). Voluntary subordination agreements such as the Interim Stipulated Agreement do not violate Idaho law. *Idaho Power Company v. State Department of Water Resources*, 104 Idaho 575, 587 (1983). *See also Crystal Creek Homeowners' Association, supra* at 341 ("by contract, a person can make his or her priority inferior to another, and courts can give legal effect to the senior user's intention to make his priority inferior in this regard.") Idaho also recognizes the beneficial effect of other types of agreements (such as "rotation" agreements) between private water users which limit the ability of the holders to exercise their water rights, and Idaho

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courts will enforce such agreements. *State v. Twin Falls Canal Co.*, 21 Idaho410, 442 -443 (1911).

The Idaho Supreme Court, in addressing the subordination agreement that was the subject of *Idaho Power Company v. State, supra*, discussed the importance of settling water right disputes using such agreements:

> Facilitating the settlement of competing claims to our scare supply of water is an important governmental objective . . . The [subordination] agreement and the implementing legislation is likewise important to this state because it settles a major and long-standing dispute over a significant volume of water.

Miles v. Idaho Power Company, 116 Idaho 635, 646 (1989). Similarly, the Interim Stipulated Agreement into which Clear Lakes and Clear Springs, among others, entered is part of a process by which competing claims to the scarce water resources of Idaho may be resolved without resorting to litigation.

The parties entering into the Interim Stipulated Agreement agreed to legally limit their water rights by agreeing not to make a call on junior water users - whether surface or ground water users - a right which would otherwise be a part of all seniors' water rights. When administering water rights that are the subject of a valid agreement in which parties incur obligations or agree to legal limitations on their rights (as opposed to an agreement which would limit the Director's authority), the Director has no authority to disregard the rights and obligations of the parties as defined by the agreement. In other words, the Director cannot confer an advantage to which a water right owner is no longer entitled, or deprive a water right owner of a benefit or protection which the agreement confers.

In *Crystal Creek Homeowners' Association, supra*, the State Engineer of Colorado interpreted a water right subordination agreement entered into by the United States Bureau of Reclamation. The agreement provided that subordinated water would remain in the Upper Gunnison

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River Basin in which it had been appropriated, rather than being available for an out-of-basin transfer. *Crystal Creek Homeowners' Association, supra* at 329. Despite the clear language of the agreement, and despite his acknowledgment that he did not have the authority to compel the Bureau to subordinate its water rights beyond that contemplated in the subordination agreement, the State Engineer interpreted the subordination agreement to mean that the Bureau of Reclamation had subordinated its water right to trans-basin diverters, thereby enabling the trans-basin diverters to appropriate water for use outside of the Upper Gunnison River Basin. *Id,* at 341. The Colorado Supreme Court stated: "We decline to follow the State Engineer's interpretation and note that the original 60,000 acre-foot subordination agreement clearly dictated that the subordinated water would remain in the Basin." *Id,* at 340. Thus, just as in Idaho, the Director's Colorado counterpart does not have the authority to limit, qualify, or modify subordination agreements between water users as pursuant to his authority to administer water rights held by those water users.

V. Any Limitation, Qualification or Modification of the Interim Stipulated Agreement by the Director Resulted in Violations of the United States and Idaho Constitutions and IDWR's Statutory Authority

Article I, Section 10 of the United States Constitution provides that "[n]o State shall . . . pass any . . . impairing the Obligation of Contracts." Article I, Section 16 of the Idaho Constitution provides that "[n]o . . . law impairing the obligation of contract shall ever be passed." "[I]n Idaho, parties to a contract have a property interest that is protectable under the Contract Clause and the Due Process Clause of the United States Constitution." *Curr v. Curr et al.*, 124 Idaho 686, 691 - 692 (1993). Impairment of a contract occurs when an act of legislative character "attempts to take from a party a right to which he is entitled by its terms, or which deprives him of the means of

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enforcing such a right." *Steward v. Nelson*, 54 Idaho 437, 443, 32 P.2d 843, 846 (1934) (quoting 12 C.J. p. 1056 Par 669).

If the Director did, in fact, limit, qualify or modify the provisions of the Interim Stipulated Agreement, his actions are similar to those of the Idaho Industrial Commission in *Curr v. Curr et al.*, 124 Idaho 686, 691 - 692 (1993). In that case, lump sum agreements between injured workers represented by counsel and the workers' employers over the amounts of workers' compensation due the employees were submitted to the Commission for approval. Each employee had entered into a contingent fee agreement with their attorney. Despite the fact that there was no fee dispute, the Commission reduced the fees, purportedly pursuant to the statutory authority granted it under I.C. § 72-803 to approve or disapprove attorney fee agreements. *Id*, at 688 - 690. On appeal, the Idaho Supreme Court addressed the Commission's actions:

> In effecting the attorney fee modifications under the claimed authority of I.C. § 72-803 where there is no fee dispute, the Commission is acting in its quasi-legislative as opposed to its quasi-judicial capacity. The Commission must accordingly act within the bounds of its legislatively delegated authority and of the omnipresent mantle of the United States Constitution. In *sua sponte* modifying appellants' uncontested attorney fees absent the guidelines of a properly enacted regulatory scheme, the Commission infracted both perimeters.

Curr, supra at 691. *See also Colby v. City of Medford*, 167 P. 487, 498-99 (Or. 1917) (State agencies acting pursuant to their statutorily delegated authority may not, in the exercise of those powers, impair the obligation of contracts); *Town of Mt. Pleasant v. Beckwith*, 100 U.S. 514, 534 (1879) ("Laws passed by a State impairing the obligation of a contract are void, and if a State cannot pass such a law, it follows that no agency can do so which acts under the State with delegated authority.)

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At the time that the Director purportedly selected the provisions of the Interim Stipulated Agreement to be enforced pursuant to the language of his February 19, 2002 *Order*, there was similarly no dispute over the terms of the Interim Stipulated Agreement, nor was there any direct statutory authority or "properly enacted regulatory scheme" providing guidelines for the Director's limitation, qualification, or modification of the Interim Stipulated Agreement. Thus, the Director was acting in his "quasi-legislative" capacity and was bound by the perimeters of his statutory authority and the United States and Idaho Constitutions, just as was the Industrial Commission in *Curr, supra*. Just as in *Curr*, where the Commission violated its statutory authority and the United States Constitution by modifying uncontested fee agreements, so has the Director violated Clear Lakes' constitutionally guaranteed rights and IDWR's statutory authority by modifying the Interim Stipulated Agreement.

Under the law as set forth in *Curr, supra*, Clear Lakes, as a party to the Interim Stipulated Agreement, has a property interest protected by the Contract and Due Process Clauses of the Constitution. By either qualifying, limiting or modifying the Interim Stipulated Agreement, or by selecting the provisions of the Interim Stipulated Agreement that he chooses to enforce such that the Agreement does not protect junior surface water right holders from a call for water by a senior, the Director has taken from Clear Lakes a right to which it is entitled under the terms of the Agreement, and which is protected by the Contract Clause. Accordingly, the Interim Stipulated Agreement has been impaired by the Director's actions, whether they are construed as selecting the provisions to be enforced, or qualifying, limiting or modifying the Agreement.

In *Curr, supra*, the Supreme Court held that "to justifiably modify attorney fee agreements

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in the interest of public welfare, the Commission must afford due process to the contracting parties, i.e., notice and an opportunity to be heard at a meaningful time."[3] *Curr, supra*, at 692 *citing Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985); *see also Sweitzer v. Dean*, 118 Idaho 568, 573 (1990) (where the government intends to take or alter one's property interest that is in existence, then the party that will be harmed is entitled to procedural due process protections of notice and a hearing prior to the action); *Rudd v. Rudd*, 105 Idaho 112, 115 (1983) ("The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard").

The Director's February 19, 2002 *Order* states that "immediate administration of water rights . . . is necessary for the protection of prior surface and ground water rights." February 19, 2002 *Order*, p. 5. Therefore, the Director, in issuing the *Order* (and in purportedly selecting the provisions of the Interim Stipulated Agreement which he would enforce), believed he was acting in the public welfare. Accordingly, he was required to afford notice and a meaningful opportunity to be heard to the parties to the Agreement.

The February 19, 2002 *Order* states that a hearing on the proposed creation of a water district was held on February 4, 2002. February 19, 2002 *Order*, p. 3. The only party to testify at the hearing supported "the establishment of a water district to administer ground water in accordance with the prior appropriation doctrine and State law." *Id.* The only written comments received by the

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[3] Although the opinion does not so state, presumably the only reason the Commission had any authority whatsoever to modify attorney fee agreements was that it had been granted authority under I.C. § 72-803 to approve attorney fee claims. As discussed further below, no such similar authority has been granted to the Director.

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Director addressed the issues of whether Water District 36-A should be combined into a water district with ground water rights or whether it should continue to be autonomous, and measurement and reporting of ground water usage at United States Fish and Wildlife Service facilities. *Id*, at pp. 3 - 4. No party commented on the Director's (apparently) contemplated selection of the Interim Stipulated Agreement provisions which were to be enforced. This seems curious, given the fact that, according to the *Decision*, the Director "telegraphed his punch in the January [18, 2002] Order." *Decision*, p. 13. If an opportunity for a hearing on the proposed qualification, limitation or modification of the Interim Stipulated Agreement was given, it must have been the hearing on February 4, 2002 and the period immediately subsequent during which the Director accepted written comments, because neither the February 19, 2002 *Order* nor the Director's January 18, 2002 *Order Approving Stipulated Agreements* either mention or discuss any other hearing regarding the contents of the February 19, 2002 *Order*, which, according to the Hearing Officer, "firmly established the limitations on the safe harbor provision." *Decision*, p. 13.

A. No Notice of the Director's Limitation, Qualification, Modification or Selective Enforcement of the Interim Stipulated Agreement was Given to the Parties

The "notice" requirement of due process "mandates meaningful notification of the regulations to be imposed." *Curr, supra, citing Loudermill*, 470 U.S. at 546, 105 S. Ct. at 1495. At a minimum, due process in the context of changes to an agreement between private parties proposed by an agency requires that notice of the purpose of the hearing be given, that evidentiary standards to be used at the hearing be clearly articulated, that the burden and level of proof be assigned, and that formal guidelines upon which the modification will be based be published "to eliminate any latent arbitrariness." *Id.*

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In the context of rulemaking, if a final regulation varies from its proposal, it is valid only if "it is in character with the original proposal and the modifications are a natural outgrowth of the notice and comments." *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, 319 F.3d 398, 422 (9th Cir. 2003). Notice of the modification of a proposed rule is adequate only if the complaining party should have anticipated the modification. *Id.*

Under the factual predicate for the *Decision*, notice of the proposed modification of the Interim Stipulated Agreement in this case could only have been provided by the January 18, 2002 *Order Approving Stipulated Agreements*, the February 19, 2002 *Final Order* or the notice of the hearing on the proposed creation of Water District 130. The February 19, 2002 *Final Order* described the notice of the hearing:

> The Notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held . . . concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

February 19, 2002 *Order*, p. 3. Notice of the hearing was both mailed and published in area newspapers. *Id.* However, neither the February 19, 2002 *Order*, the January 18, 2002 *Order*, nor any other document ever gave the parties any notice whatsoever that the Interim Stipulated Agreement would be enforced by the Director such that the safe harbor provided therein did not apply to junior surface water users.

If the Director did indeed limit, qualify or modify the Interim Stipulated Agreement by his issuance of the February 19, 2002 *Order* (or by his issuance of the January 18, 2002 *Order*), no notice of that limitation, qualification or modification was provided to any party to the Agreement, including Clear Lakes. The language in the February 19, 2002 and January 18, 2002 *Orders* on which

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the *Decision* relies to conclude that the Director limited, qualified or modified the Interim Stipulated Agreement to provide safe harbor only to ground water users does not discuss or mention such limitation, qualification or modification, does not preclude the provision of safe harbor to junior surface water users, and cannot in any way be reasonably construed to mean anything other than what the *Orders* say: that the watermaster will enforce the provisions of the stipulated agreements approved by the Director. Similarly, neither the January 18, 2002 *Order* nor the February 19, 2002 *Order* provide any affirmative statement that the Director will enforce calls between surface water users. Accordingly, it was impossible for Clear Lakes or any party to the Interim Stipulated Agreement to conclude or even anticipate that the Director was going to enforce the Agreement such that it did not provide "safe harbor" to junior surface water users. As a result, any selective enforcement or modification of the Interim Stipulated Agreement by the Director resulted in a violation of Clear Lakes' due process rights.

B. The Director had no Statutory Authority to Limit, Qualify or Modify the Interim Stipulated Agreement

A legislatively created agency, such as the Idaho Department of Water Resources (created pursuant to I.C. § 42-1701) may only "act pursuant to an enumerated power, whether it be directly statutory or based upon rules or regulations properly issued" under statutes granting the agency regulatory authority. *Curr, supra*, at 691. In *Curr*, even though I.C. § 72-803 provided that "[c]laims of attorneys. . . shall be subject to approval by the commission," the Supreme Court held there was no direct statutory authority, nor any rules or regulations properly issued by the Commission under which it could modify attorney fee agreements between private parties. *Id.* As opposed to the situation in *Curr, supra*, where the Industrial Commission was given at least some

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minimal statutory authority to approve attorneys' fee claims in workman's compensation disputes, there is no similar statute in Title 42 of the Idaho Code which can even be construed to give the Director authority to approve agreements between private water users which limit or alter their water rights - even if only for a time certain. There is certainly no statute under which the Director had clear authority to qualify, limit or modify contracts between private parties such as the Interim Stipulated Agreement. Pursuant to I.C. § 42-603, the Director does have authority to promulgate and adopt rules and regulations regarding the distribution of water in water districts under Idaho's Administrative Procedure Act. However, there are no rules properly promulgated and issued which address the Director's limitation, qualification or modification of private agreements between water users as to the exercise of their water rights.

Accordingly, if the Director did limit, qualify or modify the Interim Stipulated Agreement, he acted arbitrarily and capriciously, abused his discretion, and impermissibly transcended the bounds of his statutory authority. *Curr, supra* at 691.

VI. The Order of Dismissal Does not Preclude Clear Lakes from Raising the Issues in this Proceeding

The *Decision,* without examining the language of the stipulation for dismissal filed by IDWR and Clear Lakes in the Gooding County District Court litigation, holds that because the language of the *Order* dismissing the litigation contains the words "with prejudice," any issues raised by Clear Lakes in this administrative proceeding are precluded by res judicata. *Decision,* at pp. 16 - 17. In support of this conclusion, the *Decision* cites *Kawai Farms v. Longstreet,* 121 Idaho 610 (1992). However, as explained in Clear Lakes' prior briefing, *Kawai Farms* did not involve a qualified Stipulation for Dismissal as was the case in Clear Lakes' litigation against IDWR in the Gooding

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County District Court case.

Not only was the *Stipulation to Dismiss* in the Gooding County District Court case qualified, but it required that IDWR provide an administrative hearing to Clear Lakes on the very issues that were the subject of the District Court litigation. The *Decision* does not state that the Director did not have the authority to grant such a hearing. Instead, the *Decision* assumes that the words "with prejudice" must inalterably lead to a conclusion that any further litigation of the issues in the Gooding County District Court litigation is precluded. The "with prejudice" language can not prevent an administrative agency with jurisdiction over a matter from giving an opposing district court litigant an opportunity to have that matter heard before the administrative agency if the opposing litigant agrees to dismiss the district court case in such a manner as to prevent the matter from being refiled again in district court - as was obviously the intent of IDWR and Clear Lakes when they entered into the *Stipulation to Dismiss*.

In *Kershaw v. Pierce Cattle Co.*, 87 Idaho 323 (1963), the parties filed a stipulation to dismiss an action with prejudice in which one party to that case agreed to dismiss a separate action then pending in California, and to release garnishments and attachments levied in that action. *Kershaw*, pp. 326 - 327. The Idaho District Court required the dismissal of the California case together with the execution and delivery of releases as a condition precedent to the dismissal of the Idaho action. *Id*, at 328. In holding that the District Court had acted properly, the Idaho Supreme Court stated that "parties may make a stipulation to depend on the outcome of another action" and that "[s]tipulations for the settlement of litigation are regarded with favor by the courts, and will be enforced unless good cause to the contrary is shown." *Id*, at 329. Thus, stipulations such as that

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entered into by Clear Lakes and IDWR are enforced by the courts, and may be conditioned upon litigation or actions in other jurisdictions, exactly as occurred in this case.

In *Rodriguez v. Dept. of Correction*, 136 Idaho 90, 29 P.3d 401 (2001), the Idaho Supreme Court held that there was issue preclusion even though a dismissal without prejudice was entered, where the plaintiff had a full opportunity to argue the merits of his claim, and the district court entered a decision addressing the claim. *Rodriguez*, at 94. If it is permissible to look behind a dismissal without prejudice and determine that the facts of the case warrant a finding that it was in fact dismissed with prejudice, certainly the opposite must also be true.

In *Cantrell v. Henderson*, 718 P. 2nd 318 (Mont. 1986), the Court looked behind the words "with prejudice" in a stipulation to dismiss filed by a plaintiff and defendant where defendant's employer was also named as a defendant under a theory of *respondeat superior*. The Court was concerned that blindly following a rule that a Court could not look behind the words "with prejudice" would result in a "trap for the unwary" and would lead "to results not intended by the parties." *Id.* at 321. The Court explained that its holding "reflects the inappropriateness in modern practice of an interpretation which finally disposes of substantive issues based on a technical misstep by counsel." *Id.* Accordingly, the Cantrell Court reversed the trial court, and held that the term "with prejudice" did not result in the dismissal of the case against the employer. *Id.*

The Hearing Officer must look beyond the words "with prejudice" to find that IDWR is bound by the *Stipulation to Dismiss* to give Clear Lakes the hearing contemplated therein. "Stipulations of parties or counsel made in pending proceedings are conclusive as to all matters properly contained and included therein." *Arnett v. Throop*, 75 Idaho 331, 334 (1954). By holding that the *Stipulation*

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to Dismiss prevents the hearing contemplated by the Stipulation's very terms, the Decision in essence holds that IDWR's jurisdiction is usurped by the District Court, and results in IDWR's breach of the *Stipulation to Dismiss.*

CONCLUSION

In order to avoid widespread curtailment of junior ground water diversions pumping water from the Eastern Snake Plain Aquifer (ESPA), the State of Idaho and the Director strongly encouraged Clear Lakes and other owners of surface water rights to agree not to seek curtailment of the junior ground water rights. Obviously, surface water right owners could not agree to forgo the priority of their water rights if they would be subject to curtailment in response to calls for water by more senior rights. "Safe harbor" was essential to induce Clear Lakes and other surface water right owners to enter the agreement. Equally essential to the Interim Stipulated Agreement was the explicit understanding that IDWR would enforce its provisions. Consistent with this understanding, the Director's January 18, 2002 order approving the Interim Stipulated Agreement and the Director's February 19, 2002 order creating Water District 130 require IDWR to enforce the provisions of the Interim Stipulated Agreement. Contrary to the Interim Stipulated Agreement, Clear Springs called upon IDWR to curtail Clear Lakes' water rights, and, contrary to the Director's orders, IDWR curtailed Clear Lakes' diversions.

Rather than uphold the Interim Stipulated Agreement, the Hearing Officer accepts Clear Springs' argument that "the intent of the parties to the Interim Stipulated Agreement is immaterial." *Decision*, p. 14. According to this argument, despite the parties' clearly expressed intention to provide safe harbor to every signatory to the Interim Stipulated Agreement, the Director could and

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did "pick and choose" from the Interim Stipulated Agreement what was acceptable to him to enforce the Interim Stipulated Agreement "his way," and "limit or qualify" or completely disregard the provisions of agreements between water right owners regarding the exercise of their water rights as against each other. Any such actions by the Director to limit, qualify or modify the Interim Stipulated Agreement result in violations of the United States and Idaho Constitutions, and transcend the boundaries of the Director's statutory authority. Accordingly, those actions must reversed.

After deciding that Clear Lakes' water rights could be curtailed if Clear Springs made a call for water, the Director advised Clear Lakes that, if it disagreed with his *Decision*, Clear Lakes should "take him to court." On the same day, Clear Springs submitted a call for water. The Watermaster's ensuing notice of curtailment to Clear Lakes telegraphed IDWR's intention to deny a request for stay. As the Director suggested, Clear Lakes filed an action to enjoin IDWR's proposed curtailment in district court. Then, in district court, IDWR argued that Clear Lakes should have pursued an administrative hearing before filing the district court action. Clear Lakes agreed to dismiss the case "with prejudice" to assure IDWR that Clear Lakes would not file another original action in district court, if, and only if, IDWR agreed to provide Clear Lakes a hearing with an independent hearing officer. Now, just as the Hearing Officer finds that the terms of the Interim Stipulated Agreement are immaterial to the Director's enforcement of the Interim Stipulated Agreement, the Hearing Officer ignores the Director's agreement to provide Clear Lakes a hearing, and concludes that Clear Lakes is barred from the hearing the Director promised by Clear Lakes' agreement to dismiss the district court action "with prejudice." The law clearly provides that the term "with prejudice" is not to be blindly followed by a court or hearing officer determining the preclusive effect of a stipulation to

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dismiss, and that it is necessary to look behind the "with prejudice" language to determine the actual intent of the parties to the stipulation to dismiss. When the Hearing Officer examines the language of the Stipulation to Dismiss, there is simply no interpretation which does not commit IDWR to providing an administrative process in which Clear Lakes could raise all issues in the Gooding County District Court litigation.

Based upon the foregoing arguments and upon the record herein, Clear Lakes respectfully requests that the Hearing Officer reconsider his decision of April 13, 2003, and issue a revised corrected Recommended Order providing for the Director's immediate enforcement of the Interim Stipulated Agreement, and granting a stay of further curtailments of Clear Lakes' water rights.

Dated this 28th day of April, 2003.

Ringert Clark, Chartered

By: Charles L. Honsinger
Attorneys for Clear Lakes Trout Company

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2003, a true and correct copy of the foregoing was served upon all parties listed below:

By United States Mail:

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By Hand Delivery:

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Person Serving document

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ATTACHMENT 1

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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

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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

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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 property[1]; Clear Springs was to hold the second priority right to draw 200 cfs[2]; 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.

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priority right to draw 75 cfs[3]. (Clear Springs was to hold two additional but junior rights to draw an additional 61.55 cfs[4], 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.

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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 2.7[5]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 2.7[6], 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

[5]These 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 2.7 of 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."

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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 IDAPA[9]

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.

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[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).

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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

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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

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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.

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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

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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.

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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

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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).

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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 for 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

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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

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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.

D. Duff McKee, Hearing Officer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 20
Twin Falls, Idaho 83301

Victoria Wigle
Administrative Assistant to the Director

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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

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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 RECOMMENDATION FOR ORDER ON MOTION FOR RECONSIDERATION

Introduction

My decision and recommendations for order in this matter was lodged with the Director and released to the parties on April 13, 2003. Clear Lakes filed a motion for reconsideration within the time allowed, supported by a brief. Clear Lakes has filed a brief in opposition to the motion. No hearing is required.

Summary of Recommendation for Order

I recommend that the Director deny the motion for reconsideration, and enter a final order in accordance with my decision and recommendations for order as originally entered.

Analysis

I continue to adhere to the conclusion that private parties may not restrict or curtail the statutory jurisdiction and authority and the regulatory and administrative responsibilities of the IDWR and its Director by private agreement among themselves. I continue to adhere to the conclusion that it is the orders of the Director, and not the agreements of the parties, that control the determination of this case.

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By the clear terms of the orders entered by the Director in this case, he did not extend the operation of the so-called "safe harbor" clause to junior surface water right holders. He did recognize the "safe harbor" provision of the interim stipulated agreement in the orders he entered, but only insofar as this clause operated to protect junior *ground* water right holders.

There is no issue of constitutional infringement with private contracts as to the actions of the IDWR and its Director because neither the Director nor the IDWR were parties to the interim stipulated agreement, and neither are or were *contractually* obligated to any of its terms. As the constitutional argument might pertain to the actions of Clear Springs in initiating a call for water, the issue was resolved by the with-prejudice dismissal of the state court litigation between Clear Lakes and Clear Springs.

The argument that the Director's actions were without sufficient notice to Clear Lakes is disingenuous. Clear Lakes received and had plenty of notice from the early orders that clearly contained the limitation in the finding recognizing the safe harbor clause. No administrative action was commenced to challenge the Director's orders. Instead a court challenge was filed and eventually dismissed with prejudice.

Clear Lakes' counsel is correct in pointing out that I have placed significant importance upon the with prejudice dismissal of the state court litigation. I believe that the with-prejudice dismissal is binding and conclusive of all issues within the state court litigation. If Clear Lakes now wish to argue that the court order was not supposed to be that conclusive, they should have obtained that interpretation from the court – either a modification or retraction of the court order – before bringing the administrative matter to hearing before the IDWR. The Director has no authority to ignore or construe around this

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court order, and the determinative impact of the term stated in it, "dismissed with prejudice."

The remainder of the points raised consists of repetition of previously argued positions, and requires no analysis.

Conclusion

For these reasons, I respectfully recommend that the Director deny the motion for reconsideration.

Dated this 9th day of May, 2003.

D. Duff McKee, Hearing Officer

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MAY 27 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2003, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

May 19, 2003

CERTIFIED MAIL

Re: In the Matter of Petition to Modify/Rescind Amended Watermaster Instructions for Distribution of Water Among Water Rights Nos. 36-2659, 36-2708, 36-7004, 36-7201 and 36-7218

Dear Interested Parties:

The Department of Water Resources (department) has issued the enclosed **Order Denying Motion for Reconsideration of the Recommended Order** pursuant to section 67-5243, Idaho Code. **Any party may in writing support or take exceptions to any part of the previously filed recommended order as described in the enclosed information sheet.**

If you have any questions, please call me at (208) 327-7953.

Sincerely,

Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosures
c: IDWR - Regional Office

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LETTER TO INTERESTED PARTIES DATED MAY 19, 2003 FROM DEBORAH J. GIBSON

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EXPLANATORY INFORMATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "recommended order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the recommended order, any party may in writing support or take exceptions to any part of the recommended order and may file a brief in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for

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reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) the petition for reconsideration is disposed of; or
(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of the issuance of the final order. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. See Section 67-5274, Idaho Code.

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Total Postage & Fees	$

5/19/03
Postmark Here
dg

Sent To: John K. Simpson
Street, Apt. No.; or PO Box No.: P.O. Box 2139
City, State, ZIP+4: Boise, Id. 83701-2139

PS Form 3800, May 2000 — See Reverse for Instructions

7000 1670 0011 3313 9079

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

5/19/03
Postmark Here
dg

Sent To: Dan Steenson, et. al.
Street, Apt. No.; or PO Box No.: P.O. Box 2773
City, State, ZIP+4: Boise, Id. 83701-2773

PS Form 3800, May 2000 — See Reverse for Instructions

7000 1670 0011 3313 9086

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

DANIEL V STEENSON
JAMES G REID
CHARLES HONSINGER
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

36-2659

2. Article Number (Copy from service label)
7000 1670 0011 3313 9086

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print): Ernie White
B. Date of Delivery: 5-20
C. Signature: X Ernie White ☐ Agent ☐ Addressee
D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

PS Form 3811, July 1999 — Domestic Return Receipt — 102595-00-M-0952

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DEC 1 2 2003

CERTIFIED MAIL RECEIPTS

RINGERT
CLARK
CHARTERED
LAWYERS

RECEIVED
JUN 1 1 2003
Department of Water Resources

Laura E. Burri
Jeffrey R. Christenson
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
Patrick D. Furey
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
William F. Ringert
Daniel V. Steenson
Allyn L. Sweeney

Samuel Kaufman (1921-1986)

June 10, 2003

BY FACSIMILE AND MAIL

Karl Dreher
Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237
FAX: (208)327-7866

Re: Issuance of Final Order In the Matter of the Amended Watermaster Instructions for Distribution of Water Among Water Right Nos. 36-02659, 02708, 36-07004, 36-7201 and 36-07218, and Notice of Intent to Redistribute Flows

Dear Mr. Dreher:

No party to the above-referenced proceeding filed exceptions to the Hearing Officer's May 19, 2003 decision denying Clear Lakes' Petition for Reconsideration of the Hearing Officer's April 13, 2003 Decision and Recommendation for Order. Idaho Code section 67-5246(2) requires that you issue a final order following review of the Hearing Officer's recommended order. Your May 19, 2003 letter to Ms. Kay Hardy, President of Clear Lakes Trout Company, reiterates the Hearing Officer's decision that "IDWR enforced the [Interim Stipulated Agreement for Areas Within and Near Basin 36] as approved by 'Order Approving Stipulated Agreements' dated January 18, 2002, and will continue such enforcement through December 31, 2003." It is clear from this statement that you have adopted the Hearing Officer's decision. Please issue your final order immediately, so that Clear Lakes will have a meaningful opportunity to pursue an appeal prior to the expiration of the Interim Stipulated Agreement.

Sincerely,

Daniel V. Steenson

MICROFILMED
JUN 17 2003

cc: Clear Lakes Trout Company

455 South Third Street • P.O. Box 2773 • Boise, Idaho 83701 • 208/342-4591 FAX 342-4657

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

June 13, 2003

RE: In The Matter Of Petition To Modify Amended Watermaster Instructions For Distribution Of Water Among Water Right Nos. 36-02659, 36-02708, 36-7004, 36-7201 and 36-7218 In Water District No. 130

Dear Interested Parties:

The Department of Water Resources (department) has issued the accompanying order as a **"final order"** pursuant to section 67-5246 or 67-5247, Idaho Code. Enclosed is an informational sheet that explains how to respond to final orders.

If you have any questions, please call me at (208) 327-7953.

Sincerely,

Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosure

c: IDWR – Southern Region
D. Duff McKee

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JUN 17 2003

EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a **"Final Order"** issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) the petition for reconsideration is disposed of; or

(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

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(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a 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(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

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