

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF REQUEST FOR)
RECOVERY AND RE-USE OF WATER)
DIVERTED UNDER RIGHT 36-7201 IN THE)
NAME OF CLEAR SPRINGS FOODS INC)

PRELIMINARY ORDER

In a letter to the Department of Water Resources ("Department") dated May 2, 2005, Dr. Charles E. Brockway, consultant for Clear Springs Foods, Inc. ("Clear Springs"), requested approval of the construction and operation of a pump-back system pursuant to provisions of Idaho Code § 42-105 for re-circulation of water diverted under water right no. 36-7201. The Department responded in a letter dated May 17, 2005, seeking more detail and clarification of the pump-back system. In a letter dated June 7, 2005, Dr. Brockway provided more details of the intended pump-back system.

FINDINGS OF FACT

1. Clear Springs is the owner and operator of water right no. 36-7201 which is recorded in the records of the Department as follows:

Status: Decree
Priority: 08/04/1971
Source: Springs
Tributary to: Clear Lakes

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
Fish Propagation	1/1	12/31	8.0 cfs	
Commercial	1/1	12/31	2.0 cfs	
	Total Diversion			10.0 cfs

Location of Point(s) of Diversion

Spring NW¼NW¼SE¼ Sec 2, Twp 09S, Rge 14E, B.M.
Spring SW¼SW¼NE¼ Sec 2, Twp 09S, Rge 14E, B.M.

Place of Use

Fish Propagation and Commercial Use located within:
NW¼SE¼ Sec 2, Twp 09S, Rge 14E, B.M.

Conditions of Right

- 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.
- Industrial, Fish Processing plant; Fish Propagation, Holding ponds
- This partial decree is subject to such general provisions necessary for the definition of the 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.
- Facility volume 6552 Cubic Feet.

2. Clear Springs diverts water from an upper spring and a lower spring. Clear Springs collects water from the upper spring in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec 2, Twp 09S, Rge 14E, B.M. and diverts the water to a set of small raceways identified by Brockway as the "holding ponds" that are located within the processing plant building. These raceways are used to hold fish just prior to processing. Clear Springs is authorized to divert up to 8.0 cfs from the upper spring into these raceways. Water from the holding ponds is discharged back to Kanaka Creek.

3. Clear Springs collects water from the lower spring in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec 2, Twp 09S, Rge 14E, B.M. and diverts to the "processing plant." A separate pipeline from the lower spring diverts flow on an intermittent basis to a fresh-water storage tank in the processing plant. This water is chlorinated and used in the fish process operations. When flows are not being diverted into storage, the lower pipeline discharges into Kanaka Creek. Wastewater from fish processing is discharged into a treatment plant and then into Clear Lakes. Clear Springs is authorized to divert up to 2.0 cfs from the lower spring.

4. Supply pipelines from the upper and lower springs do not have measuring devices. Prior to the pump-back project, flows available to the holding ponds and to the processing plant were collectively estimated by measuring flows over the weir in Kanaka Creek at the point where Kanaka Creek exits the Clear Springs property. These measurements were taken during times when the storage tank was not filling and all flows were in Kanaka Creek. This method will also measure any additional flows in Kanaka Creek that may not be diverted by Clear Springs. IDWR approved this method of measurement in 1995 with the understanding that it might result in readings that were higher than actual diversions made by Clear Springs.

5. The spring source of right 36-7201 is hydraulically connected to the Eastern Snake Plain Aquifer ("ESPA"). Due to prolonged drought, diversion of ground water from the aquifer, reduced recharge to the aquifer, and other hydrologic reasons, the flows of the springs

have declined from historic levels that were relied on by Clear Springs to beneficially use water under right no. 36-7201.

6. To alleviate impacts of reduced spring flows, the State of Idaho awarded monetary grants to various spring users including Clear Springs to develop projects. The proposed pump-back system is such a project.

7. Water discharging from the Clear Springs holding ponds flows into Kanaka Creek. The discharge of Clear Springs' wastewater effluent is regulated under existing NPDES permits.

8. The pump-back system project proposes installation of a pump in Kanaka Creek with a capacity of up to 4.0 cfs. The pump will be located in the NW¼NW¼SE¼ Sec 2, Twp 09S, Rge 14E, B.M. downstream from the points where return flows from the holding ponds discharge into Kanaka Creek. The pump-back system is designed to discharge into the "Spring Collector Box," the diversion identified above as the upper spring point of diversion, located in the SW¼SW¼NE¼ Sec 2, Twp 09S, Rge 14E, B.M.

10. Springs discharge into Kanaka Creek as it flows downstream to the point of discharge of the Clear Springs effluent to Kanaka Creek above the pump-back intake. Water not diverted from the springs, additional gain to Kanaka Creek below the springs diverted by Clear Springs, and Clear Springs' effluent accumulate in Kanaka Creek. Clear Springs has advised IDWR that most of the flows of Kanaka Creek emanate from the springs that are diverted to the holding ponds and the processing plant. Holders of other downstream water rights rely on the flows of Kanaka Creek to fill their water rights.

11. Initial operation of the pump-back system will temporarily decrease the flows in Kanaka Creek until an equilibrium state is attained. Slowly ramping-up the diversion rate of the pump-back system will minimize the reduction in flow of Kanaka Creek between the commencement of pump-back and the time when the point of equilibrium is reached. When ramping-up the pump-back system, Clear Springs proposes that it will not reduce the existing flow in Kanaka Creek by more than 29 gpm.

12. Clear Springs' operation plan provides for installation of measuring devices on (a) the pump-back system pipeline, and (b) the pipeline delivering water from the Spring Collector Box to the holding ponds, below where the pump-back water and the spring water are combined. The operation plan also proposes maintenance of the existing weir on Kanaka Creek located downstream of the proposed pump-back pump intake.

13. Diversions in the area including the springs and those on Kanaka Creek are under the control of the watermaster of Water District 130.

14. The watermaster has visited the site and is familiar with the existing water rights, facilities and diversions. The watermaster does not oppose the proposed plan provided all the measuring devices are installed as proposed.

15. The present measurement of the two spring diversions is not satisfactory and does not allow for adequate watermaster monitoring and control of the pump-back system.

CONCLUSIONS OF LAW

1. Idaho Code § 42-105 states, in pertinent part:

(1) The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.

2. Clear Springs could intercept return flows from the holding ponds prior to discharge back into Kanaka Creek and re-circulate the water to the head of the holding ponds without prior approval of the Department which would have a similar effect on the rate of flow in Kanaka Creek as the current pump-back proposal.

3. Because the pump-back intake is located in Kanaka Creek, Clear Springs will be diverting water from a source not authorized by its existing water right. The commingling and redirection recognized by Idaho Code § 42-105 allows pumping from a natural water source in which water from the original source of water is mingled. In most factual settings, where commingling under Idaho Code § 42-105 has been allowed, the commingled water has not been beneficially used prior to commingling in the public source. Because Clear Springs' use of water is largely nonconsumptive, however, it is physically possible for Clear Springs to divert and beneficially use (a) water from the original source, and (b) water from the new source, comprised of both (i) fresh water flowing in the new source, and (ii) water diverted from the original source that Clear Springs has already beneficially used and has discharged into the new source. This is acceptable only to the extent that Clear Springs retains control of the effluent.

4. Idaho Code § 42-105 expressly states that commingling cannot diminish the amount of water to which prior appropriators may be entitled. Idaho Code § 42-105 must also be reconciled with Idaho Code § 42-222, which governs transfers of water including adding a new point of diversion. Idaho Code § 42-222 prohibits approval of a transfer that will result in an enlargement of use of a water right. An enlargement of use includes diversion of more flow rate than the water right originally authorizes. Commingling under Idaho Code § 42-105 cannot circumvent the prohibition of enlargement of use in Idaho Code § 42-222.

5. As a result, Clear Springs' combined diversion of water from Kanaka Creek and from the upper spring cannot exceed 8.0 cfs. Combined diversion of more than 8.0 cfs would result in diversion from Kanaka Creek and the upper spring of a flow rate in excess of the flow rate authorized by Clear Springs' water rights. For instance, if 7.0 cfs of natural spring water is diverted from the upper spring at the Spring Collector Box, and the flow in Kanaka Creek at the pump-back intake is 5.0 cfs, the pump-back rate must be limited to 1.0 cfs.

6. To ensure that the combined flow rate diverted from Kanaka Creek and from the upper spring is limited to 8.0 cfs, both the flow rate of the diversion from the upper spring and the flow rate of the pump-back system must be determined.

7. Measurement of the pump-back flow and measurement of the mixed flow of the pump-back and the diversion from the upper spring allows determination of the flow diverted from the upper spring.

8. Approval of this pump-back system, if properly monitored, will not injure other water rights.

9. Approval of this pump-back system, as conditioned, will not enlarge the use of water right no. 36-7201.

10. Approval of this pump-back system is in the public interest.

11. Approval of this pump-back system is consistent with conservation of the water resources of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that the request for operation of the pump-back system as described, pursuant to the provisions of Idaho Code § 42-105, is **APPROVED** subject to the following conditions:

1. The pump-back system is under the control of the watermaster of WD130.

2. Prior to operation of the pump-back system the weir in Kanaka Creek below the pump-back station intended to monitor Kanaka Creek leaving the Clear Spring's property shall be upgraded to meet standard weir conditions subject to watermaster control.

3. Flow meters shall be installed on the pump-back diversion pipeline and on the pipeline delivering water from the spring collector box to the holding ponds as outlined in the system diagram that has been provided by Brockway Engineering PLLC. A lockable regulating valve shall be installed on the pump-back diversion. Flow meters and lockable control valves must be acceptable to the watermaster and the Department. The watermaster shall have control over the measuring and control devices.

4. The watermaster of WD130 shall be present during initial operation and ramping of the pump-back system to monitor installed measuring devices, control works, and local impacts. Impact to Kanaka Creek during pump-back ramping shall be limited to no more than 29 gpm or to a greater amount determined by the watermaster during the initial ramping. Upon completion of the initial ramping Clear Springs or their consultant shall develop a "time vs. rate of flow" ramping schedule in consultation with the watermaster and file it with IDWR. The schedule shall be considered for future ramping events.

5. Prior to any ramping event, all downstream Kanaka Creek water users shall be notified and coordinated with to avoid potential injury.

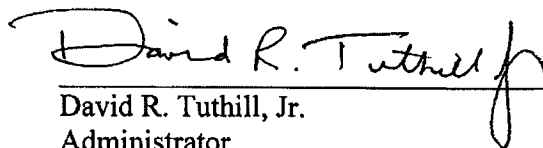
6. The pump-back rate is limited to the lesser of: (a) 4.0 cfs, or (b) the difference between 8.0 cfs and the amount of water diverted from the upper spring; minus any amount determined not to be returning to Kanaka Creek.

7. Clear Springs assumes all risk should the use of the pump-back system injure other water rights.

8. Pump-back under this Order shall occur only to the extent that Clear Springs retains control of the effluent from their facilities.

9. The Department may cancel this approval at any time upon the Department's determination that the operation of the pump-back system injures other water rights.

DATED this 1st day of July, 2005.



David R. Tuthill, Jr.
Administrator
Water Management Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2005, a true and correct copy of the above and foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Documents Served: Preliminary Order

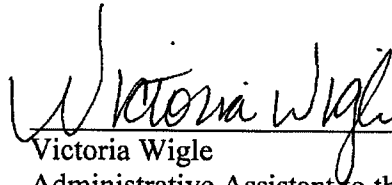
Statement of Available Procedures and Applicable Time Limits

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Victoria Wigle
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