

Pml

NO. _____
FILED
A.M. _____ P.M. 5:05

MAR 01 2004

J. DAVID NAVARRO, Clerk
By Maureen Syke
DEPUTY

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

RECEIVED

MAR 03 2004

Department of Water Resources

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

MEMORANDUM DECISION
AND ORDER

CLEAR LAKES TROUT COMPANY, INC.

Petitioner,

vs.

IDAHO, DEPARTMENT OF WATER
RESOURCES, an agency of the State
of Idaho,

Respondent,

and

CLEAR SPRINGS FOODS, INC.

Respondent.

This case is before the Court on petition for judicial review from a final order of the
Director of the Idaho Department of Water Resources (IDWR). For the reasons that follow, the
order will be affirmed.

SMX

FACTS AND PROCEDURAL HISTORY

As noted above, this case is before the Court on a Petition for Judicial Review of a final order of the Director of the Department of Water Resources (the Director) arising out of a challenge by Clear Lakes Trout Company (Clear Lakes) to certain instructions issued by the Director to the watermaster, Cindy Yenter, regarding the allocation of water between Clear Lakes and Clear Springs Foods, Inc. (Clear Springs).

Clear Lakes and Clear Springs are both engaged in raising trout in the Snake River Basin. The water for the trout farms comes from a common spring or springs in the Thousand Springs area of the Snake River basin. It flows into two pools, the east pool and the west pool, which are joined by a channel and controlled by an adjustable weir. Clear Lakes holds a first priority surface water right to divert 100 cfs of water from the springs. Clear Springs has the second priority surface water right to divert 200 cfs. Clear Lakes has a third priority surface water right to divert 75 cfs. Finally, Clear Springs has two additional junior rights totaling 61.55 cfs. The amount of water available for diversion and use by the trout farms varies with fluctuations in the spring flow, which is affected by ground water use, weather conditions, and other factors.

Because of concerns relating to the effects of ground water usage on surface water rights, including the rights of Clear Lakes and Clear Springs, the Director expressed an intent to curtail ground water usage. In response, an agreement was made by which the ground water users agreed to provide a certain amount of water to replace water being lost to the surface water users (the Interim Stipulated Agreement). That agreement provided in part:

2.8 Safe Harbor:

In exchange for the commitments enumerated in paragraphs 2.1 through 2.7 the undersigned holders of senior priority surface rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction other

1 than as provided in paragraph 2.7, of *any junior water rights* held by or represented
2 by the undersigned with Basin 36 for the term of this agreement. (Emphasis added)

3 4. Enforcement:

4 4.1 The parties understand the *Director intends to approve this stipulated*
5 *agreement* in lieu of issuing curtailment orders under Idaho Code § 42-
6 244b, and that in the event *this Agreement* is breached, any party may
7 petition the Director, or the Director on his own initiative may seek an
8 appropriate remedy.

9 4.2 Upon the SRBA District Court issuing an order for interim administration
10 of water rights within Basin 36 and related areas, *this Agreement will be*
11 *enforced through such administration.* AR, 57. (Emphasis added.)

12 On January 18, 2002 the Director approved the agreement but changed the language of the
13 foregoing "safe harbor" provision. The findings of fact in the order approving the agreement
14 stated:

15 Under the agreements, the represented holders of senior priority surface
16 rights agreed not to exercise their senior priorities against the represented holders of
17 *junior priority ground water rights* in exchange for commitments by the ground
18 water right holders to provide specific quantities of replacement water during the
19 two year term of the Agreements as a replacement for water that would have
20 resulted from curtailment of ground water diversions intended by the Director.
21 (Emphasis added.)

22 This interim order was not challenged by administrative review or otherwise.

23 Following the approval of the agreement, the Director entered a final order on February 19, 2002
24 creating an administrative water district, District 130, to administer the water rights of the users in
25 the area of Clear Lakes and Clear Springs. That order reiterated the language in the previous order
26 set forth above. No challenge to the February order was filed.

The Director proceeded to develop instructions for the watermaster on the allocation of
water between Clear Lakes and Clear Springs in the event the amount of available water from the
spring fell below a certain level. Cindy Yenter is the water master for District 130. After

1 consultation with both Clear Lakes and Clear Springs the Director issued instructions to the
2 watermaster. After further consultation and review, the Director issued amended instructions. On
3 June 19, 2002 the watermaster gave notice, as required by the amended instructions, of intent to
4 reduce the amount of water available to Clear Lakes under its third priority water right, in order to
5 fill Clear Springs's second priority right. Clear Lakes did not seek administrative review of the
6 watermaster's proposal, although the instructions provided for such review. Instead, it filed suit in
7 Gooding County district court for injunctive relief, and sought a stay of the watermaster's
8 proposed action. Clear Springs intervened. That court denied the request for stay.

9
10 Eventually, Clear Lakes and IDWR entered into a stipulation for dismissal of the district
11 court suit with prejudice. The stipulation contained an acknowledgement of Clear Lakes' right to
12 initiate a contested case before IDWR to seek review and modification of the amended
13 watermaster instructions, and IDWR agreed to hold a hearing and to provide a hearing officer who
14 was not an employee of IDWR for such a case. Clear Springs objected to the dismissal and did not
15 sign the stipulation. After a hearing the district judge dismissed the case with prejudice as to all
16 parties.

17
18 Clear Lakes filed its petition for contested case, a hearing was held, and the Director issued
19 the Final Order that is the subject of the petition for judicial review now before this Court. The
20 petition for judicial review raises issues of the authority for the order approving the Interim
21 Stipulated Agreement concerning the "safe harbor" provision, and of the interpretation of the
22 stipulation and order dismissing the Gooding County lawsuit.

23 ANALYSIS

24
25 Idaho Code § 67-5279 sets forth the standard to be applied by a reviewing court on a
26 petition for review of an agency action:

1 § 67-5279. Scope of review — Type of relief. — (1) The court shall not substitute
2 its judgment for that of the agency as to the weight of the evidence on questions of
3 fact.

4 (3) When the agency was required by the provisions of this chapter or by
5 other provisions of law to issue an order, the court shall affirm the agency action
6 unless the court finds that the agency's findings, inferences, conclusions, or
7 decisions are:

- 8 (a) in violation of constitutional or statutory provisions;
- 9 (b) in excess of the statutory authority of the agency;
- 10 (c) made upon unlawful procedure;
- 11 (d) not supported by substantial evidence on the record as a whole; or
- 12 (e) arbitrary, capricious, or an abuse of discretion.

13 If the agency action is not affirmed, it shall be set aside, in whole or in part,
14 and remanded for further proceedings as necessary.

15 (4) Notwithstanding the provisions of subsections (2) and (3) of this
16 section, agency action shall be affirmed unless substantial rights of the appellant
17 have been prejudiced.

18 Clear Lakes raises essentially two issues on review. The first is whether the stipulated
19 dismissal of the Gooding County suit precluded Clear Lakes' petition for contested case before
20 IDWR. The second is whether the Director had and exercised discretion to limit or qualify his
21 approval and enforcement of the "safe harbor" provision of the Interim Stipulated Agreement.

22 As to the first issue, the Director did not find that the dismissal with prejudice of the
23 Gooding County suit precluded Clear Lakes' petition for contested case. Indeed, the Director
24 appointed an independent hearing officer as required by the stipulation, and this hearing officer in
25 fact held a hearing on the petition. As a result of that hearing, the hearing officer actually
26 determined the issues raised in the petition as to IDWR, as will be discussed below. The hearing
27 officer did determine that the stipulation for dismissal with prejudice precluded Clear Lakes from
28 raising any issues concerning Clear Springs, because Clear Springs was not a signatory to the
29 stipulation for dismissal of the Gooding County suit, and the suit was dismissed with prejudice

1 over its objection. The Director essentially adopted these findings and conclusions in his final
2 order.

3 Clear Lakes now argues that the dismissal as against Clear Lakes should be viewed as a
4 dismissal without prejudice, citing *Castle v. Hays*, 131 Idaho 373, 957 P.2d 351 (1998), and
5 *Kershaw v. Pierce Cattle Co.*, 87 Idaho 323, 393 P.2d 31 (1964). Neither case is persuasive. It is
6 clear from the record in this case that all parties and the Gooding County judge were discussing a
7 dismissal with prejudice as to all parties, and that such a dismissal was not the result of
8 inadvertence. The findings and conclusions of the Director are supported by the record and the
9 applicable law. Under the standard set forth in Idaho Code § 67-5279, this portion of the final
10 order must be affirmed.

11
12 The second issue is whether the hearing officer and the Director correctly found and
13 concluded that the Director had the authority and the discretion to modify the literal language of
14 the Interim Stipulated Agreement's "safe harbor" clause, or whether the Director was bound by
15 that language. Clear Lakes' argument is two-fold. First, it argues that since IDWR, the Director
16 and a deputy from the office of the Idaho Attorney General were involved in facilitating the
17 negotiation of the agreement, IDWR and the Director are bound by its terms. However, neither
18 IDWR, the Director, nor any representative of the Attorney General were signatories to the
19 agreement. Clear Lakes cites no legal authority for the proposition that private parties can, by
20 agreement, limit the authority of IDWR or the Director to perform the duties required of them by
21 law. The primary cases cited by Clear Lakes are *Idaho Power Co. v. State Department of Water*
22 *Resources*, 104 Idaho 575, 587 (1983), in which the court discussed a subordination clause
23 inserted in the Federal Power Commission license granted to Idaho Power for operation of the
24 Hells Canyon Dam; and *Miles v. Idaho Power*, 116 Idaho 635, 778 P.2d 757 (1989), in which the
25

1 court affirmed that statutes implementing an agreement between the state and the power company
2 did not violate the equal protection clause of the Constitution. Clear Lakes also cites *Board of*
3 *Commissioners of Arapaho County v. Crystal Creek Homeowner's Assn*, 14 P.3d 325 (Colo.
4 2000), in which the court discussed the binding effect of a subordination agreement. In that case,
5 however, the court held that a subordination agreement by the federal government did not affect
6 the amount of water available to non-parties. These cases are readily distinguishable. None
7 purport to hold that private agreements to which the state is not a party are binding on the state.

8
9 Thus, although Paragraphs 2.10 and 2.12 of the Interim Stipulated Agreement provide the
10 parties' understanding that IDWR would petition the SRBA court for the authority to implement
11 interim administration of water rights in District 36, that such administration would include
12 enforcement of the agreement, and that the Director would ultimately issue an order approving the
13 ISA, IDWR and the Director were not bound by the language in the agreement, since they never
14 signed it. Both the hearing officer and the Director found and concluded that public policy
15 dictated that private parties could not, by agreement, tie the directors hands in the administration of
16 water rights. In the absence of any legal authority to the contrary, these determinations must be
17 affirmed.

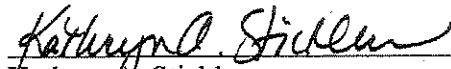
18
19 Finally, Clear Lakes argues that the Director's actions ignoring Clear Lakes' interpretation
20 of the Interim Stipulated Agreement violate the "obligation of contract" provisions of the Federal
21 and Idaho Constitutions, citing *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993). *Curr* is a
22 workers compensation case in which the Idaho Industrial Commission *sua sponte* reduced
23 uncontested attorney fee agreements. The discussion of constitutional issues in that case centered
24 on the right to the due process, not the obligation of contact, provisions of the constitutions. Due
25 process encompasses notice and an opportunity to be heard. Here, the record is clear that when the
26

1 Director issued the January and February 2002 orders, all parties were given notice, and certainly
2 as to the second (final) order had the ability to contest the Director's approval of the agreement
3 that modified the terms of the safe harbor provision. Further, Clear Lakes had a full opportunity to
4 litigate these issues either in the Gooding County district court or before the agency. There has
5 been no due process violation.

6 Based on the foregoing, the Final Order of the Director of IDWR is affirmed.

7 IT IS SO ORDERED.

8 Dated this 1st day of March 2004.

10 
11 Kathryn A. Sticklen
12 District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

DANIEL V STEENSON
CHARLES L HONSINGER
RINGERT CLARK CHTD
POST OFFICE BOX 2773
BOISE IDAHO 83702

JOHN K SIMPSON
TRAVIS L THOMPSON
BARKER ROSHOLT & SIMPSON LLP
205 N 10TH STREET SUITE 520
POST OFFICE BOX 2139
BOISE IDAHO 83701-2139

PHILLIP J RASSIER
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF WATER RESOURCES
1301 N ORCHARD
POST OFFICE BOX 83720
BOISE IDAHO 83720-0098

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date:

March 2, 2008

By

Martha Lyke
Deputy Clerk