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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 JUNE 20, 2003)	
NOTICE OF INTENT TO RESUME)	PETITION TO INITIATE CONTESTED
ADMINISTRATION OF CLEAR LAKES)	CASE/REQUEST FOR EXPEDITED
AREA WATER RIGHTS)	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

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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: 
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