

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

IN THE MATTER OF JUNE 20, 2003)	ORDER DENYING PETITION
NOTICE OF INTENT TO RESUME)	TO INITIATE CONTESTED
ADMINISTRATION OF CLEAR LAKES)	CASE/REQUEST FOR
AREA WATER RIGHTS)	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

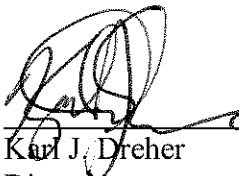
Lakes fails to set forth any allegations of fact or law that would justify or provide a reasonable basis for the issuance of a stay by IDWR. Furthermore, continued delay of administration would prevent Clear Springs, the holder of the more senior water right relative to Clear Lakes' right no. 36-7004, 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.

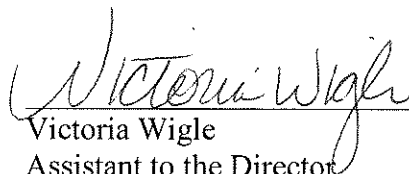

Karl J. Dreher
Director

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

A handwritten signature in cursive script, reading "Victoria Wigle", is written over a horizontal line.

Victoria Wigle
Assistant to the Director
Idaho Department of Water Resources

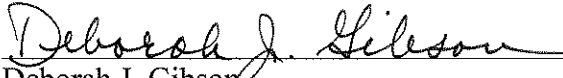
CERTIFICATE OF SERVICE

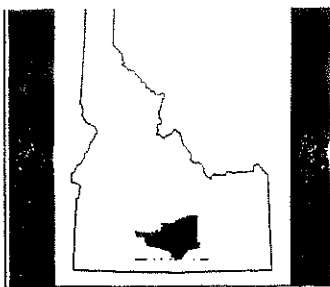
I HEREBY CERTIFY that on this 7th day of July, 2003, the above and foregoing Order Denying Petition to Initiate Contested Case/Request for Expedited Hearing/Petition to Stay Administration, and Explanation Information to Accompany a Final Order was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Daniel V. Steenson
Charles L. Honsinger
S. Bryce Farris
Ringert Clark Chartered
455 S Third
P.O. Box 2773
Boise, Idaho 83701-2773

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

John K. Simpson
Travis L. Thompson
Barker Rosholt & Simpson, LLP
P.O. Box 2139
Boise, Idaho 83701-2139


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau



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.

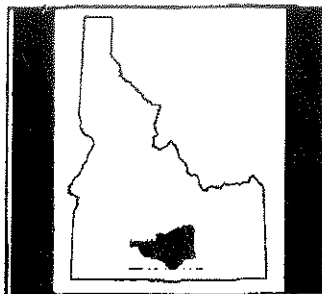
If you have questions, I may be reached at 208-736-3033 or 208-731-0901.

Regards,

Cindy Yenter
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
Watermaster
Water District 130

cc: Glen Saxton and Phil Rassler, 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,

A handwritten signature in cursive script, appearing to read "Larry W. Cope".

Larry W. Cope
President & CEO