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

_____))
IN THE MATTER OF DISTRIBUTION))
OF WATER TO WATER RIGHTS NOS.))
36-07210, 36-07427, AND 36-02356A))
))
Blue Lakes Delivery Call))
_____))
IN THE MATTER OF DISTRIBUTION))
OF WATER TO WATER RIGHTS NOS.))
36-04013A, 36-04013B, AND 36-07148))
(SNAKE RIVER FARM)))
))
Clear Springs, Snake River Farm))
Delivery Call))
_____))

**SPRING USERS' JOINT
MEMORANDUM REGARDING
EXCEPTIONS TO THE HEARING
OFFICER'S RECOMMENDED
ORDER**

COME NOW, BLUE LAKES TROUT FARM, INC. ("Blue Lakes"), and CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through counsel of record, and pursuant to Rule 720 of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), and hereby file the following *Memorandum Regarding Exceptions to the Hearing Officer's Recommended Order.*

The basis for the Spring Users' exceptions are described below. In addition, the Spring Users further incorporate their *Joint Petition for Clarification* filed on March 12, 2008 with the Hearing Officer.

INTRODUCTION

Justice Gerald F. Schroeder, the Hearing Officer in this matter, issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("Recommended Order") on January 11, 2008. The *Recommended Order* referenced and attached the Hearing Officer's prior decision on the parties' summary judgment motions that was issued on November 14, 2007. See *Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment* ("Summary Judgment Order"). Finally, the Hearing Officer issued his *Responses to Petitions for Reconsideration and Clarification and Dairymens' Stipulated Agreement* on February 29, 2008 ("Response Order").

EXCEPTIONS TO RECOMMENDED ORDER

To the extent the Hearing Officer did not address parts of the Spring Users' *Joint Petition for Partial Reconsideration* filed on January 25, 2008, the Spring Users incorporate those arguments and positions herein. In addition, the Spring Users further incorporate their *Joint Petition for Clarification* filed on March 12, 2008, with the Hearing Officer. As discussed below, the Director should (1) address and revise material injury determinations to adequately reflect injury caused to water rights 36-7210 and 36-4013A; (2) revise material injury determinations to properly account for the uncertainty in the Model; and (3) conduct a full accounting of the IGWA's 2005 through 2007 replacement water plans and their implementation (or lack thereof), and identify and carryover the remaining mitigation obligations into 2008.

I. The Director's Injury Determinations Should be Revised to Account for the Material Injury to Blue Lakes' Water Right 36-7210 and Clear Springs' Water Right 36-4013A .

The Spring Users take exception to and request clarification from the Director addressing the full and continuing obligation of junior priority ground water right holders. As addressed in the Spring Users' March 12, 2008, *Petition for Clarification*, since the Hearing Officer found material injury to Blue Lakes' water right 36-07210 (November 17, 1971) and Clear Springs' water right 36-04013A (September 15, 1955), all hydraulically-connected ground water rights with priority dates junior to these water rights are subject to curtailment in response to Blue Lakes' and Clear Springs' delivery calls. Accordingly, the final agency orders must identify curtailment or mitigation requirements from all ground water right holders with priority dates junior to these water rights.

Since the Hearing Officer determined that Blue Lakes' 1971 water right and Clear Springs' 1955 water right have been injured, the Director should recalculate and revise the prior injury determinations relative to Blue Lakes and Clear Springs and order curtailment or mitigation based upon that revised determination. *See Response Order* at 8. Consequently, new curtailment goals and/or replacement water obligations must be determined to mitigate the injury to Blue Lakes' 1971 water right and Clear Springs' 1955 water right. Further, it is the Department's obligation to ensure that the mitigation goals are accurately definitely pursuant to the results of the ESPAM and the spring flow data relative to the Devil's Washbowl to Buhl and Buhl to Thousand Springs reaches.¹

¹ Blue Lakes and Clear Springs continue to question the validity of the reach gain accruals for the Devil's Washbowl to Buhl and the Buhl to Thousand Springs reaches contained in the May 19, 2005 and July 8, 2005 Orders. The Department and the Director have an obligation to verify the data and model results relied upon by those orders and future orders to ensure the results are accurate.

II. Administration Should Include All Water Users Who are Materially Injuring Blue Lakes' and Clear Springs' Senior Water Rights

Although it is not perfect, the ESPAM is the best available tool for addressing the interactions between ground and surface water on the Eastern Snake Plain. This matter was not disputed at the hearing. *See Recommended Order* at 14. Any imperfections in the Model, however, should not be applied to the detriment of Blue Lakes' and/or Clear Springs' senior surface water rights.

Much testimony was presented during the hearing regarding the “10% trim line,” or “margin of error,” relative to the Model, which was applied by the Director in the 2005 Orders. In essence, this testimony revolved around the uncertainties inherent in the calibrated river gage readings that form, in part, the basis for the Model's calculations. These uncertainties were applied to the detriment of Blue Lakes' and Clear Springs' senior water rights, in that any junior water users who fell within the 10% margin of error would not be required to curtail or provide replacement water – even though those water users were found to have materially injured Blue Lakes' and Clear Springs' water rights.

Any margin or error inherent in the Model inputs should not be applied in such a matter.

Justice Schroeder recognized as follows:

The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on ***the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low.***

Recommended Order, at 14 (emphasis added). Stated differently, the impacts of junior groundwater diversions on the Spring Users' senior water rights could be *either* higher or lower than that shown in the Model results. As such, a 10% trim line is not proper.

The 10% trim line is based on the calibration of the Model and *has nothing to do with the elements of decreed junior ground water rights* and whether or not those rights are subject to priority administration. It does not describe wells used to measure ground water levels across the ESPA or gages used to measure spring discharges in the Thousand Springs reach.

All ground waters in Water District 130 are deemed legally connected, for purposes of administration. All hydraulically connected water sources must be administered by priority. Nothing in Idaho law permits the imposition of a penalty against a senior water right holder based entirely on the margin of error associated with the Model. Any margin of error present in the Model should not be used to the benefit *or* detriment of either a senior or junior water right holder. As such, the decision regarding use of the 10% trim line to the injury of Blue Lakes and Clear Springs and for the benefit of excluding certain junior priority ground water rights from administration should be revised.

III. IGWA Should be Required to Provide Replacement Water Sufficient to Meet the Requirements of the 2005 Orders and Any Annual Shortfall From 2005, 2006 or 2007 Should Carry Over Into the 2008 Obligations.

At a minimum, the Director must address the outstanding obligations from IGWA for its failure to meet the mitigation obligations set forth in the 2005 *Blue Lakes' Order* and 2005 *Clear Springs' Order*. With respect to this issue, Blue Lakes and Clear Springs incorporate their *Petitions for Reconsideration* of the Director's June 15, 2007 Curtailment Orders filed in this matter on June 28th and June 29th 2007.

As set forth in the *Recommended Order*, the Hearing Officer determined the following with respect to IGWA's replacement plans:

2. Replacement plans must meet the targeted goals of curtailment. Replacement plans are an alternative to curtailment. To be valid they must meet the goals of curtailment within the time frames of curtailment. A failure in one year to meet the goals of curtailment requires carrying over the

shortage to be made up in the following years. The cap on phased in curtailment is five years. That period of time should apply also to any approved mitigation plan, unless an agreement is reached with the Spring Users that extends the period or provides a different alternative. That appears unlikely. Consequently, if the targeted goals are not met in the five year phase in period, curtailment to meet the initial goals is required.

3. The Director's approval of a mitigation plan does not eliminate the need to meet the goals to be achieved by curtailment. The fact that the Director approves a replacement water plan for a particular year does not eliminate the ultimate goal of providing the amount of water to the Spring Users set forth in the Orders. The value of the approval is that the rights of IGWA and the Spring Users are settled for that year and they may plan accordingly. But the ultimate obligation that would be met by curtailment remains and is carried over. This is relevant in this case, since it appears that the last approved mitigation plan falls short of the targeted goal.

Recommended Order at 27.

Testimony from the former Director and IDWR staff at the hearing confirmed the Hearing Officer's decision that the "last approved mitigation plan falls short of the targeted goal" for the Blue Lakes' and Clear Springs' Orders, as well as prior years. With respect to 2005 and 2006, the following testimony demonstrates shortfalls exist from IGWA's mitigation actions implemented in those years.

Former Director Karl Dreher

Q. So the 2006 orders that you just identified, they approved IGWA's supplemental, or substitute curtailment plans; is that correct?

A. That's correct.

* * *

Q. And those means were reviewed by the Department?

A. That's correct.

Q. And ultimately by you.

A. And then we – we did some – some auditing at the end to see what actually was achieved. But in the end it became moot because of Judge Woods' action.

Q. The – after this 2006 order was issued you held a hearing in this matter. I believe it was on June 5, 2006, regarding the 2005 plans; is that correct?

A. That would have been about the time, yes.

Q. Okay. And do you recall if an order was issued after that hearing?

A. I don't recall that I issued an order. . . .

* * *

Q. And do you recall if the ground water users submitted a similar type of plan in 2006 for the second year of the phased-in curtailment period?

A. I believe they did. But I don't recall what – what we did with that. I mean, there still would have been a cloud over the conjunctive management rules so I suspect they submitted it.

Q. But an order wasn't issued?

A. But there was no order issued.

Dreher Testimony at 1188-89.

Tim Luke (IDWR Water Distribution Section Manager)

Q. Do you know if there was an order issued after that 2006 hearing?

A. Not specifically on the hearing itself.

* * *

Q. Okay. Thank you. Did IGWA provide a plan in 2006, to the best of your knowledge?

A. They did.

Q. And did you review that plan at all?

A. I had some involvement in reviewing it, yes.

Q. And again, we're talking about 2006. Do you know if the Director issued an order on the 2006 plan?

A. No, I don't believe he did.

* * *

Q. There was an order issued on the 2005 plan, there was then a hearing that occurred. And the question that I asked you is whether or not an order was issued after that hearing and you had said to me that an order was not issued and we discussed the reasons.

A. That's correct.

Luke Testimony at 617-19.

Q. I guess going back to 2006, isn't it true the Director required ground water users to submit a plan by May 30th of that year to implement the second year of that five-year program?

A. Yes, he did.

Q. And did IGWA ever meet its target for 2006?

A. Not any given – no. No, they didn't.

Luke Testimony at 733, Ins. 7-13.

Allan Wylie:

Q. Okay. And what issues did you and the other staff who worked on the plan, evaluating the plan, identify with respect to the 2006 plan?

A. It wasn't going to be adequate particularly for Snake River Farm.

Wylie Testimony at 1496, Ins. 20-24.

Q. And there was a post season audit for 2006?

A. There was.

Q. And what was the result of that audit with respect to mitigation for the Blue Lakes order?

A. I don't believe they – IGWA met any of their targets.

Id. at 1500, Ins. 21-25, at 1501, ln. 1.

Although a hearing on IGWA's 2005 Replacement Water Plan was held on June 5, 2006, no order was ever issued addressing the final accounting for that plan and whether or not the

requirements for 2005 were met. Accordingly, a final review of IGWA's 2005 plan, which included the filings and hearing held on June 5, 2006, must be addressed to determine what obligation remains to be carried over from 2005.

In addition, based upon the above testimony it is clear that IGWA's 2006 plan was inadequate and that an additional obligation carried forward to 2007. With respect to Blue Lakes, the Director further acknowledged in his June 15, 2007 Order that IGWA was short in 2006. *See Order Curtailing Junior Priority Ground Water Rights (Blue Lakes)* at 8, ¶ 12 ("In 2006, the second year of phased-in curtailment, it was determined by the Director that IGWA proposed 16.5 cfs (**3.5 cfs shortfall**) to the Devil's Washbowl to Buhl Gage spring reach") (emphasis added). With respect to Clear Springs, the Director acknowledged in his June 15, 2007 Order that IGWA was short in 2006 as well. *See Order Curtailing Junior Priority Ground Water Rights (Clear Springs)* at 10, ¶ 15 ("In 2006, the second year of phased-in curtailment, it was determined by the Director that IGWA proposed 9.5 cfs (**6.5 cfs shortfall**) to the Buhl Gage to Thousand Springs reach of the Snake River.") (emphasis added).

In both cases, the Director reasoned that while IGWA was short in 2006, the Department "did not have rules under which to enforce the terms of its" 2005 orders for Blue Lakes and Clear Springs. *See June 15 2007 Blue Lakes Order* at 9, ¶ 14; *June 15 2007 Clear Springs Order* at 10, ¶ 14. Contrary to these statements, the CMRs are in place now, and the Director is required to enforce the prior curtailment orders. Furthermore, as decided by the Hearing Officer, a "failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years," and "the ultimate obligation that would be met by curtailment remains and is carried over". *Recommended Order* at 27.

Accordingly, at a minimum, the Director must carryover IGWA's shortfalls from 2006 (3.5 cfs for Blue Lakes; 6.5 cfs for Clear Springs) to add to the mitigation obligation for 2008.

As for 2007, IGWA again failed to meet its mitigation obligations. *See Recommended Order* at 27 ("it appears that the last approved mitigation plan falls short of the targeted goal"). Testimony from IDWR staff at the hearing and the Director's own 2007 orders confirms the shortfalls and outstanding obligations that must be carried forward into 2008:

Tim Luke:

Q. If you would turn to page 11, paragraph 27, in Exhibit 258; and page 12, paragraph 27, in Exhibit 259. Would you please identify what the shortages were for the ground water users in 2007 for Blue Lakes and Clear Springs?

A. In the Blue Lakes order the shortage was 7.1 CFS. And in the Snake River Farm order the shortage was 10.1 CFS.

Luke Testimony at 621, lns. 13-18.

Q. Now, finally with respect to 2007. You testified that the ground water districts' plan was determined to be short in meeting the 2007 obligation by the Director in his June 15, 2007, order, Exhibit No. 258.

A. Yes.

Q. Is that correct? And the shortfall was 7.1 CFS?

A. Yes, that's right.

Id. at 697, lns. 17-24.

Q. Okay. And isn't it the case that in this order the finding was that the shortage had been reduced from 7.1 CFS to 6.6 CFS? And that is at page 5.

A. Item?

Q. I'm looking at item 11. Were you aware of that?

A. Yes.

Q. And the obligation – the mitigation obligation in any year was to provide mitigation that would ultimately meet the 10, 20, 30, 40, 50, CFS to the reach, for the given year; correct?

A. Yeah.

Q. And are you aware that the Department has been evaluating that in terms of a steady state analysis?

A. Yes. It has been steady state. That's my understanding.

Q. And the ground water users have sought credit on that basis; correct?

A. Yes.

Id. at 698-99.

Q. If you look at finding 12 then, and look at conclusion of law numbers 13 and 14, that reflects, does it not, a steady state analysis or the ultimate product of mitigation, but some consideration of what additional water would show up during the course – the remainder of the course of the year 2007, something more –

A. Right, which would reduce it to 2 cfs.

Q. But that's a transient analysis; isn't that correct?

A. Okay. Yeah, I think it could be read that way.

Luke Testimony at 700, lns. 1-11.

Q. And to that ultimate goal, you have to take action in each of those five years amounting to the year increment, the first year you have to provide 8 CFS?

A. Yes.

Q. Second year 16?

A. Yes.

Q. And those are all at steady state?

A. That's my understanding, yes, it is.

Id. at 735-36.

Q. Looking over at 262. I believe that was the Director's July 6th Order – July 5, 2007, order rescinding that earlier curtailment order.

A. Yes.

Q. And isn't true, like the Blue Lakes order the Director did not evaluate that shortfall in terms of what was being short to the reach, but instead looked at the source for Clear Springs water rights instead?

A. Yes. The approach was the same.

Q. So as of July 6th there was still a shortfall of up to 10.7 CFS at this time?

A. Yes.

Id. at 737, lns. 11-22.

Allan Wylie:

Q. Turning to 2007, Dr. Wylie. Were you asked to review IGWA's 2007 plan?

A. Yes, I did.

* * *

Q. And did you provide any information to the director based on your review?

A. Yes, I did. I evaluated the benefits from the conversions, from the CREP acres, and from the recharge plan.

Wylie Testimony at 827, lns. 1-4, 10-14

Q. Thank you, Mr. Wylie. If you could please look at paragraph 27 in both the Blue Lakes order and the Clear Springs order and identify what the 2007 shortage was for IGWA in each of those calls.

A. Paragraph 27?

Q. Yes.

A. This is the Blue Lakes call and the deficiency identified in paragraph 27 is 7.1 CFS. And for the Clear Springs call the deficiency is 10.1 CFS.

Q. And those shortages were to the particular reaches?

A. The particular reaches in question, yes.

Q. At steady state?

A. At steady state.

Id. at 828, lns. 1-15.

Q. Turning now to the 2007 IGWA supplemental plan; were you asked to review that plan?

A. I was.

Q. And what information, if any, did you provide to the director based on your review?

A. The benefits resulting from an additional 10,000 CFS supplied by IGWA – 10,000 CFS recharge supplied by IGWA.

Q. And was that the 10,000 additional CF – or acre feet, I should say

–

A. Acre feet, that's correct.

Id. at 829, lns. 8-18.

Q. Dr. Wylie, have you look at paragraph 11 and also paragraph 16 of the Clear Springs order. Would you identify what the IGWA shortages were in the third year of phased in curtailment taking into consideration the additional 10,000 acre feet of recharge?

A. 6.6 for Blue Lakes, and 10.7 for Clear Springs.

Id. at 830, lns. 13-19.

Q. Dr. Wylie, did the 2007 orders rescinding curtailment in using the model to examine the effects of the substitute curtailment plans, how were those runs made? Were they made in transient or steady state?

A. The – the conversions and the CREP were made in --- CRPE acres were made – their contribution was made assuming a steady state. The director said that they should be steady state because there were indications that those mitigation plans would – those mitigation efforts would continue on into the future.

So the recharge, however, was done in transient mode because there was no indication that IGWA intended to do almost 30,000 acre feet of recharge year after year.

Id. at 832, lns. 6-19.

Q. In other words, you look at the pattern of mitigation and you determine how much water ultimately will accrue from the reach from those actions over time, not just during the course of a single year, for example?

A. For 2005 and 2006 the analysis were all steady state.

Q. Okay. And your analysis for 2007, was your analysis also at steady state?

A. For the CREP which replaced their voluntary reductions and for the conversion acres, those were steady state.

Q. Okay. And you described that the other day in your testimony; correct?

A. Correct.

Wylie Testimony at 1495, lns. 11-20.

Q. Okay. And certainly the same plans in 2007 wouldn't – as was submitted in 2006, wouldn't reach the – wouldn't meet the 30 CFS requirement for 2007?

A. That's correct.

Id. at 1501, lns. 20-23.

Q. Okay. And then after considering additional mitigation provided by others, you concluded that the shortfall at pages 11 and 12, in paragraphs 27 and 28, would be 7.1 CFS; is that correct?

A. Yes.

Q. Okay. And as the director described in his testimony that would then require curtailment to make up the shortage in the plan; correct?

A. Correct.

Q. And then as the director described to the extent the shortfall wasn't made up, it would be carried over into the next year?

A. That's correct.

Id. at 1502, lns. 8-20.

Q. So then the shortfall remaining after the additional 10,000 acre feet offered by the supplemental plan was 6.6 CFS according to your calculations?

A. Yes.

Q. And that's half a CFS less than the shortfall of 7.1 CFS which you found in and as reported in the previous order; correct?

A. Correct.

Id. at 1505, lns. 18-25.

Q. And this is not an analysis that you performed with respect to any prior mitigation order; is that correct?

A. That's correct.

Q. And this is a transient analysis as opposed to a steady state analysis as we previously discussed?

A. That's right.

* * *

Q. Okay. And again, that represents curtailment over a three months period, what accrues from curtailment over a three month period at a transient basis for one year; right?

A. Correct.

Q. And then what accrues from the 10,000 additional acre feet of recharge over a one year period?

A. They're both over a one year period.

* * *

Q. Now that is an entirely different analysis than the steady state analysis that is intended to reflect the benefits of accruing from mitigation activities during the year, benefits that will accrue over time; correct?

A. That's very different.

Q. And if you – if you took an IGWA mitigation plan and analyzed it that way, it could never meet the mitigation requirement could they? In other words if you?

A. It makes it very difficult yes.

Q. And this analysis that we just discussed is reflected on page 9 paragraphs 13 and 14; isn't that correct? 15 as well.

A. That's correct.

Q. And the conclusion that mitigation measures for Blue Lakes are sufficient is – is not accurate if we're analyzing the mitigation actions at steady state; correct?

A. The conclusion is not accurate if we analyze it at steady state.

Q. If you analyze the mitigation plan at steady state it's still 6.6 CFS short, which is only half a CFS better than the 7.1 CFS shortfall that warranted curtailment.

A. Yes. If we used the steady state analysis it would be – I would wager there would be a larger difference.

Q. Okay. And has there been discussion within the department about the 6.6 CFS shortfall carrying over into the next irrigation season for 2008? That you know, I should say.

A. It's –

Q. I can see you are struggling. Let me ask you a better question. I should if you follow the prior protocol.

A. Yes, and I'm only struggling. The simple answer is yes. And I guess I'm not required to explain. So, yes.

Wylie Testimony at 1506-1510.

As acknowledged by IDWR staff by their testimony at the hearing, it's clear that IGWA's obligation was not met in 2007, for either Blue Lakes or Clear Springs. Whereas the Director's July 5, 2007 orders rescinding the curtailment orders mixed and matched the analysis of mitigation options and the results of curtailment using both steady state and transient analysis, the order did not erase the admitted shortfall in IGWA's plan, and the failure to meet the third year phase-in requirements under the 2005 Orders. As such, the obligations should carry forward and be added to 2008 requirements as recommended by the Hearing Officer. A final accounting of actions taken in 2005, 2006, and 2007 should be resolved and included in a final order to accurately identify the outstanding obligations that need to be added to IGWA's requirements for 2008.

Since the Hearing Officer's *Recommended Order* did not identify those outstanding obligations to be carried forward, the Spring Users take exception to that part of the decision and request the Director to perform those calculations for the final order.

CONCLUSION

For the reasons identified above, the Director should address the issue of material injury to Blue Lakes' 1971 and Clear Springs' 1955 water right in the final order. In addition, the Director should revise the material injury determinations, to the extent that they impose a 10% trim line that reduces curtailment or replacement water obligations of junior water users found to be materially injuring senior water users.

These revised injury determinations will likely affect the existing obligations of junior priority ground water right holders. In addition to this, the implementation of IGWA's replacement water plans from 2005 to 2007 should be accounted for and any remaining

obligations should carry forward for 2008. For the foregoing reasons the *Recommended Order* should be revised accordingly.

Dated this 10th day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2008, I served a true and correct copy of the foregoing **SPRING USERS' JOINT MEMORANDUM REGARDING EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDED ORDER** by delivering it to the following individuals by the method indicated below, addressed as stated.

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