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DEC 08 2009
DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC.,
Petitioner,
vs.
BLUE LAKES TROUT FARM, INC.,
Cross-Petitioner,
vs.
IDAHO GROUND WATER
APPROPRIATORS, INC., NORTH
SNAKE GROUND WATER DISTRICT
and MAGIC VALLEY GROUND WATER
DISTRICT,
Cross-Petitioners,
vs.
IDAHO DAIRYMEN'S ASSOCIATION,
INC.
Cross-Petitioner,
vs.
RANGEN, INC.
Cross-Petitioner,

Filed pursuant to
I.R.C.P. 5(e)(1) on
December 4, 2009
at 4:50 P.M.
John Melanson
District Judge, Pro Tem

Case No. 2008-0000444
ORDER ON PETITIONS FOR
REHEARING

¹ Director David Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

vs.)
)
)
GARY SPACKMAN,¹ in his capacity as)
Director of the Idaho Department of Water)
Resources, and THE IDAHO)
DEPARTMENT OF WATER)
RESOURCES,)
)
Respondents.)
)
)
IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHTS NOS.)
36-04013A, 36-04013B, and 36-07148.)
)
(Clear Springs Delivery Call))
)
)
)
IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHTS NOS.)
36-02356A, 36-07210, and 36-07427.)
)
(Blue Lakes Delivery Call))
)
)

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc.

Daniel K. Steenson, Charles L. Honsinger, S. Bryce Farris, Jon Gould, of Ringert Law, Chartered, Boise, Idaho, attorneys for Blue Lakes Trout Farm, Inc.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for Gary Spackman, in his capacity as Interim Director of the Idaho Department of Water Resources.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

J. Justin May, of May Sudweeks & Browning, LLP, Boise, Idaho, attorney for Rangen, Inc.

I.

PROCEDURAL BACKGROUND AND FACTS

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources (“Director,” “IDWR,” or “Department”) issued in response to two separate delivery calls. This Court issued its *Order on Petition for Judicial Review* in this matter on June 19, 2009 (“June 19, 2009 Order”). On July 10, 2009, Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (collectively “Spring Users”) filed a *Joint Petition for Rehearing*. On July 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively “Ground Water Users”) also filed a *Petition for Rehearing*.

The facts and procedural history of this case are explained in detail in the Court’s June 19, 2009 *Order*. The nature of the case, course of proceedings, and relevant facts are therefore incorporated herein by reference.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held September 29, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, the matter is deemed fully submitted for decision on the next business day, or September 30, 2009.

III.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as

to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

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

Idaho Code § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.² *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in

² Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

Idaho Code Section § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also*, *Cooper v. Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

IV. ISSUES PRESENTED

A. Issues Raised by Spring Users.

The Spring Users raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the evidence and findings in the record establish that Blue Lakes' water right 36-7210 and Clear Springs' water right 36-4013A are injured by junior ground water diversions?
2. Whether the Court properly remanded the case to the Director to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis?
3. Whether Idaho law requires a hearing to be held prior to the regulation of junior priority ground water rights in an organized water district after a determination of material injury?
4. Whether this Court, after holding that the Director abused his discretion, should remand this case to the Director with instructions for timely administration?

B. Issues Raised by Ground Water Users.

The Ground Water Users also raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the Court properly treated the Director's analysis of seasonal variation as a material injury issue, rather than a futile call issue?
2. Whether the Director had sufficient evidence to support a finding of material injury?
3. Whether the Director correctly applied the law of full economic development?
4. Whether the Spring Users' delivery call can preclude development consistent with Swan Falls Agreement and State Water Plan?

V.

ANALYSIS AND DISCUSSION

A. Seasonal Variations, Material Injury, Futile Call and Water Rights 36-7210 (Blue Lakes) and 36-4013A (Clear Springs).

The Spring Users assert that evidence and findings in the record conclusively establish that water right nos. 36-7210 and 36-4013A are materially injured by ground water diversions and that this Court should not remand the case to the Director for application of the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis. Specifically, the Spring Users assert that the Director's material injury analysis is flawed because it takes into account seasonal variations. However, as this Court previously explained, if curtailment occurs, seasonal low flows will still be present and curtailment of juniors will not result in eliminating these seasonal lows. It is undisputed that the spring flows

fluctuate between highs and lows on a seasonal basis and between years from factors other than ground water pumping. R. Vol. 16 at 3707-08. Therefore, as this Court explained, if all ground water pumping by juniors was eliminated, those seasonal variations would still exist. Under these circumstances, it follows that the senior spring water users appropriated their rights subject to seasonal fluctuations which existed prior to the subsequent ground water appropriations by juniors. As former Director Dreher testified, "If you curtailed all ground water on the plain there would be instances during the year when some, not necessarily all, but when some of the full quantity of the springs rights would not be met." TR. at 1376. As such, it becomes futile to curtail the juniors in an attempt to increase seasonal lows in order to fill the quantities decreed.

Much has been made by the parties of this Court's statement in the June 19, 2009 *Order* that a material injury analysis under this particular set of circumstances is akin to application of the futile call doctrine. The Court's intent was not to rule that the two principles are the same, only that they can be analogous and share some of the same characteristics. To the extent they share the same factors, which party should bear the burden of proof? As this Court explained:

Simply put, a determination of material injury requires the Director to determine what portion of a senior's water deficit is caused by naturally occurring seasonal lows as opposed to the portion of the deficit that results from the exercise of junior rights. **Both the material injury analysis under the CMR and the futile call doctrine require the director to exclude any water deficit attributable to such seasonal variations.** Juniors cannot be curtailed to provide water that a senior would not have received anyway due to seasonal variations; nor can juniors be required to provide replacement water for such amounts.

June 19, 2009 *Order*, p. 21-22. The Court used this analogy in order to explain why the application of a material injury analysis is not a re-adjudication of a decreed water right, provided the appropriate burden of proof is applied. As explained by our Supreme Court, the CMR do not shift the burden of proof to make the senior re-prove or re-adjudicate his water right:

Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge in some other constitutionally permissible way, the senior's call.

American Falls Reservoir District No. 2 v. IDWR, 143 Idaho 862, 877-878, 154 P.3d 433, 448-449 (2007). Thus, when the material injury analysis includes what is also fundamentally a determination requisite to a futile call analysis, the junior must bear the burden of proof on that issue, just as the junior would bear that burden in a futile call analysis. Otherwise, the senior is essentially put in a position of re-proving the historical use of the right. In this case, the lack of available historical flow data was improperly construed by the Director against the senior.

The Court has a difficult time reconciling the argument that the concepts of material injury and futile call do not share overlapping characteristics in some circumstances. The concept of material injury takes into account a broad range of circumstances. *See* CMR 042.01. One of the circumstances considered by the Director in this case was that although the rights of the senior spring users and junior ground pumpers are hydraulically connected, ground water pumping by junior right holders was not responsible for all of the seasonal lows, nor was such pumping materially injuring said rights. As a result, the Director found that the senior is not entitled to replacement water or administration of ground water rights to satisfy senior rights affected by seasonal lows. However, this Court views this determination to be similar to the determination made in a futile call. In one instance, as occurred in this case, the burden of proof was placed on the senior making the call to establish the extent of material injury. But, in the context of a traditional futile call analysis, the burden of proof would be on the junior defending against the call. Yet, the inquiry in both cases is essentially the same and both cases originate in the same way – a call for administration by a senior. It would be inconsistent to allocate the burden of proof differently in the two cases. In this Court's view, requiring the senior to re-prove beneficial use at the time of the appropriation is suspiciously close to revisiting the adjudication process.

Accordingly, the case must be remanded in order to permit the Director to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination.

B. The Director Did Not Err in his Application of the Full Economic Development or Public Interest Analysis.

The Ground Water Users ask this Court to remand to the Director to reconsider his application of the policy of full economic development. The Ground Water Users argue that the Director incorrectly based his determination of full economic development on the ESPA model's margin of error; therefore, remand is necessary to require the Director to make specific findings concerning the "broad scope of curtailment."

Reviewing the Director's analysis of full economic development within the context of the proper standard of review, this Court held in its June 19, 2009, *Order* that the Director's determination was reasonable and not an abuse of discretion. Indeed, this Court gave great deference to the Director's determination of "reasonableness" under the Conjunctive Management Rules (CMR). Such a determination of "reasonableness" required the Director to balance the State's policy of full economic development, the exercise of senior priority rights, and the public interest. A determination of full economic development, as contemplated by the CMR and Idaho Code § 42-226, is not an analysis of the "highest and best" use of the water or the "best economic return" from the use of the water. Rather, full economic development denotes expansive utilization of the aquifer, and does not necessarily dictate a preference of a more profitable or popular water use over another. Applying the balancing test, the Director made findings that the Spring Users were employing reasonable diversion practices and that the amount of undeveloped water or "dead storage" in the aquifer was reasonable under the circumstances.

The Director made such determinations based on the evidence presented. Such evidence included current and proposed alternative methods of diversion for the Spring Users, the ESPA model results, and argument from the Ground Water Users that the scope of curtailment under the model violated the policy of full economic development. Further, the Director was presented with evidence that alternative methods (aside from the ground water model) existed to perhaps narrow the scope of curtailment. However, the *results* of such methods were not presented at the hearing.

The Ground Water Users argue that some may interpret the Court's June 19, 2009 *Order* to stand for the proposition that the Director's authority to limit administration by priority is dependant upon the existence of "viable reasonable alternatives." Such an interpretation would be misguided. In this case, the Director was provided with results

from the ESPA model, and while alternative methods existed to narrow the scope of curtailment, neither side presented the results of such methodology. Thus, the Director did not abuse his discretion by utilizing the results of the model when applying the policy of full economic development. This does not mean that in future cases, the Director may *only* limit administration by priority *if* alternative methods are presented. More accurately, the Court's holding signifies that the Director has discretion to consider and weigh the evidence. Because no alternative methods to the ESPA model (perhaps in the form of curtailment based on proximity to the spring complex) were presented to the Director, he could not consider such alternatives. Therefore, the Director did not abuse his discretion by relying upon the model when applying the policy of full economic development.

While the Ground Water Users urge this Court to remand to the Director for a more "independent" analysis of full economic development, the Director previously made that determination based on the evidence and argument presented at the hearing. The Director balanced the reasonable use of the senior Spring Users against the State's policy of full economic development, within his discretion. Again, while there may be dispute over the Director's ultimate conclusion, the Director arrived at his decision based on the evidence presented. No viable alternative methods to the ESPA were presented at the hearing. The Director's determination was reasonable based on the information and argument presented and as such, this Court will not substitute its judgment for that of the Director. Accordingly, based upon the applicable standard of review, the Court cannot conclude that the Director abused his discretion or acted arbitrarily or capriciously in his determination.

C. The Swan Falls Agreement and the State Water Plan Are Not Conclusive of Full Economic Development in Responding to Individual Delivery Calls.

The Ground Water Users request that this Court reconsider its determination that the Swan Falls Agreement and the State Water Plan are not conclusive of full economic development in individual delivery calls. As stated in the Court's June 19, 2009 *Order*, neither the Swan Falls Agreement nor the State Water Plan establish minimum flows for specific sub-reaches or spring complexes. The Swan Falls Agreement and the State

Water Plan establish minimum flows to be met at Murphy Gauge, which is located on the main stem of the Snake River well below Thousand Springs. As discussed in this Court's decision, the Swan Falls Agreement contemplated management of the aquifer on a large scale or macro level. This is illustrated by the possibility that reaches farther upstream (such as those in this case) may be depleted; even while the minimum flows at Murphy are met. The Court has reviewed its decision on this issue and declines to amend its previous conclusion.

D. Because the Director's Orders Provide for a Hearing, the Director Erred by Not Providing a Hearing After Making a Determination of Material Injury.

The Spring Users argue that the Director is not required to hold a hearing before issuing an order of curtailment of junior ground water rights in an organized water district after a determination of material injury is made. In support of this argument, the Spring Users rely on an Idaho Supreme Court case, *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).³ In its June 19, 2009 *Order*, this Court held that because the Director's orders in response to the delivery calls provided for a hearing should one be requested, the Director erred by not holding a hearing when the Ground Water Users requested one. The Court also held that such a hearing would be consistent with the requirements of due process. Further, as the Court mentioned, holding such a hearing is practical, in that it can be held in conjunction with the hearing conducted on the mitigation plan, thereby eliminating delay and further injury to senior users.

The Spring Users assert and this Court agrees that I.C. § 42-607 does not expressly require a hearing prior to curtailment of junior water users in an organized water district. The CMR also set forth different procedures when a call is made against water users in an organized water district (CMR 040); against water users in a ground water management area (CMR 041); and against water users not in an organized water district, ground water management area or a water district where the regulation of ground water has not been included as a function of the water district (CMR 030). For responses to delivery calls not in an organized water district, ground water management area or a

³ The facts in *Nettleton* are distinguishable from the facts in this case. *Nettleton* addressed unadjudicated beneficial use water rights in an organized water district, and was issued prior to the adoption of the Conjunctive Management Rules. It is ambiguous as to its broader application.

water district where the regulation of ground water has not been included as a function of the water district, CMR 030 requires the filing of a petition for a contested case and service upon all known respondents. CMR 030.02. For responses to delivery calls in a ground water management area CMR 041 requires the filing of a petition and a “fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area.” CMR 041.01. b. However, in organized water districts no such similar procedures are required. Rather, CMR 040 provides for regulation through the water master upon a finding that material injury is occurring. CMR 040.01.a. and b.

However, as explained in the June 19, 2009 *Order*, the CMR require a hearing after junior water users submit a mitigation plan and prior to the approval of such a plan. However, neither I.C. § 42-607 nor the CMR preclude the Director from providing for a hearing after the material injury determination and prior to curtailment. In this case, the Director issued two orders in response to the delivery calls initiated by Clear Springs and Blue Lakes. Both sides took issue with at least a portion of the Director’s material injury determination. Each order included language that explicitly provided for a hearing, which was *consistent* with the requirements of due process because it allowed each side the opportunity to be heard. To the extent that the Court’s the June 19, 2009 *Order* can be read to hold that constitutional due process *requires* that the Director hold a hearing after the material injury determination is made, that portion of the opinion is withdrawn.

Therefore, this Court affirms its earlier decision that the Director erred by failing to hold a hearing as provided in his orders.

VI. CONCLUSION

The Court has reviewed its June 19, 2009 *Order*, and concludes as follows:

1. The case is **remanded** so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination as explained herein. Although the CMR do not specify timing for

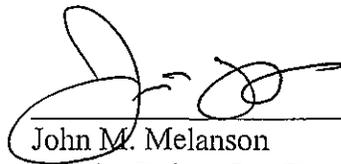
the filing of mitigation plans, in order to avoid prejudice to either side, it is imperative that any mitigation plan submitted in response to a material injury determination be approved (after a hearing, in accordance with the CMR and this Court's decisions) prior to allowing juniors subject to administration to commence water use.

2. While the Court has ruled that the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing and failing to order curtailment after finding the mitigation plans inadequate, there is no practical remedy to cure those errors at this point in these proceedings. The issues presented have been heard by two different Directors, a Hearing Officer, and finally, this Court.

3. In all other respects, the decision of the Director is **affirmed**.

IT IS SO ORDERED.

Dated: Dec. 4, 2009



John M. Melanson
District Judge, *Pro Tem*

NOTICE OF ORDERS

I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 4th day of December, the Court filed this foregoing instrument pursuant to I.R.C.P. 5(e)(1) and on the 7th day of December, 2009, pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petitions for Rehearing to the parties listed below via US Mail postage prepaid:

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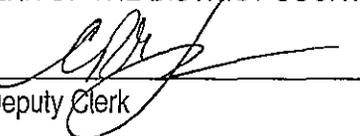
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CLERK OF THE DISTRICT COURT

BY, 

Deputy Clerk