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DEPARTMENT OF
WATER RESOURCES

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**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.,)

Case No. 2008-0000444

Petitioner,)

vs.)

BLUE LAKES TROUT FARM, INC.,)

**MEMORANDUM IN SUPPORT
OF BLUE LAKES TROUT
FARM INC.'S MOTION TO
ENFORCE ORDERS**

Cross-Petitioner,)

vs.)

IDAHO GROUND WATER)
APPROPRIATORS, INC., NORTH SNAKE)
GROUNDS WATER DISTRICT and MAGIC)
VALLEY GROUND WATER DISTRICT,)

Cross-Petitioner,)

vs.)

IDAHO DAIRYMEN'S ASSOCIATION,)
INC.,)

Cross-Petitioner,)

COPY

vs.)
)
 RANGEN, INC.,)
)
 Cross-Petitioner,)
)
 vs.)
)
 DAVID R. TUTHILL, JR., in his capacity as)
 Director of the Idaho Department of Water)
 Resources, and THE DEPARTMENT OF)
 WATER RESOURCES,)
)
 Respondents.)
)
 IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-0413A, 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))
)

COMES NOW, Cross-Petitioner Blue Lakes Trout Farm, Inc., (“Blue Lakes”) and files this *Memorandum in Support of Motion to Enforce Order*.

INTRODUCTION

The Director has failed and refused to act in response to this Court’s remand order, and has precluded Blue Lakes from presenting evidence of updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes’ water rights, based on the assertion that the appeal of this Court’s *Orders* on judicial review “divests” the Director of jurisdiction to consider or act on these issues. The Director has also

asserted that Blue Lakes' is precluded by *res judicata* from presenting evidence related to the trimline and spring allocation determinations.

Neither of these assertions has any merit. The pendency of the appeal does not divest the Director's jurisdiction or suspend his obligation to administer water rights in accordance with Idaho law and this Court's *Orders*. It is therefore appropriate and necessary for this Court to issue an order and/or writ of mandate that requires the Director to comply with this Court's *Orders* promptly and completely. Blue Lakes requests that the Court issue an order and/or writ of mandate requiring the Director to comply with this Court's remand order to determine injury to Blue Lakes' water right no. 36-7210 as required by the order. Blue Lakes also requests that the Court issue an order and/or writ of mandate to make it clear that the Director has a present and ongoing duty to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes' water rights, and to allow Blue Lakes to present such evidence in any proceeding before IDWR related to Blue Lakes' water delivery call.

BACKGROUND

On June 19, 2009 this Court entered its *Order on Petition for Judicial Review*. Blue Lakes, Clear Springs Foods, Inc. ("Clear Springs") and the Idaho Ground Water Appropriators, Inc. et al ("IGWA") each filed petitions for rehearing.

On December 4, 2009, this Court entered its *Order on Petitions For Rehearing* ("*Rehearing Order*") in which it re-affirmed the Director's *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("*Final Order*") in most respects, and reiterated its prior decision to remand the case to the Director for a determination of material injury to Blue Lakes'

1971 priority water right no. 36-7210 and Clear Springs' 1955 priority water right no. 36-4013A "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." *Rehearing Order* at 8. The Court held that lack of data concerning seasonal flows at the times of appropriation does not deprive the Spring Users' decrees of their presumptive weight. *Order on Petition for Judicial Review* at 22-24; *Rehearing Order* at 7-8. In other words, the lack of data cannot be construed against the Spring Users. The Court held that the burden is on junior ground water users to show that their diversions do not cause material injury to the Spring Users' rights. In this conclusion, the District Court stated that "it is imperative that any mitigation plan submitted in response to a material injury determination be approved . . . prior to allowing juniors subject to administration to commence water use." *Rehearing Order* at 13.

Meanwhile, on July 6, 2009, IGWA filed with the Idaho Department of Water Resources ("IDWR") the *Ground Water Users' Joint Mitigation Plan for 2009 (Blue Lakes)*. *Stenson Aff.*, Ex. A-1. Blue Lakes filed a protest because, among other things, the Mitigation Plan did not adequately mitigate for the injury to Blue Lakes' water rights. *Id.*, Ex. A-2. Blue Lakes requested and was granted permission to conduct discovery related to the extent of injury to its water rights and corresponding mitigation obligation. *Id.*, Exs. A-3 and A-4. On November 24, 2009 the Director held a status conference to schedule a hearing.

On December 4, 2009, the same day this Court issued its *Rehearing Order*, IGWA filed a *Motion to Limit Scope of Hearing and Proposed Schedule* ("*Motion to Limit Scope*"), asking the Director to limit the hearing on IGWA's mitigation plan to preclude consideration of issues relating to "the mitigation owed, the amount of material injury found, etc. . . . until the appeal

involving those issues has been finalized.” *Id.*, Ex. A-5. In its December 16, 2009 *Brief in Opposition to IGWA’s Motion to Limit Scope*, Blue Lakes argued that the pendency of the appeal does not preclude Blue Lakes from presenting evidence concerning the technical basis for the Director’s injury and mitigation determinations, and that the injury to Blue Lakes’ water right no. 36-7210 must be determined in accordance with this Court’s remand order. *Id.*, Ex. A-6.

On December 22, 2009, the Director issued an *Order Granting Motion to Limit Scope of Hearing (“Order Limiting Scope”)*, in which he limited the scope of the hearing to the narrow question of whether the mitigation plans proposed by IGWA and others would meet the mitigation obligations that were previously established by the Director. *Id.*, Ex. A-8. The Director precluded Blue Lakes from presenting any evidence, data or analysis related to the technical basis of the Director’s injury and mitigation determinations. *Id.* The Director refused to take action in response to this Court’s remand, asserting that he does not have jurisdiction to consider any issues addressed by this Court because this Court’s Orders did not provide that the case was temporarily remanded to the Director pursuant to I.A.R. 13.3:

According to Idaho Appellate Rule 13.3, a court sitting in its appellate capacity may, upon ‘its own motion, or on motion of any party showing good cause, order a case to be remanded to the district court or to the administrative agency to take further action as designated in the order of remand.’ I.A.R. 13.3(a). During remand, ‘the appeal shall remain pending in the “Supreme Court, but the district court or administrative agency shall have jurisdiction to take all actions necessary to fulfill the requirements of the order of remand.’ Notably, the court must state that remand is in accordance with I.A.R. 13.3 ‘before the issuance of an opinion . . . I.A.R. 13.3(a).

Here, neither opinion issued by Judge Melanson was in accordance with I.A.R. 13.3; accordingly, the Director is without jurisdiction to consider the arguments raised by Blue Lakes and Clear Springs. *See Syth v. Parke*, 121 Idaho 162, 163 823 P.2d 766, 767 (1991). Judge Melanson’s December 4, 2009 *Order on Petitions for Rehearing* is and appealable order and jurisdiction will not be reinvested with the Director until either the time for appeal, has expired with no

party filing for appeal, or the matter is concluded by the Supreme Court.

Id. at 3.

On January 15, 2010, IGWA filed a *Notice of Appeal* from this Court's *Order on Petition for Rehearing*. On February 5, 2009, Blue Lakes and Clear Springs filed a cross-appeal. None of the petitions contested this Court's remand order, or this Court's determinations that the Director's flawed timeline and spring allocation determinations were within his discretion, but are subject to reconsideration when better methods are developed.

On February 9, 2010, Blue Lakes filed a *Petition For Reconsideration* of the Director's *Order Limiting Scope of Hearing*. Blue Lakes argued that the Director is required to comply with this Court's remand order, and that the Director's refusal to consider updated or improved analysis and/or methods for determining the impact of junior ground water diversions on Blue Lakes' water rights is contrary to the Director's *Final Order*, as affirmed by this Court in its *Order on Petition for Judicial Review*.

Blue Lakes recognized that IGWA's mitigation plan would provide Blue Lakes with the quantity of water required by the Director's previous injury and mitigation determinations. A hearing on the narrow issue set for hearing by the Director's *Order Limiting Scope* was thus unnecessary. Accordingly, Blue Lakes filed a partial withdrawal of its protest as to this narrow issue of whether IGWA's mitigation plan would provide the quantity of water required by the Director. *Id.*, Ex. A-10. Blue Lakes expressly maintained its protest to IGWA's mitigation plan with respect to all other issues that it had raised and that were precluded by the Director's *Order Limiting Scope*, including the issue of injury to Blue Lakes' water right no. 36-7210 that this Court remanded to the Director, as well as technical issues related to the Director's injury and

mitigation determinations. *Id.*, at 2.

On April 2, 2010, the Director summarily denied Blue Lakes' *Petition for Reconsideration*, stating only that he found Blue Lakes' arguments "unpersuasive." *Id.*, Ex. A-11.

ARGUMENT

1. This Court Has the Authority to Enforce its Orders in This Case

Idaho Appellate Rule 13(b) provides that "the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency of an appeal: . . . (13) Take any action or enter any order required for the enforcement of any judgment, order or decree." A district court's inherent power to enforce its judgments is reserved "notwithstanding a notice of appeal." *Madsen v. State*, 114 Idaho 182, 185, fn. 2, 755 P.2d 429, 285 fn. 2; *see Fuestel v. Stevenson*, 119 Idaho 698, 700, 809 P.2d 1177 (App. 1991). A district court's reserved powers to enforce its orders include, for example, the use of contempt proceedings. *Madsen, supra*.

2. There is No Jurisdictional Impediment to the Director's Duty to Administer Water Rights

The Director's reliance on I.A.R. 13.3 to excuse himself from complying with this Court's Orders is completely erroneous. I.A.R. 13.3 does not apply to this case because the District Court's remand order is not a temporary remand, i.e. a remand during this Court's review prior to the issuance an opinion. The remand order is instead a component of this Court's opinion, which is a final order. Since this Court is no longer "sitting in its appellate capacity," compliance with I.A.R. 13.3 is not required, as suggested by the Director.

The Director incorrectly states that, the "*Order on Petitions for Rehearing* is an appealable order and jurisdiction will not be reinvested with the Director until "the matter is concluded by the

Supreme Court.” *Order Limiting Scope* at 3. (No party filed a notice of appeal on the issues Blue Lakes raised before the Director.) The Director’s statutory jurisdiction and obligation to administer junior ground water rights in response to Blue Lakes’ water delivery call was not divested by the petitions for judicial review or the pendency of the appeal. Indeed, administration has continued throughout the pendency of the appeal.

The Director’s notion that his jurisdiction must be “reinvested” before he has authority to act in accordance with this Court’s remand and utilize best available science appears to be inappropriately transposed from the use of the term “reinvest” in *Syth v. Parke*, 121 Idaho 162, 163, 823 P.2d 706, 767 (1991), whereby the Idaho Supreme Court explained that the Supreme Court did not “reinvest the trial court with jurisdiction to rule upon its own *sua sponte* motion to reconsider its prior order granting a new trial.” While a district court retains jurisdiction to enforce its orders, its jurisdiction to act with respect to a case it has decided pending appeal to a higher court is generally divested, absent further instruction from the higher court. A district court’s episodic jurisdiction over a case should not be confused with the Director’s ongoing, statutory duty to administer water rights.

3. The Director is Required to Comply with the District Court’s Remand Order “Promptly and Completely”

This Court’s *Rehearing Order* remanded the case to IDWR to “apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations” as part of a determination of material injury to Blue Lakes’ 1971 priority water right no. 36-07210. *Order on Petitions for Rehearing*, at 12-13. The remand order is not temporary, ambiguous or conditional. The Director is required to comply with this Court’s order promptly and completely. *Bayes v. State*, 117 Idaho at 99-101, 785 P.2d at 663-664 (Ct. App. 1989).

The Director has acknowledged his duty to comply with district court orders pending appeal on at least two prior occasions.

In *Musser v. Higginsion*, 125 Idaho 392, 871 P.2d 809, the Director and IDWR appealed the SRBA Court's *Writ of Mandate*, and filed motions to stay the writ first with the SRBA Court and then with Idaho Supreme Court to avoid having to "immediately promulgate temporary rules for distribution of water between the Snake Plain Aquifer and the Snake River" as required by the writ. *Stenson Aff.*, Exs. C-1, C-2 and C-5. The SRBA Court and the Idaho Supreme Court denied the Director's motions for stay. *Id.*, Exs. C-4 and C-9.

In their motions, the Director and IDWR explained:

IDWR must comply with the Writ of Mandate during the pendency of the appeal, even though IDWR believes that it was wrongly entered. *Bayes v. State*, 117 Idaho 96, 99-101 (Ct. Ap. 1989). A notice of Appeal was filed with the district court of August 11, 1993. A copy of the Notice of Appeal is attached hereto as Exhibit C. This leaves IDWR two options: IDWR must immediately promulgate temporary rules for distribution of water between the Snake Plain Aquifer and the Snake River, or, as IDWR has done, move this Court for a stay of the district court's Writ pending the outcome of this appeal, or until IDWR promulgates permanent rules, whichever is earlier.

Id., Ex. C-5 at 5.

The Director and IDWR anticipated that they would be in contempt without the requested stay: "To avoid the possibility of a finding of contempt by the court against IDWR, IDWR requests that the court stay its Writ of Mandate pending the outcome of IDWR's appeal. *Id.*, Ex. C-2 at 4.

In recognizing that he and "IDWR must comply with the Writ of Mandate during the pendency of the appeal," the Director cited *Bayes v. State, supra*, wherein the Idaho Court of Appeals quoted at length from its earlier decision in *In re Contempt of Reeves*, 112 Idaho 574, 733 P.2d 795 (Ct.App.1987):

If a party were free to disobey any order with which he or she disagreed, the entire judicial process would break down. [***10] As the United States Supreme Court explained in *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975):

We begin with the basic proposition that **all orders and judgments of courts must be complied with promptly**. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but **absent a stay, to comply with the order pending appeal**. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect **Such orders must be complied with promptly and completely**, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation. This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. [Citations omitted.] But, **once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders** Remedies for judicial error may be cumbersome but the inquiry flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice.

419 U.S. at 458-60, 95 S.Ct. at 591-92. See also *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *Howat v. Kansas*, 258 U.S. 181, 42 S.Ct. 277, 66 L.Ed. 550 (1922). This rule applies even where the order later is found to have infringed upon constitutional rights or to be based upon an unconstitutional statute. [Citations omitted.] Only in the case where an order was "transparently invalid or had only a frivolous pretense to validity" will a criminal contempt finding be reversed. [Citations omitted.] We believe that this is a heavy burden to meet, and that an individual who disobeys an order of the court acts at his peril. Unless he can convince the appellate court that the order was so clearly invalid that no reasonable man could believe otherwise, a criminal contempt order will be upheld. We further consider it incumbent upon the individual to bring the error to the attention of the court before undertaking to disobey the order. [Citations omitted.]

Bayes v. State, supra (emphasis added).

The Director more recently acknowledged his duty to promptly comply with this Court's summary judgment order finding IDWR's Conjunctive Management Rules ("CMRs") unconstitutional pending appeal in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862; 154 P.3d 433 (2007) . In that case, the Director and IDWR filed a *Notice of Appeal* on July 11, 2006, and on July 20, 2006, they filed a *Motion For Stay* to allow the Director to continue to administer junior ground water rights under the CMRs. *Steenerson Aff.*, Exs. B-1, B-2. Similar to his arguments in *Musser*, the Director argued that, without the CMRs, he lacked legal authority to administer junior ground water rights, that such administration would be too difficult and would result in "large scale curtailment ESPA ground water right holders," which the Director sought to avoid. *Id.*, Ex. B-3 at 10-19. After this Court denied the Director's Motion for Stay (Exs. B-4, B-5), on August 17, 2006 the Director and IDWR filed a *Motion for Stay Pending Appeal* with the Idaho Supreme Court and presented the same arguments. *Id.*, Exs. B-6, B-7. The Idaho Supreme Court denied the Director's motion for stay. *Id.*, Ex. B-8.

The same legal principle explained in *Bayes v. State* and applicable in *Musser* and *AFRD No. 2* applies in this case. The Director is required to comply with the District Court's remand order promptly and completely. Hydraulically connected junior ground water right holders have the burden to show that their diversions do not cause material injury to the Blue Lakes' 1971 water right no. 26-7210. If they fail to meet this burden, they must be curtailed or receive approval for a plan that mitigates the injury they cause to the Blue Lakes' 1971 water right. A mitigation plan submitted in response to a material injury determination must be approved prior to allowing juniors subject to administration to commence water use. *Order on Petitions for Rehearing* at 13.

There is no good faith argument that I.A.R. 13.3 applies to this Court's *Orders* in this case to "divest" the director of jurisdiction pending appeal in this case. The Director did not assert in either *Musser* or *AFRD No. 2* that the orders issued by the SRBA Court or this Court had to comply with I.A.R. 13.3 in order for the Director to be "reinvested with jurisdiction" and be required to comply with those orders pending appeal. To the contrary, after appealing those same decisions, the Director recognized his duty to comply and quickly sought to stay them. Given the Director's recognition of this duty in these two prior cases, it appears that the Director is knowingly defying this Court's remand order, rather than seeking a stay, which he has not been granted in the past. The Director's maneuver has improperly shifted the burden from the Director, to show why he should not be required to comply with this Court's orders, to Blue Lakes, forcing it to seek an order of this Court to require the Director to comply. Blue Lakes' *Petition for Reconsideration* of the Director's *Order Limiting Scope* provided the Director ample opportunity to voluntarily comply. The Director's summary denial of that motion, which provided no analysis, reasoning, or response to the facts, authorities and argument presented by Blue Lakes, demonstrates the necessity for the issuance of an order mandating prompt and complete compliance.

4. There is No Basis for the Director to Refuse to Consider New, Updated or Improved Analysis and/or Methods for Determining the Impact of Junior Ground Water Diversions on Blue Lakes Water Rights

In his response to Blue Lakes' water delivery call, the former Director used the Enhanced Snake Plain Aquifer Model ("ESPAM") for the first time to administer hydraulically connected ground and surface water rights. The Director's use of a computer model for this purpose involves numerous technical issues that are the subject of ongoing analysis and discussion among

ESPA hydrologic and modeling experts. Utilizing the scientific method, the experts test and refine or reject hypotheses, methods and conclusions. Through this process, the best available scientific understanding of the relationship between the ESPA and hydraulically-connected spring source evolves. To be based on the best available information, the Director's administrative actions must tack and evolve as well.

Two of the technical issues that are the subject of ongoing analysis and discussion are how to determine and account for model uncertainty in the administration of junior ground water rights causing injury, and how to determine the extent to which junior ground water withdrawals deplete individual spring flows. The resolution of these issues significantly affects the Director's injury and mitigation determinations. It is these issues that Blue Lakes seeks to address with new, updated and improved analysis and methods.

The Director states that he "would ordinarily agree that . . . he should utilize the best available information." *Order Limiting Scope* at 3. He further states, however, that he is prohibited from "considering the information proffered by Blue Lakes," by "at least two legal principles." Contrary to this statement, there are no overriding principles that prevent the Director from meeting his undisputed duty to utilize the best available information in administering water rights.

a. The Pendency of the Appeal Does Not Suspend the Director's Duty to Consider and Utilize the Best Available Information in Administering Water Rights

The first legal principle described by the Director is "jurisdiction." As previously discussed, however, the pendency of the appeal of the Director's 2005 Order on Blue Lakes' water delivery call does not divest the Director of jurisdiction to administer water rights in response to

Blue Lakes' water delivery call. Nor does the appeal affect the Director's obligation to utilize the best available information when administering water rights. This Court found that, given the information available at the time, the Director did not abuse his discretion in making his model uncertainty, trimline, and spring apportionment decisions. This Court did not, however, sanctify those decisions. Clearly, if the Director had the discretion to make those decisions, he has the discretion to modify or abandon them altogether as and when necessary for his administrative decisions and actions to comport with contemporary information, analysis and understandings.

In fact, the Director has a duty to utilize the best available science to determine the impact of junior ESPA ground water diversions on Blue Lakes' senior water rights, and adjust his decisions and actions accordingly. I.C. § 42-607; CMR 42.01.c; *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 878-879, 154 P.3d 433, 449-450 (2007). No party has ever contested this proposition that the Director is required to utilize the best available information in response to the Blue Lakes' water delivery call. The Director adopted and the District Court affirmed the Hearing Officer's finding that: "Continuing efforts should be made to improve the accuracy of all scientific conclusions." "If that produces more reliable results, those results should be used in the future." *Responses to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement ("Reconsideration Order")* at 7-8. The District Court also found that when better methods are developed to determine the impact of ground water diversions on spring flows and to deal with model uncertainty in administration, those better methods should be used. *Order on Petition for Judicial Review* at 25-29.

In an order issued just last week on April 7, 2010, in proceedings related to the water delivery calls of the Surface Water Coalition, the Director acknowledged that consideration and

use of “new analytical methods or modeling concepts” is a component of his “ongoing duty to administer the State’s Water Resources”:

Recognizing his ongoing duty to administer the State’s water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate this methodology. As the process of predicting and evaluating material injury moves forward, and more data is developed, the methodology will be subject to adjustment and refinement.

Stenson Aff., Ex. D, at 30.

Accordingly, the pendency of the appeal cannot possibly suspend the Director’s duty to utilize the best available information and, to that end, to consider the information Blue Lakes seeks to present. Just as the Director is required to comply with the District Court’s remand order (*see supra* at 4-6), the Director is also required to comply with the direction of the Hearing Officer (which the Director adopted) and the District Court to utilize the best available information.

b. Res Judicata Does Not Apply

Res Judicata is the second legal principle the Director believes prohibits him “from considering the information proffered by Blue Lakes.” *Order Limiting Scope* at 3. The inapplicability of *res judicata* to preclude consideration of the information Blue Lakes seeks to present is clear from the language of the aforementioned administrative and judicial orders. They each expressly provide for the consideration and use of improved analysis and methods to determine the impact of junior ground water withdrawals on Blue Lakes’ water rights. The orders specifically reference the Director’s determinations of model uncertainty, trimline, and spring apportionment. Accordingly, *res judicata* cannot possibly apply to preclude Blue Lakes from presenting the very information the orders require to be considered.

The judicial objective of finality expressed by the legal principle *res judicata* does not fit well in these early stages of the interface between evolving scientific understanding and administrative action. This has been recognized in the orders issued by the Hearing Officer, the Director and the District Court, and acknowledged by the parties involved in these proceedings. The Director's *Order Limiting Scope* stands in stark contrast to the previously uncontroverted recognition of these circumstances.

When traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958). The doctrine of *res judicata* is not applicable when new information is available, its application would produce a result that is inconsistent with the prior adjudication, or its application would produce a result contrary to policy. See *Erickson v. Amoth*, 105 Idaho 798, 800-801 (1983), *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845 (2003). As discussed, the Director's application of *res judicata* to prohibit him from considering the best available information is clearly inconsistent with the prior adjudication. It also produces a result that is contrary to the policy and duty of the director to receive, consider and utilize such information.

The Director's *Order Limiting Scope* states that Blue Lakes has not shown that it will present new information that was not available at the time of the 2007 hearing on the Director's 2005 Orders on the Blue Lakes and Clear Springs water delivery calls. The following description is offered in response to explain what Blue Lakes intends to present.

At the time of the 2007 hearing on the Director's 2005 Orders on the Blue Lakes and Clear Springs water delivery calls, the prevailing view was that the model could only be used to predict the impact of junior ground water diversions on reaches of the Snake River to which it had been

calibrated, and that it could not be used directly to reliably determine the impact of ground water withdrawals to individual springs. Due to the perceived “reach only” limitation of the model, the District Court found that the Director did not abuse his discretion to: (1) use the model to predict the impact of junior ground water diversions on the Devils Washbowl to Buhl reach and base administration on that prediction; (2) assign a 10% +/- uncertainty to the model’s outputs, based on stream gage error; (3) based on this uncertainty estimate, apply a 10% “trimline” which excludes from administration a substantial number of junior wells that are shown by the ESPA model to deplete Blue Lakes’ spring source, and (4) prorate the impact of junior ground water diversions on Blue Lakes’ spring source (20%, 10 cfs) to define the juniors’ mitigation obligation to Blue Lakes.

The Hearing Officer, the Director, the District Court, and IDWR’s ESPA model expert Dr. Allen Wylie have all recognized the shortcomings of Director’s model uncertainty, trimline or spring percentage determinations, and the need for further analysis. *See Steenson Aff.*, Ex. A-6 at 6-8.

After the 2007 hearing, Blue Lakes’ consultant obtained previously unavailable information from IDWR and performed additional analysis to discover that, because the model has been calibrated to the Blue Lakes’ spring source, it can be used to show the impact of ground water diversions on Blue Lakes’ springs. This method produces more accurate and reliable results than the “reach only” approach with the Director’s “trimline” and “spring percentage” “post-modeling administrative adjustments.” *Steenson Aff.*, Ex. A-9 at 11. This is in part because it eliminates the impact of error associated with stream gage measurements. Blue Lakes is prepared to present this method and its results to the Director.

Also subsequent to the 2007 hearing, several experts authored and submitted a “White Paper” to advise the Director and the ESPAM Committee that the trimline represents a scientifically indefensible application of model uncertainty. *Id.*, Ex. A-9, Attachment B. During his recent deposition testimony, Dr. Wylie agreed with this conclusion of the White Paper. *Id.*, Ex. A-7, (Ex. C at 101-108). Based upon the analysis of the White Paper, Blue Lakes is also prepared to present a method of applying model uncertainty in the administration of junior ground water rights that is more scientifically defensible than the “trimline.”

5. The Director’s Order Limiting Scope Violates Blue Lakes’ Right to Due Process

The Constitution of the United States provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14, §1; Const. Art. 1, §13. Procedural due process is a protection against the arbitrary deprivation of one of these rights. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It protects the minimum guarantees of notice and a hearing where deprivation of a property interest may occur. *Boise Tower Assocs., LLC v. Hogland*, 215 P.3d 494, 500 (2009). Because a water right is a property right, procedural due process is applicable when a party may be deprived of its water right.

Blue Lakes’ water rights have been and continue to be injured as a result of diversions by hydraulically connected junior ground water users. Due in part to the Director’s flawed model uncertainty, trimline, and spring apportionment determinations, the Director has substantially understated the depletive effect of junior ground water diversions on Blue Lakes’ water rights, and is allowing large numbers of junior ground water rights to continue to cause injury to Blue Lakes water rights without providing adequate mitigation. The Director’s use of the flawed injury

determination in evaluating the adequacy of a mitigation plan deprives Blue Lakes of the full benefit of its water rights. The Director's refusal to allow Blue Lakes to present better analysis and methods to determine the impact of junior ground water diversions on Blue Lakes' water rights deprives Blue Lakes of its right to procedural due process prior to continued deprivation of Blue Lakes' water rights.

CONCLUSION

For the foregoing reasons, it is appropriate and necessary for this Court to issue an order requiring the Director to comply promptly and completely with this Court's prior Orders in this case. The Director has an immediate duty to determine injury to Blue Lakes' water right no. 36-7210 in accordance with this court's remand order. Blue Lakes also requests that the Court issue an order and/or writ of mandate to make it clear that the Director has a present and ongoing duty to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes' water rights, and to allow Blue Lakes to present such evidence in any proceeding before IDWR related to Blue Lakes' water delivery call.

Dated this 12th day of April, 2010.



Daniel V. Steenson

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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