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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.	)	
	)	<b>REPLY MEMORANDUM IN</b>
BLUE LAKES TROUT FARM, INC.,	)	<b>SUPPORT OF BLUE LAKES</b>
	)	<b>TROUT FARM INC.'S MOTION</b>
Cross-Petitioner,	)	<b>TO ENFORCE REMAND ORDER</b>
	)	
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,	)	
	)	

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) )  
 )

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

**ARGUMENT**

**A. The Director is Required to Comply With the Court’s Remand Order Promptly and Completely**

The Director’s *Response* to Blue Lakes’ *Motion to Enforce Orders* acknowledges that the Court remanded the case to the Director with specific instruction to determine the injury caused by junior ground water rights to Blue Lakes’ 1971 priority water right no. 36-7210. The Director has not attempted to argue that the Court’s remand order is ineffective, ambiguous or conditional. The

Director has not shown that there is any impediment to his jurisdiction, authority or ability to comply with the Court's remand order. The Director has presented no valid excuse for his failure to comply with the Court's order.

**B. A "Request to Re-Open" is Not a Condition Precedent to Compliance With This Court's Orders**

The Director attempts to excuse his inaction by suggesting that a Blue Lakes' "request to re-open Blue Lakes CM Rule 42 delivery call for a determination of material injury to water right no. 36-7210" is a condition precedent to the Director's compliance with the Court's remand order. Presumably, by interposing this additional "request to re-open" procedure, the Director would impose on Blue Lakes an additional burden to support the request, and would assume discretion to grant or deny it. The Director cites no authority to impose this newly fabricated procedure. The Court's remand order instructs and requires the Director to act. It is not conditioned upon any request, petition, or motion from any party. As the Director has acknowledged in the *Musser* and *AFRD #2* cases, absent a stay, he has a duty to comply promptly and completely with the Court's Orders.

**C. The Pendency of the Appeal is No Excuse**

The Director has not shown that the pendency of the appeal alters his obligation to comply with this Court's remand order, his obligation to administer junior ground water rights causing injury to Blue Lakes's senior rights, or his obligation to consider best available science in his administrative determinations, including his injury determinations. The Director's requests for stays pending the appeals in the *Musser* and *AFRD #2* cases demonstrate that the Director knows that he has jurisdiction and the obligation to comply promptly and completely with this Court's Orders.

The Director argues that he should be allowed to continue to "wait and see" what the Supreme Court decides before he complies with this Court's remand order or considers new data, analysis or

methods for determining the impact of junior ground water diversions on Blue Lakes' senior water rights, because the Supreme Court could overturn this Court's rulings, and "change the landscape" for administration. If this were a valid argument, it would have excused any administration of junior ground water rights beginning in 2005 when Blue Lakes and other parties filed their initial administrative challenges to the Director's 2005 Orders. Five years would have passed with no action to protect Blue Lakes' senior water rights.

The possibility that an appellate court will reverse a lower tribunal's decision does not excuse compliance with the agency or court order that is in effect while on appeal. Without a stay, the Director is required to comply promptly and completely with this Court's Orders. *See Blue Lakes' Mem. in Support*, at 8-12. Ironically, the Director cites *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) for the proposition that Blue Lakes will be bound by "law of the case" when the Supreme Court issues its decision. This Court's Orders establish "law of the case" which binds the Director. This Court's Orders require the Director to determine injury to Blue Lakes' water rights no. 36-7210, and to consider the best available science in evaluating the impact of junior ground water diversions, as and when it is developed, becomes available or is presented by any party.

**D. Injury is an Issue When the Director Considers a Mitigation Plan**

The Director suggests that there are separate and distinct "CMR 42" injury and "CMR 43" mitigation proceedings, such that, once the Director has determined injury in a "CMR 42 proceeding" injury cannot be considered in the Director's consideration of a mitigation plan in a "CMR 43 proceeding." In this case, there have been no separate and distinct CMR 42 and CMR 43 proceedings. The Director responded to Blue Lakes' water delivery call by issuing an order in 2005 in which he determined injury, and proscribed several mitigation alternatives, including staged

mitigation over a five year period. The ground water districts submitted mitigation plans for 2005, 2006 and 2007 before the 2007 hearing on the 2005 Order. The Director's injury and mitigation determinations, and the sufficiency of the mitigation plans were all at issue in the 2007 hearing, and addressed by the Director's Final Order, which was the subject of the parties' petitions for judicial review to this Court.

The Director's attempt to remove injury from consideration when reviewing a mitigation plan is contrary CMR 43, which provides:

**03. Factors to Be Considered.** Factors that may be considered by the Director *in determining whether a proposed mitigation plan will prevent injury to senior rights include*, but are not limited to, the following: . . . **b. Whether the mitigation plan will . . . offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source.**

(Emphasis added.)

**E. Res Judicata Does Not Preclude Blue Lakes From Presenting Updated, Improved and/or New Data, Analysis and Methods for Determining the Impact of Junior Ground Water Diversions on Blue Lakes' Water Rights**

The Director has acknowledged that he has a continuing duty to consider and administer water rights in accordance with the best available information and methods to evaluate the impact of junior ground water diversions on Blue Lakes' senior water rights. The Director does not dispute that this Court's *Order on Petition for Judicial Review*, the Director's *Final Order*, the Hearing Officer's findings and conclusions, as well as IDWR staff all acknowledge the need for continued analysis of injury in light of the continuing evaluation and development of the ESPAM model and the flaws in the Director's "post-modeling" administrative determinations of model uncertainty, trim line, and spring allocation. Under these circumstances, Blue Lakes cannot be precluded 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. Blue Lakes cannot be precluded from showing that there is a better way.

As previously explained by Blue Lakes, the Director's assertion that *res judicata* precludes Blue Lakes from presenting such evidence is contrary to the administrative and judicial findings and orders in this case, and to public policy. *Blue Lakes' Mem. in Support*, at 15-18. The Director argues that new analysis or methods are precluded if they utilize data that was available at the time of the 2007 hearing, because the analysis or methods "could have been" presented. As previously discussed, new insight, analysis and methods should not be precluded just because they utilize previously available data. This case represents the first instance in which the Director has utilized the ESPAM model to administer a water delivery call. The model is the subject of ongoing discussion and development by a large committee of experts. At this early stage of the use of the model, it is to be expected that new insight, analysis and methods will produce more reliable results. This is precisely what Hearing Officer Schroeder recognized in his findings and conclusions, which the Director and this Court have adopted. In this sense, *res judicata* should not be applied to prevent the advancement of administration consistent with the advancement of scientific understanding.

### **1. Dr. Wylie's Testimony**

The Director has quoted a small portion of Dr. Wylie's recent deposition testimony to support the Director's argument that the evidence Blue Lakes seeks to present was all considered in the 2007 hearing and is therefore precluded by *res judicata*.<sup>1</sup> The testimony quoted by the Director was elicited

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<sup>1</sup>A complete transcript of Dr. Wylie's deposition testimony is attached as Exhibit A to the Second *Affidavit of Daniel V. Steenson in Support of Motion to Enforce Order*, filed herewith.

on cross examination by the IDWR's counsel. In fact, Dr. Wylie's deposition testimony before and after the friendly cross examination supports the need for the Director to consider the evidence Blue Lakes seeks to present.

At the time of the 2007 hearing, the conventional wisdom was that the ESPAM model could not be used directly to show the impact of junior ground water diversions on individual spring sources because it had been calibrated to Snake River reaches rather than to individual springs. In response to Blue Lakes' water delivery call, the Director used the model to show that the impact of junior ground water pumping on the Devils Washbowl to Buhl Reach was 51 cfs. The Director then inferred that, because Blue Lakes Spring flow is approximately 20% of the total flow of springs in the Devils Washbowl to Buhl Reach, that the impact of junior ground water pumping on Blue Lakes's spring supply is 10 cfs (20% of 51 cfs). This is the Director's spring allocation determination for Blue Lakes' water supply.

Because the model was calibrated to Snake River reaches, the Director assumed that the uncertainty of model predictions would be equivalent to the +/- 10% error in Snake River gauges. This is the Director's model uncertainty determination, that is the basis for the Director's "trim line," whereby he excluded from administration all junior ground water rights whose impact on the springs is 10% or less than their depletions (e.g. .1 cfs impact from a 1.0 cfs diversion).

The Hearing Officer, Director, and this Court found that, while these determinations were flawed: model uncertainty should be addressed in administering water right; no better method for making the model uncertainty and spring allocation determinations was available at the time of hearing; the Director had the discretion to use these methods until better ones were available;

continuing efforts should be made to improve all technical determinations, and when better methods are available, they should be used.

Dr. Wylie testified that the director's "post-modeling" administrative policy determinations of model uncertainty, trim line, and spring allocation are not scientifically rigorous or defensible." *Steenon Second Aff., Ex. A*, at 17, ln. 14 - 20 ln. 17; 62, lns. 4-18; 120, lns. 16-22. The ESPAM Committee has continued to evaluate the issue of model uncertainty since the 2007 hearing. On February 25, 2009, the Director sent a letter to Committee members posing the following question: "As part of the uncertainty analysis, should ESHMC members address the technical aspects (not polity issues) of a trim line as a function of uncertainty?" *Steenon Aff., Ex. A-9*, Attachment B, (Attachment A). Consistent with the Director's briefing to this Court, the Director stated that the purpose for the trim line "was to avoid curtailing ground water users who might have *no effect* on enhancing reach gains." (Emphasis added.) The Director quoted portions of the Hearing Officer's recommendation in which the Hearing Officer discussed the need for "development of a more scientifically based error factor [as a] high priority in improvement," and invited committee members to submit written analysis and make presentations to the committee "regarding the technical aspects of ths use of a trim line."

Five Committee members submitted a "White Paper, Technical Evaluation of the Trim Line." and gave a presentation to the committee. *Id.*, Attachment B. In that analysis, they concluded that: The inference that ground water withdrawals outside the 10 percent trim line might have no effect on reach gains based on an assumed model uncertainty of +/- 10 percent is incorrect." *Id.* at 2. They also concluded that cumulatively, ground water withdrawals outside the trim line have a significant impact on spring flows, accounting for 1/3 to 1/2 of the total impact of ground water pumping on the springs.



During his November 13, 2009 deposition testimony, Dr. Wylie agreed with these conclusions of the five experts in their White Paper. *Second Steenson Aff.*, Ex. A., at 101, ln. 6 - 104, ln.; 106, ln. 6 - ln. 108, ln. 7.

Blue Lakes' seeks to present evidence that the ESPAM model has been calibrated to Blue Lakes spring flow, and can be used directly to show the impact of junior ground water pumping on Blue Lakes' water supply. This method eliminates the need for the scientifically indefensible post-modeling administrative adjustments performed by the Director under the current methodology, because the model is not used indirectly to show the impact of junior ground water diversions on the Devils Washbowl to Buhl reach of the Snake River. There is therefore no need to use either Director's scientifically indefensible 20% spring apportionment method to guess at the direct impact, and the error in the Snake River stream gages becomes irrelevant.

In his deposition testimony, Dr. Wylie confirmed that the ESPAM model has been calibrated to Blue Lakes spring flow. *Id.*, at 111, ln. 13 - 113, ln. 4. Dr. Wylie's only concern about using the model directly to determine the impact of junior ground water diversions on Blue Lakes' water supply is that there are one or two other springs in the Devils Washbowl to Buhl reach that have not been calibrated:

- A. So if I could be convinced that enough of the flux was accounted for in that reach?
- Q. Yes.
- A. The – then the model could be used to directly determine the flow at Blue Lakes.
- Q. And it could then be used with less uncertainty, correct, than is currently imputed as a result of the 10 percent error in the river gauges, since the river gauges would no longer be a factor.
- A. Well, with any luck at all, the current uncertainty definition would – is going to go away. We're going to – I'm very excited about going and doing a rigorous uncertainty analysis. So that placeholder is, I hope, going to go away.

*Id.*, 125, ln. 25 - 26, ln. 15.

- Q. [I]f your concerns about I guess what your are thinking is an incomplete dataset for the springs in the Devil's Washbowl to Buhl reach can be resolved, then I take it you would be certainly willing to talk with Blue Lakes' expert or others about the possibility of using the model directly here, given the calibration of the model? You're a scientist?
- A. Uh-huh.
- Q. Is that a 'yes'?
- A. Uh-huh.

*Id.*, at 128, ln. 16 - 129, ln. 2.

- Q. Okay. And so as we discussed, it may be very appropriate to utilize the calibration of the model to Blue Lakes Springs, in your mind, if any gaps in spring-flow data and calibration in the Devil's Washbowl to Buhl reach can be filled; correct?
- A. Yes. If sufficient percentage of the flux, the discharge in that reach is accounted for.
- Q. And as we discussed, there are perhaps two major springs of five where additional data could be collected, but three of the five there has been calibration by you through the model; correct?
- A. Correct.
- Q. So the gap may not be very large, and we may not be very far away from being able to use the calibration of the model to Blue Lakes Springs to evaluate the impact of ground water withdrawals on Blue Lakes Springs; correct?
- A. It -- we may not be very far from me being comfortable to do that. I -- that would be a director's -- would make the final call on that.

*Id.*, at 146, ln. 13 - 147, ln. 10.

The Director has a duty to consider the most current scientific analysis and methods. He must consider, and cannot preclude Blue Lakes from presenting the opinions of several experts and Dr. Wylie that the premise for the trim line (that diversions outside may have no impact on spring flows) is incorrect. The Director must consider their views that, cumulatively, ground water diversions outside the trim line have a significant impact on spring flows. The Director has a duty to consider, and cannot preclude Blue Lakes from presenting, a proposed use of the ESPAM model which the Director's own modeling expert, Dr. Wylie, acknowledges has merit if certain data gaps are filled. *Res Judicata* does not apply to these technical matters.

## CONCLUSION

For the foregoing reasons, Blue Lakes respectfully requests that the Court issue an order requiring the Director to promptly and completely comply with the Court's remand order. 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. 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 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.

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 6<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
Daniel V. Steenson

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of May, 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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