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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BLUE LAKES TROUT FARM, INC., Petitioner/Plaintiff, vs. GARY SPACKMAN, in his official capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents/Defendants.	Case No. CV-WA-2010-19823 **MEMORANDUM IN OPPOSITION TO APPLICATION FOR PEREMPTORY WRIT OF MANDATE**

COME NOW, Respondents/Defendants, Idaho Department of Water Resources, ("IDWR" or "Department"), and Gary Spackman, Interim Director of the Idaho Department of Water Resources ("Director"), and submit this *Memorandum in Opposition to Application for Peremptory Writ of Mandate* ("*Memorandum*"). This *Memorandum* is supported by the *Affidavit of Garrick Baxter* ("*Baxter Affidavit*"), submitted herewith.

INTRODUCTION

Blue Lakes Trout Farm Inc.'s ("Blue Lakes") application for peremptory writ of mandate is a ruse to relitigate issues already decided in the Thousand Springs Call proceeding. The hearing officer, the Director and Judge John Melanson have already considered and rejected the arguments that Blue Lakes raises in the application. All three have held that, for purposes of the current delivery call, the Department used the best scientific evidence available. Blue Lakes' application raises the same unsuccessful arguments for a fourth time, hoping this Court will ignore the previous precedent. The application should be rejected because: 1) This Court lacks jurisdiction to issue an order regarding the 10% margin of error and trim line as those legal questions are currently on appeal to the Idaho Supreme Court; 2) The "law of the case" doctrine prevents Blue Lakes from raising a belated challenge to Judge Melanson's conclusions regarding the 10% margin of error, the trim line, and modeling to the spring reaches; 3) The doctrine of res judicata precludes Blue Lakes from challenging Judge Melanson's conclusions regarding the 10% margin of error, the trim line, and modeling to the spring reaches and prevents the litigation of new issues that could have been raised in the underlying proceeding; and 4) Blue Lakes has not established a clear legal right to the relief sought and has a plain, speedy and adequate remedy in the ordinary course of law. Because the Department is forced to defend against an

action that has no reasonable basis in law or fact, the Department seeks an award of costs and attorneys fees. Idaho Code §§ 12-117, -121.

FACTS AND PROCEDURAL HISTORY

A. The Administrative Proceeding

The underlying administrative proceeding (commonly referred to as "the Thousand Springs Call") originated before the Department in 2005 when Blue Lakes and Clear Springs Foods, Inc. ("Clear Springs") sent letters to the Department requesting that the Department administer junior priority water rights to supply Blue Lakes' and Clear Springs' senior water rights. A multi-day hearing on the request was held in November of 2007, in which the parties presented evidence and testimony to the hearing officer. On January 11, 2008, the hearing officer, Gerald F. Schroeder, issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (hereafter "*Opinion*").[1] The hearing officer affirmed the Department's approach on its use of a 10% margin of error. *Opinion* at 14 ("There is common sense to the 10% error factor assigned by the former Director."). The hearing officer also affirmed the use of the trim line. *Opinion* at 22 ("The Director's use of the 'trim line' to limit curtailment was proper."). The hearing officer also found it was not proper to model to the individual spring. *Opinion* at 13 ("The model cannot predict the effect of a particular well on a particular spring.").

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[1] A copy of this opinion is attached to the accompanying Affidavit of Garrick Baxter as Attachment A.

B. The District Court Decision

The Department adopted the hearing officer's findings as to the 10% margin of error, trim line, and modeling to the spring reach when it issued its Final Order in July of 2008. The Department's Final Order was appealed to district court, the Honorable Judge John Melanson presiding. On June 19, 2009, the district court entered its *Order on Petition for Judicial Review* (hereafter "*Order on Review*").[2] Judge Melanson affirmed the use of the 10% margin of error. *Order on Review* at 26 ("This Court agrees that the evidence, albeit conflicting supports the use of the 10 % margin of error as a minimum and is not arbitrary or capricious."). The use of the trim line was also affirmed. *Order on Review* at 28 ("[t]he use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model."). Judge Melanson also concluded that the Department was not required to model to the individual spring. *Order on Review* at 28 ("The Director's apportionment of flows to spring complexes is supported by the evidence and is not arbitrary or capricious."). While Judge Melanson affirmed the Department on these issues, he reversed the Department on another issue, holding that the Department did not properly address the issue of seasonal variability in determining injury to one of Blue Lakes' water rights and one of Clear Springs' water rights.

C. Split of the Thousand Springs Call Proceeding

Judge Melanson remanded the issue of seasonal variability back to the Department for further proceedings. *Order on Review* at 24-25. Blue Lakes and Clear Springs appealed other

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[2] A copy of this opinion is attached to the accompanying Affidavit of Garrick Baxter as Attachment B.

issues from Judge Melanson's Order to the Idaho Supreme Court. *Baxter Affidavit*, Attachment C.

D. Thousand Springs Call On Remand

As a result of the remand, the Department issued its order on seasonal variability on July 19, 2010 ("*Seasonal Variability Order*").[3] In the order, the Department concluded that Blue Lakes' water right no. 36-7210 and Clear Springs' water right no. 36-4013A were materially injured. *Seasonal Variability Order* at 22. As a result of the material injury determination, the Department ran the Eastern Snake Plain Aquifer Model ("ESPAM") to calculate the expected benefit of curtailment to Blue Lakes' and Clear Springs' senior water rights. *Seasonal Variability Order* at 11-12, 17-18.

Blue Lakes, Clear Springs and the Ground Water Users[4] all filed requests for hearing in response to the Department's July 19, 2010 final order. Although the Department found that Blue Lakes' water right had been materially injured, Blue Lakes disagreed with application of the ESPAM. Blue Lakes argued that IDWR "failed to use the most current and best available data/information to identify hydraulically-connected junior ground water diversions ...." *Petition Requesting Hearing on July 19, 2010 Final Order*, at 2.[5]

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[3] A copy of this order is attached to the accompanying Affidavit of Garrick Baxter as Attachment D.

[4] The following are the "Ground Water Users" who filed the request for hearing with the Director: Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District.

[5] A copy of this request for hearing is attached to the accompanying Affidavit of Garrick Baxter as Attachment E.

Upon receiving requests for hearing, the Director set a prehearing conference and directed the parties to come prepared to discuss the scope of the hearing. The Director was concerned that he lacked jurisdiction to consider certain issues because the issues were on appeal to the Idaho Supreme Court. On September 14, 2010, the Director conducted a pre-hearing conference regarding the appropriate scope of the hearing. The Ground Water Users recognized that some of the legal issues raised in their petition were on appeal to the Idaho Supreme Court, but argued that this is the first time the Director has found that these particular water rights had been injured, and therefore the Director must allow them to present facts and legal defenses against this new finding of material injury. For example, the Ground Water Users pointed out that under the *July 19, 2010 Final Order*, junior ground water users must mitigate an additional 3.5 cfs and 1.2 cfs of simulated depletions to Blue Lakes' and Clear Springs' water rights respectively to prevent curtailment. The Ground Water Users questioned whether Blue Lakes and Clear Springs can beneficially use the additional amount of water if it is provided and sought to raise this issue in the proceeding.

Blue Lakes and Clear Springs argued that if the Director makes new findings and conclusions of law regarding beneficial use, the Director should also reconsider previous determinations about the accuracy and limitations of the ESPAM. Blue Lakes and Clear Springs argued that the Director should revisit his previous determinations regarding 10% model uncertainty, the trim-line, and the ability of the model to predict the effect of pumping on a particular spring.

The Director approved the Ground Water Users' request to present additional evidence about how the new findings of material injury affect previous conclusions of law because the

Ground Water Users were never afforded the opportunity to present evidence on how this additional obligation might affect the previous conclusions of law.[6] *Order Setting Hearing Schedule And Order Limiting Scope Of Hearing*, at 3 (a copy of which is attached as Exhibit 1 to Blue Lakes' verified complaint). The Director, however, restricted additional argument by Blue Lakes and Clear Springs on the issues of 10% model uncertainty, the trim line, and ability of the model to predict effect on a particular spring because Blue Lakes and Clear Springs had fully litigated those same issues in the Thousand Springs Call. *Id.* The Director concluded that since the issue of 10% uncertainty and the trim line were within the jurisdiction of the Idaho Supreme Court, it was not appropriate for the Department to revisit these issues in the remand proceeding. *Id.* Furthermore, the Director found that the issue of modeling the reach gains was not appealed to the Idaho Supreme Court by any party. Thus, the Director concluded that the District Court's finding on this issue was binding on all parties. *Id.*

ARGUMENT

I. This Court lacks jurisdiction to issue an order regarding the 10% margin of error and trim line because those legal questions are currently on appeal to the Idaho Supreme Court.

This is not Blue Lakes' first attempt to seek a court order on this issue. On April 12, 2010, Blue Lakes filed a *Motion to Enforce Orders* with Judge Melanson. Just as in its current request, Blue Lakes sought an order from Judge Melanson requiring IDWR to allow Blue Lakes to present "evidence of updated, improved and/or new data, analysis and methods for

[6] The Director's order allowing the Ground Water Users to present new argument contained one caveat. The Ground Water Users will be prevented from presenting argument that the economic benefits of ground water use outweigh the economic benefit of fish propagation. The Director concluded that this argument was previously raised, rejected and not subject to relitigation.

determining the impact of junior ground water diversions on Blue Lakes' water rights." *Motion to Enforce Orders* at 4. Specifically, Blue Lakes wanted to present evidence regarding the trim line and the modeling results. In response, Judge Melanson held that the Department was not required to relitigate issues already determined and not remanded back to the Department. Judge Melanson found Blue Lakes' request to be outside the scope of his jurisdiction:

> This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction to "take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders.* The prior *Orders* affirmed the Director's use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand.

Order Granting in Part Motion to Enforce Order; Order Setting Status Conference Judge John Melanson, May 11, 2010 (Case No. 2008-444).

On remand before the Department, Blue Lakes continues to try to relitigate these same issues. Blue Lakes openly acknowledges that it wants to present new evidence regarding the use of the trim line and the Director's spring allocation determinations. *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate*, at 4. As Judge Melanson did, this Court must reject Blue Lakes' attempts to relitigate the issues that are on appeal. Upon the filing of a notice of appeal, a district court loses jurisdiction over the entire action except as provided in Rule 13 of the Idaho Appellate Rules. *Bagley v. Thomason*, --- Id. ---, --- P.3d ---, 2010 WL 3895187 (2010). I.A.P 13 sets forth the types of actions that may be taken during pendency of an appeal. Judge Melanson held that I.A.P. 13(b)(13) allows the district court to enforce orders on remand,

but that he lacked jurisdiction to go outside the scope of the remand and address issues that are on appeal. If Blue Lakes believes the Department is not properly complying with Judge Melanson's orders, it should raise those issues with Judge Melanson, not this Court.

The issue of the 10% margin of error and the trim line are both currently on appeal to the Idaho Supreme Court. *Baxter Affidavit*, Attachment C, pp. 9-12. It cannot reasonably be argued that this Court can now exercise jurisdiction where Judge Melanson previously held that the district court lacked jurisdiction. If Judge Melanson lacked jurisdiction over these issues while they are pending before the Idaho Supreme Court, it is axiomatic that this Court lacks jurisdiction over these same issues.

Blue Lakes will undoubtedly argue that the Director discriminated against it by authorizing the Ground Water Users to present evidence that the Ground Water Users' additional obligations of 3.5 cfs to Blue Lakes and 1.2 cfs to Clear Springs affects the Director's previous legal conclusions, but at the same time preventing Blue Lakes from revisiting legal conclusions regarding the use of the ESPAM. The Ground Water Users' situation, however, is distinguishable. It is significant that the finding of material injury to senior water right nos. 36-7210 and 36-4013A increased the obligation of the Ground Water Users. The Ground Water Users were never afforded the opportunity to present evidence on how this additional obligation might affect the previous conclusions of law. In contrast, nothing changed regarding how the Department applied ESPAM. The same model version (ESPAM 1.1) was employed by the Department to determine the mitigation obligation when the matter of seasonal variability was remanded back to the Department. There is no justification to revisit the validity of ESPAM 1.1.

II. The "law of the case" doctrine prevents Blue Lakes from raising a belated challenge to Judge Melanson's conclusions regarding the 10% margin of error, the trim line, and modeling to the spring reaches.

The doctrine of "law of the case" acts to ensure consistent results in the appellate process at all levels by protecting against relitigation of settled issues. *Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000). The doctrine provides that a "decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation." *Id.* *Swanson* involved a divorce proceeding and the characterization of certain property. At trial, the magistrate court held that the husband's settlement proceeds should be described as community property. *Swanson*, 134 Idaho at 514, 5 P.3d at 975. On appeal to the district court, the magistrate court's ruling that the settlement proceeds were community property was affirmed. *Id.* The judgment was partially vacated, however, on other grounds. *Id.* On remand, the husband again argued that the magistrate court should recharacterize the settlement proceeds as separate property. The magistrate court refused to recharacterize the settlement, citing the "law of the case" doctrine and an amended order was subsequently issued. *Id.* On appeal of the amended order, the husband argued that the magistrate court erred in refusing to recharacterize the settlement proceeds as community property. *Swanson*, 134 Idaho at 515, 5 P.3d at 976. He argued that the law of the case doctrine only applied to decisions by the Idaho Supreme Court, not lower appellate courts. The Court soundly rejected the husband's legal argument, finding that the "law of the case" doctrine was not limited to decisions issued by the Idaho Supreme Court, but that it applied equally to all lower appellate court decisions not appealed. *Swanson*, 134 Idaho at 515-16, 5 P.3d at 976-77. The Court held that the doctrine of the "law of the case" provides that "where an appellate court states a principle of law in deciding

a case, that rule becomes the law of the case and is controlling both in lower court and on subsequent appeals as long as the facts are substantially the same." *Swanson*, 134 Idaho at 516, 5 P.3d at 977. The Court also emphasized that the doctrine is mandatory in Idaho. *Swanson*, 134 Idaho at 518, 5 P.3d at 979.

Applied to this case, the issues of the 10% margin of error, the trim line and whether the Department must model to the individual springs have already been decided in this proceeding. Judge Melanson affirmed the use of the 10% margin of error. *Order on Review* at 26. The use of the trim line was also affirmed. *Order on Review* at 28. Judge Melanson ruled that Department is not required to model to the individual springs. In his *Order on Review*, Judge Melanson held that the Director's apportionment of flows to spring complexes is supported by the evidence and is not arbitrary or capricious. *Order on Review* at 28. He specifically found that "The ESPA model was designed to predict the effects of curtailment to sub-reaches… ." *Id.* Judge Melanson's decisions constitute law of the case, and Blue Lakes cannot collaterally attack the decision in the remand proceeding.

III. The doctrine of res judicata precludes Blue Lakes from challenging Judge Melanson's conclusions regarding the 10% margin of error, the trim line, and modeling to the spring reaches and prevents the litigation of new issues that could have been raised in the underlying proceeding.

Should this Court determine that the current proceeding before the Department is separate from the underlying Thousand Springs Call, then the doctrine of res judicata precludes Blue Lakes from arguing that the Department must revisit the 10% margin of error, the trim line and that the Department must model to the individual springs. The doctrine also prevents the litigation of new issues that could have been raised in the underlying proceeding but were not.

The doctrine of *res judicata* covers both issue preclusion (collateral estoppel) and claim preclusion (true *res judicata*). *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). Separate tests are used to determine whether claim preclusion or issue preclusion applies. *Id.*

A. Issue Preclusion

Issue preclusion (or collateral estoppel) protects litigants from litigating an identical issue with the same party or its privy. *Ticor Title Co.*, 144 Idaho at 123, 157 P.3d at 617 (citing *Rodriguez v. Dep't of Corr.*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001)). Five factors are required for collateral estoppel to bar relitigation of an issue decided in an earlier proceeding:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Rodriguez, 136 Idaho at 93, 29 P.3d at 403.

In the November 2007 hearings, Blue Lakes had a full and fair opportunity to litigate the issues of the 10% margin of error, the trim line and whether the Department must model to the individual spring. The issues were raised and discussed. This is evidenced by the fact that both the hearing officer and Judge Melanson issued orders that addressed these issues. The issues decided in the prior litigation were identical to the issues presented here and they were previously decided by Judge Melanson. Judge Melanson's order represented a final judgment on the merits as evidenced by the fact that the parties have appealed the matter to the Idaho Supreme Court. Finally, the Department was a participant in both the underlying call matter and

this proceeding. As such, the doctrine of collateral estoppel prevents Blue Lakes from relitigating the issues of the 10% margin of error, the trim line and whether the Department must model to the individual springs.

The doctrine of res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Ticor Title Co.*, 144 Idaho at 123, 157 P.3d at 617. The present case is a clear example of why res judicata should apply, as Blue Lakes' repetitious claims serve to tie up judicial resources and cause other parties to needlessly expend resources to respond.

B. Claim Preclusion

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action which might have been made. *Ticor Title Co.*, 144 Idaho at 123, 157 P.3d at 617. As such, claim preclusion bars Blue Lakes from raising new claims about the ESPAM that were not previously litigated in the Thousand Springs Call.

In its application for writ of mandate, Blue Lakes discusses a "white paper" prepared by some of the participants of the ESPAM modeling committee. *Memorandum In Support Of Application for Peremptory Writ of Mandate*, at 5, and suggests that the paper contains new, updated information not previously considered in the Thousand Springs Call. During the Thousand Springs Call, the Department had the opportunity to ask Dr. Allan Wylie about the scope of the 2007 hearings. In his deposition testimony, Dr. Wylie responded to the arguments

about new and better evidence being proffered by Blue Lakes and Clear Springs. Specifically, he discussed the "white paper":

> Q. [By Mr. Bromley:] Exhibit 40, the white paper that was submitted to the modeling committee by Koreny and Brockway, what's your opinion of the white paper?
>
> A. I felt it was a waste of committee time. The -- in my opinion, the trim line is a policy. And I don't believe that that's committee business. Much of the material there is already presented in -- between Ms. McHugh's examination of me and Mr. Simpson's examination of me in the hearing.
> (Ms. McHugh rejoins the proceedings.)
>
> Q. The 2007 hearing?
>
> A. The 2007 hearing, much of that information was covered there. The new thing in there is the -- that they present the results of a 1 percent, the -- Mr. Simpson and I discussed the errors in there, so if we exclude those errors of trimming the data to the Water District 130, then -- and we exclude what was covered in the 2007 hearing, then the 1 percent information is what is new.
>
> Q. This is the 1 percent uncertainty that the white paper assigns to the model?
>
> A. Well, the 1 percent trim line.
>
> Q. The 1 percent trim line. Is that getting at what a de minimis impact would be; is that your understanding?
>
> A. It could be. I -- I'm uncomfortable with what a true definition of "de minimis" might be.
>
> Q. Do you have any opinion as to where that 1 percent may have come from?
>
> A. I believe that what Mr. Koreny was trying to do was split the difference between the 10 percent and what's used in Colorado.
>
> Q. And do you know what's used in Colorado?
>
> A. No. I did read Dr. Scheuder's expert report, but I don't remember.
>
> Q. Somewhere in the neighborhood of 1 percent?

A. It's less than 1 percent.

Baxter Affidavit, Attachment F (Wylie Dep. 131:11-133:1)(emphasis added).

Based upon Dr. Wylie's deposition testimony, to the extent that the information in the white paper was already presented, Blue Lakes is precluded from relitigating the issue again. To the extent that Blue Lakes claims that the information presented in the "white paper" on model uncertainty is new, it should be barred by claim preclusion because the information should have been presented at the time of the 2007 hearing when the issues of the margin of error and trim line were addressed. Indeed, Judge Melanson specifically found that "No evidence was presented to establish a higher margin of error or to controvert that the margin of error is less than 10%." *Order on Review* at 26.

With its application for writ of mandate, Blue Lakes also provided an affidavit of John Koreny. Attached to the Koreny Affidavit is a report concluding that the ESPAM can be used to predict the flows at Blue Lakes Spring individually. As the testimony of Dr. Wylie quoted below points out, the issue of spring apportionment and modeling to the individual spring was discussed at the 2007 hearing:

> Q. [By Mr. Bromley:] Allan, we've sat through discussions with John Simpson and Dan Steenson primarily about methods concerning the 10 percent uncertainty and then spring apportionment to Blue Lakes and Clear Springs respectively. Was any of the information presented to you today new to you?
>
> A. No.
>
> Q. Was the information presented today discussed at the 2007 hearing?
>
> A. Most of it, yes.
>
> Q. Do you know what wasn't?

A. There were different expert reports presented, but much of the information in the expert -- the new expert reports were in previous expert reports.

Q. The information that was in Dr. Brockway's expert report concerning spring apportionment to Clear Springs that was discussed this morning, was that in an expert report or discussed at the prior hearing in 2007?

A. Yes. In Eric Harmon's report there was -- a very similar sort of analysis was presented. I believe Dr. Brockway used some different -- different wells. And my recollection is that Mr. Harmon did not use Clear Lakes Spring as one of his springs.

Q. Has anyone previously used Clear Lakes Springs with this regression analysis that was talked about?

A. I suspect that Laura Janczak did.

Q. And are you aware approximately when the Janczak paper or thesis was published or known to people?

A. 2001.

Q. So that was before the hearing, then?

A. Yes.

* * *

Q. Okay. Mr. Steenson provided you with Exhibit 43, which was a definition of the scientific method.

A. Yes.

Q. And I believe you read that and agreed with what it stated. Was the information presented to you in Exhibits 44 and 45 consistent with the scientific method as Mr. Steenson was asking you to apply them?

A. Exhibit 44 and 45 were taken from the report, the final report that IWRRI published on calibration of version 1.1 of the model. And we tried to be very scientific and rigorous in calibration of the model. What Mr. Steenson was trying to drive at was using the model to calculate what the -- directly determined the flux at Blue Lakes Springs. That may or may not be scientifically defensible. I will -- I would want to look at quite a bit more data, much more carefully.

Q. For what reasons would it not be defensible?

A. I would want to make sure that enough of the flux in that reach is accounted for with viable calibration targets before I would be comfortable using the model to predict flow at the Blue Lakes Spring. Without sufficient data, the model could be stealing water from up or downstream springs to help it match Blue Lakes so shockingly well.

Q. By that do you mean that there aren't any other parameters that these other springs that the model tries to replicate what's measured at Blue Lakes Spring, and could take water from a different location that doesn't necessarily match reality?

A. That's right. It could be doing unspeakable things to match this so well. And the fact that it matches it so shockingly well, it's seductive to a nonmodeler. To modelers, it makes you suspicious that you're joining the liar's club.

Q. The measurements in Exhibits 44 and 45, did you say that these were from IWRRI?

A. IWRRI's report on the -- final report on the model calibration.

Q. Okay. And that, again, was available prior to the 2007 hearing?

A. That's correct.

Q. And was any of this information presented at the 2007 hearing?

A. The final report is in the record. I don't recall talking about these graphs.

Baxter Affidavit, Attachment F (Wylie Dep. 129:20-131:6, 133:3-135:6).

Based upon Dr. Wylie's deposition testimony, to the extent that the information in the Koreny Report was already presented and rejected at the 2007 hearing, Blue Lakes is precluded from relitigating the issue. To the extent that Blue Lakes claims that the information presented in the Koreny Report is new information, it should be barred by claim preclusion because the

information in the Koreny Report should have been presented at the time of the 2007 hearing when the issue of modeling to the spring reach was addressed.

IV. Blue Lakes has not established a clear legal right to the relief sought and has a plain, speedy and adequate remedy in the ordinary course of law.

A decision to issue a writ of mandate is committed to the discretion of the court. I.R.C.P. 74(b). The party seeking a writ of mandate "must establish a 'clear legal right' to the relief sought." *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct. App. 2004) (citing *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997)). In addition, a writ of mandate will not issue where the petitioner has a "plain, speedy and adequate remedy in the ordinary course of law." Idaho Code § 7-303.

First, this Court should not exercise its jurisdiction over this matter because Blue Lakes' attempt to raise and reargue the same issues for a fourth time amount to forum shopping by Blue Lakes. As discussed above, Blue Lakes' argument that the Department should use the "best available science" is really just a guise that was already considered and rejected by Judge Melanson. Blue Lakes should be prevented from raising the very same arguments with another court.

Second, Blue Lakes has failed to establish a clear legal right to the relief sought. In its petition, Blue Lakes fails to point to any case law or legal doctrine that would provide this Court jurisdiction over the 10% margin of error and the trim line, issues currently pending before the Idaho Supreme Court. Moreover, the "law of the case" doctrine and the doctrine of res judicata preclude Blue Lakes from arguing that the Department must model to the individual springs and prevent Blue Lakes from asserting new arguments within this matter. While Blue Lakes tries to

repackage these issues under the rubric of "best scientific evidence," this is only a smokescreen to get the Court to revisit issues already decided by Judge Melanson.

Third, Blue Lakes has a plain, speedy and adequate remedy in the ordinary course of law. "A right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights." *State v. District Court of Fourth Judicial Dist.*, 143 Idaho 695, 152 P.3d 566 (2007) (quoting *Rufener v. Shaud,* 98 Idaho 823, 825, 573 P.2d 142, 144 (1977)). Contrary to Blue Lakes' insinuations, injury is being addressed. In this case, the Director already found material injury to Blue Lakes' senior water right, requiring the Ground Water Users to face additional curtailment unless they provide mitigation to Blue Lakes. As such, there are no "exceptional circumstances" that justify the issuance of a writ of mandate.

Finally, Blue Lakes has an adequate remedy in the ordinary course of law – a direct appeal. Existence of an adequate remedy in the ordinary course of law will prevent issuance of a writ, and the party seeking the writ must prove that no such remedy exists. *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 44, 794 P.2d 632, 633 (1990). Blue Lakes fails to show how the appeal process would be inadequate. The fact that Blue Lakes is currently appealing these same issues to the Idaho Supreme Court suggest that it has an adequate remedy at law. Oral argument on these issues is scheduled before the Idaho Supreme Court on December 3, 2010.

ATTORNEY FEES

Blue Lakes' application for peremptory writ of mandate is an attempt by Blue Lakes to shop its arguments before a new court, hoping that it will get a different result. These same

arguments have been previously rejected by the Director and by Judge Melanson. Because the Department is forced to defend against an action that has no reasonable basis in law or fact, the Department seeks an award of costs and attorneys fees pursuant to Idaho Code §§ 12-117, -121.

CONCLUSION

Blue Lakes' application for peremptory writ of mandate is simply an attempt by Blue Lakes to relitigate issues already decided in the Thousand Springs Call proceeding. The application must be denied for numerous reasons. First, this Court lacks jurisdiction to issue an order regarding the 10% margin of error and trim line as those legal questions are currently on appeal to the Idaho Supreme Court. Second, the "law of the case" doctrine prevents Blue Lakes from challenging Judge Melanson's previous conclusions regarding the 10% margin of error, the trim line, and modeling to the spring reaches on remand. Third, the doctrine of res judicata precludes Blue Lakes from challenging Judge Melanson's conclusions regarding the 10% margin of error, the trim line, and modeling to the spring reaches and prevents the litigation of new issues that could have been raised in the underlying proceeding. Finally, Blue Lakes has not established a clear legal right to the relief sought and has a plain, speedy and adequate remedy in the ordinary course of law. For all these reasons, this Court should deny Blue Lakes' application.

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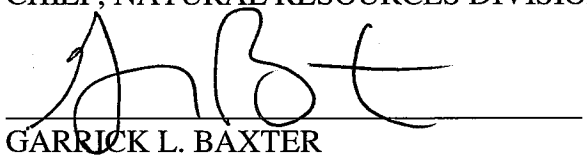
DATED this 27 day of October, 2010.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of October, 2010, I caused a true and correct copy of the foregoing ANSWER to be filed with the Court and served on the following parties by the indicated methods:

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