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DEPARTMENT OF
WATER RESOURCES

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BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
02356A, 36-7210, AND 36-07427,

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
4013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

**Docket No. CM-DC-2010-02
CM-DC-2010-03**

**RESPONSE IN OPPOSITION TO
SECOND JOINT MOTION FOR
PROTECTIVE ORDER**

COMES NOW Idaho Ground Water Appropriators, Inc. ("IGWA"), Magic Valley Ground Water District and North Snake Ground Water District, for and on behalf of their respective members (collectively the "Ground Water Users"), through counsel, and hereby submit this *Response in Opposition to Second Joint Motion for Protective Order* ("Second Joint Motion") filed October 8, 2010, by Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively the "Spring Users").

ARGUMENT

The Spring Users ask the Director to issue a protective order foreclosing all discovery into (1) pre-adjudication development of Blue Lakes' and Clear Springs' facilities and use of; (2) post adjudication development and use of facilities and water; (3) facility construction, improvement, operation and fish production records; (4) information relating to the trim line or 10% margin of error.¹ (*Second Joint Motion* at 3.) They say this information should be kept hidden from the Director and from the Groundwater Users on the basis that it was previously found to be outside the scope of the hearing, the information is not relevant, nor reasonably calculated to lead to discovery of relevant information, privileged and confidential, burdensome and damaging, and would expand the scope of the hearing. (*Second Joint Motion* at 4.) Their request must be denied because it bars discovery of information that is relevant to the various issues before the Director in this proceeding.

A protective order is an extraordinary action that is warranted only where "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." I.R.C.P. 26(c). In light of the critical role discovery plays in unveiling the truth, protective orders are rare, normally limited to circumstances whether there is a compelling need to protect the information from public exposure.

The central issue in this proceeding is whether the Spring Users have suffered material injury under their 1955 and 1971 priority water rights. The protective order sought by the Spring Users forecloses discovery of information that is necessary to determine material injury to these

¹ IGWA's discovery requests were filed regarding this information based on the expectation that the Spring Users would request reconsideration of the Director's order on that issue. In the event the Spring Users are successful on getting the Director's order changed either through their writ action or through the Director, the Ground Water Users would be entitled to seek discovery. IGWA agrees with the Director's order excluding this information that is related to issues directly pending on appeal.

rights. The Ground Water Users' discovery requests goes to that information. Since it is the Ground Water Users' burden under the current state of the law, to prove water availability or lack of water availability, and likewise, whether that water could be beneficially used or that the additional amount can be beneficially used, as such, they should be allowed to get a full picture of the historical availability and use of water. Without full and fair discovery, the Ground Water Users cannot show what the Spring Users' needs are and have been, what amount of water fulfills their current needs, nor whether conservation practices or alternate means of diversion can meet their needs. The amount of spring discharge over time, the amount of that discharge that is diverted and used over time is pertinent to the question of whether these water rights have been materially injured by ground water pumping.

This is an administrative hearing and the issues involved are important. The parties should be allowed liberal discovery: "evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." The presiding officer at hearing is not bound by the Idaho Rules of Evidence. Rather, he is allowed to permit the admission of any evidence "commonly relied upon by prudent persons in the conduct of their affairs." (IDAPA 37.01.01.600).

CM Rule 42 includes a non-exclusive list of factors the Director must consider in determining material injury. The factors speak to three questions the Director must answer in this proceeding: 1) whether the Spring Users are short of water, 2) whether the Spring Users need additional water to accomplish their designated beneficial use, and 3) whether the Spring Users' needs can be met by employing conservation efficiencies or alternate means of diversion. The discovery requests in this case, go directly to these factors.

a. Pre-adjudication development of Spring Users' facilities, use and availability of water.

First, whether the Spring Users are short of water requires consideration of “[t]he amount of water available from the source from which the water right is diverted.” CM Rule 42.01.a. This includes a “factual determination as to what portion of a senior’s deficit is attributable to seasonal variations” which requires the Director to “examine evidence that would show what those seasonal variations looked like before pumping by hydraulically connected juniors – i.e. what were the seasonal variations at the time of the senior’s appropriation?” (*Order on Petitions for Judicial Review* at 22). If the Groundwater Users cannot discover the Spring Users’ historic water use and delivery data, the Director’s determination of these issues will be compromised. The Director’s Final Order which is at issue in this hearing acknowledges that he did not have before him, information or evidence of water availability, diversion and use in 1955 and 1971. *Final Order*, CM-DC-2010-002 and CM-DC-2010-003 IDWR, July 19, 2010, at FF8, FF 39.

Second, whether the senior needs additional water requires consideration of “[t]he amount of water being diverted and used compared to the water rights.” CM Rule 42.01.e. If the senior’s does not need additional water to accomplish the authorized beneficial use, there is no injury. If the Groundwater Users cannot discover how the Spring Users use water within their facilities, their ability to challenge the Spring Users’ allegation of water needs will be undermined. Discovery of historic water availability and use thereof, goes specifically to whether this additional amount of water can be beneficially used by the Spring Users. If the historic facts bear out that there is no change in production, there is no additional fish reared, or stocked, if 1 additional cfs of water is added to the Spring Users’ facilities, then the Ground Water Users are entitled to discover that information and to use that information to present evidence to the

Director that the Spring Users' needs are met or that they cannot put additional water to beneficial use. The Spring Users acknowledge that a senior appropriator is not allowed to "divert more water than good husbandry requires for the authorized beneficial use." (Second Joint Motion at 7). In the case of fish propagation, however, the Ground Water Users are not able to discover what amount of water is required by good husbandry or is needed or can be put to beneficial use without actually knowing what the Spring Users' historic availability, diversion and use of the water as compared to the water rights and as compared to the current availability, diversion and use of the water.

Third, if the senior needs additional water, the Director must determine whether the senior's needs can be met "by employing reasonable diversion and conveyance efficiency and conservation practices." CM Rule 42.01.g. The Director must also consider whether the senior's needs can be met "by using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells" CM Rule 42.01.h. If the Groundwater Users cannot discover the Spring Users facility construct and design, water use practices, conservation efficiencies employed to date, investigation of conservation efficiencies and alternate means of diversion, etc, they cannot adequately address these CM Rules.

Information relating to the historical use and development of the Spring Users' sources are plainly relevant to the effect groundwater pumping may or may not have had on the Spring Users' water rights. IDWR's Conjunctive Management Rules specifically allow inquiry into the "history and seasonal availability of water for diversion so as to not require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods." IDAPA 37.03.11.043.03.B.

Inquiry into facility construction, improvement, and operation is certainly reasonably calculated to lead to the discovery of relevant information cited in the prior section. In fact, Rule 42 of the Conjunctive Management Rules sets forth several factors which discuss the effort or expense of the holder of a water right to divert water from the source (IDAPA 37.03.11.042.01.b and c) and the reasonableness of diversion. In addition, the Conjunctive Management Rules allow inquiry into whether or not the “construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner’s surface water right priority” may be considered as an alternate or reasonable means of diversion to meet the senior’s water right. (IDAPA 37.03.11.042.01.h) Thus, it is necessary for IGWA to understand fully the development of this historical spring system, the seasonal and inter-year variations of the spring flows, and how the facilities’ structures affect the beneficial use of the water rights under which the facilities operate.

b. The Prior Order Re Discovery Should Not Preclude Discovery of This Information In this Hearing.

The Spring Users’ Second Joint Motion is based on the Hearing Officer’s *Order Re Discovery* that arose out of the prior proceeding. That *Order Re Discovery* limited the Spring Users’ use of production records if they were not produced. The Spring Users, however, mischaracterize the prior order. The Hearing Officer’s prior order did not state that “discovery is limited to post-adjudication information” as stated by the Spring Users in their Second Joint Motion at pg. 4. Rather, the *Order Re Discovery* found that the “historical background as to the discharge records might lead to relevant information covering issues that may arise in this litigation. Consequently, the prior oral ruling is modified to provide that Blue Lakes and Clear Springs shall provide the discharge records from the time of initial licensing.” Exhibit 3 to

Arrington Aff. at 2. The *Order Re Discovery* did, however, state that “at hearing, discovery was limited to information at the time of and following the adjudication. The decrees were entered based upon facilities and improvements in place. The likelihood of any relevant information developing from production of information of this nature [i.e. spring construction, improvements collection, diversion, and water rights used, field reports and proof of beneficial use] prior to that time is slight and the burden significant. Discovery is limited to information at the time of and following adjudication.” *Order Re Discovery* at 2-3.

The prior *Order Re Discovery* should not apply in this proceeding, however, to the extent the Director believes the prior *Order Re Discovery* applies to this proceeding, the Ground Water Users request it be modified in order to allow full and fair disclosure in this proceeding. First, the question of whether the Spring Users can beneficially use the additional increment of water that would arise under a finding of material injury to the 1955 and 1971 priority water rights was not at issue in that case because these more senior water rights were not found to have been materially injured at that time.

Second, with the passing of nearly three years since the hearing on the 2005 Curtailment Orders, the consideration of evidence in conjunctive management has been evolving. Continued adherence to an unnecessarily restrictive discovery order by a different hearing officer does not promote full and fair disclosure of all relevant evidence and information.

Third, there is no harm to the Spring Users by allowing discovery of the information, which may lead to other discoverable or admissible evidence. While they claim that it is burdensome, privileged and confidential, there is nothing to back up that claim. The Spring Users have claimed that water is their “life blood” and we know that the history and development of their facilities has been a proud and often touted attribute of their water use. But, now, they

claim that providing information of their history and details of their water use and availability is burdensome. In contrast, barring the Ground Water Users from discovering the information significantly prejudices them by making it nearly impossible to test the Spring Users' current claims of injury, shortage and need for an additional increment of water; comparing their current needs and uses to their historic needs and uses provides valuable information to test their current claims and water use practices. IGWA's ability to fully develop defenses to IDWR's curtailment orders is also stifled. For example, if the facts show that an additional 1 cfs will not actually result in any additional use or any change whatsoever in the Spring Users' operation, then the question of futile call arises, waste may be occurring, full economic development is compromised and optimum use of the water resource is not occurring. Without understanding their past use and needs, whether they are currently using water efficiently cannot be fully evaluated.

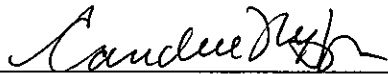
At hearing, the Director can make the decision of whether or not the information presented is relevant and admissible.

CONCLUSION

The *Second Joint Motion* fails to apply the correct legal standard for issuance of a protective order. Furthermore, the *Second Joint Motion* is replete with arguments pertaining to the relevance of information that is clearly discoverable within the liberal standard of evidence applicable to this administrative proceeding. Any burden to the Spring Users by allowing discovery of the information is outweighed by the high prejudice the Ground Water Users will suffer if they are precluded from discovering the requested information. As such, the Spring Users' *Second Joint Motion* should be denied.

DATED this 15th day of October, 2010.

RACINE, OLSON, NYE, BUDGE &
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By: 
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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of October, 2010, the foregoing was served to those as follows:

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