

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO WATER RIGHTS NOS. 36-02356A, 36-07210, ) **RESPONSES TO PETITIONS**  
AND 36-07427 ) **FOR RECONSIDERATION**  
) **AND CLARIFICATION**  
**(Blue Lakes Delivery Call)** ) **AND DAIRYMENS'**  
\_\_\_\_\_ ) **STIPULATED AGREEMENT**

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO WATER RIGHTS NOS. 36-04013A, 36-04013B, )  
AND 36-07148 (SNAKE RIVER FARM); AND TO )  
WATER RIGHTS NOS. 36-07083 AND 36-07568 )  
(CRYSTAL SPRINGS FARMS) )  
)  
**(Clear Springs Delivery Call)** )  
\_\_\_\_\_ )

IGWA has petitioned for reconsideration and clarification of the recommended order previously issued. The Spring Users have jointly petitioned for partial reconsideration. The Idaho Dairymens' Association, Inc., IDWR, and Clear Springs have submitted a stipulated agreement regarding certain dairy ground water use. This is the response to the issues raised in the petitions and the stipulation.

**I**

**THE FINDINGS OF THE DIRECTOR WERE ADOPTED BY THE HEARING OFFICER UNLESS EXPLICITLY REJECTED BY THE HEARING OFFICER**

The Recommended Order did not state clearly that the findings by the former Director were accepted by the Hearing Officer and recommended to the current Director unless explicitly recommended otherwise. That proposition is now stated explicitly, subject to any modifications in the recommendations set forth in this response. Any claims made by the parties in the

petitions that are not explicitly addressed in this opinion are denied for the reason that the issues have been addressed and additional comment would fail to add clarity.

## II

### **THE EVIDENCE IS CLEAR THAT THE SPRING USERS HAVE SUFFERED MATERIAL INJURY AS A CONSEQUENCE OF DEPLETIONS TO THE AQUIFER, A PORTION OF WHICH ARE ATTRIBUTABLE TO GROUND WATER PUMPING**

IGWA maintains that there is no proof that the Spring Users suffered material injury. The Petition asserts that, “Mere allegations that more water would in fact be put to beneficial use if available does not meet the Spring User’s burden of proof.” The finding of material injury is not based on mere allegations. There was sworn testimony by those responsible for the operation of the trout farms that the ponds and raceways were built to accommodate more water than they have been receiving under their decreed rights and that they would in fact raise more fish if they received more water. Fish propagate and grow in water. More water allows the production of more fish. Less water accommodates fewer fish. Depletion of the water supply in the ponds and raceways limits the production of fish. That is material injury when the business is the production of fish. It is no different from a crop farmer testifying that he or she could not raise a crop on acres of land for which there was a decreed water right but no water because of junior right depletions. The sworn testimony of those responsible for the operation of the trout farms confirms the material injury. There is no contradictory evidence. Material injury occurred when the Spring Users could not raise as large a crop of fish with water supplies depleted below their decreed rights and below the capacity of their facilities to accommodate which was in part due to depletions from junior ground water pumping.

## III

### **THE RECORD ESTABLISHES NO BETTER MARGIN OF ERROR TO BE APPLIED TO THE MODEL THAN THAT UTILIZED BY THE DIRECTOR**

The determination of model uncertainty is one of the most difficult issues in this case. The recommendation previously made to the Director fully explains this fact. The modeling committee has not moved forward to determine a percentage of uncertainty to be applied. IGWA’s expert speculates that the level is somewhere between 20% and something less than 50%. Within that range there is no empirical basis to say there is a better percentage than that

utilized by the Director. The Director used the 10% uncertainty in the stream gauges. That uncertainty may be too high or too low on a particular gauge. Statistically if there were enough gauges the errors might equalize so the end result might be zero error. That is, of course, speculation. However, the 10% stream gauge error potential, high or low, is not speculation. That is the recognized error potential in the gauges. IGWA points to the other factors that can contribute to model error – non-uniform geology of the aquifer, variations within the model cells, recharge gains and losses, the fact that the model is incapable of predicting that curtailed ground water will actually show up at a particular spring. However, these factors were not assigned a percentile of error that could be tested and peer reviewed.

The former Director utilized the only factor with a known scientific basis to calculate a percentage. It is not fully defensible, but it is more defensible than any other amount produced in the hearing. The alternative to acceptance of the percentage utilized by the former Director is not to arbitrarily jump to a higher percentage somewhere between 20% and 50% with no supportable basis. The alternative would be to take the model at face value and utilize no error factor, no trim line, on the basis that there is no reliable error factor that can be identified. There is a compelling argument that can be made for that result, but the recommendation to do that was not made because those who have examined the issue acknowledge that some margin of error does exist. The former Director's determination and the recommendation from the hearing acknowledge that fact, recognizing that it is a provisional figure until the modeling committee develops a scientifically based margin of error.

As the science of the model develops, the Director will have a more reliable, peer reviewed, error factor to utilize. As previously noted, the development of such an error factor should be a high priority. The recommendation in this case should yield to that development when it occurs, but for now the 10% error factor is the only defensible percentage in this record.

#### IV

#### **THE GROUND WATER USERS HAVE FAILED TO ESTABLISH THAT THE SPRING USERS' CALLS IN THIS CASE ARE FUTILE, AND THE EVIDENCE PRESENTED INDICATES THAT THEY ARE NOT FUTILE**

IGWA maintains that the recommended order fails to identify or explain what constitutes a reasonable response time or reasonable quantity of water that must be delivered by curtailment

to justify curtailment. The Conjunctive Management Rules provided guidance in these areas. Rule 20.04 provides the following standards:

These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

Further guidance is provided by Conjunctive Management Rule 40 which provides the following:

**RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN ORGANIZED WATER DISTRICT (RULE 40).**

**01. Responding to a Delivery Call.** When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

**a.** Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five year (5) period to lessen the economic impact of immediate and complete curtailment...

The Director may use phased in curtailment of ground water rights when the result is not immediate. The period allowed the Director when utilizing phased in curtailment is five years. The use of phased in curtailment is intended “to lessen the economic impact of immediate and complete curtailment.” CM Rule 40.01.a. Concomitant with this objective, to avoid a futile call, it is reasonable to require that the curtailment will result in the delivery of sufficient water to the senior-right holder to significantly ameliorate the effects of the junior users’ depletion of the

aquifer in increments over a five year period. The former Director utilized phased in curtailment, setting objectives to be achieved at stages either through curtailment or the provision of replacement water. The staging set by the former Director provides a reasonable response time consistent with the Conjunctive Management Rules for curtailment or for achievement of the same results through replacement water. The amounts of water set forth in the targeted goals are usable by the Spring Users. If these targets are met the injuries that have developed over a period of years as the consequence of ground water pumping will be ameliorated. The delayed response time does not make the calls futile.

IGWA seeks a specification of the reasonable quantity of water that must result to the Spring Users from curtailment to avoid the defense of a futile call or that the curtailment results in a waste of the resource. The target amounts set by the former Director are reasonable so far as delivering water to the Spring Users.

## V

### **THE RECORD DOES NOT ESTABLISH THE DEFENSE THAT THE CURTAILMENT ORDERED WOULD RESULT IN A WASTE OF WATER**

IGWA maintains that curtailment of a large volume of water to provide small percentages of water to the Spring Users constitutes a waste of water. There is nothing to indicate that the Spring Users are wasting water in their practices. It is the location of their businesses and the source of their water that creates the difficulty. Clearly, curtailment would result in restricting the amount of ground water use significantly more than the quantity of water that will go to the specific Spring Users' facilities. The provision of replacement water does not go directly on a one cfs to one cfs ratio to the Spring Users' facilities. How the curtailed water or replacement water that does not go to the Spring Users will be used or lost is not established in this record. This proceeding does not encompass the entirety of water use downstream from the curtailed ground water users and the springs in issue. It would be speculation to conclude that the result of the curtailment would be the waste of water.

## VI

### **THE PRINCIPLE OF REASONABLE USE OF WATER DOES NOT BAR THE CURTAILMENT OR ALTERNATIVELY THE REQUIREMENT OF REPLACEMENT WATER**

IGWA presents the proposition that, “The Order explains that the curtailment of 600,000 acres for a speculative benefit is an unreasonable monopolization of the Aquifer, but does not explain why the curtailment of 57,220 acres or 52,420 acres for a speculative benefit is likewise not an unreasonable monopolization of the Aquifer.” The Recommended Order explained the logic of the recommendation, but several comments are appropriate in response to this claim. The curtailment ordered by the former Director was not speculative. It was based on the best science available. There were questions raised about the use of the Model to predict the result in particular springs, but no evidence was presented that this Hearing Officer found to be credible that identified a better science or more reliable result. There was criticism of the percentages assigned of water that would accrue to the Spring Users from the total reach gains that would result from curtailment. Certainly there is a question of whether the linear approach used and the percentages assigned render the best result. But there was no credible evidence of a better result. This Hearing Officer could not defend alternate findings from the evidence presented by Dr. Brendecke, Eric Harmon, Dr. Wylie, or any other witness. There were serious questions raised, but there were no answers given that would lead to defensible findings different from those previously made.

The difference between the curtailment ordered and the amount that would have been ordered absent the application of a trim line is the difference between an acceptable level of science for resolution of the issues and speculation in light of the potential for at least a 10% uncertainty that, if disregarded, would result in the curtailment of an additional half million acres plus. No greater light would shine on the issue than what has been said.

## VII

### **IGWA’S ARGUMENTS DO NOT ADDRESS OR RECOGNIZE THE DOCTRINE OF “FIRST IN TIME, FIRST IN RIGHT”**

A difficulty in this case is that IGWA does not address a core issue -- the effect of the doctrine of “first in time, first in right” in water rights. The end result of the arguments by

IGWA is that even though junior aquifer depletions have encroached upon senior rights over the years, there is no remediation for the harm because the result is harsh. The Spring Users have rights senior to the ground water users. Those senior rights have been damaged by depletions to the aquifer, reducing the flows from the springs. Various factors have contributed to those depletions, including weather, reduced incidental recharge, and ground water pumping. There is no remediation for the weather or reductions in incidental recharge by reason of more efficient farm practices. The reduction of the aquifer by junior ground water users is, however, subject to remediation. The ground water users are in a very sympathetic position. They have developed substantial, beneficial businesses upon promises of inexpensive power and what was said to be an unlimited water supply that could be tapped from the ground. But that sympathy must be hedged by the law that senior-right holders may call against junior-right holders when the juniors cause material injury to the seniors. In the early stages of the development of water law in Idaho the Idaho Supreme Court rejected the concept of a "common right" to water whereby priority would be ignored and water apportioned among users as common property, balancing one need with another. *Kirk v. Bartholomew*, 3 Idaho 367, 29 Pac. 40 (1892). "As between appropriators, the first in time is first in right." Idaho Code section 42-106. The principle has limits, but it is a starting point that must be addressed.

## VIII

### **THE PERCENTAGES OF REACH GAINS FROM CURTAILMENT FOR THE SPRING USERS' FACILITIES ARE THE BEST AVAILABLE, SUBJECT TO REVISION IF MORE ACCURATE PERCENTAGES ARE DEVELOPED**

The percentages of increase to the Spring Users' facilities from curtailment utilized by the former Director were the best evidence submitted at the hearing. They are subject to question, and it may well be that the percentage of reach gains to the Spring Users facilities will be greater, or perhaps less, than that forecast by the former Director. Criticism of the former Director's methodology and conclusions did not, however, provide any percentages that could be relied upon above those utilized by the former Director. Recommendations of different percentages would be based on guesses, not defined percentages produced at the hearing. Efforts to clarify the science should be ongoing by IDWR, and if more reliable percentages for gains to the Spring Users facilities develop, they should be utilized. This issue is similar to the margin of error factor utilized by the former Director. 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.

## IX

### **BLUE LAKES' AND CLEAR SPRINGS' WATER SUPPLIES AT THE TIME OF APPROPRIATION WERE ADEQUATE TO FILL THE 1971 AND 1955 WATER RIGHTS AND HAVE BEEN INJURED BY SUBSEQUENT GROUND WATER DEPLETIONS; HOWEVER, THE RECOMMENDED CURTAILMENTS SHOULD NOT BE MODIFIED AS A RESULT OF THIS FINDING**

The former Director determined that the record of flow measurements maintained by the Department, beginning in 1995, showed that the Blues Lakes 1971 right and the Clear Springs 1955 right were filled at the authorized diversion rates when the flows were at their seasonal highs, and, consequently Blues Lakes and Clear Springs did not suffer material injury to these rights. Upon reconsideration it appears that the hearing recommendation on this point should be revised.

Seasonal variations are appropriate to consider in determining if an injury occurs as a consequence of weather, incidental recharge, ground water depletions from pumping or any other factor that might cause more or less water to flow at a particular time. However, the fact that a water right is filled at a seasonal high period does not lead to the conclusion that there is no material injury for the remainder of the year when there is less water flowing than the decreed right. Material injury cannot be determined or rejected from these facts alone. There must be an examination of the cause or causes of the decline below the decreed right. If ground water pumping contributes to the decline in water that would be applied to a beneficial use, there is material injury.

In this case the evidence indicates that the Blue Lakes 1971 right and the Clear Springs 1955 right were filled throughout the year at the decreed levels at the times of appropriation. In the recent past they have been filled for only a portion of the years, ranging from a high of twelve months for Blues Lakes in 1977 and seven months in 1995 to lows of two months in 2004, three months in 2005, and three months in 2006. Clear Springs' 1955 right was filled year round from 1988 through 2001 and filled for six months in 2004, two months in 2005, and four



months in 2006. A portion of the declines is attributable to ground water pumping. Consequently, there should be a finding of injury to those water rights.

The Spring Users seek an order that the curtailment order be pushed back to the earlier times encompassing the two water rights in issue. However, it is not recommended that the curtailments extend to those dates. The curtailment orders, and the replacement water plans in their stead, should fill the 1955 and 1971 rights. Those orders addressed the combined total of the water rights of the Spring Users and the remediation was calculated against those combined totals. The 1955 and 1971 rights were calculated in determining the full extent of the Spring Users' rights and the injury to those totals. The analysis limiting the scope of curtailment has been articulated in the recommended order previously issued and will not be reiterated.

## **X**

### **THE DETERMINATION CONCERNING BLUE LAKES TROUT FARM AND BLUE LAKES COUNTRY CLUB SHOULD BE MODIFIED TO REFLECT THAT IT IS A ROTATION AGREEMENT NOT A SUBORDINATION AGREEMENT**

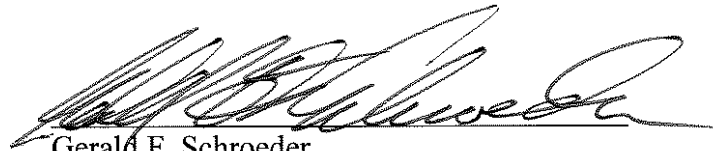
The Agreement between Blue Lakes Trout Farm, Inc. and Blue Lakes Country Club, Inc. has the effect of allowing BLCC to use a greater amount of water during eight hours at nighttime than its priorities would allow in exchange for limiting the time of use. One consequence of the Agreement is that BLCC is able to use water right no. 36-08593 for 0.7 cfs out of priority. To this extent the Agreement constitutes a subordination of Blue Lakes' rights during the eight hours BLCC irrigates. However, another consequence of the Agreement is that BLCC limits the time of use of its rights, including its May 26, 1949 right for 1.2 cfs. The result is that water should pass to Blue Lakes Trout Farm at times that it otherwise would be used at BLCC. This has the effect of being a water rotation agreement whereby both parties gain a benefit.

Blue Lakes' Petition for Partial Reconsideration is granted in this regard. Paragraph XV of the initial Order Constituting Findings of Fact, Conclusions of Law and Recommendation is modified. The amount of curtailment should not be reduced as a consequence of the Agreement between Blue Lakes Country Club and Blue Lakes Trout Farm.

**THE STIPULATION AND AGREEMENT REGARDING CERTAIN DAIRY  
GROUND WATER USE SHOULD BE ADOPTED AS A PART OF THE ORDER  
ENTERED IN THIS CASE**

Subsequent to hearing in this matter the Idaho Department of Water Resources, the Idaho Dairymen's Association, Inc., and Clear Springs Foods stipulated to an Agreement Regarding Certain Dairy Ground Water Use. Blue Lakes Trout Farm did not join in the Stipulation and Agreement. Nonetheless, the final order in this matter should contain terms substantially in conformance with the terms of the Stipulation and Agreement.

Dated 29 February, 2008.

A handwritten signature in black ink, appearing to read 'Gerald F. Schroeder', written over a horizontal line.

Gerald F. Schroeder  
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of February, 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

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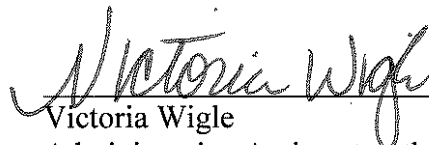
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