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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, AND 36-07427 **(Blue Lakes Delivery Call)** IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, AND 36-07148. **(Clear Springs Delivery Call)**	**SECOND JOINT MOTION FOR A PROTECTIVE ORDER**

COME NOW, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs"), through their respective attorneys of record, and, pursuant to Rule 26(c) of the Idaho Rules of Civil Procedure ("IRCP") jointly move the Director for a protective order that discovery not be had on information and documents identified in the *Notice of Taking Rule 30(b)(6) Deposition Duces Tecum of Blue Lakes*, and the *Notice of Taking Rule 30(b)(6) Deposition Duces Tecum of Clear Springs/Snake River Farms*, attached as **Exhibit 1** and **Exhibit 2**, respectively, to

the *Affidavit of S. Bryce Farris* ("*Farris Aff.*"), submitted herewith.[1]

A. Request for Expedited Hearing

In order to avoid confusion in the discovery or depositions in this matter, Blue Lakes and Clear Springs request the Director's expedited consideration, hearing and ruling on this motion at the Director's earliest convenience. The notices of deposition were sent with only 14 days notice and a decision on this Motion is required as soon as possible for purposes of those scheduled depositions.

B. Summary of Grounds for Protective Order

The Idaho Ground Water Appropriators, Inc. ("IGWA"), served the attached notices upon Blue Lakes and Clear Springs on October 5, 2010, to take depositions on October 19 and 20, 2010. Each of the notices lists the same sixteen matters for oral examination and document production.[2]

Blue Lakes and Clear Springs seek a protective order because the information and documents sought to be discovered are neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to the any of the issues before the Idaho Department of Water Resources ("IDWR") or the hearing officer in this proceeding. IGWA's discovery requests exceed the scope of this proceeding in the following respects:

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[1] This *Motion* is characterized as the "*Second" Joint Motion for Protective Order* because Blue Lakes and Clear Springs previously filed a *Joint Motion for a Protective Order* in this matter which was decided by the Hearing Officer, Hon. Gerald Schroeder, on September 10, 2007. *See Farris Aff.*, **Ex. 3**.

[2] The *Notice of Deposition for Clear Springs* includes seventeen paragraphs, however, there is numbering error in that the Notice is missing paragraphs 12 and 13. The *Notice of Deposition for Blue Lakes* identified an additional matter stated in paragraph 15 which is not included Notice for Clear Springs. Thus, there are minor discrepancies in the notices, but essentially the matters are the same.

1. IGWA seeks information related to the pre-adjudication development and use of Blue Lakes' and Clear Springs' facilities and water rights (request nos. 4, 6, 8 and 11);

2. IGWA seeks information related to the post-adjudication development and use of Blue Lakes' and Clear Springs' facilities and water rights even though such information was presented and decided at the Hearing in November 2007 (request nos. 5 and 7);

3. much of the information IGWA seeks (facility construction, improvement and operation (request nos. 6 and 7) and annual fish production records (request no. 11) has no bearing on Blue Lakes' and Clear Springs' water shortages, or on the impact of ground water diversions on Blue Lakes' and Clear Springs' water supplies;

4. IGWA seeks information relating to the trim line or 10% margin of error as applied is in error even though the Director issued an *Order Setting Hearing and Schedule and Order Limiting Scope of Hearing* precluding Blue Lakes and Clear Lakes from raising issues related to the use and application of the ground water model. For clarification, Blue Lakes and Clear Springs disagree with the Director's Order precluding such issues relating to the use and application of the ground water model, but if the Director's Order is allowed to stand then IGWA should not be allowed to discover such information at this time.

In addition, much of the information sought by IGWA was previously found to be outside the scope of this proceeding when these very issues were previously raised by IGWA and decided by the Hearing Officer, Hon. Gerald Schroeder, in this matter on September 7, 2007. *See Affidavit of S. Bryce Farris*, **Exhibit 3**. When confronted with this very issue the Hearing Officer issued an

Order Re Discovery which held the following with respect to production records:

> 2. The ultimate question of whether production records must be produced remained open following the hearing. Prior authority from the SRBA District Court indicates that such information is not discoverable. That determination is binding in this proceedings. However, if that information is not produced in discovery Blue Lakes and Clear (sic) Springs may not introduce information from the records to support any position they assert, e.g. more water allows the production of more or larger healthy fish.

Id. **Ex. 3**, pg. 2. With respect to the pre-adjudication records, the Hearing Officer's *Order Re Discovery* held that discovery is limited to post-adjudication information. *Id.* **Ex. 3**, pg. 2-3, ¶¶ 4-5.

Despite the Hearing Officer's prior Order, IGWA apparently intends to seek the same information in this remand proceeding. Thus, Blue Lakes and Clear Springs once again seek a protective order because the information and documents sought to be discovered are neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to the any of the issues before the Idaho Department of Water Resources ("IDWR") or the Director in this proceeding.

In addition to being outside the scope of this proceeding, much of the information sought by IGWA is privileged and confidential. The unnecessary production of this information would be burdensome and damaging to Blue Lakes' and to Clear Springs' respective business operations.

Moreover, treating a water right owner's production, facility construction, improvement and operation, as relevant to IDWR's administration of vested water rights undermines those rights, the prior appropriation doctrine and the objective of efficient administration of water rights in Idaho.

Finally, the unnecessary production of such information would expand the scope of the hearing for this matter. If Blue Lakes' and Clear Springs' production, facility construction, improvement and operation becomes relevant in this matter, then such information of IGWA's

individual members would also become relevant. Records relating to production, facility construction, improvement and operation for each individual ground water user would similarly be discoverable. This would unnecessarily expand the scope of the hearing and lead to the examination of the records for hundreds, if not thousands, of individual ground water users when ultimately such information is not relevant to IDWR's duties to administer water rights pursuant to Idaho law. Notably, no statute or administrative rule provides IDWR with the authority to review or compare production records in the context of distributing water within organized water districts. Hence, burdensome and unnecessary discovery as to these matters should be prohibited to protect Blue Lakes' and Clear Springs' respective business interests.

C. Discussion

1. IGWA's Requests Are Beyond The Scope of Any Permissible Inquiry Into Blue Lakes' and Clear Springs' Needs for Delivery of Their Decreed Water Rights

Facts predating Blue Lakes' and Clear Springs' decrees may not be resurrected in an attempt to show that they are entitled to, or need, less than the decreed quantities of their water right because a "decree entered in a general adjudication [is] conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420. More recently, in the judicial review proceeding in the A & B Delivery Call case, Judge Wildman confirmed that a decree is a judicial determination of beneficial use and stated:

> both Idaho's licensure and adjudication statutory schemes expressly take into account the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree to an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.**

Farris Aff., **Exhibit 4**. *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka

County Case No. CV 2009-000647 dated May 4, 2010 ("*Memorandum Decision*").[3]

The *Memorandum Decision* relied upon *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007), in which the Idaho Supreme Court addressed the constitutionality of the CMRs and confirmed that:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. We note that in the Initial Order entered in this case, the Director requested extensive information from American Falls for the prior fifteen irrigation seasons, to which American Falls objected in part. While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some **post-adjudication** factors which are relevant to the determination of how much water is actually needed.

Id. 154 P.3d at 448-449 (emphasis added).

The *Memorandum Decision* goes on to clarify such "post adjudication factors" which may be relevant to the determination of how much water is actually needed may include a junior appropriator's defenses of waste or failure to put the decreed quantity to beneficial use. However, "in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence" and the burden of proof lies with the junior appropriator. *Memorandum Decision*, pg. 38.

A junior appropriator's defense of waste does not open the door to discovery of a senior water user's production records. The term "waste" is used to refer to the concept that an appropriator is not entitled to divert water when he is not applying water to the beneficial use

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[3] Judge Melanson subsequently entered an *Order on Petitions for Rehearing*, Gooding County Case No. 2008-000551, dated August 23, 2010 in which he adopted and "expressly incorporated by reference the Memorandum's Decision's analysis, located on pages 24-38." *See Farris Aff.*, **Exhibit 5**.

authorized under his water right, or to divert more water than good husbandry requires for the authorized beneficial use. *Joyce Livestock Co. v. United States* (In re SRBA Case No. 39576), 156 P.3d 502, 516 (2007); *In re Robinson*, 61 Idaho 462, 469, 103 P.2d 693, 696 (1940). "[W]hen and to the extent that a prior appropriator is not beneficially using the water appropriated, it becomes public water, and he must allow it to flow past his diversion for the use of junior appropriators." *Ward v. Kidd*, 87 Idaho 216, 227, 392 P.2d 183, 190 (1964) (emphasis added). "The policy of the law against the waste cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator." *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966).

However, a determination that the water will be put to beneficial use without waste does not involve an inquiry into the production records, facility construction, operation or improvement of the senior appropriator. More specifically, the inquiry of whether the water will be put to beneficial use does not require a senior to show that it can produce better or more fish or better or more crops and thus the production and financial records are irrelevant. As noted by the Hearing Officer, the SRBA Court has addressed this issue and held that "The court cannot limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is no an enlargement of use of the water right." *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* at 17 (In Re SRBA Case No. 39576, Subcase Nos. 36-02708 et al., Twin Falls County Dist. Ct., Fifth Jud. Dist.) ("*Facility Volume Order*") *Farris Aff.* **Exhibit 6**. The *Facility Volume Order* clarified that attempting to regulate so that junior water users may be required to pay less is contrary to the prior appropriation doctrine and "illustrates that trying to regulate fish propagators with facility volume

is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water." *Id.* pg. 9. It is this reasoning and decision which was relied upon by the Hearing Officer when he concluded that production records are not discoverable because "[p]rior authority from the SRBA District Court indicates that such information is not discoverable. That determination is binding in this proceedings." *Order Re Discovery, Farris Aff.*, **Exhibit 3**, pg. 2.

2. **IDWR's Inquiry into a Vested Water Right Owner's Need for Water**

Not only has this very issue been decided by the Hearing Officer in these curtailment proceedings, but the issue has been raised and decided in prior curtailment proceedings before the Gooding County District Court. In its first and, we believe, only actual curtailment of a water right in Water District 130, IDWR established that the scope of its inquiry into a senior water right owner's need for water is limited to verification that water user is not receiving its decreed quantity of water and that the water will be put to the authorized beneficial use.

On June 7, 2002, Clear Springs submitted a "water delivery call" requesting distribution of water to Clear Springs 200 cfs water right no. 36-02708 for use at a facility (not involved in this proceeding) located adjacent to Clear Lake. *Steenson Aff.*, **Ex. I.**[4] On June 13, 2002, the Director issued instructions to the Water District 130 watermaster for the curtailment of water diversions by Clear Lakes Trout Company ("Clear Lakes," not involved in this proceeding) in order to supply Clear Springs with a constant flow of 200 cfs. *Steenson Aff.*, **Ex. J.** The instructions do not reexamine Clear Springs' pre-adjudication development or use of its water rights, or the type,

[4] Reference to the *Steenson Aff.* refers to the *Affidavit of Daniel V. Steenson* filed in this matter on August 22, 2007. For ease of reference, the *Steenson Affidavit* is attached to the *Affidavit of S. Bryce Farris* as **Exhibit 7**.

number and size of fish. The only inquiry into Clear Springs' water use required by the instructions is to determine whether "water is needed under the senior priority water right making the call . . . and will be applied to the [authorized] beneficial use." *Id.* p. 12, ¶¶ 4 & 5.

As soon as the watermaster confirms Clear Spring's need for water, the instructions direct her to provide 14-day notice to give Clear Lakes' an opportunity to remove trout before the curtailment. *Id.*, p. 12, ¶ 5. After 14 days, the instructions direct the watermaster to "adjust the adjustable weir as necessary to distribute water to the rights in order of priority." *Id.*, p. 12, ¶ 6. Thereafter, "[t]he watermaster is to document, check and adjust the distribution of water in accordance with priority of the rights on a weekly basis." *Id.*, p. 12, ¶ 7.

The watermaster followed the Director's instructions expeditiously. On June 18, 2002 she measured Clear Lakes' and Clear Springs' diversions and determined that Clear Springs needed the water by asking Clear Springs' manager if Clear Springs would use the water, and observing that some of Clear Springs' raceways were empty. *Steenson Aff.*, **Ex. K, Ex. L**, p. 20, ln 19 - p. 21, ln. 16. The next day, the watermaster sent a "Notice of Intent to Redistribute Flows" to Clear Lakes and to Clear Springs, in which she reported these measurements and her finding that Clear Springs would put the water to beneficial use. *Id.*, **Ex. K**. As instructed, the watermaster gave notice that, in 14 days, she would curtail Clear Lakes' water rights to supply Clear Springs with its "full compliment" of 200 cfs under right no. 36-02708. She further advised the parties that she would make weekly visits to make further adjustments as necessary to maintain the 200 cfs flow to Clear Springs. *Id.*

Later that year, in deposition testimony, the watermaster explained that she understands "need," as used in the Director's instructions, to mean being able to put the water to beneficial use. *Id.*, **Ex. L**, p. 20, lns. 19-20. She understands the instructions to direct her to deliver the quantity of

water stated in Clear Springs' decree. *Id.*, p. 61, ln. 21 - p. 62, ln. 11. She understands that, generally, her job is to deliver the quantity of water stated in the water right "because it's not my job to determine how much water [an irrigator] needs . . . it's his job." *Id.*, p. 62, ln. 23 - p. 63, ln. 9. Accordingly, the watermaster did not seek production information from Clear Springs either prior to curtailing Clear Lakes to establish Clear Springs' need, or after curtailing Clear Lakes to verify that Clear Springs was putting the water to beneficial use. *Id.*, **Ex. L**, p. 24, lns 7-16, p. 25, lns. 22-24.

During his deposition, the Director confirmed that the watermaster properly followed his instructions to determine Clear Springs' need by her visual observation of Clear Springs' raceways (i.e. fish rearing facilities) and obtaining Clear Springs' commitment that it would rear fish in those raceways after water was redistributed. *Id.*, **Ex. M**, p. 144, ln. 22-p. 145, ln. 5. The Director stated that, when administering water rights, IDWR has no authority to require a water user to provide production records. *Id.*, at p. 148, lns. 19-22, p. 149, lns. 8-21, p. 152, lns. 18-20, p. 153, lns. 17-25. Production records are not necessary for IDWR to determine whether water is being wasted. *Id.*, p. 150, lns. 6-8.

In an affidavit, the Director further explained IDWR's beneficial use verification authority and practice:

> 7. . . . [T]he Watermaster relied upon field observations to ascertain whether Clear Springs was applying the additional water to the beneficial use authorized under the calling right. I further responded that it is not the practice of IDWR to request production records from water users to verify that beneficial use of the water is being made because IDWR does not have statutory authority to require the production of such records.
>
> 8. IDWR does not consider production records necessary to demonstrate that water is being applied to the beneficial use authorized under a water right.

> Production records would not serve as a substitute for field observation that water is being placed to beneficial use in accordance with a water right.

Steenson Aff., **Ex. N.**, pp. 2-3.

No statutes have been enacted and no administrative rules have been promulgated since 2002 that would change the Director's testimony wherein he admitted "IDWR does not have statutory authority to require the production of such records." In a 2002 Gooding County District Court case, Clear Lakes filed a motion to compel Clear Springs to produce fish production records for the period since the watermaster curtailed Clear Lakes' diversion of water pursuant to the aforementioned watermaster instructions. *Id.*, **Ex. O.** During the hearing on the motion to compel, Clear Springs argued that production records were not necessary or relevant to IDWR's determination of need, and that being compelled to produce privileged production records would compromise Clear Springs business operations. *Id.*, **Ex. P.** p. 23 - p. 18, ln. 4. IDWR's counsel, Mr. Rassier, agreed with Clear Springs:

> . . . I would like to emphasize that the language in the instructions to the watermaster, . . . instructs the water master to make a determination, first of all, that Clear Springs is in a position to use the water.
>
> That's what I think the director meant by instructing the watermaster to determine need. That there's less water available to Clear Springs is authorized to divert and put to beneficial use under this water right, and then that there is in fact a place for that water to be used.
>
> And the watermaster did observe that there were empty raceways. The watermaster subsequently observed that after the adjustment to the water rights were made that there was water flowing in those raceways, and that there were fish in those raceways; and I think that is the extent to which the department would go in determining that beneficial use is being made of the water in accordance with the water right.
>
> . . .

> I mean it's difficult enough administering water rights in this state without getting the department in the position of reviewing production records of various waterusers to determine whether they're making more or less of a beneficial use, or productive use, of that water as compared with some other user on the system who would like to use the water, also.

Id., p. 19, on. 16 - p. 21, ln. 9.

In denying Clear Lakes' motion to compel from the bench, the district court found that production records are irrelevant and unnecessary to IDWR's determination of Clear Springs' need and beneficial use of water, and rejected the notion (not argued by Clear Lakes) that IDWR's water distribution responsibility included determining whether water users were making "maximum" or "optimum" use of water. *Id.*, p. 24, ln. 19 - p. 25, ln. 13.

The same ruling and reasoning applies in this case with respect to IGWA's discovery requests for irrelevant information. As recognized by Hearing Officer Schroeder, the former Director, and Judge Burdick (then district judge), there is no basis to allow the discovery of business records that are not necessary for purposes of the administration of water rights under Idaho law.

D. <u>Post Hearing Information</u>.

As indicated in the Hearing Officer's *Order Re Discovery*, IGWA was allowed to discover and present post-adjudication information at the hearing in November 2007. This matter is currently before the Director on remand. Thus, the issues and evidence relating to post-adjudication information to the November 2007 hearing have been litigated and decided by the Hearing Officer, affirmed by the Director and affirmed in part by the District Court. For the same reasoning discussed, *supra*, in which the courts have consistently held that a decree is a "judicial determination" of the beneficial use of a water right and a senior water right should not be required to re-prove or re-adjudicate its water rights, a prior determination by the Hearing Officer, and

affirmed by the Director, should also equate to a judicial determination of the beneficial use of the water right and Blue Lakes and Clear Springs should not be required to re-prove or re-adjudicate their water rights prior to the hearing. Accordingly, discovery of such information by IGWA should be limited to not only post-adjudication information, but information subsequsent to November 2007 hearing.

With respect to facility construction, improvement and operation, since no physical changes have been made at the Blue Lakes' and Clear Springs' facilities since 2007, further discovery into those matters would be prohibited as well. After all, the Water District 130 Watermaster already inspected the diversion facilities and confirmed the "reasonable" diversions employed by Blue Lakes and Clear Springs. Hearing Officer Schroeder upheld this finding and rejected IGWA's claim that Blue Lakes and Clear Springs had "unreasonable" means of diversion. Since those same facilities remain in place, that decision is binding and IGWA cannot re-litigate that issue now.

E. Conclusion

A decree is conclusive as to the water right owner's entitlement to water. Facts which predate the decree may not be revisited to show that the water right owner is entitled to, or needs, less than the decreed quantity of water. A vested water right owner's entitlement may only be reduced for failure to use the water right for the 5-year statutory forfeiture period. A water right owner is not required to reprove its entitlement to its decreed quantity of water or re-justify a diversion that has been found "reasonable" in a prior proceeding. IDWR's narrow inquiry into a water right owner's need for water is limited to determining whether the water user is receiving its decreed quantity of water, and whether the water user will put the water to the authorized beneficial use without waste (i.e. consistent with "good husbandry"). IDWR makes this determination by

measuring the water user's diversion of water, field observation to verify that the water can be put to beneficial use, and confirmation from the water user that the water will be put to use.

The level of production that may result from the use of a vested water right is beyond the scope of this inquiry. IDWR has neither the authority nor the administrative capacity to evaluate a water user's productivity, or facility construction, improvement and operation in responding to the water user's call for delivery of water. None of these matters is a component of a water right or within IDWR's regulatory authority. Treating these considerations as relevant to a watermaster's ministerial duty of delivering water within a water district undermines priority as the basis for delivery of water in times of shortage, and any possibility of the efficient administration of water rights. This is especially true in a case such as this, where numerous, hydraulically-connected junior ground water right owners would also, necessarily, be subject to the same discovery and evaluation that is suggested by IGWA's proposed discovery requests.

For the foregoing reasons, Blue Lakes and Clear Springs respectfully request that the Director issue a protective order as to IGWA's proposed discovery of information discussed herein that is outside the scope of this proceeding, and has no bearing on Blue Lakes' and Clear Springs' water shortages, or on the impact of ground water diversions on Blue Lakes' and Clear Springs' water supplies. Blue Lakes and Clear Springs request that the protective order address, without limitation, (1) discovery is limited to post-adjudication (April 10, 2000) information ; (2) discovery is limited to new information subsequent to the prior hearing in this matter in November 2007; (3) discovery does not include Blue Lakes' and Clear Springs' production, facility construction, improvement and operation records; and (4) discovery does not include evidence of the application and use of the model so long as the Director precludes Blue Lakes and Clear Springs from introducing such

information.

DATED this 8th day of October, 2010.

RINGERT LAW CHARTERED

By _____
Daniel V. Steenson

BARKER, ROSHOLT & SIMPSON

By _____
John K. Simpson

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2010, I served a true and correct copy of the foregoing **JOINT MOTION FOR PROTECTIVE ORDER** by delivering it to the following individuals by the method indicated below, addressed as stated.

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