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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

CLEAR SPRINGS FOODS, INC.,	)	
	)	
Petitioner,	)	Case No. No. 2008-444
vs.	)	
	)	
BLUE LAKES TROUT FARM, INC.,	)	
	)	
Cross-Petitioner,	)	
vs.	)	<b>IDWR RESPONSE BRIEF</b>
	)	<b>ON REHEARING</b>
	)	
IDAHO GROUND WATER APPROPRIATORS,	)	
INC., NORTH SNAKE GROUND WATER	)	
DISTRICT, and MAGIC VALLEY GROUND	)	
WATER DISTRICT,	)	
	)	
Cross-Petitioners,	)	
vs.	)	
	)	
<b>GARY SPACKMAN</b> , in his capacity as Interim	)	
Director of the Idaho Department of Water Resources,	)	
and <b>THE DEPARTMENT OF WATER</b>	)	
<b>RESOURCES</b> ,	)	
	)	
Respondents.	)	

IN THE MATTER OF DISTRIBUTION OF  
WATER TO WATER RIGHTS NOS. 36-0413A,  
36-04013B, and 36-07148.

(Clear Springs Delivery Call)

IN THE MATTER OF DISTRIBUTION OF  
WATER TO WATER RIGHT NOS. 36-02356A,  
36-07210, and 36-07427.

(Blue Lakes Delivery Call)

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COMES NOW Gary Spackman, Interim Director of the Idaho Department of Water Resources (“Director”) and the Idaho Department of Water Resources, an executive agency of the state of Idaho (“Department”), by and through the undersigned deputy attorney general, and respectfully submit this Response Brief to the *Ground Water Users’ Rehearing Brief* (“Ground Water Users’ Brief”) and the *Spring Users’ Brief in Support of Joint Petition for Rehearing* (“Spring Users’ Brief”).

**I. PROCEDURAL BACKGROUND**

On June 19, 2009, this Court issued its *Order on Petition for Rehearing* (“Order”) in which it affirmed in part and remanded in part the decisions reached by the Director in response to the delivery calls filed by Blue Lakes Trout Farm, Inc. (“Blue Lakes”) and Clear Springs Foods, Inc. (“Clear Springs”) (collectively referred to herein as the “Spring Users”). Petitions for rehearing were timely submitted by the Ground Water Users and the Spring Users. An *Amended Scheduling Order on Petitions for Rehearing* was issued by the Court on August 20, 2009. Initial briefing was filed with the Court on August 26, 2009 by the Ground Water Users and Spring Users. The Department did not seek rehearing but is responding to certain issues raised by the Ground Water Users and Spring Users.

## **II. RESPONSE TO CERTAIN ISSUES RAISED ON REHEARING**

### **A. Material Injury and Futile Call**

In its Order, the Court stated that the Director's seasonal variability analysis "is essentially akin to the application of the futile call doctrine." *Order* at 19. The Department agrees with the Ground Water Users' request that the Court reconsider its statement on this point. *Ground Water Users' Brief* at 11. The application of the futile call doctrine should only occur after a finding of material injury—raised either by the Director in his initial order on material injury or as a defense to such finding by junior ground water users—not as part of the Director's material injury analysis.

In his analysis of material injury in his initial orders on the Blue Lakes and Clear Springs delivery calls, one factor the Director examined was the seasonal variability (both intra- and inter-year) associated with the calling water rights at the time of appropriation. Based on the Director's understanding of the nature and extent of the Spring Users' water rights at the time of appropriation, the Director determined that there was injury to some, but not all of the rights. Once the determination of material injury was made, the Director selected the date of curtailment as the most senior priority date of Blue Lakes' and Clear Springs' injured water rights. Using the Eastern Snake Plain Aquifer Model, the Director simulated curtailment based on those priority dates. After taking 10% model uncertainty into account, the results of the simulated curtailment showed that, at steady state, 51 cfs would accrue to the 24-mile Devil's Washbowl to Buhl Gage reach, and 38 cfs would accrue to the 11-mile Buhl Gage to Thousand Springs reach. Of the water expected to accrue to the reaches, 10 cfs was expected to be realized at the Blue Lakes facility (20% of 51 cfs), and 2.6 cfs was expected to be realized at the Clear Springs facility (6.9% of 38 cfs).

In reviewing the amount of water that would be made available to the Spring Users' respective reaches and facilities, the Director determined that the call was not futile and ordered curtailment of junior ground water rights. Only after a determination of material injury is made should the question of futile call be raised. Futile call recognizes that injury is occurring, but that curtailment of junior rights should not take place because curtailment would not produce a useable quantity of water to the senior within a reasonable amount of time, thereby resulting in waste of the resource. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Due to the long ranging impacts of ground water depletions, the common law doctrine of futile call has been modified by the CM Rules for purposes of conjunctive administration. CM Rule 20.04. Additionally, futile call is not listed as a factor in CM Rule 42 that the Director may consider in "Determining Material Injury[.]" The CM Rules therefore require that the Director's determination of material injury remain separate from application of futile call.

**B. Seasonal Variation**

The Spring Users ask the Court to reconsider its decision to remand the Director's determination on seasonal variation to apply what the Court identified as the appropriate burdens of proof. The Spring Users assert that remand is not necessary because the record conclusively demonstrates that Blue Lakes' water right no. 36-7210 and Clear Springs' water right no. 36-4013A are materially injured.

The Spring Users continue to disagree with the findings of Directors Dreher and Tuthill that water right nos. 36-4013A and 36-7210 are not injured because of seasonal variation. All evidence on this issue has been thoroughly presented to the Court. As explained by the Department and understood by the Court, the Director's primary basis for finding that water right nos. 36-4013A and 36-7210 were not injured was a lack of reasonable evidence to support that

the rights were filled on a continuous basis at the time of appropriation. Tr. p. 1216, lns. 2-22; Tr. p. 1353, lns. 18-25; p. 1354, lns. 1-25; p. 1355, lns. 1-25; p. 1356, lns. 1-8; Tr. p. 1407, lns. 18-25; p. 1408, lns. 1-25; p. 1409, lns. 1-3 (direct and cross-examination testimony of Director Dreher explaining his rationale on this issue). While the Court agreed that it was proper for the Director to take seasonal variability into account, the Court determined that “the lack of data regarding historical conditions and the insufficiency of the evidence regarding conditions at the time of appropriation was construed against the Spring Users . . . —this in effect became a readjudication of the quantity element of the right [and shifted the burden of proof to the senior].” *Order* at 24.

The Spring Users state it is immaterial “whether or not flows were sufficient at the time of appropriation to fill water rights 36-7210 and 36-4013A continuously throughout the period of use.” *Spring Users’ Brief* at 8. Examination of seasonal variability is not only expressly recognized by the CM Rules, but it is essential for the Director to have a complete understanding of the nature and extent of a water right at the time of its appropriation to properly administer interconnected surface and ground water rights.

The Department routinely recommends surface water rights in the Snake River Basin Adjudication (“SRBA”) with a standard Season of Use element, even if the right may only be available for a limited period of time. This can occur when the right is junior in priority, is a “high flow” or “flood flow” right, or is on an intermittent stream or spring source. In surface water administration, the dilemma of seasonal variability and application of the Season of Use element is resolved by priority of right. In administration of interconnected surface and ground water sources, Season of Use can become an unintended driver.

In the SRBA, the Director is tasked with recognizing the extent of beneficial use. Idaho Code § 42-1401B(1). Because of that, it is not necessary for a claimant to submit a series of measurements to the Department to support the claimed Season of Use (whether an irrigation claim with a Season of Use of April 1 to November 1; or a fish propagation claim with a year-round Season of Use, as is the case with the Spring Users' rights). The question of historical availability is left to the Director in administration. *American Falls Reservoir District No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (2007) (a decree is not conclusive as to the nature and extent of all elements of a water right). *See also* CM Rule 42.01.c (a factor the Director may consider in his determination of material injury is the "seasonal . . . impact[] of all ground water withdrawals"); CM Rule 43.03.b ("Consideration will be given to the history and seasonal availability of water for diversion so as not to 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.").

While it may be true that a right was continuously filled throughout the Season of Use at the time of appropriation, the Spring Users' approach advocates blind application of this element: "For water rights, the rubber hits the road when a senior makes a water delivery call. If a decree is truly 'conclusive as to the nature and extent of all water rights in the adjudicated water system' as provided by I.C. § 42-1420, then the Director simply has no business re-examining the senior's water supply or beneficial use at the time of appropriation to determine how much water the senior is entitled to receive under its decreed water right." *Spring Users' Brief* at 14.

On sources such as the Snake River, where there is a large record of available data on stream flows, seasonal variability can be understood and applied by the Director in his initial

response to a conjunctive management delivery call. That information may then be used by a junior who is subject to curtailment or the senior who made the delivery call. On smaller sources, there may be insufficient data in the public domain, or the information is in the sole possession of the senior. Under the approach advocated by the Spring Users, the senior making the delivery call would be under no obligation to provide this information to the Director. Without this information, the Director would be required to blindly accept the Season of Use element stated on the decree and ministerially curtail junior ground water rights if the senior's Quantity element was not satisfied at any time during the Season of Use—despite the fact that the decree never examined the issue. Junior ground water users would be unable to defend against the Director's determination of material injury because the conclusive nature of the decree would prevent the junior from obtaining any information in the senior's possession on seasonal availability at the time of appropriation. The result of this approach will lead to misapplication of the prior appropriation doctrine—enforcement of priority of right without regard to optimum development, reasonable use, and monopolization. *See* Idaho Const. Art. XV, §§ 5, 7; Idaho Code §§ 42-101, -226, -602; CM Rule 20.03.

**C. Remand**

Citing to a finding of fact entered by Director Dreher in his initial orders on the Blue Lakes and Clear Springs delivery calls, the Spring Users ask the Court not to remand this matter for additional findings by the Director on the issue of seasonal variability:

There are no known measurements, nor any other means, for reasonably determining the intra-year variations in the discharges from the springs comprising the source for these water rights on the dates of appropriation for these water rights.

*Spring Users' Brief* at 12 citing R. Vol. I at 55, ¶ 49; R. Vol. III at 498-99, ¶ 54.

The Spring Users state that this finding of fact stands for the proposition that “the agency has already decided that it cannot undertake the analysis recommended by the Court on remand.” *Id.*

The conclusion advanced by the Spring Users is incorrect. At the hearing, Director Dreher explained in his direct testimony and under cross-examination from an attorney representing Clear Springs that additional information was expected to be elicited through the hearing process and would be considered. Tr. p. 1185, lns. 16-25 (“The process for resolving this that I had in mind was that the order would get issued, there’d be some degree of relief provided, and then there’d be a hearing over which I had planned to serve as the presiding officer, to sort out factual disputes and legal disputes. And I wouldn’t have embarked on that -- or I didn’t really embark on the process, I wouldn’t have had that process in mind unless I would have been willing to make changes as different facts surfaced, and perhaps more information, or clarifying information was provided.”); Tr. p. 1420, lns. 3-17 (“We’ll have a hearing process, we’ll sort out factual disagreements, legal disagreements, and we’ll modify these orders as necessary to reflect the best available factual information, the best available scientific basis.”)

If the Court continues to determine that remand is appropriate, the Court should direct the Spring Users to provide all information on the historical availability of water right nos. 36-4013A and 36-7210 to the Director for his review and consideration.

**D. Imparting Surface Water Administration Practices on Conjunctive Administration**

The Spring Users request that the Court reconsider its statement that if the Director finds material injury in response to a conjunctive management delivery call, junior ground water rights should not be curtailed until a hearing occurs. *Spring Users’ Brief* at 15. The Spring Users argue that upon a finding of material injury, no hearing is required and the Director must immediately curtail junior ground water rights unless a mitigation plan is in place. A basis for



the Spring Users' argument for immediate curtailment is reliance upon case law discussing surface water disputes. *Spring Users' Brief* at 16-20 citing *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972); *Order Granting Intervention and Denying Motion for Preliminary Injunction*, Case No. CV-02-00377 (Gooding County, 5<sup>th</sup> Jud. Dist., 2002).

Reliance upon surface water administration case law, such as the dispute between Clear Lakes Trout Company ("Clear Lakes") and Clear Springs, *Order Granting Intervention and Denying Motion for Preliminary Injunction*, Case No. CV-02-00377 (Gooding County, 5<sup>th</sup> Jud. Dist., 2002), is incorrect in the present process of conjunctive administration. In *American Falls*, the Court stated that the district court's reliance upon *Moe v. Harger*, 10 Idaho 302, 307, 77 P. 645, 647 (1904), as support for its holding that the CM Rules were unconstitutional because they did not presume that junior ground water diversions injure senior surface water users was misplaced because, "The issues presented are simply not the same." *American Falls* at 877, 154 P.3d at 448. *See also* T. p. 463, lns. 18-25; p. 464, lns. 1-25; p. 465, lns. 1-25; p. 466, lns. 1-24 (watermaster Cindy Yenter discussing administration of surface water rights in Water District No. 130, including the surface water to surface water dispute between Clear Lakes and Clear Springs).

#### **E. Identification of Timeframes and Procedures**

The Spring Users "urge the Court to identify procedures to ensure timely administration and enforcement of mitigation plans" *Spring Users' Brief* at 20. This issue was addressed in *American Falls*:

Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the

complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

*American Falls* at 875, 154 P.3d at 446.

#### IV. CONCLUSION

Based on the foregoing, the Department respectfully requests the Court consider the arguments made herein.

DATED this 10<sup>th</sup> day of September 2009.

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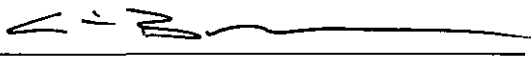
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I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 10<sup>th</sup> day of September 2009.

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