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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,)

vs.)

) Case No. No. 2008-444

BLUE LAKES TROUT FARM, INC.,)
)
Cross-Petitioner,)

vs.)

) **IDWR RESPONSE TO BLUE LAKES**
) **TROUT FARM, INC.'S MOTION TO**
) **ENFORCE ORDERS**

IDAHO GROUND WATER APPROPRIATORS,)
INC., NORTH SNAKE GROUND WATER)
DISTRICT, and MAGIC VALLEY GROUND)
WATER DISTRICT,)

vs.)

) Cross-Petitioners,)

) vs.)

GARY SPACKMAN, in his capacity as Interim)
Director of the Idaho Department of Water Resources,)
and **THE DEPARTMENT OF WATER**)
RESOURCES,)

) 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)

COME NOW Respondents, the Idaho Department of Water Resources and Interim Director Gary Spackman (collectively referred to herein as “Director” or “Department”), and respond to *Blue Lakes Trout Farm, Inc.’s Motion to Enforce Order* (“Motion”), filed with this Court on April 12, 2010. Blue Lakes Trout Farm, Inc.’s (“Blue Lakes”) Motion, accompanying memorandum (“Memorandum”), and affidavit (“Steenon Affidavit”), filed pursuant to Idaho Appellate Rule 13(b)(13), request “that the Court issue an order and/or writ of mandate requiring the Director to comply promptly and completely with this Court’s remand order” *Motion* at 4. Specifically, Blue Lakes requests that the Court order the Director to: (1) “determine injury to Blue Lakes’ water right no. 36-7210 . . . [;]” and (2) “make it clear that the Director has a present and ongoing duty to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes’ water rights, and to allow Blue Lakes to present such evidence in any proceeding before IDWR related to Blue Lakes’ water delivery call.” *Id.* at 4-5.

ARGUMENT

I. If Jurisdiction Is Proper, The Director Will Treat Blue Lakes' Motion As A Request To Re-Open Proceedings In Its CM Rule 42 Delivery Call For Water Right No. 36-7210

This matter began as an original administrative action before the Director following a delivery call filed by Blue Lakes pursuant to Conjunctive Management ("CM") Rule 42. In that proceeding, the Director found that Blue Lakes was materially injured by junior ground water diversions.¹ The Director's determination of material injury subsequently came before this Court on judicial review. Pertinent to the Motion filed by Blue Lakes, this Court on review found that the Director properly applied 10% uncertainty to the Eastern Snake Plain Aquifer ("ESPA") Model; that Blue Lakes' spring apportionment from the Devil's Washbowl to Buhl gage spring reach was 20%; and that the Director improperly applied a lack of seasonal variability measurements in his finding that water right no. 36-7210 was not materially injured. The Department agrees with Blue Lakes that the issue of seasonal variability relative to water right no. 36-7210 has been remanded to the Department for additional proceedings.

On January 15, 2010, a notice of appeal was filed by the Idaho Ground Water Appropriators, Inc. ("IGWA") before the Idaho Supreme Court, raising nine issues for review. On February 5, 2010, a notice of cross-appeal was filed by Blue Lakes, raising two issues for review. The Department did not file a notice of appeal or cross-appeal. A briefing schedule has been set.

In response to the Director's finding of material injury, and prior to the filing of the notice of appeal and cross-appeal, three CM Rule 43 mitigation plans were filed by junior ground

¹ Blue Lakes' discussion of *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) and *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) are not applicable in this proceeding. Here, the Director has found material injury to Blue Lakes and has been administering junior ground water rights pursuant to his determination of material injury. Additionally, this Court's remand did not find that water right no. 36-7210 was materially injured. The issue was remanded to determine material injury, if any.

water users. A hearing was set on the CM Rule 43 mitigation plans and an order governing the scope of the proceedings was entered (“Order Limiting Scope”). *Stenson Affidavit*, Exhibit A-8. The purpose of the Order Limiting Scope was to narrowly focus the issues relative to the ability of the three CM Rule 43 mitigation plans, “either individually or collectively, to satisfy the mitigation requirement of 59.3 cfs to the Devil’s Washbowl to Buhl Gage spring reach or 11.9 cfs directly to Blue Lakes (20% of 59.3 cfs).” *Id.* at 5. Indeed, Blue Lakes recognizes in this proceeding “that IGWA’s mitigation plan would provide Blue Lakes with the quantity of water required by the Director’s previous injury and mitigation determination.” *Memorandum* at 6. On April 7, 2010, the Director held a hearing on the three mitigation plans.

While IGWA has filed its notice of appeal and Blue Lakes has filed its notice of cross-appeal, the Department cannot know the nature and extent of the issues presented until at least the appellant and cross-appellant briefs have been filed. I.A.R. 35(a)(4) (“A list of the issues presented [in appellant’s brief] on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. . . . The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.”). *But see* I.A.R. 35(b)(4) (“In the event the respondent contends that the issues presented on appeal listed in appellant’s brief are not sufficient, incomplete, or raise additional issues for review, the respondent may list additional issues . . .”). Even then, if the Supreme Court ultimately determines that this Court or the Director decided certain issues incorrectly, it could alter the landscape of any administrative proceeding the Department might hold regarding material injury to water right no. 36-7210. Notwithstanding issues of judicial economy, the Order Limiting Scope was entered to ensure that any administrative action taken during the appeal to the Supreme Court on Blue Lakes’ CM Rule 42 delivery call would not be found at a later date to lack jurisdiction. *See* I.R.C.P. 12(b).

While Blue Lakes asks this Court to allow it to present information regarding injury “in any proceeding” before the Department, *Motion* at 5, the proper forum in which to address the scope of injury is in a CM Rule 42 delivery call proceeding, not a CM Rule 43 mitigation plan proceeding. Given the substance of Blue Lakes’ pleadings before the Director in the CM Rule 43 proceedings, it could be interpreted that Blue Lakes intended to re-open the CM Rule 42 delivery call relative to water right no. 36-7210. In light of the Motion, and if the Court finds the Department has jurisdiction to move forward and decide material injury issues even while on appeal, it would be the Department’s intention to treat the Motion as a request to re-open Blue Lakes’ CM Rule 42 delivery call for a determination of material injury to water right no. 36-7210.

II. This Court’s Decisions On Model Uncertainty And Spring Apportionment Are Binding Upon The Parties Unless Determined Otherwise By The Supreme Court

As mentioned previously, the Court affirmed the Director’s determination of uncertainty associated with the ESPA Model (10%) and spring apportionment to the Blue Lakes facility (20% of gains to the Devil’s Washbowl to Buhl Gage spring reach). In its notice of cross-appeal to the Supreme Court, Blue Lakes has clearly raised the issue of model uncertainty and has arguably raised the issue of spring apportionment. *Bromley Affidavit*, Attachment B. In its notice of appeal to the Supreme Court, IGWA has clearly raised the issue of model uncertainty and has arguably raised the issue of spring apportionment. *Bromley Affidavit*, Attachment C. This Court’s decision on model uncertainty and spring apportionment are binding unless altered by the Supreme Court. “The filing of a notice of appeal divests the district court of jurisdiction to proceed further with an action” *Madsen v. State, Dept. of Health and Welfare*, 114 Idaho 182, 184-85, 755 P.2d 479, 481-82 (Ct. App. 1988). Blue Lakes must accept this Court’s decisions unless altered by the Supreme Court.

III. If The Supreme Court Affirms, Or Certain Issues Are Not Raised Before The Supreme Court, This Court’s Determinations Will Become Law Of The Case In Subsequent Administrative Proceedings

If this Court’s decisions affirming the Director’s conclusions regarding model uncertainty and/or spring apportionment are affirmed by the Supreme Court, those holdings will become law of the case in any future proceeding. “The doctrine of ‘law of the case’ is well established in Idaho and provides that ‘upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal’” *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000). If either issue is not appealed to the Supreme Court, this Court’s holding affirming the Director will also become law of the case. *Id.* Blue Lakes will be bound of law of the case when proceedings are re-opened before the Department on its CM Rule 42 delivery call regarding material injury to water right no. 36-7210.

IV. Res Judicata May Bar Blue Lakes From Presenting Certain Information In Subsequent Administrative Proceedings

In the Order Limiting Scope, the Director stated that he should use the best available information, “to the extent he is authorized to do so by Idaho law” *Steenson Affidavit*, Exhibit A-8 at 3. The Director stated that a constraint upon using information proffered by Blue Lakes was *res judicata*. In *Sagewillow*, the Supreme Court framed the doctrine of *res judicata* as follows:

The doctrine of *res judicata* applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of *res judicata* was as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.

The ‘sameness’ of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

Sagewillow at 844, 70 P.3d at 682.

Blue Lakes was party to the CM Rule 42 delivery call hearing before the Director, the hearing officer, and the District Court. The Court has affirmed the Director on the issues of model uncertainty and spring apportionment.

Presently, Blue Lakes states that the Order Limiting Scope has deprived it from: (1) presenting “previously unavailable information from IDWR . . . [to show] that, because the model has been calibrated to the Blue Lakes’ spring source, it can be used to show the impact of ground water diversions on the Blue Lakes’ spring” (i.e. spring apportionment); and (2) presenting a different method to account for model uncertainty, as outlined in its “White Paper.” *Memorandum* at 17-18. In support of its position that this information is not barred by *res judicata*, Blue Lakes cites deposition testimony from Dr. Allan Wylie.

While this is not the appropriate forum in which to litigate *res judicata*, it is important to note that Blue Lakes did not present the Court with Dr. Wylie’s deposition testimony in which he agreed that the information Blue Lakes now seeks to present is information that was presented at the 2007 administrative hearing, was known at the time of the 2007 hearing, or could have been presented. Regarding the White Paper, Dr. Wylie testified as follows:

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. Scheüder's expert report, but I don't remember.

Q. Somewhere in the neighborhood of 1 percent?

A. It's less than 1 percent.

Bromley Affidavit, Attachment A (Tr. p. 131, lns. 11-25; p. 132; p. 133, ln. 1).

Based upon Dr. Wylie's deposition testimony, the information presented in the White Paper on model uncertainty was known at the time of hearing and may be barred by *res judicata*. *Sagewillow* at 844, 70 P.3d at 682.

Blue Lakes also asserts that, based on "previously unavailable information[.]" it has "discover[ed]" a way in which to use the ESPA Model to simulate "the impacts of ground water diversions on Blue Lakes' springs." *Memorandum* at 17. Based upon Dr. Wylie's deposition testimony, this information regarding spring apportionment was known at the time of the 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 IWRRRI 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.

Bromley Affidavit, Attachment A (Tr. p. 129, lns. 17-25; p. 130; p. 131, lns. 1-6; p. 133, lns. 3-25; p. 134; p. 135, lns. 1-6.).

Based upon Dr. Wylie's deposition testimony, the information that Blue Lakes seeks to present regarding spring apportionment was known at the time of hearing and may be barred by *res judicata*. *Sagewillow* at 844, 70 P.3d at 682.

By asking this Court to sanction its use of the use of the ESPA Model at Blue Lakes spring to determine spring apportionment and the White Paper to determine model uncertainty, Blue Lakes would rewrite the Director's determinations of material injury; thereby constituting an end-run around the administrative, judicial review, and appellate processes. Blue Lakes, like all parties, must accept the results of what it chose to present or could have presented at the 2007 administrative hearing. The appropriate forum in which to address these issues, however, is before the Director, not this Court.

V. Blue Lakes' Constitutional Rights Have Not Been Violated

As stated above, the Order Limiting Scope was entered to narrowly focus the CM Rule 43 mitigation plan proceedings on the ability of the plans to mitigate the Director's previous determination of material injury to Blue Lakes. If the Court finds that the Department has jurisdiction while the CM Rule 42 delivery proceeding is on appeal to the Idaho Supreme Court,

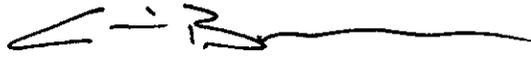
the Department will treat Blue Lakes' Motion as a request to re-open the CM Rule 42 delivery call proceeding. Provided that certain issues are not barred, the CM Rule 42 delivery call proceeding is the proper forum in which to raise issues related to material injury.

CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court deny Blue Lakes' Motion. If the Court deems it appropriate, the Department will re-open the CM Rule 42 proceeding regarding material injury to water right no. 36-7210.

DATED this 22nd day of April, 2010.

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CERTIFICATE OF SERVICE

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 22nd day of April, 2010.

Document Served: **IDWR RESPONSE TO BLUE LAKES TROUT FARM, INC.'S MOTION TO ENFORCE ORDERS**

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