

**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,) Docket No. CM-DC-2010-002
AND 36-07427.)

(Blue Lakes Delivery Call))
) Docket No. CM-DC-2010-003

IN THE MATTER OF DISTRIBUTION OF WATER) **ORDER SETTING HEARING**
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,) **SCHEDULE and ORDER**
AND 36-07148.) **LIMITING SCOPE OF**
) **HEARING**

(Clear Springs Delivery Call))
)

I. Scope of Proceedings

In 2005, Blue Lakes Trout Farm, Inc. (“Blue Lakes”) and Clear Springs Foods, Inc. (“Clear Springs”) sent letters to the Idaho Department of Water Resources (“Department”) requesting that the Department administer junior priority water rights to supply Blue Lakes’ and Clear Springs’ senior water rights. A multi-day hearing on the request for administration was held in November of 2007, in which the parties to this case presented evidence and testimony to the hearing officer. The hearing officer issued his recommended decision on January 11, 2008 and the Department issued a final order on July 11, 2008.

The Department’s July 11, 2008 final order was appealed to district court. The District Court issued its *Order on Petition for Judicial Review* on June 19, 2009. In the *Order on Petition for Judicial Review* (hereafter referred to as “Order on Review”), the Court held, among other things, that the Department did not properly apply the appropriate burdens of proof and evidentiary standards regarding seasonal variation when the Director found no injury to water right no. 36-7210, held by Blue Lakes and water right no. 36-4013A, held by Clear Springs. The Court remanded the issue of seasonal variability back to the Department for further proceedings. *Order on Review* at 24. The District Court affirmed the Department on other issues and many of those issues are currently on appeal to the Idaho Supreme Court. *See Clear Springs Foods Inc., et. al v. IDWR*, Supreme Court Docket No. 37308-2010.

The District Court’s decision about the burdens of proof and evidentiary standards for determining the effects of seasonal variability was not appealed to the Idaho Supreme Court. On

May 11, 2010, District Judge John Melanson issued an *Order Granting in part Motion to Enforce Orders*. The order required that the Director apply the proper burdens of proof and evidentiary standards to determine the effects of seasonal variability on water rights held by Blue Lakes and Clear Springs.

On July 19, 2010, Interim Director Gary Spackman (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Final Order* regarding the issue of seasonal variability and injury (“July 19, 2010 Final Order”) to Blue Lakes’ water right no. 36-7210 and Clear Springs’ water right no. 36-4013A.

The Department received *Petition Requesting Hearing on July 19, 2010 Final Order* from Blue Lakes on July 29, 2010. On August 2, 2010, the Department received *Petition Requesting Hearing on July 19, 2010 Final Order* from Clear Springs. The Department received *Ground Water Users’ Petition for Reconsideration and Request for Hearing* filed by Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively “Ground Water Users”) on August 2, 2010.

On August 20, 2010, the Director issued his *Order Granting Request for Hearing and Scheduling Prehearing Conference* (“Prehearing Order”) in which he set a prehearing conference and directed the parties to come prepared to discuss hearing dates and the scope of the hearing. In the *Order*, the Director suggested that because some of the issues identified by the parties in their petitions are on review to the Idaho Supreme Court, the Director might limit the scope of the hearing to exclude those issues on appeal.

On September 14, 2010, the Director conducted a pre-hearing conference in this matter. At the hearing, the parties agreed to a hearing schedule. The parties also presented argument to the Director regarding the appropriate scope of the hearing. The Ground Water Users recognize that some of the legal issues raised in their petition are on appeal to the Idaho Supreme Court, but argue that this is the first time the Director has found that these particular water rights had been injured, and the new facts of this proceeding require the Director to reconsider previously determined questions of law in light of the new facts. For example, the Ground Water Users point out that under the *July 19, 2010 Final Order*, junior ground water users must mitigate an additional 3.5 cfs and 1.2 cfs of simulated depletions to Blue Lakes’ and Clear Springs’ water rights respectively to prevent curtailment. The Ground Water Users question whether Blue Lakes and Clear Springs can beneficially use the additional amount of water if it is provided and seek to raise this issue in the proceeding.

In response to the Director’s question about the appropriate scope of the hearing, Blue Lakes and Clear Springs also argue that previously determined legal issues raised in their petitions should again be considered by the Department. They argue that, because there are new facts increasing the mitigation obligation of the Ground Water Users, the Director should reconsider previous determinations about the accuracy and limitations of the Eastern Snake Plain Aquifer Model (“ESPAM”). For example, Blue Lakes and Clear Springs argue that the Director should revisit his previous determinations regarding 10% model uncertainty, the trim-line, and the ability of the model to predict the effect of pumping on a particular spring.

After due consideration, the Director finds it appropriate to limit the scope of the hearing. First, the issue of 10% model uncertainty, the trim-line, and ability of the model to predict effect on a particular spring were already addressed in the November 2007 hearing. At the hearing, testimony and evidence regarding the ESPAM model was presented and evaluated by the hearing officer. As a result, the hearing officer made specific findings upholding the validity of the ESPAM model. *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* (January 11, 2008) at 13-14. These findings were adopted by the Director. *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* (July 11, 2008) at 9. The District Court on judicial review upheld the Director's determination of 10% model uncertainty, the use of the trim line and modeling of the reach gains. *Order on Petition for Judicial Review* at 12, 25-26, 28. The issues of the 10% model uncertainty and the trim line have been appealed by Blue Lakes and Clear Springs to the Idaho Supreme Court and oral arguments on these issues are set to be heard in December of this year. As such, these issues are within the jurisdiction of the Idaho Supreme Court and it is not appropriate to address in this proceeding. *See Order Granting in par Motion to Enforce Orders; Order Setting Status Conference* at 4 (holding that the District Court will not address the ESPAM model issues raised by Blue Lakes because those issues are on appeal to the Idaho Supreme Court and are not within the scope of the remand). Furthermore, the issue of modeling the reach gains was not appealed to the Supreme Court by any party. Thus, the District Court's finding on this issue is binding on the parties and the Department declines to revisit this issue in this proceeding.

The Director believes it would be appropriate to address the issues of 10% model uncertainty, the trim-line, and modeling of the reach gains in this proceeding if the Department had modified how it applied the ESPAM model on remand. However, the same model version (ESPAM 1.1) was employed by the Department to determine the mitigation obligation when the matter of seasonal variability was remanded back to the Department. While the Department found that additional water rights are being materially injured, the question of material injury does not require us to revisit the validity of ESPAM 1.1. Blue Lakes and Clear Springs will be allowed to present evidence and argument on how the *July 19, 2010 Final Order* implemented curtailment. See Clear Springs' *Petition Requesting Hearing on July 2010 Final Order* ¶¶ 4-6; Blue Lakes' *Petition Requesting Hearing on July 19, 2010 Final Order* ¶¶ 5-6.

While the legal arguments raised by the Ground Water Users are on appeal to the Idaho Supreme Court, the Ground Water Users should not be precluded from arguing that the new facts and the related additional curtailment obligations created by the July 19, 2010 order could affect how the law is applied to the new facts. The Director will allow the Ground Water Users to present testimony on the legal issues raised in their petition but only to the extent new facts affect the legal conclusions previously reached by the Director. For example, IGWA may present information on whether the additional increment of water allotted to Blue Lakes and Clear Springs in the *July 19, 2010 Final Order* can be put to beneficial use for fish propagation. However, this opportunity is not open-ended. The Director will reject any argument or presentation of economic benefits that simply compare the economic benefit of ground water pumping versus the economic benefit of fish propagation. This straight comparison of economic benefit has already been rejected by the Director.

ORDER

IT IS HEREBY ORDERED that the following schedule shall govern this proceeding:

October 1, 2010	Disclosure of Expert Witnesses
November 5, 2010	Simultaneous Filing of Prefiled Direct Testimony
December 17, 2010	Simultaneous Filing of Prefiled Rebuttal Testimony
January 10–14, 2011	Hearing (5 days) starting at 9:00 am Location: IDWR State Office located at 322 East Front Street, Boise Idaho, 6 th Floor Conference Rooms C & D.

IT IS FURTHER ORDERED that petitioners Blue Lakes and Clear Springs are precluded from addressing, in this proceeding, issues related to the 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model. The Ground Water Users may present testimony on the legal issues raised in their petition, but only to the extent new facts affect the legal conclusions previously reached by the Director.

IT IS FURTHER ORDER that the parties are authorized to conduct discovery consistent with the scope of the hearing as limited by this Order. IDAPA 37.01.01.521.

IT IS FURTHER ORDERED that the Department will make the following witnesses available for questioning consistent with the scope of the hearing as limited by this Order:

Allan Wylie
Mat Weaver
Liz Cresto

If the parties wish to depose these individuals, the parties shall contact Garrick Baxter to schedule deposition times.

DATED this 1st day of October 2010.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of October 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

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