

**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 CONTINUING
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,)	PROCEEDING BASED ON
AND 36-07148.)	AGREEMENT OF PARTIES
(Clear Springs Delivery Call))	
)	
_____)	

PROCEDURAL HISTORY

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.

On July 29, 2010, the Department received a *Petition Requesting Hearing on July 19, 2010 Final Order* from Blue Lakes. On August 2, 2010, the Department received a *Petition Requesting Hearing on July 19, 2010 Final Order* from Clear Springs. On August 2, 2010, 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 20, 2010, the Director issued his *Order Granting Request for Hearing and Scheduling Prehearing Conference* in which he set a prehearing conference and directed the parties to come prepared to discuss hearing dates and the scope of the hearing.

On September 14, 2010, the Director conducted a prehearing 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.

On October 1, 2010, the Director issued his *Order Setting Hearing Schedule and Order*

Limiting Scope of Hearing (“Hearing Order”). The Hearing Order scheduled the hearing to begin on January 10, 2010. The Hearing Order also limited the scope of the hearing. The Director ordered that Blue Lakes and Clear Springs would not be allowed to present evidence about 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model because those issues were either on appeal to the Idaho Supreme Court or were foreclosed under the doctrine of res judicata or law of the case. Hearing Order at 3. The Director also determined that some of the legal issues raised by the Ground Water Users were on appeal to the Idaho Supreme Court, but concluded that the Ground Water Users would be allowed to present new evidence because the finding of material injury to senior water right nos. 36-7210 and 36-4013A increased the obligation of the Ground Water Users and the Ground Water Users were never afforded the opportunity to present evidence about how this additional obligation might affect the previous conclusions of law. *Id.*

On October 8, 2010, Blue Lakes and Clear Spring filed a *Second Joint Motion for a Protective Order*, in which Blue Lakes and Clear Springs sought to restrict the scope of depositions to be conducted in this proceeding.

On October 12, 2010, Blue Lakes filed its *Application for Peremptory Writ of Mandate* (“Application for Writ”) with the Snake River Basin Adjudication District Court of the Fifth Judicial District, the Honorable Eric Wildman presiding. In the Application for Writ, Blue Lakes sought an order requiring the Department to allow Blue Lakes and Clear Springs to present evidence about 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model. A hearing on the petition was held on October 28, 2010.

On October 15, 2010 the Department received the Ground Water Users’ *Motion to Continue Administrative Hearing* (“Motion to Continue”) and a *Response In Opposition to Second Joint Motion for Protective Order*. In the Motion to Continue, the Ground Water Users seek to have this matter continued pending a final decision from the Idaho Supreme Court in Docket Number 37308-2010. The Ground Water Users represent that the Director approved mitigation plans that will enable them to satisfy the new injury findings for both deliver calls. Specifically, the Ground Water Users state that “The *Over-The-Rim Plan* approved February 9, 2010, in administrative case number CM-MP-2009-004, enables the Ground Water Districts to satisfy the injury findings to all of Clear Springs’ water rights.” Motion to Continue at 2 (emphasis in original). With regards to Blue Lakes, the Ground Water Users state:

The Ground Water Districts’ *Mitigation Plan for Blue Lakes* approved on May 7, 2010, enables the direct delivery of mitigation water from Alpheus Creek to Blue Lakes. The Ground Water Districts’ *Mitigation Plan for Conversions, Dry-Ups, and Recharge* approved on July 19, 2010, provides credit for other mitigation activities of the Groundwater Users. These plans collectively provide sufficient water to meet the injury findings to Blue Lakes.

Motion to Continue at 2 (emphasis in original).

On October 29, 2010, District Judge Wildman denied Blue Lakes’ *Application for Peremptory Writ of Mandate*, holding that a writ of mandate will not issue because Blue Lakes

has a plain, speedy and adequate remedy at law. Furthermore, Judge Wildman concluded that Idaho Appellate Rule 13 does not provide an exception that would allow Judge Wildman to issue a writ of mandate ordering the Department to address issues which are the same, or intertwined with, those presently pending on appeal to the Idaho Supreme Court in Docket Number 37308-2010.

On November 1, 2010, Blue Lakes and Clear Springs filed *Spring Users' Response to Ground Water Districts' Motion for Continuance* ("Response"), in which they agree the Director should continue this contested case until a decision is issued by the Idaho Supreme Court in Docket Number 37308-2010. In the Response, Blue Lakes and Clear Springs agree the Ground Water Users must comply with the July 19, 2010 Final Order requiring curtailment or adequate mitigation for 2011, but "dispute the assertion that prior mitigation plans provide sufficient mitigation for the new injury findings... ." Response, at 3.

CONCLUSION

Continuing the hearing currently scheduled to begin on January 10, 2010 will promote juridical economy and be a more efficient use of time and resources for the parties and the Department. During the pendency of the continuance, the Ground Water Users must satisfy the mitigation requirements of the July 19, 2010 Final Order. However, it does not appear the Ground Water Users have the required mitigation plans approved as suggested by the Ground Water Users in their Motion to Continue. The *Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)* (hereafter "Final Order Approving Blue Lakes' Mitigation Plan") was approved on May 7, 2010. Under the order, mitigation plan participants have an obligation to Blue Lakes for 11.9 cfs. Final Order Approving Blue Lakes Mitigation Plan, Attachment A. The mitigation plan benefit was calculated to be 12.8 cfs. *Id.* Under the July 19, 2010 Final Order, the Ground Water Users incur an additional 1.0 cfs obligation in 2011. July 19, 2010 Final Order at 23. Assuming full compliance with the Final Order Approving Blue Lakes' Mitigation Plan, the Ground Water Users will still come up short. Contrary to the Ground Water User's assertion, the *Mitigation Plan for Conversions, Dry-Ups, and Recharge* has not been approved as to Blue Lakes. It has only been approved as to the Surface Water Coalition. *Final Order Approving Mitigation Credits Regarding SWC Delivery Call*, Docket No: CM-MP-2009-006, (July 19, 2010). It will be incumbent upon the Ground Water Users to seek timely approval of the outstanding mitigation plan. Furthermore, the Over-The-Rim Plan for Clear Springs is currently pending before the Department as a recommended order. The Director has not acted on the recommended order because the parties requested a stay of the proceeding during the term of a private mitigation agreement between the Ground Water Users and Clear Springs. The Department is prepared to issue a Final Order on the Over-The-Rim Plan after the expiration of the private mitigation agreement between the Ground Water Users and Clear Springs on November 15, 2010.

ORDER

IT IS HEREBY ORDERED that the based upon the Motion to Continue filed by the Ground Water Users and the concurrence by Blue Lakes and Clear Spring that this matter should be continued, the hearing scheduled to begin on January 10, 2011 is CONTINUED until

sometime after the issuance of a decision by the Idaho Supreme Court in Docket Number 37308-2010. If a party wants to proceed with the hearing once a decision is issued by the Idaho Supreme Court in Docket Number 37308-2010, the party shall move the Department for order resetting the hearing.

IT IS FURTHER ORDERED that, during the pendency of the continuance, the Ground Water Users shall satisfy the mitigation requirements of the Department's July 19, 2010 Final Order. It will be incumbent upon the Ground Water Users to seek timely approval of any applicable mitigation plans.

DATED this 4th day of November, 2010.



GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

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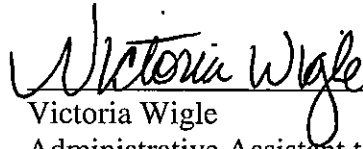
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