

Regarding Seasonal Variability. On January 21, 2011, Clear Springs Foods, Inc. (“Clear Springs”) also filed a *Petition Requesting Hearing on January 10, 2011 Amended Final Order Regarding Seasonal Variability.* The Ground Water Users filed their *Second Petition for Reconsideration and Request for Hearing* on January 21, 2011.

In this order, the Director grants the requests for hearing filed by the parties. Furthermore, the Director agrees that the proceeding should be continued pending a decision by the Idaho Supreme Court in Docket Number 37308-2010.

PROCEDURAL HISTORY

On July 19, 2010, the Director 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 the 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, 2011. 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 the 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 him 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

The parties' requests for hearing the Amended Seasonal Variability Order should be granted. Nonetheless, continuing the scheduling of the hearing will promote judicial economy and be a more efficient use of time and resources for the parties and the Department because of uncertainty regarding a number of legal issues currently on appeal to the Idaho Supreme Court in Docket Number 37308-2010. Accordingly, this matter should be continued until sometime after the issuance of a decision by the Idaho Supreme Court in Docket Number 37308-2010.

The *Final Order Approving Mitigation Plans (Blue Lakes Delivery Call)* (hereafter "Final Order Approving Mitigation Plan") was issued on May 7, 2010. Under the Final Order Approving Mitigation Plan, mitigation plan participants have an obligation to Blue Lakes for 11.9 cfs. Final Order Approving Mitigation Plan, Attachment A. The mitigation plan benefit was calculated to be 12.8 cfs. *Id.* Subsequent to the issuance of the Final Order Approving Mitigation Plan, A&B Irrigation District ("A&B") filed a *Notice of Partial Withdrawal of Mitigation Plan*, which sought to eliminate the credit A&B received for enrollment of certain acres in the Conservation Reserve Enhancement Program ("CREP"). The Department modeled the credit to be 0.01 cfs. Accordingly, the total benefit under the modified plan is 12.79 cfs without A&B's CREP credit. Under the Amended Seasonal Variability Order, dated January 10, 2011, the Ground Water Users incur an additional 0.71 cfs obligation in 2011. Amended Seasonal Variability Order at 24. Assuming full compliance with the Final Order Approving Mitigation Plan and the Amended Seasonal Variability Order, the Ground Water Users will have sufficient mitigation for 2011 with regards to Blue Lakes (11.9 cfs + 0.71 cfs = 12.61 cfs, which is less than the 12.79 cfs revised simulated benefit calculated after withdrawal of A&B's elimination of credit for enrollment in CREP).¹

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*.

In the Motion for Clarification, the Ground Water Users ask the Department for information regarding the individuals or entities contained in the "non-member participants" category that is contained in Table 1 of Attachment A of the Final Order Approving Mitigation Plan. Motion for Clarification at 2. The "non-member participants" as identified in Table 1 are ground water users subject to the mitigation obligation and located outside the ground water districts. Non-member participants may include some individuals that are outside the ground

¹ The Ground Water Users also filed a *Mitigation Plan for Conversions, Dry-Ups, and Recharge*, which was approved by the Director on May 14, 2009. On June 18, 2010, the Ground Water Users sought a mitigation credit under the May 14, 2009 approved mitigation plan for the above the rim activities. At the last scheduling conference (July 13, 2010), the Ground Water Users and Blue Lakes agreed to work on a proposed hearing schedule. While the 2011 mitigation obligation is satisfied, the Ground Water Users' request for credit must be approved for it to apply to future mitigation obligations.

water districts but have joined the ground water districts for purposes of mitigation. The Department will work with the Ground Water Users to identify those individuals and entities.

In the Motion for Clarification, the Ground Water Users also ask the Department to provide information outlining the mitigation obligation for each individual junior ground water entity. Motion for Clarification at 1. Attachment A is provided in response to this request.

ORDER

IT IS HEREBY ORDERED that the requests for hearing filed by Blue Lakes, Clear Springs and the Ground Water Users are hereby granted.

IT IS FURTHER ORDERED that the hearing in this matter 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.

DATED this 7th day of February, 2011.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

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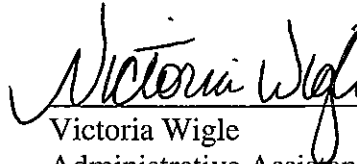
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