

(“Clear Springs”), the Hearing Officer bifurcated the hearing to delay consideration of these issues “until the appeal relating to those issues is final.” *Id.* at 2.

The GWDs’ *Motion* should be denied for several reasons.

First, the decision to bifurcate the hearing in the Clear Springs mitigation plan proceeding was not based on the pendency of the appeal in *Clear Springs Foods, Inc. v. Tuthill*, Case no. 2008-444 (Fifth Jud. Dis. Gooding County). The Hearing Officer in that proceeding views the GWDs’ novel proposed method to deliver water “over the rim” through a pipeline to Clear Springs Snake River Farm as a gateway issue that should be addressed before other issues raised in Clear Springs’ protest are considered. The GWDs’ *Mitigation Plan for 2009 (Blue Lakes)* does not propose a novel water delivery method that should be considered before other issues are addressed.

Second, the Hearing Officer, the Director, and the District Court have made it clear that analysis of the impacts of ground water pumping on spring flows and spring rights is an ongoing process. The Director has a continuing duty to utilize the best available data and scientific methods in this analysis. The parties are not precluded from presenting new data and/or improved methods for evaluating these impacts.

Third, the District Court has remanded *Clear Springs Foods, Inc. v. Tuthill*, to the Director so that he may “apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations” as part of a determination of material injury to Blue Lakes’ 1971 priority water right no. 36-07210. *Order on Petitions for Rehearing*, at 12-13. The Director is required to accord the decree for Blue Lakes’ right presumptive weight, and the burden is on junior ground water users to demonstrate that they are not causing material injury to the right. In this conclusion, the District Court stated that “it is imperative that any mitigation

plan submitted in response to a material injury determination be approved (after a hearing, in accordance with the CMR and this Court's decisions) prior to allowing juniors subject to administration to commence water use." Therefore in addition to the established injury to Blue Lakes' 1973 priority water right no. 36-07427, the injury to Blue lakes' 1971 right must also be addressed in this proceeding, in accordance with the District Court's remand instructions.

Blue Lakes proposes the following schedule to provide the parties the opportunity to submit opening and rebuttal testimony, and to conduct discovery.

- 1-29-10 All parties file expert reports and testimony, discovery authorized.
- 2-26-10 All parties file rebuttal expert reports and rebuttal testimony
- 3-15-10 Hearing(s) begin

ARGUMENT

A. The Hearing Officer's Bifurcation of the Hearing in the "Over the Rim Case" Does Not Support the GWDs' Motion to Limit the Scope of this Hearing

The reason the Hearing Officer in the Clear Springs mitigation proceeding bifurcated that hearing does not exist in this case. The Hearing Officer's August 28, 2009 *Scheduling Order* in the Clear Springs mitigation proceeding set a hearing date to determine the acceptability of the proposed "over the rim" method, and provided that: "The remaining issues raised by the objections shall be addressed as and if they become relevant to a final determination."

Scheduling Order at 1, ¶ 1. The *Scheduling Order* further provides that "discovery may proceed on those remaining issues." *Id.* at 2, ¶ 5. There is no mention in the *Scheduling Order* of the appeal in *Clear Springs Foods, Inc. v. Tuthill*.

During the August 26, 2009 status conference in the Clear Springs mitigation proceeding, the Hearing Officer explained his rationale for bifurcating the hearing. He did not identify the

pendency of the appeal as a reason to delay consideration of the trimline and spring percentage issues.

Hearing Officer: Let me just interrupt first. Can we stage this, that is, as I understand, that you object to the concept of the Over the Rim plan, that in terms of reliability and in terms of reputation, several areas if, as a concept that is found to be either adequate or inadequate, then we would move forward with these other, I mean if it's found to be inadequate that's not an acceptable system, then the rest of this evidence would not seem to be relevant in this proceeding would it?

Mr. Simpson: Well I think your Honor it is relevant in the overall administration of the rights, as between this junior and senior, as to what its ongoing obligation is using the best science.

Hearing Officer: Well I understand that and I actually agree with you, but let's assume that there's a determination that Over the Rim is simply not an acceptable mitigation, then we have to back up and look at alternatives and then the evidence that you're talking about would seem to be highly relevant.

* * *

Hearing Officer: On the other hand, if a determination were made that Over the Rim is a practical and acceptable means of mitigation then we would move forward when we ought to, whether the foundational facts of how much water must be produced and the quality of that water, well the quality would have to come in initially as to whether it could produce the quality that you need. But, if it's found to be an acceptable approach wouldn't we then move forward to these other issues?

Mr. Simpson: Certainly the issues could be staged. I mean they could be staged for its first consideration of the method of delivery if you will and second being the amount and the quality of the water being delivered what are those proper numbers if you will. So you could stage it.

Hearing Officer: That would be, you know that's my preference to stage the proceeding and see where that leads in terms of additional rights that may have developed or new science and new conclusions that may have developed. Clearly I would say I anticipated, and I think the Directors anticipated, that if there's better information in the future or if there is simply changed conditions like, as I've always said, the 7.5 on the Richter scale, that you could revisit those earlier conclusions. If that's, but my belief is that we should first determine whether the method of mitigation is even an acceptable method. If not, the evidence that might ultimately come around would, I think, focus much differently than if it is found to be an acceptable method.

Unofficial transcription of audio recording of “Snake River Farms Status Conference - August 26, 2009,” downloaded from www.idwr.idaho.gov/News/WaterCalls/1000Spring%20Users%20Calls/thousand_audio.htm.

In this proceeding, on October 7, 2009, Blue Lakes filed a *Motion for Order Authorizing Limited Discovery* of Department employees “related to the technical basis of the Director’s determination of the mitigation obligation for Blue lakes, including, but not limited to, the Director’s determination of model uncertainty (10%), the Director’s use of a ‘10% trim line’ to exclude certain junior ground water rights from administration in response to Spring Users’ water delivery calls, and the director’s method of allocating spring flow within a reach to determine injury to the Spring Users’ facilities.” *Motion* at 3-4. On October 13, 2009, the GWDs filed an *Objection*, arguing that matters identified in Blue Lakes’ *Motion* “are outside the scope of any hearing relating to the 2009 Mitigation Plan and are subject of the pending appeal in *Clear Springs Foods, Inc. v. Tuthill*, Case no. 2008-444 (Fifth Jud. Dis. Gooding County).” In his November 2, 2009 *Order Authorizing Limited Discovery*, the Director authorized Blue Lakes to conduct the requested discovery. The Director stated that he agreed with the reasoning of the Hearing Officer in the *Clear Springs* mitigation proceeding that the admissibility and relevance of information obtained in discovery may be addressed during the hearing process. *Order* at 2. He made no reference to the pending appeal.

Accordingly, the Hearing Officer’s decision to bifurcate the hearing in the *Clear Springs* mitigation proceeding does not support the GWDs’ *Motion* to limit the scope of the hearing in this proceeding. The GWDs’ 2009 Mitigation Plan for Blue Lakes does not include a novel method of delivering water directly to Blue Lakes. There is therefore no reason to have an initial hearing on the delivery method. It is also clear that the pendency of the appeal in *Clear Springs Foods, Inc. v. Tuthill* does not preclude consideration of evidence of improved methods to

determine the extent of injury to Blue Lakes' water rights and resulting mitigation obligation. To the contrary, ongoing development and consideration of such methods was contemplated in the decisions and orders of the Hearing Officer, the Director and the District Court in *Clear Springs Foods, Inc. v. Tuthill*.

B. Technical Issues Pertaining to the Extent of Injury and Mitigation Requirements Are Subject to Ongoing Analysis and Are Within the Scope of This Proceeding

The District Court addressed the trimline and spring percentage issues in its *Order on Petition for Judicial Review* in *Clear Springs Foods v. Tuthill*, finding that, although the Director's trimline and percentage allocation of reach gains to Blue Lakes' water supply (Alpheus Creek) are flawed, the Director did not abuse his discretion in adopting them until better methods are developed to determine the impact of ground water diversions on spring flows and to deal with model uncertainty in administration. *Order on Petition for Judicial Review* at 25-29.

Blue Lakes will not appeal the District Court's decision on the trimline and spring percentage issues. In this proceeding, Blue Lakes intends to present evidence to show that there are more reliable and scientifically defensible methods to determine the impact of junior ground water diversions on Blue Lakes' water supply, and to deal with model uncertainty in the administration of junior ground water rights.

The Director has a duty to utilize the best available data and scientific methods to determine the impact of junior ground water diversions on senior water rights and administer water rights. I.C. § 42-607; CMR 42.01.c; *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 878-879, 154 P.3d 433, 449-450 (2007). The Director adopted and the District Court affirmed the Hearing Officer's finding that: "Continuing efforts should be made to improve the accuracy of all scientific conclusions." "If that produces more reliable results, those results

should be used in the future.” *Responses to Petitions for Reconsideration and Clarification and Dairymen’s Stipulated Agreement (“Reconsideration Oder”)* at 7-8.

The findings of the District Court are indicative of the need for ongoing analysis of the impact of ground water pumping on spring rights.

The margin of error used by the Director was not established in conjunction with the development of the model nor was it developed pursuant to any scientific methodology or peer review process. . . The Hearing Officer concluded that the Director’s reasoning was sound as a matter of common sense until a better margin of error is established.

Order at 26.

While there was testimony presented that there may exist more accurate methods for determining gains to particular spring complexes, no evidence of the specifics for implementing the alternative methods or the results of such methods were presented. *See* TR. 1866-67, (Brendecke Testimony); Exh. 312 at 12-13 (Brockway Testimony). Accordingly, given the data and methodology available to the Director, in light of the limitations of the model, despite being subject to differences of opinion, the apportionment was not arbitrary or capricious.

Id. at 29.

Department staff confirm the expectation and need for ongoing evaluation of the impact of ground water pumping on spring flows. Dr. Wylie testified that “the Department should try to use the most current up-to-date data and techniques always.” *Stenson Aff.*, Ex. A, Wylie Depo. at 15, Ins. 19-21. Watermaster Cindy Yenter and Dr. Alan Wylie acknowledged that during the summer of 2008 there was an unexpected decline in Blue Lakes’ water supply, indicating the need to update the model with new data. *Id.*, Ex. A, Wylie Depo. at 56-60; Ex. B, Yenter Depo. at 74-75. The Watermaster confirmed that the following matters are subject to ongoing analysis as the Department evaluates the efficacy of mitigation and as the impacts of ground water pumping on spring rights are better understood:

1. The accuracy of the Department’s estimate of injury to senior spring rights caused by junior ground water pumping. Information showing that the Department’s injury

estimate is inaccurate is cause for the Department to reevaluate and potentially modify mitigation plan requirements.

2. The sufficiency of the mitigation that is required or offered to address the injury.
3. Whether the mitigation activities that are described in a mitigation plan will produce the required mitigation.
4. Ensuring that the ground water users are actually performing the mitigation activities that are described in their plans.

Id., Ex. A, Yenter Depo. at 76-78.

In his most recent deposition testimony, Dr. Wylie reiterated that the Director's spring percentage method of allocating reach gains to the Clear Springs' and Blue Lakes' spring sources was a "post-modeling administrative" determination that is not scientifically defensible, and that something more scientifically defensible could be developed. *Id.*, Ex. C, Wylie Depo. at 17-20, 32-36, 88-90, 100-101. He testified that he is willing to defend his estimation that model uncertainty is 10% only as a "placeholder," until a better analysis is presented. *Id.*, at 62, lns. 8-22. Like the spring percentage determination, the "trimline" was a post-modeling administrative determination by the Director that is not scientifically defensible. *Id.* at 63, 100-101. The trimline excludes from administration wells that, individually have a measurable impact on spring flows, and collectively have a significant impact on spring flows. *Id.* at 101-107.

Given the Director's continuing duty to utilize the best available data and methods to determine injury and mitigation obligations, the scope of this hearing cannot be limited to preclude consideration of evidence of scientifically defensible alternatives to the flawed trimline and spring percentage methods.

C. The Issue of Injury to Blue Lakes' 1971 Priority Right Has Been Remanded to the Director and Must be Addressed in This Proceeding

On the same day the GWDs filed their *Motion to Limit Scope of Hearing*, the District Court entered its *Order on Petitions for Rehearing (Rehearing Order)* in the *Clear Springs v. Tuthill* appeal. The District Court re-affirmed the Director's *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls (Final Order)* in most respects, and reiterated its decision to remand the case to the Director for a determination of material injury to Blue Lakes' 1971 priority water right no. 36-7210 and Clear Springs' 1955 priority water right no. 36-4013A "to permit the Director to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination." *Rehearing Order* at 8. The Court held that lack of data concerning seasonal flows at the times of appropriation does not deprive the Spring Users' decrees of their presumptive weight. *Order on Petition for Judicial Review* at 22-24; *Rehearing Order* at 7-8. In other words, the lack of data cannot be construed against the Spring Users. The Court held that the burden is on junior ground water users to show that their diversions do not cause material injury to the Spring Users' rights. In this conclusion, the District Court stated that "it is imperative that any mitigation plan submitted in response to a material injury determination be approved . . . prior to allowing juniors subject to administration to commence water use." *Recommended Order* at 13.

Accordingly, in addition to the established injury to Blue Lakes' 1973 priority water right no. 36-07427, the injury to Blue Lakes' 1971 priority water right must also be addressed in this proceeding. The Director is required to accord the decree for Blue Lakes' 1971 priority right presumptive weight. Junior ground water users have the burden to show that they do not cause injury to Blue Lakes' 1971 priority right. If juniors cannot meet this burden, to avoid

curtailment, they must receive approval for a plan that will mitigate for the injury they cause to Blue Lakes' 1971 and 1973 priority rights.

CONCLUSION

For the foregoing reasons, Blue Lakes respectfully requests that the Director deny the GWDs' *Motion to Limit the Scope of Hearing*, and set the discovery/disclosure schedule as proposed herein.

Dated this 16th day of December, 2009.

RINGERT LAW, CHTD.

A handwritten signature in black ink, appearing to read "Daniel V. Steenson", written over a horizontal line.

Daniel V. Steenson
Attorneys for Blue Lakes Trout Farm, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December, 2009, I served a true and correct copy of the foregoing **BLUE LAKES' OPPOSITION TO MOTION TO LIMIT SCOPE OF HEARING** by delivering it to the following individuals by the method indicated below, addressed as stated.

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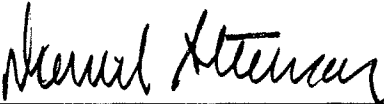
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