

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF TH  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

CLEAR SPRINGS FOODS, INC.,	)	Case No. 2008-0000444
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
BLUE LAKES TROUT FARM, INC.,	)	
	)	
Cross-Petitioner,	)	
	)	
vs.	)	
	)	
IDAHO GROUND WATER	)	
APPROPRIATORS, INC., NORTH SNAKE	)	
GROUND'S WATER DISTRICT and MAGIC	)	
VALLEY GROUND WATER DISTRICT,	)	
	)	
Cross-Petitioner,	)	
	)	
vs.	)	
	)	
IDAHO DAIRYMEN'S ASSOCIATION,	)	
INC.,	)	
	)	
Cross-Petitioner,	)	
	)	
vs.	)	
	)	
RANGEN, INC.,	)	
	)	
Cross-Petitioner,	)	
	)	
vs.	)	
	)	

DAVID R. TUTHILL, JR., in his capacity as )  
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 RIGHTS NOS. 36- )  
02356A, 36-07210, and 36-07427, )  
(Blue Lakes Delivery Call) )  
\_\_\_\_\_ )

**OPENING BRIEF OF BLUE LAKES TROUT FARM, INC.**

---

Honorable John Melanson, District Judge, Presiding

---

Daniel V. Steenson  
Charles L. Honsinger  
S. Bryce Farris  
RINGERT LAW CHARTERED  
455 S. Third Street  
P.O. Box 2773  
Boise, Idaho 83701-2773  
Telephone: (208) 342-4591  
Attorneys for Cross-Petitioner,  
Blue Lakes Trout Farm, Inc.

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF CASES AND AUTHORITIES .....	v
STATEMENT OF THE CASE .....	1
A.    NATURE OF THE CASE.....	1
B.    COURSE OF PROCEEDINGS.....	1
C.    STATEMENT OF THE FACTS.....	2
1.    Blue Lakes’ Facilities and Water Rights .....	2
2.    Blue Lakes Water Shortage and Injury .....	3
3.    Ground Water Pumping is a Cause of the Declines in Blue Lakes’ Water Supply ..	4
ISSUES PRESENTED .....	5
ARGUMENT.....	6
A.    The Director Erred in Finding that Blue Lakes’ 1971 Water Right is Not Injured and Failing to Administer Water Rights Accordingly.....	6
1.    The May 19, 2005 Order .....	6
2.    The Hearing Officer Found Injury to Blue Lakes’ 1971 Right, But Erroneously concluded that the May 19, 2005 Order Addressed that Injury .....	8
3.    The Final Order Found No Injury to Blue Lakes’ 1971 Right by Ignoring the Evidence .....	10
4.    Curtailing Juniors Cannot Enhance the Water Supply Beyond What Existed at the Time of Appropriation .....	11
5.    Alpheus Creek Water Flows Were Adequate to Fill Blue Lakes’ 1971 Right at the Time of Appropriation .....	12
6.    Since 2002, IDWR Has Acknowledged Injury to Blue Lakes’ 1971 Right, and has Curtailed Junior Surface Water Rights .....	13

7.	Seasonal Variance in Flows Does not Alter IDWR’s Obligation to Administer Water Rights According to Priority .....	17
8.	The Director’s Reevaluation of Blue Lakes’ Water Rights is Contrary to His Duty to Administer Water Rights in Accordance With SRBA Decrees and Improperly Shifts the Burden to Blue Lakes .....	18
B.	The Hortatory Policy Statements in CMR 20.03 Do Not Support Out-of-Priority Diversions .....	21
C.	The Director erred in failing to require junior priority ground water right holders to fully perform their mitigation obligations in 2006 and 2007 .....	25
D.	Whether the Director’s procedures for submission, review, approval and performance of mitigation plans are arbitrary and capricious .....	31
CONCLUSION .....		32

## **TABLE OF CASES AND AUTHORITIES**

### **CASES**

<u>Alamo Water Co. v. Darrington</u> , 95 Idaho 16, 21, 501 .....	19, 24
<u>Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.</u> , 154 P.3d 433, 448-449 (2007) .....	20, 22
<u>Beecher v. Cassia Creek Irr. Co. Inc.</u> , 66 Idaho 1, 9-10 (1944); P. 2D 700 (1972) .....	19, 24
<u>Bonner General Hop. v. Bonner County</u> , 133 Idaho 7, 10, 18-20, 981 P.2d 242, 245 (1999) .....	23
<u>Magic Valley Radiology, P.A. v. Kolouch</u> , 123 Idaho 434, 437, 849 P.2d 107, 110 (1996) .....	18
<u>Nampa and Meridian Irr. Dist. v. Barclay</u> , 56 Idaho 13, 47 P.2D 916 (1935) .....	19, 24
<u>State v. Nelson</u> , 131 Idaho 12, 13, 16 951 P.2d 943, 947 (1998) .....	19, 20, 24
<u>State v. Hagerman Water Right Owners [HWRO] (in Re Srba Case No. 39576)</u> , 130 Idaho 736, 744, 746, 947 P.2d 409, 417, 419 (1997) .....	20
<u>Stethem v. Skinner</u> , 11 Idaho 374, 82 P. 451 (1905) .....	19, 24
<u>Title Co. v. Stanion, II</u> , 144 Idaho 119, 157 P.3d 613, 620. ....	18

### **STATUTES**

I.C. Title 42, chapter 6 .....	22, 24, 25
I.C. § 42-202B .....	22
I.C. § 42-222(2) .....	22
I.C. § 42-607 .....	5, 19, 24
I.C. § 42-1411 (2)(j) .....	19
I.C. § 42-1420 .....	18
I.C. § 42-1420(1) .....	19, 24
I.R.C.P. 54(b) .....	21

IDAPA 37.03.11 .....	21
----------------------	----

**OTHER AUTHORITIES**

Idaho Constitution, Article XV, sec. 5 .....	21
--	----

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This is an action for judicial review of the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls*, issued by the Director of the Idaho Department of Water Resources (IDWR) on July 11, 2008.

### **B. COURSE OF PROCEEDINGS**

On March 22, 2005, Blue Lakes Trout Farm, Inc. (“Blue Lakes”), submitted a water delivery call to the Director of IDWR, seeking administration of junior ground water rights in order to supply water to its senior spring water rights. Administrative Record (AR) Vol. 1, p. 1. On May 19, 2005 the Director issued an Order in response to Blue Lakes’ delivery call, in which the Director found no injury to Blue Lakes’ 1971 priority water right no. 36-7210, acknowledged injury to Blue Lakes’ 1973 priority water right no. 36-07427, and ordered that the ground water users he determined to be causing injury either be curtailed or provide mitigation. AR, Vol. 1, p. 45. Blue Lakes and other parties filed petitions seeking reconsideration and/or a hearing on the May 19, 2005 Order.

Ground water users affected by the Order, represented by the Idaho Ground Water Appropriators (“IGWA”), filed plans in 2005, 2006 and 2007 in response to the Order’s mitigation requirements to avoid curtailment. IDWR and the Director responded to these plans in various ways, resulting in no curtailment of ground water users during those years. During this time, a new Director of IDWR was appointed.

The proceeding before IDWR on Blue Lakes’ water delivery call was consolidated with a proceeding on a water delivery call filed by Clear Springs Foods, Inc. (“Clear Springs”). The Director

appointed Justice Gerald F. Schroeder as the Hearing Officer to preside over the hearing on the consolidated IDWR proceedings.

Blue Lakes and Clear Springs (collectively referred to as the “spring users”) filed a motion for partial summary judgment as did IGWA. On November 14, 2007, the Hearing Officer issued an order granting in part and denying in part the summary judgment motions. AR, Vol. 14, p. 3230.

Hearing commenced on November 28, 2007 and continued until December 13, 2007, after which the Hearing Officer issued an Opinion constituting Findings of Fact, Conclusions of Law and Recommendation on January 11, 2008. AR, Vol. 16, p. 3690. On February 29, 2008, the Hearing Officer filed a Response to Petitions for Reconsideration and Clarification and Dairymen’s Stipulated Agreement. AR., Vol. 16, p. 3839. The Hearing Officer’s Opinion accepted and recommended approval of the findings contained in the various Orders that were the subject of the hearing, except those findings that were rejected or modified by the Hearing Officer’s Opinion and Response. *Id.*

After the parties filed exceptions to the Hearing Officer’s Orders, on July 11, 2008 the Director issued a Final Oder Regarding Blue Lakes and Clear Springs Delivery Calls. In the Final Order, the Director adopted the findings of the subject Orders and the recommendations of the Hearing Officer, with the exception of findings that were modified by the Final Order.

## **C. STATEMENT OF THE FACTS.**

### **1. Blue Lakes’ Facilities and Water Rights**

The May 19, 2005 Order provides a generally accurate overview of Blue Lakes’ water rights and water diversion and conveyance facilities. AR, Vol. 1, p. 56, ¶¶ 52-55. Blue lakes raises trout for commercial production. The entire flow of Alpheus Creek is diverted through concrete headworks into a pipeline, and conveyed to Blue Lakes’ concrete raceways and hatchery building, where trout

at various life stages are reared. A portion of the diverted water, 25.3 cfs, is conveyed directly to Pristine Springs, Inc. to fill its prior water right. The location and configuration of Blue Lakes' diversion and trout rearing facilities are depicted in Hearing Exhibits (HE) 201 and 202. Gregory Kaslo, Blue Lakes' vice president of operations and oversight, provided a detailed description of Blue Lakes facilities and trout rearing operations, including water usage, during the hearing. Hearing Transcript (TR), Day 2, pp. 250-281.

Blue Lakes owns three water rights that authorize an aggregate, year-round diversion of 197.06 cfs from Alpheus Creek. HE 31. On April 10, 2000, the SRBA District Court issued partial decrees for Blue Lakes' water rights, including the water rights for which Blue Lakes seeks administration of hydraulically-connected junior ground water rights (i.e. Blue Lakes' water right nos. 36-07210 and 36-07427). *Id.* Each decree describes each element of the water right (source, quantity, priority date, point of diversion, purpose of use, period of use, and place of use). The decreed source of Blue Lakes' water right nos. 36-07210 and 36-07427 is "Alpheus Creek" tributary to the "Snake River." The annual period of use is a full calendar year, January 1 to December 31. The quantity of each right is defined as a rate in cubic feet per second (CFS), and an annual volume in acre feet per year (AFY). The volume in each decree reflects diversion of water at the specified rate (45 cfs for 36-07210 and 52.23 cfs for 36-07427) 24 hours per day, 365 days per year. Hearing Transcript (Tr.), Day 11, p. 2107, lns. 14-25. There are no conditions or limitations on any of the decreed elements of Blue Lakes' water rights.

## **2. Blue Lakes Water Shortage and Injury**

The May 19, 2005 Order contains a table showing daily maximum, average, and minimum flows available to Blue Lakes on a monthly basis during the years 1994/1995 and 2004, the year

before Blue Lakes submitted its water delivery call. AR, Vol. 1, pp. 57-58. The data was collected by Tim Luke, manager of IDWR's water distribution section. For illustrative purposes, this data is depicted on a line graph admitted as HE 205, and attached hereto as Attachment A for the Court's convenience. TR, 671-672. The data shows that Alpheus Creek water flows in 2004 were at all times inadequate to fill Blue Lakes' 1973 priority water right, and were inadequate to fill Blue Lakes' 1971 priority right ten of twelve months that year. Mr. Luke testified that the measurements included in the table conclusively demonstrate that the water supply in 2004 was inadequate to supply Blue Lakes' 1971 priority water right no. 7210. TR, p. 679, lns. 1-8.

In addition to the measurements reported in the May 19, 2005 Order, HE 204 contains Blue Lakes' daily water flow measurements showing water shortages in 2005, 2006 and 2007 that are similar to the 2004 water shortages. Blue Lakes' water diversion and conveyance system, and its fish rearing facilities, have sufficient capacity to utilize its water rights for commercial fish production. Alpheus Creek water flows are currently insufficient to supply Blue Lakes' water rights and to operate the Blue Lakes' facility to full capacity. Additional water will provide the additional physical environment and oxygen content necessary for Blue Lakes' to increase fish production by increasing stocking densities (numbers of fish).

Mr. Kaslo testified that Blue Lakes is capable of putting additional water to beneficial use, and he explained how diminished water flows negatively impact Blue Lakes' trout rearing operations. TR, pp. 272-281.

### **3. Ground Water Pumping is a Cause of the Declines in Blue Lakes' Water Supply**

Ground water pumping is a cause of the decline in Alpheus Creek flows and Blue Lake's water supply. Ground water development on the ESPA, including consumptive uses for irrigation,

dramatically increased beginning in the 1950s. AR, Vol. 1, p. 46, at 2 ¶ 6. Pumping under ground water rights depletes the ESPA by approximately 2.0 million acre-feet per year through consumptive use. *Id.*, ¶ 4. Spring discharges are dependent on aquifer levels. *See Direct Testimony of Charles M. Brendecke* (“*Brendecke Direct*”) at p.21, lns.5-8. As aquifer levels decline, the discharge from springs declines as well. *Brendecke Direct* at p.37, lns. 20-21. Factors affecting aquifer levels and spring discharges include ground water pumping, incidental recharge and precipitation levels. Groundwater diversions from the ESPA have reduced aquifer levels causing reductions in hydraulically-connected spring discharges. AR, Vol. 1, p. 49, ¶ 18; *Brendecke Direct* at p. 38, lns.13-15. All groundwater depletions from the ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions over time. AR, Vol. 1, p. 47 ¶ 11; HE 400A, p.8.

As previously discussed, on March 22, 2005, Blue Lakes submitted a letter to the Director requesting that the Director “direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply Blue Lakes’ prior rights,” and the orders and administrative proceedings summarized above and in briefing before the Hearing Officer led to this appeal. AR, Vol. 1, p. 1.

### **ISSUES PRESENTED**

Blue Lakes’ statement of issues in its Cross-Petition for Judicial Review is condensed and simplified here. Blue Lakes is aware that the Petitioner, Clear Springs, is addressing certain issues stated in Blue Lakes’ Cross-Petition, and that additional briefing on them here is unnecessary. Blue Lakes reserves the right to concur with Clear Springs in this proceeding on such issues.

In addition, as explained in the Hearing Officer’s Responses to Petitions For Reconsideration

and Clarification, unresolved questions about the technical validity basis for the so-called “10% trim line” and attribution of a percentage of reach gains to Blue Lakes’ spring source are subject to ongoing investigation, evaluation, and potential modification before IDWR, so that resolution of such technical matters by this Court is neither necessary nor feasible. AR, Vol. 16, 3844-3846. Finally, Blue Lakes has determined that the record in this case does not provide a basis for raising the issue pertaining to the Director’s exempting ground water rights for domestic and stockwatering purposes from administration.

- a. Whether the Director erred in finding that Blue Lakes’ water right no. 36-7210 is not injured by junior ground water pumping.
- b. Whether consideration of the “public interest” as discussed by the Hearing Officer is consistent with the Director’s duty to administer water rights.
- c. Whether the Director erred in failing to require junior priority ground water right holders to fully perform their mitigation obligations in 2006 and 2007.
- d. Whether the Director’s procedures for submission, review, approval and performance of mitigation plans are arbitrary and capricious and in violation his statutory obligations and Blue Lakes’ statutory and constitutional rights.

### **ARGUMENT**

#### **A. The Director Erred in Finding that Blue Lakes’ 1971 Water Right is Not Injured and Failing to Administer Water Rights Accordingly**

##### **1. The May 19, 2005 Order**

The measurements of Alpheus Creek water flows that are reported in the May 19, 2005 Order conclusively show that the 2004 water supply was inadequate to fill Blue Lakes’ 1971 priority right

the majority of the year. However, in the May 19, 2005 Order, the Director concluded that Blue Lakes' 1971 water right was "fully satisfied" in 2004. To reach this implausible conclusion, the Director makes the following supposition:

Blue Lakes Trout cannot call for the curtailment of junior priority water rights at all times that insufficient water is physically available to fill [its water rights] at the authorized rates of diversion. Blue Lakes Trout is not entitled to a water supply that is enhanced beyond conditions that existed at the time such rights were established; i.e. Blue Lakes Trout cannot call for the curtailment of junior priority water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion for Blue lakes' rights **unless such seasonal variations are caused by depletions resulting from diversion and use of water under junior priority rights.**

AR, Vol. 1, p. 55, ¶ 50 (emphasis added).

Under the heading "Authorized Diversion Rate for Water Right Nos. []," the Director observed that "[s]prings discharging to the Thousand Springs area do not discharge at a constant rate," and that such "seasonal variations result from various factors, including seasonal changes in incidental recharge **and ground water diversions.**" *Id.*, p. 54, ¶¶ 45, 47 (emphasis added). This observation that ground water diversions are a contributing cause of seasonal variations appears to establish the Director's highlighted predicate for curtailment in the above quote.

The Director concluded that "seasonal," or "intra-year" variations in the discharge from the springs that are the sources for [Blue Lakes' water rights] existed when appropriations for these rights were initiated." The Director acknowledged his lack of information to determine the extent of these variations:

While both the regional and local factors affecting inter-year and intra-year variations in spring discharge are generally understood, the interactions between these factors are complex and the specific effects of individual factors and various combinations of factors on the discharge from individual springs are not presently quantifiable. . . . There are no known measurements, nor any other means, for reasonably determining

the intra-year variations in the discharges from the springs comprising the source for these water rights on the dates of appropriation for these water rights.

*Id.*, pp. 54-55, ¶¶ 48, 49.

The Director treats these historic, assumed, undefined seasonal variations in water supplies as conditions that existed when Blue Lakes perfected its water rights, such that Blue Lakes is “not entitled to a water supply that is enhanced beyond the[se] conditions” whatever they may have been. “[T]aking into account the variations in spring flows between months that have existed since the date of appropriation,” the Director concludes that Blue Lakes’ 1971 priority water right no. 36-07210 for 45 cfs was fully satisfied during 2004 by the presence of adequate, “average daily flows” during the month of November, “when the flows in Alpheus Creek are at seasonal highs,” despite the fact that the flows during the remainder of the year were inadequate to satisfy this right. *Id.*, p. 58, ¶ 64.

The Director’s analysis and his conclusion that Blue Lakes’ 1971 water right was “fully satisfied” and was not injured in 2004 is erroneous for multiple reasons discussed below.

**2. The Hearing Officer Found Injury to Blue Lakes’ 1971 Right, But Erroneously concluded that the May 19, 2005 Order Addressed that Injury**

On reconsideration, the Hearing Officer concluded that ground water pumping causes material injury to Blue Lakes’ 1971 water right. AR, Vol. 16, 3846-3847. The Hearing Officer acknowledged the evidence showing that Blue Lakes’ 1971 right was filled twelve months in 1977, seven months in 1995, and lows of two or three months in 2004-2006. He also observed that: “A portion of the declines is attributable to ground water pumping.” “Consequently, there should be a finding of injury to these water rights.” *Id.* at 3847.

However, the Hearing Officer did not recommend that the May 19, 2005 *Order* be modified to require curtailment of ground water rights junior to Blue Lakes’ 1971 right, based on the erroneous

observation that the May 19, 2005 Order “addressed the combined total of the water rights of the Spring Users and the remediation was calculated against those totals.” In fact, the extent of the curtailment and the mitigation alternatives was defined exclusively by the priority dates of Blue Lakes’ later priority water right. Those mitigation alternatives do not come close to remediating the full extent of Blue Lakes’ water shortages.

The May 19, 2005 *Order* in response to Blue Lakes’ water delivery call found that ground water pumping causes material injury to Blue Lakes’ third priority, December 28, 1973 water right because there is never enough water to fill this right. AR Vol. 1, at 58-59, ¶¶ 65, 67, p. 70, ¶ 28. The Director then evaluated the effects of curtailing ground water diversions that have priority dates later Blue Lakes’ 1973 right and, using the ESPA model, concluded that curtailing those rights would increase spring flows in the spring reach within which Blue Lakes is located (Devil’s Washbowl to Buhl Gage) by “an average of 51 cfs at steady state conditions.” *Id.*, p. 61, ¶¶ 76, 77. The Director determined that 20% of this water, approximately 10 cfs, would appear at Blue Lakes’ diversion.

On this basis, the Director ordered curtailment of ground water rights “that have priority dates later than December 28, 1973.” *Id.*, at 72. The director prescribed mitigation alternatives that would produce the amount of water he believed would result from curtailing post December 28, 1973 rights: either by delivering 10 cfs directly to Blue Lakes’ diversion, or by increasing spring flows in the Devil’s Washbowl to Buhl gage spring reach by 51 cfs at steady state. *Id.*, at 72-73.

The 2004 flow data in the Blue Lakes *Order* at 57-58, ¶ 60, shows that the mitigation alternatives prescribed by the *Order*, delivering 10 cfs to Blue Lakes’ diversion, will not fill Blue Lakes’ 1971 priority right or come close to addressing the full extent of Blue Lakes’ injury. The

following table comparing Blue Lakes' water rights to its minimum daily flows during 2004-2007 shows how chronic Blue Lakes' water shortages have become.

Blue Lakes' Water Rights & Shortages

<u>W/R</u>	<u>Quantity</u>	<u>Mos. Short</u> <u>'04-'06<sup>1</sup></u>	<u>Shortage (min. daily flow)</u>			
			<u>2004<sup>2</sup></u> <u>(115 cfs<sup>6</sup>)</u>	<u>2005<sup>3</sup></u> <u>(119 cfs)</u>	<u>2006<sup>4</sup></u> <u>(111 cfs)</u>	<u>2007<sup>5</sup></u> <u>(116 cfs)</u>
1958	99.83 cfs	0 mos.				
1971	45.00 cfs	9-10 mos.	29.83 cfs	25.83 cfs	33.83 cfs	28.83 cfs
1973	<u>52.23 cfs</u>	12 mos.	<u>52.23 cfs</u>	<u>52.23 cfs</u>	<u>52.23 cfs</u>	<u>52.23 cfs</u>
	197.06 cfs		82.06 cfs	78.06 cfs	86.06 cfs	81.60 cfs

It is therefore clear that the curtailment and the mitigation alternatives prescribed by the Blue Lakes *Order* are inadequate to address the full extent of Blue Lakes' injury. As required by the prior appropriation doctrine, all rights junior to Blue Lakes' 1971 water right are subject to administration by curtailment or mitigation.

**3. The Final Order Found No Injury to Blue Lakes' 1971 Right by Ignoring the Evidence**

To avoid the inescapable conclusion that Blue Lakes' 1971 right is injured, the current Director ignored the pertinent evidence regarding Alpheus Creek flows, except for the former Director's observation during hearing that a 1977 USGS measurement of Alpheus Creek water flows was "anomolous." On this basis, the current Director concluded that "[i]nsufficient credible evidence

---

<sup>1</sup>AR., Vol. 1 at 57-58, ¶ 60.; HE. 204.

<sup>2</sup>AR., Vol. 1 at 57-58, ¶ 60.

<sup>3</sup>HE. 204.

<sup>4</sup>HE. 204.

<sup>5</sup>HE. 204.

<sup>6</sup>Total measured diversion.

was presented at hearing to support a finding” that Blue Lakes’ 1971 right is injured. AR, Vol. 16 at 3955, ¶ 18. On this thin basis, the Director refused to find that ground water rights junior to Blue Lake’s 1971 priority right are subject to administration. *Id.*

As discussed below, the overwhelming weight of the evidence demonstrates that there is no factual basis to conclude that Blue Lakes’ 1971 right was not filled at the time of appropriation, or that curtailing juniors could “enhance” Blue Lakes’ water supply. In addition, since 2002, IDWR has acknowledged the injury to Blue Lakes’ 1971 right and administered junior rights on Alpheus Creek accordingly.

With respect to the current Director’s reliance upon the former Director’s comments about the 1977 measurements, it should be observed that the March measurements are in line with the annual seasonal trend of flows and in line with the water flows at that time of year in the mid 1970s. See HE 18. A significant part of the reason the apparently anomalous October 31, 1977 measurement is lower is that the diversion to the ditch supplying Blue Lakes was decreased from 206 cfs in March of 1977, to 177 cfs in October, and the amount of water that passed by the diversion increased from 12 to 26 cfs. The total flow of Alpheus Creek, measured as 203 cfs by USGS, was much closer to what would be expected. Additionally, the latter half of 1977 appears from USGS data to be the beginning of a trend toward somewhat lower flows during the 1980s. *Id.* In any event, the measurements are not as anomalous as suggested by the former Director during his review of the data at hearing, and is not as previously discussed, sufficient to supply Blue Lakes’ 1971 right.

#### **4. Curtailing Juniors Cannot Enhance the Water Supply Beyond What Existed at the Time of Appropriation**

The Director and Mr. Luke acknowledged that it is not possible to enhance or increase a senior’s water supply by curtailing a water right that didn’t exist at the time of the senior’s

OPENING BRIEF OF BLUE LAKES TROUT FARM, INC. - Page 11

appropriation. TR, p. 1359, lns 13-17; 761, lns. 1-14. IGWA's expert, Dr. Brendecke acknowledged this fact as well:

MR. STEENSON: Would you agree that it's not possible to increase spring flows above what existed at the time of appropriation of a water right, surface water right, by curtailing junior ground water rights that didn't exist at the time of the senior's appropriation?

DR. BREDECKE: I think that the -- yeah, I think I agree generally with that statement. If all of the wells that came after a particular point in time were eliminated, the best you could do is get back to the conditions at that point in time.

TR, p. 1843-1844

On the basis of this testimony and simple logic, the Hearing Officer concluded:

The concept that curtailment of junior water rights can enhance a senior's rights beyond the amount available at the time of appropriation is not sound. Curtailment of juniors would not put more water in the system than existed prior to the junior's appropriation.

AR, Vol. 16, p. 3707.

**5. Alpheus Creek Water Flows Were Adequate to Fill Blue Lakes' 1971 Right at the Time of Appropriation**

There is no evidence that Alpheus Creek water flows at the time Blue Lakes' appropriated its 1971 water were inadequate to fill it. To the contrary, all the USGS measurements which Mr. Luke collected and the Director considered in preparing his May 19, 2005 order show sufficient water supply to fill Blue Lakes' 1971 right. See HEs 204 and 205 (copy of 205 attached hereto). Adding to the strength of this evidence is the trend of spring water flows, as observed by the Director and all the experts, from highs during the 1950s to the current, lower flows. Mr. Luke acknowledged that all the available data shows adequate water flows in 1977 to fill Blue Lakes' 1971 right. TR 676, lns. 6-20.

**6. Since 2002, IDWR Has Acknowledged Injury to Blue Lakes' 1971 Right, and has Curtailed Junior Surface Water Rights**

The Water District 130 Watermaster, Cindy Yenter, has been curtailing diversions from Alpheus Creek to deliver water to Blue Lakes' 1971 and 1973 water rights since 2002. Hearing Exhibit 263 is a May 7, 2002 letter from Mrs. Yenter to "Alpheus Creek water users." Enclosed with the letter is a list of water rights to Alpheus Creek and the springs feeding the creek in order of priority. Blue Lakes' 1971 right, no. 36-7210, is identified in the list and in Mrs. Yenter's letter as the "5<sup>th</sup> priority water right." Mrs. Yenter's letter contains the following "[a]nalysis and [c]onclusions" with respect to Blue Lakes:

The 5<sup>th</sup> priority water right, held by Blue Lakes Trout, is not being completely filled by the natural flow in Alpheus Creek. Average weekly flows available at the BLT weir from 5/2 to 5/9 filled only about 65% of the right. The average daily flow on May 9 provided for only about 60% of the right.

The letter also states that Blue Lakes' 1973 priority water right, no. 36-7427 is "not presently being filled." The letter states that: "The 6<sup>th</sup> and 10<sup>th</sup> priority rights, held by McCollum Simplot and BLCC [i.e. Blue Lakes Country Club], respectively are diverting out of priority order," and advises the water users that those water rights must be curtailed." The Simplot/McCollum right no. 36-07239, with a 1972 priority, is not subject to curtailment in order to supply Blue Lakes' 1973 priority right, but is subject to curtailment to supply Blue Lakes' 1971 priority right.

The list enclosed with the letter shows that on May 13, 2002, the total flow of Alpheus Creek was 157.86 cfs, and that Blue Lakes was receiving only 22.7 of its 45 cfs, about half of its 1971 right. Curtailing McCollum's 6 cfs, 1972 priority provided Blue Lakes' 1971 right 28.7 cfs (64%), leaving a shortage of 16.3 cfs.

During hearing, Mrs. Yenter explained how she has been actively administering water rights annually as prescribed in the May 17, 2002 letter to address the water shortages to Blue Lakes' 1971 and 1973 water rights each year since 2002. Tr., Day 4, p. 542, ln. 19 - p. 545, ln. 15. Curtailment of the McCollum right to deliver to Blue Lakes' 1971 right was among Mrs. Yenter's first administrative actions as Watermaster of Water District 130. Tr., Day 4, p. 542, ln. 19 - p. 543, ln.

7.

A. In March, well, and it's been as early as February in some years, the water right that is historically curtailed every summer is a water right that belongs to Silver Creek Farms, and you know the name of record on the water right might be Simplot McCollum Development. I'm not sure if it was ever changed. But the hatchery facility name is Silver Creek Farms, and it's the one that's across the river on the Twin Falls side. They have a water right in the amount of 6 CFS which they use for fish production; specifically, they use it for cooling in their tilapia-rearing facility. **Generally around February or March every year the flows in Altheus /sic/ Creek drop to the point where one of Blue Lakes Trout's rights is being injured.** I can't remember the number off the top of my head. But it does get into a priority issue, so I give the order at sometime in every spring for the Silver Creek Farm's right to be shut off. Then in the fall when the water comes back up, then that right can be, the Silver Creek Farm's right can be delivered in priority order again, so I give the order that it can turn back on.

Q. Do you do so on the basis of measured flows?

A. Yes, I do; flows measured at the Blue Lakes Trout main diversion.

Q. Do you do so in what you might call the normal administrative process for distribution among surface water rights where you measure flows, determine inadequacy of diversion, and administer or curtail in accordance with the priority of the rights to the system?

A. That's correct.

Tr., day 3, 540, ln. 2 - 542, ln. 1 (emphasis added).

A. Blue Lakes Trout's 1958 right is at rank 2, and then they have number 5 ranked right with a 1971 13 priority, that's their 45 CFS right. Their final right is ranked number 7. That's their 1973 right.

Q. As I look at your letter under the heading "Actions" at page 2, you reference curtailment of the sixth priority McCollum right, page 2 of your letter.

A. Uh-huh, I see that.

Q. Is that curtailment action taken in order to supply the fifth priority right, in other words, Blue Lakes' second priority right as referenced at the third bullet point up above?

A. Yes, yes. That 6 CFS would go right back to Blue Lakes under that right.

Q. By that right we mean -- We mean right -- yeah, right number 7210.

Q. Is that Blue Lakes' second priority right for 45 CFS?

A. Yes, that one.

Q. So you have been actively administering the McCollum right in order to deliver water to Blue Lakes' second priority right since 2002; is that correct?

A. Yes.

Q. And you have been doing so as and when necessary due to declines in spring flow that occur throughout the year; is that correct?

A. You mean as necessary?

Q. As necessary.

A. Yeah, as necessary.

Tr., Day 3, 540, ln. 2 - 545, ln. 15.

Tim Luke, the manager of IDWR's water distribution section who provided information to the former Director in preparing the May 19, 2005 Order, was aware that the Watermaster has been actively administering junior Alpheus Creek water rights to deliver water to Blue Lakes' 1971 priority right. TR., day 4, p. 680, ln. 25 - p. 681, ln. 9. The May 19, 2005 Order referenced the Watermaster's ongoing administration of Alpheus Creek water rights to supply Blue Lakes' 1971 right no 36-7210:

74. Water rights nos. 36-07239 and 36-15455 are held by Simplot McCollum Development Company, dba Canyon Springs. Water right no. 36-07239 has the priority date of April 24, 1972, and authorizes the diversion of 6.0 cfs from Alpheus Creek, just downstream of the diversion of the Blue Lakes Country Club rights, for fish propagation. This right is generally curtailed by the watermaster for Water District No. 130, except during the higher flow months during the winter, to distribute water to Blue Lakes Trout water right no. 36-07210.

AR, Vol. 1, at 60.

Although this finding appears in his Order, during hearing, the former Director seemed unaware of the active administration of junior Alpheus Creek rights to supply Blue Lakes' 1971 right.

Q. Okay. Then if you could turn to Exhibit 263. We were talking about this yesterday and wonder if you had a chance to look at it since our discussion.

A. That would be the letter?

Q. Yes, sir.

A. Yeah, I did look at it. I don't have it with me.

Q. Thank you. Now, you are aware that water master Cindy Yenter has been regulating, that is curtailing water rights junior to Blue Lakes Trout Farm's second priority water right number 7210, since 2002. That is, curtailing water rights below the rim to Alpheus Creek in the Blue Lakes springs complex.

A. Well, this -- this memorandum certainly would indicate that.

\*\*\*

Q. Now, with respect to paragraph number 74 of your May 19, 2005, order -- . . . in the third sentence recognizes that water rights to Alpheus Creek in the Blue Lakes springs complex are being -- have been curtailed by the water master in order to deliver water to Blue Lakes Trout Farms 1971 priority, second priority right; isn't that correct?

A. Yes.

Q. Okay. So administration, active administration is occurring and has been occurring since 2002 to fill that right or deliver water to that right; correct?

A. The Exhibit 263 that you had me look at, would indicate that -- that administration has been occurring since 2002. But I didn't get actively involved in the water master's activities until Blue Lakes made its delivery call in 2005.

Q. Did you instruct Cindy Yenter to modify her administration of water rights to Alpheus Creek in the Blue Lakes springs complex at any time?

A. No, not that I recall. But again, as I indicated yesterday, I had not seen this Exhibit 263 until you gave it to me yesterday.

Tr., Day 8, at 1300, ln. 16 - 1301, ln. 6; 1306, lns. 1-15.

There is no legitimate factual or legal basis for the Director's 2005 determination that Blue Lakes' 1971 water right is being filled so that administration of junior ground water rights is not required, when IDWR has been curtailing junior surface water rights since 2002 based on the Watermaster's finding that only 60%-65% of the right is being filled. The failure to consistently administer surface and ground water rights injures not only Blue Lakes, it also injures the junior surface water right rights (i.e. the Simplot/McCollum 1972 right) that are being curtailed while more junior ground water users continue to pump. This is not to say that the junior surface water users should not be curtailed to supply Blue Lakes' 1971 right, but the law does require that ground water rights junior to Blue Lakes' right are also subject to curtailment.

#### **7. Seasonal Variance in Flows Does not Alter IDWR's Obligation to Administer Water Rights According to Priority**

Apart from the factual disconnects discussed above in the Director's failure to acknowledge the injury to Blue Lake's 1971 water right and administer junior ground water rights accordingly, the Director's thesis that variance in water flows is contrary to IDWR's practice in administering water rights. The Watermaster's curtailment of the McCollum right to deliver water to Blue Lakes is a perfect example of how IDWR administers fluctuating flows. Mr. Luke confirmed at hearing that water rights are distributed in accordance with priority during the course of the year as flows vary from seasonal highs to seasonal lows. TR, pp. 678.

**8. The Director's Reevaluation of Blue Lakes' Water Rights is Contrary to His Duty to Administer Water Rights in Accordance With SRBA Decrees and Improperly Shifts the Burden to Blue Lakes**

Variable water flows certainly are not cause for the Director to reexamine the extent of beneficial use of a decreed water right and find that a water right holder is entitled to delivery of less than the decreed quantity of the right. If the former Director's approach to reexamining Blue Lakes' water rights for purposes of administration is sustained, all rights are subject to the same reexamination when the IDWR is called upon to administer water rights.

The Director was clear during his testimony at hearing, and even clearer during his deposition testimony submitted to the Hearing Officer on summary judgment, that the purpose and effect of his very thorough investigation of the appropriation and use of Blue Lakes' water rights, predating the decree and including all the information in IDWR's licensing and SRBA files, was to evaluate the meaning of the water right for purposes of administration. TR, 1347-1351; AR, Vol. 15, p. 3569-3570. The conclusion of his analysis was that, for purposes of administration, the quantity element of Blue Lakes' 1971 water right means something dramatically less than what was stated in the decree.

The Director has no authority to reevaluate decreed water rights for purposes of administration as has been done in this case. The Hearing Officer recognized the binding effect of Blue Lakes' decrees under *res judicata* and I.C. § 42-1420. AR, Vol. 14, 3234-3236. "Claim preclusion bars adjudication not only on the matters offered and received to defeat the claim, *but also as to 'every matter which might and should have been litigated in the first suit.'*" *Title Co. v. Stanion, II*, 144 Idaho 119, 157 P.3d 613, 620 (citing *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993)) (emphasis added). In other words, when a valid, final judgment is rendered in a proceeding, it "extinguished all claims arising out of the same transaction or series of transactions

out of which the cause of action arose.” This Court has noted that the “transactional concept of a claim is broad” and that claim preclusion “may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories.”

In the SRBA, the Director and parties to the SRBA have the opportunity to challenge the elements of a recommended water right, or to propose remarks that are necessary for “administration of the right by the director,” the Director’s stated purpose for investigating Blue Lakes water rights and defining them in terms of seasonal variations in water flows. I.C. § 42-1411(2)(j). There was, in fact, a failed attempt in the SRBA by the North Snake Ground Water District (NSGWD), to limit the Spring Users’ water rights based on alleged “seasonal variations”, further indicating that this was an issue to be raised in the SRBA. AR, Vol. 15, 3571-3574.

Idaho Code 42-607 requires the Director to “to distribute water according to the adjudication or decree.” *State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943 (1998). A “decree entered in a general adjudication [is] conclusive as to the nature and extent of all water rights in the adjudicated water system.” I.C. § 42-1420(1). The Director is required to distribute water in compliance with applicable decrees, and cannot go beyond the plain terms of a water right decree to determine whether it is supported by the findings in the adjudication. *Almo Water Co. v. Darrington*, 95 Idaho 16, 501; *Beecher v Cassia Creek Irr. Co. Inc.*, 66 Idaho 1, 9-10 (1944); P.2D 700 (1972); *Nampa & Meridian Irr. Dist. V. Barclay*, 56 Idaho 13, 47 P.2D 916 (1935); *Stethem v. Skinner*, 11 Idaho 374, 82 P. 451 (1905). “The holders of water rights are entitled to presume that the watermaster is delivering water to them in compliance with the governing decree.” *Almo*, at 21.

Finality in water rights is essential. ‘A water right is tantamount to a real property right, and is legally protected as such.’ An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of the property. . . . A decree is important to the continued efficient administration of a water right. The

watermaster must look to the decree for instructions as to the source of the water. If the provisions define a water right it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.

*State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998).

A water right may not be lost or reduced based on current non-application to beneficial use for less than the five year period for forfeiture specified in I.C. § 42-222(2). *State v. Hagerman Water Right Owners [HWRO] (in Re Srba Case No. 39576)*, 130 Idaho 736, 744, 746, 947 P.2d 409, 417, 419 (1997). The Director must presume that Blue Lakes is entitled to delivery of its decreed rights. Blue Lakes is not required to reprove its need for its decreed water rights. In *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 154 P.3d 433 (2007), the Idaho Supreme Court stated that:

The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. We note that in the Initial Order entered in this case, the Director requested extensive information from American Falls for the prior fifteen irrigation seasons, to which American Falls objected in part. While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.

154 P.3d at 448-449.

Burden-shifting is precisely what has happened in this case, where the former Director found Blue Lakes' 1971 right was "fully satisfied," by flows substantially less than the decreed quantity of the right, based on his inability to find evidence establishing to his satisfaction that the full quantity had been available. Again, the evidence established that the full quantity was available at the time of appropriation, when IDWR evaluated Blue Lakes' beneficial use the first time for the purpose of issuing a license. The current Director's Final Order has the same burden-shifting effect, finding, with

blindly on, “no credible evidence” that the licensed and decreed quantity had been available to, diverted and used by Blue Lakes at the time of appropriation.

The SRBA court has warned against this very approach to administration:

The *Partial Decree* issued for 36-07694 is a judgment certified as final pursuant to I.R.C.P. 54(b). To the extent the license, director’s recommendation and *Partial Decree* were alleged to be issued in error; those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a reexamination of prior existing conditions in the context of applying a “material injury” analysis through the application of IDWR’s Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq.*

*Order on Motion to Enforce Order Granting State of Idaho’s Motion for Interim Administration*, Subcase 92-0021 at 8 (2005).

Certainly, Blue Lakes understands that its decreed water rights do not guarantee delivery of the decreed quantity. But when Blue Lakes’ water right is being injured, as has been amply demonstrated in this case, priority administration is required to provide whatever relief will come from curtailment of junior ground water rights that deplete Blue Lakes’ water supply.

**B. The Hortatory Policy Statements in CMR 20.03 Do Not Support Out-of-Priority Diversions**

The Hearing Officer refers to the policy statements of rule 20.03 and references the “public interest,” a term not used in the CMRs as a rationale for certain aspects of the 2005 orders, such as the 10% “trimline” and the timing of curtailment. AR, Vol. 16, 3704-3706.

Blue Lakes agrees with the Hearing Officer’s statement that:

Article XV, Section 5 of the Idaho Constitution acknowledges the priority in time of water rights but **passed to the Legislature** the authority to subject that priority to ‘such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

*Id.*, 3704-3705 (emphasis added).

The “local public interest” is defined broadly in I.C. § 42-202B for the purpose of IDWR’s evaluation of proposed new appropriations, to encompass “the interests that the people in the area affected by a proposed water use have in the effects of such use on the public water resource.” Such broader considerations are appropriate where water rights have not vested, and the issues pertaining to the exercise or curtailment of water rights are not involved. As observed, the determination of under what circumstances such considerations may affect the appropriation and use of water rights is a legislative, not judicial or administrative prerogative.

There is no such concept in the water distribution statutes of chapter 6 of Title 42. Watermasters and IDWR are in no better position to determine what is in the public interest when distributing water rights than they are able to compare the water users’ economic productivity.

Using broadly defined policy statements to modify administration that would otherwise be required under the prior appropriation doctrine and chapter 6, Title 42 of the Idaho Code is infirm ground for water rights administration that must be tread carefully and cautiously. In its briefing to the district court in *AFRD No. 2 v. IDWR*, IDWR assured the district court that the CMRs are constitutional because they “emphasize the importance of priority more than any other principle or policy,” and explained the role of the Rules’ policy statements regarding “reasonable use.”

Further, the provisions of the Rules that deal with reasonableness, efficiency and the policy of full and optimum development are limited and the burden falls on the Director to establish the facts for their application. The plain language of the rules demonstrates that constitutional application is not only easily possible, but probable.

For instance, **Rule 20.03** (‘Reasonable Use of Surface and Ground Water’) is a ‘General Statement of Purpose and Policy’ that **recites policy language from the Idaho Constitution and the Idaho Code regarding reasonable use and full and optimum development of the state’s water, but imposes no such standards or requirements of its own. The Rule does not require, instruct or authorize**

**the Director to apply the stated policies in any particular way, or to reach any particular outcome. Rule 20.03 is, in name and substance, a ‘merely hortatory’ statement of general policy and purpose.** *Bonner General Hosp. v. Bonner County*, 133 Idaho 7, 10, 981 P.2d 242, 245 (1999) (holding that a codified statement of legislative purpose that did not purport to impose requirements was ‘merely hortatory’). Further, Rule 20.03 explicitly recognizes the rule that first in time is first in right. Rule 20.03 (‘reasonable use includes the concepts of priority in time and superiority in right’). Thus, the plain language of Rule 20.03 simply cannot support the argument that Rule 20.03 renders the Rules incapable of valid application under any circumstances. **Rather, the Rule reflects the presumption of priority administration.**

**Rule 42** (‘Determining material Injury and Reasonableness of Water Diversions’) provides a list of factors that the Director ‘may’ consider in determining whether a senior is ‘using water efficiently and without waste.’ Rule 42.01. Thus, on its face, **Rule 42 also respects senior rights and presumes entitlement to the full amount of water absent any proven facts that would require a contrary results** [*sic*] under applicable principles of the prior appropriation doctrine as established by Idaho law. The plain terms of Rule 42.01 demonstrate that a valid and constitutional application of the rules is at least as likely, if not more so, than any invalid application.

The same analysis applies to Rule 40.03 (‘**Reasonable Exercise of Rights**’). Rule 40.03 incorporates the permissive language and factors of Rule 42 expressly and because ‘reasonable exercise’ under Rule 40.03 requires consideration of whether there has been a ‘material injury and whether a senior is ‘diverting and using water efficiently and without waste.’ Rule 40.03. Thus, Rule 40.03 is identical to Rule 42 for purposes of determining what constitutes a ‘reasonable exercise of rights.’ Accordingly, **under Rule 40.03, there is a presumption the senior has a right to receive the full amount set forth in the partial decree.** It follows that a valid application of Rule 40.03 clearly is possible, and the Rules cannot be facially invalid.

**Thus, the Rules are best and most accurately viewed as presuming that the rule ‘first in time is first in right’ controls absent facts to the contrary.** The Plaintiffs’ argument essentially assumes that the Rules will be used to subject senior rights to some form of strict scrutiny and/or micromanage the senior’s use of water. To the contrary, **the permissive and hortatory nature of the language for considering reasonableness, efficiency, and the policies of optimum and full development of the state’s water lends itself to just the opposite; administration in accordance with priority is presumed and required, and the Rules impose a burden on the Director, when responding to a delivery call, to determine a factual basis for distribution less than the full quantity of water stated in the decree.**

*Id.*, p. 18-20 (emphasis added).

Thus IDWR, in interpreting its own rules, construes the Director's discretion narrowly, within the parameters of the more technical determinations of material injury and reasonableness of diversions under Rules 40 and 42. IDWR's explanation of the "hortatory" nature of Rule 20.03 does not go as far as the Hearing Officer's interpretation that the Rule is "at the heart of the rules and how they will be implemented." This may be more true in spirit than in heavy lifting. According to IDWR, priority of administration is at the nervous center of the Rules and the authorities provided by chapter 6 of Title 42 are the lifeblood. Again, in the manner and to the extent proscribed by the legislature.

The role of the Director, IDWR and watermasters is not fundamentally altered by the Rules. Idaho Code 42-607 requires the Director to "to distribute water according to the adjudication or decree." *State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943 (1998). A "decree entered in a general adjudication [is] conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420(1). The Director is required to distribute water in compliance with applicable decrees, and cannot go beyond the plain terms of a water right decree to determine whether it is supported by the findings in the adjudication. *Almo Water Co. v. Darrington*, 95 Idaho 16, 501; *Beecher v Casssia Creek Irr. Co. Inc.*, 66 Idaho 1, 9-10 (1944); P.2D 700 (1972); *Nampa & Meridian Irr. Dist. V. Barclay*, 56 Idaho 13, 47 P.2D 916 (1935); *Stethem v. Skinner*, 11 Idaho 374, 82 P. 451 (1905). "The holders of water rights are entitled to presume that the watermaster is delivering water to them in compliance with the governing decree." *Almo*, at 21.

All witnesses who testified about the basis for the "trimline" confirmed that it is based on gage error that is estimated to be plus or minus 10%, and that gage error can be compounded, so that the impact of "trimmed" ground water rights could be twice as much, or more than 10%. As

such,10% is arbitrary. In his 2005 order the Director found that “all depletions of ground water from the ESPA cause reductions in flows in the Snake River and Spring discharges equal in quantity to the ground water depletions over time.” Ex. 30, *BL Order*, p. 3, ¶ 11. The Hearing Officer has confirmed the Spring Users’ calls are not futile.

If policy considerations of the impact of administering water rights in accordance with the prior appropriation doctrine are to be considered at all in terms of what is “reasonable,” then the broader impacts of failing to administer out-of-priority junior ground water diversion must also be considered. At a minimum, the “trimmed” water rights should be required to provide mitigation for the impacts of their ground water depletions, because they all affect spring flows to some degree.

**C. The Director erred in failing to require junior priority ground water right holders to fully perform their mitigation obligations in 2006 and 2007**

Again, the Director’s duty to administer junior water rights that cause injury to senior water rights is mandatory and ministerial. Neither chapter 6 of Title 42 nor the Rules provide the Director discretion to forgo administration, once material injury has been established.

In 2006, the Director did not require ground water users subject to the May 19, 2005 Order to perform the mitigation obligations prescribed by that Order because of the pendency of litigation concerning the Rules. TR, 617-618, 733. The former Director acknowledged that IDWR had authority pursuant to chapter 6 of Title 42 to administer water rights and accept mitigation without the Rules, but chose not to, because there were “no rules” as a result of the district court’s decision invalidating them TR, 1339-1341. The Director cited no authority supporting his failure to meet his statutory obligations to administer junior ground water users in 2006. Mr. Luke explained it this way:

A. Well, as was mentioned earlier, the conjunctive management rules were not in effect for almost half that year or so. For lack of a better term they were -- we suspended, I guess, the mitigation requirement. I guess that -- the conjunctive management rules is the only thing that provides for the phased mitigation.

Q. So what did the Department do in 2006?

A. In terms of what --

Q. Require any administration?

A. -- requiring those? Really didn't do anything. It was, you know, through the summer, as I recall there was -- they sought a stay so they could stay on track with implementing. And I think that stay was denied. So the mitigation was never formally approved for that year and really wasn't implemented either. So it was on appeal to the supreme court and we're basically in a holding pattern.

TR, 734.

Nonetheless, pursuant to the Director's administration of those orders, the 2006 obligation should have "carried forward" from 2006 to 2007. Director testified as follows:

Q. So let's say you got to the end of year one, if IGWA was obligated to provide the reach gain of 10 CFS and they were over and actually provided, or if they were under and provided 9, how does that affect their obligation the second year?

A. Well, any obligation the second year would carry forward. Again remember these measurements were made at steady state conditions. So if whatever actions were taken in year one resulted in less than 10 CFS at steady state conditions, which steady state conditions might take 20, 40, 50 years to reach. It's not like there was a huge amount of water that -- that the spring users were deprived of, because of the transient approach, I guess, if you would to steady state conditions. So in that event, if they had done -- if they provided 11 CFS, great. That meant for the second year they'd only need to provide another 9 CFS to reach the second year goal of 20. And if they'd only provided 8 CFS, then they'd have to provide another 12 CFS to meet the second year goal of 20.

Q. So you contemplated somewhat of a rolling forward number?

A. That's correct. Again, with the idea the measurement were always made at the future steady state conditions. What were the benefits at steady state in the future from the actions that were taken today.

TR, 1259, ln. 10 - 1260 ln. 10.

The Director has taken no action to require the ground water users to perform their unmet obligation from 2006.

The Director's order approving the mitigation plans submitted by the ground water districts in 2007 inexplicably wrote off substantial unmet mitigation obligations. HE 262. These actions are inexplicable in part because the Orders make no sense and no IDWR employee could explain the failure to require the ground water users to fully perform their mitigation obligation. Mr. Luke verified the unmet shortfall, but could not explain it.

Q. Now, finally with respect to 2007. You testified that the ground water districts' plan was determined to be short in meeting the 2007 obligation by the Director in his June 15, 2007, order, Exhibit No. 258.

A. Yes.

Q. Is that correct? And that shortfall was 7.1 CFS?

A. Yes, that's right.

Q. And in order to meet the mitigation requirement for 2007 the Director ordered curtailment to the extent necessary in reverse order of priority of ground water rights to produce the 7.1 CFS to the reach; isn't that correct?

A. Yes.

Q. Then you said you weren't involved in evaluating the supplemental plan, but you have reviewed Exhibit 261, the order approving the mitigation offer for 2007 with the supplement?

A. Yes.

Q. Okay. And isn't it the case that in this order the finding was that the shortage had been reduced from 7.1 CFS to 6.6 CFS? And that is at page 5.

A. Item?

Q. I'm looking at item 11. Were you aware of that?

A. Yes.

Q. And the obligation -- the mitigation obligation in any year was to provide mitigation that would ultimately meet the 10, 20, 30, 40, 50, CFS to the reach, for the given year; correct?

A. Yeah.

Q. And are you aware that the Department has been evaluating that in terms of a steady state analysis?

A. Yes. It has been steady state. That's my understanding.

Q. And the ground water users have sought credit on that basis; correct?

A. Yes.

Q. So has the Department discussed how it's going to handle this 6.6 CFS shortfall? Would it carry over to the next year so that the obligation will go from 40 CFS in 2008 for 46.6 CFS?

A. Well, I thought -- I thought the additional recharge reduced it to 2 CFS.

Q. If you look at the table there, recharge would be in the far left-hand column under the word recharge. Do you see 5.4, 5.4 CFS --

A. Right.

Q. -- in the July 5, 2007, order; right?

A. Yeah.

Q. Then if you look back at the curtailment order of June 15, 2007, the aggregate recharge -- and I'm not sure I can point you to exactly which paragraph to look at, but the aggregate recharge was just a half a CFS or so less, wasn't it? In other words, as is clear from the July 5, 2007, order the shortfall identified here remains 6.6 CFS.

A. But what about in finding 12 with the additional 10,000 acre feet?

Q. If you look at finding 12 then, and look at conclusion of law numbers 13 and 14, that reflects, does it not, not a steady state analysis or the ultimate product of mitigation, but some consideration of what additional water would show up during the course -- the remainder of the course of the year 2007, something more --

A. Right, which would reduce it to 2 CFS.

Q. But that's a transient analysis; isn't that correct?

A. Okay. Yeah, I think it could be read that way.

Q. And that is not the basis upon which the mitigation plans have been offered or evaluated heretofore; correct?

A. Well, I thought they were on steady state, yeah.

Q. Right. In other words, what paragraph 12 says is well, if we consider how much water's going to come back for the next six months from these mitigation efforts, some of which won't start until October or November --

A. Yeah.

Q. -- not a whole lot of water. So it's not worth curtailing. I'm going to make basically a futile call determination on the mitigation plan; isn't it?

A. I don't know.

TR, 697-700

Q. So has there been some discussion within the Department that they're going to change the way they evaluate mitigation to look at only the benefits that accrue during the course of the year when the mitigation is required?

A. You know, I don't know. That's kind of a distinction or a finer point that I have not been involved.

Q. Okay. And who within the Department could elucidate this particular question, do you think?

A. I guess Dr. Wylie would have been -- could address that given his knowledge of the model. And I assume he may have had discussions with the Director or other staff. I don't know.

TR, 702.

After a similar discussion with Dr. Wylie, he testified that he did not understand the Director's orders pertaining to the 2007 mitigation either:

Q. Now, that is an entirely different analysis than the steady state analysis that is intended to reflect the benefits accruing from mitigation activities during the year, benefits that will accrue over time; correct?

That's very different.

Q. And if you -- if you took an IGWA mitigation plan and analyzed it that way, it could never meet the mitigation requirement could they? In other words if you?

A. It makes it very difficult, yes.

Q. And this analysis that we just discussed is reflected on page 9 paragraphs 13 and 14; isn't that correct? 15 as well.

A. That's correct.

Q. And the conclusion that the mitigation measures for Blue Lakes are sufficient is -- is not accurate if we're analyzing the mitigation actions at steady state; correct?

A. The conclusion is not accurate if we analyze it at steady state.

Q. If you analyze the mitigation plan at steady state it's still 6.6 CFS short, which is only half a CFS better than the 7.1 CFS shortfall that warranted curtailment.

A. Yes. If we used the steady state analysis it would be -- I would wager there would be a larger difference.

Q. Okay. And has there been discussion within the department about the 6.6 CFS shortfall carrying over into the next irrigation season for 2008? That you know, I should say.

A. It's --

Q. I can see you struggling. Let me ask you a better question. I should if you follow the prior protocol.

A. Yes, and I'm only struggling. The simple answer is yes. And I guess I'm not required to explain. So, yes.

TR, 1508-1510.

The preceding testimony establishes that there is an unmet obligation that should carry forward to 2008.

**D. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary and capricious**

In fact, the problem is that the Director has not established or enforced procedures to ensure that mitigation plans are submitted timely so that they can be reviewed and approved before the irrigation season begins. With no procedures, mitigation plans, and particularly supplements to those plans, have been submitted well into the irrigation season. *See, e.g.* HE 247, 262. The Director's 2007 Order approving the 2007 mitigation plan was not issued until July 5<sup>th</sup>, and contained the inexplicable findings described above. Of course, once the irrigation season starts and ground water pumps are running, there is no likelihood that curtailment will occur, if a plan is deemed inadequate.

The failure to adopt procedures is compounded by the failure to adopt and enforce clear standards for mitigation. Curtailment conclusively addresses the impact of pumping in that it stops depletions. Each of the mitigation alternatives proscribed by the Director involves numerous, complicated technical and enforcement issues. Performance and benefits are not evaluated until long after the irrigation season. And the Director has shown little willingness to carry unmet obligations forward.

If the Director is going to continue to provide mitigation alternatives to curtailment, he should be required to articulate and adopt clear procedures and standards by which to administer such alternatives.

## CONCLUSION

The Director's refusal to acknowledge the injury to Blue Lakes' 1971 priority water right is clearly erroneous, and is not supported by any facts in the record. The theory upon which the refusal to acknowledge the injury is fundamentally flawed. The Director is precluded from reevaluating Blue Lakes' decrees for purposes of administration, and shifting to Blue Lakes the burden of defending its water rights in this proceeding. Blue Lakes requests that the Court instruct the Director to acknowledge the injury to Blue Lakes' 1971 right, and to administer water rights accordingly.

The public interest as articulated by the Hearing Officer is not a basis for determining administrative outcomes. The Director's discretion to make determinations about material injury and reasonableness of diversions must be exercised within the parameters of his duties under Title 42 and the Rules, as determined or approved by the legislature.

The ground water users who are subject to the a May 19, 2005 Order have not met their mitigation obligations for 2006 or 2007, as discussed herein. Blue Lakes requests that the Court instruct the Director to require the ground water users to meet these obligations.

Mitigation by administration is floundering from a lack of procedures and clear standards. Blue Lakes requests that the Court instruct the Director to adopt procedures and standards so that mitigation can be administered in a timely and meaningful fashion.

Respectfully submitted this 9<sup>th</sup> day of January, 2009.

RINGERT LAW CHARTERED

By   
Daniel V. Steenson

### CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of January, 2009, I caused to be served two true and correct copies of the foregoing document to the following addressees by the method indicated:

Judge Melanson  
SRBA Court  
253 3<sup>rd</sup> Ave. No.  
PO Box 2707  
Twin Falls, ID 83303-2707

☐ U.S. First Class Mail, Postage Prepaid  
☐ Federal Express  
☒ Hand Delivery  
☐ Facsimile  
☐ Electronic Mail

Randall C. Budge  
Candice M. McHugh  
Racine, Olson, Nye, Budge & Bailey, Chtd.  
P.O. Box 1391  
Pocatello, ID 83204  
[rcb@racinelaw.net](mailto:rcb@racinelaw.net)  
[cmm@racinelaw.net](mailto:cmm@racinelaw.net)

☒ U.S. First Class Mail, Postage Prepaid  
☐ Federal Express  
☐ Hand Delivery  
☐ Facsimile  
☐ Electronic Mail

Mike Creamer  
Jeff Fereday  
GIVENS PURSLEY  
P.O. Box 2720  
Boise, ID 83701-2720  
[mcc@givenspursley.com](mailto:mcc@givenspursley.com)  
[jefffereday@givenspursley.com](mailto:jefffereday@givenspursley.com)

☒ U.S. First Class Mail, Postage Prepaid  
☐ Federal Express  
☐ Hand Delivery  
☐ Facsimile  
☐ Electronic Mail

Justin May  
May, Sudweeks & Browning LLP  
1419 W. Washington  
Boise, ID 83702  
[jmay@may-law.com](mailto:jmay@may-law.com)

☒ U.S. First Class Mail, Postage Prepaid  
☐ Federal Express  
☐ Hand Delivery  
☐ Facsimile  
☐ Electronic Mail

Michael Gilmore  
ATTORNEY GENERAL'S OFFICE  
P.O. Box 83720  
Boise, Idaho 83720-0010  
[mike.gilmore@ag.idaho.gov](mailto:mike.gilmore@ag.idaho.gov)

☒ U.S. First Class Mail, Postage Prepaid  
☐ Federal Express  
☐ Hand Delivery  
☐ Facsimile  
☐ Electronic Mail

John K. Simpson  
Travis L. Thompson  
Paul L. Arrington  
BARKER, ROSHOLT and SIMPSON, LLP  
113 Main Avenue West, Suite 303  
P.O. Box 485  
Twin Falls, ID 83303-0485  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[tlr@idahowaters.com](mailto:tlr@idahowaters.com)  
[pla@idahowaters.com](mailto:pla@idahowaters.com)

☒ U.S. First Class Mail, Postage Prepaid  
☐ Federal Express  
☐ Hand Delivery  
☐ Facsimile  
☐ Electronic Mail



---

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