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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BLUE LAKES TROUT FARM, INC., Petitioner/Plaintiff, vs. GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents/Defendants.	CASE NO.: CV-WA-2010-19823 **MEMORANDUM IN SUPPORT OF APPLICATION FOR PEREMPTORY WRIT OF MANDATE**

COMES NOW the Petitioner/Plaintiff, Blue Lakes Trout Farm, Inc. (hereinafter referred to as "Plaintiff"), by and through its undersigned attorneys of record, Ringert Law Chartered, and hereby submits this *Memorandum in Support of Application for a Peremptory Writ of Mandate.* This *Memorandum* is supported by the prior pleadings in this matter and the *Affidavits of John*

Korney and S. Bryce Farris submitted herewith.

INTRODUCTION

The procedural history of this matter has been summarized by the Director in the *Order Setting Hearing and Schedule and Order Limiting Scope of Hearing* "*Order*" issued on October 1, 2010. *See Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate*, "*Verified Complaint*" **Exhibit 1** and ¶ 4. The *Order* provides that "petitioners Blue Lakes and Clear Springs are precluded from addressing, in this proceeding, issues related to the 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model." Plaintiff filed the *Verified Complaint* and *Application for Peremptory Writ of Mandate* praying that this Court compel the Director to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Plaintiff's water rights, and to allow Plaintiff to present such evidence at any hearing before Defendants related to Plaintiff's delivery call. The hearing set in the *Order* is for January 10-14, 2011 and the deadline for filing pre-filed direct testimony, including expert reports is November 5, 2010. Thus, Plaintiff is requesting immediate and expedited consideration of this matter by the Court.

ARGUMENT

A. The Director has a Present and Ongoing Duty to Consider and Utilize the Best Available Information in Administering Water Rights.

In response to Plaintiff's water delivery call, Defendants used the Enhanced Snake River Plain Aquifer Model ("ESPAM") for the first time to administer hydraulically connected ground and surface water rights. The use of a computer model for this purpose involves numerous technical issues that are the subject of ongoing analysis and discussion among ESPA hydrologic and modeling

experts. Utilizing the scientific method, the experts test and refine or reject hypotheses, methods and conclusions. Through this process, the best available scientific understanding of the relationship between the ESPA and hydraulically-connected spring sources evolves. To be based on the best available information, the Director's administrative actions must tack and evolve as well.

Plaintiff's intention to present new, updated and improved analysis and methods is consistent with the prior decision of the Hearing Officer, Hon. Gerald Schroeder, which was affirmed by the Director and the District Judge John Melanson, which found that: "Continuing efforts should be made to improve the accuracy of all scientific conclusions . . . . and [i]f that produces more reliable results, those results should be used in the future." District Judge John Melanson also found that when better methods are developed to determine the impacts of ground water diversions on spring flows and to deal with model uncertainty in administration, those better methods should be used.

Two of the technical issues that are the subject of ongoing analysis and discussion are how to determine and account for model uncertainty in the administration of junior ground water rights causing injury, and how to determine the extent to which junior ground water withdrawals deplete individual spring flows. The resolution of these issues significantly affects the Director's injury and mitigation determinations, including those he made in his July 17, 2010 *Final Order* determining the injury to Blue Lakes' 1971 priority water right and proscribing mitigation as an alternative to curtailment. It is these issues that Plaintiff seeks to address with new, updated and improved analysis and methods.

B. Plaintiff Should Not be Precluded from Presenting, Updated, Improved and/or New Data, Analysis and Methods for Determining the Impacts of Junior Ground Water Diversions on Plaintiff's Water Rights.

The following is offered to explain what Plaintiff intends to present and what the Director has precluded from consideration at the hearing in January. At the time of the 2007 hearing referenced in the *Order*, the conventional wisdom was that the ESPAM could not be used directly to show the impact of junior ground water diversions on individual spring sources because it had been calibrated to Snake River reaches rather than to individual springs. In response to Plaintiff's water delivery call, the Director used the model to show that the impact of junior ground water pumping on the Devils Washbowl to Buhl Reach was 51 cfs. The Director then inferred that, because Blue Lakes Spring flow is approximately 20% of the total flow of springs in the Devils Washbowl to Buhl Reach, that the impact of junior ground water pumping on Blue Lakes's spring supply is 10 cfs (20% of 51 cfs). This is the Director's spring allocation determination for Blue Lakes' water supply.

Because the model was calibrated to Snake River reaches, the Director assumed that the uncertainty of model predictions would be equivalent to the +/- 10% error in Snake River gauges. This is the Director's model uncertainty determination, that is the basis for the Director's "trim line," whereby he excluded from administration all junior ground water rights whose impact on the springs is 10% or less than their depletions (e.g. .1 cfs impact from a 1.0 cfs diversion).

The Hearing Officer, Director, and the District Court found that, while these determinations were flawed: model uncertainty should be addressed in administering water rights; no better method for making the model uncertainty and spring allocation determinations was available at the time of

hearing; the Director had the discretion to use these methods until better ones were available; continuing efforts should be made to improve all technical determinations, and when better methods are available, they should be used.

Defendants' ESPA model expert Dr. Allen Wylie testified that the Director's "post-modeling" administrative policy determinations of model uncertainty, trim line, and spring allocation are not scientifically rigorous or defensible." *Farris Aff., Ex. A*, at 17, ln. 14 - 20 ln. 17; 62, lns. 4-18; 120, lns. 16-22. The ESPAM Committee has continued to evaluate the issue of model uncertainty since the 2007 hearing. On February 25, 2009, the Director sent a letter to Committee members posing the following question: "As part of the uncertainty analysis, should ESHMC members address the technical aspects (not polity issues) of a trim line as a function of uncertainty?" *Farris Aff.*, Ex. B, (Attachment A). Consistent with the Director's briefing to this Court, the Director stated that the purpose for the trim line "was to avoid curtailing ground water users who might have ***no effect*** on enhancing reach gains." (Emphasis added.) The Director quoted portions of the Hearing Officer's recommendation in which the Hearing Officer discussed the need for "'development of a more scientifically based error factor [as a] high priority in improvement,'" and invited committee members to submit written analysis and make presentations to the committee "regarding the technical aspects of ths use of a trim line."

Subsequent to the 2007 hearing, five Committee members submitted a "White Paper, Technical Evaluation of the Trim Line." and gave a presentation to the committee. *Farris Aff.* Ex. B. In that analysis, they concluded that: The inference that ground water withdrawals outside the 10 percent trim line might have no effect on reach gains based on an assumed model uncertainty of

+/- 10 percent is incorrect." *Id.* at 2. They also concluded that cumulatively, ground water withdrawals outside the trim line have a significant impact on spring flows, accounting for 1/3 to 1/2 of the total impact of ground water pumping on the springs. During his November 13, 2009 deposition testimony, Dr. Wylie agreed with these conclusions of the five experts in their White Paper. *Farris Aff.*, Ex. A., at 101, ln. 6 - 104, ln.; 106, ln. 6 - ln. 108, ln. 7.

Blue Lakes' seeks to present evidence that the ESPAM model has been calibrated to Blue Lakes spring flow, and can be used directly to show the impact of junior ground water pumping on Blue Lakes' water supply. This method eliminates the need for the scientifically indefensible post-modeling administrative adjustments performed by the Director under the current methodology, because the model is not used indirectly to show the impact of junior ground water diversions on the Devils Washbowl to Buhl reach of the Snake River. There is therefore no need to use the Director's scientifically indefensible 20% spring apportionment method to guess at the direct impact, and the error in the Snake River stream gages becomes irrelevant.

In his deposition testimony, Dr. Wylie confirmed that the ESPAM model has been calibrated to Blue Lakes spring flow. *Id.*, at 111, ln. 13 - 113, ln. 4. Dr. Wylie's only concern about using the model directly to determine the impact of junior ground water diversions on Blue Lakes' water supply is that there are one or two other springs in the Devils Washbowl to Buhl reach that have not been calibrated:

A. So if I could be convinced that enough of the flux was accounted for in that reach?
Q. Yes.
A. The – then the model could be used to directly determine the flow at Blue Lakes.
Q. And it could then be used with less uncertainty, correct, than is currently imputed as a result of the 10 percent error in the river gauges, since the river gauges would no longer be a factor.

A. Well, with any luck at all, the current uncertainty definition would – is going to go away. We're going to – I'm very excited about going and doing a rigorous uncertainty analysis. So that placeholder is, I hope, going to go away.

Id., 125, ln. 25 - 26, ln. 15.

Q. [I]f your concerns about I guess what your are thinking is an incomplete data set for the springs in the Devil's Washbowl to Buhl reach can be resolved, then I take it you would be certainly willing to talk with Blue Lakes' expert or others about the possibility of using the model directly here, given the calibration of the model? You're a scientist?
A. Uh-huh.
Q. Is that a 'yes'?
A. Uh-huh.

Id., at 128, ln. 16 - 129, ln. 2.

Q. Okay. And so as we discussed, it may be very appropriate to utilize the calibration of the model to Blue Lakes Springs, in your mind, if any gaps in spring-flow data and calibration in the Devil's Washbowl to Buhl reach can be filled; correct?
A. Yes. If sufficient percentage of the flux, the discharge in that reach is accounted for.
Q. And as we discussed, there are perhaps two major springs of five where additional data could be collected, but three of the five there has been calibration by you through the model; correct?
A. Correct.
Q. So the gap may not be very large, and we may not be very far away from being able to use the calibration of the model to Blue Lakes Springs to evaluate the impact of ground water withdrawals on Blue Lakes Springs; correct?
A. It -- we may not be very far from me being comfortable to do that. I -- that would be a director's -- would make the final call on that.

Id., at 146, ln. 13 - 147, ln. 10.

Blue Lakes' expert, John Korney, has performed the analysis and filled the data gaps referred to by Dr. Wylie and intends present such analysis at the hearing before the Director. For the Court's reference and review of such analysis, a draft of the expert opinion of John Korney, which would be due on November 5, 2010, is attached to the *Affidavit of John Korney* submitted herewith.

The Director has a duty to consider the most current scientific analysis and methods. He

must consider, and cannot preclude Blue Lakes from presenting the opinions of several experts and Dr. Wylie that the premise for the trim line (that diversions outside may have no impact on spring flows) is incorrect. The Director must consider their views that, cumulatively, ground water diversions outside the trim line have a significant impact on spring flows. The Director has a duty to consider, and cannot preclude Blue Lakes from presenting, a proposed use of the ESPAM model which the Director's own modeling expert, Dr. Wylie, acknowledges has merit if certain data gaps are filled.

CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court issue and order and/or peremptory writ of mandate to make it clear that the Director has a present and ongoing duty to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Plaintiff's water rights and to allow Plaintiff to present such evidence in any proceeding before Defendants related to Plaintiff's water delivery call.

DATED this 14th day of October, 2010.

RINGERT LAW CHARTERED

By: _____
Daniel V. Steenson
Attorneys for Petitioner/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2010, I served a true and correct copy of the foregoing **APPLICATION FOR PEREMPTORY WRIT OF MANDATE** by delivering it to the following individuals by the method indicated below, addressed as stated.

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