

RECEIVED
OCT 28 2010
DEPARTMENT OF
WATER RESOURCES

Daniel V. Steenson, ISB #4332
Charles L. Honsinger, ISB #5240
S. Bryce Farris, ISB #5636
Jon Gould, ISB #6709
RINGERT LAW, CHTD.
455 S. Third St.
P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorneys for Blue Lakes Trout Farm, Inc.

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

**BLUE LAKES' RESPONSE TO
MEMORANDUM IN OPPOSITION**

COMES NOW the Petitioner/Plaintiff, Blue Lakes Trout Farm, Inc. (hereinafter referred to as "Blue Lakes"), by and through its undersigned attorneys of record, Ringert Law Chartered, and hereby submits this *Response to Memorandum in Opposition to Application for a Peremptory Writ of Mandate*. This *Response* is supported by the *Second Affidavit of S. Bryce Farris*, which is filed concurrently herewith, along with the pleadings and records already on file with the Court.

COPY

INTRODUCTION

On October 7, 2010, Blue Lakes filed the present action. On October 12, 2010, Blue Lakes filed an Application for Peremptory Writ of Mandate requesting that this Court immediately issue a declaratory judgment or mandate tot he Director compelling him to updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes' water rights. Blue Lakes also submitted a Memorandum in Support and the Affidavits of S. Bryce Farris and John Koreny in support.

Now, on the eve of the hearing, and not in compliance with the Idaho Rules of Civil Procedure, the Director has filed a *Memorandum in Opposition to Application for Peremptory Writ of Mandate* which fails to address the decisions of the Hearing Officer, the District Court, IDWR's expert and his own recognition of the shortcomings of the model uncertainty, trimline, and spring apportionment determinations and the clear recognition of the Directors ongoing duty to consider new, updated or improved analysis and/or methods for determining the impact of junior ground water diversions on Blue Lakes' water rights.

1. **There is No Basis for the Director to Refuse to Consider New, Updated or Improved Analysis and/or Methods for Determining the Impact of Junior Ground Water Diversions on Blue Lakes Water Rights.**
 - a. **Judge Melanson's Order in Case No. 2008-444 Does Not Address This Court's Jurisdiction.**

The Director argues that Judge Melanson's May 11, 2010 *Order Granting in Part Motion to Enforce Order* issued in response to Blue Lakes' *Motion to Enforce* the District Court's remand Orders issued in Case No. 2008-444 indicate that this Court lacks jurisdiction over the present action. The Director's argument is based on a mistaken interpretation of Judge

Melanson's Order. In the excerpt of that order quoted by the Director at page 8 of his *Memorandum in Opposition*, Judge Melanson explained that issues pertaining to the technical basis for the Director's margin of error, trimline and spring allocation determinations were not addressed by the District Court's Orders of remand, which simply required the Director to determine injury to Blue Lakes' water right no. 36-7210 and 36-4013A. Accordingly, Judge Melanson decided that his jurisdiction in response to Blue Lakes' *Motion to Enforce* his remand Orders did not include those technical issues.

This Court's jurisdiction is not limited to or by Judge Melanson's remand Orders. The Director has admitted that this Court has original jurisdiction over the issuance of writs of mandamus pursuant to I.C. §§ 1-705 and 7-301, and has jurisdiction over petitions for judicial review and declaratory judgment pursuant to the Idaho Supreme Court *Administrative Order* dated December 9, 2009.

b. The Pendency of the Appeal Does Not Suspend the Director's Duty to Consider and Utilize the Best Available Information in Administering Water Rights.

Contrary to the Director's arguments, the pendency of the appeal of the Director's 2005 Order on Blue Lakes' water delivery call does not divest the Director of jurisdiction to administer water rights in response to Blue Lakes' water delivery call. Nor does the appeal affect the Director's obligation to utilize the best available information when administering water rights. On judicial review, the District Court found that, given the information available at the time, the Director did not abuse his discretion in making his model uncertainty, trimline, and spring apportionment decisions. The Court did not, however, sanctify those decisions. Clearly, if the Director had the discretion to make those decisions, he has the discretion to modify or abandon

them altogether as and when necessary for his administrative decisions and actions to comport with contemporary information, analysis and understandings.

In fact, the Director has a duty to utilize the best available science to determine the impact of junior ESPA ground water diversions on Blue Lakes' senior water rights, and adjust his decisions and actions accordingly. 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). No party has ever contested this proposition that the Director is required to utilize the best available information in response to the Blue Lakes' water delivery call. 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." *Second Affidavit of Bryce Farris, Ex. A, Responses to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement ("Reconsideration Order")* at 7-8. The District Court also found that when better methods are developed to determine the impact of ground water diversions on spring flows and to deal with model uncertainty in administration, those better methods should be used. *Baxter Affidavit*, Attachment B at 25-29.

In an order issued on April 7, 2010, in proceedings related to the water delivery calls of the Surface Water Coalition, the Director acknowledged that consideration and use of "new analytical methods or modeling concepts" is a component of his "ongoing duty to administer the State's Water Resources":

Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate this methodology. As the process of predicting and evaluating material injury moves forward, and more data is developed, the methodology will be subject to adjustment and refinement.

Farris Second Aff., Ex. B, at 30.

The issues presented to the Idaho Supreme Court related to the trimline are narrow legal issues that do not relate to the technical basis for the trimline. Blue Lakes and Clear Springs have raised only two issues. First, whether a plus or minus error factor can be used by the Director to the benefit of any party to a water delivery call proceeding. Second, whether the Director improperly shifted the burden of proof to the Spring Users by making the trimline determination. The Supreme Court's response to these issues will not reach the technical basis for the trimline, nor will it reach the basis of the Director's 10% model error determination or his spring allocation determination.

Accordingly, the pendency of the appeal cannot possibly suspend the Director's duty to utilize the best available information and, to that end, to consider the information Blue Lakes seeks to present. Just as the Director is required to comply with the District Court's remand order (*see supra* at 4-6), the Director is also required to comply with the direction of the Hearing Officer (which the Director adopted) and the District Court to utilize the best available information.

c. Res Judicata Does Not Apply.

The inapplicability of *res judicata* to preclude consideration of the information Blue Lakes seeks to present is clear from the language of the aforementioned administrative and judicial orders. They each expressly provide for the consideration and use of improved analysis

and methods to determine the impact of junior ground water withdrawals on Blue Lakes' water rights. The orders specifically reference the Director's determinations of model uncertainty, trimline, and spring apportionment. Accordingly, *res judicata* cannot possibly apply to preclude Blue Lakes from presenting the very information the orders require to be considered.

The judicial objective of finality expressed by the legal principle *res judicata* does not fit well in these early stages of the interface between evolving scientific understanding and administrative action. This has been recognized in the orders issued by the Hearing Officer, the Director and the District Court, and acknowledged by the parties involved in these proceedings. The Director's *Order Limiting Scope* stands in stark contrast to the previously uncontroverted recognition of these circumstances.

When traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958). The doctrine of *res judicata* is not applicable when new information is available, its application would produce a result that is inconsistent with the prior adjudication, or its application would produce a result contrary to policy. See *Erickson v. Amoth*, 105 Idaho 798, 800-801 (1983), *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845 (2003). As discussed, the Director's application of *res judicata* to prohibit him from considering the best available information is clearly inconsistent with the prior adjudication. It also produces a result that is contrary to the policy and duty of the Director to receive, consider and utilize such information.

At the time of the 2007 hearing on the Director's 2005 Orders on the Blue Lakes and Clear Springs water delivery calls, the prevailing view was that the model could only be used to predict the impact of junior ground water diversions on reaches of the Snake River to which it

had been calibrated, and that it could not be used directly to reliably determine the impact of ground water withdrawals to individual springs. Due to the perceived “reach only” limitation of the model, the District Court found that the Director did not abuse his discretion to: (1) use the model to predict the impact of junior ground water diversions on the Devils Washbowl to Buhl reach and base administration on that prediction; (2) assign a 10% +/- uncertainty to the model’s outputs, based on stream gage error; (3) based on this uncertainty estimate, apply a 10% “trimline” which excludes from administration a substantial number of junior wells that are shown by the ESPA model to deplete Blue Lakes’ spring source; and (4) prorate the impact of junior ground water diversions on Blue Lakes’ spring source (20%, 10 cfs) to define the juniors’ mitigation obligation to Blue Lakes.

The Hearing Officer, the Director, the District Court, and IDWR’s ESPA model expert Dr. Allen Wylie have all recognized the shortcomings of Director’s model uncertainty, trimline or spring percentage determinations, and the need for further analysis.

After the 2007 hearing, Blue Lakes’ consultant obtained previously unavailable information from IDWR and performed additional analysis to discover that, because the model has been calibrated to the Blue Lakes’ spring source, it can be used to show the impact of ground water diversions on Blue Lakes’ springs. This method produces more accurate and reliable results than the “reach only” approach with the Director’s “trimline” and “spring percentage” “post-modeling administrative adjustments.” This is in part because it eliminates the impact of error associated with stream gage measurements. Blue Lakes is prepared to present this method and its results to the Director.

Also subsequent to the 2007 hearing, several experts authored and submitted a "White Paper" to advise the Director and the ESPAM Committee that the trimline represents a scientifically indefensible application of model uncertainty. *Farris Aff.*, Ex. B. During his recent deposition testimony, Dr. Wylie agreed with this conclusion of the White Paper. *Farris Aff.*, Ex. A at 101-108). Based upon the analysis of the White Paper, Blue Lakes is also prepared to present a method of applying model uncertainty in the administration of junior ground water rights that is more scientifically defensible than the "trimline." *See Affidavit of John Koreny.*

d. "Law of the Case" Does Not Apply.

Contrary to the Director's argument at pages 10-11 of the *Memorandum in Opposition*, there is no determination or "law of the case" which precludes consideration of the information Blue Lakes seeks to present. As previously discussed, the Hearing Officer, the Director in his Final Order, and Judge Melanson each acknowledged the shortcomings in the technical basis for the 10% error, trimline, and spring allocation determinations, the need for continuing analysis of these determinations, and to utilize better science and methods when they are available. There was no determination that shut the door on the presentation or consideration of such evidence. If anything, the law of the case is that there is a need for continuing analysis of these determinations, and to utilize better science and methods when they are available.

2. The Director's Order Limiting Scope Violates Blue Lakes' Right to Due Process

The Constitution of the United States provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14, §1; Const. Art. I, §13. Procedural due process is a protection against the arbitrary deprivation of one of these rights. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It protects

the minimum guarantees of notice and a hearing where deprivation of a property interest may occur. *Boise Tower Assocs., LLC v. Hogland*, 215 P.3d 494, 500 (2009). Because a water right is a property right, procedural due process is applicable when a party may be deprived of its water right.

Blues Lakes' water rights have been and continue to be injured as a result of diversions by hydraulically connected junior ground water users. Due in part to the Director's flawed model uncertainty, trimline, and spring apportionment determinations, the Director has substantially understated the depletive effect of junior ground water diversions on Blue Lakes' water rights, and is allowing large numbers of junior ground water rights to continue to cause injury to Blue Lakes' water rights without providing adequate mitigation. The Director's use of the flawed injury determination in evaluating the adequacy of a mitigation plan deprives Blue Lakes of the full benefit of its water rights. The Director's refusal to allow Blue Lakes to present better analysis and methods to determine the impact of junior ground water diversions on Blue Lakes' water rights deprives Blue Lakes of its right to procedural due process prior to continued deprivation of Blue Lakes' water rights.

3. The Director Is Applying Different Standards to Blue Lakes and the Ground Water Users.

At page 9 of his *Memorandum in Opposition*, the Director attempts to distinguish his decision allowing the ground water users to present evidence related to issues that are on appeal to the Idaho Supreme Court. He argues that they were not afforded the opportunity to present evidence on how the Director's determination of injury to Blue Lakes' water right no. 36-7210

“might affect the previous conclusions of law.” Of course, Blue Lakes has not had the same opportunity.

4. Blue Lakes Has a Clear Legal Right to the Relief Requested of This Court and Has No Other Adequate Remedy.

Blue Lakes has no lesser right than the ground water users to present evidence related to the Director’s determination of injury to water right no. 36-7210. This right is a necessary corollary to the Director’s continuing, clear and admitted obligation to administer water rights and to consider the best available information and scientific analysis regarding the impact of junior ground water diversions on Blue Lakes’ water rights, and to employ improved methods for making that determination when the become available.

The Director correctly observes that Blue Lakes has tried and been denied the opportunity to present such evidence. In the current administrative proceeding, the Director has sua sponte precluded Blue Lakes from presenting such evidence at the hearing that is scheduled for January of 2011, just a few months prior to the beginning of another irrigation season. If Blue Lakes is precluded from presenting this evidence, and can only challenge the Director’s Order limiting the scope of the hearing through a petition for judicial review, at least one more irrigation season of injury to Blue Lakes’ water rights will pass by before a judicial determination may be made, after which another hearing would be required (assuming the Director’s Order is overturned).

Accordingly, this action is the only adequate remedy available to Blue Lakes.

CONCLUSION

For the foregoing reasons, Blue Lakes respectfully requests that this Court enter a declaratory ruling and writ of mandate to allow Blue Lakes to present the information identified in the pleadings and affidavits on file with this Court.

Dated this 28th day of October, 2010.



Daniel V. Steenson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2010, I served a true and correct copy of the foregoing **BLUE LAKES' RESPONSE TO MEMORANDUM IN OPPOSITION** by delivering it to the following individuals by the method indicated below, addressed as stated.

Director Gary Spackman. () U.S. Mail, Postage Prepaid
c/o Victoria Wigle () Facsimile
Idaho Department of Water Resources (x) Hand Delivery
322 East Front Street (x) E-Mail
P.O. Box 83720
Boise, ID 83720-0098
victoria.wigle@idwr.idaho.gov

Garrick L. Baxter () U.S. Mail, Postage Prepaid
Chris M. Bromley () Facsimile
Deputy Attorney Generals () Hand Delivery
Idaho Department of Water Resources (x) E-Mail
P.O. Box 83720
Boise, ID 83720-0098
Garrick.Baxter@idwr.idaho.gov
Chris.Bromley@idwr.idaho.gov

Courtesy Copies to the Following via E-Mail:

Randy Budge () US Mail, Postage Prepaid
Candice M. McHugh () Facsimile
Racine Olson (x) E-mail
P.O. Box 1391
Pocatello, Idaho 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

John Simpson () US Mail, Postage Prepaid
Travis Thompson () Facsimile
Barker Rosholt (x) E-mail
P.O. Box 2139
Boise, Idaho 83701-2139
(208) 244-6034
jks@idahowaters.com
tlr@idahowaters.com

Mike Creamer
Jeff Fereday
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701-2720
mcc@givernspursley.com
jeffereday@givenspursley.com

US Mail, Postage Prepaid
 Facsimile
 E-mail

Michael S. Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010
mike.gilmore@ag.idaho.gov

US Mail, Postage Prepaid
 Facsimile
 E-mail

Justin May
May Sudweeks & Browning LLP
1419 W. Washington
Boise, Idaho 83702
jmay@may-law.com

US Mail, Postage Prepaid
 Facsimile
 E-mail

Robert E. Williams
Fredericksen Williams Meservy
P.O. Box 168
Jerome, Idaho 83338-0168
rewilliams@cableone.net

US Mail, Postage Prepaid
 Facsimile
 E-mail

Allen Merritt
Cindy Yenter
Watermaster - Water District 130
IDWR – Southern Region
1341 Fillmore St., Ste 200
Twin Falls, Idaho 83301-3380
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

US Mail, Postage Prepaid
 Facsimile
 E-mail



Daniel V. Steenson