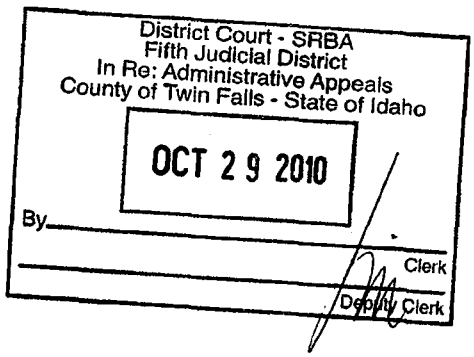
EXHIBIT H

IN THE DISTRICT COURT OF 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,** **and** **CLEAR SPRINGS FOODS, INC., and THE IDAHO GROUND WATER APPROPRIATORS, INC.,** **Intervenors,**	**CASE NO.: CV WA 2010-19823** **ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDATE**



I.

FACTS AND PROCEDURAL BACKGROUND

The facts and procedural background set forth in this Court's *Order Denying Petition for Alternative Writ of Mandate* issued in the above-captioned matter on October 8, 2010, are expressly incorporated herein by reference. In addition, on October 12, 2010, Petitioner Blue Lakes Trout Farms, Inc. ("Blue Lakes") filed an *Application for Peremptory Writ of Mandate*, requesting that this Court compel the Respondents "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 IDWR related to Plaintiff's water delivery call." Clear Springs Foods, Inc. ("Clear Springs") subsequently intervened in support of the *Application* and the Idaho Ground Water Appropriators, Inc. ("IGWA") intervened in opposition to the *Application.*

On October 28, 2010, Respondents filed their *Answer* to Petitioner's *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate* ("*Complaint*"), along with a *Memorandum in Opposition to Application for Peremptory Writ of Mandate*. A hearing on Petitioner's *Application* was held before this Court on October 28, 2010. In its *Application* Petitioner requested immediate and expedited consideration of this matter by the Court as the parties have a November 5, 2010 deadline in the underlying proceeding which may be affected by the decision of this Court. As such, at oral argument this Court instructed the parties that a written ruling would be released in short order.

II.
DISCUSSION

A. Standard of Review.

A decision to issue a writ of mandate is committed to the discretion of the court. I.R.C.P. 74(b). Whether a party is seeking an alternative writ or a peremptory writ the standard is the same: "[T]he party seeking a writ of mandate must establish a 'clear legal right' to the relief sought. Additionally, the writ of mandate will not issue where the petitioner has 'a plain, speedy and adequate remedy in the ordinary course of law." *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct. App. 2004) (citing *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997)).

B. Peremptory Writ of Mandate.

Blue Lakes assigns error to the Director's decision, contained in his *Order Limiting Scope of Hearing*, that Blue Lakes is precluded from addressing issues in the underlying proceeding related to the 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model. Blue Lakes argues that the

Director's ruling in this regard wrongfully prohibits it from presenting evidence that provides a better technical basis for determining the extent of injury and mitigation obligations than the "trimline" and "spring allocation" determinations of the Director.[1] In support of its argument, Blue Lakes asserts that certain of the district court's previous orders in Gooding County Case No. 2008-444 authorize and/or require the Director to entertain the presentation of such evidence. For the following reasons, this Court denies Blue Lakes' *Application.*

i. Blue Lakes has a plain, speedy and adequate remedy at law.

The issuance of a peremptory writ of mandate in this matter would be improper under the above-mentioned standard of review because Blue Lakes has a plain, speedy and adequate remedy at law. In *State v. District Court,* 143 Idaho 695, 698, 152 P.3d 566, 569 (2007), the Idaho Supreme Court directed that "A right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights."

In this case, the ability of Blue Lakes to seek judicial review of decisions made by the Director in the underlying proceeding is provided for by Idaho's Administrative Procedure Act ("IDAPA"). I.C. §§ 67-5201, *et seq.*; *See also*, I.C. § 42-1701A. The Court has made clear that it never was the intention or meaning either of the common law or the statute that issuance of writs should take the place of appeals. *Smith v. Young*, 71 Idaho 31, 34, 225 P.2d 446, 468 (1950). Supplanting the judicial review process provided for in IDAPA by issuing a peremptory writ of mandate in this matter to overrule an interlocutory determination by the Director would therefore be improper.

As such, the Court finds Blue Lakes' argument that it has no remedy at law unpersuasive. Once a final decision of the Director is issued in the underlying proceeding, Blue Lakes will be entitled to take advantage of those rights afforded to aggrieved parties under IDAPA, including the right to seek judicial review. Although Blue Lakes presumably contends that its rights under IDAPA are not adequate because it must wait for a final determination of the Director, this Court is precluded from testing

[1] Specifically, Blue Lakes seeks to present evidence by way of an expert report prepared by its expert John S. Koreny that the Eastern Snake Plain Aquifer Model ("ESPAM") has been calibrated to Blue Lakes' individual spring flow as opposed to river reaches.

the adequacy of a remedy on inconvenience grounds alone. *See e.g., Rufener v. Shaud,* 98 Idaho 823, 825, 573 P.2d 142, 144 (holding, "the adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. If such a rule were to obtain, the law of appeals might as well be abrogated at once").

Furthermore, the Idaho Supreme Court has instructed that a writ of mandate "will not lie to control discretionary acts of courts acting within their jurisdiction." *State v. District Court,* 143 Idaho 695, 698, 152 P.3d 566, 569 (2007). The determination by the Director to limit the scope of the hearing pending before him on remand after taking into account the limited issue remanded to him in Gooding County Case No. 2008-444, and the issues presently pending before the Idaho Supreme Court on appeal, was discretionary in nature as opposed to ministerial. The remedy sought in this matter does not result from the Director refusing to perform his statutory duty of administering water rights. Rather, the dispute results from a disagreement over how the Director is performing his duty. In *Musser v.* Higginson, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), the Idaho Supreme Court held "the director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." As such, utilizing a writ of mandate to overrule the Director's determination in this matter would be an inappropriate attempt to control a discretionary action of the Director.

ii. This Court lacks jurisdiction to issue the requested writ of mandate.

The Court finds that the subject matter of the peremptory writ of mandate, namely evidence relating to the use of the trimline, the margin of error in the ground water model and other issues related to the application of the ground water model are intertwined with, or are the same issues raised in Gooding County Case 2008-444, which is currently on appeal to the Idaho Supreme Court. This Court is unable to parse the issues as narrowly as argued by Blue Lakes. As to the remanded portion of Gooding County Case 2008-444, the case was remanded by Judge Melanson for a limited purpose only – to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variation as part of a material injury determination.

Following remand in Gooding County Case 2008-444, Blue Lakes filed a *Motion to Enforce Order* in that matter before then district court Judge John Melanson. Blue Lakes' *Motion* sought, among other things, to have the district court order the Director to permit Blue Lakes to present the same evidence which it now seeks this Court to order the Director to consider. Judge Melanson concluded that he did not have jurisdiction to modify his order under Idaho Appellate Rule 13:

> Upon remand, this Court did not contemplate that the Director would hold a hearing or take new evidence when applying the proper burdens of proof and evidentiary standards. Rather, the scope of the Court's *Orders* on remand is narrow – the Director must consider the evidence presented below and apply the correct burdens and standards when considering seasonable variations as part of a material injury analysis.
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> ...
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> However, the Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand. The evidence Blue Lakes seeks to introduce at the mitigation plan hearing is outside the scope of this Court's previous *Orders* on remand. This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction to "take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders*. The prior *Orders* affirmed the Director's use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand. The Determination of what evidence the director may or may not consider in conjunction with a mitigation plan hearing is also beyond the scope of this Court's prior *Orders*.

Gooding County Case No. 2008-444, *Order Granting in Part Motion to Enforce Orders*, pp.3–4 (May 12, 2010).

The filing of a separate action seeking the exact same relief which Judge Melanson concluded that he did not have jurisdiction over does not resolve the jurisdictional problems. In essence, Blue Lakes is asking this Court to modify Judge Melanson's Orders. Judge Melanson's ruling is not only the law of the case, but this Court concurs with the ruling. According, this Court concludes consistent with Judge Melanson that Idaho Appellate Rule 13 does not provide an exception to this Court which would allow it to issue the writ of mandate ordering the Department to address issues which are the same, or intertwined with, those presently pending on appeal.

III.

Therefore, IT IS HEREBY ORDERED that Blue Lakes' Application for Peremptory Writ of Mandate **is denied.**

Dated October 29, 2010.

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDATE was mailed on October 29, 2010, with sufficient first-class postage to the following:

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