

TO WATER RIGHTS NOS. 36-0413A, 36-04013B,)
AND 36-07148.)
))
(Clear Springs Delivery Call))
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IN THE MATER OF DISTRIBUTION OF WATER TO)
WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-)
07427.)
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(Blue Lakes Delivery Call))
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COMES NOW, Clear Springs Foods, Inc. (“Clear Springs”), by and through its attorneys of record, and hereby submits this *Reply in Support of Blue Lakes Trout Farm, Inc.’s Motion to Enforce Orders*.

INTRODUCTION

Clear Springs, like Blue Lakes, is troubled by the Director’s refusal to comply with this Court’s remand order and consider available scientific information and updated data and methods in conjunctive administration. Although Clear Springs’ 1955 water right is not directly at issue in Blue Lakes’ motion, any rulings on the matter may affect future proceedings in front of IDWR regarding its ordered remand to consider injury to Clear Springs’ water right. Therefore, Clear Springs is filing this reply in support of Blue Lakes’ motion to ensure any future proceedings regarding injury to the 1955 water right are held in accordance with the Court’s prior orders.

The Department’s claim that it must “reopen” the administrative proceedings in order to consider injury to Blue Lakes’ 1971 priority water right (36-7210) – and presumably Clear Springs’ 1955 priority water right – is wrong. This Court remanded the matter to the Department and plainly ordered the agency to apply “the appropriate burdens of proof and evidentiary standards when considering seasonal variations” to Blue Lakes’ 1971 priority water right (and

Clear Springs' 1955 priority water right). There is no justification for the Director to refuse to take this action, and his non-compliance is directly contrary to this Court's June 19, 2009 *Order on Petition for Judicial Review*.

Furthermore, the Director's refusal to consider the best available information threatens to derail the advancement of scientific methods and modeling in conjunctive water right administration. The use of modeling and methods to determine the impact of groundwater pumping on hydraulically connected springs in the administration of water rights is not "set in stone" as the Director would have it in this case. Rather, the technical science and understanding of groundwater to surface water relationships continues to evolve, and can always be improved by the use of new data and improved scientific methods. As such, the same information may be used to support different and more advanced modeling exercises.

For example, the Eastern Snake Hydrologic Modeling Committee (ESHMC) continues to meet on a regular basis with IDWR and the Idaho Water Resources Research Institute (University of Idaho) to work on improvements to the Enhanced Snake Plain Aquifer Model (ESPAM). The Committee is working on Version 2.0 of the ESPAM, which was not available at the time for IDWR to use in the delivery call matters in this case. However, under the Director's reasoning in response to Blue Lakes' motion, Version 2.0 (or any future versions of the Model), even if they are more scientifically robust as compared to Version 1.1 (the current version of the Model), could never be used in the administration of Blue Lakes' or Clear Springs' water rights at issue in this case. Under the Director's position, Version 1.1 of the Model would be cemented into place for all time, regardless of updated or better information and technology.

In addition to the model improvements, the State of Idaho continues to work to obtain better and more frequent water flow measurements at springs and from ground water sources like

the ESPA. If this information can never be used for purposes of conjunctive administration then what is the purpose of seeking to obtain these additional water measurements in the first place? Clearly, the Director cannot preclude the use of such information in carrying out his statutory duties and his present attempt to do so is contrary to law and violates the Department's duty to administer water rights using the latest and best information.

Unless the Director can use updated scientific methods and data, including a new and improved version of the ESPAM – regardless of when the data used to create that modeling may have become available – the administration of water rights will never progress. The importance of using the best available scientific information and modeling cannot be understated and the Court should reject the Director's refusal to consider this information. Therefore, the Court should grant Blue Lakes' *Motion to Enforce*.

ARGUMENT

I. Compliance with the Court's Remand Order Does Not Require the Director to "Re-Open" the Blue Lakes' Administrative Case.

The Director's assertion that the administrative call proceedings must be reopened before he can comply with the Court's remand order is misplaced. There is no requirement either in the remand order or the Conjunctive Management Rules that the Director "re-open" the matter in order to apply appropriate standards of review to the evidence already in the record. Stated simply, the Court remanded the case to the Director for further proceedings consistent with the Court's Order. By definition, "remand" means "to send back", or the "act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings . . . or to take some further action." BLACK'S LAW DICTIONARY 896 (6th ed. 1991). Contrary to the Department's position, there is nothing to "re-open" in front of the Director as if a case had previously been "closed". Just the opposite, this Court sent the case back to the

Director with specific instructions regarding the proper standards to apply when evaluating injury to Blue Lakes' 1971 water right and Clear Springs' 1955 water right. No party, including the Department, appealed that decision.

Notably, when the Hearing Officer reviewed the available evidence, and applied the appropriate standard and burden, he found that both Blue Lakes' 1971 water right and Clear Springs' 1955 water right were being materially injured by junior groundwater pumping. R. Vol. 16, 3846-47. As such, the Director already has factual findings in the record to review on this issue. In sum, neither the law nor the record supports the Director's claim that the administrative case must be "re-opened" or that Blue Lakes is required to take some affirmative action with the Department before the Director must comply with the Court's Order on remand.

II. The Director is Not Precluded from Considering the Best Available Scientific Information in Conjunctive Administration.

Throughout these proceedings – both before the Director and this Court – all parties, including the Department, have consistently and repeatedly emphasized that the ESPAM Model used by the Director in this case was a work in progress – a science that is still being developed. It has always been understood that additional studying and improvements would be necessary to hone the model and make it a more effective tool for conjunctive administration. Indeed, the Modeling Committee, IDWR, and IWRRI have continued to meet over the past three years after the hearing in this case was held and have pursued completion of a new and improved model, Version 2.0. The State also continues to seek improved measurements of spring flows and ground water levels, presumably to use as inputs for improved modeling of interactions between groundwater and surface water sources on the ESPA.

The Hearing Officer specifically held the model would be improved and that the "development of a more scientifically based error factor should be a priority in improvement of

the model.” R. Vol. 16 at 3703. The Hearing Officer further recognized that a “modeling committee” should conduct further analysis and provide the Director with “a more reliable, peer reviewed, error factor to utilize.” R. Vol. 16 at 3841. Indeed, the Hearing Officer plainly found that “[c]ontinuing efforts should be made to improve the accuracy of all scientific conclusions” and “if that produces more reliable results, those results should be used in the future.” *Id.* at 3845-46. The Director adopted these findings without alteration in his *Final Order*. R. Vol. 16 at 3950. Finally, this Court, on pages 25-29 of the *Order on Petition for Judicial Review*, recognized the importance of the best available science in water right administration.

Notwithstanding the Director’s adoption of the Hearing Officer’s Recommended Order on this point, the Director has refused to consider information “made to improve the accuracy of all scientific conclusions.” This refusal to consider the latest information and analysis that Blue Lakes has offered to present is confusing at best. At the outset, it is important to understand that this is not a “senior” water right issue. The use of advanced modeling techniques or additional information to improve the science is a benefit to all parties involved – whether a senior or junior water user or the Department itself. Yet, under the Department’s theory, the Director would be precluded from using the latest scientific analysis if any of the information used in that analysis, or the method used to consider that information, was potentially available for consideration at the time of hearing in this case held in the late fall of 2007. Presumably, this would be the case even if that advanced scientific analysis further supported, or confirmed, the Director’s decision.

Here, the Department refuses to even consider information presented by Blue Lakes because the information was apparently “available” during or prior to the hearing in the delivery call proceedings. According to the Department, since this information was available during the

hearing, it cannot be reviewed now or ever, or subject to further study or analysis using alternate, including better and improved scientific methods for conjunctive administration.

The modeling science continues to advance. Indeed, the parties' understanding of the information today has advanced over their understanding of the same information in 2005 when these calls were initiated. As such, analyzing the same or similar information under today's understanding of the science will produce improved, or more defensible results. Such is the case here with the information to be presented by Blue Lakes.

The refusal to consider this information based on an advancing understanding of the science will, in essence, stop the advancement of the science and the best available information to be used in conjunctive administration of water rights on the Eastern Snake Plane Aquifer. Indeed, a majority of the inputs for the modeling *pre-dates* these administrative proceedings. As the Director stated in his May 19, 2005 *Order*, at 5:

The reformulated ground water model for the ESPA was calibrated to recorded ground water levels in the ESPA, spring discharge in the spring reaches described in Finding 14, and reach gains or losses to Snake River flows, determined from stream gages together with other stream flow measurements, *for the period May 1, 1980 to April 30, 2002*. (Emphasis added).

R. Vol. 1 at 49 (emphasis added).

Any updated data sets, or advancements or revisions in the modeling – such as are necessary to “improve the accuracy of all scientific conclusions” – will rely on much of the same information. *See* Ex. A to *Second Steenson Aff.*, (*Wylie Depo Tr.* at 124). Furthermore, the linear regression analysis used by Blue Lakes has, according to Wylie, been around for 100 to 200 years. *Id.* at 149. This does not mean, however, that the understanding of how to use that analysis or how to present specific data in that analysis to the Department for its consideration in administering water rights will never advance.

Yet, under the Director's theory, this information could not be considered since the data or the scientific testing method (i.e. the linear regression analysis) was available during or prior to the administrative hearing in this case. Just because some of the information, like historical flow data, may have been available during the administration hearing does not mean that there can no longer be any advancement in the scientific understanding of that information or that new methods cannot be developed to assist the Department and the Director in conjunctive administration. The understanding of the parties or the Department as to the relationship between ground water and surface water and how pumping affects springs was not "frozen" for all time at the time of the hearing in December 2007. Rather, as more information is gathered, and more experience with the analysis is gained, the understanding of the scientific modeling and analysis will advance to better assist the parties and the Department for the purposes of proper conjunctive administration. Stated simply, the Department has a continuing obligation and duty to use the best available information, including improved modeling methods and updated data, to properly administer water rights within the State.

The use of this information cannot be precluded – regardless of who presented the information. The hold otherwise would block the advancement of scientific modeling and is directly contrary to the opinions of this Court, the Hearing Officer and the prior Director. *Cf. Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006) (Endangered Species Act requirement to use "best scientific and commercial data available" "prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on"). Accordingly, the Court should grant Blue Lakes' requested relief and deny the Department's efforts to "freeze" the state of the science in conjunctive administration on the ESPA.

III. The Ground Water Users' Argument that the Court Should "Wait-and-See" is Not Supported by Idaho Law and Should be Rejected.

The Ground Water Users join in support of IDWR's *Response* to Blue Lakes' motion but offer no legal reasons to deny the relief requested. *See Ground Water Users' Response* dated April 23, 2010. Instead, the Ground Water Users urge the Court to deny the relief because an appeal of the Court's Order is pending before the Idaho Supreme Court. *IGWA Resp.* at 4. The pendency of the appeal, however, does not divest IDWR and the Director of the "clear legal duty" to administer water rights in accordance with Idaho law, including during the 2010 irrigation season. *See* I.C. §§ 42-602, 607; *Musser v. Higginson*, 125 Idaho 392, 396 (1995). Since the Court remanded the case back to the Director for further proceedings to evaluate injury to Blue Lakes' 1971 water right, the Director is obligated to comply with that final judgment. Although the Ground Water Users may dispute the Court's *Order on Petition for Judicial Review* and the confirmation that junior ground water pumping injures Blue Lakes' senior surface water rights, the appeal by itself does not halt administration or what the Director is required to do in compliance with the Court's decision on remand.

It is telling that neither IDWR nor the Ground Water Users have requested a stay of the Court's decision, from either the District Court or the Idaho Supreme Court, as required by Idaho's civil rules. Unless the Court's decision is stayed, the Director must comply with the Order in a timely manner and complete the necessary evaluation as directed on remand. While a "wait-and-see" approach is appealing to the Ground Water Users who continue to pump out-of-priority, it has no legal support and only furthers the injury suffered by Blue Lakes' senior water right.

Whereas the Director has been aware of the requirements on remand since June 2009, it is clear the delay and refusal to take the required action has prejudiced Blue Lakes to the benefit

of the junior priority Ground Water Users this year. The Court should reject the Ground Water Users' argument accordingly.

CONCLUSION

The Director has no legal basis to refuse to comply with the Court's remand order. The Director is obligated to proceed with the injury evaluation for Blue Lakes' 1971 water right, using the proper standards and burdens as identified by the Court. Further, the Director has no legal or factual basis to refuse to consider new scientific information and methods for purposes of conjunctive administration. Since the Director has refused, for the past 10 months, to take the required action set forth in the Court's Order it is clear that Blue Lakes has no other remedy at this point. The Court should grant Blue Lakes' motion accordingly.

RESPECTFULLY submitted, this 6th day of May, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of May, 2010, I served true and correct copies of the foregoing upon the following by the method indicated:

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