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**BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

_____)
 IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-07210, 36-07427, AND 36-02356A)
)
Blue Lakes Delivery Call)
 _____))
 IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-04013A, 36-04013B, AND 36-07148)
 (SNAKE RIVER FARM))
)
Clear Springs, Snake River Farm)
Delivery Call)
 _____)

**SPRING USERS' JOINT PETITION
 FOR CLARIFICATION**

COME NOW, Blue Lakes Trout Farm, Inc. (“Blue Lakes”) and Clear Springs Foods, Inc. (“Clear Springs”) (collectively referred to as the “Spring Users”), by and through their respective counsel of record, and file this Joint Petition for Clarification of the Hearing Officer’s February 29, 2008 *Responses to Petitions For Reconsideration and Clarification and Dairymens’ Stipulated Agreement (“February 29 Order”)*.

GROUNDS FOR CLARIFICATION

The Spring Users seek clarification of the Hearing Officer's *February 29 Order* pursuant to Rule 770 of IDWR's Rules of procedure.¹

On reconsideration, the Hearing Officer concluded that ground water pumping causes material injury to Blue Lakes' November 17, 1971 priority water right no. 36-07210 and to Clear Springs' September 15, 1955 priority water right 36-04013A. *February 29 Order* at 8-9. However, the Hearing Officer does not recommend that the Director's 2005 *Orders* be modified to require curtailment of hydraulically-connected ground water rights with priorities junior to these water rights, based on the erroneous observation that: "Those orders addressed the combined total of the water rights of the Spring Users and the 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' and Clear Springs' later priority water rights. Those mitigation alternatives do not come close to remediating the full extent of Blue Lakes' or Clear Springs' water shortages.

Blue Lakes' Order & Water Shortages

The Director's 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. Ex. 30, pp. 14-15, ¶¶ 65, 67, p. 26, ¶ 28. The Director found no material injury to Blue Lakes' second priority, November 17, 1971 priority water right no. 36-07210, despite the fact that Blue Lakes' water supply is

¹Rule 770 provides: "Any party or person affected by an order may petition to clarify any order, whether interlocutory, recommended, preliminary or final. Petitions for clarification from final orders do not suspend or toll the time to petition for reconsideration or appeal the order. A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration. IDAPA 3701.01.770."

inadequate to deliver this right the majority of the year. *Id.*, p. 14, ¶ 64. The Director then evaluated the effects of curtailing ground water diversions that “have priority dates later than the priority date for water right no. 36-07427 (December 28, 1973)” 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. 17, ¶¶ 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.*, p. 28. The director prescribed mitigation alternatives that would produce the amount of water resulting from curtailing post December 28, 1973 ground water 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.*, pp. 28-29.

The 2004 flow data in the Blue Lakes *Order* at p. 13, ¶ 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 2004-2006, shows how chronic Blue Lakes’ water shortages have become.

Blue Lakes’ Water Rights & Shortages

<u>Rt. No.</u>	<u>Priority</u>	<u>Quantity</u>	<u>Mos. Short</u>	<u>Shortage (min. daily flow)</u>		
				<u>‘06-‘07</u>	<u>2004 (115 cfs²)</u>	<u>2005 (119 cfs)</u>
02356A	1958	99.83 cfs	0 mos.			
07210	1971	45.00 cfs	9-10 mos.	29.83 cfs	25.83 cfs	33.83 cfs
<u>07427</u>	1973	<u>52.23 cfs</u>	12 mos.	<u>52.23 cfs</u>	<u>52.23 cfs</u>	<u>52.23 cfs</u>
	Total:	197.06 cfs		82.06 cfs	78.06 cfs	86.06 cfs

²Total measured diversion.

Even at the brief, seasonal high flows, in 2004 for example, Blue Lakes' received 149.45 cfs, a shortage of 47.61 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 curtailment and remediation.

Clear Springs Order & Water Shortages

The Director's July 8, 2005 *Order* in response to Clear Springs' water delivery call found that ground water pumping causes material injury to Clear Springs' fifth and sixth priority water right nos. 36-04013B and 36-07148, with priority dates of February 4, 1964 and January 31, 1971, respectively, because there is never enough water to fill these rights. Ex. 138, p. 14-15, ¶ 62. The Director found no material injury to Clear Springs' fourth priority, September 15, 1955 priority water right no. 36-04013A, despite the fact that Clear Springs' water supply is inadequate to deliver this water right several months of the year. *Id.*, p. 14, ¶ 61, 66. The Director then evaluated the effects of curtailing ground water diversions that "have priority dates later than the priority date for water right no. 36-0413B (February 4, 1964)" and, using the ESPA model, concluded that curtailing those rights would increase spring flows in the spring reach within which Clear Springs is located (Buhl Gage to Thousand Springs) by "an average of 38 cfs . . . at steady state conditions". *Id.*, p. 16-17, ¶ 71. The Director determined that 7% of this water, approximately 2.7 cfs, would appear at Clear Springs' Snake River Farm diversion.

On this basis, the Director ordered curtailment of ground water rights "for consumptive uses later in priority than February 4, 1964." *Id.*, p. 37. The Director recognized that actions taken by IGWA in 2005 would produce 7.8 cfs at steady state conditions and that additional

actions had to be taken to increase the simulated spring discharge in the Devil’s Washbowl to Buhl Gage reach to at least 8 cfs, or “a corresponding amount of involuntary curtailment in 2005 by priority date” would be ordered. *Id.*, p. 37-38.

The 2004 flow data in the *Clear Springs Order* at p. 14, ¶ 60, shows that the mitigation alternatives identified in the *Order*, delivering 2.7 cfs to Clear Springs’ Snake River Farm diversion, will not fill Clear Springs’ 1955 priority right or come close to addressing the full extent of Clear Springs’ injury. The following table, comparing Clear Springs’ water rights to its minimum daily flows during 2004-2006, shows how chronic Clear Springs’ water shortages have become.

Clear Springs’ Water Rights & Shortages

<u>Rt. No.</u>	<u>Priority</u>	<u>Quantity</u>	<u>Mos. Short</u>	<u>Shortage (min. daily flow)</u>		
				<u>‘04-‘06</u>	<u>2004 (85 cfs³)</u>	<u>2005 (82 cfs)</u>
02703	1933	40.00 cfs	0 mos.			
02048	1938	20.00 cfs	0 mos.			
04013C	1940	14.00 cfs	0 mos.			
04013A	1955	15.00 cfs	2-10 mos.	4.00 cfs	7.00 cfs	8.00 cfs
04013B	1964	27.00 cfs	12 mos.	27.00 cfs	27.00 cfs	27.00 cfs
07148	1971	<u>1.67 cfs</u>	12 mos.	<u>1.67 cfs</u>	<u>1.67 cfs</u>	<u>1.67 cfs</u>
		117.67 cfs		32.67 cfs	35.67 cfs	36.67 cfs

Even at the brief, seasonal high flows, in 2005 for example, Clear Springs received 91.5 cfs, a shortage of 26.17 cfs.

It is therefore clear that the curtailment and the mitigation alternatives prescribed by the *Clear Springs Order* are inadequate to address the full extent of Clear Springs’ injury. As required by the prior appropriation doctrine, all rights junior to Clear Springs’ 1955 water right are subject to curtailment and remediation.

³Total measured diversion.

CONCLUSION

For the foregoing reasons, Blue Lakes and Clear Springs respectfully request that the Hearing Officer clarify and/or modify his *February 29, 2008 Opinion* to recommend that the Blue Lakes *Order* be modified to require curtailment or mitigation from ground water rights junior to Blue Lakes' November 17, 1971 priority water right no. 36-07210, and that the Clear Springs *Order* be modified to require curtailment or mitigation from ground water rights junior to Clear Springs' September 15, 1955 priority water right 36-04013A

Dated this 12th day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2008, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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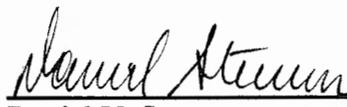
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