

RECEIVED

JUL 06 2009

DEPARTMENT OF
WATER RESOURCES

Randall C. Budge (ISB # 1949)
Candice M. McHugh (ISB #5908)
Thomas J. Budge (ISB #7465)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
PO Box 1391
Pocatello, ID 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109

Attorneys for North Snake and Magic Valley Ground Water Districts

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

IN THE MATTER OF DISTRIBUTION
OF WATER TO WATER RIGHTS NOS.
36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

**GROUND WATER USERS' JOINT
MITIGATION PLAN FOR 2009
(Blue Lakes)**

COMES NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD), (collectively "Ground Water Users") and through the undersigned counsel, and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities, and hereby provide this Joint Mitigation Plan for 2009 (2009 Plan) to provide direct replacement water supplies which will prevent any injury to the senior water rights listed above for use by Blue Lakes Trout Farm, Inc. NSGWD and MVGWD have entered into agreements with Southwest Irrigation District, Goose Creek Irrigation District and Carey Ground Water District allowing them to lease a portion of water

right 36-2603C to meet their mitigation obligations; thus, this 2009 Plan includes these entities and their respective members and provides them sufficient water to meet their mitigation requirements to Blue Lakes.

This 2009 Plan is provided in response to the Idaho Department of Water Resources (IDWR or Department) Director's May 19, 2005, Order in the Matter of Distribution of Water to Water Rights Nos. 36-2356A, 36-7210, and 36-7427 (Blue Lakes Trout), and subsequent Orders relating thereto. These orders are referred to herein collectively as the Director's Orders.

This 2009 Plan may be considered as a replacement water plan for approval pursuant to I.C. § 42-602 and in compliance with the *Order On Petition For Judicial Review* issued June 19, 2009 by District Judge John M. Melanson in Gooding County Case No. 2008-444 ("June 19, 2009 Order"); or alternatively as a mitigation plan pursuant to Conjunctive Management Rule 43, IDAPA 37.03.11.043.¹

I. RESERVATION OF DEFENSES

By submitting this 2009 Plan, the Ground Water Users do not waive and expressly reserve any and all objections and defenses they have made to the Director's Orders.

II. INTRODUCTION

The Director's Orders require the Ground Water Users to provide mitigation or replacement water in lieu of involuntary curtailment of ground water rights located in Water Districts 130 and 140. The Director's Orders provided for an accelerated schedule of curtailment

¹ Judge Melanson's June 19, 2009 Order provides at p. 50 that "Replacement water is a tool that the Director may use when administering water rights under I.C. 42-602, in order to offset injury to senior users during times of shortage;" and, further, that "the Director's authority is not limited to the standards set out in the CMR." However, the June 19, 2009 Order concludes by stating: "Therefore, the Director should adhere to the CRM when responding to a conjunctive management delivery call."

or mitigation over a five year period.² The Director's Order further provided that Blue Lakes Trout gets 20 percent of the Devil's Washbowl to Buhl Gage spring reach gain.³ On April 21, 2009, the Department recalculated the requirements because of the creation of Water District 140 and a copy of the requirements was provided to the parties in this matter via email on May 22, 2009 from Director Tuthill. A copy of these calculations is attached hereto as Exhibit A. Water District 140's contribution to the ground water depletions to the Devil's Washbowl to Buhl Gage spring reach is now calculated to be 59.31 cfs or 11.9 cfs to Blue Lakes. Accordingly, the 2009 delivery requirement to Blue Lakes Trout to comply with the Director's Order is 11.9 cfs.⁴

III. 2005, 2006 AND 2007 REPLACEMENT WATER PLANS

The NSGWD and MVGWD previously submitted Replacement Water Plans for 2005, 2006, 2007 and 2008. Orders were entered approving the 2005, 2007 and 2008 Replacement Water Plans. Because of litigation and appeal relating to the constitutionality of the Conjunctive Management Rules, in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*,

² The May 19, 2005 Order at pages 28-29 provided that beginning on June 7, 2005, unless mitigation or replacement water is provided to Blue Lakes, then ground water diversions are to cease based on certain priority dates each year on April 1 until April 1, 2008; the May 19, 2005 Order at page 29 further provides that "[b]ased on simulations using the ground water model for the ESPA, after each phase of the curtailment the cumulative average discharge of springs in the Devil's Washbowl to Buhl Gage Reach is simulated to increase by 10 cfs, 20 cfs, 30 cfs, 40 cfs, and 51 cfs, respectively."

³ Finding of Fact 15 at pages 4-5 of the May 19, 2005 Order provided that Blue Lakes Trout diverts surface water from Alpheus Creek, located in the Devil's Washbowl to Buhl Gage spring reach and that "flows at the head of Alpheus Creek accounted for 20 percent of the reach gains in the Devil's Washbowl to Buhl Gage spring reach for the steady state conditions used to calibrate the ESPA ground water model."

⁴ The 2009 reach gain requirement for the Devil's Washbowl to Buhl Gage spring reach of 59.31 cfs multiplied by 20% equals 11.9 cfs. See also fn 2 supra.

the Director did not issue any order approving or disapproving the 2006 Replacement Water Plan. Nevertheless portions of the 2006 Replacement plan were implemented.⁵

The 2005 and 2007 and 2008 Replacement Water Plans were fully implemented. NSGWD and MVGWD have provided delivery and diversion data regarding their Replacement Water Plan efforts in each of these previous years to the Department and Ms. Cindy Yenter, watermaster for Water District 130.

IV. 2009 MITIGATION PLAN ACTIVITIES

This 2009 Plan and the supporting data and documents previously filed in support of the 2005, 2006, 2007 and 2008 Replacement Water Plans demonstrate in part how the Ground Water Users located within Water Districts 130 and 140 will respond to the Director's Orders and increase aggregate aquifer discharge in the Devil's Washbowl to Buhl and Buhl to Thousand Springs subreaches.

This 2009 Plan addresses material injury to Blue Lakes Trout spring-dependent water supplies located in the Devil's Washbowl to Buhl subreach in two ways. First, mitigation will be provided through the direct delivery of replacement water to Blue Lakes Trout of 10 cfs of spring flow from Alpheus Creek under Water Right No. 36-2603C, 10 cfs of which is owned by North Snake and Magic Valley Ground Water Districts. This amount has been continuously supplied to Blue Lakes since April of 2008 and is greater than the combined mitigation obligations of the Ground Water Users as calculated by the Department.

⁵ The entire proposal in the Ground Water Districts' 2006 Replacement Water Plan, specifically, late-season recharge, was not implemented because the Department could not guarantee any mitigation credit for that effort in light of the pending appeal to the Supreme Court. Therefore, the Ground Water Districts did not pursue that program in the fall of 2006. This also resulted in no early-season recharge program in 2007.

Second, this 2009 Replacement Water Plan will increase gains to the subreach by the delivery of surface water via the North Side Canal Company's delivery system to acres that have been converted from ground water irrigation to surface water irrigation within the North Snake Ground Water District ("Conversion Deliveries") and by ongoing acres enrolled in CREP.

1. **Blue Lakes Trout Replacement Water Project**

Ten (10) cfs of Alpheus Creek water under Water Right No. 36-2603C with a priority date of April 17, 1964, has been continuously delivered directly to Blue Lakes Trout as direct replacement water since April 2008 and will continue to be delivered indefinitely in the future as needed to meet the Ground Water Users mitigation obligations. The Director's May 19, 2005, Order at page 26, Finding of Fact 26 found material injury to Blue Lakes Trout Water Right No. 36-7427 with a priority date of December 28, 1973. The ten (10) cfs of water owned by NSGWD and MVGWD under Water Right No. 36-2603C is senior to Blue Lakes Trout's Water Right No. 36-7427.

Currently, Blue Lakes Trout diverts all the water that is available in Alpheus Creek and diverts the flow into a large pipeline. The water is measured over a broad-crested weir which has a stilling well and a staff gauge which is the location of the official measurement point for that diversion. The water flows down the pipeline approximately one quarter of a mile until it reaches the Blue Lakes Trout hatchery facility. Right before the Blue Lakes Trout hatchery there is a separation tower containing an orifice where the NSGWD and MVGWD portion of Water Right No. 2603C is diverted into a smaller pipeline and bypasses Blue Lakes Trout's hatchery facility. Existing facilities provide direct delivery to Blue lakes and there is no need to construct any conveyance works to provide Blue Lakes Trout the 10 cfs, rather, an adjustment in the

separation tower and/or orifice. The 10 cfs has been delivered as described to Blue Lakes since April, 2008.

2. Conversion Deliveries

Acres within the NSGWD have been converted from ground water irrigation to surface water irrigation to increase incidental recharge to the aquifer and spring discharge and as a part of the NSGWD and MVGWD previous mitigation efforts and also their 2009 Replacement Water Plan and Third Mitigation Plan (Over-the-Rim) to Clear Springs Foods, Inc's Snake River Farm which has added approximately 926 acres of new conversions. Surface water deliveries to these lands in 2006, 2007 and 2008 through the efforts of the NSGWD and MVGWD consisted of a approximately 35,000 acre feet each year of actual deliveries to converted acres with charged conveyance losses through the North Side Canal Company delivery system. Under the agreement with North Side Canal Company, a conveyance charge of 30% was added to the delivery amounts. In 2009 the delivery of surface water to prior conversion acres and also new conversion acres under the 2009 Over-The-Rim mitigation plan to Clear Springs Food, Inc. is ongoing with exact deliveries not known until after the year end accounting is complete.

Projected deliveries for 2009 are in excess of 15,000 acre-feet at the North Side Canal Company's point of diversion at Milner Dam. All water delivered to the conversion acres should also be assumed to offset consumption of ground water, with any excess water percolating to the aquifer at the location of the converted acres. In addition, North Side Canal Company conveyance charges should be assumed to percolate to the aquifer beneath the pertinent portions of the main canal and laterals used to make the conversion deliveries.

The Ground Water Users, through the Idaho Ground Water Appropriators, Inc. have secured multiple storage water lease agreements which provide the necessary surface water for delivery to the North Side Canal Company's point of diversion at Milner Dam for delivery to all of the conversion acres in 2009 in the same manner as prior years.⁶

The above described conversions will to have positive effects on reach gains in the Devil's Washbowl to Buhl subreach. Based on the updated analysis contained in Exhibit A, the benefits of irrigation conversions in Water District 130 and the water delivered through the North Side Canal Company system, in steady state will result in a reach gain of 15.32 cfs to the Devil's Washbowl to Buhl reach. Of this amount, 3.1 cfs will accrue to Blue Lakes Trout.

3. CREP

The Ground Water Users continue to support the CREP program. CREP acres provide a steady state reach gain of 4.99 cfs to the Devil's Washbowl to Buhl spring reach with 1.0 cfs to accrue to Blue Lakes Trout. See Exhibit A.

4. Ground Water Users' Accounting and Monitoring

The 10 cfs of water delivered directly from Water Right No. 36-2603C, along with the benefits set forth on Exhibit A from the conversions (3.1 cfs) and CREP (1 cfs) will make up any shortfall and exceed the 2009 delivery requirement of 11.9 cfs to Blue Lakes Trout, Inc. To aid in the Department's analysis and approval process, the Ground Water Users rely upon the same data that was submitted in support of the 2008 Replacement Water Plan and the 2008 actual delivery information.

⁶ Copies of these lease agreements and the conveyance agreements with NSCC are on file at the Department along with payment of the necessary Rental Pool and Water Bank administrative fees.

The Ground Water Users will continue to maintain documentation and accounting of its Replacement Water Plan activities and will monitor its activities in cooperation with the Department and the Water District 130 watermaster to verify and monitor compliance with the 2009 Plan.

V. CONCLUSION

The Ground Water Users request that:

- A. That the 2009 Plan be approved; and
- B. That the Director make a determination that the 2009 Plan alleviates any need for additional mitigation or curtailment; and,
- C. That the 2009 Plan fully satisfies all shortages and material injury to Blue Lakes Trout; and,
- D. That the Director determine whether this plan should be approved as a replacement water plan pursuant to I.C. § 42-602 and the June 19, 2009 Order, or, approved as a CM Rule 43 mitigation plan and give notice and establish a procedure accordingly.

The Ground Water Districts reserve the right to modify or withdraw the 2009 Plan as necessary to secure approval or comply with the Director's orders.

DATED this 2nd day of July, 2009.

RACINE OLSON NYE BUDGE &
BAILEY CHARTERED

By: 
Candice M. McHugh
Attorneys for NSGWD and
MVGWD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2009, the above and foregoing document was served in the following manner:

Director Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Victoria.wigle@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
Magic Valley Water District Orlo H. Maughan, Chairman P.O. Box 430 Paul, Idaho 83347 mvgwd@hotmail.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
North Snake Ground Water District Lynn Carlquist, Chairman 1092 South 2500 East Hazelton, Idaho 83335 carlquil@yahoo.com	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
Phillip J. Rassier Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Phil.rassier@idwr.idaho.gov Chris.bromley@idwr.idaho.gov	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
Michael S. Gilmore Attorney General's Office P.O. Box 83720 Boise, Idaho 83720-0010 Mike.gilmore@ag.idaho.gov <i>Attorneys for State Agency Ground Water Users</i>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
Jeff Fereday Mike Creamer Givens, Pursley P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com <i>Attorneys for Idaho Dairymen Association</i>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

<p>J. Justin May May, Sudweeks & Browning P.O. Box 6091 Boise, Idaho 83707 jmay@may-law.com <i>Attorneys for Rangen, Inc.</i></p>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
<p>Daniel V. Steenson Ringert Clark P.O. Box 2773 Boise, Idaho 83701-2773 dvs@ringertclark.com <i>Attorneys for Blue Lakes Trout, Inc.</i></p>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
<p>Josephine P. Beeman Beeman & Associates 409 W. Jefferson Boise, Idaho 83702 Jo.beeman@beemanlaw.com <i>Attorney for Water Mitigation Coalition</i></p>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
<p>Robert E. Williams Fredricksen Williams Meservy P.O. Box 168 153 E. Main Street Jerome, Idaho 83338-0168 rewilliams@cableone.net <i>Attorney for Cities</i></p>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail
<p>Williams Parsons 137 W 13th St. PO Box 910 Burley, ID 83318 wparsons@pmt.org <i>Attorney for SWID and Goose Creek Irr. Dist.</i></p>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail
<p>Dana Hofstetter 608 W Franklin St. Boise, ID 83702 dana@idahowaterlaw.com <i>Attorney for Carey Ground Water Dist.</i></p>	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail

Candace M. Hyle

entity	acres	to reach (cfs)	to spring (cfs)
N Snake	23,397	25.59	5.1
Magic V*	29,659	17.47	3.5
A&B	1,892	1.17	0.2
Carey V	1,970	0.97	0.2
Southwest	13,053	9.80	2.0
Goose Cr	588	0.40	0.1
not in a GW Dist [^]	3,320	3.91	0.8
Total	73,879	59.31	11.9
Mitigation		to reach (cfs)	to spring (cfs)
N Snk & Mag V			
Ongoing Conv		15.32	3.1
CREP		4.99	1.0
SnkRivFrm Mit		2.04	0.4
Total		22.36	4.5
A&B			
Ongoing Conv		1.93	0.4
CREP			
Total		1.93	0.4

* About 2,000 junior acres within Magic Valley are in 140

[^] About 1/2 of these junior acres are in 130