

A. Dean Tranmer, ISB # 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn, ISB #7928
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for the City of Pocatello

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

IN THE MATTER OF THE NORTH SNAKE)
AND MAGIC VALLEY GROUND WATER)
IRRIGATION DISTRICTS' 2009 JOINT)
MITIGATION PLAN TO COMPENSATE BLUE)
LAKES TROUT FARM, INC.)

_____)
IN THE MATTER OF THE A&B IRRIGATION)
DISTRICT'S 2009 MITIGATION PLAN TO)
COMPENSATE BLUE LAKES TROUT FARM,)
INC.)

(Water Right Nos. 36-02356a, 36-07210, and 36-)
07427))
_____)

Docket Nos.:
CM-MP-2009-001
CM-MP-2009-002
CM-MP-2009-003

**CITY OF POCATELLO'S
RESPONSE TO BLUE
LAKES' PETITION FOR
RECONSIDERATION**

The City of Pocatello ("City" or "Pocatello") hereby submits its response to the *Petition for Reconsideration* ("Petition") filed by Blue Lakes Trout Farm, Inc. ("Blue Lakes"), filed on February 9, 2010.

INTRODUCTION

This matter is before the Director for approval of several mitigation plans filed by junior groundwater users. The mitigation plans were filed to avoid injury and satisfy mitigation obligations as determined by the Director and affirmed by the District Court in Case No. 2008-0000444. Pursuant to the District Court's orders and the Conjunctive Management Rules ("CMR"), junior water users A&B Irrigation District ("A&B") and Ground Water Districts, among others, have filed mitigation plans to establish that they can and will provide adequate mitigation water through approved mitigation methods before the start of the 2010 irrigation season. Resolution of the proposed mitigation plans prior to the irrigation season is critical to all parties to this matter.

Pursuant to a stipulation with Blue Lakes, A&B proposes a plan that allegedly fully mitigates its injury to senior water users through substitute curtailment actions in the A&B project. *See Stipulation and Joint Motion for Approval of A&B Irrigation District's Rule 43 Mitigation Plan*, February 1, 2010. In addition, Ground Water Districts propose in their mitigation plan to provide direct delivery of Alpheus Creek water to fully mitigate their obligations under current orders (*see Ground Water District's Statement Regarding Mitigation Activities Under Mitigation Plan for Blue Lakes*, January 11, 2010).

Blue Lakes' Petition for Reconsideration ignores the Director's jurisdictional limitations in the present matter. As explained by the Director in the *Order Granting Motion to Limit Scope of Hearing; Denying Motion to Strike Clear Springs' Protest; and Scheduling Order*, December 22, 2009 ("Order Limiting Scope"), pending appeal of Case No. 2008-0000444 the Director does not have jurisdiction in the mitigation plan proceedings to consider the issues raised by Blue Lakes. The scope of the Director's jurisdiction is dictated by the CMR and the Idaho Appellate Rules, as the Director correctly explained in the Order Limiting Scope. Re-determining Blue

Lakes' injury amounts is not among the issues that is properly before the Director, is precluded by *res judicata*, and from a water rights administration standpoint practically infeasible.

Pursuant to CMR 43, the Director must consider the proposed mitigation plans pursuant to several factors and approve the plans if, *inter alia*, the plan "will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available. . . ." CMR 43.03.b. Whether the above-described plans provide sufficient, adequate and reliable mitigation water to satisfy the injury obligations found by the Director in the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* issued July 11, 2008 and affirmed in part by the District Court on June 19, 2009 is not in dispute between the parties.

Where the parties disagree is in regard to whether the Director must allow re-litigation of issues already determined by the Director. Blue Lakes wants to present evidence relating to material injury to its 1971 water right, the amount of mitigation it is owed, and evidence regarding "new, updated or improved analysis and/or methods for determining the impact of junior ground water diversions on Blue Lakes' water rights." Petition 6. The Director properly found that he does not have jurisdiction to consider these matters in the present proceeding and limited the scope of any hearing in these matters to "the ability of the plans, either individually or collectively, to satisfy the mitigation requirement of 59.3 cfs to the Devil's Washbowl to Buhl Gage spring reach or 11.9 cfs directly to Blue Lakes." Order Limiting Scope 5.

Blue Lakes' Petition relies on the same legal arguments it made in response to the Ground Water District's Motion to Limit Scope. Blue Lakes' Petition does not allege that anything has changed since the Director's Order Limiting Scope, nor does Blue Lakes show that the procedural posture of this matter has changed since December of 2009. As such, Blue Lakes has failed to provide any persuasive reason for why the Director should reconsider the Order

Limiting Scope. To open up the mitigation hearing to subjects that the Department does not currently maintain jurisdiction over and has already litigated would be in error.

I. TO PROCEED WITH THE PROPOSED MITIGATION PLANS USING THE PREVIOUSLY-DETERMINED MITIGATION OBLIGATIONS IS CONSISTENT WITH THE DISTRICT COURT'S ORDERS.

Contrary to Blue Lakes' assertions, the Director's decision to consider the proposed mitigation plans pursuant to CMR 43 and prior orders does not equate to a refusal to comply with the Court's remand. As explained below, nothing in the District Court's orders affects the mitigation obligations as determined by the Director.

The District Court in its *Order on Petition for Judicial Review* determined that the Director should consider certain factors in his determination of injury. The District Court affirmed the Director's decision to account for model uncertainty by assigning a value of 10% and the Director's finding that 20% of the reach gains that accrue to the Devil's Washbowl to Buhl Gage spring reach arrive at Blue Lakes' facility. *See Order on Petition for Judicial Review*, June 19, 2009; *Order on Petitions for Rehearing*, December 4, 2009. *See also* Order Limiting Scope 2. As explained by the Director, the Director used these values to determine "the amount of replacement water that must be provided by junior ground water users to the Devil's Washbowl to Buhl Gage spring reach is 59.3 cfs, or 11.9 cfs directly to Blue Lakes." Order Limiting Scope 2. Because the District Court affirmed these findings, the question of injury and mitigation obligations is final for the purposes of the proposed mitigation plans and must be used accordingly in evaluating the plans.

Blue Lakes' reliance on *Musser v. Higginson* is misplaced. *See* Petition 4-5. In *Musser*, the District Court issued a writ of mandamus ordering the Director to immediately comply with I.C. § 42-602 and distribute water in accordance with the doctrine of prior appropriation. *Musser v. Higginson*, 125 Idaho 392, 393, 871 P.2d 809, 810 (1994). On appeal, the Idaho Supreme

Court found that a writ of mandamus was appropriately entered because the Department had failed entirely to administer the subject water rights. *Id.* In *Musser*, therefore, the district court ordered IDWR to act, and this writ was in effect while the question of whether the Department had a duty to act was on appeal. In contrast, in the matter at hand, the District Court has ordered the Director to look again at Blue Lakes' 1971 water right and how he applied burdens of proof—the Court has not ordered the Director to revisit the injury determinations made during the 2007 hearing. The question of whether the injury determinations made in the 2007 hearing were appropriate is the subject of the appeal to the Idaho Supreme Court. As such, the Director *is* following the Court's orders, and *Musser* is inapposite.

II. TO PROCEED WITH THE PROPOSED MITIGATION PLAN USING ALREADY-DETERMINED MITIGATION AMOUNTS IS THE DIRECTOR'S DUTY.

The Director is obligated by statute to administer and distribute the waters of Idaho in accordance with prior appropriation doctrine as established by Idaho law. I.C. § 42-602; *see also Musser v. Higginson*, 125 Idaho at 395, 871 P.2d at 812. Once injury is determined pursuant to a CMR 42 hearing, as is the case in the matter at hand, junior users must submit a proposed mitigation plan to prevent injury to senior water rights. *See generally* CMR 42 & 43. Therefore, contrary to Blue Lakes' assertions, the Director is in fact required to evaluate the proposed mitigation plans pursuant to his statutory duty to administer water rights. Blue Lakes' arguments that the Director must reconsider the scope of the hearing on the grounds that he has an obligation to consider the 'best available' evidence in determining injury to water users has no place in this matter. Petition 7-9. Blue Lakes' contentions regarding the adequacy of the Director's reliance on technical evidence can be, if properly appealed, determined by the Supreme Court in the appeal of Case No. 2008-0000444, and not in the context of the proposed mitigation plans.

III. FOR THE LIMITED PURPOSES OF THE MITIGATION PLAN MATTER CURRENTLY BEFORE THE DIRECTOR, RES JUDICATA MUST APPLY TO THE PREVIOUSLY DETERMINED MITIGATION AMOUNTS.

As described in the Ground Water District's Reply in Support of Motion to Limit Scope of the Hearing, December 18, 2009, the principles of *res judicata* foreclose redetermination of injury in the context of this matter. Blue Lakes was a party to the CMR Rule 42 proceeding before the Director at the 2007 hearing. As determined by the Director in the Order Limiting Scope, "Blue Lakes and Clear Springs have not stated that the information they intend to present is information that is different 'as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.'" Order Limiting Scope 4.

The Director properly found that re-litigation of injury amounts is barred by *res judicata*, and Blue Lakes' Petition does not overcome the *res judicata* bar. To overcome *res judicata*, a party must show that there has been a "material subsequent event precluding the [application of the] first judgment." *Erickson v. Amoth*, 105 Idaho 798, 801, 673 P.2d 398, 401 (1983) (removal of access road that eliminated access to party's property was a material subsequent event such that *res judicata* was not properly applied in second road condemnation proceeding). Here, Blue Lakes has failed to allege the occurrence of such a "material subsequent event", and therefore *res judicata* must apply to the Director's prior determination of injury obligations. Junior mitigation plan proponents seek to comply with the mitigation requirements, and their compliance cannot serve as an open door to re-litigation of the Director's prior determination of injury.

IV. PURSUANT TO DUE PROCESS, BLUE LAKES HAS ALREADY PARTICIPATED IN A HEARING ON THE ISSUE OF INJURY AND MITIGATION OBLIGATIONS AND THE DIRECTOR MAY PROCEED TO ADDRESS THE PROPOSED MITIGATION PLANS WITHOUT A REDETERMINATION OF INJURY.

Blue Lakes' disagreement with the Department's determination of mitigation obligations, which was affirmed in relevant part by the District Court, as discussed above, does not equate to a deprivation of due process in the present mitigation plan proceeding. Blue Lakes participated in the 2007 hearing that determined the extent of injury. Blue Lakes had an opportunity rebut the Department's administrative methodology in 2007. Due process does not require the Director to allow Blue Lakes another chance to controvert that methodology. Further, a party is only entitled to due process on issues over which the Department has jurisdiction and are properly before the Department. Re-litigation of injury amounts does not meet either of those two requirements.

CONCLUSION

Senior users cannot rely on an injury determination as the basis of the need for a mitigation plan and at the same time claim that the amount of injury is still an open question for the purposes of that mitigation hearing. There cannot be a requirement for a mitigation plan and simultaneously no final finding of mitigation obligation: the former is contingent on the latter. The Director properly limited the scope of any hearing on the proposed mitigation plans because of the pending appeal in Case No. 2008-00004444 and *res judicata*—because Blue Lakes has not offered new or more persuasive arguments to require reconsideration of that decision, the Petition should be denied.

DATED this 23rd day of February, 2010.

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

CITY OF POCA TELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By *Mitra Pemberton for*
Sarah A. Klahn

By *Mitra Pemberton for*
A. Dean Tranmer

By *Mitra Pemberton*
Mitra M. Pemberton

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2010, the above and foregoing **City of Pocatello's Response to Blue Lakes' Petition for Reconsideration** for **Docket No. CM-MP-2009-001, CM-MP-2009-002, CM-MP-2009-003** [aka Blues Lakes Mitigation] was sent to the following by U.S. mail, postage prepaid, and by e-mail at the listed e-mail addresses:


Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Interim Director
c/o Deborah Gibson
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
deborah.gibson@idwr.idaho.gov
phil.rassier@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Travis Thompson
John K. Simpson
Paul L. Arrington
Barker Rosholt & Simpson
113 Main Ave, W, Ste 303
PO Box 485
Twin Falls, ID 83303-0485
tlt@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Daniel V. Steenson
Charles L. Honsinger
Ringert Clark
P.O. Box 2773
Boise, ID 83701-2773
dvs@ringertlaw.com
clh@ringertlaw.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

A. Dean Tranmer
City of Pocatello
P. O. Box 4169
Pocatello ID 83201
dtranmer@pocatello.us

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Robert A. Maynard
Erika E. Malmen
Perkins & Coie LLP
1111 W Jefferson St Ste 500
Boise ID 83702-5391
rmaynard@perkinscoie.com
emalmen@perkinscoie.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

William Parsons
137 W 13th St
PO Box 910
Burley ID 83318
wparsons@pmt.org

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery