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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. 36-02356A,)	PETITION REQUESTING
36-07210, AND 36-07427)	HEARING ON ORDER
)	APPROVING 2008 REPLACEMENT
Blue Lakes Delivery Call)	WATER PLAN
_____)	

Blue Lakes Trout Farm, Inc. (Blue Lakes), by and through its counsel, files this *Petition Requesting Hearing on Order Approving 2008 Replacement Water Plan* (“*Petition*”) in the above-captioned matter.

This *Petition* states the initial grounds Blue Lakes has identified to date for contesting the *Order Approving IGWA 2008 Replacement Plan* (“*2008 Order*”). Blue Lakes reserves its rights to amend these grounds, and present additional grounds, for contesting the *2008 Order* through the customary pre-hearing opportunities to submit statements of issues, and to present argument and submit briefing on all issues that are raised during hearing.

Blue Lakes reserves the right to file with a district court an original action or actions to contest the *2008 Order*.

INTRODUCTION

On April 4, 2008, the North Snake Ground Water District (“NSGWD”) and the Magic Valley Ground Water District (“MVGWD”) (collectively “Ground Water Districts”) submitted their *Joint Replacement Water Plan For 2008* (“*2008 Plan*”) to mitigate injury to Blue Lakes’ water right nos. 36-02356A, 36-07210, and 36-07427. See *2008 Plan* at 1. The Ground Water Districts served Blue Lakes with an unsigned copy of the *2008 Plan* by email on April 4, 2008.

On June 1, 2008, the Director issued the *2008 Order*.

Neither the Ground Water Districts’ *2008 Plan* nor the Director’s *2008 Order* were before the Hearing Officer during the 2007 hearing in the above-captioned matter or were the subject of the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* issued on July 11, 2008.

On July 31, 2008, Blue Lakes filed a *Petition for Clarification of Order Approving 2008 Replacement Water Plan* (“*Petition for Clarification*”). On August 5, 2008 the Director issued an *Order Regarding Petition for Clarification and Finalizing Replacement Plan Order*, which made the *2008 Order* effective as of August 5, 2008, and provided parties fifteen (15) days to file a petition stating grounds for contesting the *2008 Order* and requesting a hearing.

Initial Grounds For Contesting the Order

1. The *2008 Order* is not effective, because the Director failed to follow the procedural requirements of Rule 43.02 of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CMRs,” IDAPA 37.03.11.43.02). Rule 43.02 provides:

Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-

222, Idaho Code, in the same manner as applications to transfer water rights.

There has been no notice “in a similar manner as applications under section 42-203A,” containing the required information and providing an opportunity to file protests, and of course no hearing on protests prior to issuance of the *2008 Order*. See I.C. §§42-202(1), 42-203A(1). Indeed, there appears to have been no public notice, as the Ground Water Districts’ *2008 Plan* does not appear on IDWR’s website with other “Thousand Springs Area Water Call Related Documents.”

The Director’s response to Blue Lakes’ *Petition for Clarification* does not justify his failure to follow the procedural requirements of the CMRs. The Ground Water District’s labeling their 2008 Plan as a “Replacement Water Plan” does not make it anything other than a mitigation plan. Indeed, in their email transmitting the *2008 Plan* to the Director, Blue Lakes and the other parties (attached hereto as **Attachment A**), the Ground Water Districts explained that the purpose of their plan is “*to mitigate any injury to Blue Lake Trout Farm, Inc.*, in compliance with the May 19, 2005 Order.” (Emphasis added.)

Similarly, the Ground Water Districts’ alleged failure to “invoke the requirements of Rule 43” does not render the CMR’s inapplicable to the Director’s review of the *2008 Plan*. In its demand for distribution of water pursuant to Title 42, chapter 6, Blue Lakes did not invoke the CMRs, yet the Director treated the demand as a water delivery call subject to the CMRs. Rule 43 of the CMRs defines the mandatory procedure for submission and approval of mitigation plans. Whether a mitigation plan provides adequate “replacement water” is among the factors the Director is to consider in determining whether a mitigation plan will prevent injury to senior water rights.

The Director cannot selectively apply the CMRs to determine whether and how IDWR will administer junior ground water rights, and then choose not to apply the CMRs when approving a mitigation plan.

2. The Director failed to require timely submission of the *2008 Plan*, so that it could be effectively evaluated by the Director and affected parties prior to the onset of junior ground water pumping during the 2008 irrigation season.

3. The Director failed to provide an adequate procedure for review, protest and hearing of the *2008 Plan* prior to his approval.

4. The Director's failure to require timely submission of the *2008 Plan* resulted in the Director's untimely action on the plan after the onset of junior ground water pumping during the 2008 irrigation season.

5. The *2008 Order* does not require all water rights that are junior to Blue Lakes' water right no. 36-07210 to provide mitigation for their depletions to the Eastern Snake Plain Aquifer (ESPA), and the resultant injury to Blue Lakes' water right.

6. The *2008 Order* does not require water rights that are junior to Blue Lakes' water right no. 36-07427 to provide sufficient mitigation for their depletions to the ESPA, and the resultant injury to Blue Lakes' water right.

7. The *2008 Order* does not require the Ground Water Districts to meet their "carry-over" mitigation obligations from prior years.

8. The *2008 Order* does not provide or reference sufficient information to evaluate the Director's alleged "post audit of IGWA's previous replacement water actions."

9. Available information concerning 2008 water supplies indicates that the Department has underestimated the impact of junior ground water diversions on Alpheus Creek

and/or that such diversions are greater than those represented by the Ground Water Districts and anticipated by IDWR, resulting in Alpheus Creek flows during the 2008 irrigation season that are lower than in 2007. The continued decline in Alpheus Creek flows has diminished the benefits of the replacement water provided to Blue Lakes during 2008 under water right no. 36-2603C.

10. The *2008 Plan* is inadequate to mitigate for the injury to Blue Lakes' water rights from junior ground water pumping from the ESPA.

11. The Director cannot lawfully approve the *2008 Plan* unless Blue Lakes agrees to accept such mitigation as an alternative to curtailment of junior ESPA water rights.

Dated this 20th day of August, 2008.

RINGERT LAW, CHTD.



Daniel V. Steenson
Attorneys for Blue Lakes Trout Farm, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2008, I served a true and correct copy of the foregoing **PETITION REQUESTING HEARING ON ORDER APPROVING 2008 REPLACEMENT WATER PLAN** by delivering it to the following individuals by the method indicated below, addressed as stated.

Director David K. Tuthill, Jr.
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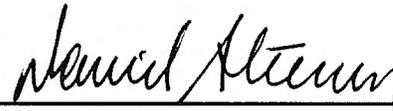
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Daniel V. Steenson

Attachment A

Dan Steenson

From: Robin Roebuck [rlr@racinelaw.net]
Sent: Friday, April 04, 2008 11:27 AM
To: Charlie Honsinger; Dan Steenson; David R. Tuthill; Emily Haines; Gerald F. Schroeder; J. Justin May; Jeff Fereday; John Simpson; Josephine Beeman; Michael S. Gilmore; Mike Creamer; Phillip J. Rassier; Robert E. Williams; Sheila Lee; Travis L. Thompson
Cc: Randy Budge; Candice M. McHugh; carlquil@yahoo.com; desteve@pmt.org; Tim Deeg; chuck.brendecke@amec.com; Lynn Tominaga
Attachments: 2008 Blue Lakes Joint Replacement Water Plan 4-4-08 Final2.pdf

Attached please find North Snake and Magic Valley Ground Water Districts' Joint Replacement Water Plan for 2008 to mitigate any injury to Blue Lakes Trout Farm, Inc., in compliance with the May 19, 2005 Order. The original is being filed with the Department with all interested parties served electronically per the service list.

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