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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE SECOND
MITIGATION PLAN OF THE NORTH
SNAKE AND MAGIC VALLEY GROUND
WATER DISTRICTS TO COMPENSATE
SNAKE RIVER FARMS

BLUE LAKES TROUT FARMS,
INC.'s BRIEF IN SUPPORT OF
MOTION TO DISMISS AND
IDWR'S LACK OF AUTHORITY
TO REQUIRE A CALLING PARTY
TO ACCEPT MONETARY
MITIGATION

I. INTRODUCTION

COMES NOW, BLUE LAKES TROUT, INC. ("Blue Lakes"), by and through its attorneys of record, Ringert Law Chartered, and pursuant to the Director's February 20, 2009 *Order on Status Conference and Provide Briefing Schedule on Second Mitigation Plan for Monetary Compensation*, submits this brief. As discussed below, this matter should be dismissed because (i) the proposed mitigation plan lacks requisite information and (ii) the Director lacks authority to require a calling party to accept monetary mitigation caused by out of priority depletions to the water source.

BLUE LAKES TROUT FARMS INC.'s BRIEF IN SUPPORT OF MOTION TO DISMISS AND IDWR'S LACK OF AUTHORITY TO REQUIRE A CALLING PARTY TO ACCEPT MONETARY MITIGATION - Page 1

Blue Lakes has a substantial interest in the resolution of the legal issue of whether a calling senior water right holder can be required to accept monetary or other forms of compensation, instead of water. Pursuant to the Director's May 19, 2005 Order in response to Blue Lakes' water delivery call, North Snake Ground Water District and Magic Valley Ground Water District (the "GWDs") are subject to curtailment or are required to provide mitigation to address the injury to Blue Lakes' water right caused by junior ground water rights. The GWDs have not met their mitigation obligations from prior years, and do not have an approved mitigation plan for 2009.

II. ARGUMENT

Conjunctive Management ("CM") Rule 43 is clear in requiring a proposed mitigation plan to set forth the water supplies proposed to be used for mitigation. Blue Lakes agrees with the GWDs that the parties "should be able to rely upon the ordinary language of the rules that have been implemented by the Department and held constitutional." *Randall C. Budge*, counsel for the GWDs, Snake River Farms Mitigation Status Conference, February 19, 2009. The Amended Second Mitigation Plan (hereinafter "Mitigation Plan") submitted by the GWDs fails to set forth the water supplies proposed to be used for mitigation as required by CM Rule 43 and therefore should be dismissed by the Director. Consequently, addressing the question of whether the Director has the authority to require the calling party to accept monetary compensation or compensation in the form of something other than water is merely an academic exercise. Regardless, this brief addresses both the defective, insufficient and incomplete nature of the Mitigation Plan and the Director's lack of authority to require a calling party to accept monetary compensation.

A. A Proposed Mitigation Plan Must Be Submitted To The Director Pursuant To CM Rule 43.01 Not CM Rule 43.03

Proposed mitigation plans are submitted to the Director pursuant to CM Rule 43.01, *Submission of Mitigation Plans*. This rule defines the requisite form and content of a proposed mitigation plan and states:

A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information:

- a. The name and mailing address of the person or persons submitting the plan
- b. Identification of the water rights for which benefit the mitigation plan is proposed
- c. **A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies**
- d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03.

Conjunctive Management Rule 43.01, IDAPA 37.03.11 (emphasis added).

The CM Rules clearly require a proposed mitigation to set forth water supplies proposed to be used mitigation. The Mitigation Plan submitted by GWDs fail to set forth the water supplies proposed to be used for mitigation and is therefore a defective, insufficient and/or incomplete pleading that must be dismissed or returned.

B. The Mitigation Plan's Reliance on CM Rule 43.03.c is Misplaced

The GWDs submitted their Second Mitigation Plan "to the Director **pursuant to CM Rule 43.03.c . . .**" *Amended Second Mitigation Plan of North Snake Ground Water District and Magic Valley Ground Water District Providing for Other Appropriate Compensation* at page 3 (emphasis added). The GWDs' reliance on CM Rule 43.03.c, specifically reliance on the phrase "other

appropriate compensation” as authority that a proposed mitigation plan can provide mitigation other than water, is a fatal misreading of the Rule.

CM Rule 43.03, *Factors To Be Considered*, lists factors **to be considered by the Director** in determining whether a proposed mitigation plan will prevent injury to senior rights (emphasis added). CM Rule 43.03 is to be relied upon by the Director in evaluating an existing proposed mitigation plan prepared in accordance with CM Rule 43.01. The requisite elements of a proposed mitigation plan are not interchangeable with the factors of CM Rule 43.03. The result of GWDs’ incorrect reliance on CM Rule 43.03 is an incomplete proposed mitigation plan that must be dismissed or returned.

C. Defective, Insufficient Or Incomplete Mitigation Plans Must Be Dismissed

Upon receipt of a proposed mitigation plan the Director is to “consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.” CM Rule 43.02, IDAPA 37.03.11. A proposed mitigation plan is a pleading defined by Rule of Procedure 210, IDAPA 37.01.01. Defective or insufficient pleadings may be returned or dismissed. Rule of Procedure 304, IDAPA 37.01.01. Additionally, incomplete applications to transfer water rights are returned to the applicant.¹

The GWDs’ Mitigation Plan is defective, insufficient and incomplete because it fails set forth the water supplies to be used for mitigation as required by CM Rule 43.01. Therefore the Director must dismiss this plan.

¹The IDWR Application for Transfer form includes the following instructive language: “An application for transfer must be prepared in accordance with the minimum requirements listed below to be acceptable for processing by the Department. Incomplete applications will be returned.”

D. Director Lacks Authority to Require the Calling Party to Accept Monetary Mitigation or Award Damages

An agency has no jurisdiction beyond that specifically granted to it by statute. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981). "[A]n administrative order may generally be collaterally attacked when the issuing agency lacks jurisdiction over the matter considered" *Id* at 749 (1981) quoting *Utah-Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 374, 597 P.2d 1058 (1979).

The Director of the Department of Water Resource has been granted authority to distribute water in accordance with the prior appropriation doctrine and adopt rules and regulations for the distribution of water. *Idaho Code* §§ 42-602 and 42-603. Additional powers and duties are granted to the Director by Chapter 18, Title 42, *Idaho Code*. However, the Director's authority is limited to the distribution and administration of water. Requiring a calling party to accept mitigation in the form of something other than water goes beyond the authority of the Director.

This position is consistent with the Department's understanding of statutory limitations on its authority. The traditional position of the Department is that while it can approve a monetary mitigation plan, it cannot require a calling party to accept mitigation in the form of dollars. *David Tuthill*, Department of Water Resources Director, Snake River Farms Mitigation Status Conference, February 19, 2009.

"[The GWDs] do not assert that the Department can go out and order the ground water districts to pay monetary compensation." *Randall C. Budge*, counsel for the GWDs, Snake River Farms Mitigation Status Conference, February 19, 2009. Moreover, the GWDs recognize that the Department has no authority to award damages. *See Id.*

However, the GWDs claim that this matter “is no different than any other crop loss situation.” *Id.* “There is ample authority in Idaho law that if someone is damaged as to their ability to produce a crop, there is specific authority providing for a measure of damages in the form of lost profits and that’s what we think we re doing here as a part of our mitigation plan.” *Id.* Admittedly, the GWDs proposed monetary compensation in the Mitigation Plan is a damage award. The Director lacks the authority to make such an award.

E. Practical Implications of the GWDs’ Mitigation Plan.

Looking beyond the issue of authority, the practical implications of requiring acceptance of mitigation plans that substitute “other appropriate compensation” for water are limitless. The Department has knowledge, expertise and authority to distribute and administer water in the State of Idaho. The Department lacks the knowledge and expertise to value, distribute and administer “other appropriate compensation” such as money or fish.

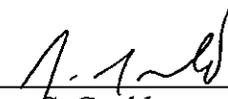
By requiring a calling party to accept mitigation in the form of other appropriate compensation the Director would limitlessly expand the duties for the Department. While the proposed mitigation may be money and fish in this matter, it might be sugar beets and potatoes for the next farmer or waterless toilets and artificial grass for the next subdivision. The Department not only lacks the authority to requirement this type of mitigation, it lacks the knowledge and expertise to value, distribute and/or administer mitigation other than water. Expanding the duties and requirements of the Department in these times when every state department is cutting back on staff is not only extremely unsound, it goes beyond the Department’s statutory authority.

III. CONCLUSION

For the above stated reasons, the Director should dismiss the GWD's Amended Second Mitigation Plan and recognize that the Department cannot require a calling party to accept mitigation in a form other than water.

DATED this 2nd day of March, 2009.

RINGERT LAW CHARTERED

By: 
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Attorney for Blue Lakes Trout, Inc.

CERTIFICATE OF SERVICE

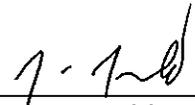
I HEREBY CERTIFY that on this 2nd day of March, 2009, I caused to be served a true and correct copy of the foregoing document by U.S. mail, postage pre-paid to the following:

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