

Randall C. Budge (ISB # 1949)
Candice M. McHugh (ISB #5908)
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 NORTH SNAKE
AND MAGIC VALLEY GROUND
WATER 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 No. CM-MP-2009-001

CM-MP-2009-002

(CM-MP-2009-003)¹

**GROUND WATER DISTRICTS'
REPLY IN SUPPORT OF MOTION TO
LIMIT SCOPE OF HEARING**

COMES NOW NORTH SNAKE GROUND WATER DISTRICT and MAGIC VALLEY
GROUND WATER DISTRICT ("Ground Water Districts") on behalf of their respective

¹ The Ground Water Districts are not parties to South West Irrigation District's mitigation plan, however, because these matters are grouped together at the moment, the docket number for that plan is included here.

members and those ground water users who are non-member participants in the mitigation activities and file this *Reply in Support of Motion to Limit Scope of Hearing* and reply to *Blue Lakes Trout Farm, Inc.'s Brief in Opposition to Ground Water Districts' Motion to Limit Scope of Hearing and Proposed Schedule* ("Brief in Opposition"), *Clear Springs Foods, Inc.'s Response to Ground Water District's Motion to Limit Scope of Hearing and Proposed Schedule*, and *Unit A Association Response to Ground Water District's Motion to Limit Scope of Hearing and Proposed Schedule*.

The Ground Water Districts request that the Director limit the scope of the hearing on the *Ground Water Users' Joint Mitigation Plan for 2009 (Blue Lakes)* ("2009 Plan") intended to begin in early March 2010. Blue Lakes' Brief in Opposition points out the very reason why the Director must limit the scope of the hearing to those issues relevant to the Ground Water Districts' 2009 Plan and not open the hearing to those issues relating to the amount of material injury to Blue Lakes and the methodology used to arrive at the determination of the material injury.

On page 6 of its Brief in Opposition Blue Lakes states specifically that "Blue Lakes intends to present evidence to show that there are more reliable and scientifically defensible methods to determine the impact of junior ground water diversion on Blue Lakes' water supply, and to deal with model uncertainty in the administration of junior ground water rights." Blue Lakes goes on to state that the Director has a duty to use the best data and science to determine the impact of junior ground water diversions on senior water rights. Blue Lakes specifically states that "[A]ccordingly, in addition to the established injury to Blue Lakes' 1973 priority Water Right No. 36-07427, the injury to Blue Lakes' 1971 priority right must also be addressed

in this proceeding.” Opposition Brief at 9. Blue Lakes says that the junior groundwater users have the burden to show they are not causing injury to the 1971 priority right and that if they cannot meet the burden, they must “receive approval for a plan that will mitigate for the injury they caused to Blue Lakes’ 1971 and 1973 priority rights.” *Id.* at 9-10 (emphasis added).

The parties in this matter expended much time and resources regarding the amount of material injury suffered by Blue Lakes as a result of junior groundwater pumping at the 2007 hearing relating to Blue Lakes’ delivery call. The very issue at the 2007 hearing was whether or not junior groundwater diversions were responsible for causing material injury to Blue Lakes and if so, how much mitigation was owed to Blue Lakes. To now open those settled matters in a hearing relating to the 2009 Plan would be a waste of resources, inefficient and is barred by the doctrine of *res judicata*.

Res judicata has been applied to administrative determinations in Idaho. The Idaho Supreme Court has held that “[t]he doctrine of *res judicata* applies to administrative proceedings.” *Sagewillow, Inc. v. Idaho Dep’t of Water Resources*, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003).

As the Supreme Court found:

The doctrine of *res judicata* applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of res judicata was as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication

concludes parties and privies not only 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.

The 'sameness' of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

Sagewillow, Inc. v. Idaho Dep't of Water Resources, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (emphasis added). The issue of whether Blue Lakes has been materially injured by junior groundwater users was determined in the 2007 hearing. The 2007 hearing afforded all parties the opportunity to contest the injury determinations made by the Director. In response the Ground Water Districts filed their 2009 Plan and all that remains is whether the 2009 Plan is approvable under Conjunctive Management Rule 43.

Blue Lakes argues that because the District Court has remanded the question of whether Blue Lakes' 1971 priority right has been injured that it is appropriate in a mitigation plan hearing to revisit that question. Brief in Opposition at 9. However, that conflates the two distinct proceedings. The delivery call hearing (and any remand relating to issues on appeal therefrom) is a separate administrative proceeding relating strictly to the question of material injury under Conjunctive Management Rule 42. Any proceeding on whether or not a proposed mitigation plan is an adequate method to address material injury being suffered by a senior user or that may be suffered by a senior user in the future is a separate and distinct matter requiring notice and compliance with the procedural requirements under Idaho Code § 42-222. Such a hearing proceeds separately under Conjunctive Management Rule 43. To collapse the two proceedings now and revisit the material injury question unnecessarily broadens the scope of the March

March hearing on the 2009 Plan, prejudices the groundwater users by requiring them to re-litigate the same material injury questions that have been previously decided and are on appeal. This is impractical and certainly not warranted under the Conjunctive Management Rules.

While the junior groundwater users are diligently pursuing approval of a mitigation plan, Blue Lakes is making it nearly impossible by requiring that all issues that were previously litigated in the 2007 hearing be re-litigated in a compressed time frame. It is important to note that what Blue Lakes is intending to do in this case is to broaden the issues and unduly burden the groundwater users so they will be unable to meet an April 1 date for approval of the 2009 Plan. The Ground Water Districts can be prepared to present evidence relating to their 2009 Plan at the March 2009 hearing, but cannot be ready to present additional evidence and testimony on material injury, spring percentages, model uncertainty and the like --- all of which were already previously litigated between these same parties in 2007 and are not within the jurisdiction of the Director in the present matter.

CONCLUSION

For the foregoing reasons, the Ground Water Districts request that the Director limit the scope of the hearing to those issues raised specifically in the 2009 Plan and not include those issues that are currently part of the pending appeal which includes, among other things, whether or not Blue Lakes' 1971 water right is injured, the amount of material injury owed to Blue Lakes, spring percentages, the relationship between groundwater pumping and Blue Lakes' water supply, the trimline, and model uncertainty.

DATED the 18th day of December, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



RANDALL C. BUDGE
CANDICE M. MCHUGH
Attorneys for Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of December, 2009, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

Gary Spackman, Interim Director
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov
phil.rassier@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

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

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701
jks@idahowaters.com
tlt@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, Idaho 83701-2773
dvs@ringertclark.com
clh@ringertclark.com

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

Robert A. Maynard
Erica Malman
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

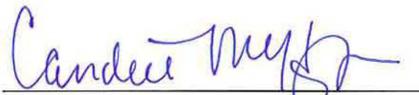
U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

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

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

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

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


CANDICE M. McHUGH