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**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**

**GROUND WATER DISTRICTS'  
RESPONSE TO PETITION FOR  
RECONSIDERATION**

North Snake Ground Water District and Magic Valley Ground Water District (collectively "Ground Water Districts"), hereby submit this response to the *Petition for Reconsideration* ("Petition") filed by Blue Lakes Trout Farm, Inc. ("Blue Lakes"), on February 9, 2010. Blue Lakes' Petition requests the Director modify his *Order Granting Motion to Limit Scope Hearing; Denying Motion to Strike; and Scheduling Order* ("*Order Limiting Scope*")

issued on December 22, 2009. The Petition specifically requests that the Director allow Blue Lakes to present certain evidence relating to material injury to its 1971 water right, the amount of mitigation owed to Blue Lakes, 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 at 6. It is Blue Lakes’ position that the hearing held in 2007 on its delivery call that found material injury to certain of its water rights and determined the junior ground water users’ mitigation requirements, does not prevent Blue Lakes from retrying the same issues regarding material injury, mitigation amounts and methods regarding the relationship between groundwater use and spring discharge. This is Blue Lakes’ position even though many of the same issues are pending on appeal before the Supreme Court, and a Supreme Court decision could change the result of the 2007 hearing. Further, it is Blue Lakes’ position that it be allowed to present such evidence in a hearing on the *Ground Water Districts’ 2009 Joint Mitigation Plan* (“Mitigation Plan”) which is in response to the current curtailment orders issued by the Director. Blue Lakes’ Petition is without basis and must be denied.

#### **DISCUSSION**

On December 4, 2009, the Ground Water Districts filed the *Ground Water Districts’ Motion to Limit Scope of Hearing and Proposed Schedule* (“Motion to Limit Scope”) stating that the purpose of the upcoming hearing in the above captioned matter before the Director is to determine whether the Ground Water Districts’ Mitigation Plan is sufficient to meet the obligations under previously issued orders finding material injury to Blue Lakes and whether or not the Mitigation Plan includes acceptable methods of mitigation. Motion to Limit Scope at 2.

The Director agreed and issued his Order Limiting Scope and stated that the “hearing on the three mitigation plans that have been filed ... shall be limited to the ability of the plans, either individually or collectively, to satisfy the mitigation requirement of 59.3 cfs [to the reach] or 11.9 cfs to Blue Lakes...” Order Limiting Scope at 5. The Director based his decision on the fact that *res judicata*<sup>1</sup> applies to some issues and the fact that while the underlying orders relating to the delivery call are pending on appeal the Department is without jurisdiction to make new or additional findings on the matters that were decided in that case. Specifically, the Director’s Order Limiting Scope on page 4 correctly found that the question of injury to Blue Lakes’ 1971 water right, 36-7210 is outside of his jurisdiction. The reasons set forth in the Order Limiting Scope are sound and should not be changed.

**A. The Director is Only Required to Comply With the District Court’s Order to Ensure That Mitigation is Supplied by Junior Ground Water Users While the Case is Pending on Appeal.**

Blue Lakes’ Petition takes issue with the Director’s decision and claims that the Director has jurisdiction, must comply with the District Court’s remand order, that the Director has no basis to refuse to consider new methods for determining impact to Blue Lakes from junior groundwater users and claims that the Director’s actions violates Blue Lakes’ due process rights. Blue Lakes’ arguments miss the point. There is no doubt that the Director’s findings and ultimate determination of injury to Blue Lakes requiring groundwater users to mitigate is on appeal to the Supreme Court.

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<sup>1</sup> The “new” science Blue Lakes claims it now has was available to them in the original delivery call case and thus, the doctrine of *res judicata* precludes Blue Lakes from getting a second bite of the apple and relitigating the same issue.

The amount of mitigation owed by the Ground Water Districts has already been established and in fact was the central issue at the 2007 Hearing. Whether Blue Lakes' additional water right is injured, or whether the amount of material injury was properly determined should not be part of the consideration in a hearing on the Ground Water Districts' Mitigation Plan. The question to be determined here is simply whether or not the direct delivery of water to Blue Lakes under the current orders mitigates the injury currently found under existing orders.

Blue Lakes' relies on the case *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) to argue that the Director must comply with the District Court's order of remand while an appeal from the District Court is pending at the Supreme Court. However, Blue Lakes' reliance on *Musser* is misplaced. While Blue Lakes is correct that a district court order must be complied with during the pendency of an appeal (absent a stay), the test of whether a district court's order is being complied with is the subject of the order itself. In *Musser* the appeal involved a writ of mandamus directing the Director to administer Musser's water rights; here the district court's order requires the junior groundwater users to mitigate injury to Blue Lakes and, by extension, requires the Director to ensure that such mitigation is provided. The orders that are in force and are being complied with by the junior groundwater users and the Director is ensuring that compliance.

**B. The Issues Involved in a Mitigation Plan Hearing Do Not Include Revisiting Prior Material Injury Determinations and Methodologies.**

Once the Department makes a determination of material injury, junior users must be given the opportunity to file a mitigation plan in response to the order finding material injury.

The issues to be considered at the mitigation plan hearing are whether or not the mitigation provided in fact addresses the amount of material injury found. The hearing on the mitigation plan is not the place to then revisit how much mitigation should be owed or whether or not there is new science to prove additional material injury. Under Blue Lake's arguments, no determination of material injury would ever be final and senior users could always thwart attempts by juniors to provide mitigation by claiming additional injury during the mitigation plan hearing. Under this theory, the mitigation amount would be a constantly moving target and the administrative process to resolve mitigation plans would be meaningless. The Director's Order Limiting Scope is correct and should be affirmed.

### CONCLUSION

Based on the foregoing the Ground Water Districts request that the Petition for Reconsideration be denied.

**DATED** this 23rd day of February, 2010.

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## CERTIFICATE OF MAILING

I hereby certify that on this 23<sup>rd</sup> day of February, 2010, 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:

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