EXHIBIT C

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 36-02356, 36-07210, 36-07427, 36-07720
	)	
	)	AFFIDAVIT OF
Case No. 39576	)	DAVID R. TUTHILL, JR.
	)	

STATE OF IDAHO)
) ss.
County of Ada)

David R. Tuthill, Jr., being first duly sworn, deposes and states as follows:

1. My name is David R. Tuthill, Jr. I am the Adjudication Bureau Chief for the Idaho Department of Water Resources (IDWR).

2. My work address is Idaho Department of Water Resources (IDWR), 1301 North Orchard, Boise, Idaho 83706. I reside in Boise, Idaho.

3. My educational background includes a Bachelor of Science degree in agricultural engineering from Colorado State University at Fort Collins, Colorado, in 1974, and a Master of Science degree in civil engineering from the University of Colorado at Boulder, Colorado, in 1975. I have also attended and presented papers at numerous seminars on water rights investigation and administration.

4. I have been registered as a professional engineer in Idaho since 1979.

5. I have worked for IDWR for 21 years in the following positions respectively: Adjudication Section Supervisor; Payette Adjudication Supervisor; Water Allocation Section Supervisor; Regional Office Manager of IDWR's Western Regional Office; and currently as Adjudication Bureau Chief. In these positions I have investigated hundreds of water rights, including reviewing their descriptions in decrees, licenses and permits. I have supervised the distribution of water to water right holders and resolved disputes between competing water users. I have extensive first-hand knowledge of how water rights for a variety of uses interact with other water rights from the same source. I have extensive first-hand experience with the difficulty of resolving disputes between water right holders when the water use under a right is not adequately described.

6. I am familiar with the factual and legal basis for IDWR's policy regarding recommendation of facility volume parameters for fish propagation rights. I have personal knowledge of fish propagation facilities and their uses, and the impact those water uses have on other water rights from the same source.

7. I have either personal knowledge of the facts I testify to in this Affidavit, or they

are available to me from IDWR records and personnel, and are the type of facts or data that are regularly and customarily considered by experts in the field of water use and water right investigation and administration to be a reasonable basis to form an opinion about such water use or water right.

8. I adopt as my testimony and incorporate in this Affidavit the Report Regarding IDWR's Recommendation of Fish Propagation Facility Volume Pursuant to Claim to Water Right Nos. 36-02356, 36-07210, 36-07427, 36-07720 dated July 22, 1997, attached to this Affidavit as Exhibit 1.

9. In Exhibit 1 I set forth my factual understanding of the law which underlies my opinion on behalf of IDWR regarding its use of facility volume to describe fish propagation water rights. Charles L. Honsinger, Deputy Attorney General, assisted me in laying out this description. To the extent, if any, these statements are inaccurate as a matter of fact, the opinions expressed in my report may change.

FURTHER YOUR AFFIANT SAYETH NAUGHT

David R. Tuthill

DAVID R. TUTHILL, JR.

SUBSCRIBED AND SWORN to before me this 22nd day of July, 1997.

Notary Public for the State of Idaho
Residing at: Boise ID
My commission expires: 12/5/2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of July, 1997 I caused to be served by First Class U.S. Mail, a true and correct copy of the foregoing document on the following person(s):

Norman M. Semanko
Rosholt, Robertson & Tucker
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Twin Falls, ID 83303

Laird Lucas
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Daniel Steenson
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Dana M Smith
Person Mailing Documents

EXHIBIT 1

REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME PURSUANT TO CLAIM TO WATER RIGHT NOS. 36-02356, 36-07210, 36-07427, 36-07720

In Re SRBA
Twin Falls County Civil Case No. 39576
Sub-Case Nos. 36-02356, 36-07210, 36-07427, 36-07720

Report to the SRBA District Court

Prepared by David R. Tuthill Jr., Adjudication Bureau Chief
Idaho Department of Water Resources

July 22, 1997

REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME PURSUANT TO CLAIM TO WATER RIGHT NO. 36-02356, 36-07210, 36-07427, 36-07720

David R. Tuthill Jr., Adjudication Bureau Chief, Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right nos. 36-02356, 36-07210, 36-07427, and 36-07720 in compliance with I.R.E. 706. Mr. Tuthill will be available as a witness to testify regarding IDWR's position as to this issue.

LEGAL PRINCIPLES UNDERLYING RECOMMENDATION OF FACILITY VOLUME

IDWR's conclusion that water rights for fish propagation facilities should be described by the facility volume rests upon the following legal principles. These principles are not described for purposes of legal argument, but simply for the purpose of laying the framework for the Department's ultimate conclusion regarding the necessity of describing fish propagation rights with facility volume. If these principles are erroneous or inaccurate the conclusions reached in this report may change.

1. In the SRBA, IDWR must make recommendations as to the extent of beneficial use and administration of each water right under state law.

2. IDWR recommends facility volume in fish propagation rights pursuant to I.C. §42-1411(2)(k) and I.C. §42-1411(2)(j).

3. Beneficial use is the basis, measure and extent of a water right.

4. The description of beneficial use is the description of the water right.

5. Different beneficial uses are described in different ways.

6. The description of a water right should be adequate for the Department of Water Resources to administer it vis a vis other water rights.

7. To the extent necessary to satisfy their rights, water right holders are entitled to the maintenance of both water quantity and quality on their water source as of the date of their appropriation of water.

8. The beneficial use of water pursuant to a water right cannot be changed or enlarged in such a way that other water right holders on a source will be injured.

9. Authority to regulate for purposes of maintaining and improving water quality is primarily vested in the Division of Environmental Quality, Department of Health and Welfare. However, there are numerous instances in which water *quantity* issues within IDWR's area of responsibility affect water *quality* issues. For example, water quality may be an issue to be

considered as part of the public interest criteria for applications to appropriate water, applications to amend permits to appropriate water, and applications for changes in use of water rights.

FACTUAL BASIS FOR RECOMMENDATION OF FACILITY VOLUME

1. The majority of fish propagation facilities divert water from a spring or stream into ponds or raceways where the fish are raised. This diversion reduces the quantity of water in the stream at the diversion point. The water is then released from the raceway or pond back into a stream or river.

2. Because of the nature of this use it is primarily non-consumptive in terms of water quantity. There is some evaporation loss from the ponds or raceways and some amount of transient storage. In terms of water quality this use has a greater impact than many other uses. As water is discharged from the fish propagation facility, it carries some wastes from the fish propagation operation which can render it unusable for downstream uses requiring high quality water.

3. In Idaho many fish propagation facilities are in the Thousand Springs area of the Snake River Canyon. They are located there because of the availability of consistently clean, cold water flowing from the Thousand Springs of the Snake Plain Aquifer. The springs flow from the rims, walls and floor of the canyon and form surface streams flowing to the Snake River.

4. Water from the springs and streams is diverted by canals or pipelines into the fish propagation facilities. Several fish propagation facilities can be located on the same stream, some with diversion points downstream from the return flows of upstream fish facilities. The downstream fish propagation facility or other user may depend upon a particular quality of water being returned to their source from the upstream fish propagation facility.

5. Other appropriators often divert water from the same spring or stream source as does a specific fish propagation facility. These appropriators might be affected by the timing or the quantity of the diversion into that facility.

6. Because the springs are fed by the aquifer above the Snake River Canyon, groundwater appropriators diverting from the aquifer may also be affected by the timing or the quantity of diversions into fish propagation facilities.

7. When fish facilities are constructed the raceways or ponds have a particular volume. This volume generally relates to the number of fish the water user can raise and the water treatment needed for return flows to meet water quality standards.

8. An indicating factor of both the diversion rate necessary for and the volume of water used in a fish propagation facility is the facility's volume. If the facility volume should change, there is a possibility that the diversion rate and diversion volume or discharge amount would also change. This could result in an expansion of the right and cause possible injury to other water right holders.

9. Significant expansions in facility volume can result in injury to other water users, even where there is no increase in diversion rate, by increasing the diversion volume (generally by diverting the same diversion rate for longer periods of time), by increasing the consumptive use (generally due to treatment required to meet water quality standards prior to discharge into a water source), or by decreasing water quality.

10. Facility volume expansions can also result in an increase in water quality. Thus, IDWR will not necessarily prevent such expansions; instead, it will use the parameter as an indicator suggesting that it should investigate the impacts of the expansion.

11. An increase in facility volume may result in an increase in production. An increase in production may affect other water users should a senior fish propagator make a call on the resource. If a water right holder junior to the fish propagator is required to mitigate injury to the senior fish propagator, mitigation for increased production from the increase in facility volume would injure the junior.

12. An increase in facility volume may affect the public interest in such matters as the impacts of increased production, or the impact of the expansion on water quantity or quality. The facility volume parameter gives other users and the public notice of the expansion, and triggers IDWR's public interest review.

13. IDWR has described water rights for fish propagation purposes with facility volume parameters in licenses since 1979, pursuant to an Administrator's Memorandum to the Regional Offices and Water Allocation Section. Before 1979, IDWR did not include a facility volume descriptor in fish propagation water right licenses. The impetus for inclusion of facility volume in fish propagation water rights was to prevent the impact of fish propagation facilities on each other relative to water quality.

CONCLUSIONS

It is my opinion, on behalf of IDWR, that:

1. The extent of beneficial water use at fish propagation facilities is quantified, in part, by the particular facility's volume. An accurate description of a fish propagation water right should include facility volume.

2. An increase in facility volume at a fish propagation facility alerts IDWR to a potential change in the beneficial use of the associated water right, and gives it the ability to determine whether the increase results in an expansion of the right and injury to other users, because of either water quantity or water quality impacts, or both. IDWR considers the water quality aspect as complementary to the primary purpose for inclusion of facility volume descriptors in water rights; that of defining the extent of beneficial use.

3. An increase in the facility volume parameter at a fish propagation facility provides notice to the public that its interest in water quality, water quantity, or in the impacts of increased production may be affected by the expansion of the facility.

4. Facility volume is an imperfect parameter with which to describe the extent of beneficial use of a fish propagation water right. For example, an increase in a fish propagation facility's volume in some cases may actually lessen the water quality impact that the facility has on other water rights. However, as mentioned above, the parameter defines the extent of beneficial use of a water right used for fish propagation purposes and serves as a benchmark by which IDWR or other parties can determine whether the impacts of any expansion in the facility may injure other water rights.

5. Water rights should explicitly describe fish propagation facility volume to allow for effective protection of water rights and water uses that may be impacted by the fish propagation use. This is the most convenient and effective means to define and administer water rights with sufficient specificity to prevent significant expansions in facility volume that may result in enlargement in use of the right or injury to other water rights.

RESPECTFULLY SUBMITTED this 22nd day of July, 1997.

David R. Tuthill Jr.

David R. Tuthill
Adjudication Bureau Chief
Idaho Department of Water Resources

SUPPLEMENTAL REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME PURSUANT TO CLAIM TO WATER RIGHT NOS. 36-02048, 36-02703, 36-02708, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07083, 36-07141, 36-07201, 36-07218, 36-07568

In Re SRBA

Twin Falls County Civil Case No. 39576

Sub-Case Nos. 36-02048, 36-02703, 36-02708, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07083, 36-07141, 36-07201, 36-07218, 36-07568

Clerk Spec

Supplemental Report to the SRBA District Court

Prepared by David R. Tuthill Jr., Adjudication Bureau Chief
Idaho Department of Water Resources

December 15, 1997

David R. Tuthill Jr., Adjudication Bureau Chief, Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right nos. 36-02048, 36-02703, 36-02708, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07083, 36-07141, 36-07201, 36-07218, and 36-07568 in compliance with I.C. § 42-1412(4). Mr. Tuthill will be available as a witness to testify regarding IDWR's position as to this issue.

LEGAL PRINCIPLES UNDERLYING RECOMMENDATION OF FACILITY VOLUME

IDWR's conclusion that water rights for fish propagation facilities should be described by the facility volume rests upon the legal principles listed below. These principles are not described for purposes of legal argument, but simply as a matter of fact, in that they underlie the Department's ultimate conclusion regarding the necessity of describing fish propagation rights with facility volume. If the Court determines that IDWR's understanding of the applicable legal principles is erroneous or inaccurate the conclusions reached in this report may change.

1. In the SRBA, IDWR must make recommendations as to the extent of beneficial use and administration of each water right under state law.

2. Extent of beneficial use is the ultimate basis and measure of a water right under state law.

3. A description of the beneficial use is the description of the water right. This description is generally provided by identifying the elements listed in I.C. § 42-1411(a) - (h)

4. Some beneficial uses cannot be fully described using the elements listed in I.C. § 42-1411(a) - (h), so additional elements are provided for in I.C. §42-1411(2)(i) and (j). I.C.§ 42-14119(i) provides that the director shall determine "conditions on the exercise of any water right included in any ... license ...." I.C.§ 42-14119(j) provides that the director shall determine "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director."

5. IDWR recommends facility volume for fish propagation rights pursuant to I.C. §42-1411(2)(i) and (j).

6. The description of a water right should be adequate for the Department of Water Resources to administer use of the water right.

7. The extent of beneficial use of water pursuant to a water right cannot be increased without obtaining a new right for the enlarged use in accordance with state law.

FACTUAL BASIS FOR RECOMMENDATION OF FACILITY VOLUME

1. The majority of fish propagation facilities divert water from a spring or stream into ponds or raceways where the fish are raised. This diversion reduces the quantity of water in the stream at the diversion point. The water is then released from the raceway or pond back into a stream or river.

2. Because of the nature of this use it is primarily non-consumptive in terms of water quantity. There is some evaporation loss from the ponds or raceways and some amount of transient storage. In terms of water quality this use has a greater impact than many other uses. As water is discharged from the fish propagation facility, it carries some wastes from the fish propagation operation which can render it unusable for downstream uses requiring high quality water.

3. In Idaho many fish propagation facilities are in the Thousand Springs area of the Snake River Canyon. They are located there because of the availability of consistently clean, cold water flowing from the Thousand Springs of the Snake Plain Aquifer. The springs flow from the rims, walls and floor of the canyon and form surface streams flowing to the Snake River.

4. Water from the springs and streams is diverted by canals or pipelines into the fish propagation facilities. Several fish propagation facilities can be located on the same stream, some with diversion points downstream from the return flows of upstream fish facilities. The downstream fish propagation facility or other user may depend upon a particular quality of water being returned to their source from the upstream fish propagation facility.

5. Other appropriators often divert water from the same spring or stream source as does a specific fish propagation facility. These appropriators might be affected by the timing or the quantity of the diversion into that facility.

6. Because the springs are fed by the aquifer above the Snake River Canyon, groundwater appropriators diverting from the aquifer may also be affected by the timing or the quantity of diversions into fish propagation facilities.

7. When fish facilities are constructed the raceways or ponds have a particular volume. This volume generally relates to the number of fish the water user can raise and the water treatment needed for return flows to meet water quality standards.

8. An indicating factor of both the diversion rate necessary for and the volume of water used in a fish propagation facility is the facility's volume. If the facility volume should

change, there is a possibility that the diversion rate and diversion volume or discharge amount would also change. This could result in an expansion of the right and cause possible injury to other water right holders.

9. Significant expansions in facility volume can result in injury to other water users, even where there is no increase in diversion rate, by increasing the diversion volume (generally by diverting the same diversion rate for longer periods of time), by increasing the consumptive use (generally due to treatment required to meet water quality standards prior to discharge into a water source), or by decreasing water quality.

10. An increase in facility volume may result in an increase in the beneficial use - fish production. An increase in production may affect other water users should a senior fish propagator make a call on the resource. If a water right holder junior to the fish propagator is required to mitigate injury to the senior fish propagator, mitigation for increased beneficial use from the increase in facility volume would injure the junior.

11. Facility volume expansions can also result in improvement in water quality. Thus, IDWR does not necessarily prevent such expansions; instead, it uses the parameter as an indicator suggesting that it should investigate the impacts of the expansion.

12. An increase in facility volume may affect the public interest in such matters as the impacts of increased production, or the impact of the expansion on water quantity or quality. The facility volume parameter gives other users and the public notice of the expansion, and triggers IDWR's public interest review.

13. IDWR has described water rights for fish propagation purposes with facility volume parameters in licenses since 1979, pursuant to an Administrator's Memorandum to the Regional Offices and Water Allocation Section. Before 1979, IDWR did not include a facility volume descriptor in fish propagation water right licenses.

14 Pursuant to the Idaho Supreme Court's decision in Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985), when water right permits for fish facilities are applied for, plans "sufficient to generally apprise the public of the efficacy of the proposed use and of its potential impact" are submitted to IDWR as part of the licensing process. These plans show, among other things, the facility volume.

14.a. Water right licenses were issued for right numbers 36-07201, 36-07218 and 36-07568 by IDWR. Each of these licenses contained a facility volume condition on the license. The licensee did not appeal the inclusion of the facility volume condition and it became a final condition on the water right licenses.

15 The facility volume condition for water rights for fish propagation facilities is an important parameter to define and measure the extent of beneficial use of water used for fish propagation. Although facility volume provides an indicator of potential water quality impacts if fish propagation facilities are enlarged, this is not the primary reason for including facility volume as a descriptive element for fish propagation water rights.

CONCLUSIONS

It is my opinion, on behalf of IDWR, that:

1. The extent of beneficial water use at fish propagation facilities is quantified, in part, by the particular facility's volume. An accurate description of a fish propagation water right should include facility volume.

2. An increase in facility volume at a fish propagation facility alerts IDWR to a potential enlargement in the beneficial use of the associated water right, and gives IDWR the ability to determine whether the increase results in an expansion of the right and injury to other users, because of either water quantity or water quality impacts, or both. IDWR considers the water quality aspect as complementary to the primary purpose for inclusion of facility volume descriptors in water rights; that of defining the extent of beneficial use.

3. An increase in the facility volume parameter at a fish propagation facility provides notice to the public that its interest in water quality, water quantity, or in the impacts of increased beneficial use may be affected by the expansion of the facility.

4. Although, an increase in a fish propagation facility's volume in some cases may actually lessen the water quality impact that the facility has on other water rights, the parameter defines the extent of beneficial use of a water right used for fish propagation purposes and serves as a benchmark by which IDWR or other parties can determine whether the impacts of any expansion in the facility may injure other water rights.

5. Water rights should explicitly describe fish propagation facility volume to allow for effective protection of water rights and water uses that may be impacted by the fish propagation use. This parameter is the most effective means to define and administer water rights with sufficient specificity to prevent significant expansions in facility volume that may result in enlargement in use of the right and injury to other water rights.

6. For those water rights originally licensed with a facility volume condition, that condition should be included in the court's decree to avoid a collateral attack on the license conditions.

RESPECTFULLY SUBMITTED this 15th day of December, 1997.

David R. Tuthill

David R. Tuthill
Adjudication Bureau Chief
Idaho Department of Water Resources

EXHIBIT D

North Snake Ground Water District

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

In Re SRBA	)	Subcase Nos. 36-02356, 36-07210,
	)	36-07427, and 36-07720
Case No. 39576	)	(Blue Lakes)
	)	
_____	)	**REPLY BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND**

In their June 5, 1998 Brief, the Claimant, Blue Lakes Trout Farm, Inc. ("Blue Lakes"), claims that facility volume is not necessary to define or administer fish propagation rights. In reaching this conclusion, Blue Lakes asserts that (1) there is no factual relationship between facility volume and fish production; (2) the diversion rate and diversion volume in the Special Master's Recommendations are sufficient to define the quantity element for these fish propagation rights; and (3) facility volume is not necessary for mitigation purposes. For the reasons discussed below, Blue Lakes' conclusion and the premises upon which it is based misconstrues the potential impact of fish facility expansions on junior water users.

1. **Larger Facilities Use More Water and Produce More Fish.**

Blue Lakes refers to an IDWR Memorandum as support for the principle that facility volume is unrelated to fish production. *Blue Lakes' June 5, 1998 Brief*, at 9. The referenced Memorandum apparently states, "production is usually based on the amount of water available rather than the amount of land or the size of the facilities." This statement does not assert, as Blue Lakes claims, that there is no relationship between facility volume and production. Rather, the statement merely indicates that amount of water available is typically the constraint for fish production rather than the amount of land or the size of the facilities. That is to say, land to expand facilities is typically more readily available than additional water. This statement, however, does not disavow any connection between facility volume and fish production as Blue Lakes asserts.

Blue Lakes further refers to the testimony of its witness James E. Parsons as confirming that, "Blue Lakes' production is dependent upon the rate of flow, not the size of the facility." *Blue Lakes' June 5, 1998 Brief*, at 9. In all of Mr. Parsons' testimony, there is actually only one question concerning the relationship between facility volume and production:

> Q: We talked about this morning with Mr. Tuthill, you were present, asked him whether production was based on the amount of water available as a diversion rate and diversion volume or the size of the facilities. And the memo that we looked at seems to suggest that it is in fact based on the amount of water and not on the size of the facilities.
>
> Would you agree with that conclusion?
>
> A: I would. Typically we estimate production based on pounds that we can rear per cubic feet per second of water. So on a flow-rate basis.

September 4, 1997 Trial Transcript, pp. 205-06, LL. 21-6 (attached hereto as Exhibit A). Here, Mr. Parsons states that fish production is usually described in terms of pounds per cubic feet per second of water. However, his response does not specifically exclude a relationship between production and facility size.

One would expect a relationship among facility size, the amount of water used, and the rate of production. It only makes sense that a larger facility would require the use of more water and be able to produce more fish. Thus, fish production is not necessarily limited by the quantity of water rather than the size of the facilities. There is a relationship between the size of the facility and the amount of water used. One would expect that larger facilities would require more water and be able to produce more fish.

In the *Brief in Support of Motion to Alter or Amend*, the North Snake Ground Water District ("NSGWD") provided a hypothetical in which the average rate of diversion increased as a result of facility expansion. As explained in the hypothetical, a fish propagation facility could increase fish production while remaining within their maximum allowed diversion rate by increasing their facility volume and their average rate of diversion. This hypothetical demonstrates the interrelationship of facility size with both water use and fish production. Blue Lakes has not demonstrated that it operates continuously at the maximum licensed diversion rate. Therefore, the potential exists that water use may increase unless a facility volume quantity is designated.

Nowhere does the record disavow any connection between facility volume and the amount of production. Actually, a larger fish tank which holds more water also is able to hold more fish while requiring more fresh water. While Blue Lakes admits the relationship between production and the quantity of water used, it fails to recognize the concomitant relationship among larger facility volumes, increased water use, and increased production.

2. The Diversion Rates and Diverted Volumes Designated in the Special Master's Recommendations Are Not Adequate to Fully Define Quantity.

The diversion rates for these four rights which were included in the water right licenses and then adopted in the Director's Report and Special Master's Recommendations represent maximum allowable diversion rates. It is well known that the Hagerman springs typically are subject to seasonal variations and that the fish propagation facilities actually may utilize average

rates of diversion that are less than the licensed cap. Nevertheless, the diverted volume amounts in the licenses and in the Director's Report and Special Master's Recommendations are calculated based on a continuous year-round flow of the maximum allowable diversion rate. Thus, the diverted volume amounts for these rights do not add any additional limitation. The diverted volume figures provide for continuous year-round diversion at a maximum allowed diversion rate even if the maximum rate of diversion is not an accurate measure of the actual amount of water used at the facility.

The licensed diversion rate which is then incorporated in the Special Master's Recommendations does not reflect seasonal variations or actual diversion practices. In other words, Blue Lakes may be able to increase its production by expanding its facility volume and its average diversion rate without exceeding either the rate of diversion or diverted volume of its water rights as described in its licenses or in the Special Master's Recommendations. Thus, the rates of diversion and the diverted volumes as currently specified are not adequate to describe current actual beneficial uses for these fish propagation rights. Facility volumes are necessary to describe the size of the facilities and to define the parameters of the current actual beneficial uses.

3. Facility Volume Designations, Subordination Provisions for Water Quantities Associated with Facility Expansions, or Some Other Legal Means Are Necessary To Protect Junior Users from Expansions in Actual Beneficial Use.

Blue Lakes argues that facility volume designations are not necessary because IDWR cannot force a junior user to provide mitigation and because, at this point, a call by senior Hagerman fish propagators is only hypothetical. Blue Lakes' arguments do not recognize that even though juniors may have the option of either providing mitigation or curtailing their own water use to supply senior users, in either event the junior should not be subject to expansions in use post-dating their own water rights. Further, a call by senior Hagerman spring users is more than hypothetical; Hagerman area spring users have issued calls in the past and, therefore, a call

by a Hagerman fish facility remains a distinct possibility. *See Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

In their *Brief in Support of Motion to Alter or Amend*, the NSGWD proposed an alternative to fish facility volume designations. NSGWD noted that "fish propagation water rights could be conditioned to expressly indicate that any facility expansions beyond a certain original facility volume would be subordinated to existing water rights." *Brief in Support of Motion to Alter or Amend*, at 9. Under such a provision, junior water users would not be subject to a call from or mitigation for facility expansions post-dating their own water rights. Such an approach would not prevent Blue Lakes from expanding its facility but would protect junior users from a call associated with such a change. This would address Blue Lakes' concerns for operational freedom and at the same time protect junior users from being curtailed as a result of facility expansions.

Conclusion

For the forgoing reasons, facility volumes or other appropriate provisions should be included in the Special Master's Recommendations to protect junior users from expansions of fish propagation water uses.

DATED this 29th day of June, 1998.

BEEMAN & HOFSTETTER, P.C.

By _____
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 1998, I caused to be served copies of the ***Reply Brief in Support of Motion to Alter or Amend*** by facsimile, addressed to:

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Environment & Natural Resources
550 W. Fort St., MSC 033
Boise, ID 83724

Dana L. Hofstetter

D:\1780\2\ac\2234

JAMES E. PARSONS, called as a witness by Claimant Blue Lakes Trout, being first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION

BY MR. SEMANKO:

Q. Good afternoon. How are you?

A. Okay. Tired.

Q. It's been a long time. Could you please state your full name and what you do for a living for the record?

A. Okay. My name is James E. Parsons; and I'm the research and technical director for Blue Lakes Trout Farm.

Q. Do you live here in Twin Falls or –

A. Yes.

Q. How long have you been employed with Blue Lakes Trout Farm?

A. Five years for Blue Lakes Trout Farm.

Q. Is that in the current capacity that you're in now?

A. Yes.

Q. Do you have additional experience with fish propagation facilities?

A. An additional 14 years working as, in the technical side of aquaculture.

Q. At a specific location or –

A. Eight years with Clear Springs, and then previous to that in Oregon within propagation.

Q. And Clear Lakes is in this same Mid Snake stretch; is that correct?

A. Yes.

MR. SEMANKO: I might leave it to the special master. If he has any questions about how the facility operates, I'm going to leave that wide open for you to go ahead and ask those questions rather than going through that, not knowing whether you need that or not. We've got the maps and an aerial photo as well. So if we need to do that, I think that would be the best way to handle it.

Q. (BY MR. SEMANKO) Are you familiar with the facility volume at Blue Lakes Trout Farm?

A. Yes.

Q. And you've calculated that; isn't that correct?

A. Yes.

Q. That's one of our exhibits. You can see it from here.

And did you calculate this yourself?

A. Yes. It has both operating capacity as it was that particular day and the total capacity.

MR. SEMANKO: That was Exhibit No. 11, Your Honor.

Q. (BY MR. SEMANKO) There's been a lot of talk today about increasing facility volume.

First of all, just for the record, to your knowledge does Blue Lakes Trout Farm have any current plans to expand their facilities?

A. No. Not unless you consider adding another dam board.

Q. Another dam board, okay.

A. Yes.

Q. Have you submitted any applications to expand your facilities?

A. No.

Q. To appropriate more water?

A. No.

Q. To transfer or change the place of use?

A. No.

Q. In your opinion would an increase in facility volume at your plant result in your inability to meet your point source national pollution discharge elimination system, NPDES, permit requirements? As a necessity, would that happen?

A. No. No, that would have to be considered in any facility expansion that we would undertake. We

would have to be able to meet those parameters and prove that we could before going ahead with the project.

Q. Who would you have to prove that to?

A. DEQ.

Q. They would not let you expand your facility if it achieved such a result?

A. Right.

Q. Who currently regulates your facility other than DEQ?

A. The facility volume?

Q. Does anybody regulate your facility volume?

A. No.

Q. Does anybody measure your facility volume on a regular basis?

A. No.

Q. You don't do that?

A. No.

Q. The department of water resources doesn't require you to do that?

A. No.

Q. DEQ doesn't require you to do that?

A. No.

Q. Does your facility volume – it's changed over the years. Has it impacted any water rights to

your knowledge, the changes in facility volume, over time?

A. None that I'm aware of.

Q. Are you aware of any downstream uses requiring the high quality water – or a particular quality of water?

A. There is a facility below us that uses our return water for fish propagation, but –

Q. Have they complained about your presence?

A. No.

Q. Are they happy that you're there?

A. They're happy we're there.

Q. And why is that?

A. We've collected the water and moved it to a point where they can actually divert the flow into their facility.

Q. Have you ever had a conflict with any downstream operators regarding who gets what or whether it was polluted?

A. No.

Q. It was mentioned this morning that the Thousand Springs area is meant to be synonymous with the Mid Snake stretch from Milner to King Hill roughly.

To your knowledge are all fish propagation

facilities in that stretch roughly the same; or are there some differences?

A. There's quite a bit of difference, I think, between facilities that divert water from the north side springs, the larger volume facilities, and facilities that use much smaller volumes on the south side that tend to be irrigation return flows or seep tunnels.

Q. What kind of volumes are you talking about now? The diversion volume, or the facility volume?

A. Diversion volume or flow rates.

Q. Okay. But they're all basically, to your knowledge, flow-through systems?

A. Yes.

Q. That's the entire Mid Snake stretch?

A. Yes.

Q. How long is the flow-through timing in your facility?

A. Based on the operational facility volume that we calculated, an average flow rate for our facility of 150 cfs, it's about 77 minutes.

Q. 77 minutes to flow through the entire facility?

A. Yes.

Q. Just a little over an hour. How about at

the operation – or I'm sorry, at the capacity level?

A. That works out to just over a hundred minutes.

Q. A hundred minutes. So just over an hour and a half.

Do you consider that to be storage of the water right?

A. No, I wouldn't.

Q. Have you ever applied for a storage right?

A. No.

Q. Have you ever been advised by the department that you need a storage right?

A. No.

Q. Would you consider your facility to be nonconsumptive in nature?

A. Yes.

Q. To your knowledge, based on your knowledge, would you make that characterization of the other facilities in the Mid Snake?

A. Yes.

Q. We talked about this morning with Mr. Tuthill, you were present, asked him whether production was based on the amount of water available as a diversion rate and diversion volume or the size of the facilities. And the memo that we looked at seems

to suggest that it is in fact based on the amount of water and not on the size of the facilities.

Would you agree with that conclusion?

A. I would. Typically we estimate production based on pounds that we can rear per cubic feet per second of water. So on a flow-rate basis.

Q. We heard a lot of things about what facility volume is meant to cure, things that could happen in the future, may have happened, or may never happen.

From your perspective, are there things that facility volume – including facility volume on your rights would do to you that would impact your ability to operate now or in the future?

A. I think one of the things that was brought out is that perhaps in the future we may have to expand our size of our facilities to meet water quality standards, just to add additional treatment or to somehow effect an improved water quality. It's conceivable that that could actually prevent that from happening.

Q. Speaking about your plant in specific and any knowledge that you have of the Mid Snake plants in general, are higher velocities sometimes needed to deal with diseases and parasites and things like that?

A. Yes.

Q. And that would be a change in the facility volume?
A. You typically increase the velocity by lowering the depth of the pond for lowering the volume.
Q. And to lower a velocity, you would need more facility volume?
A. Yes.
Q. Do you sometimes need lower velocities for a density problem?
A. No, not typically.
Q. Not in your facility?
A. Right.
Q. Are you aware of anyone who has needed that in the Mid Snake?
A. No, I'm not aware of anybody needing that.
Q. Do other factors affect facility volume? Dissolved oxygen, is that a problem?
A. No.
Q. Temperature?
A. No. Not given the volume of flow that we have and our retention time, no.
Q. Because of the size and the retention times?
A. Yes.
Q. You mentioned water quality concerns. Can you explain to us a little bit what quiescent zones and

settling ponds are, and how those relate to your facility and deal with water quality?
A. Okay. The typical way now to improve water quality before it leaves our facilities is to have an area of -- a part of a rearing area where fish are excluded at the downstream end of the rearing area. That allows the solids that might be present in that water column to settle out. Those are then typically vacuumed and moved off line to another set of ponds where they're collected.
Q. Do you know whether adding additional quiescent zones or settling ponds would be viewed by the department as additional facility volume?
A. I don't know whether it would be -- it would have to be if you had to expand your facility to deal with that.
Q. Those things are ponds or portions of existing raceways?
A. Yes.
Q. So they would be included in the total?
A. Yes.
Q. And could in fact take away from your production if you weren't allowed to deal with that in a different way?
A. Yeah. The standard for quiescent zone

sizing has changed over the years, and has required us to remove areas out of production and into quiescent zone sizing.
Q. So in this rough drawing that I've made here of the blue area, would that be the original 29 ponds?
A. Yes.
Q. Is any of that now a quiescent zone?
A. Yes.
Q. But it used to be production?
A. All production.
Q. And you've made up for some of that production in other facilities?
A. Yes.
Q. And then some?
A. Yes.
MR. SEMANKO: Your Honor, that's really all the questions I have. As I've stated, if you'd like a better understanding of the system, I'd be happy to let you go through that with him.
THE COURT: Sure. Mr. Steenson, do you have any questions?
MR. STEENSON: No, Your Honor.
THE COURT: Mr. Parsons, I appreciate you sitting through all of this. The figures that Mr. Semanko talked about in Blue Lakes' Exhibit 11, it

has your calculations of system capacity.
If I go down to the very bottom there where it has totals, that's the total facility volume for all of your facilities?
A. Right.
THE COURT: And they're not broken down by which permit they're involved with here?
A. No.
THE COURT: Do these figures -- and they're not converted to acre-feet. Do they equal the stipulated facility volume amounts that were mentioned this morning when you were here earlier?
A. Yes. The total volume, the capacity volume is very similar to the total amount of acre-feet that has been suggested.
THE COURT: Does Blue Lakes re-pump its water, recirculate it?
A. No.
THE COURT: So it goes through once and it's gone?
A. It goes through once. And then we'll go through several uses, but that's typically just a downstream flow.
THE COURT: Several uses. You mean including your ponding?

A. We call a use where it might flow at one particular level and then it drops perhaps three feet into another level, same size raceway. And that's to add additional oxygen back into the water. So, for instance, if I may, water would come into --

THE COURT: Oh, Mr. Parsons, if you'll hold on a second, we'll put a portable microphone on you there. We don't want to miss what you're saying.

A. Do you want to point? I can --

MR. SEMANKO: I can do that, sure.

A. Okay. Water may come into the top of one series of raceways and then flow downstream. You can kinda see where the break point is between those. And there's a recharge that takes place at that point for oxygenation purposes. That's why we do that. The drop aerates the water and adds oxygen back to the water.

In terms of pumping, as I thought about that, you know, that would impact water quality more than it would if we reuse the water. If you were to take the whole volume of water, take it back and run it through the fish one time, you know, you could very highly expand your production with that method, probably more so than adding additional raceways. So if the concern is over water quality, that would seem to be a bigger concern.

THE COURT: But that's nowhere in any of your permits, whether you can or can't recycle or reuse or re-pump water?

A. No. No.

THE COURT: Well, Mr. Tuthill said in his affidavit that some facilities, even larger ones, have better quality.

Why would that be? You have more fish; you're using more water. Why would you have better quality?

A. I guess I -- in referring to what? To increasing facility volume?

THE COURT: Well, for instance, if you take a small hatchery, it may have a certain level of quality. You take a larger one; it may have a higher standard of quality. It meets a higher standard, or the water is cleaner as it goes out.

Is that because the large facilities treat their water better, or they can afford the expense of doing that, or --

A. No. I think there's a number of operational considerations that affect water quality far beyond how many fish you produce. You know, anywhere from the type of feed that you feed to the type of waste treatment that you affect on your effluent. And I don't think you can generalize in saying that big

facilities could be better than small facilities, or vice versa.

THE COURT: Do all facilities have to meet the same water quality standards?

A. Currently, yes.

THE COURT: So if I'm standing at the bottom of yours and I measure that quality, it's the same theoretically as it would be at a tiny operation next door?

A. It has to meet the same concentration limits, yes.

THE COURT: And that's regardless of whether the water is going to someone else or being dumped directly into the Snake?

A. Yes.

THE COURT: That's all I have.

Mr. Semanko, do you have any more questions?

MR. SEMANKO: No, I don't, Your Honor.

THE COURT: Mr. Parsons, thank you for your testimony. I appreciate it.

(WITNESS EXCUSED)

THE COURT: Mr. Semanko, do you have anybody else you'd like to call in?

MR. SEMANKO: Your Honor, we have no other witnesses.

THE COURT: And, Mr. Steenson, I understand you may have a witness for us.

MR. STEENSON: Yeah. We have one witness, Your Honor. Harold Johnson.

THE COURT: Or do you want to take a break now?

MR. STEENSON: I'd like to just plow through. It's getting late.

THE COURT: Let's plow through, if you can stay with us, Mr. Spencer.

MR. SPENCER: Yes, Your Honor.

MR. STEENSON: Your Honor, I intend to offer one additional exhibit. I do not have extra copies. I'll show it to the other parties.

(DISCUSSION HAD OFF THE RECORD)

THE COURT: Mr. Steenson, you'd like that to be marked as Clear Lakes' Exhibit 5?

MR. STEENSON: Yes. Yes, Your Honor.

THE COURT: All right.

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