

Daniel V. Steenson, ISB #4332
Charles L. Honsinger, ISB #5240
S. Bryce Farris, ISB #5636
RINGERT LAW CHARTERED
455 South Third Street
P.O. Box 2773
Twin Falls, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Petitioner Blue Lakes Trout Farm, Inc.

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

CLEAR SPINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

**IDAHO GROUND WATER
APPROPRIATORS, INC., NORTH SNAKE
GROUND WATER DISTRICT, and MAGIC
VALLEY GROUND WATER DISTRICT,**

Cross-Petitioners,

vs.

**DAVID K. TUTHILL, JR., in his capacity as
Director of the Idaho Department of Water
Resources, and THE IDAHO DEPARTMENT
OF WATER RESOURCES,**

Respondents.

CASE NO. CV 2008-444

Fee Category R.2 - \$88.00

**BLUE LAKES TROUT FARM,
INC.'S CROSS-PETITION FOR
JUDICIAL REVIEW**

COPY

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-)
0413A, 36-04013B, AND 36-07148.)

(Clear Springs Delivery Call))

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 36-)
02356A, 36-07210, AND 36-07427.)

(Blue Lakes Delivery Call))
_____)

COMES NOW, the Cross-Petitioner Blue Lakes Trout Farm, Inc. ("Blue Lakes"), by and through its undersigned counsel, and hereby files this Cross-Petition as follows:

CROSS-PETITION FOR JUDICIAL REVIEW

1. This Cross-Petition is filed pursuant to Idaho Code § 67-5273(2) and I.R.C.P. 84(c).
2. On July 28, 2008, Clear Springs Foods, Inc. ("Clear Springs") filed a *Notice of Appeal and Petition for Judicial Review of Agency Action* pursuant to Idaho Code §§ 67-5270 and 67-5279, seeking judicial review of a final order issued by the Director of the Idaho Department of Water Resources ("IDWR"), David K. Tuthill, Jr., on July 11, 2008 ("*Final Order*").
3. Blue Lakes is a party to this action and participated in the consolidated administrative proceedings and hearings on the IDWR Director's May 19, 2005 *Order* in response to Blue Lakes' water delivery call, and the Director's July 8, 2005 *Order* in response to Clear Springs' water delivery call, which culminated in Director Tuthill's issuance of the *Final Order*.

4. This Cross-Petition seeks judicial review of the *Final Order*. Blue Lakes intends to assert the following issues on judicial review:

a. Whether the Director erred in reevaluating the extent of Blue Lakes' beneficial use of its water rights at the time of appropriation and at other times prior to the date the rights were decreed by the Snake River Basin Adjudication (SRBA) District Court to find that Blue Lakes' second priority water right no. 36-7201 is not entitled to priority delivery of the decreed quantity during the decreed period of use.

b. Whether the Director erred in concluding that Blue Lakes' water right no. 36-7210 is not injured by junior ground water pumping.

(1) Whether the Director impermissibly shifted the burden of proof or relieved the junior ground water users of their burden of proof to show that Blue Lakes is not entitled to priority delivery of the decreed quantity of its second priority water right no. 36-7210.

(2) Whether there was sufficient evidence to overcome the presumption that Blue Lakes' is entitled to priority delivery of the decreed quantity of its second priority water right no. 36-7210.

(3) Whether there was sufficient evidence for the Director to infer that the water supply was insufficient to fill Blue Lakes' second priority water right no. 36-7210 at the time of appropriation.

(4) Whether the Director erred in concluding that the water supply in 2005 was adequate to fill Blue Lakes' water right no. 36-7210.

c. Whether the Director erred using a 10% "trim line" to exclude certain junior priority ground water rights from administration.

d. Whether the Director erred in using a percentage of reach gains to the Snake River to reduce the quantity of water junior priority ground water right holders are required to provide to Blue Lakes' as mitigation for Blue Lakes' water losses in lieu of curtailment.

e. Whether the Director erred in failing to properly account for and require junior priority ground water right holders to perform their outstanding mitigation obligations for the injury they caused to Blue Lakes in 2005, 2006, 2007 and 2008.

f. Whether the Director erred in using a "public interest" criteria in the administration of junior priority ground water rights.

g. Whether the Director erred in phasing-in curtailment or mitigation obligations of junior priority ground water rights over a 5-year period.

h. Whether the Director erred in using a "replacement water plan" process not provided for by statute or the Department's conjunctive management rules in administration of junior priority ground water rights in 2005, 2006, and 2007.

i. Whether the Director erred in approving "replacement water plans" through various orders issued in 2005, 2006, and 2007.

j. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary and capricious and in violation his statutory obligations and Blue Lakes' statutory and constitutional rights.

k. Whether the Director erred in exempting ground water rights for de minimis domestic and stock watering purposes from priority administration in order to supply Blue Lakes' senior priority water rights.

4. Pursuant to I.R.C.P. 84(d)(5), Blue Lakes reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated in this petition or which become later discovered.

5. The Cross-Petitioners request that a transcript of the hearing be made a part of the agency record for judicial review.

6. IDWR held a hearing in this matter from November 28, 2007 to December 13, 2007, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The person who may have a copy of such transcript is Victoria Wigle, Director's Administrative Assistant, Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803, Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov. The transcript has already been paid for and prepared at the request of the parties to this matter.

7. Blue Lakes anticipates that it can reach a stipulation regarding the agency record with the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

8. Service of this Cross-Petition for Judicial Review has been made on the other parties at the time of the filing of this Cross-Petition.

DATED this 8th day of August 2008.

RINGERT LAW CHARTERED



Daniel V. Steenson

Attorneys for Petitioner Blue Lakes Trout Farm, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of August, 2008, I served true and correct copies of the *Notice of Appeal and Cross Petition for Judicial Review* upon the following by the method indicated:

Deputy Clerk
Gooding County District Court
624 Main St.
P.O. Box 27
Gooding, Idaho 83330

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Overnight Mail
☐ Facsimile
☐ Email

Clive J. Strong
Phillip J. Rassier
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
clive.strong@ag.idaho.gov
phil.rassier@idwr.idaho.gov
john.homan@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Randy Budge
Candice M. McHugh
RACINE OLSON
P.O. Box 1391
Pocatello, Idaho 83204-1391

☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON
P.O. Box 485
Twin Falls, Idaho 83303-0485

☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail

Mike Creamer
Jeff Fereday
GIVENS PURSLEY
P.O. Box 2720
Boise, Idaho 83701-2720

☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail

Michael S. Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010

☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail

Frank Erwin
Watermaster
Water District 36
711 East Avenue North
Hagerman, Idaho 83332

☒ US Mail, Postage Prepaid
☐ Facsimile
☐ E-mail

Bob Shaffer
Watermaster
Water District 34
P.O. Box 53
Mackay, Idaho 83251

☒ US Mail, Postage Prepaid
☐ Facsimile
☐ E-mail

Allen Merritt
Cindy Yenter
Watermaster - Water District 130
IDWR - Southern Region
1341 Fillmore St., Ste 200
Twin Falls, Idaho 83301-3380


☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail

Justin May
May Sudweeks & Browning LLP
1419 W. Washington
Boise, Idaho 83702

☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail

Robert E. Williams
Fredericksen Williams Meservy
P.O. Box 168
Jerome, Idaho 83338-0168

☐ US Mail, Postage Prepaid
☐ Facsimile
☒ E-mail



Daniel V. Steenson