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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS 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. IDAHO DAIRYMEN'S ASSOCIATION, INC., Cross-Petitioner, vs. RANGEN, INC.,	Case No. CV-2008-0000444 **GROUND WATER USERS' REPLY BRIEF IN SUPPORT OF MOTION FOR STAY** **Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District**

Cross-Petitioner,

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.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427
(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148
(Clear Springs Delivery Call)

This memorandum is submitted in support of the *Ground Water Users' Motion for Stay* filed June 10, 2010 and in reply to *Blue Lakes Trout Farm, Inc.'s Brief in Response to Motion for Stay* filed July 6, 2010.

I. BACKGROUND

The appeal pending before this Court is taken from a Final Order issued by the director of the Idaho Department of Water Resources (the "Director") on July 11, 2008. The Final Order found "material injury" to water right no. 36-7427 (1973 priority date) owned by Blue Lakes Trout Farms, Inc. ("Blue Lakes") and to water right nos. 36-04013B (1964 priority date) and 36-7148 (1971 priority date) owned by Clear Springs Foods, Inc., ("Clear Springs") but not to Blue Lake's water right no. 36-7210 (1971 priority date) and not to Clear Springs' water right no. 36-4013A (1955 priority date). All parties appealed the Final Order.

On June 19, 2009, this Court issued its *Order on Petition for Judicial Review*, remanding the case "so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination" concerning Blue Lakes 1971 priority water right and Clear Springs 1955 priority water right.

Order on Petition for Judicial Review at 58. The parties filed petitions for rehearing. On December 8, 2009, the Court issued its *Order on Petitions for Rehearing* where the Court again remanded the case to the Director so that "he may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination." *Order on Petitions for Rehearing* at 12. These Orders are collectively referred to herein as the "*Remand Orders*."

On April 12, 2010, Blue Lakes filed a *Motion to Enforce Orders*, asserting that the Director had not complied with the remand of this Court. On May 11, 2010, this Court issued its *Order Granting in Part Motion to Enforce Orders; Order Setting Status Conference ("Order on Motion to Enforce")*, instructing the Director to "forthwith comply with this Court's earlier ***Orders*** on remand and apply the proper burdens of proof and evidentiary standards when considering seasonal [sic] variations as part of a material injury analysis for water right nos. 36-7210 and 36-4013A." *Order on Motion to Enforce* at 4; emphasis in original.

On June 18, 2010, the Ground Water Users filed their *Motion for Stay*, asking the Court to stay enforcement of its *Remand Orders* because there are significant issues on appeal to the Idaho Supreme Court that bear directly on the processes, burdens of proof, and evidentiary standards the Director should apply when determining material injury to water right nos. 36-7210 and 36-4013A. On July 6, 2010, Blue Lakes filed *Blue Lakes Brief in Response to Motion to Stay* (referred to herein as "*Blue Lakes' Response Brief*"), asking the Court to deny the Ground Water Users' *Motion for Stay*.

II. ARGUMENT

A. Blue Lakes Misunderstands the Legal Standard for a Stay Pending Appeal.

Blue Lakes argues that the Court should apply the standards for injunctive relief under I.R.C.P. 65(e) in deciding whether to grant a stay pending appeal under I.A.R. 13(b). *Blue Lakes' Response Br.* 4. On that basis, Blue Lakes argues that a stay is limited to "extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Id.* at 4. These arguments are misguided for at least three reasons.

First, I.A.R. 13(b)—unlike rule I.R.C.P. 65(e) governing injunctions—does not state any prerequisites to issuance of a stay pending appeal. The fact that I.A.R. 13(b) does not mirror or

incorporate the grounds for injunctions set forth in I.R.C.P. 65(e) is telling. This Court may in its discretion, under Idaho Appellate Rule 13(b)(14)

> Stay execution or enforcement of any judgment, order or decree appealed from, other than a monetary judgment, upon the posting of such security and upon such conditions as the district court shall determine.

Second, while in some instances federal courts have held that the application of I.A.R. 13(b) to the same standards as are required of an injunction under I.R.C.P. 65(e), it is not a requirement to do so in Idaho. To obtain an injunction, one must usually show a likelihood of prevailing on the merits of the case. In contrast, a motion for stay pending appeal does not occur until after the case has been finally decided by the trial court. Since an appeal by its very nature is the result of a failure to prevail on some merit of the case before the trial court, it would make no sense to limit a stay pending appeal to circumstances where the trial court believes the movant is likely to prevail on appeal. A lesser standard necessarily applies to I.A.R. 13(b). When an appeal that raises important legal issues and implicates the public interest, as does this case, a court's view of the merits is at most a secondary consideration in determining whether a stay is appropriate. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. N.M. 1996).

Third, the Idaho Supreme Court has addressed the authority of a district court to stay operation of a judgment during appeal, holding simply that it is a "discretionary power." *Walters v. Dunn*, 18 Idaho 450, 457 (1910). Citing *Walters*, the Court has further held that "[w]here it appears necessary to preserve the *status quo* to do complete justice the appellate court will grant a stay of proceedings in furtherance of its appellate powers." *McHan v. McHan*, 59 Idaho 41, 46 (1938). In *McHan*, the Court addressed the potential for injury to the parties, reasoning that "[i]t is entirely possible that the refusal to grant a stay would injuriously affect appellant, and it likewise is apparent that granting such stay will not be seriously injurious to respondent." *Id.* Notably, the Court did not require clear evidence of imminent and irreparable harm, just the possibility of serious injury. The Court simply decided that it made sense to maintain the *status quo* pending appeal. Maintaining the *status quo* is particularly appropriate "when a serious legal question is presented, when little if any harm will befall other interested persons or the public, and when denial of the order would inflict irreparable injury on the movant." *Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Further, the Supreme Court affirmed the Magistrate's decision to stay proceedings pending the

outcome of an appeal when the magistrate judge recognized that the decision was committed to his discretion, consistent with legal standards and that he exercised reason in making his decision. *Johnson v. Johnson*, 147 Idaho 912, 919 (2009). In Johnson, the magistrate noted that if the "'[i]f the Supreme Court says, [the initial magistrate judge] was correct and New York should have taken jurisdiction, then my trial that I try pending appeal is a total waste of time, effort and money.'" Id. Similar to this case, if the Director expends resources to make a decision and bases it on the wrong legal standards or the fact that the Spring Users' calls are invalid for any number of reasons pending an appeal, then the decision and any surrounding appeals would be a total waste of time, effort and money.

This Court has the authority to grant the stay and protect all the parties' best interest. Thus, the question before this Court is not whether "extraordinary circumstances" exist or a high likelihood of prevailing on appeal, but whether there are meritorious issues on appeal and whether it makes sense to maintain the *status quo* to avoid serious injury to the parties and to prevent a waste of time and resources. Staying compliance with the Court's remand orders will preserve the *status quo* and allow the Ground Water Users to continue with their conversion and CREP acres and to continue to work on long-term solutions that will benefit the aquifer and Blue Lakes. At the same time, Blue Lakes is getting the benefit of 10 cfs of direct delivery of water, as well as an estimated 5.2 cfs of additional benefits from other mitigation activities that the Ground Water Users have done in the past and will continue into the future. Accordingly, the Ground Water Users are now and have been since 2008 "over mitigating" to Blue Lakes by providing considerably more mitigation water than is required under current orders of the Department which require 9.6 cfs.[1]

B. A Stay Pending Appeal is Necessary to Avoid Severe Harm to the Ground Water Users.

Enforcement of the Remand Orders creates a substantial risk of serious and erroneous injury to the Ground Water Users. As recently attested by the Director, a finding of material injury to water right nos. 36-7210 and 36-4013A will result in the curtailment of "tens of thousands of additional irrigated acres." Spackman Aff. 3, ¶ 9, July 6, 2010. These are planted acres with growing crops. The deprivation of water to these acres will, without question, cause

[1] See Exhibit A and discussion in Section II. C. below.

extreme harm. In contrast, the curtailment of tens of thousands of additional acres will provide little if any benefit to Blue Lakes due to the delayed and fractional effect of curtailment on spring flows.

C. A Stay Pending Appeal Does not Threaten Significant Injury to Blue Lakes or Clear Springs.

For more than five years—ever since the Director found material injury to Blue Lakes' water right no. 36-07427 in the year 2005—the Ground Water Users have been required to provide mitigation to Blue Lakes in order to avoid curtailment of more than fifty thousand acres of ground water irrigated lands. As part of this mitigation, North Snake Ground Water District and Magic Valley Ground Water District were compelled to purchase 10 cfs of a 1964 priority date water right on Alpheus Creek (the same source of supply for Blue Lakes' water rights) at a cost of $11 million. All of this water has been delivered directly to Blue Lakes since April 2008.

For the past two years, the Ground Water Users have actually provided more water to Blue Lakes than required. Attached hereto as *Exhibit A* is the Direct Testimony of Dr. Charles Brendecke filed in support of the *Ground Water Users' Joint Mitigation Plan for Blue Lakes*. Exhibit 202 to Dr. Brendecke's Direct Testimony shows the most current estimates of the mitigation obligations to Blue Lakes from the Ground Water Users and its members as 9.6 cfs. On May 7, 2010, the Director approved the *Ground Water Users' Joint Mitigation Plan for Blue Lakes* that currently delivers 10 cfs of Alpheus Creek water directly to Blue Lakes under the Ground Water Users' water right no. 36- 2603C.[2] The Ground Water Users have been delivering the full 10 cfs since April, 2008, whereas the effects of curtailment of ground water rights would have taken decades to be fully realized. As for Clear Springs, the Ground Water Users and Clear Springs have a stipulated agreement in place for 2010 and are working on joint solutions for Clear Springs. The Ground Water Users have an approved mitigation plan to build an over-the-rim pipeline to deliver water directly to Clear Springs if settlement discussions with Clear Springs are unsuccessful. *In the Matter of the Third Mitigation Plan (Over-The-Rim) of the North Snake and Magic Valley Ground Water Districts to Provide Replacement Water for*

[2] *In the Matter of the North Snake and Magic Valley Ground Water Districts' 2009 Joint Mitigation Plan to Compensate Blue Lakes Trout Farm, Inc.*, IDWR Case No. CM-MP-2009-001, Final Order Approving Mitigation Plans (May 7, 2009).

Clear Springs Snake River Farm, Opinion and Recommendation Concerning the Over-the-Rim Mitigation Plan (Feb. 9, 2010).

The Ground Water Users have also undertaken mitigation in response to a delivery call made by the Surface Water Coalition (SWC) which has further benefitted Blue Lakes. Attached hereto as *Exhibit B* is *IGWA's Request for Mitigation Credit for the Blue Lakes' Delivery Call* along with an Affidavit of Dr. Brendecke filed with the Director on June 18, 2010, showing that approximately 5.2 cfs is expected to accrue to Blue Lakes from mitigation to the SWC. As such, the total mitigation provided to Blue Lakes for the past two years has been over 15 cfs, not including benefits from mitigation provided by other ground water users such as A&B Irrigation District and Southwest and Good Creek Irrigation Districts. (Ex. A at Ex. 202.)

Maintaining the *status quo* will not harm Blue Lakes or Clear Springs, but will in fact continue to provide them with more water than was contemplated or required under existing orders.

D. The Order Instructs the Director to Apply Burdens of Proof and Evidentiary Standards that are at the Heart of the Appeal.

This Court's remand instructs the Director to apply "the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis" concerning Blue Lake's water right no. 36-7210. As explained in the Ground Water Users' *Motion for Stay*, the burdens of proof and evidentiary standards to be applied in the context of groundwater administration are issues of first impression that are at the heart of the appeal pending before the Supreme Court.

As this Court is aware from the prior briefing in this matter, there are many unsettled issues involved in the appeal. One of which is the fact that even in light of the Ground Water Act's mandate that priority be exercised in a reasonable manner so as to not block full economic development of the state's ground water resources, the Director continues to insist on curtailing tens of thousands of acres. As the Director's Affidavit in paragraph 9 indicates, his decision upon remand, if he finds that Blue Lakes' earlier water right is injured, will result in the drying up of "tens of thousands of additional irrigated acres", leaving towns, schools and businesses without water while the appeal is pending, or forcing the Ground Water Districts to spend millions of dollars to buy water, convert more lands, build pipelines, dig ditches across people's lands and

construct permanent infrastructure which may ultimately not be necessary and will result in irreparable harm to the junior ground water users, and people's property and livelihoods.

E. Failure to Issue a Stay Will Create Conundrums for the Parties and the Supreme Court.

Compounding the pending judicial appellate process with further administrative process is not only unworkable for the junior ground water users with the potential of causing them irreparable harm if they stop spending millions of dollars, but the process is costly and inefficient for all parties involved. A reasonable solution would be a stay of any action by or before the director alleviating the need for the parties and IDWR to wrangle at the administrative level and potentially cause additional complexity to the record and issues already on appeal to the Supreme Court. Some common sense needs to be applied to this case and this Court has the discretion to do that by granting a stay and ordering such security as it deems just and proper.

In this case, the Ground Water Users are already over-mitigating Blue Lakes. The junior ground water users have been burdened over the past four years with spending millions of dollars to forestall physical curtailment of their water rights and destruction of their livelihoods as if they had already lost all arguments on the appeal. Given this Court's power to consider justice and equity to all parties, this Court should allow the ground water users some relief until all issues have been fully, fairly and finally decided by the Supreme Court in the pending appeal where opening briefs have already been filed and with respondents' briefs due shortly.

F. The Public Interest Weighs Strongly In Favor of Granting a Stay.

A stay pending the resolution of these issues on appeal is not only in the interests of the junior ground water users but is also in the interests of the public and the State as a whole.

The public interest is best served by minimizing the disruption of the day-to-day conduct of business and uses of water for agricultural, municipal, domestic, industrial and commercial purposes while issues of critical importance to these sectors are resolved. Furthermore, the public interest is served by allowing all the parties to focus on the long-term solutions that are presented in the CAMP process. The constant in-fighting and fear of loss does not aid in this endeavor. The public interest therefore weighs in favor of maintaining the status quo with compensation to Clear Springs for its lost net profit while the appeal is pending.

A stay would also minimize uncertainty among water right holders as everyone would finally know what to expect this year and possibly next year and will no longer be on the roller

coaster of filing and fighting proposed mitigation plans. While the parties have significantly different views of the law, they have the common objective of expeditiously resolving these issues in a manner that minimizes uncertainty and unnecessary economic dislocation. A stay will advance this common objective and the public interest by reducing all the collateral litigation.

G. The Court Should Issue a Stay Prior to the Upcoming Hearing, Before the Director Issues an Order on Remand.

The Court has scheduled a hearing on the *Motion for Stay* for July 19, 2010. The Director has indicated that he intends to issue an order in compliance with the Court's remand order before July 19, 2010. However, once the Director issues his order, one of the parties will likely file an appeal and then the procedural quagmire will have occurred and the waste of administrative, judicial and party resources will not be avoided. Therefore, the Ground Water Users request that the Court consider the Motion for Stay immediately without oral argument and relieve the Director of having to issue any order. Alternatively, the Ground Water Users request a stay from this Court of enforcement of the order if the Director issues an order and finds material injury to Blue Lakes' 1971 water right.

III. CONCLUSION

If the Ground Water Users prevail on any of their arguments before the Supreme Court, then having spent additional state and party resources at the administrative level will have been wasted. And in light of the fact that Blue Lakes is already receiving more mitigation benefit than is required under existing orders, forcing the Director and the parties into a procedural quagmire or to force junior ground water users to face curtailment of tens of thousands of additional acres[3] is contrary to the efficient use of judicial resources, state resources[4] and contrary to the public interest.

The result of any action or order by the Director would then be subject to judicial review and presumably would need to be consolidated with the pending appeal before the Supreme Court. This stay is being requested in order to provide some relief to all parties from the constant, divisive and costly litigation while the appeal is pending by avoiding further administrative action that may be rendered unnecessary once the Supreme Court has acted, to avoid further confusion of the appellate record which is already large and convoluted, to avoid

[3] See Affidavit of Gary Spackman filed in this matter at ¶ 9.
[4] See Affidavit of Gary Spackman.

delaying action on the appeal before the Supreme Court and to avoid the irreparable harm that would be suffered by the junior ground water users and the public if the Director was to find material injury to Blue Lakes' more senior water right. The facts and circumstances presented in this case all warrant keeping with the status quo and not requiring further administrative findings or action.

For the reasons stated above, the Ground Water Users request that the Court stay compliance with its remand order or alternatively, stay the enforcement of the Director's Order if further material injury is found.

SUBMITTED, this 12th day of July, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

Candice McHugh

Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2010, the above and foregoing document was served in the following manner:

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Candice M. McHugh

EXHIBIT A

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.

(Water Right Nos. 36-02356A, 36-07210, and 36-07427)

Docket No. CM-MP-2009-001

DIRECT TESTIMONY OF CHARLES M. BRENDECKE

SUBMITTED ON BEHALF OF:

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

January 11, 2010

LISTS OF SPONSORED EXHIBITS

DIRECT TESTIMONY OF CHARLES M. BRENDECKE

Q STATE YOUR NAME, BUSINESS ADDRESS AND POSITION.

A My name is Charles M. Brendecke. I am employed by AMEC Earth and Environmental, Inc., 1002 Walnut Street, Suite 200, Boulder, Colorado, 80302, a division of AMEC plc. I am a Principal of the firm.

Q WHO ARE YOU TESTIFYING FOR?

A I am testifying as an expert witness on behalf of the Idaho Ground Water Appropriators, Inc, ("IGWA") North Snake Ground Water District and Magic Valley Ground Water District (collectively "Ground Water Districts"). I have served as the primary technical consultant and advisor to IGWA and the Ground Water Districts since 1999.

Q WHAT IS YOUR AREA OF EXPERTISE?

A My training is as a civil engineer specializing in hydrology and water resources. This area of study includes hydrogeology and hydrologic modeling. I have over thirty years experience in this field of work.

Q PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A I received a Bachelor of Science degree in Civil Engineering from the University of Colorado in 1971. I received Master of Science and Doctor of Philosophy degrees in Civil Engineering from Stanford University in 1976 and 1979, respectively. My current resume is provided as **Exhibit 200.**

Q **HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT WITNESS BEFORE?**

A Yes. I have been qualified as an expert in hydrology and water rights in several Divisions of the Colorado Water Court. I have testified in several previous hearings before the Idaho Department of Water Resources. I have been qualified as an expert in hydrology, statistical hydrology and hydrologic modeling in interstate proceedings before the U.S. Supreme Court.

Q **DO YOU HAVE ANY PROFESSIONAL REGISTRATIONS?**

A Yes. I am a registered Professional Engineer in Idaho, Wyoming and Colorado.

Q **WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?**

A I will offer testimony in three general areas: 1), the Eastern Snake Plain aquifer and ground water model, generally; 2) the mitigation obligations to Blue Lakes Trout Company of the North Snake and Magic Valley Ground Water Districts and other groundwater users on the Eastern Snake Plain and the mitigation plans they have filed to meet these obligations; and 3) the fact that the benefits of the mitigation plans that have been filed exceed the mitigation obligations of the Ground Water Districts and other groundwater users.

Q **CAN YOU DESCRIBE GENERALLY THE LOCATION OF THE BLUE LAKES TROUT COMPANY DIVERSION AND AQUACULTURE FACILITY?**

A Yes. **Exhibit 201** is a map showing the locations of the major water delivery organizations on the Eastern Snake River Plain. As shown on **Exhibit 201**, the Blue Lakes Trout Company ("Blue Lakes Trout") is located on the north side of

the Snake River Canyon near the City of Twin Falls. The facility diverts water from Alpheus Creek, which is fed by the Blue Lakes Spring complex. This spring complex is one of those that discharge in the Devils Washbowl to Buhl reach of the Snake River. Other entities that divert water from the Blue Lakes Spring complex or Alpheus Creek include the City of Twin Falls, the Blue Lakes Country Club, the Pristine Springs aquaculture facility and the Canyon Springs aquaculture facility.

Q WHAT IS THE MITIGATION REQUIREMENT FOR BLUE LAKES TROUT COMPANY?

A The Idaho Department of Water Resources ("Department") has issued several orders that quantify the mitigation required for Blue Lakes Trout. The first of these was the original order of May 19, 2005, issued in response to Blue Lakes Trout's request for administration of junior-priority groundwater rights. This original order called for delivery of 51 cubic feet per second (cfs) to the Devils Washbowl to Buhl reach of the Snake River, phased in over a 5-year period. The order also found that Blue Lakes Trout receives 20% of the gain to the Devils Washbowl to Buhl reach, so the ultimate mitigation requirement directly to Blue Lakes Trout was 10 cfs. This original quantification of the requirement has been modified to reflect subsequent water rights transfers and the addition of Water District 140 into the potential curtailment area. The most recent mitigation requirements are contained in a table distributed by Director Tuthill on May 22, 2009. This table is reproduced as **Exhibit 202.** In it, the total mitigation required for Blue Lakes Trout is stated to be 11.9 cfs. I have communicated with Allan

Wylie at the Department and confirmed that the requirements shown in **Exhibit 202** are the most current estimates available.

Q HOW IS THIS MITIGATION REQUIREMENT DETERMINED?

A The Department determines this mitigation requirement using the ESPA groundwater model. In general terms, the procedure involves identifying all the groundwater irrigation rights and associated wells within the curtailment area that are junior in priority to the injured Blue Lakes Trout water right. The model is then used to simulate the increase in reach gain that would result from curtailment of those water rights. The mitigation requirement to the reach is then considered to be equal to that simulated increase in reach gain. The reasons that the mitigation requirement has changed from the original order are because water right transfers into and out of the curtailment area have changed the number of junior wells operating within the curtailment area and because Water District 140 and its junior wells were added into the curtailment area.

Q WHAT IS YOUR FAMILIARITY WITH THE ESPA GROUNDWATER MODEL?

A I have served as IGWA's representative on the Eastern Snake Hydrologic Modeling Committee ("modeling committee") since 2000. The modeling committee provides peer review to the Department and to University of Idaho researchers who are responsible for developing, maintaining and enhancing the model. In addition, I have used the model at various times to evaluate water management and mitigation strategies on behalf of my client. While it is not perfect, the model is the best available scientific tool for evaluating the effects of

such strategies on the regional aquifer system and on hydraulically-connected reaches of the Snake River.

Q WHAT MITIGATION PLANS HAVE BEEN PROPOSED AND IMPLEMENTED FOR BLUE LAKES TROUT COMPANY?

A I know of five mitigation plans that provide benefits to Blue Lakes Trout. These include the plan submitted by IGWA and the North Snake and Magic Valley Ground Water Districts ("IGWA Plan"); the plan submitted by the A&B Irrigation District ("A&B Plan"); the plan submitted by the Southwest Irrigation District and Goose Creek Irrigation District ("SWID Plan"); a mitigation agreement entered into by the Idaho Dairymen's Association ("IDA Plan"); and a mitigation agreement entered into by a group of agricultural processers known as the Water Management Coalition ("Processors' Plan"). These plans propose or implement a variety of measures that result in increased water delivery to the Devils Washbowl to Buhl reach and to Blue LakesTrout..

Q WERE THE DAIRYMEN'S AND PROCESSORS' PLANS SUBMITTED IN RESPONSE TO THE BLUE LAKES TROUT DELIVERY CALL?

A I do not believe they were. I believe they were submitted in response to the delivery calls by Clear Springs Foods (Snake River Farm) and by the Surface Water Coalition. Blue Lakes Trout is not a party to either the Dairymen's or Processors agreements. And while these two plans almost certainly benefit the Devils Washbowl to Buhl reach and Blue Lakes Trout, I have been unable to find any documentation that quantifies this benefit.

Q CAN YOU PLEASE DESCRIBE THE MEASURES THAT ARE CONTAINED IN THE IGWA PLAN?

A Yes. The IGWA Plan has, as its centerpiece, the direct delivery of spring water to Blue Lakes Trout. This direct delivery has been achieved through the purchase 10 cfs of a senior water right held by Pristine Springs, an adjacent aquaculture facility that shares a common point of diversion with Blue Lakes Trout. This 10 cfs has been delivered to Blue Lakes Trout since April of 2008. The administration of this direct delivery is more fully described in the affidavit of Cindy Yenter (Affidavit of Cindy Yenter, January 11, 2009). In 2009 and several prior years, IGWA also implemented various other measures on the plain above the canyon rim that increase the reach gain to the Devils Washbowl to Buhl reach; these measures have included dry-up of irrigated lands via the CREP program, conversion of groundwater-supplied lands to surface water use, and late-season managed recharge. **Exhibit 203** shows the locations of the wells that have been participating in the conversion program.

Q **WHAT MEASURES ARE CONTAINED IN THE OTHER MITIGATION PLANS?**

A The SWID Plan relies primarily on conversions of groundwater-irrigated parcels to surface water use; surface water is supplied to these lands through the Burley Irrigation District and via a pipeline from the Snake River. In the past, the Southwest Irrigation District has also undertaken various other measures, including recharge, as part of its internal water management activities; some of these may also contribute to increased gains to the Devils Washbowl to Buhl reach, though I have not seen a quantification of these effects.

The A&B Plan relies on conversion of groundwater-supplied parcels to surface water use and, to a lesser extent, on the dry-up of groundwater-irrigated parcels through the CREP program.

The Dairymen's Plan relies on dry-up of groundwater-irrigated lands and deliveries of storage water through the North Side Canal system, presumably for recharge. The Processors' Plan similarly relies on deliveries of storage water through the North Side Canal.

Q WHAT ARE THE EFFECTS OF THESE PLANS IN TERMS OF THE MITIGATION REQUIREMENTS?

A **Exhibit 204** summarizes the benefits to the Devils Washbowl to Buhl reach and to Blue Lakes Trout from the IGWA, SWID and A&B plans. As can be seen from **Exhibit 204**, the combined steady-state benefit of all the activities in these three plans is 16.57 cfs, substantially exceeding the mitigation requirement of 11.9 cfs. The benefits from the Dairymen's and Processors' plans would increase the excess mitigation.

Q IS IT NECESSARY FOR IGWA TO CONTINUE WITH ALL ASPECTS OF ITS MITIGATION ACTIVITIES IN ORDER TO MEET ITS PORTION OF THE OVERALL MITIGATION REQUIREMENT?

A No. As can be seen on **Exhibit 202**, the IGWA mitigation requirement is 8.6 cfs. IGWA has also contracted to provide mitigation for the Carey Valley Ground Water District, whose obligation is 0.2 cfs, bringing the total IGWA obligation to 8.8 cfs. IGWA's direct delivery to Blue Lakes Trout of the 10 cfs Pristine Springs water right is more than enough to satisfy this 8.8 cfs requirement, so I would conclude that the CREP, conversion and recharge activities that IGWA has

undertaken in the past are not necessary for it to meet the Blue Lakes Trout mitigation requirement.

Q HOW DOES THE DELIVERY OF WATER UNDER THE IGWA PLAN COMPARE TO THE DELIVERY THAT WOULD BE ACHIEVED FROM CURTAILMENT OF JUNIOR GROUND WATER RIGHTS IN THE ?

A The delivery of water under the IGWA plan exceeds the amount that would be achieved through curtailment, regardless of whether it is evaluated in steady-state or transient terms. The exceedance shown by comparing **Exhibits 204 and 202** reflects a steady-state evaluation. In transient terms, the delivery under the IGWA plan provides water in a more timely way than would curtailment. This is illustrated by **Exhibit 205**, which is a reproduction of Exhibit 462 from the original spring user hearing held in late 2007. **Exhibit 205** shows the transient benefit to the Devils Washbowl to Buhl reach and to Blue Lakes Trout from curtailment of all ground water irrigation rights on the Eastern Snake Plain that are junior to January 1, 1973. This priority date is senior to the December 28, 1973, calling priority date of Blue Lakes Trout. As can be seen in **Exhibit 205**, the gain to Blue Lakes Trout after 5 years of curtailment would be only 8 cfs compared to the 10 cfs presently provided by the IGWA plan alone. It would take more than 10 years of curtailment of all junior groundwater irrigation rights on the Eastern Snake Plain to achieve what has been already provided by the IGWA Plan alone. From this I would conclude that Blue Lakes Trout is mitigated in a more timely way by the IGWA and other plans than they would be by insisting on curtailment of junior groundwater rights.

Charles M. Brendecke, Ph.D., P.E.

Principal

Professional Summary

Dr. Brendecke has more than 38 years of diverse experience in hydrology, water rights, water resources engineering, and water resources planning and management. He has directed or contributed to several river-basin-scale water management studies involving development of hydrologic data, forecasts of future water demands, evaluation of potential water storage projects and creation of planning models to investigate effects of changes in water management. Several of these studies have involved in-stream flow and endangered species issues. His work as the project manager and lead expert in a variety of water rights proceedings includes historical consumptive use analysis, evaluation of surface/groundwater interactions, groundwater modeling, conjunctive administration of surface and groundwater rights, stream depletion analysis, development of protective terms and conditions, settlement negotiations, and expert witness testimony. He has been qualified as an expert witness in numerous venues, including the U.S. Supreme Court.

Professional Qualifications

Professional Engineer (PE), CO #17578, WY #6960, ID #11896

Education

Ph.D., Civil Engineering, Stanford University, 1979.

M.S., Civil Engineering, Stanford University, 1976.

B.S., Civil Engineering, University of Colorado, 1971.

Public Policy Mediation Training – CDR Associates, 2004.

Memberships

American Society of Civil Engineers

American Water Resources Association

American Geophysical Union

Languages

English

Location

Boulder, Colorado

Summary of Core Skills

Hydrology; Water rights; Water supply planning /management; Surface/ground water interaction; Reservoir system operations; computer modeling of surface and groundwater systems; Statistical hydrology; Negotiation/litigation support; Expert witness testimony.

Employment History

2007-present	Principal, AMEC's Earth & Environmental Division. Responsible for strategic practice area development, management of engineering studies, consultant on water rights and water resources planning projects, expert witness testimony.
1986-2007	Principal and President (1990 to 2007), Hydrosphere Resource Consultants, Inc. Responsible for management of engineering studies, company development and management, consultant on water rights and water resources planning projects.
1985-1986	Senior Project Engineer, Wright Water Engineers Inc. Responsible for engineering analysis and report preparation on water rights and hydrologic studies.
1979-1985	Assistant Professor of Civil Engineering, University of Colorado. Responsible for teaching and research in areas of water resources and systems analysis.
	Faculty Research Associate, Institute for Arctic and Alpine Research. Directed various research studies in alpine hydrology and meteorology.
	Consultant, U.S. Army Corps of Engineers; Western Environmental Analysts, Inc.; Dietze & Davis, P.C.; Copper Mountain, Inc.; Hydrologic Consulting Engineers, Inc.; Westfork Investments, Ltd.
1975-1979	Research Assistant and Lecturer, Stanford University. Responsible for conducting research and lecturing for undergraduate courses in civil engineering.
1973-1975	Design Engineer, Wright-McLaughlin Engineers, Inc. Performed engineering design of water supply and wastewater collection systems.

Publications and Presentations

Brendecke, C., 2004, "Toward Conjunctive Management of the Eastern Snake Plain Aquifer," poster presentation at Natural Resources Law Center 25th Summer Conference Groundwater in the West, June 16-18, Boulder, CO.

Brendecke, C., 2004, "Interstate Water Conflict: Compacts, Adjudications and Decrees," presentation at Water Policy Seminar: Freshwater Conflicts in the United States, May 19, Stanford, CA.

Brendecke, C., and R.D.Tenney, 2001, "Water Rights, Compact Entitlements and Endangered Fishes of the Yampa River Basin," Proceedings of the Annual Water Resources Conference, American Water Resources Association, November 12-15, Albuquerque, NM.

Brendecke, Charles M., 2001, "Conjunctive Management: Science or Fiction?" presentation to Idaho Water Users Association 18th Annual Water Law and Resource Issues Seminar, November 8-9, Boise, ID.

Tenney, Ray D., and C.M. Brendecke, 1998, "Planning for Water Development and Endangered Species Recovery in the Yampa River Basin." Proceedings of the Wetlands Engineering & River Restoration Conference, 1998, American Society of Civil Engineers, March 26th, 1998, Denver, CO.

Payton, E., C. Brendecke, B. Harding, E. Armbruster, T. McGuckin and C. Huntley. 1997. "Agricultural Water Conservation Planning & Pricing-Tools & Technologies." Proceedings of the Irrigation Association's 18th International Conference, Nov. 2, 1997, Nashville, TN.

Hydrosphere Resource Consultants, Inc., 1996, "Achieving Efficient Water Management: Agricultural Water Conservation Planning," workshop for U.S. Bureau of Reclamation staff, Dec. 16 - 18, Las Vegas, NV.

Brendecke, C., B. Harding and E. Payton, 1996, "PC-Based Decision Support Tools: Lessons from a Dozen Applications," Proceedings of the Fifth Water Resources Operations Management Workshop, Water Resources Planning and Management Division (ASCE). March 4, Arlington, Virginia.

Howe, C.W., M. Smith, L. Bennett, C. Brendecke, J. Flack, R. Hamm, R. Mann, L. Rozaklis, and K. Wunderlich, 1994, "The Value of Water Supply Reliability in Urban Water Systems," Journal of Environmental Economics and Management, 26, 19-30.

Brendecke, C., 1993, "Managing Snake River Operations for Juvenile Salmon Migration," Proceedings of the ASCE Water Resource Planning and Management Conference Division 20th Anniversary Conference, Seattle, Washington, May.

Brendecke, C., 1992, "The Hydrosphere Snake River Operations Model", 9th Annual Water Law and Resource Issues Seminar, Idaho Water Users Association, Boise, Idaho.

Brendecke, C., and B. Harding, 1990, "Logical Intransitivities and Other Administrative Nightmares: Can Models Help?," Proceedings of the 26th Annual AWRA Conference and Symposium, November 4-9, Denver, Colorado.

Harding, B., C. Brendecke, and R. Kerr, 1990, "Legal and Economic Disincentives in the Transfer of Models to Users," Proceedings of the 26th Annual AWRA Conference and Symposium, November 4-9, Denver, Colorado.

Brendecke, C., W. DeOreo, E. Payton, and L. Rozaklis, 1989, "Network Models of Water Rights and System Operations," Journal of the Water Resources Planning and Management Division (ASCE).

Rozaklis, L., E. Payton, C. Brendecke, and B. Harding, 1988, "Modeling Water Allocation Problems Under Complex Hydrologic and Institutional Settings," paper presented at the 24th Annual AWRA Conference and Symposium, November 8, Milwaukee, Wisconsin.

Brendecke, C., W. DeOreo, and L. Rozaklis, 1987, "Water Rights Analysis and System Operation Using Network Optimization Models," paper presented at the 14th Annual ASCE Water Resources Planning and Management Division Conference, March 16-18, Kansas City.

Brendecke, C., E. Payton, and R. Wheeler, 1987, "Network Optimization Models for Water Rights Analysis and System Operating Studies for the City of Boulder," Proceedings of the Colorado Water Engineering and Management Conference, February 17-18, Ft. Collins, Colorado.

Payton, E., and C. Brendecke, 1985, "Rainfall and Snowmelt Frequency in an Alpine Watershed," Proceedings of the 53rd Western Snow Conference, April 16-18, Boulder, Colorado, pp. 25-36.

Brendecke, C., and J. Sweeten, 1985, "A Simulation Model of Boulder's Alpine Water Supply," Proceedings of the 53rd Western Snow Conference, April 16-18, Boulder, Colorado, pp. 63-71.

James, E., and C. Brendecke, 1985, "The Redistribution and Sublimation Loss of Snowpack in an Alpine Watershed," Proceedings of the 53rd Western Snow Conference, April 16-18, Boulder, Colorado, pp.148-151.

Brendecke, C., D. Laiho, and D. Holden, 1985, "Comparison of Two Daily Streamflow Simulation Models of an Alpine Watershed," Journal of Hydrology, 77, pp. 171-186.

Brendecke, C., D. Laiho, and J. Sweeten, 1984, "Management of a Municipally Owned Alpine Watershed Using Continuous Simulation," Proceedings of the 11th International Symposium on Urban Hydrology, Hydraulics, and Sediment Control, July 23-26, Lexington, Kentucky, pp. 79-87.

Lewis, W., D. Crumpacker, J. Saunders, and C. Brendecke, 1984, Eutrophication and Land Use, Ecological Studies Vol. 46, Springer-Verlag, New York, 202 pp.

Brendecke, C., D. Laiho, and D. Holden, 1984, "A Comparative Evaluation of Streamflow Simulation Models in a Colorado Alpine and Subalpine Environment," Proceedings of the American Geophysical Union Front Range Branch Hydrology Days, April 24-26, Ft. Collins, Colorado, pp. 40-55.

Baker, F., and C. Brendecke, 1983, "Seepage from Oilfield Brine Disposal Ponds in Utah," Groundwater, 21(3), pp. 317-324.

Brendecke, C., and L. Ortolano, 1981, "Environmental Considerations in Corps Planning," Water Resources Bulletin, 17(2), pp. 248-254.

Detailed Skills by Representative Project

Municipal Water Storage Planning. Project manager for reconnaissance-level evaluation of potential water storage projects for major municipal water utility in southern Colorado.

Rio Grande Basin Groundwater Management. Testifying expert for Conejos Water Conservancy District regarding proposed methods for replacement of injurious depletions caused by groundwater pumping in Special Improvement District No. 1 of the Rio Grande Water Conservation District.

Spear T Ranch v. Knaub, et.al. Project manager for groundwater modeling analysis regarding effects of pumping on surface flows at points of diversion on Pumpkin Creek, Morrill County, Nebraska.

Conjunctive Administration of Ground Water Rights. Project manager and testifying expert for Idaho Ground Water Appropriators, Inc., in proceedings related to administration of surface and ground water rights. Work has involved oversight of regional ground water model development of the Eastern Snake Plain Aquifer, ground water modeling in support of management and mitigation plans, and analysis of historical water use data.

Rio Grande Basin Confined Aquifer Use Rules. Testifying expert for the State of Colorado regarding the use of the RGDSS ground water model in developing rules governing new withdrawals from the confined aquifer system of the San Luis Valley.

Columbia River Basin Reservoir Operations. Project manager for studies of the impact of modified reservoir operations on agricultural interests in the Kootenai River basin.

New Mexico Surface Water Studies. Project manager for a program of surface and ground water studies on the Pecos River in support of State initiatives.

Interstate Compact Litigation. Expert witness in litigation between Kansas and Colorado regarding Arkansas River water uses.

Interstate Compact Litigation. Project manager and expert witness in litigation between Nebraska and Wyoming regarding storage project operations and water deliveries to agricultural users on the North Platte River.

Snake River Water Rights. Project manager for studies of historical irrigation practices and modeling of surface/ground water interaction on the eastern Snake River Plain, Idaho.

Rio Grande Decision Support System. Quality assurance officer on development of comprehensive surface water model of the Rio Grande River basin in Colorado.

Agricultural Water Conservation. Project manager for development of a water conservation guidebook for use by irrigation districts. The guidebook describes planning approaches and methods for evaluating specific conservation measures.

Colorado City Metropolitan District. Project manager for water supply planning studies and water rights litigation support for municipal water provider.

Gunnison Basin Planning Model. Project manager for development of an interactive PC-based computer model of the Gunnison River basin. The model uses a network solution algorithm and incorporates a Windows™-based interface.

Boulder Creek Water Rights. Lead expert in a variety of water rights proceedings for the City of Boulder related to applications, changes, and transfers of agricultural rights in the Boulder Creek basin.

Yampa River Basin Planning Studies. Project manager for comprehensive water supply planning study that included demand forecasting, development of a basin computer model, and evaluation of potential water storage project operations.

Snake River Basin Water Supply Study. Project manager for a comprehensive review of water use in the Snake River basin and computer model evaluation of potential water management strategies, including agricultural water conservation, to enhance anadromous fisheries.

Columbus Ditch Transfer. Performed engineering analysis of the historical use of irrigation rights located on the Blue River, determining the portion of consumptive use made possible by Green Mountain Reservoir releases.

Muddy Creek Water Rights. Analyzed the historical consumptive use of the irrigation water rights associated with the Gary Hill Ranch on Muddy Creek, in support of water rights acquisition associated with the construction of Muddy Creek Reservoir.

Summit County Small Reservoir Study. Project manager for a Blue River basin water management study involving development of a hydrologic model and evaluation of new storage facilities for instream flow maintenance.

Gunnison Basin Planning Study. Project manager for development of a detailed hydrology and water rights model of the 8000 square mile Gunnison River basin as part of a comprehensive river basin planning study.

Windy Gap Delivery Study. Developed detailed computer models of Colorado-Big Thompson Project operations to support analysis of the yields of the Windy Gap Project, which shares common facilities.

Superconducting Super Collider Water Supply. Determined industrial water needs and developed the water supply strategy for a proposed Department of Energy physics research facility.

Boulder Raw Water Master Plan. Prepared a comprehensive report concerning water rights holdings and water supply system operating policies for a Front Range municipality of 100,000 persons.

Standley Lake Pollutant Loading. Developed hydrologic and pollutant loading model of Standley Lake to assess relative effects of non-point sources and a proposed effluent exchange by a major industrial water user.

Pecos River Compact. Consultant to the Special Master of the U.S. Supreme Court on technical issues in a lawsuit between Texas and New Mexico concerning river depletions and water deliveries.

Rocky Ford Ditch Transfer. Performed engineering analyses of historic irrigation practices and Arkansas River depletions associated with a 4100-acre tract in southeastern Colorado.

Buena Vista Water Rights. Analysis of the historic use of irrigation water rights and development of engineering data supporting their transfer to municipal use.

Dillon Clean Lakes Study. Development of a comprehensive hydrologic monitoring network to determine lake inflow patterns and non-point source pollutant loadings from various land uses.

Restoration of West Tenmile Creek. Performed hydrologic and hydraulic analysis and design of comprehensive stream habitat improvements at Copper Mountain ski area.

Expert Testimony

Kansas v. Colorado, No. 105 Original

Deposition: April 25-26, 2002

Testimony: December 9-10, 2002; January 16, 2003.

04CW24 Colorado Water Division 3 "Confined Aquifer Use Rules"

Deposition: December 21, 2005

Testimony: February 14-15 2006

June, 2008 (Costs Hearing)

Water Delivery Call by Blue Lakes Trout Co. and Clear Springs Foods, Inc., before Idaho Department of Water Resources

Deposition: November 12-13, 2007

Testimony: December 11-12, 2007

Water Delivery Call by the Surface Water Coalition, before Idaho Department of Water Resources

Deposition: October 24, 2007

Testimony: February 1, 2008

Water Delivery Call by the A&B Irrigation District, before Idaho Department of Water Resources

Deposition: September 15, 2008

07CW52 Colorado Water Division 3 "Sub-district 1 Plan of Water Management"

Testimony: October 6, 2009

Water Delivery Call by Clear Springs Foods, Inc., before Idaho Department of Water Resources

Deposition: October 13, 2009

ESPA - Selected Water Delivery Organizations
Irrigation Entities
Blue Lakes
Potat Company
Exhibit 201
Source: EWR

EXHIBIT 201

Exhibit 202 Current Mitigation Requirements for Blue Lakes Trout Company

Entity	Acres	to Reach (cfs)	to Spring (cfs)
North Snake Ground Water District	23,397	25.59	5.1
Magic Valley Ground Water District	29,659	17.47	3.5
Carey Ground Water District	1,970	0.97	0.2
A&B Irrigation District	1,892	1.17	0.2
Southwest Irrigation District	13,053	9.80	2.0
Goose Creek Irrigation District	588	0.40	0.1
Not in Groundwater Districts	3,320	3.91	0.8
Total	**73,879**	**59.3**	**11.9**

Source: Ground Water User's Joint Mitigation Plan - per May 22, 2009 email from Director Tuthill.

EXHIBIT 202

EXHIBIT 203

Exhibit 204 Summary of Mitigation Benefits

Benefits To Reach (cfs)						
Entity	Direct Delivery from Alpheus Creek (36-2603C)	Conversions	CREP	SRF Over-the-Rim	Total	Source
North Valley Snake, Magic Valley, & Carey Ground Water Districts	10	12.87 (1)	4.99	1.65 (2)	**29.51**	Ground Water Users' Joint Mitigation Plan for 2009 (Blue Lakes) July 2, 2009
A&B Irrigation District		2	0.06		**2.06**	A&B Irrigation District's Rule 43 Mitigation Plan August 10, 2009
Southwest & Goose Creek IDs & non-district landowners		11.27			**11.27**	Southwest Irrigation District & Goose Creek Irrigation District - Mitigation Plan IDWR Oct 20, 2009
Dairymen						
Food Processors						
Total	**10.00**	**26.14**	**5.05**	**1.65**	**42.84**	
Benefits To Blue Lakes Trout Company (cfs)						
North Valley Snake, Magic Valley, & Carey Ground Water Districts	10	2.6	1.0	0.3	**13.90**	
A&B Irrigation District		0.4	0.01		**0.41**	
Southwest & Goose Creek IDs & non-district landowners		2.3			**2.25**	
Dairymen						
Food Processors						
Total	**10.00**	**5.23**	**1.01**	**0.33**	**16.57**	

(1) Pro-rated to reflect conversions extant in 2009.
(2) Pro-rated to reflect most recent plan formulation.

EXHIBIT 204

EXHIBIT 205
Transient Benefits to Blue Lakes Trout Company from curtailment of Junior Ground Water Rights.

Blue Lakes

Gain to Devil's Washbowl-Buhl Subreach from ESPA-wide Curtailment in cubic feet per second

	Curtailment Date				
	1870	1949	1961	1973	1985
Total Acres Curtailed	1,102,000	989,700	664,300	372,000	74,200
Transient Subreach Gain (cfs)					
After 1 year	51	49	36	22	3
After 5 years	108	97	65	39	6
After 10 years	154	134	88	51	9
After 50 years	261	224	141	79	15
After 100 years	286	247	154	85	17
Steady State Subreach Gain (cfs)	298	257	160	88	18

Projected Gain to Blue Lakes Spring (cubic feet per second)

	Curtailment Date				
	1870	1949	1961	1973	1985
Total Acres Curtailed	1,102,000	989,700	664,300	372,000	74,200
Transient Spring Gain (cfs)					
After 1 year	10	10	7	4	1
After 5 years	22	19	13	8	1
After 10 years	31	27	18	10	2
After 50 years	52	45	28	16	3
After 100 years	57	49	31	17	3
Steady State Spring Gain (cfs)	60	51	32	18	4

EXHIBIT B

Randall C. Budge, ISB #1949
Candice M. McHugh, ISB #5908
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ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF THE IDAHO GROUND W ATER APPROPRIATORS, INC.' S MITIGATION PLAN FOR CONVERSIONS, DRY-UPS, AND RECHARGE	Docket No.: CM-MP-2009-06 **IGWA'S REQUEST FOR MITIGATION CREDIT FOR BLUE LAKES' DELIVERY CALL**

COME NOW THE IDAHO GROUND WATER APPROPRIATORS, INC. ("IGWA"), through counsel and on behalf of its Ground Water District Members and other water user members for and on behalf of their respective members and those ground water users who are non-member participants in their mitigation activities and hereby submit this *Request for Mitigation Credit for the Blue Lakes' Delivery Call* under the *Mitigation Plan for Conversions, Dry-Ups and Recharge* ("Mitigation Plan") for use in response to the material injury finding to Blue Lakes Trout Farm, Inc. ("Blue Lakes") water right no. 36-07427 and to any additional or future finding of material injury to Blue Lakes' water rights.

On May 19, 2005, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") issued an order ("May 2005 Order") in response to a delivery call filed by Blue Lakes. The May 2005 Order found material injury to Blue Lakes' water right no. 36-07427 bearing a priority date of December 28, 1973.

On July 2, 2009, the Ground Water Users filed the *Ground Water Users' Joint Mitigation Plan* ("Joint Mitigation Plan") for Blue Lakes under Rule 43 of the Rules for the Conjunctive Administration of Surface and Ground Water Resources, IDAPA 37.03.11. On January 11, 2010, the Ground Water Users filed a *Groundwater Districts' Statement Regarding Mitigation Activities under Mitigation Plan for Blue Lakes* ("Statement") indicating that the direct delivery of 10.0 cfs of water to Blue Lakes fully mitigates Blue Lakes' injury and as such, the Ground Water Users only intend to pursue the direct delivery component to address the material injury to Blue Lakes under their Joint Mitigation Plan and further stated:

> As such, while accounting for the CREP and conversion acres that exist as part of other mitigation activities and plans will be ongoing, continuing CREP and conversion acres to compensate Blue Lakes for its material injury is unnecessary and would obligate the Ground Water Districts to more mitigation than is required. Therefore, Ground Water Districts do not intend to continue, under this *Mitigation Plan,* to perform any CREP or conversion activities. However, approval of the use of these mitigation activities is still being sought in order to allow for their use, if any increased mitigation obligation to Blue Lakes should occur under a changed or future order.

Statement at 2. On May 7, 2010, the Director of the Department approved the Joint Mitigation Plan for Blue Lakes. On May 14, 2010, the Director of the Department approved the Mitigation Plan filed by IGWA and stated that "IGWA's *Mitigation Plan for Conversions, Dry-Ups and Recharge* is GRANTED. If mitigation credit is sought by IGWA, the Director shall

determine the appropriate credit, if any, to provide." Order at 4. (emphasis original). This Request for Mitigation Credit for Blue Lakes' Delivery Call is pursuant to the May 14, 2010, Order approving IGWA's Mitigation Plan.

The Ground Water Users have been providing mitigation water to Blue Lakes in the form of direct delivery of water since April, 2008, plus improved spring discharge through conversion, CREP and recharge activities since 2005. The direct delivery of water to Blue Lakes is a simple determination and the Ground Water Users have been given credit for that activity in the May 7, 2010 Order approving their Joint Mitigation Plan for Blue Lakes. However, no credit has yet been sought, nor given, for other mitigation activities that have increased the spring water supply to Blue Lakes.

On June 10, 2010, the Ground Water Users requested a stay from the District Court in *Clear Springs v. Idaho Ground Water Appropriators, Inc.*, Civil Case No. 2008-444 (Fifth Jud. Dist., Gooding County), because the Director agreed to re-evaluate material injury to Blue Lakes' water right no. 36-7210 bearing a priority date of 1971. In light of the Ground Water Users' request for stay pending before the District Court and in order to avoid possible curtailment upon an increased finding of material injury, the Ground Water Users are now requesting mitigation credit for their conversion, CREP and recharge activities that have increased the water supply to Blue Lakes.

Below is a table that summarizes, to the best of our knowledge, the benefit to Blue Lakes from previous and ongoing mitigation activities of the Ground Water Users and other parties.

Estimated* Gains to Blue Lakes Spring

From Existing Mitigation Activities

Mitigation Plan/Component	Spring Gain (cfs)
Delivery of Pristine Springs water right	10
Ongoing Conversions**	2.5
CREP	1.0
Managed Recharge***	1.3
Snake River Farm conversions	0.4
SWID/Goose Cr. Blue Lakes Plan	
J Canal conversions	0.9
Cassia Pipeline	1.4
Idaho Dairymen	Not known
Processors	Not known

* From existing information (previous Department model runs, 2009 recharge data, Department water administration records). Some estimates may need slight adjustment for trim line differences.
** Prorated to reflect 2010 acreage
*** Based on 2009 recharge of 13,687 acre-feet

The Ground Water Users request that the Director consider the above benefits to Blue Lakes and consider the entire water supply that is provided through these activities. The information contained in the above table comes from Department modeling of mitigation plans for North Snake Ground Water, Magic Valley Ground Water District and South West Irrigation District and recharge information presented to the Eastern Snake Hydrologic Modeling Committee. See accompanying *Affidavit of Charles M. Brendecke.*

Specifically, the Ground Water Users request credit for their actions in addition to the already approved 10 cfs of direct delivery to Blue Lakes that have resulted in an estimated 5.2 cfs of gain to Blue Lakes spring, the spring that the Director has determined supplies water to Blue Lakes. Because this Mitigation Plan has already been approved, credit for the activities set

forth in the table above should be given and the Director should approve mitigation credit for IGWA's activities and use that credit to reduce the direct delivery obligation to Blue Lakes and use it to reduce or eliminate any additional or future mitigation obligations of the Ground Water Users in the ongoing administration of the Blue Lakes' Delivery Call.

A courtesy copy of this document is being sent to Mr. Steenson, counsel for Blue Lakes.

Submitted this 18th day of June, 2010.

Randall C. Budge
Candice M. McHugh