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DEPARTMENT OF
WATER RESOURCES

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Blue Lakes Trout Farm, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS 36-02356A, 36-07210 AND 36-07427	MOTION FOR ORDER AUTHORIZING LIMITED DISCOVERY

COMES NOW Blue Lakes Trout Farm, Inc. (hereinafter "Blue Lakes"), by and through its counsel Ringert Clark, Chartered, and, pursuant to Rule 521 of the Department's Rules of Procedure, hereby moves for an order authorizing limited discovery in the above-entitled matter. Blue Lakes requests that the Department disclose and produce all documents and other information relied upon or considered for each of the findings in the *Order* issued on May 19, 2005 in the above-entitled action that are related to or that implicate IDWR's groundwater model, and identify the employees and/or contractors and consultants that gathered or developed that information. Blue Lakes further requests a minimum six month period following the requested disclosures for the parties to conduct discovery related to those disclosures and the basis for the Director's order.

Rule 521 provides as follows:

No party before the agency is entitled to engage in discovery unless the party moves for an order authorizing discovery and the agency issues an order authorizing the requested discovery, or upon agreement of all parties to the discovery that discovery may be conducted. The presiding officer shall provide a schedule for discovery in the order authorizing discovery, but the order authorizing and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure . . . .

IDAPA 37.01.01.521. Rule 520 provides various methods of discovery including depositions, production requests, written interrogatories, and requests for admission. IDAPA 37.01.01.520.

A. Discovery

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Sweitzer v. Dean*, 118 Idaho 568, 573, 798 P.2d 27, 32 (1990). There can be no opportunity for a meaningful hearing in this matter without the opportunity to conduct the requested discovery. The Director consulted and relied upon substantial information that is not apparent from the Director's order. There has never been a hearing in this matter. The parties have not yet presented evidence or argument. Nevertheless, the Director has issued a complex order that purports to provide precise quantifications of apparently complicated phenomena. That order is based upon a background of facts and opinions gathered and developed by the Director and the Department through its own employees and contractors. Blue Lakes and the other parties to this matter are entitled to disclosures and a period of discovery regarding the background information that forms the basis for the Director's *Order*.

The Director's *Order* in the above-entitled matter relies substantially upon a ground water model developed by the Department.

> The Department uses a calibrated ground water model to determine the effects on the ESPA and hydraulically-connected reaches of the Snake River and its

> tributaries from pumping a single well in the ESPA, from pumping selected groups of wells, and from surface water uses on lands above the ESPA.

Order, Finding of Fact 12. The Director relied upon the model because he found it provided "the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries." *Order*, Finding of Fact 20.

No meaningful hearing can be conducted until Blue Lakes and the other parties to this matter are given a chance to discover and review the underlying assumptions, data, and processes (including the ground water model) that resulted in the Director's order. Blue Lakes requests that the Department and the Director disclose the information relied upon and consulted by the Director for the findings and conclusions in the *Order* and identify the employees and contractors/consultants that assisted in the gathering and development of that information. Blue Lakes further requests that the Director authorize discovery through any method specified in Rule 520 regarding the information disclosed. The information requested is a crucial first step in the discovery process that must precede any meaningful hearing in this case. The disclosures and discovery requested in this motion should take place before any other proceedings and not just at some point prior to the hearing.

B. Scheduling

On July 29, 2005, the Director issued a Notice of Status Conference scheduling a status conference in this matter for August 16, 2005. The notice provides that the parties shall:

> (1) identify the issues they anticipate raising at the hearing to be conducted in this matter; (2) present proposed prehearing schedules identifying time limits to file and hear motions, complete any authorized discovery, simplify issues, identify

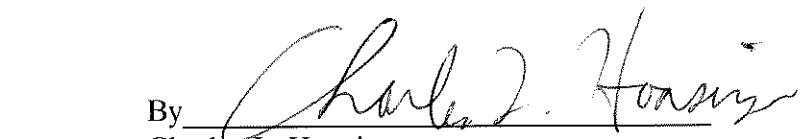
> witnesses, exchange exhibits, hold a final prehearing conference, and address other matters as appropriate; (3) identify dates and an estimated length of time for the hearing; (4) address the potential for utilizing evidence taken at hearing in multiple related proceedings; (5) address ways to avoid unnecessary proof and submission of cumulative evidence; and (6) such other matters as will expedite the disposition of the case.

Blue Lakes set forth the issues that can be anticipated at this time in its June 3, 2005 *Petition Requesting: Hearing on May 19, 2005 Order, Independent Hearing Officer, and Discovery* on file herein. Blue Lakes cannot anticipate the issues that may become apparent following the discovery that is requested by this motion. Only after the requested discovery has occurred will Blue Lakes be in a position to identify those issues as requested in number one above. With regard to number two and three above, Blue Lakes is not in a position to meaningfully determine an appropriate schedule or time limits until the requested discovery has been completed. Blue Lakes is similarly unable to address the relationship between this and other matters as requested in numbers four and five without the requested discovery. The parties to this matter are entitled to a period of discovery directed to the Department, its employees, and its contractors to examine the basis for the *Order*. Until the parties have had an opportunity to conduct that discovery, there can be no other meaningful proceedings in this matter.

Blue Lakes respectfully requests that the Department disclose the information and authorize the discovery requested in this motion. Blue Lakes further requests a minimum six-month period to conduct the requested discovery after which the issues raised in the *Notice of Status Conference* may be more meaningfully addressed.

DATED This 15th day of August, 2005.

RINGERT CLARK, CHARTERED

By 
Charles L. Honsinger
Attorneys for Blue Lakes Trout Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2005, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Jeffrey C. Fereday Michael C. Creamer GIVENS PURSLEY P.O. Box 2720 Boise, Idaho 83701-2720 (208) 388-1200	( ) U.S. Mail, Postage Prepaid (X) Facsimile ( ) E-mail
Michael Gilmore ATTORNEY GENERAL'S OFFICE P.O. Box 83720 Boise, Idaho 83720-0010 Fax: (208) 334-2830	( ) U.S. Mail, Postage Prepaid (X) Facsimile ( ) E-mail
Scott Cambell MOFFATT THOMAS P.O. Box 829 Boise, Idaho 83701 Fax: (208) 385-5384	( ) U.S. Mail, Postage Prepaid (X) Facsimile ( ) E-mail
James Tucker IDAHO POWER COMPANY 1221 W. Idaho Street Boise, Idaho 83702 Fax: (208)388-6935	( ) U.S. Mail, Postage Prepaid (X) Facsimile ( ) E-mail
James Lochhead Adam Devoe BROWNSTEIN HYATT 410 17th Street, 22nd Floor Denver, CO 80202 Fax: (303)223-1111	( ) U.S. Mail, Postage Prepaid (X) Facsimile ( ) E-mail

Charles L. Honsinger