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Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427	**PETITION REQUESTING: HEARING MAY 19, 2005 ORDER, INDEPENDENT HEARING OFFICER AND DISCOVERY**

Blue Lakes Trout Farm, Inc. (Blue Lakes), by and through its counsel, files this Petition Requesting: (1) a hearing on the May 19, 2005 Order (Order) in the above-captioned matter; (2) appointment of an independent hearing officer, and (3) an order authorizing Blue Lakes to conduct discovery related to the Order.

This Petition states the initial grounds Blue Lakes has identified to date for contesting the actions of the Order. Blue Lakes reserves its rights to amend these grounds, and present additional grounds, for contesting the Order through the customary pre-hearing opportunities to submit statements of issues, and to present argument and submit briefing on all issues that are raised during hearing. Given the length and complexity of the Order, these opportunities to identify and refine

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issues during the course of this proceeding are essential to adequate development of the record and due process

Blue Lakes reserves the right to file with a district court an original action or actions to contest the determinations and actions of the Order.

Relief Requested

The Order should be rescinded and the Director should order the curtailment of all ESPA water rights that are junior to Blue Lakes' water right no. 36-07210. This curtailment should continue until there is a continuous flow of 197.06 cfs to Blue Lakes' diversion.

Initial Grounds For Contesting the Order

A. Eastern Snake Plain Aquifer Hydrology and the Department's Ground Water Model

Findings of Fact (FOF) 1 through 20 contain assertions regarding past and present hydraulic conditions of the Eastern Snake Plain Aquifer (ESPA) and connected spring and surface water sources, and "the Department's ground water model." Blue Lakes has insufficient information at this time to address the accuracy or validity of all of these assertions, or their relevance to Blue Lakes' demand for distribution of water pursuant to chapter 6, Title 42, Idaho Code. Blue Lakes reserves the right to contest these assertions during the course of this administrative proceeding.

Blue Lakes acknowledges that the ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources, including Alpheus Creek (FOF 7) It has been established as a matter of law through the Snake River Basin Adjudication (SRBA) that all ground water rights and surface water rights in Basin 36 are to be administered as connected sources in accordance with the prior appropriation doctrine. *Partial Decree For Connected Sources in Basin*

36. Blue Lakes acknowledges the statement in FOF 11 that all ESPA ground water depletions cause equivalent reductions in the flows of the Snake River and the springs.

Blue Lakes contests the assertion in FOF 19 that: "The Department is implementing full conjunctive administration of rights to the use of hydraulically-connected surface and ground waters within the [ESPA] consistent with Idaho law and available information." Blue Lakes believes that the Director is improperly using the Department's ground water model referenced in FOFs 19 and 20 to justify non-administration of many out-of-priority, junior ESPA ground water diversions in contravention of the SRBA's court's mandate, Blue Lakes' water rights, and Idaho constitutional, statutory and common law.

One clear error in the Director's use of the model is reliance on the 10% uncertainty in the model's results as a basis for excluding from administration junior ESPA ground water rights that the model predicts would have a 10% or less effect on spring flows. Obviously, such uncertainty is equally likely to result in an overstatement or an understatement of the effects of ESPA ground water withdrawals on spring flows. Therefore, the uncertainty should not be used as a basis to include or exclude any water rights from administration.

B. The Director's Reevaluation and Reduction of Blue Lakes' Water Rights is Contrary to Idaho Law

Blue Lakes has perfected and verified its water rights according the appropriation and adjudication procedures of Title 42, Idaho Code. The Department issued Blue Lakes' licenses and recommended the water rights as licensed for decree by the SRBA court. The SRBA court issued partial decrees as recommended by the Department. The water rights are recognized and protected under Idaho law as valuable property. The rates of diversion established by these water rights <u>are</u>

quantity entitlements. The Director has no authority or basis to question, reevaluate or redetermine any of the elements of Blue Lakes' water rights, yet this is precisely what the Director does in the Order.

The Director fails to recognize that the decreed quantities of Blue Lakes' water rights define Blue Lakes' entitlement to the flows of Alpheus Creek and are binding upon the Director for purposes of distribution of water pursuant to chapter 6, Title 42, Idaho Code. The Director reduces the quantities of Blue Lakes' water right nos. 36-07210 and 36-07427 that the Director will recognize based on his post-adjudication reexamination of historic, intermittent Alpheus Creek flow data and unsupported assumptions about Blue Lakes' pre-adjudication diversion and use of water. As a result of this impermissible redetermination of Blue Lakes' water rights, the Director concludes that Blue Lakes water right no. 36-07210 is filled, when in fact it is not filled and was not filled during the majority of 2004, and that Blue Lakes is not entitled to delivery of the full decreed quantities of water right nos. 36-07210 and 36-07427. There is no valid legal authority which supports the Director's refusal to recognize Blue Lakes' water rights as decreed for purposes of administration.

Blue Lakes water rights, as licensed and decreed, entitle it to divert 197.06 cfs. The Director has no authority, and no factual basis, to determine that Blue Lakes is entitled to divert no more than 184.7 cfs when Pristine Springs is diverting 25.3 cfs pursuant to water right no. 36-02603C, or to recognize only 184.7 cfs of Blue Lakes' water rights for purposes of distributing water pursuant to chapter 6, Title 42, Idaho Code. There was no such determination by the Department in licensing Blue Lakes' water rights or recommending Blue Lakes' rights to the SRBA court for decree, and no such finding by the SRBA court.

Blue Lakes water rights, as licensed and decreed, entitle year-round diversion of 197.06 cfs The Director has no authority to now determine that Blue Lakes is entitled to a lesser quantity during portions of the year based on assumed "seasonal" or "intra-year variations" in spring flows at the time Blue Lakes appropriated its water rights. Even if he had such authority, the Director has no factual basis for such a determination, as stated in FOF 49: "There are no known measurements, nor any other means, for reasonably determining the intra-year variations in the discharges form the springs comprising the source for these water rights on the dates of appropriation of these water rights."

The Director has no authority to use "seasonal highs" or "the maximum average of daily flows" during a given month to determine that Blue Lakes' water right no. 36-07210 for year-round diversion of 45 cfs is filled. Blue Lakes is entitled to a continuous flow of 197.06 cfs. None of the minimum daily flows available for Blue Lakes during 2004 were sufficient to fill water right no. 36-07210. At the low point in 2004, Blue Lakes received only 114.95 cfs. This shortage completely deprived Blue Lakes of the use of water right 36-07247, and provided only 15.12 cfs of Blue Lakes 45 cfs for water right no. 36-07210. The Director's conclusion that the water supply has been sufficient to continuously fill water right no.36-07210 is completely erroneous, absurd, and directly contradicted by the facts recited in the Order.

The Director's treatment of Blue Lakes' water rights and its response to Blue Lakes' delivery demand are contrary to his treatment of other, similarly situated water users seeking distribution of water. In response to the "water delivery call" by Clear Springs Foods, Inc. (Clear Springs) in 2002, the Director has curtailed and continues to curtail the diversion of water by Clear Lakes Trout Company Inc. (Clear Lakes) to supply Clear Springs a continuous supply of 200 cfs. The Director

has not reevaluated Clear Springs' water rights or past water diversions, or imputed to Clear Springs' rights any limitation based on known or assumed "seasonal" or "intra-year" water supply variations. The Director's reevaluation and limitation of Blue Lakes' water rights for purposes of administration constitutes selective, discriminatory, and unequal application and administration of the law in contravention of Blue Lakes' water rights, the Director's duties and Idaho law.

While the Director reexamines and reduces Blue Lakes' water rights for purposes of administration, the Director fails to reexamine the past or present beneficial use and water rights of junior ESPA water user whose diversions diminish Blue Lakes' water supply. This failure constitutes selective, discriminatory, and unequal application and administration of the law in contravention of Blue Lakes water rights, the Director's duties and Idaho law.

C. The Order Does Not Provide For the Administration of Water Rights as Required by Idaho Law

The Order does not provide for the efficient administration of water rights or the distribution of water to Blue Lakes as required by the Idaho constitution and Title 42, Idaho Code. Idaho Const. art. XV, § 3; I.C. § 42-106; I.C. § 42-237A(g); I.C. § 42-602; I.C. § 42-607; *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). The Director briefly recites a few of these foundational authorities, but does not follow them. Instead, the Director relies extensively upon the Department's Conjunctive Management Rules (quoted at length at pages 20-25 of the Order and referenced throughout). The Director fails to acknowledge that the Idaho Supreme Court and the SRBA District Court have observed that the Conjunctive Management rules do not provide for administration of water rights on the basis of prior appropriation as required. *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 568 P.2d 568 (1997); *Basin-Wide Issue 5. Order*

on Cross Motions for Summary Judgment 26, 29-30. The Director has failed to heed these warnings and review and modify the rules to conform to the prior appropriation doctrine and administration as required under Idaho law. As a consequence, the Conjunctive Management Rules, as written and as applied by the Director in the Order, violate Blue Lakes' water rights and the Idaho constitutional, statutory and common law governing the Department's duty to distribute water rights in a water district.

Applying the conjunctive management rules, the Director applies different standards to the administration of junior ground water rights than the Director applies to the administration of surface water rights. (See FOF 44.) The Director's application of these different standards favors and protects junior ground water users from curtailment that would be subject to curtailment under the standards the Director applies to the administration of surface water rights. This unequal application and administration of the law contravenes Blue Lakes water rights, the Director's duties, and Idaho law.

The Water Master for Water District 130 is required by chapter 6, Title 42 of the Idaho Code, specifically I.C. § 42-607, to curtail junior water rights in times of shortage in order to supply water to senior water rights. As stated by SRBA Judge Burdick:

> Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the *Musser* case. Instead, IDWR should look to the respective decrees on a common source and if necessary, curtail junior rights or make other delivery adjustments to satisfy rights in a manner that is not inconsistent with the prior appropriation doctrine.

Basin-Wide Issue 5: Order on Cross Motions for Summary Judgment 31.

Under the Director's application of the Conjunctive Management Rules, the Water Master will not curtail junior ground water rights unless the senior has made a "water delivery call." The Rules require that the call to meet certain requirements (see FOF 43), and allow the Director to determine whether the senior water right owner is suffering "material injury,"as a predicate to administration of junior water rights. One of the key components of the Director's material injury analysis is his reevaluation of the senior water right, with no corresponding reevaluation of the junior ground water user's right.

Blue Lakes' March 22, 2005 letter demands that the Water Master perform her duties to administer water rights as required by I.C. § 42-607. Blue Lakes' letter does not invoke or refer to the Conjunctive Management Rules. In order to apply the rules, the Director improperly construed Blue Lakes' demand as a water delivery call. The Director relies upon the Conjunctive Management Rules to make the following findings and conclusions, among others, that are contrary to Blue Lakes' water rights, the Director's duties to administer water rights, and Idaho law:

(1) as part of his material injury analysis, the Director reevaluates and reduces the quantities of Blue Lakes' water rights for administration purposes as described above;

(2) the Director limits the number of junior ground water rights that are subject to curtailment to distribute water to Blue Lakes, as described above;

(3) the Director prescribes mitigation over a five-year period that will be inadequate to satisfy or mitigate for Blue Lakes' water shortage as an alternative to distribution of water as required by chapter 6, Title 42, Idaho Code without Blue Lakes' acceptance of such mitigation;

(4) the Director allows junior ground water users to continue to deplete Blue Lakes' water supply while Blue Lakes continues to experience shortages, in contravention of the Idaho constitution, I.C. § 42-607 and I.C. § 42-237A(g), and other provisions of Idaho law.

D. Mitigation

The Director cannot prescribe mitigation as an alternative to enforcement and protection of Blue Lakes' water rights through curtailment of ESPA water rights that are junior to Blue Lakes' water right no. 36-07210.

The Director cannot approve mitigation plans to address Blue Lakes' water shortage unless Blue Lakes agrees to accept such mitigation as an alternative to curtailment of ESPA water rights that are junior to Blue Lakes' water right no. 36-07210.

Mitigation must be provided immediately and must offset the entirety of the depletions to the ESPA caused by water rights that are junior to Blue Lakes' water right no. 36-07210, or increase the flow of Alpheus Creek without diminishing its water quality to provide a continuous flow of 197.06 cfs to Blue Lakes' diversion in a time frame that is acceptable to Blue Lakes, or provide another form of mitigation that is acceptable to Blue Lakes.

The mitigation prescribed by the Director in the Order at pages 28-30 does not meet any of the aforementioned criteria, does not adequately address Blue Lakes' water shortage, and is unacceptable to Blue Lakes.

Independent Hearing Officer

Blue Lakes requests that the Director appoint an independent hearing officer to preside over these proceedings as provided in I.C. § 42-1701A(2). Blue Lakes is entitled to a hearing conducted by a hearing officer that is objective and unbiased, and will hear the evidence and arguments with

an open mind The Director cannot be objective or unbiased, or have an open mind, in a hearing in which his own findings of fact, conclusions of law, and actions are contested. The Director's extensive and direct personal involvement in the development of the factual and legal basis for his Order precludes his objective review of the evidence and arguments that will be presented. The independence and objectivity required for this hearing cannot be provided by Department employees. Blue Lakes therefore requests appointment of a sufficiently qualified hearing officer that is not an employee of the Department and has no contractual relationship with the Department other than as a hearing officer.

Discovery

The Order contains and refers to highly technical information, makes complex findings of fact and conclusions of law, and provides prescriptions for mitigation plans. Much of the information the Director relies upon is not contained in the Order. Blue Lakes has numerous questions about the Director's analysis and opinions, as well as information, analysis, and opinions of others that the Director used in preparing the Order. For these reasons, Blue Lakes requests an order authorizing Blue Lakes to conduct discovery (interrogatories, requests for production, requests for admission, and depositions) related to the contents and basis for the Order, from all persons and entities that participated in preparing the Order, or from whom information, analysis, or opinions were obtained in preparing the Order.

Dated this 3rd day of June, 2005.

RINGERT CLARK, CHARTERED

By: _____
Daniel V. Steenson
Ringert Clark Chartered
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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