RECEIVED
JUN 26 2006
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 RIGHT NOS. 36-02356A, 36-07210, AND 36-07427 and IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHT NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	**BLUE LAKES TROUT FARM, INC.'S RESPONSE TO IGWA'S POST-HEARING MEMORANDUM**

COMES NOW Blue Lakes Trout Farm, Inc. ("Blue Lakes"), by and through its counsel, Ringert Clark, Chartered, and hereby submits this *Response* to *IGWA's Post-Hearing Memorandum Regarding Director's Order Approving IGWA's 2005 Substitute Curtailments* that was filed with the Director on June 19, 2006.

ORIGINAL

Introduction

The limited purpose of the June 5, 2006 hearing on IGWA's *Petition for Reconsideration of Order Approving IGWA's 2005 Substitute Curtailments* ("*Petition*") was for the Director to receive testimony and evidence to determine whether he should amend his April 29, 2006 approval *Order* to give IGWA more "credit" for mitigation activities by its members during 2005. Exhibit A, Transcript of June 5, 2006 Hearing ("Tr."), p. 7, ln. 18 - p. 8, ln. 4. The scope of the hearing did not include any of the issues raised by the parties' respective petitions for reconsideration of the Director's 2005 orders in response to the demands for delivery of water submitted by Blue Lakes or Clear Springs Foods, Inc. ("Clear Springs"), or *Blue Lakes' Protest to Ground Water Districts Plan for Providing Replacement Water*. Blue Lakes has reserved, and continues to reserve, all of its previously stated objections and protests to the Director's May 19, 2005 *Order*, and to IGWA's replacement water plan. Blue Lakes' *Objection to Motion for Stay*; Tr. p. 13, lns. 6-19.

Blue Lakes' participation in the hearing and its arguments herein do not constitute acceptance of the mitigation prescribed by the Director as an alternative to curtailment of hydraulically connected water rights that are junior to Blue Lakes' November 17, 1971 priority water right no. 36-07210 and its December 28, 1973 priority water right no. 36-07427, as required by the Idaho Constitution and Chapter 6, Title 42 of the Idaho Code. Blue Lakes' water shortage under these two water rights is approximately 90 cfs. Tr., p. 75, ln. 4 - . 76, ln. 1. No hydraulically-connected junior water rights can lawfully divert water until Blue Lakes' water rights are satisfied or Blue Lakes has agreed to some other remedy.

The Director has a clear legal duty to distribute water in accordance with priority. The Director cannot avoid this duty or choose the alternate course of administration by mitigation based upon the Conjunctive Management Rules or the underlying concepts which the Fifth Judicial District Court declared to be unconstitutional, unlawful and void in its June 2, 2005 *Order on Plaintiffs' Motion for Summary Judgment*, in American Falls Reservoir District #2, et al. v. IDWR, et al., Case no. 2005-000600. Any such past or continuing action is unconstitutional, unlawful and void.

A. IGWA Received the Full Benefit of the 2005 Mitigation Alternative Prescribed by the May 19, 2005 *Order*

To avoid partial, phased curtailment by priority in 2005, the Director's May 19, 2005 *Order* allowed IGWA's members "to submit a plan or plans to the Director to provide mitigation by offsetting the entirety of the depletion to the ESPA under such rights or to provide Blue Lakes Trout with a replacement water supply of suitable water quality of 10 cfs ." May 19, 2005 *Order*, p. 28, ¶ (1).[1] The May 19, 2005 *Order* set forth conditions for 5-year, phased mitigation by "substitute curtailment" Id, p. 28, ¶ (3).[2]

IGWA chose the mitigation alternative, and submitted a mitigation plan for "substitute curtailment" in 2005 of ground water diversions that ultimately reduce spring flows by 10 cfs to the Devils Washbowl to Buhl reach, as prescribed by the May 19, 2005 *Order*. The Director's

---

[1]As previously stated, Blue Lakes reserves its objections to the Director's proposed 5-year, phased curtailment of hydraulically-connected junior ground water rights and his prescription of mitigation as an alternative to curtailment in accordance with priority as required by the Idaho Constitution and Chapter 6, Title 42, Idaho Code.

[2]Blue Lakes reserves its objection that the prescribed, 5-year phased mitigation does not offset the entirety of the depletion of the ESPA caused by hydraulically connected junior ground water rights, as required by the Director's Order.

standard for mitigation is that its impact on the water supply must be as "real" and certain as turning off junior pumps. Tr. p. 224, lns. 5-15. The burden is on IGWA to verify that the mitigation it provides will actually "offset" its members' withdrawals and produce the amount of water required by the Director's May 19, 2005 *Order*.

The Director approved the partial mitigation proposed by IGWA for 2005 in his July 6, 2005 *Order Approving IGWA Substitute Curtailment Plan (Blue Lakes Delivery Call)*, finding that the steady state effect of IGWA's "voluntary curtailments" and "conversions" on the Devil's Washbowl to Buhl reach would be 12.2 cfs.[3] With that approval, there was no "involuntary" curtailment of junior ground water pumping in 2005. IGWA received the relief from partial "involuntary" curtailment it sought.

The Director's April 29, 2006 approval *Order* is a result of post 2005 "reanalysis" or accounting of IGWA's 2005 partial mitigation. The April 29, 2006 approval *Order* approves IGWA's 2005 substitute curtailments, finding their steady state effect to be 14.4 cfs. Again, with this second approval, and having avoided any involuntary curtailment in 2005, IGWA received the full benefit of the mitigation alternative prescribed in the Director's May 19, 2005 *Order*. Whether IGWA's 2005 mitigation activities are given more than 10 cfs of "credit' is, in this sense, irrelevant. Meanwhile, Blue Lakes involuntary curtailment resulting from ground water pumping continues to be approximately 90 cfs, nearly half of its decreed water rights.

Since IGWA was not aggrieved in 2005 by the Director's approval of its 2005 mitigation plan, what then is the real reason for IGWA's motion for reconsideration? IGWA has not

---

[3]By that time, of course, a substantial part of the irrigation season, out of priority ground water diversions and resulting diminishment of Blue Lakes' water supply had already occurred.

planned additional substitute curtailments of ground water rights to meet the 20 cfs requirement for 2006 set forth in the May 19, 2005 *Order*. Therefore IGWA seeks additional "credit" for or recognition of curtailment of water use on lands that do not meet the eligibility criteria set forth in the May 19, 2005 *Order*, and for speculative, unverified effects of marginal water use and incidental recharge so that these activities may be "counted' toward IGWA's 2006, 20 cfs obligation. These are not sufficient or valid grounds to amend the April 29, 2006 *Order*.

B. "Substitute Curtailment" Criteria

The "substitute curtailment" alternative prescribed by the Director's May 19, 2006 *Order* allows IGWA to avoid curtailment by priority by submitting a plan to forego ESPA ground water diversions

> over a period of not more than five years ('substitute curtailment') and continuing until further order of the Director so long as full beneficial use was made under the foregone rights in the prior year or use was foregone in the prior year for purposes of mitigation for which credits for mitigation to the Devil's Washbowl to Buhl Gage sprig reach have not otherwise been granted.

May 19, 2006 *Order*, p. 29, ¶ 3 (emphasis added).

IGWA understood these criteria and submitted a plan for 2005 substitute curtailment of water use on land that was actually irrigated in 2004 or idled previously as part of a mitigation plan. *Groundwater Districts' Plan for Providing Replacement Water (Blue Lakes Delivery Call)*, p. 5; Tr., p. 162, ln. 21 - p 163, ln. 12 (Minchey); p. 212, lns. 13-25 (Brendicke); p. 69, ln. 10 - p. 70, ln. 8 (Yenter); p. 104, ln. 21 - p. 105, ln. 11 (Luke). It was on this basis that IDWR approved the plan. *Order Regarding IGWA Replacement Water Plan (Blue Lakes' Delivery Call)*, p. 11, ¶ 50; Tr, p. 70, ln. 9 - p. 71, , 7 (Yenter). Ground Water District representatives testified that they have not yet provided adequate information to verify the identity and number of acres that were

in a mitigation plan prior to 2005 for which they expect to receive mitigation credit. Tr. p. 164, ln. 4 - 165, ln. 2; p. 159, lns. 4-15 (Minchey); p. 186, ln. 13 - p. 187 ln. 25 (Stevenson). Having received the full protection and benefit of Director's approval of its 2005 mitigation plan, IGWA cannot now complain about the conditions under which the alterative was provided, sought and approved.

Despite the Director's approval of IGWA's 2005 mitigation plan and IGWA's acknowledged failings in verifying voluntarily curtailed lands, Representatives of the North Snake Ground Water District and the Magic Valley Ground Water District testified that the IDWR's determinations of voluntary curtailments were "'ridiculous," that their members were mad, and that their likely response is to resume pumping on acres for which they did not receive mitigation credit. Tr., p. 155, ln. 20 - p. 157, ln. 15; p. 158, ln. 18 - p. 160, ln. 8 (Minchey); Tr. P. 176, ln. 25 - p. 178, ln. 1; p. 182, ln. 18 - p. 184, ln. 13. In its post-hearing brief, IGWA reiterates the threat to increase pumping from the ESPA, and elevates the reaction of its members to a "matter of policy (avoiding disincentives to ongoing voluntary curtailment of valid ground water rights)." *IGWA's Post-Hearing Memorandum*, p. 9. Obviously, IGWA's members have very little concern that they will ever be subject to curtailment by priority in order to supply Blue Lakes and other senior spring water rights. IGWA thus turns the Director's May 19, 2005 *Order* on its head, whereby "substitute" or "voluntary" curtailment is supposed to be an alternative to priority curtailment of all junior, hydraulically ground water rights. Under the Director's scheme of administration by mitigation, IGWA now perceives the issue to be whether it has sufficient incentive to reduce junior pumping, rather than their members being subject to administration in accordance with priority as required by the Idaho Constitution and the Idaho Code.

The fact that IGWA is arguing in 2006 about the "credit" it received for mitigation activities in 2005 is further evidence of how far the Director's administration by mitigation has strayed from efficient administration of hydraulically connected water rights as required by the Idaho Constitution, Chapter 6, Title 42 of the Idaho Code, and by the SRBA Court's decrees. Blue Lakes' water shortage persists while yet another decision of the Director may wind its way through administrative review and potential appeal.

Dated this 26th day of June, 2006.

RINGERT CLARK, CHARTERED

By: Charles L. Honsinger for
Daniel V. Steenson
Attorneys for Blue Lakes Trout Farm, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2006, 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 Fax: (208) 388-1200	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
John K. Simpson, ISB #4242 Travis L. Thompson, ISB #6168 BARKER ROSHOLT & SIMPSON LLP 205 N. 10th St., Suite 520 P.O. Box 2139 Boise, Idaho 83701-2139 Fax: (208) 344-6034	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
Michael Gilmore ATTORNEY GENERAL'S OFFICE P.O. Box 83720 Boise, Idaho 83720-0010 Fax: (208) 334-2830	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
Scott Cambell MOFFATT THOMAS P.O. Box 829 Boise, Idaho 83701 Fax: (208) 385-5384	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
James Tucker IDAHO POWER COMPANY 1221 W. Idaho Street Boise, Idaho 83702 Fax: (208) 388-6935	(X) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail

James Lochhead
Adam Devoe
BROWNSTEIN HYATT
410 17th Street, 22nd Floor
Denver, CO 80202
Fax: (303) 223-1111

(X) U.S. Mail, Postage Prepaid
( ) Facsimile
( ) E-mail

Charles T. Hansen for
Daniel V. Steenson