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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,) **MOTION FOR ORDER**
36-07210, AND 36-07427) **AUTHORIZING LIMITED**
) **DISCOVERY**
Blue Lakes Delivery Call)
_____)

Blue Lakes Trout Farm, Inc. ("Blue Lakes"), by and through its counsel, hereby moves for an order pursuant to Rule 521 of the Department's Rules of Procedure authorizing limited discovery of Department employees related to the matters described herein. Blue Lakes requests expedited consideration of this motion so that Blue Lakes' depositions of Department employees may be coordinated with depositions of Department employees on the same or similar issues in the contested case proceeding before the Department on the *Third Mitigation Plan of the North Snake and Magic Valley Ground Water Districts to Provide Replacement Water for Clear Springs Snake River Farm*. Coordinating such depositions will result in efficiencies for the Department, Department employees and the parties involved.

1. Basis and Scope of Limited Discovery Motion

Junior ground water rights diverting water from the ESPA within Water District Nos. 130 and 140 deplete Blue Lakes' water source and thereby cause material injury to water right nos. 36-07210 and 36-07427. The North Snake Ground Water District and the Magic Valley Ground Water District (collectively "Ground Water Districts") represent the holders of junior ground water rights causing injury to Blue Lakes' water rights. In 2005, Blue Lake's filed with the Department a call for delivery of water seeking administration of hydraulically-connected ground water rights with priorities junior to 36-07210 and 36-07427. Clear Springs Foods, Inc. ("Clear Springs") also filed a water delivery call in 2005 alleging injury to water rights it utilizes to rear trout at its Snake River Farm facility, also caused by ground water diversions from the ESPA. Department orders in response to the Blue Lakes' and Clear Springs' (collectively "Spring Users") water delivery calls have included injury determinations and approval of mitigation plans.

Proceedings on the Department's Blue Lakes' and Clear Springs' orders were consolidated, resulting in a contested case hearing in 2007, an *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation* ("Recommended Order") by the Hearing Officer, a *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* (*Final Order*) by the Director, and petitions for judicial review, currently pending before the District Court for the Fifth Judicial District. Common issues in the consolidated proceedings included the Director's determination of model uncertainty (10%), the Director's use of a "10% trim line" to exclude certain junior ground water rights from administration in response to the Spring Users' water delivery calls, and the director's method of allocating spring flow within a reach to determine injury to the Spring Users' facilities. Each of these determinations affects the quantities of water

required to mitigate the injury to the Spring Users' water rights caused by junior ground water pumping.

In his *Recommended Order* and his *Responses to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement* ("*Reconsideration Order*"), the Hearing Officer reviewed these determinations and found that: "Continuing efforts should be made to improve the accuracy of all scientific conclusions." "If that produces more reliable results, those results should be used in the future." *Reconsideration Order* at 7-8 (*see also, Reconsideration Order* at 3, *Recommended Order* at 14-15). This finding of the Hearing Officer was accepted in the Director's *Final Order* (*Final Order* at 2, ¶ 7), and was not challenged on appeal.

On June 2, 2009, the Ground Water Districts filed a *Joint Mitigation Plan for 2009* to mitigate for the injury to Blue Lakes' water right no. 36-07427. On August 12, 2009, Blue Lakes filed a *Protest to Ground Water Users' Joint Mitigation Plan for 2009* ("*Blue Lakes' Protest*"), in which it asserts that the *Joint Mitigation Plan* is inadequate to mitigate for the injury to Blue Lakes' water rights from junior ground water pumping. Blue Lakes intends to present evidence related to the technical basis of the Director's determination of the mitigation obligation for Blue Lakes, including, but not limited to, the Director's determination of model uncertainty (10%), the Director's use of a "10% trim line" to exclude certain junior ground water rights from administration in response to the Spring Users' water delivery calls, and the director's method of allocating spring flow within a reach to determine injury to the Spring Users' facilities. Each of these determinations affects the quantity of water required to mitigate the injury to Blue Lakes' water rights caused by junior ground water pumping.

Accordingly, Blue Lakes requests authorization to conduct discovery of Department employees by the means listed in Rule 520 of the Departments' Rules of Procedure related to the

technical basis of the Director's determination of the mitigation obligation for Blue Lakes, including, but not limited to, the Director's determination of model uncertainty (10%), the Director's use of a "10% trim line" to exclude certain junior ground water rights from administration in response to the Spring Users' water delivery calls, and the director's method of allocating spring flow within a reach to determine injury to the Spring Users' facilities.

2. Schedule for Discovery and Request for Expedited Consideration

Clear Springs' *Protest of the 2009 Replacement Water Plan and Third Mitigation Plan of North Snake Groundwater District and Magic Valley Groundwater District* ("Clear Springs' *Protest*") incorporated objections Clear Springs raised in its March 17, 2009 letter "Re: 2009 Replacement Water Plan and Third Mitigation Plan." Clear Springs' objections raise issues pertaining to the Director's determinations referenced in the preceding paragraph of this *Motion*. March 17, 2009 Letter, pp. 2-3.

On August 28, 2009, the Hearing Officer in the Clear Springs mitigation proceeding issued a *Scheduling Order* which sets a hearing date for the "over the rim" component of the Ground Water Districts' mitigation plan for Clear Springs, and provides that: "The remaining issues raised by the objections shall be addressed as and if they become relevant to a final determination." *Scheduling Order* at 1, ¶ 1. The *Scheduling Order* further provides that discovery may proceed on those remaining issues." *Id.* at 2, ¶ 5.

Blue Lakes has been informed that depositions of Department employees concerning the issues of concern to Blue Lakes may proceed as early as this month (October). Blue Lakes therefore requests expedited consideration and issuance of an Order authorizing Blue Lakes to conduct the discovery described in this *Motion* so that Blue Lakes may participate in the pending

depositions, and thereby avoid multiple depositions of the same Department employees on the same or similar subject matter.

Blue Lakes does not seek authorization for discovery related to the “over-the-rim” portion of the Ground Water Districts’ mitigation proposal for Clear Springs.

Dated this 7th day of October, 2009.

RINGERT LAW, CHTD.



Daniel V. Steenson
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Attorneys for Blue Lakes Trout Farm, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2009, I served a true and correct copy of the foregoing **MOTION FOR ORDER AUTHORIZING LIMITED DISCOVERY** by delivering it to the following individuals by the method indicated below, addressed as stated.

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