

A. Dean Tranmer, ISB # 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn, ISB #7928
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for the City of Pocatello

**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.

IN THE MATTER OF THE A&B
IRRIGATION DISTRICT'S 2009
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
CM-MP-2009-002
(CM-MP-2009-003)**

**POCATELLO'S REPLY BRIEF IN
SUPPORT OF GROUND WATER
DISTRICT'S MOTION TO LIMIT
SCOPE OF HEARING**

COMES NOW the City of Pocatello (“Pocatello”) and submits this Reply Brief in Support of Ground Water District’s Motion to Limit Scope of Hearing and Proposed Schedule (“Motion”). Pocatello and the Ground Water Districts ask the Director to limit the scope of future mitigation hearings in this matter to issues relevant to the proposed mitigation plans and exclude the relitigation of issues determined in the subject delivery call proceedings, namely the amount of material injury and the methodology used to determine material injury.

Where IDWR administration results in a delivery call hearing before mitigation proceedings, the determination of material injury has been the focus of the hearing on the propriety of the injury determination by the Department. The parties expended significant time, effort, and expense in preparing and presenting evidence and testimony to the Director regarding the amount of material injury. The mitigation plans at issue in these captioned matters arise from determinations of injury made by the Director in a delivery call hearing. As such, the Director’s determination of the amount of material injury as a result of a delivery call hearing is the injury to be mitigated through a mitigation plan. To allow, as Clear Springs and others have suggested, that a hearing on the captioned mitigation plans provides them another “bite at the apple” is impractical, uneconomical and also contrary to Idaho law.

The Conjunctive Management Rules (CMR) require the Director to determine whether a proposed mitigation plan “will prevent injury to senior rights.” CMR 43.01(3). The nature and extent of the “injury to senior rights” was earlier determined by the Director in the course of the delivery call hearing. When the amount of injury has been determined by the Director in a delivery call proceeding, that controls under the doctrine of res judicata. *Sagewillow, Inc. v.*

Idaho Dep't of Water Resources, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003). (“[The doctrine of *res judicata* applies to administrative proceedings.”).

While the Director may have a duty to conduct an ongoing analysis of the impact of junior ground water pumping on senior rights, that duty does not translate into requiring the Department to reevaluate the amount of material injury suffered by senior appropriators in the interim period between the delivery call proceeding and the corresponding mitigation proceeding. Under the Clear Springs interpretation, senior water users could require junior ground water users to expend endless amounts of resources resisting their ever escalating claims of injury—as well as to come up with ever escalating amounts of mitigation water. The prior appropriation system is built on certainty, not extortion. To hold otherwise would have the illogical result that Director can require junior groundwater users to file a proposed mitigation plan because of the finding of injury in a delivery call proceeding, but disregard the amount of injury determined in that same delivery call proceeding. Such a result flies in the face of administrative efficiency and judicial economy and compromises the parties’ substantial interests in avoiding unnecessary and duplicative litigation.

For these reasons Pocatello requests that the Director grant the Motion and limit the scope of the hearing to those issues raised in the proposed mitigation plans and exclude re-litigation of the amount of material injury owed to senior users.

DATED the 17th day of December, 2009.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

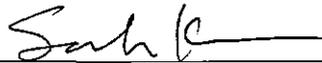
By 
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2009, the above and foregoing **Pocatello's Reply Brief in Support of Ground Water District's Motion to Limit Scope of Hearing for Docket No. CM-MP-2009-001 and CM-MP-2009-002** [aka Blues Lakes Mitigation] was sent to the following by e-mail at the listed e-mail addresses:



Sarah Klahn, White & Jankowski, LLP

Gary Spackman, Interim Director
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
deborah.gibson@idwr.idaho.gov
phil.rassier@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Travis Thompson
John K. Simpson
Paul L. Arrington
Barker Rosholt & Simpson
113 Main Ave, W, Ste 303
PO Box 485
Twin Falls, ID 83303-0485
tft@idahowaters.com
jks@idahowaters.com
pla@idahowaters.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Daniel V. Steenson
Charles L. Honsinger
Ringert Clark
P.O. Box 2773
Boise, ID 83701-2773
dvs@ringertlaw.com
clh@ringertlaw.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

A. Dean Tranmer
City of Pocatello
P. O. Box 4169
Pocatello ID 83201
dtranmer@pocatello.us

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

Robert A. Maynard
Erika E. Malmen
Perkins & Coie LLP
1111 W Jefferson St Ste 500
Boise ID 83702-5391
rmaynard@perkinscoie.com
emalmen@perkinscoie.com

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery

William Parsons
137 W 13th St
PO Box 910
Burley ID 83318
wparsons@pmt.org

U.S. Mail, postage prepaid
 Facsimile
 E-Mail
 Hand Delivery