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**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
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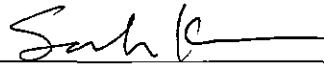
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CERTIFICATE OF SERVICE

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:



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