

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](mailto: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](mailto: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 17<sup>th</sup> day of December, 2009.

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

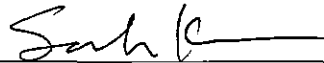
By   
A. Dean Tranmer

WHITE & JANKOWSKI, LLP  
Attorneys for the City of Pocatello

By   
Sarah A. Klahn

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> 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](mailto:deborah.gibson@idwr.idaho.gov)  
[phil.rassier@idwr.idaho.gov](mailto:phil.rassier@idwr.idaho.gov)  
[chris.bromley@idwr.idaho.gov](mailto: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](mailto:tft@idahowaters.com)  
[jks@idahowaters.com](mailto:jks@idahowaters.com)  
[pla@idahowaters.com](mailto: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](mailto:dvs@ringertlaw.com)  
[clh@ringertlaw.com](mailto: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](mailto:rcb@racinelaw.net)  
[cmm@racinelaw.net](mailto: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](mailto: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](mailto:rmaynard@perkinscoie.com)  
[emalmen@perkinscoie.com](mailto:emalmen@perkinscoie.com)

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

William Parsons  
137 W 13<sup>th</sup> St  
PO Box 910  
Burley ID 83318  
[wparsons@pmt.org](mailto:wparsons@pmt.org)

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