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Attorney for **CITY OF PAUL**

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

| | | | |
|-----------------------------------|---|-------------------------------------|--|
| IN THE MATTER OF DISTRIBUTION OF |) | <u>RESPONSE TO NOTICE OF</u> | |
| WATER TO WATER RIGHT NOS. |) | | <u>CURTAILMENT OF GROUND</u> |
| |) | | <u>WATER RIGHTS AND REQUEST</u> |
| 36-02356A, 36-07210, and 36-07427 |) | | <u>FOR APPROVAL OF MITIGATION</u> |
| |) | | <u>PLAN OF CITY OF PAUL</u> |
| |) | | |
| |) | | (Blue Lakes Delivery Call) |
| |) | | |
| |) | | |
| |) | | |

The City of Paul, Idaho (City) files this Response and Request for Approval as follows:

1. This Response and Request for Approval is submitted pursuant to that Order Curtailing Junior Priority Ground Water Rights (Blue Lakes Delivery Call) dated June 15, 2007 and that letter from Cindy Yenter, Watermaster, Water District 130, dated June 18, 2007.

2. The City's water right described in the Order and letter is Water Right No. 36-8763 (WR 36-8763), more particularly described as:

| Water Right No. | Priority Date | Source | Beneficial Use | Season of Use | Diversion Rate |
|-----------------|---------------|-------------|----------------|---------------|----------------|
| 36-8763 | 10/18/1999 | Groundwater | Municipal | 1/1 to 12/31 | 2.75 cfs |

3. In addition to WR 36-8763, the City owns the following water rights which shall be collectively referred to as “City Senior Rights”:

| Water Right No. | Priority Date | Source | Beneficial Use | Season of Use | Diversion Rate |
|-----------------|---------------|-------------|----------------|---------------|----------------|
| 36-4083 | 4/27/1920 | Groundwater | Municipal | 1/1 to 12/31 | 0.67 cfs |
| 36-7206 | 8/09/1971 | Groundwater | Municipal | 1/1 to 12/31 | 1.06 cfs |
| 36-7899 | 2/27/1980 | Groundwater | Municipal | 1/1 to 12/31 | 0.78 cfs |

4. All of the water rights held by the City are pumped from three (3) wells located within the city limits of the City and the wells are located less than ten (10) miles from one another. All of the water rights held by the City provide that the place of use is within the City and surrounding service area. The City Senior Rights all provide that they are limited to a total combined diversion rate of 2.51 cfs and to a total combined annual diversion volume of 1,107.8 AF. This allows the City, pursuant to City Senior Rights, to divert 1,619,354 gallons per day, or an average of 49,255,354 gallons per month, up to the total combined annual diversion of 1,107.8 AF or 360,976,630 gallons.

5. Although the “proof made date” on WR 36-8763 was October 18, 1999, the Idaho Department of Water Resources (IDWR) has yet to license the right. City requests that IDWR license WR 36-8763 so that transfer applications can be made in order to formally link WR 36-8763 with the City Senior Rights.

6. As of the latest population census, City's population was 958 persons. City provides water delivery service to 497 water accounts, 444 of which are domestic accounts and 53 of which are school, church, commercial, and industrial accounts. The source of this water is ground water diverted pursuant to City's water rights.

7. City lies within the greater boundaries of the Minidoka Irrigation District (MID) and is entitled to receive the delivery of surface water from MID to irrigate 511.37 acres located within City.

8. 218 domestic water accounts use surface water originating from MID in order to irrigate their lawns. In addition 12 acres of City park, 25 acres of agricultural ground located within the city limits, and a 75 acre City farm are irrigated with surface water originating from MID. 226 domestic water accounts irrigate lawns with water supplied by City ground water wells. It is estimated by the City's Public Works Director, using 6,100 square feet of lawn per user as an average, that domestic users irrigate a total of approximately 32 acres of lawn with water supplied by the City's ground water wells.

9. Attached as Exhibit A are the total gallons pumped by the City using all of its groundwater rights for the years 1994 through 2006. The maximum amount diverted was in the year 2002 when 174,654,375 gallons, or 536 acre feet, were diverted during the entire year. As can be seen from an examination of Exhibit A, City has never exceeded the ground water diversions authorized by the City Senior Rights, either on a monthly basis or an annual basis.

10. During the late 1990s and early 2000s, the City upgraded the City water system and City sewer system. In addition, in 2004, IDWR recalibrated the City's water measurement meters. As a result, diversions for the years 2005 and 2006 were significantly less than recorded diversions for prior

years.

11. For the time period July 1, 2006 through June 25, 2007, 17,100,000 gallons of ground water diverted by the City were diverted for uses other than domestic uses. This represents approximately ten percent (10%) of the total groundwater diversions of City.

12. The City is permitted to apply treated waste water to 58.8 acres of agricultural ground. This water is recovered from the City waste water system, treated in the City's waste water treatment facility and pumped from a City lagoon onto agricultural ground pursuant to the land application permit. The total annual volumes of water recovered from the City's waste water system and pumped onto agricultural ground commencing the year 2000 through 2006 are described Exhibit B attached.

13. IDAPA 37.03.11.020.11 (CMR 20.11), its facial constitutionality having been upheld by the Idaho Supreme Court in the case of *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), provides:

Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

14. Idaho Code §§ 42-111(a) and (b) defines a "domestic purpose" to be "the use of water for homes.... and for any other purpose in connection therewith, including irrigation of up to one-half (1/2)

acre of land, if the total use is not in excess of 13,000 gallons per day, or any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day”.

15. A condition of approval of WR 36-8763, inserted by IDWR, recognizes the right of City to pump up to 13,000 gallons per dwelling pursuant to WR 36-8763:

The daily diversion volume for non-domestic uses under this municipal right shall not exceed 2,500 gallons per use and the daily diversion volume for domestic uses under this right shall not exceed 13,000 gallons per dwelling in accordance with Section 42-111, Idaho Code.

16. Although the City supplies water to 444 domestic accounts, which theoretically would authorize diversions of 5,772,000 gallons per day, 175,565,000 per month or over 2 billion gallons per year, subject to the limitations imposed by the City’s water rights, an examination of Exhibit A illustrates that the City is diverting substantially less than the amount it is entitled to divert pursuant to the City Senior Rights.

17. City asserts that taking into account its diversions, the provisions of WR 36-8763, and the wording of CMR 20.11, WR 36-8763, to the extent the City uses the right or can use the right for domestic purposes, cannot be curtailed; however, City recognizes that its total diversions for all purposes, including domestic purposes, do not exceed its rights to divert pursuant to the City Senior Rights.

18. City also asserts that it has the right to use Water Right 36-8763 for domestic uses, that it cannot be curtailed for that use, and if IDWR determines that it can be curtailed for other uses, City asserts that it has a right to apportion all of its domestic uses to WR 36-8763 and apportion all other

uses to the City Senior Rights. Again, City recognizes that its total diversions pursuant to the City Senior Rights, for all purposes, do not exceed its right to divert pursuant to those rights, and therefore the apportionment of uses between rights is not required at this time unless WR 36-8763 is curtailed.

19. It is the understanding of City that IDWR asserts that municipal water rights are one hundred percent (100%) consumptive. City asserts that municipal water rights are not one hundred percent (100%) consumptive and that a significant percentage of the ground water diverted by the City is not, in fact, consumed, as is illustrated by the City's waste water land application program described above.

WHEREFORE, City submits the following response and request for approval:

1. City requests that IDWR issue a license for WR 36-8763 as expeditiously as possible; upon receipt of a license, City will make application to transfer Water Right 36-8763 and the City Senior Rights so that all water rights are interconnected.

2. City requests that the Director determine that mitigation is not required by City due to the fact that the total City ground water diversions do not exceed the right to divert pursuant to the City Senior Rights.

3. In the alternative, as a mitigation plan, the City proposes that it be allowed to continue diverting from all wells located within the City so long as diversions from the wells do not exceed the total diversions authorized by the City Senior Rights, effectively mitigating for the use of Water Right 36-8763 by the use of the City Senior Rights.

4. City reserves the right to request a determination of: (1) how CMR 20.11 and other

applicable law apply to WR 36-8763 and, (2) the City's assertion that WR 36-8763 cannot be curtailed due to the fact that the right does not exceed the City's right to divert for domestic uses or, in the alternative, (3) the City's right to apportion uses between WR 36-8763 and the City Senior Rights in order to obtain the protections provided by CMR 20.11 and applicable law.

5. City further reserves the right to seek a determination of its actual consumptive use of diverted ground water and to have IDWR only curtail, if authorized, actual consumptive uses not otherwise protected by CMR 20.11 and applicable law.

6. It is requested that in the event more specific information is necessary or desired, City be granted a reasonable opportunity to provide such additional information prior to curtailment.

DATED this 28 day of June, 2007.

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2000
63.18mg
193.89 acre ft

2001
50.77mg
155.81 acre ft

2002
53.00mg
162.65 acre ft

2003
39.16mg
120.00 acre ft

2004
26.3mg
80.71 acre ft

2005
14.22mg
43.58 acre ft

2006
38.76mg
118.95 acre ft

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of June, 2007, I served the **RESPONSE TO NOTICE OF CURTAILMENT OF GROUND WATER RIGHTS AND REQUEST FOR APPROVAL OF MITIGATION PLAN OF CITY OF PAUL** upon the following in the following manner:

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