RECEIVED
SEP 01 2016
DEPARTMENT OF WATER RESOURCES

McHUGH BROMLEY
ATTORNEYS AT LAW, PLLC

Candice M. McHugh
cmchugh@mchughbromley.com

380 S. 4th Street, Ste. 103
Boise, Idaho 83702
(208) 287-0991

Chris M. Bromley
cbromley@mchughbromley.com

September 1, 2016

Director Gary Spackman
Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise, ID 83720-0098

Re: City of Bellevue's Comments Regarding Proposed ESPA GWMA

Dear Director Spackman:

On July 7, 2016, you sent a letter to water users informing them of your intention to hold a series of public meetings regarding the creation of an Eastern Snake Plain Aquifer ("ESPA") Ground Water Management Area ("GWMA"). On behalf of the City of Bellevue ("City"), I attended the July 25, 2016 public meeting in Hailey, Idaho. At that public meeting, you indicated the Idaho Department of Water Resources ("IDWR") would accept comment on the proposed ESPA GWMA. While a hard deadline was not given, you indicated that comments should be received by September 1, 2016. Please accept this letter as the City's comment to the proposed ESPA GWMA.

While the City sees a number of legal and technical problems with the creation of an ESPA GWMA that includes the Big Wood (and not waiving any arguments the City may wish to raise in the future), the City has two main concerns. First, is the fact that the City will lose its ability to self-mitigate and provide water to its nearly 2,500 citizens. This is an inherent problem with a GWMA that does not exist in Conjunctive Management. A second concern is IDWR has already established a GWMA in the Big Wood. A subsequent, overlapping GWMA is therefore not necessary.

Taking the second concern first, a GWMA already exists in the Big Wood. The Big Wood GMWA was designated on June 28, 1991, and has its own management policy. That policy provides, "Most consumptive use applications will be denied unless the applicants can demonstrate there will be no injury or can provide acceptable mitigation to prior rights." *Big Wood GWMA Management Policy* at 3. Additionally, water rights for new municipal uses "must be mitigated by the municipality." *Id.* at 4. While there are other GWMAs and Critical GWMAs above Milner on the south side of the Snake River, the Big Wood GWMA is the only GWMA on the north side. Furthermore, there are no overlapping GWMAs or Critical GMWAs above Milner. The proposed ESPA GWMA would overlap all established GWMAs and Critical GWMAs above Milner, yet there is nothing in Idaho law that explains how IDWR would administer multiple GWMAs, such as the proposed ESPA GWMA with the already established Big Wood GWMA, and the previously

established management principles. At best, enveloping the Big Wood GWMA within the proposed ESPA GWMA will result in redundant administration that is consistent with the Big Wood GWMA Management Policy. However, as will be explained below, the City has serious concerns that the imposition of the ESPA GMWA will take away the City's ability to self-mitigate.

In Conjunctive Management, a ground water user is entitled to file a mitigation plan, in accordance with CM Rule 43, to mitigate for his or her depletions. *City of Bliss et al. v. Idaho Dept. of Water Res.*, Case No. CV-2015-172 (Fifth Jud. Dist. Sept. 8, 2015). When the Director approves a user's CM Rule 43 Mitigation Plan, the proponent of the Plan is protected from curtailment. CM Rule 42.02. However, in a GWMA, the plain language of the law only allows the Director to approve a single "management plan for the area." Idaho Code § 42-233b (emphasis added). At the meeting in Hailey, IDWR confirmed the plain language of Idaho Code § 42-233b, but went on to say there could be subparts of a Ground Water Management Plan ("GWMP"). While you say in your July 7 letter that there are "distinct advantages" with an ESPA GWMA, there are more causes for concern than comfort. There is nothing in Idaho law that allows for subparts, nothing in law that explains what these subparts would look like, how they would be reviewed, how they would be approved, and, of particular importance to the City, how they would function if other users or subparts of the GWMP are not meeting their requirements.

As you have stated, the "template" for the ESPA GWMP could be the settlement agreement ("Term Sheet") negotiated between the Surface Water Coalition ("SWC") and the Idaho Ground Water Appropriators, Inc. ("IGWA"). The goal of the Term Sheet is to raise ESPA levels to the average of 1991-2001 by 2026, as measured at nineteen sentinel wells that were negotiated by the parties. To achieve the goal, IGWA's members have agreed to reduce pumping by 240,000 acre-feet (an approximate 13% across-the-board reduction in pumping), and the State has agreed to average annual recharge of 250,000 acre-feet. Presently, the infrastructure does not exist to recharge this volume of water, which is why State funding has been earmarked to accomplish the recharge goal.

Setting aside the critical facts that the City was not party to the Term Sheet and could never have foreseen a decision to bind non-parties, and that we do not know when the State will be able to accomplish its recharge goal, the creation of a GWMA puts ground water users in a proverbial bathtub, whereby all ground water users rise and fall by collective action or inaction. As you know, municipal ground water pumping is a very small part of the overall water budget in any given basin. As a result, if the goal of the GWMP is to raise ESPA aquifer levels to the 1991-2001 average, even the most well-intentioned city, like the City of Bellevue, cannot on its own, by virtue of scale, take actions that will raise the ESPA to the 1991-2001 average at the sentinel wells, which will purportedly be accomplished by 240,000 acre-feet of reduced pumping and 250,000 acre-feet of recharge. Even if all cities joined together to eliminate their depletions, the Term Sheet goal could still not be reached.

This puts the City of Bellevue in the untenable position of being labeled as part of the perceived "problem" yet with no ability to "solve" it. This is an inherent problem with a GWMA as opposed to Conjunctive Management. The City will mitigate its ground water depletions if such

depletions cause material injury to senior water users, and is interested in exploring actions that will proactively solve water supply problems before they arise.

The City simply cannot pass its responsibility to promote the general welfare of its citizens and to ensure a healthy and safe water supply, *see e.g.* Idaho Code §§ 50-302, -323, by passing that responsibility to other water users to ensure the safety of the City's water. Due to the inability to self-mitigate, the City opposes the creation of an ESPA GWMA that includes the Big Wood. While you asked for comments directed at the proposed ESPA GWMA, comments from IGWA members have been filed with IDWR who would rather see the Director investigate expansion of CM Rule 50, instead of taking the drastic step of forming the ESPA GWMA. *See e.g. American Falls-Aberdeen Ground Water District Comment Letter, Dated July 13, 2016.* From the City's perspective, the most prudent course of action is to give the Term Sheet time to work and proceed under the CM Rules. Under the CM Rules, the City can meet its responsibility of assuring a secure water supply for its citizens without abdicating its duty to others. If the Term Sheet does not work, then a discussion could be had regarding CM Rule 50, as well as the potential that the Director could then revisit the idea and need for an ESPA GWMA.

Sincerely,

Chris M. Bromley