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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS HELD BY MEMBERS OF THE BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION DIVERTING FROM THE BIG WOOD RIVER	Docket No. CM-DC-2015-001 Docket No. CM-DC-2015-002
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS HELD BY MEMBERS OF THE BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION DIVERTING FROM THE LITTLE WOOD RIVER	**JOINT MOTION FOR REVIEW OF INTERLOCUTORY ORDER**

The City of Hailey ("Hailey") and the City of Bellevue ("Bellevue") (collectively, the "Cities"), by and through their respective attorneys of record, jointly file this *Joint Motion for Review of Interlocutory Order* ("*Joint Motion*") requesting the Director to review his July 22, 2015, *Order Denying Joint Motion To Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* ("*Order*") in the Big Wood River and Little Wood River delivery call proceedings

("Delivery Calls").[1] . This *Petition* is filed pursuant to Idaho Department of Water Resources Procedural Rules, IDAPA 37.01.01.260 and 711.

ARGUMENT

The *Order* should be revised and the Director should initiate rulemaking to define an area of common ground water ("ACGWS") supply as required by the Conjunctive Management Rules, IDAPA 37.03.11 ("CM Rules"). In denying the Cities' *Joint Motion To Designate ACGWS by Rulemaking and to Dismiss Delivery Calls*, the Director determined that "[t]he ACGWS for the [Delivery Calls] is a factual question that can be established based upon the information presented at hearing applying the definition [of ACGWS] set forth in CM Rule 10.01." *Order* p. 3. However, that is contrary to the plain language of the CM Rules that specifically limits the scope of the CM Rules to "procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." CM Rule 1 (emphasis added). The CM Rules' scope of application is to the procedures to respond to the senior's claim of injury; the CM Rules do not include provisions that contemplate holding a hearing to determine and define the area of common ground water supply in a delivery call that is governed by CM Rule 40, which the Director has determined to be the rule applicable to these Delivery Calls against ground water rights within an organized water district.

The Director found that the Delivery Calls should proceed under CM Rule 40. *Order Denying Sun Valley Company's Motion to Dismiss* at 3. CM Rule 40 applies when a delivery call is made by the holder of a "senior-priority water right (petitioner) alleging that by reason of

[1] The Department has captioned the Delivery Calls as follows: "In The Matter of Distribution of Water to Water Rights held by Members of the Big Wood & Little Wood Water Users Association Diverting from the Big Wood River," and "In the Matter of Distribution of Water to Water Rights held by Members of the Big Wood & Little Wood Water Users Association Diverting from the Little Wood River."

diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply [i.e. ACGWS] in an organized water district the petitioner is suffering material injury . . . ." CM Rule 040.01 (emphasis added). No area of common ground water supply has been defined for the area that includes the Cities' ground water rights. Currently, the only area of common ground water supply is set forth in CM Rule 50, which designates the Eastern Snake Plain Aquifer as an area of common ground water supply. CM Rule 50. The Cities' water rights are not included in that defined area, nor are any of the junior ground water users that have been "designated" unilaterally by the Director as part of the Delivery Calls.

The CM Rules are replete with the requisite requirement that an area of common ground water supply has been defined, before proceeding with a delivery call: CM Rule 20.01 states that the CM Rules "govern the distribution of water from ground water sources and areas having a common ground water supply." (emphasis added) CM Rule 20.06 goes on to state that the CM Rules "provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts;" the plain reading suggests that an area of common ground water supply has been "designated [i.e. defined]" and that the next step is the incorporation of the ground water rights within that defined area into a water district so that the Director has the jurisdiction, authority and mechanism to distribute ground water rights from the area of common ground water supply.

The Director's authority to remedy the senior user's injury (if any) is limited to curtailing junior ground water rights within the defined area of common ground water supply. See *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2010-382, pp. 24-25

(Fifth Jud. Dist., Sept. 26, 2014) (the District Court upheld the Director's conclusion that he "can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01" and that the senior user can only seek administration within the area of common ground water supply.) Yet, in this case, there is no defined area of common ground water supply and as such, whether the proper junior users are before the agency is not yet known. The Director has made a broad assumption that water diverted by ground water users located within Water Districts 37 and 37B are in fact from an area of common ground water supply, requiring all of these junior users to appear and defend against the senior users' vague claims of injury, without first knowing if the junior ground water users are legally and factually diverting from an area of common ground water supply that impacts the senior users' water supply.

Therefore, the Cities ask the Director to revise his Order and to first define the area of common ground water supply by rule under the Idaho Administrative Procedure Act, I.C. § 67-5201 *et. seq.*, and to proceed in these Delivery Calls in a manner consistent with prior delivery call actions.

CONCLUSION

The Order should be reviewed and revised to grant the Cities' *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls.*

DATED this 18th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of August, 2015, I served a true and correct copy of the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed and by e-mail to participants who have provided e-mail addresses to the Department for service to the following:

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