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DEPARTMENT OF  
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

**IN THE MATTERS OF THE BIG WOOD  
RIVER AND LITTLE WOOD RIVER  
DELIVERY CALLS**

**DOCKET NOS. CM-DC-2015-001 &  
CM-DC-2015-002**

**MEMORANDUM IN SUPPORT OF JOINT  
MOTION TO DESIGNATE ACGWS BY  
RULEMAKING AND TO DISMISS  
DELIVERY CALLS**

The City of Hailey (“Hailey”) and the City of Bellevue (“Bellevue”), by and through their respective attorneys of record, file this *Memorandum* in support of their contemporaneously filed *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“*Motion*”) in the above-captioned matters (the “*Delivery Calls*”).

For the reasons set forth below, the Director must first initiate rulemaking in accordance with the Idaho Administrative Procedure Act, I.C. § 67-5201 *et. seq.*, to designate an area of common ground water supply (“ACGWS”) before proceeding with the *Delivery Calls*. The Director should dismiss the *Delivery Calls* until such time as an ACGWS has been properly

determined and a delivery call action under Rule 40 of the Conjunctive Management Rules, IDAPA 37.03.11 (“CM Rules”),<sup>1</sup> can properly be brought and pursued.

#### BACKGROUND

The Big Wood & Little Wood Water Users Association (“Petitioners”) sent letters on February 23, 2015 to the Director of the Idaho Department of Water Resources (“Department” or “IDWR”) in which they alleged, among other things:

1. That they are entitled to “delivery of water from the Big Wood River below Magic Dam” and to “delivery of water from the Little Wood River below its confluence with Silver Creek.”
2. That their “surface water rights . . . are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system.”
3. That the Department determined in 1991 “that the surface and ground waters of the Big Wood River drainage are interconnected, and that diversion of ground water from wells can deplete the surface water flow in streams and rivers.”
4. That “[t]he past and present failure of the [IDWR] to administer the subject surface and hydrologically connected ground water rights under the prior appropriation doctrine has resulted in material injury to Petitioners.”
5. That the Big Wood River and the Little Wood River below its confluence with Silver Creek are “hydrologically connected to the Wood River Valley aquifer system. Ground water use from the Wood River Valley aquifer has increased. The

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<sup>1</sup> The CM Rules “prescribe 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.” IDAPA 37.03.11.001 (emphasis added).

accompanying downward trend in ground-water levels has resulted in significantly lower flows in the Big Wood River near Bellevue [and in Silver Creek] which [are] largely fed by ground water.”

6. That “[d]ue to the failure of the [IDWR] to administer the subject water rights under the prior appropriation doctrine, the Petitioners have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury. Any future delay in the requested administration will result in further injury.”

Petitioners’ letters demanded that the Director order “the Watermaster for Water District No. 37 to administer Petitioners’ surface water rights, and hydrologically connected to [sic] ground water rights within the district in accordance with the prior appropriation doctrine.”

The Department determined that Petitioners’ letters should be treated as petitions for new delivery calls pursuant to the Department’s CM Rules and initiated the above-captioned contested cases. *Letter from Director Gary Spackman to Joseph F. James* (Mar. 6, 2015). The Department subsequently provided notice of the Delivery Calls to certain holders of junior-priority ground water rights that it presumably believes may be affected by one or both of the Delivery Calls. Hailey and Bellevue both received the Department’s notice, and both have filed notices of intent to participate in the Delivery Calls.

At the June 3, 2015, Pre-Hearing Conference on the Delivery Calls, the Director confirmed on the record that these proceedings are governed by CM Rule 40, IDAPA 37.03.11.040.<sup>2</sup> Rule 40 applies to these Delivery Calls because the Petitioners’ water rights and

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<sup>2</sup> The CM Rules’ procedures for responding to delivery calls fall into three categories: (1) procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into

the junior ground water rights sought to be curtailed are within existing water districts—Water District 37 and Water District 37-B.

As a CM Rule 40 delivery call, the Director is limited by the CM Rules to respond against junior ground water rights only within a designated ACGWS in an organized water district. Rule 40 states:

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of 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 in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

CM Rule 40 (emphasis added).

The plain language of CM Rule 40 is consistent with the Director's prior application of the Rule. The Director repeatedly has recognized that IDWR has authority to administer junior ground water rights in a Rule 40 delivery call only within a designated ACGWS. *See, e.g., Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights*

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an existing or new water district or designated a ground water management area (Rule 30); (2) procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created (Rule 40); and (3) procedures for responding to delivery calls between senior and junior ground water users within areas that have been designated as ground water management areas (Rule 41). IDAPA 37.03.11.020.07. A ground water management area was designated in 1991 that encompasses much, but not all, of Water Districts 37 and 37-B, but this is of no consequence in these Delivery Calls because CM Rule 41 addresses calls between senior and junior ground water users in ground water management areas.

*Junior to July 13, 1962*, p. 37, Conclusion of Law 41 (Jan. 29, 2014) (“IDWR is only authorized to curtail diversions within the area of common ground water supply described in Rule 50 of the CM Rules.”); *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”), pp. 34-35, Order ¶ 5 (June 23, 2010) (“the Director can only curtail junior ground water rights within the area of common ground water supply, CM Rule 50.01”).

For more than a decade, the Director has consistently limited curtailments determined in Rule 40 proceedings to junior ground water rights within the Eastern Snake Plain Aquifer (“ESPA”) ACGWS—presently the only ACGWS currently designated under the CM Rules. *See, e.g., Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)*, p. 4 (Apr. 29, 2010) (“The curtailment shall affect 73,782 acres within the area of common ground water supply . . . .”); *Amended Order [in Surface Water Coalition delivery call]*, pp. 28-29, Finding of Fact 127, (May 2, 2005) (“curtailing the subset of ground water diversions . . . within the area of common ground water supply for the ESPA defined in Rule 50 . . . .”); IDAPA 37.03.11.050.01 (currently listing only the ESPA as an area determined to have a common ground water supply). A map depicting the ESPA ACGWS appears on page 5 of Exhibit I to the *Affidavit of Chris M. Bromley* (“*Bromley Affidavit*”) filed contemporaneously with this *Memorandum*.<sup>3</sup>

In 2014, Fifth Judicial District Court Judge Wildman confirmed the Director’s interpretation that Rule 40 limits conjunctive administration and curtailment to junior ground water rights within the designated ACGWS. *Memorandum Decision and Order on Petitions for Judicial Review* (“*Wildman Order*”), CV-2010-382, pp. 24-25 (Fifth Jud. Dist., Sept. 26, 2014)

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<sup>3</sup> Exhibit I to the *Bromley Affidavit* contains a copy of the minutes to the February 11, 2015, Senate Resources & Environment Committee meeting at which the Director and a member of his staff testified about Docket No. 37-031101101—the Director’s proposed repeal of CM Rule 50, IDAPA 37.03.11.050, defining the ESPA ACGWS. As discussed later in this *Memorandum*, the Legislature rejected the Director’s proposed repeal of Rule 50.

(“When a senior water user seeks the conjunctive administration of ground water rights under the CM Rules, the senior user is seeking administration within the area of common ground water supply. The plain language of CM Rules make this clear.”).

CM Rule 10.01 defines “Area Having a Common Ground Water Supply” as “[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.” IDAPA 37.03.11.010.01.

According to a map presented by IDWR’s Tim Luke at the May 4, 2015 status conference for the Delivery Calls, the Petitioners’ water rights all appear to be within Rule 50’s ESPA ACGWS, but none of the junior ground water rights identified by the Department as potentially implicated in these Delivery Calls are within the ESPA ACGWS (or within any other designated ACGWS, since none exist). A copy of Mr. Luke’s map is attached as Exhibit L to the *Bromley Affidavit*.<sup>4</sup>

Because their junior water rights are not within the ESPA ACGWS and no other ACGWS currently exists in Idaho, Hailey and Bellevue contend that the Director must designate an ACGWS that encompasses their water rights and the Petitioners’ water rights (if such an ACGWS even could be designated) before the Director may respond to the Delivery Calls under Rule 40. As discussed below, in a CM Rule 40 delivery call, the ACGWS may only be

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<sup>4</sup> Although not stated in the Exhibit L map’s legend, the red dotted line wandering southwest to northeast from Glens Ferry past Carey appears to be Rule 50’s ESPA ACGWS boundary. *Compare to Bromley Affidavit Exhibit I p. 5* (IDWR map included showing the ESPA ACGWS boundary, ESPAM 2.1 model boundary, and ESPA tributary boundaries). It is not clear how the Department determined which junior ground water rights to include in Mr. Luke’s map, or whether that map accurately depicts the realm of potentially implicated junior ground water rights.

designated through rulemaking under the Idaho Administrative Procedures Act, I.C. § 67-5201, *et. seq.*

## ARGUMENT

### **I. THE DIRECTOR MUST ESTABLISH AN ACGWS APPLICABLE TO THESE DELIVERY CALLS THROUGH RULEMAKING.**

The Idaho Legislature has granted the Director authority to designate areas of common ground water supply. I.C. § 42-237a.g. (“In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district.” (emphasis added)).

The Director has adopted within the CM Rules the procedures for designating areas of common ground water supply under I.C. 42-237a.g. IDAPA 37.03.11.20.06 (“These 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 as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.”). The CM Rules are facially constitutional. *American Falls Res. Dist. No. 2. v. Idaho Dept. of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007).

The CM Rules provide that, in responding to a Rule 30 delivery call, the Director may issue an order that, among other things, determines an ACGWS. But under Rule 40—the rule

applicable in these Delivery Calls—an ACGWS may not be designated within the contested case proceeding. This distinction is significant.

Rule 40 sets forth the procedure the Director must follow in any delivery call “made by the holder of a senior-priority water right (petitioner) alleging that by reason of 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 in an organized water district the petitioner is suffering material injury . . . .” IDAPA 37.03.11.040 (emphasis added).<sup>5</sup> In other words, the Director can respond to a Rule 40 delivery call only within (1) a designated ACGWS and (2) an organized water district. Unlike the plain language in Rule 30, which authorizes the Director to designate an ACGWS in the Rule 30 delivery call proceeding, the plain language of Rule 40 prevents the Director from designating an ACGWS within the Rule 40 proceeding itself.

Here, the senior and junior rights identified on Mr. Luke’s map, *Bromley Affidavit Ex. L*, are within organized water districts, but only the seniors are within an ACGWS—the ESPA ACGWS. This means that, unless the Director limits these proceedings to juniors within the ESPA ACGWS, the Director must designate an ACGWS encompassing the Petitioners and any juniors outside the ESPA ACGWS they seek to curtail. To do this, he must amend Rule 50

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<sup>5</sup> As already described, the Director has long held that only junior ground water rights within an ACGWS may be curtailed under a Rule 40 delivery call. There is no basis for the Director to abandon this longstanding interpretation. The Idaho Supreme Court has recognized there may be times when an agency can change course from past decisions, but there must be “sufficient findings to show that its action is not arbitrary and capricious.” See *Washington Water Power Co. v. Idaho Public Utilities Commission*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980). Here, particularly in light of Judge Wildman’s ruling confirming the Director’s interpretation of Rule 40, nothing about these Delivery Calls supports a departure from the rule that the Director can only administer junior ground water rights inside a properly designated ACGWS.

To the extent that the CM Rules could be considered ambiguous as to whether an ACGWS is required to administer junior priority ground water rights in a Rule 40 delivery call or whether rulemaking is required to designate an ACGWS, that ambiguity must be resolved against the Department. *Higginson v. Westergard*, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979) (“some courts have gone so far as to hold that in suits involving a public administrative agency the rules and regulations of such agency should be strictly construed against it. . . . Any ambiguities contained therein should be resolved in favor of the adversary.”)



through rulemaking in accordance with the notice and other procedures set forth in the Idaho Administrative Procedures Act. Idaho Code § 67-5201(20) (“‘Rulemaking’ means the process for formulation, adoption, amendment or repeal of a rule.”); Idaho Code § 67-5201(19) (“The term [“Rule”] includes the amendment, repeal, or suspension of an existing rule . . .”). In amending Rule 50, the Director should establish a specific ACGWS encompassing the Petitioners and whichever juniors outside the ESPA ACGWS (if any) are potentially subject to curtailment.

**II. THERE IS NO WAY OTHER THAN RULEMAKING TO ESTABLISH AN ACGWS APPLICABLE TO THESE DELIVERY CALLS.**

As discussed, the Director may not simply designate an ACGWS within these Delivery Call proceedings. Unlike Rule 30 proceedings, within which the CM Rules expressly allow the Director to determine an ACGWS and include that determination in an order responding to the delivery call petition, IDAPA 37.03.11.030.07.c, Rule 40 proceedings require that an ACGWS exist before the Director may respond to a delivery call. IDAPA 37.03.11.040.01 (prescribing the procedures for responding to delivery calls “made by the holder of a senior-priority water right (petitioner) alleging [material injury] . . . by reason of 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 in an organized water district . . .”).

CM Rule 31, entitled “Determining Areas Having A Common Ground Water Supply,” prescribes the kinds of information the Director must consider and the criteria he must use to determine an ACGWS.<sup>6</sup> But Rule 31 does not provide a mechanism for determining an ACGWS in a Rule 40 proceeding. Rather, it acknowledges that the Director’s findings under Rule 31

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<sup>6</sup> Presumably, these criteria would be directly relevant to a determination of an area of common ground water supply that would be designated by a rulemaking amending CM Rule 50.

concerning an ACGWS “shall be included in the Order issued pursuant to Rule Subsection 030.07 [Rule 30],” IDAPA 37.03.11.031.05, discussed above.

The formation of Water Districts 37 and 37-B did not create an ACGWS or change the ESPA ACGWS.<sup>7</sup> The Department’s 2013 order incorporating ground and surface water rights in the Big Wood River Basin into Water District 37 said nothing about ACGWS. *See WD 37 Order*. Nor did it address the criteria for ACGWS designation set out in Rule 31. IDAPA 37.03.11.031.03. In fact, that order explicitly stated that the action was being taken pursuant to statutes governing water districts (Title 42, Chapter 6, Idaho Code) and had nothing to do with conjunctive management under the CM Rules. *WD 37 Order*, p. 10, Conclusion of Law 16 (“Water districts are limited to administration of water rights, including measurement and regulation of diversions. . . . [C]onjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR’s) (IDAPA 37.03.11). . . . [D]ecisions regarding conjunctive administration will be made and enforced by the Director. Conjunctive administration will not be resolved within the venues or forums of a combined water district.”).

The Legislature’s recent rejection of the Director’s attempted repeal of Rule 50 also confirms that he must determine ACGWS in these Delivery Calls through rulemaking. The Director proposed repealing Rule 50 through rulemaking in response to Clear Springs Foods’ November 2010 petition to amend Rule 50 to expand the ESPA ACGWS to include certain tributary areas that had been incorporated into the ESPAM aquifer model. *Final Order, In the*

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<sup>7</sup> As shown in Mr. Luke’s map attached as Exhibit L to the *Bromley Affidavit*, only a portion of Water District 37, and none of Water District 37-B, is within the ESPA ACGWS. *See also Bromley Affidavit Ex. A* (Attachment A map to *Preliminary Order, In the Matter of The Proposed Combination of Water District Nos. 37, 37A, 37C and 37M and the Inclusion of Both Surface and Ground Water Rights in the Combined Water District; and In the Matter of Abolishing the Upper Wood Rivers Water Management District* (Sep. 17, 2013) (“*WD 37 Order*”)).

*Matter of Petition to Amend Rule 50*, p. 7 (Aug. 29, 2014) (“*Rule 50 Order*”) (a copy of which is included as Exhibit G to the *Bromley Affidavit*).<sup>8</sup>

The Director concluded that “Rule 50 should be repealed [instead of amended] because the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water rights should be subject to administration under a delivery call.” *Rule 50 Order*, p. 6 ¶ 5. The Director based his conclusion, in part, on his finding that amending the ESPA ACGWS to match the ESPAM 2.1 model boundary would still leave out tributary basins where ground water diversions deplete the volume of recharge to the ESPA and reduce tributary stream flow and ultimately the flow in certain reaches of the Snake River.

*Rule 50 Order*, p. 2 ¶ 4. Therefore, he said:

Adoption of the ACGWS as proposed in the [*Rule 50 Petition*] would result in treating similarly situated ground water rights disparately. For example, ground water depletions within the upper Big Wood River basin and in the Big Lost River basin below Mackay Dam both reduce tributary underflow and recharge to the ESP A. The area below Mackay Dam is within the ESPAM 2.1 model boundary, and the upper Big Wood River basin is not.

*Rule 50 Order*, p. 3 ¶ 7.<sup>9</sup>

Pursuant to the rulemaking procedures in Idaho’s Administrative Procedures Act, the Director adopted his rule repealing Rule 50. Idaho Administrative Bulletin, Vol. 14-12, pp. 85-88 (Dec. 3, 2014) (a copy of which is attached as Exhibit C to the *Bromley Affidavit*). His repeal included deletion of Rule 50 in its entirety, as well as the deletion of the last sentence of Rule

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<sup>8</sup> In response to Clear Springs Foods’ 2010 petition, the Director began a negotiated rulemaking process but then suspended it in 2011 because he concluded that 1) the ESPAM was being updated to version 2, and 2) any decision regarding whether the tributary areas should be included in a modified area of common ground water supply would benefit from information being developed in the ongoing Rangen Delivery Call proceeding. *Letter from Director Gary Spackman to Water Users re: Petition to Amend Rule 50 Filed by Clear Springs Foods, Inc.*, p. 1 (Apr. 11, 2014) (“*April 2014 Letter*”), *Bromley Affidavit Ex. M*.

<sup>9</sup> The Director cites no evidence supporting the proposition that ground water depletions within the upper Big Wood River basin reduces tributary underflow and recharge to the ESPA.

20.07, IDAPA 37.03.11.020.07, which states “Rule 50 designates specific known areas having a common ground water supply within the state.” *Id.*

But the Director’s repeal of Rule 50 did not become final. The Legislature rejected the repeal after considering the Director’s testimony in support of it. Echoing his statements in the *Rule 50 Order*, the Director told the Senate Resources and Environment Committee that approving his repeal of Rule 50 would mean that “in every delivery call I would then be responsible for taking evidence in a contested case hearing from all of the parties and then determining what the individual area of common ground water supply was for each delivery call.” *Senate Resources and Environment Committee Meeting (“Senate Testimony”)*, p. 2 (Feb 11, 2015) (Spackman testimony).<sup>10</sup> Similarly, the Director told the House Resources and Conservation Committee that approving his repeal of Rule 50 “essentially will mean that there is no area [of common ground water supply] that’s defined and I will have to make that determination in each contested case hearing. *House Resources and Conservation Committee Meeting (“House Testimony”)*, p. 6 (Feb. 9, 2015) (Spackman testimony).<sup>11</sup> The Director candidly admitted that “the repeal of Rule 50 creates greater uncertainty.” *Senate Testimony*, p. 12 (Spackman testimony).

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<sup>10</sup> The *Senate Testimony* audio file is available on the Idaho Legislature’s website at: [http://164.165.67.41/IIS/2015/Senate/Committee/Resources%20&%20Environment/150211\\_sr&e\\_0130PM-Meeting.mp4](http://164.165.67.41/IIS/2015/Senate/Committee/Resources%20&%20Environment/150211_sr&e_0130PM-Meeting.mp4). A copy of the audio file is included on a CD in Exhibit D to the *Bromley Affidavit*. For convenience, a transcription of the relevant part of the *Senate Testimony* is attached as Exhibit H to the *Bromley Affidavit*. *Senate Testimony* page numbers cited in this Memorandum reflect Exhibit H’s transcript pagination, and the speaker’s identity (Director Spackman or Rich Rigby) is noted in a parenthesis within each citation.

<sup>11</sup> The *House Testimony* audio file is available on the Idaho Legislature’s website at: [http://164.165.67.41/IIS/2015/House/Committee/Resources%20&%20Conservation/150209\\_hres\\_0130PM-Meeting.mp4](http://164.165.67.41/IIS/2015/House/Committee/Resources%20&%20Conservation/150209_hres_0130PM-Meeting.mp4). A copy of the audio file is included on a CD in Exhibit D to the *Bromley Affidavit*. For convenience, a transcription of the relevant part of the *House Testimony* is attached as Exhibit E to the *Bromley Affidavit*. *Senate Testimony* page numbers cited in this Memorandum reflect Exhibit E’s transcript pagination, and the speaker’s identity (Director Spackman or Rich Rigby) is noted in a parenthesis within each citation..

At the same time, the Director told the Legislative committees that “[i]f you reject the proposal, then Rule 50 would stay in place and the area of common groundwater supply would remain as presently defined in yellow and I would continue to use that as the area of common groundwater supply based on that legislative determination.” *Senate Testimony*, p. 14 (Spackman testimony).

The Legislature did, in fact, reject the Director’s repeal of Rule 50. The Legislature found that the Director’s proposed repeal of Rule 50 was “not consistent with legislative intent” and “the same is hereby rejected and declared null, void and of no force or effect.” *H. R. Con. Res. 10*, Idaho Leg. 2015 (Mar. 17, 2015), *Bromley Affidavit*, Ex. J. *See also Bromley Affidavit*, Ex. K (*H. R. Con. Res. 10 Statement of Purpose / Fiscal Note, RS23634*, stating “This rule was rejected in committee because it eliminated the current boundary lines of the Eastern Snake Plain Aquifer, and not enough technical data was available at the present time for the Department of Water Resources to accurately evaluate the underground water sources available in the additional territory added to the ESPA to define the effects on the various sections of the Aquifer.”)

In light of the Director’s testimony before the House and Senate committees, the Legislature’s rejection of the Rule 50 repeal demonstrates that (a) the Legislature does not intend for the Director to make *ad hoc* ACGWS determinations within Rule 40 delivery call proceedings, and (b) the Director must designate through rulemaking an ACGWS applicable to these Delivery Calls if junior rights outside the current ESPA ACGWS are to be implicated. The Director repeatedly told the Legislature that he wanted to repeal Rule 50 so he could make ACGWS determinations in each delivery call contested case hearing. *See, e.g., Senate Testimony*, p. 2 (Director stating that, upon Rule 50’s repeal, “I would then be responsible for taking evidence in a contested case hearing from all of the parties and then determining what the

individual area of common groundwater supply was for each delivery call”); *House Testimony*, p. 6 (Director stating that repealing Rule 50 “will require me in every single delivery call now to determine based on evidence that’s presented in a contested case hearing what that boundary should be”). The Legislature said no to this proposal.

The fact that the Director used rulemaking to try to repeal Rule 50 because he otherwise could not respond to delivery calls outside the currently-designated ESPA ACGWS, demonstrates that he cannot respond to these Delivery Calls outside the current ESPA ACGWS without going through rulemaking to designate an ACGWS encompassing potentially affected junior ground water rights (whatever those might be). If the Director already had the ability to designate an ACGWS *ad hoc* within the context of a Rule 40 proceeding, he would not have needed to try to repeal Rule 50.

Of particular importance to these Delivery Calls, the Legislature rejected the Director’s attempted repeal in light of testimony that, if Rule 50 were repealed, “[t]he Big Wood could contribute water” in delivery calls currently limited to the ESPA ACGWS. *Senate Testimony*, p. 5 (Rigby testimony). In other words, the Legislature rejected the Director’s attempted repeal of Rule 50, which might have allowed the Director to curtail junior water rights in the Big Wood River basin in response to delivery calls by senior water rights in the currently designated ESPA ACGWS—i.e. the very situation presented in these Delivery Calls.

It is apparent from the *Senate Testimony* and *House Testimony* that the Legislature does not want the Director to make *ad hoc* ACGWS determinations within Rule 40 delivery call proceedings, and that it does not want piecemeal administration of basins tributary to the ESPA. It is equally apparent that the information to determine an ACGWS in the Big Wood River basin, and many other tributary basins, does not exist. In responding to a question from Senator

Stennett (whose district includes the Big Wood River valley), Mr. Rigby testified that “we don’t have the data to expand [Rule 50] into the Big Wood Basin. But I think we have to recognize that, ultimately, with the Rule change [i.e. repeal of Rule 50] there would be regulation in the Big Wood River.” *Senate Testimony*, p. 7 (Rigby testimony). The Director further explained that “frankly, in many of these areas, we don’t have enough data to determine whether some of these ... particularly in the blue areas [in *Bromley Affidavit* Exhibit I, p. 5]... whether there is any real relationship or how remote the relationship is between either surface water or groundwater in those basins. So, at least in the near future it would be very difficult for me to include those areas in any area of common groundwater supply. We’ll need to do that background technical work.” *Senate Testimony*, p. 10 (Spackman testimony). He also explained that he had “instructed staff to start exploring and evaluating what we need to do to try to determine and gather data that is necessary to determine where the area of common ground water supply would be.” *Id.* In any case, the Director stated that “there certainly has to be enough information and data to define an area of common ground water supply” before the Director can respond to a delivery call.” *Senate Testimony*, p. 12 (Spackman testimony).

The bottom line is that Rule 50’s ESPA ACGWS currently is the only ACGWS designated in the State of Idaho, and its boundary does not encompass the junior ground water rights identified on Mr. Luke’s map, *Bromley Affidavit*, Ex. L, as implicated by these Delivery Calls. The Director must amend Rule 50 to designate an ACGWS encompassing those juniors and Petitioners (if that is even possible) before allowing these Delivery Calls to proceed.


For all of the foregoing reasons, the Director should dismiss the Delivery Calls until such time as an ACGWS has been properly determined and a delivery call action under CM Rule 40 can properly be brought and pursued before the Department.

DATED this 26th day of June, 2015.

GIVENS PURSLEY LLP

By:   
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By:   
Chris M. Bromley  
*Attorneys for City of Bellevue*



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26th day of June, 2015, the foregoing was filed, served, and copied as follows:

BIG WOOD WATER USERS ASSN  
LITTLE WOOD WATER USERS ASSN  
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GRACE EAKIN  
HEART ROCK RANCH LLC (HARRY &  
SHIRLEY HAGEY)  
JOHN & KRISTY MOLYNEUX  
JOHN FERY MARK GATES AND WARD  
WOODS (LOVING CREEK RANCH)  
JOHN STEVENSON  
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