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
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	Docket No. CM-DC-2015-002 **ORDER DENYING JOINT MOTION TO DESIGNATE ACGWS BY RULEMAKING AND TO DISMISS DELIVERY CALLS**

BACKGROUND

On February 24, 2015, the Director ("Director") of the Idaho Department of Water Resources ("Department") received two conjunctive management water delivery call letters from counsel for members of the Big Wood & Little Wood Water Users Association. The letters allege senior surface water users on the Big Wood and Little Wood Rivers are being injured by water users diverting ground water hydraulically connected to the Big Wood and Little Wood Rivers. The letters request the Director regulate junior ground water users consistent with the prior appropriation doctrine.

The Director initiated new contested case proceedings and assigned each delivery call letter its own docket number. The Big Wood Delivery Call was assigned docket no. CM-DC-2015-001. The Little Wood Delivery Call was assigned docket no. CM-DC-2015-002.

On March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the above-described delivery calls. The purpose of the letters was to inform the water users of the delivery calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate, including notices filed by the City of Hailey and the City of Bellevue ("Hailey and Bellevue").

The Department also published general notice of the delivery calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015. The Director held a status conference on May 4, 2015, and a pre-hearing conference on June 3, 2015.

On June 26, 2015, Hailey and Bellevue filed a *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* ("Motion to Dismiss"), *Memorandum in Support of Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* ("Memorandum"), and the *Affidavit of Chris M. Bromley* ("Affidavit"). Joinders in support of the Motion to Dismiss were filed by attorney James P. Speck on behalf of multiple respondents, the City of Ketchum and City of Fairfield, and the Water District 37-B Groundwater Group.[1]

ANALYSIS

Hailey and Bellevue argue the Director must "initiate rulemaking in accordance with the Idaho Administrative Procedure Act, I.C. § 67-5201" to designate an area of common ground water supply ("ACGWS") before proceeding with the Big and Little Wood Delivery Calls pursuant to Rule 40 of the Department's Rules of Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). *Memorandum* at 1.

CM Rule 40 governs the Director's response to the Big and Little Wood Delivery Calls because it applies "[w]hen 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. . . ." IDAPA 37.03.11.040.01. Hailey and Bellevue argue "the plain language of [CM] Rule 40" requires "that an ACGWS exist <u>before</u> the Director may respond to a delivery call." *Memorandum* at 8-9 (emphasis in original).

Contrary to Hailey and Bellevue's argument, CM Rule 40 does not require the Director establish an ACGWS by rulemaking before the Director can move forward with the Big and Little Wood Delivery Calls. While the Director has authority to establish an ACGWS by rule (and in fact did for the Eastern Snake Plain Aquifer ("ESPA")), the CM Rules do not mandate that the Director go through the rulemaking process to establish an ACGWS. 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. (Section 42-237a.g., Idaho Code)

[1] On April 22, 2015, the Water District 37-B Groundwater Group filed a notice of intent to participate only in proceedings related to the Big Wood Delivery Call. On July 10, 2015, counsel Dylan B. Lawrence, of the law firm Varin Wardwell LLC, filed a *Notice of Appearance* and *Joinder in Support of Motion to Dismiss Contested Case Proceedings* on behalf of the Water District 37-B Groundwater Group in both the Big and Little Wood Delivery Calls. The Water District 37-B Groundwater Group did not file a notice of intent to participate in the Little Wood Delivery Call in compliance with the Director's May 13, 2015, *Order Governing Participation*. Therefore, the Director will not consider filings by the Water District 37-B Groundwater Group in Little Wood Delivery Call proceedings.

IDAPA 37.03.11.010.01. The ACGWS for the Big and Little Wood Delivery Calls is a factual question that can be established based upon information presented at hearing applying the definition set forth in CM Rule 10.01.

Hailey and Bellevue also argue that, because CM Rule 31 establishes a process for determining an ACGWS in a CM Rule 30 delivery call, the lack of a process in CM Rule 40 means that the Director *must* follow the rulemaking process to establish an ACGWS in a CM Rule 40 delivery call. *See Memorandum* at 9-10. The Director disagrees. While CM Rule 31 requires the Director consider certain information and establishes criteria for determining an ACGWS in a CM Rule 30 delivery call, the absence of specific processes in the CM Rules to establish an ACGWS for a CM Rule 40 delivery call does not dictate that the Director must establish an ACGWS by rule in a CM Rule 40 delivery call. CM Rule 30 and 31 do not limit the Director's ability to determine an ACGWS in the Big and Little Wood Delivery Calls under CM Rule 40. As discussed above, the ACGWS is a factual question that can be established based upon information presented at hearing applying the definition set forth in CM Rule 10.01.

The Idaho Legislature has given the Director "broad powers to direct and control distribution of water from all natural water sources within water districts." *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800; Idaho Code § 42-602. "In connection with his supervision and control of the exercise of ground water rights the [Director] shall also have the power to determine what areas of the state have a common ground water supply. . . ." Idaho Code § 42-237a(g). In addition, a timely response is required when a delivery call is made. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). A requirement that the Director must initiate rulemaking to designate an ACGWS prior to responding to every CM Rule 40 delivery call against junior-priority ground water rights outside the ESPA would result in lengthy delay and run afoul of the Director's mandatory duty to "distribute water in water districts in accordance with the prior appropriation doctrine." Idaho Code § 42-602; *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014); *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State, Dep't of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999)).

The Director will not dismiss the Big and Little Wood Delivery Calls to designate an ACGWS through rulemaking before responding to the delivery calls. The Director will determine the ACGWS in the Big and Little Wood Delivery Calls based upon information presented at hearing applying the definition set forth in CM Rule 10.01.[2]

Hailey and Bellevue reference statements of the Director and District Court in the Surface Water Coalition and Rangen, Inc., delivery calls. *Memorandum* at 4-6. These statements recognize the Director may only curtail junior ground water rights within the ACGWS defined by CM Rule 50.01 in the context of delivery calls by holders of senior water

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[2] Hailey and Bellevue assert it is "apparent that the information to determine an ACGWS in the Big Wood River basin, and many other tributary basins, does not exist." *Memorandum* at 14. Again, the Director has a mandatory legal duty to distribute water in water districts in accordance with the prior appropriation doctrine. The Director must meet this duty in the Big and Little Wood Delivery Calls by designating an ACGWS through administrative hearings and deliberations associated with those delivery calls. Uncertainty cannot operate in favor of junior ground water right holders. *See Memorandum Decision and Order on Petitions for Judicial Review* at 40, Case No. CV-2014-1338 (Consolidated Gooding County Case No. Cv-2014-179) (Oct, 24, 2014).

rights against junior-priority ground water rights within the ESPA ACGWS. *See id.* Hailey and Bellevue argue the statements demonstrate the Director may *only* administer junior ground water rights in a CM Rule 40 delivery call within an already designated ACGWS. *Id.* at 4.

The statements relied upon by Hailey and Bellevue are specific to the Director's authority to curtail junior ground water rights within the ACGWS defined by CM Rule 50.01. The statements are irrelevant to the Director's authority to curtail junior ground water rights in response to a CM Rule 40 delivery call by senior water right holders against junior ground water rights outside the ESPA ACGWS, such as the Big and Little Wood Delivery Calls. Statements of the Director and District Court related to prior delivery call proceedings factually and legally distinct from the Big and Little Wood Delivery Calls are not a basis for dismissal of the delivery calls.

Hailey and Bellevue also reference the Idaho Legislature's rejection of the Director's repeal of CM Rule 50. *Memorandum* at 10-14. In the *Final Order* issued In the Matter of Petition to Amend Rule 50, the Director found:

> 12. The Director is able to administer a delivery call under the [CM] Rules without having a fixed ACGWS defined for the ESPA. Eliminating [CM] Rule 50 addresses the disparate treatment concern . . . . The administrative hearings and deliberations associated with delivery calls is the proper venue to address which ground water rights should be subject to administration.

Affidavit Ex. G at 4. The Director concluded "[CM] Rule 50 should be repealed 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." *Id.* at 6. The Director repeated this conclusion in testimony before the Idaho Legislature.[3] The Idaho Legislature's *Statement of Purpose* related to rejection of the Director's repeal of CM Rule 50 explains:

> This rule was rejected in committee because it eliminated the current boundary lines of the [ESPA], and not enough technical data was available at the present time for the [Department] to accurately evaluate the underground water sources available in the additional territory to the ESPA to define the effects on the various sections of the Aquifer.

Affidavit Ex. K. Hailey and Bellevue cite the above-described testimony and *Statement of Purpose* to support the argument "that the Legislature does not want the Director to make *ad hoc* determinations within [CM] Rule 40 delivery call proceedings." *Memorandum* at 14.

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[3] The Director testified: "Ultimately, we felt that the fairest approach was to simply repeal the Rule and then 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 groundwater supply was for each delivery call." *Affidavit* Ex. H at 2. The Director also testified: "[W]hat we are proposing is to repeal the Rule, which results in *no* definition of a boundary for the [ACGWS] for the [ESPA]. And it will require me in every single delivery call now to determine based on evidence that's presented in a contested case hearing what the boundary should be. So, there will not be any hard-wire boundary in the Rules for the [ACGWS] for the [ESPA]." *Affidavit* Ex. E at 6.

The Director's testimony and *Statement of Purpose* cited by Hailey and Bellevue are specific to the effect of the repeal of CM Rule 50 on ESPA delivery calls. The Director's testimony and *Statement of Purpose* are irrelevant to CM Rule 40 delivery calls initiated by holders of senior water rights against junior ground water rights outside the ESPA ACGWS and, therefore, not a basis to dismiss the Big and Little Wood Delivery Calls.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Motion to Dismiss is DENIED.

DATED this 22nd day of July 2015.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of July 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:

BIG WOOD WATER USERS ASSN
LITTLE WOOD WATER USERS ASSN
C/O JOSEPH F. JAMES
BROWN & JAMES
130 FOURTH AVENUE WEST
GOODING ID 83330
joe@brownjameslaw.com
dana@brownjameslaw.com

SOUTH VALLEY GROUNDWATER DISTRICT
C/O ALBERT BARKER
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE ID 83701-2139
apb@idahowaters.com
sle@idahowaters.com

HAILEY CEMETERY MAINTENCE DIST
JACOB & RUTH BLOOM
C/O PATRICK D BROWN
PATRICK D BROWN PC
PO BOX 125
TWIN FALLS ID 83303
pat@pblaw.co

IDAHO GROUND WATER APPROPRIATORS INC
C/O RANDALL C BUDGE
THOMAS J BUDGE
JOSEPH G BALLSTAEDT
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net
jgb@racinelaw.net

CITY OF FAIRFIELD
CITY OF KETCHUM
C/O SUSAN E BUXTON
CHERESE D MCLAIN
MOORE SMITH BUXTON & TURCKE
950 W BANNOCK ST STE 520
BOISE ID 83702
seb@msbtlaw.com
cdm@msbtlaw.com

SINCLAIR OIL CORPORATION DBA SUN VALLEY COMPANY
C/O SCOTT L CAMPBELL
MATTHEW J MCGEE
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701-0829
slc@moffatt.com

CITY OF HAILEY
VALLEY CLUB INC
C/O MICHAEL C CREAMER
MICHAEL P LAWRENCE
GIVENS PURLSEY LLP
PO BOX 2720
BOISE ID 83701-2720
mcc@givenspursley.com
mpl@givenspursley.com
lisahughes@givenspursley.com
lorigibson@givenspursley.com

STROM RANCHES INC
DENNIS STROM
C/O S BRYCE FARRIS
SAWTOOTH LAW OFFICES PLLC
PO BOX 7985
BOISE ID 83707-7985
bryce@sawtoothlaw.com

AF 2014 TRUST
GEOFFREY SMITH LLC
MARIANA S PAEN TRUST
C/O FRITZ HAEMMERLE
HAEMMERLE & HAMMERLE PLLC
PO BOX 1800
HAILEY ID 83333
fxh@haemlaw.com

ANIMAL SHELTER OF WOOD RIVER VALLEY
DENNIS J CARD & MAUREEN M MCCANTY
EDWARD A LAWSON
FLYING HEART RANCH II SUBDIVISION OWNERS ASSN
HELIOS DEVELOPMENT LLC
SOUTHERN COMFORT HOMEOWNERS ASSN
THE VILLAGE GREEN VCHOA
C/O JAMES R LASKI
HEATHER O'LEARY
LAWSON LASKI CLARK & POGUE PLLC
PO BOX 3310
KETCHUM ID 83340
heo@lawsonlaski.com
jrl@lawsonlaski.com

WATER DISTRICT 37-B GROUNDWATER GROUP
C/O DYLAN B LAWRENCE
VARIN WARDWELL LLC
PO BOX 1676
BOISE ID 83701-1676
dylanlawrence@varinwardwell.com

IDAHO FOUNDATION FOR PARKS AND LANDS INC
C/O CHAS MCDEVITT
MCDEVITT & MILLER LLP
PO BOX 2564
BOISE ID 83701
chas@mcdevitt-miller.com

C/O EILEEN MCDEVITT
732 FALLS VIEW DR
TWIN FALLS ID 83301
emcdevitt1@msn.com

CITY OF BELLEVUE
MICHELLE WOLF
C/O CANDICE MCHUGH
CHRIS BROMLEY
MCHUGH BROMLEY PLLC
380 S 4TH STREET STE 103
BOISE ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

ECCLES FLYING HAT RANCH LLC
ECCLES WINDOW ROCK RANCH LLC
HOLLY FARMS LTD
J EVAN ROBERTSON
SUN VALLEY WATER & SEWER DISTRICT
C/O J EVAN ROBERTSON
ROBERTSON & SLETTE PLLC
PO BOX 1906
TWIN FALLS ID 83303-1906
erobertson@rsidaholaw.com

IDAHO POWER COMPANY
C/O JOHN K SIMPSON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE ID 83701-2139
jks@idahowaters.com
jlw@idahowaters.com

AIRPORT WEST BUSINESS PARK OWNERS ASSN INC
AQUARIUS SAW LLC
ASPEN HOLLOW HOMEOWNERS ASSN (ALLAN PATZER & WILLIAM LEHMAN)
B LAMBERT TRUST (TOBY B LAMBERT)
BARBER FAMILY ASSOCIATES LP
BARRIE FAMILY PARTNERS
BELLEUE FARMS LANDOWNERS ASSN INC
BLAINE COUNTY RECREATION DISTRICT
BLAINE COUNTY SCHOOL DIST NO. 61
CAROL BURDZY THIELEN
CHANEY CREEK RANCH LLC
CHARLES & COLLEEN WEAVER
CHARLES L MATTHIESEN
CLEAR CREEK LLC
CLIFFSIDE HOMEOWNERS ASSN INC
COMMUNITY SCHOOL (JANELL L GODDARD)
DAN S FAIRMAN MD & MELYNDA KIM STANDLEE FAIRMAN
DEER CREEK FARM (LYNN CAMPION)
DON R & JUDY H ATKINSON
DONNA F TUTTLE TRUST
ELIZABETH K GRAY
F ALFREDO REGO
FLOWERS BENCH LLC
GOLDEN EAGLE RANCH HOA INC
GREENHORN HOMEOWNERS ASSN (JEFFREY T SEELY)
GRIFFIN RANCH PUD SUBDIVISION HOA (CHERI HICKS)
GRIFFIN RANCH SUBDIVISION HOA (CHERI HICKS)
GULCH TRUST (TERESA L MASON)
HEATHERLANDS HOMEOWNERS ASSN
HENRY & JANNE BURDICK
IDAHO RANCH LLC
JAMES K & SANDRA FIGGE
JAMES P & JOAN CONGER
KIRIL SOKOLOFF
LAURA L LUCERE
LINDA WOODCOCK
LOUISA JANE H JUDGE
MARGO PECK
MARION R & ROBERT M ROSENTHAL
MATS & SONYA WILANDER
MICHAEL E WILLARD
MID-VALLEY WATER CO LLC
PIONEER RESIDENTIAL & RECREATIONAL PROPERTIES LLC
R THOMAS GOODRICH & REBECCA LEA PATTON
RALPH R LAPHAM
RED CLIFFS HOMEOWNERS ASSOCIATION
REDCLIFF PARTNERS LP (RANNEY E DRAPER)
RHYTHM RANCH HOMEOWNERS ASSN
RIVER ROCK RANCH LP (SHEILA WITMER)
ROBERT ROHE
SAGEWILLOW LLC
SALIGAO LLC
SANDOR & TERI SZOMBATHY
SCI PROPERTIES LLC (BRENDA A LEVINE)
STARLITE HOMEOWNERS ASSN
STONEGATE HOMEOWNERS ASSN LLC
THE ANNE L WINGATE TRUST
THE BARKER LIVING TRUST
THE DANIEL T MONOOGIAN REVOCABLE TRUST
THE JONES TRUST
THE RALPH W & KANDI L GIRTON 1999 REVOCABLE TRUST
THE RESTATED MCMAHAN 1986 REVOCABLE TRUST
THE VERNOY IRREVOCABLE TRUST
THOMAS W WEISEL
TIMBERVIEW TERRACE HOA INC
WEBB LANDSCAPE INC (MARK PALMER)
C/O JAMES P SPECK
SPECK & AANESTAD
PO BOX 987
KETCHUM ID 83340
jim@speckandaanestad.com

DEAN R ROGERS INC (DEAN R ROGERS III)
C/O LAIRD B STONE
STEPHAN KVANVIG STONE & TRAINOR
PO BOX 83
TWIN FALLS ID 83303-0083
sks&t@idaho-law.com

CATHERINE S DAWSON REVOCABLE TRUST
DEER CREEK RANCH INC
ROBERT L BAKER REVOCABLE TRUST
SYRINGA RANCH LLC
C/O TRAVIS L THOMPSON
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS ID 83301-3029
tlt@idahowaters.com

ANTHONY & JUDY D ANGELO
PO BOX 3267
KETCHUM ID 83340
judydangelore@gmail.com

BARBARA CALL
PO BOX 4
ROSS CA 94957
barbcall@sbcglobal.net

BERNARD I FRIEDLANDER PHD
116 VALLEY CLUB DRIVE
HAILEY ID 83333

BLUEGROUSE RIDGE HOA
C/O BRIAN MCCOY
PO BOX 3510
KETCHUM ID 83340
brian@seabrd.net

BRIAN L SMITH & DIANE STEFFEY-SMITH
PO BOX 629
BELLEVUE ID 83313
brianlamarsmith@me.com

BRITTA S HUBBARD
PO BOX 1167
KETCHUM ID 83340
brittahubbard@gmail.com

BRUCE & KAREN TRUXAL
PO BOX 431
BELLEVUE ID 83313
btruxal@powereng.com

CANADIAN CLUB
HOMEOWNERS ASSN
PO BOX 4041
KETCHUM ID 83340

COLD SPRINGS WATER COMPANY
PO BOX 254
KETCHUM ID 83340

DAVID BERMAN
PO BOX 1738
CAVE CREEK AZ 85327
berman.dlb@gmail.com

DOUGLAS C WALTON
DIANA L WHITING
109 RIVER GROVE LN
HAILEY ID 83333

ERNEST & JUDITH GETTO TRUST
ERNEST J GETTO
417 ENNISBROOK DR
SANTA BARBARA CA 93108

GARY HOFFMAN
PO BOX 1529
KETCHUM ID 83340

GREGORY R BLOOMFIELD
REVOCABLE TRUST
PO BOX 757
HAILEY ID 83333

HARRY S RINKER
949 SOUTH COAST DR STE 500
COSTA MESA CA 92626
hrinker@rinkercompany.com

HARRY S RINKER
PO BOX 7250
NEWPORT BEACH CA 92658
toni@rinkercompany.com

HULEN MEADOWS WATER COMPANY
AND ASSN INC
PO BOX 254
KETCHUM ID 83340

INNOVATIVE MITIGATION SOLUTIONS
LLC
2918 N EL RANCHO PL
BOISE ID 83704

JAMES D WHITE
PO BOX 367
BELLEVUE ID 83313
jdwhite@q.com

JARED R WILLIAMS
REVOCABLE TRUST
PO BOX 99658
SEATTLE WA 98139

JIM W KOONCE
PO BOX 2015
HAILEY ID 83333

KATHERINE BRECKENRIDGE
B BAR B INC
PO BOX 685
PICABO ID 83348

KEN SANGHA
ASAM TRUST
PO BOX 9200
KETCHUM ID 83340
kensangha@gmail.com

KEVIN D LAKEY
WATER DISTRICT 37
107 W 1ST
SHOSHONE ID 83352
watermanager@cableone.net

LAWRENCE SCHOEN
18351 US HWY 20
BELLEVUE ID 83313

LUBOFF SENAVSKY &
CHARLES TIMOTHY FLOYD
PO BOX 1240
EAGLE ID 83616
bsfloyd@mac.com

MARLYS J SCHMIDT
10901 HWY 75
BELLEVUE ID 83313
mjschmidt49@msn.com

NANCIE C TATUM &
THOMAS F HENNIG
PO BOX 1365
SUN VALLEY ID 83353

PAUL & POLLY CARNEY LLOYD & DEANN
RICHINS MARK & SUSAN WILLIAMS
FISH CREEK RESERVOIR RANCH, LLC
384 2 2900 E
PAUL ID 83347

PAUL & TANA DEAN
40 FREEDOM LOOP
BELLEVUE ID 83313

PETER ZACH SEWELL
LORI SEWELL
PO BOX 3175
HAILEY ID 83333
zlsewell@gmail.com

PHILIP J VANDERHOEF
KATHLEEN MCKAY
5069 HAROLD PL NE
SEATTLE WA 98105

POPPY ENGLEHARDT
10965 HIGHWAY 75
BELLEVUE ID 83313

ROBERT BOUTTIER
PO BOX 476
BELLEVUE ID 83313

ROBERT & JUDITH PITTMAN
121 LOWER BROADFORD RD
BELLEVUE ID 83313

ROBERT J STRUTHERS
762 ROBERT ST PICABO ROUTE
BELLEVUE ID 83313

RUSTY KRAMER
WATER DISTRICT 37B
PO BOX 591
FAIRFIELD ID 83327
waterdistrict37b@outlook.com

SAGE SPRINGS HOMEOWNERS ASSN INC
PO BOX 254
KETCHUM ID 83340

SILVER SAGE OWNERS ASSN INC
C/O CAROL'S BOOKKEEPING
PO BOX 1702
KETCHUM ID 83340

STARWEATHER OWNERS ASSN INC
PO BOX 254
KETCHUM ID 83340

STEVEN C FUNK
90 FREEDOM LOOP
BELLEVUE ID 83313

SV RANCH LLC
PO BOX 333
FAIRFIELD ID 83327
camascreek@hughes.net

THOMAS & AMY MISTICK
149 ASPEN LAKES DR
HAILEY ID 83333

USDA FOREST SERVICE
ATTN JAMIE GOUGH
324 25TH ST
OGDEN UT 84401
jgough@fs.fed.us

VALLEY CLUB OWNERS ASSN INC
PO BOX 254
KETCHUM ID 83340

WILLIAM R & KATHRYN L RATLIFFE
206 BAYHORSE RD
BELLEVUE ID 83313

WOOD RIVER LAND TRUST
119 E BULLION ST
HAILEY ID 83333

COURTESEY COPY TO:

ED REAGAN
COURIER NEWS
PO BOX 339
FAIRFIELD ID 83327
news@highway46.org

Emalee Rushing
Administrative Assistant