

# WHITE PETERSON

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March 2, 2022

To: Mayor and City Councilmembers  
City of Ketchum  
Delivered electronically

From: Brian T. O'Bannon and Matthew A. Johnson, White Peterson

Re: Cities/SVWSD/SVC Term Sheet Re: Big Wood River GWMA Management Plan –  
Legal Analysis and Recommendations

### **Introduction:**

The Cities/SVWSD/SVC Term Sheet is an attachment to a ground water management plan for the Big Wood River Ground Water Management Area that contains certain commitments for cities and other entities in the Wood River Valley that use ground water for purposes other than irrigation. The Cities/SVWSD/SVC Term Sheet has already been approved by the City of Bellevue, City of Hailey, the Sun Valley Company and the Sun Valley Water and Sewer District. The Idaho Department of Water Resources (IDWR) is requesting approval of the Term Sheet by the City of Ketchum.

### **Legal Considerations:**

Conjunctive administration of ground water rights and surface water rights has been a subject of concern for the IDWR since the 1980s, when it became clear that surface water sources and ground water sources are hydrologically linked and that ground water pumping can deplete surface water levels, resulting in injury to holders of surface water rights. The IDWR adopted the Conjunctive Management (CM) Rules in 1994 in order to provide an orderly administrative process for conjunctively administering ground water and surface water rights. Conjunctive administration remains a challenge, however, due to the complex geological relationship between aquifers and surface streams.

#### **A. Big Wood River Ground Water Management Area**

The Big Wood River Ground Water Management Area (BWRGWMA) was formed in 1991 pursuant to I.C. § 42-233b, which provides that the director of the Idaho Department of Water Resources may designate a ground water management area for any ground water basin

which the director “has determined may be approaching the conditions of a critical ground water area.” The BWRGWMA was formed primarily to address concerns that groundwater pumping was depleting surface water flows and injuring the rights of surface water users. The IDWR implemented a moratorium on further development of ground water in the Wood River Valley around that time. In 2013, following adjudication and decree of water rights in Basin 37, the administrative unit that includes the Wood River Valley, IDWR ordered the inclusion of ground water rights in Water District 37 to facilitate conjunctive administration of ground water and surface water rights. In recent years, low water years have become more frequent and the issue of conjunctive administration has become more urgent. A group of senior surface water users filed a delivery call against ground water users in 2015, and again in 2017. However, no ground water management plan or mitigation plan was developed in response to these actions.

The City of Ketchum, like other cities in the Wood River Valley, relies on groundwater pumping for its municipal water supply. The City’s groundwater rights have priority dates ranging from the 1950s to the 1980s, and are therefore junior to surface water rights used for irrigation throughout Basin 37. Like other junior groundwater users, the City’s groundwater pumping is hydrologically connected to surface water flows, particularly in the Big Wood River, and could theoretically impact the availability of water to downstream senior surface water users.

B. Basin 37 Administrative Proceeding

Negotiations for a groundwater management plan began as a result of the Basin 37 Administrative Proceeding commenced by the Director of the IDWR in May 2021. The Director initiated the proceeding in response to indications that 2021 would be an especially low water year. Notice of the administrative hearing was served on May 4, 2021 to holders of groundwater rights in Basin 37. While notice was given to all holders of groundwater rights in Basin 37, the proceeding focused on the area south of Bellevue known as the “Bellevue Triangle.” Unlike in previous proceedings involving conjunctive administration of groundwater and surface water rights in Basin 37, no delivery call was filed by senior users and the Director did not proceed under the CM Rules. Instead, the Director proceeded under I.C. § 42-237a.g., which he claimed granted him authority to curtail any groundwater right if he found there was insufficient water to fulfill that right. A hearing was held June 7-12, 2021. The factual question at issue at the hearing was whether groundwater pumping in the Bellevue Triangle depleted flows in Silver Creek and the Little Wood River, resulting in material injury to holders of senior surface water rights on those streams.

While groundwater users in the upper Wood River Valley, including the cities of Ketchum, Hailey and Bellevue, the Sun Valley Company, and the Sun Valley Water and Sewer District, were not directly targeted by the proceeding, the Director permitted them to participate due to the common questions of law and fact that may apply in a future proceeding targeting other groundwater users in Basin 37. Following the hearing, the Director entered an order summarily curtailing over 300 ground water rights in the Bellevue Triangle area effective July 1, 2021.

Negotiations for a mitigation plan continued between the groundwater districts and the surface water users. In a letter to Governor Brad Little and Speaker Scott Bedke, the Director

stated that he was willing to allow resumption of ground water diversions in the Bellevue Triangle upon certain conditions, including a written mitigation plan between groundwater users whose water had been curtailed and senior surface water users and a written agreement to “negotiate in good faith to mutually develop and submit to the Director, by December 1, 2021, a ground water management plan for the entire Wood River Basin that will address future injury to senior priority surface water rights caused by ground water pumping.” In accordance with these conditions, the mitigation plan included an agreement to submit a ground water management plan to the Director by December 1, 2021. If a plan was not submitted, it was agreed that the Director “will resume the Basin 37 proceedings to determine what actions he should take to ensure that groundwater diversions within the ‘Wood River Basin’ don’t negatively affect surface water use.”

C. The Big Wood River GWMA Management Plan

Under I.C. § 42-233b, when a ground water management area is designated, the director “may approve a ground water management plan for the area.” The ground water management plan “shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.” Thus, a ground water management plan is intended to (1) prevent depletion of the aquifer and (2) manage the effects of groundwater pumping on surface water. The Big Wood River GWMA Management Plan is intended to conserve water and enhance water supply in Basin 37.

The parties to the Plan include surface water users in Basin 37 represented by the Big Wood Canal Company (BWCC) and Big Wood and Little Wood Water Users Association (BWLWWUA); ground water irrigation users represented by the Galena Ground Water District (GGWD) and South Valley Ground Water District (SVGWD); the Cities of Ketchum, Hailey, and Bellevue (Cities); the Sun Valley Company (SVC) and the Sun Valley Water and Sewer District (SVWSD). Under the Plan, the groundwater districts will be required to fallow irrigated acreage, observe season of use limitations, and may be subject to additional self-curtailed use if necessary to meet streamflow targets. The Plan also provides for additional curtailment of consumptive use and delivery of storage water in dry years. These parts of the Plan don’t apply to the Cities, except to the extent that the Cities’ contributions to the CIEF fund established under the Plan may be used to purchase storage water in dry years.

The Plan has a three-year term commencing with the 2022 water year and continuing through the 2024 water year. Idaho Code § 42-233b provides that “Water rights holders participating in an approved ground water management plan shall not be subject to administration on a time priority basis so long as they are in compliance with the ground water management plan.” Thus, participation in the plan will protect junior groundwater users from curtailment during the term of the plan.

D. City/SVC/SVWSD Term Sheet

The Cities, SVC, SVWSD, BWCC, and BWLWWUA are parties to a separate term sheet that is attached to the main term sheet as Appendix A. This term sheet was negotiated separately between the Cities, Sun Valley Company, the Sun Valley Water and Sewer District, and the

representatives of surface water users due to the differences in patterns of water use and the lesser impact that these entities have on surface water supplies. The City/SVC/SVWSD Term Sheet contains most of the commitments the Cities will make under the Plan. To the extent there is any conflict between Appendix A and the main term sheet, Appendix A will control with respect to the parties to Appendix A.

The commitments parties to the City/SVC/SVWSD Term Sheet make include the following:

- A contribution of \$10 per acre foot of groundwater diversions to the Conservation, Infrastructure, and Efficiency Fund (CIEF) established under the plan. The CIEF will be used to fund infrastructure and efficiency improvements in water systems in the basin and may be used to pay for storage water delivery to seniors in dry years. A CIEF committee will determine how the funds are spent.
- A contribution of \$3.60 per acre foot of groundwater diversions to cloud seeding projects undertaken by Idaho Power that benefit water users in Basin 37.

The plan also includes commitments to continue to investigate conservation measures and potential recharge projects.

For the first year, contributions to the CIEF and the cloud seeding projects are based on the average groundwater diversions of the entity for the years 2016-21 as set forth in Table 1 in the Term Sheet. The Term Sheet provides for recalculation of the five-year average ground water diversions each year, so the payments may increase or decrease depending on the level of ground water diversions during the term of the Plan.

### **Financial Impact:**

The first year of payments into the CIEF and cloud seeding program will be based on the calculated average ground water diversions for the City of Ketchum as set forth in the Term Sheet, which is 3137.36 AF. The contribution to CIEF for 2022 would be approximately \$31,374, and the contribution to cloud seeding would be approximately \$11,294. In 2023 and 2024, the five-year average of groundwater diversions will be recalculated, and the contributions could increase or decrease depending on the recalculated five-year average.

### **Recommendations:**

The primary benefit of the BWRGWMA Management Plan is that it effectively provides “safe harbor” from curtailment to all parties “who implement their respective obligations as described in an approved Management Plan.” This safe harbor provision will ensure that there are no threats to the City’s water supply from holders of senior water rights or administrative proceedings before IDWR for the next three years. Failure to approve the plan would expose the City to potential delivery calls of seniors and/or renewed administrative proceedings before IDWR, which would be costly to defend and could result in curtailment of portions of the City’s groundwater diversions.

An additional benefit of the Plan is that it will provide time to resolve legal issues concerning the Director's decision to invoke I.C. § 42-237a.g. as authority to conduct a summary proceeding for conjunctive administration of groundwater and surface water rights. There are numerous legal questions concerning the legality of the Director's actions that are currently on judicial review before the District Court of the Fifth Judicial District, which hears appeals from decisions of IDWR. The decision of the district court will likely be appealed to the Idaho Supreme Court, and a final resolution of these issues is likely to take 1-2 years. Among the issues to be resolved is whether the Director can ignore the Department's conjunctive management rules and engage in conjunctive administration in the manner of the Basin 37 proceeding. The resolution of these issues will provide greater clarity to the parties in future negotiations over conjunctive management of surface water and ground water rights.

**Conclusion:**

It is recommended that the City Council approve the resolution authorizing the Big Wood River Ground Water Area Management Plan.

CITY OF KETCHUM  
RESOLUTION NO. 22-017

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KETCHUM, BLAINE COUNTY, STATE OF IDAHO, MAKING CERTAIN FINDINGS; AUTHORIZING THE MAYOR TO SIGN ON BEHALF OF THE CITY OF KETCHUM THE BIG WOOD RIVER GROUND WATER MANAGEMENT AREA ADVISORY COMMITTEE GROUNDWATER MANGAMENT PLAN TERM SHEET; AUTHORIZING COUNSEL FOR THE CITY OF KETCHUM TO APPROVE AS TO FORM AND CONTENT THE CITIES/SVWSD/SVC TERM SHEET RE: BIG WOOD RIVER GWMA MANAGEMENT PLAN; DIRECTING THE CITY CLERK; AND PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED by the City Council of the City of Ketchum, Blaine County, State of Idaho:

**Section 1. Findings**

The City Council finds that a management plan has been negotiated for the Big Wood River Ground Water Management Area by the various parties holding ground water rights and surface water rights in the Management Area; that the Plan includes a term sheet designated the Cities/SVWSD/SVC Term Sheet Re: Big Wood River GWMA Management Plan that requires certain contributions from the City to funds that will enhance conservation and water supply in the Management Area; that the Plan will be in effect for a period of three years; that approval of the Plan by the City will protect the City's water supply from possible curtailment during the term of the Plan; and that it is in the best interests of the City to approve the Big Wood River Ground Water Management Plan and the Cities/SVWSD/SVC Term Sheet.

**Section 2. Authorizing the Mayor and Counsel for the City of Ketchum**

The Mayor is hereby authorized to sign the Big Wood River Ground Water Management Area Advisory Committee Groundwater Management Plan Term Sheet on behalf of the City of Ketchum. Brian T. O'Bannon is authorized to sign as counsel for the City of Ketchum the approval of the Cities/SVWSD/SVC Term Sheet as to form and content.

**Section 3. Directing the City Clerk**

The City Clerk is hereby directed to file this Resolution forthwith in the official records of this City.

**Section 4. Effective Date**

This resolution shall be in full force and effect upon its passage.

PASSED AND ADOPTED by the Council of the City of Ketchum this \_\_\_ day of March, 2022.

ATTEST

\_\_\_\_\_  
Neil Bradshaw, Mayor  
City of Ketchum

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Tara Fenwick, City Clerk

**CITIES/SVWSD/SVC TERM SHEET RE:  
BIG WOOD RIVER GWMA MANAGEMENT PLAN**

This term sheet describes participation in a management plan for the Big Wood River Ground Water Management Area (“GMWA”) by the Cities of Bellevue, Hailey, and Ketchum (collectively, the “Cities”), Sun Valley Water & Sewer District (“SVWSD”), and Sun Valley Company (“SVC”) for a term of three years, upon which the plan shall be reevaluated by the parties. For purposes of Paragraph 10 below, the parties (“Parties”) to this term sheet are Cities, SVWSD, SVC, Big Wood Canal Company (“BWCC”), and the Big Wood and Little Wood Waters Users Association (“BWLWWUA”). This term sheet shall be part of a GWMA Management Plan (“GWMA Plan”) for Basin 37 and is not effective unless a GWMA Plan is adopted by the Director of IDWR. The Cities, SVWSD, and SVC do not waive any claims or defenses with respect to their respective water rights or water uses or their potential groundwater pumping impacts on surface waters.

This term sheet addresses the Cities’, SVWSD’s, and SVC’s contributions to the GWMA Plan only for the Cities’ and SVWSD’s municipal water rights and SVC’s commercial water right for snowmaking at River Run. A list of these water rights is included as Attachment 1. The Cities of Hailey and Ketchum are members of the Galena Ground Water District with respect to their irrigation water rights, and their irrigation under those rights would be addressed in any GWMA Plan applicable to Galena Ground Water District. Pursuant to Idaho Code Section 42-233b, the Cities’, SVWSD’s, and SVC’s non-irrigation water rights will not be subject to administration on a time priority basis so long as the Cities, SVWSD, and SVC are in compliance with an approved groundwater management plan.

Aside from naturally occurring low snowpack and low runoff events, surface water diversions and agricultural irrigation groundwater pumping are the largest contributors to streamflow reductions in the Big Wood River, Silver Creek, and the Little Wood River. The Cities’, SVWSD’s, and SVC’s pumping under their respective non-irrigation groundwater rights represents a small fraction of total groundwater pumping in the GWMA according to the Wood River Valley Groundwater Flow Model v. 1.1. These figures are summarized in Table 1 below:

<b>Table 1</b>			
<b>Area/Entity</b>	<b>2016-2021 Average Annual GW Pumping (Acre Feet)</b>	<b>% of GWMA Model Domain</b>	<b>Source</b>
<b>Total GWMA Pumping (1995-2014)</b>			
WRV1.1 Model Area	47,525	--	Irr season GW CU / on-farm efficiency + Nov-Mar pumping
<b>Non-Irrigation Pumping by SVC, Cities, and SVWSD (2016-2020)</b>			
Sun Valley Company	270.82	0.6%	WMIS No. 1000705
City of Bellevue	377.43	0.8%	WMIS Nos. 1000846, 1000847

City of Ketchum	3137.36	6.8%	WMIS Nos. 1000862, 1000863, 1000864, 1000865, 1000901, 1003175
City of Hailey	1606.62	3.4%	WMIS Nos. 1000850, 1000852, 1001308, 1001309, 1001310, 1001311
SVWSD	3101.22	6.5%	WMIS Nos. 1000868, 1000869, 1000870, 1000871, 1000872, 1000873, 1000874, 1000875, 1000883, 1001247, 1001267, 1001268, 1001346
<b>Total</b>	<b>8493.45</b>	<b>17.9%</b>	

After discussions with BWCC and BWLWWUA, there is consensus that there are few opportunities available at this time for the Cities, SVWSD, and SVC to mitigate their groundwater pumping impacts to the Big Wood River. The Cities, SVWSD, and SVC agree that limiting or reducing their groundwater diversions (and consumptive use) should be promoted to the extent practicable. After consultation with BWCC and BWLWWUA, the Cities, SVWSD, and SVC will participate in a GWMA Plan as follows:

1. Starting in 2022, and every year thereafter, by January 31 for the three-year term of the GWMA Plan approved by the Director of IDWR, the Cities, SVWSD, and SVC each will contribute \$10 per acre-foot<sup>1</sup> of their average annual non-irrigation groundwater diversions (based on a 5-year rolling average of prior diversions) to an account known as the Conservation and Infrastructure, Efficiency Fund (“CIEF Fund”), as more broadly described in the GWMA Plan. The monies contributed to the CIEF Fund by the Cities, SVWSD, and SVC should be used for infrastructure improvements and other permanent measures and may be used for purchasing storage water. The first year’s payment shall be based on the pumping volumes described in Table 1, above. Table 1 shall be updated annually to account for a continuing 5-year rolling average of prior diversions. When the Cities, SVWSD, and SVC make their contribution, they shall also provide to the GWMA Advisory Committee and the CIEF Fund Committee a short report detailing the Cities’, SVWSD’s, and SVC’s respective non-irrigation rights and the measured withdrawals associated with those rights for the prior five years in order to explain the financial contribution to the CIEF Fund.
2. Any projects or storage water purchases funded by the monies contributed to the CIEF Fund by the Cities, SVWSD, and SVC, as described above, shall be approved by the CIEF Fund Committee. The CIEF Fund Committee shall be comprised of an equal number of surface water right holders and ground water right holders in the Water District 37 who are

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<sup>1</sup> This \$10 per acre-foot figure is based on a proposal by Carl Pendleton. The Cities, SVWSD, and SVC understand that \$10 per acre foot is the average annual amount Big Wood Canal Company shareholders pay in annual assessments based on reservoir releases.



elected/appointed in accordance with the bylaws of the CIEF Fund Committee.

3. For the three-year term of the GWMA Plan, Cities, SVWSD, and SVC will annually contribute \$3.60 per AF<sup>2</sup> of their respective average annual non-irrigation groundwater diversions (based on a 5-year rolling average of prior diversions) to cloud seeding projects undertaken by Idaho Power that directly benefit the Big Wood River Basin, which funds will be used only for specific cloud seeding projects approved by the Committee (in consultation with Idaho Power and IDWR);
4. Cities', SVWSD's, and SVC's contributions to the CIEF Fund and cloud seeding projects shall be recalculated each year based on the prior 5-year rolling average of non-irrigation groundwater diversions according to WMIS data or other data deemed reliable by the Committee;
5. Cities and SVWSD will continue to implement water conservation measures they deem reasonable and appropriate under their respective circumstances, such as, but not limited to: (i) promoting connection to municipal water systems for uses otherwise authorized under I.C. § 42-111; (ii) adopting tiered rate structures to incentivize less water use; (iii) imposing timing and other restrictions for residential irrigation; (iv) enacting ordinances with maximum lot size and irrigated area targets for new development; and (v) approving development-specific conservation requirements;
6. Cities, SVWSD, and SVC will schedule a meeting with local environmental groups within 60 days of a full GWMA Plan being approved by the Director to investigate potential additional water conservation measures that could be implemented;
7. Cities, SVWSD, and SVC will investigate potential recharge projects to benefit the Big Wood River above Magic Reservoir, which projects may utilize existing water rights held by the Cities, SVWSD, and SVC as well as potential new appropriations of excess Big Wood River flows (i.e. flows existing in years that Magic Reservoir fills and/or releases water for flood control);
8. Cities', SVWSD's, and SVC's contributions to the CIEF Fund must be re-evaluated each year by the Committee to ensure that future contributions are necessary for the purposes set forth in paragraph 2 above;

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<sup>2</sup> This \$3.60 per acre-foot figure is based on information provided by Idaho Power on the average cost per acre-foot of water produced from its cloud seeding program.

9. Cities, SVWSD, and SVC shall not be required to contribute to the CIEF Fund or cloud seeding projects following the termination of any GWMA Plan these terms are incorporated into;
10. Pursuant to Idaho Code Section 42-233b, Idaho Code Section 42-237a.g., and the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, the Parties agree that so long as the Cities, SVWSD, and SVC are in compliance with the measures set forth in this term sheet, the Cities', SVWSD's, and SVC's non-irrigation water rights will not be subject to delivery calls or administration on a time priority basis; and
11. Subsequent to any termination of a GWMA Plan these terms are incorporated into, Cities, SVWSD, and SVC shall proportionally be entitled to seek credit (as determined by IDWR) in the event of water rights administration or delivery calls for every additional acre-foot of water capable of delivery to senior surface water users attributable to cloud seeding they funded or infrastructure improvements or other permanent measures funded by the CIEF Fund. At such time a credit is requested, any party is entitled to contest the credit being awarded with the determination by IDWR in their sole discretion.

The Cities, SVWSD, and SVC shall be subject to the terms set forth above only upon their incorporation into a GWMA Plan approved by the Director of IDWR. No party shall be bound by this term sheet upon its termination on December 31, 2024.

The effective date of this term sheet is January 20, 2022.

*Signatures Of Counsel On Following Page*

Approved as to form and content by counsel for the Parties.

 1/27/2022

Chris M. Bromley                      Date  
*Attorney for Sun Valley Company*

\_\_\_\_\_  
J. Evan Robertson                      Date  
*Attorney for Sun Valley Water & Sewer Dist.*

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Michael P. Lawrence                      Date  
*Attorney for City of Hailey*

\_\_\_\_\_  
Candice M. McHugh                      Date  
*Attorney for City of Bellevue*

\_\_\_\_\_  
Brian T. O'Bannon                      Date  
*Attorney for City of Ketchum*

\_\_\_\_\_  
Chase T. Hendricks                      Date  
*Attorney for Big Wood &  
Little Wood Water Users Assn.*

\_\_\_\_\_  
W. Kent Fletcher                      Date  
*Attorney for Big Wood Canal Company*