

WHITE PETERSON

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TERRENCE R. WHITE
OF COUNSEL
WILLIAM F. "BUD" YOST
OF COUNSEL

* Also admitted in OR
** Also admitted in WA

May 13, 2021

To: Mayor and Councilmembers
Delivered with Council Packet, 5/17/2021

From: Matthew Johnson, City Attorney

Basin 37 IDWR Administrative Proceeding

Background:

The City was notified by the Idaho Department of Water Resources (IDWR) of an administrative proceeding to be held in connection with drought conditions for the 2021 irrigation season. Due to the drought conditions, the proceeding will be reviewing for possible curtailment (reduction of use) of junior water rights in order to satisfy flows needed for senior rights. The City is potentially involved as it holds water rights that could potentially be impacted, though the focus for the possible water call appears to be more on users south of Bellevue.

The City already participates in a joint defense agreement (JDA) with the cities of Hailey and Bellevue in connection with water issues. This JDA was renewed a few years back upon a prior concern about potential curtailment in the basin. As part of that JDA, the cities have cooperatively pursued some consultant water modeling work.

A new JDA (JDA2) has been proposed for a similar sharing of efforts for this 2021 curtailment proceeding. JDA2 is also proposed to include the Sun Valley Company and Sun Valley Water & Sewer District as parties to the shared efforts. These parties generally have similar shared and aligned interests with respect to water rights and usage in the northern area of the Wood River Valley.

Recommendation:

It will be advantageous and more cost-effective for the City participate in the shared efforts contemplated under JDA2. There are efficiencies to be gained through such shared effort, and knowing that the proposed parties to JDA2 are aligned in their interests. The proposed parties to JDA2 are not likely to be in direct conflict with each other, and if any conflict were to arise the JDA2 provides for the right to withdraw (Provision 8).

Other Steps:

Our office as city attorney has already filed a *Notice of Intent to Participate* with respect to the IDWR Basin 37 Administrative Proceeding. We will engage in and monitor those ongoing

proceedings so as to assess any potential impacts to the City and be prepared to report back to the Council as needed.

Recommended Motion:

I move to approve the Joint Defense and Confidentiality Agreement as presented, and authorize the City Attorney to sign on behalf of the City.

Enc:

- IDWR Notice of Basin 37 Administrative Proceeding, May 4, 2021
- Joint Defense and Confidentiality Agreement (JDA2), 2021
- *Notice of Intent to Participate*, May 13, 2021



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700

Website: idwr.idaho.gov • Email: idwrinfo@idwr.idaho.gov

BRAD LITTLE
Governor

GARY SPACKMAN
Director

May 4, 2021

«OwnerName»
«StreetAddress1»
«StreetAddress2»
«City» «ST» «PostalCode»

RE: Notice of Basin 37 Administrative Proceeding

Dear Water Right Holder,

You are receiving this letter because, according to the records of the Idaho Department of Water Resources ("Department"), you are the holder of one or more ground water or surface water rights within Water District 37 (Big and Little Wood River basin, including Silver Creek) or Water District 37B (Camas Creek basin).

A drought is predicted for the 2021 irrigation season and the water supply in the Little Wood River-Silver Creek drainage may be inadequate to meet the needs of surface water users in that area. Therefore, the Director of the Department has initiated an administrative proceeding to determine if the surface water rights in the Little Wood River-Silver Creek drainage will be injured in the 2021 irrigation season by pumping from junior-priority ground water rights in the Wood River Valley south of Bellevue. The administrative proceeding could result in curtailment of junior-priority ground water rights south of Bellevue this irrigation season. Domestic uses as defined in Idaho Code § 42-111, and stock watering uses as defined in Idaho Code § 42-1401A(11) are not subject to curtailment under the administrative proceeding.

Attached to this letter is the *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing*. The notice provides details of the administrative proceeding and explains how you may participate in the administrative proceeding. The administrative proceeding may affect surface and ground water rights beyond the Little Wood-Silver Creek drainage and Bellevue areas. Therefore, this notice has been sent to holders of ground and surface water rights administered by Water Districts 37 and 37B, except domestic and stock water rights described above.

Many ground water right holders in the Wood River Valley are members of either South Valley or Galena Ground Water Districts and may be represented by those ground water districts in this matter. A list of ground water district contacts is available on the Department's website at: <https://idwr.idaho.gov/files/districts/groundwater-district-contacts.pdf>

Any questions regarding the administrative proceeding may be directed to the Department's State Office at (208) 287-4800, or Southern Region Office at (208) 736-3033. If you have questions regarding notice of intent to participate or details of the pre-hearing conference you may contact Kimberle English at (208) 287-4815.

Sincerely,

Gary Spackman
Director

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

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**NOTICE OF ADMINISTRATIVE
PROCEEDING, PRE-HEARING
CONFERENCE, AND HEARING**

A drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 ("Model") show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. Pursuant to Idaho Code § 42-237a.g., "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect...the present or future use of any prior surface or ground water right." Based on the information from the Model, the Director of the Idaho Department of Water Resources ("Department") believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

NOTICE OF ADMINISTRATIVE PROCEEDING

NOTICE IS HEREBY GIVEN that pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding ground water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. Additional information and maps will be posted on the Department's website at: <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.

If you wish to participate in the administrative proceeding, **please send written notice to the Department by May 19, 2021, to P.O. Box 83720, Boise, Idaho 83720-0098 stating your intent to participate in AA-WRA-2021-001. If you do not participate, you may still be legally bound by the results of the proceedings.**

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that the Department will hold a prehearing conference to discuss the Administrative Proceeding on May 24, 2021, at 9:00 a.m. (MDT), in Conference Rooms 602C and 602D of the Department's State Office, located at 322 E. Front Street, 6th Floor, Boise, Idaho. Parties may appear in person or via Zoom teleconference. However, due to gathering restrictions, in-person

attendance is limited. Contact Kimberle English to reserve an in-person spot at: Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

All parties must be present at the prehearing conference in person, by telephone or by video conference. Parties will be provided with login information for the video conference a few days before the conference.

Parties should come to the prehearing conference prepared to discuss the following:

- Procedure at Hearing
- Remote Participation at the Hearing
- Discovery
- Witnesses
- Burdens

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure. IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The prehearing conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department no later than five (5) days prior to the conference. Inquiries for special accommodations should be directed to Kimberle English, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

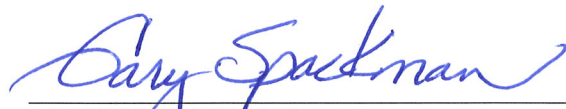
NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Department will hold a hearing in the matter on June 7-11, 2021, at 10:00 a.m. (MDT), in Conference Rooms 602A, 602B, 602C, and 602D of the Department's State Office, located at 322 E. Front Street, 6th Floor, Boise, Idaho. All parties must be present at the hearing. The possibility of remote participation will be discussed at the pre-hearing conference.

The hearing will be held in accordance with the provisions of Chapter 17, Title 42 and Chapter 542, Title 67, Idaho Code, and the Department's Rules of Procedure. IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

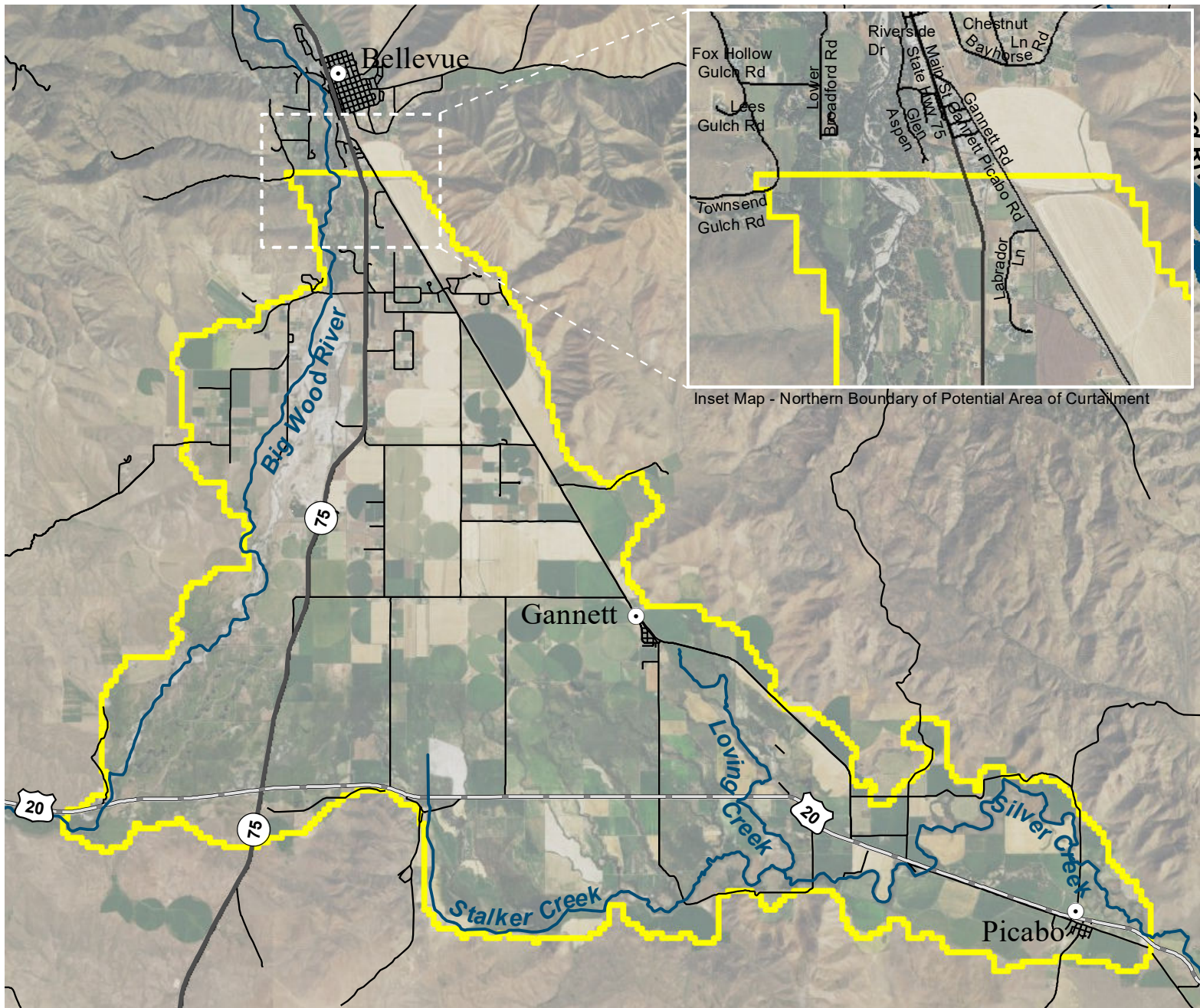
The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department no later than five (5) days prior to the hearing. Inquiries for special accommodations should be directed to Kimberle English, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

DATED this 4th day of May, 2021.



GARY SPACKMAN
Director

Basin 37 Administrative Proceeding



Inset Map - Northern Boundary of Potential Area of Curtailment

Legend

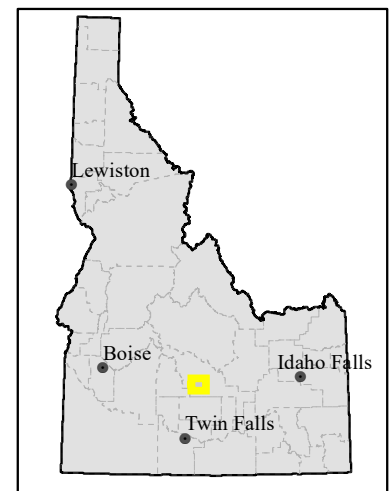
- Selected Rivers and Creeks
- Cities
- Potential Area of Curtailment

Imagery is 2019 (NAIP/FSA source)

0 1 2 4 Miles



April 29th, 2021



Location Map

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 4 day of May, 2021, the above and foregoing **NOTICE OF ADMINISTRATIVE PROCEEDING, PRE-HEARING CONFERENCE, AND HEARING** was mailed through United States Postal Service to the service list posted on the Department's website: <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.


Kensie Thorneycroft

JOINT DEFENSE AND CONFIDENTIALITY AGREEMENT

THIS JOINT DEFENSE AND CONFIDENTIALITY AGREEMENT (“Agreement”) is made and entered into by those entities listed as signatories at the end of this Agreement. The entities identified as signatories herein are hereinafter referred to each as a “Party,” and collectively as the “Parties.”

DEFINITIONS

A. The term “water delivery call” refers to an existing or potential future proceeding related to administration involving the ground water rights held by the Parties under the Idaho Department of Water Resources’ Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11, and/or a Ground Water Management Area, Idaho Code § 42-233b, *et seq.*, and/or the Department’s authorities in the Idaho Ground Water Act.

B. The term “Privileged Information” shall include, but shall not necessarily be limited to, any of the following, all of which may be the subject of exchanges between legal counsel of Parties to this Agreement or those in privity with them:

Legal theories, ideas, trial strategy, mental impressions, reports of consultants or experts hired by any party or counsel, any confidential communications as defined in I.R.E. 502, and any other material or communications that may be protected under Idaho law from disclosure for any reason.

C. The term “senior water users” refers to the senior surface water users making a water delivery call.

RECITALS

A. Despite the potential for their interests to be adverse, the Parties believe that they have a common interest in defending themselves against any water delivery call, particularly with regard to sharing of Privileged Information as provided hereinafter.

B. This Agreement is intended to provide the mechanism for the cooperation among the Parties in a water delivery call solely with respect to opinions, facts or data generated for the Parties joint use.

AGREEMENT

In consideration of the promises stated in this Agreement, the Parties agree as follows:

1. Recitals Incorporated

The above Recitals are material terms to this Agreement.

2. Purpose of Agreement

A. The Parties have concluded that a water delivery call may adversely impact the exercise of their respective water rights. The Parties, therefore, have determined that it is in their common and individual interest to cooperate in anticipation of and during a water delivery call. This Agreement facilitates that cooperation by establishing procedures for sharing Privileged Information to take full advantage of the protections provided by Idaho Rule of Evidence 502(b) and any other applicable legal authority.

B. This Agreement provides a mechanism for the joint development and voluntary sharing of Privileged Information and protects the confidential and privileged nature of such information, but as to all information, data or material possessed or developed by a Party to this Agreement, all Parties retains the discretion whether to disclose or share it with other Parties. By executing this Agreement, the Parties do not waive or relinquish any privilege or claim of confidentiality.

C. The execution of this Agreement by any Party is not an admission that a water delivery call is meritorious or supported by existing law. This Agreement is being entered into as a prudent measure to cooperate regarding the issues that are common to the Parties in a water delivery call.

3. Sharing of Privileged Information

A. Although there is no obligation to share information, the Parties intend that this Agreement shall enable them, to the fullest extent permitted by law, to share information without waiving any privileges or other exemptions from disclosure that might attach thereto, whether under the common law, the Idaho Rules of Civil Procedure, the Idaho Rules of Evidence, or under any other rule or statute. The Parties may also share non-privileged information that may be discoverable by senior water users under the provisions of the Idaho Rules of Civil Procedure.

B. This Agreement does not obligate any Party to incur costs on behalf of any other Party, nor to share the costs of consultants, studies, and experts. Any cost-sharing arrangements must be separately agreed upon in writing.

C. Disclosure of Privileged Information shall not be made to any person or entity except as specified in Section 4 below.

D. Privileged Information that is shared pursuant to this Agreement shall be kept in confidence and is to be used by counsel for the Parties exclusively and solely in their preparation of defenses and presentations related to a water delivery call. The confidentiality of this information shall survive the termination of this Agreement as to third parties. As to the Parties to this Agreement, the confidentiality and ability of the Parties to use and disseminate the information shall be governed by the terms of the Agreement.

4. Procedures for Sharing Privileged Information

A. Unless otherwise agreed to by all of the Parties in writing, Privileged Information shall not be taken out of the custody of counsel for the Parties, and no copies of such information shall be made except for use by: (1) counsel for the respective Parties; (2) other attorneys within the law firms representing the Parties; (3) the employees or agents of the law firms representing the Parties; (4) experts and consultants retained by the Parties, or their attorneys, individually or collectively; or (5) the officers, directors, employees or agents of the Parties, and then only to the extent necessary for the effective defense against a water delivery call.

B. Outside experts and consultants receiving copies of any Privileged Information shall first sign a confidentiality agreement to keep the materials in strictest confidence as agents of counsel as required by this Agreement.

C. To further the purposes of this Agreement, the Parties agree to mark all written materials exchanged pursuant to this Agreement with the legend "Privileged and Confidential Joint Defense Communication," and to require any consultants jointly retained by the Parties to similarly mark all reports or other materials prepared by the consultants. Notwithstanding the above, the failure to so mark written material exchanged pursuant to this Agreement shall not extinguish the confidential nature of such material.

D. Any requests for Privileged Information to a Party from the senior water users or the Idaho Department of Water Resources shall be disclosed to the other Parties who shall have the opportunity to defend against such disclosure.

5. Scope of Agreement

A. This Agreement does not prevent the Parties from obtaining any documents from public or private sources, and the use of such documents will not be affected by this Agreement.

B. This Agreement shall only apply to Privileged Information shared pursuant to this Agreement.

C. Nothing in this Agreement shall be construed to give rise to an action for damages that may be incurred by a Party as the result of an inadvertent or negligent disclosure by another Party. The sole remedy for breach of this Agreement shall be the exclusion of the breaching Party from future participation in this Agreement.

6. Waivers of Conflicts of Interest

Each Party understands and acknowledges that such Party is represented by its own attorney(s) in the defense against a water delivery call. Each Party further acknowledges that by fulfilling the purposes of this Agreement, as set forth in Section 2, all Parties to the Agreement agree to forego seeking the disqualification of any other Party's attorney(s) or expert(s) based on any assertion that an action taken, communication, or document exchanged pursuant to this Agreement creates a conflict of interest.

7. Reservation of Rights

All Parties reserve all existing rights, privileges, defenses and contentions as against each other with regard to a water delivery call, and they enter into and proceed under this Agreement without prejudice or waiver of those rights, privileges, defenses and contentions. Except to enforce the terms of this Agreement, or to respond to assertions about its effect, no Party shall use this Agreement or Privileged Information in a water delivery call against another Party.

8. Right to Withdraw

Each Party shall have the right to withdraw from participation at any time upon written notice to the other Parties. Concurrent with the written notice of withdrawal, the withdrawing Party shall return any documents (including all copies, recordings, or electronic data) in its possession marked as “Privileged and Confidential Joint Defense Communication” to the Party who generated each such document. Section 4: Procedures for Sharing Privileged Information shall apply to any Privileged Information obtained by a Party prior to withdrawal and shall be enforceable against the Party after withdrawal, and Section 6: Waiver of Conflicts of Interest and Section 7: Reservation of Rights shall apply to any Party that withdraws and shall be enforceable against the Party after withdrawal.

9. Public Records Law

A. Nothing in this Agreement shall be interpreted as modifying the public records laws of the State of Idaho. Any actions taken by the Parties to disclose documents to third parties shall not be deemed a breach of this Agreement where the public records laws of the State of Idaho require such disclosure.

B. In the event that a Party receives a request under the public records laws of the State of Idaho for a copy of this Agreement or for any Privileged Information received in accordance with this Agreement, the Party will immediately notify the other Parties of such a request by the most expeditious means reasonably available. The purpose of this notice is to allow the other Parties to take any action that they deem appropriate to protect the confidentiality of the Privileged Information.

10. General Provisions

A. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the state of Idaho shall apply.

B. This Agreement shall be binding upon the successors and assigns of the Parties.

C. This Agreement shall not be amended, altered, revised, modified, terminated or changed in any way except by further written agreement signed by all Parties.

D. Each signatory attorney represents and warrants that the signatory has been authorized to sign this Agreement, for or on behalf of the Party or Parties they represent, and to bind the Party or Parties on behalf of which this Agreement is executed by such signatory.

E. This Agreement may be executed in one or more counterparts, each of which shall be an original, with the same effect as if the signatures were upon the same instrument. Any Party's facsimile signature to this Agreement and any e-mailed copy of a Party's signature to this Agreement, if received from the Party or its legal counsel, will be deemed an original and binding signature of this Agreement by such Party.

F. Titles and headings of the paragraphs and sections of this Agreement are for convenience of reference only and shall not affect the construction of any provision of this Agreement.

The undersigned hereby execute this Agreement on the respective dates set forth below, to be effective as of the date of the last signature.

Candice M. McHugh
Chris M. Bromley
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, Idaho 83702
Representing, and signing on behalf of, and for: City of Bellevue.

Date: _____

Chris M. Bromley
Candice M. McHugh
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, Idaho 83702
Representing, and signing on behalf of, and for: Sun Valley Company.

Date: _____

Michael P. Lawrence
Michael C. Creamer
Givens Pursley LLP
601 W. Bannock Street
PO Box 2720
Boise, Idaho 83701-1200
Representing, and signing on behalf of, and for: City of Hailey.

Date: _____

Date:_____

Matthew A. Johnson
White Peterson Gigray & Nichols, P.A.
5700 E. Franklin Rd., Ste 200
Nampa, ID 83687
Representing, and signing on behalf of, and for: City of Ketchum.

Date:_____

J. Evan Robertson
Robertson & Slette, PLLC
134 Third Ave E
PO Box 1906
Twin Falls, ID 83303-1906
Representing, and signing on behalf of, and for: Sun Valley Water & Sewer District.

Matthew A. Johnson
Brian T. O'Bannon
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Attorneys for the City of Ketchum

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

IN THE MATTER OF BASIN 37)	
ADMINISTRATIVE PROCEEDING)	Docket No. AA-WRA-2021-001
)	NOTICE OF INTENT TO PARTICIPATE
)	
)	
)	

COMES NOW the City of Ketchum through its attorney of record, Matthew A. Johnson of WHITE, PETERSON, GIGRAY & NICHOLS, P.A. and files this Notice of Intent to Participate in the above captioned matter as set forth in the Notice of Administrative Proceeding, Pre-hearing Conference, and Hearing dated May 4, 2021 ("Notice").

The City of Ketchum received a Notice; as such IDWR has identified it is a water right holder that is potentially impacted by the proposed administrative hearing. Thus, the City files this Notice of Intent to Participate.

DATED this 12th day of May, 2021.

WHITE PETERSON

By: _____
Matthew A. Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2021, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Director Gary Spackman
Idaho Department Of Water Resources
PO Box 83720
Boise, ID 83720

☒ Via US Mail, Postage Paid
☐ Via Facsimile
☐ Hand-Delivered
☐ Via Electronic Mail

Garrick L. Baxter
Deputy Attorney General
Idaho Department Of Water Resources
PO Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov

☐ Via US Mail, Postage Paid
☐ Via Facsimile
☐ Hand-Delivered
☒ Via Electronic Mail

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John Simpson
Al Barker
BARKER ROSHOLT & SIMPSON
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Jks@idahowaters.com
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☐ Hand-Delivered
☒ Via Electronic Mail
Courtesy copy

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☒ Via Electronic Mail

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nsemanko@parsonsbehle.com

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☐ Hand-Delivered
☒ Via Electronic Mail

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honsingerlaw@gmail.com

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☐ Via Facsimile
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☒ Via Electronic Mail

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dylanlawrence@varinwardwell.com

☐ Via US Mail, Postage Paid
☐ Via Facsimile
☐ Hand-Delivered
☒ Via Electronic Mail

for WHITE PETERSON

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