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DEPARTMENT OF
WATER RESOURCES

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September 1, 2016

Director Gary Spackman
Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise, ID 83720-0098

Re: Association of Idaho Cities' Comments Regarding Proposed ESPA GWMA

Dear Director Spackman:

The Association of Idaho Cities ("AIC") was founded in 1947 and is a non-partisan corporation that is owned, organized, and operated by Idaho's city governments. AIC's members provide raw and treated water supplies to their citizens across the State. Over forty of AIC's membership cities pump ground water from the Eastern Snake Plain Aquifer ("ESPA") to supply their communities and treated water customers with water supplies. AIC has been involved both in Conjunctive Administration matters before the Idaho Department of Water Resources ("Department") and on judicial review in front of the Fifth Judicial District Court in Twin Falls.

Shortly after July 7, 2016, AIC became aware of a letter ("July 7 Letter") you sent to water users regarding a series of public meetings the Department intended to hold in order to present data on the ESPA, and what you identified as periods of increasing and decreasing aquifer levels. According to the July 7 Letter, recent trends indicate "disturbing" aquifer decline. The July 7 Letter went on to say, "After hearing from water users at the public meetings and considering the issues, I will decide whether a ground water management area should be created." Please accept this letter as AIC's comments regarding creation of an ESPA Ground Water Management Area ("GWMA").

There are two primary concerns AIC wishes to express regarding creation of an ESPA GWMA. First, AIC questions whether the decision to create an ESPA GWMA without holding an administrative hearing on such a monumental issue promotes sound public policy. Second, if an ESPA GWMA is created, AIC requests that the subsequent ESPA GWMA management plan allow municipalities to self-mitigate.

Since approximately 2005, the Department has been conjunctively administering surface and ground water rights on the Eastern Snake Plain. When the first Conjunctive Management delivery call was filed, the Department initiated a contested case and proceeded through the

administrative hearing process in accordance with the Conjunctive Management Rules ("CM Rules"). As other Conjunctive Management delivery calls were filed, the same process was followed. The Department's decisions were reviewed by the Fifth Judicial District Court and the Idaho Supreme Court. While there are a few sections of Idaho Code that speak to GWMAs, there are no administrative rules (like the CM Rules), little to no case law, and little to no understanding of Department policy. Surprisingly, the void of law, policy, and procedure in a GWMA led you to conclude in the July 7 Letter: "The formation of a ground water management area would have distinct advantages." It is difficult to understand the benefits of a GWMA when there is a robust body of law, policy, and procedure rooted in Conjunctive Management. This body of law, policy, and procedure has given water users – junior and senior – a road map and a level of predictability upon which to assess risk and base decisions.

Based on AIC's understanding of comments made by the Department at the public meetings, it appears the Department believes it can create an ESPA GWMA without holding an administrative hearing. Even if this is a correct understanding of law – AIC does understand the Department has previously created GWMAs without holding hearings – AIC questions whether electing not to hold an administrative hearing prior to creation of the proposed ESPA GWMA is rooted in sound public policy. No previously created GWMA in the State comes near to approaching the size, scope, or number of affected water users in the proposed ESPA GWMA. While it may very well have made sense to designate discretely sized GWMAs without administrative hearings, the size and scope of the proposed ESPA GWMA warrants a deliberate, open process that only an administrative hearing can give. Holding an administrative hearing on creation of such a large-scale administrative boundary would provide confidence to water users in the process, allow the Department to review and weigh evidence and argument, and result in a transparent outcome. If the Department concludes from the public meetings and oral and written comments that designation of an ESPA GWMA could be necessary, AIC encourages the Department to hold an administrative hearing on said designation in order to reach the best decision, whatever that decision may be.

If some version of the proposed ESPA GWMA is created, AIC requests that its members be entitled to self-mitigate for their consumptive municipal depletions. AIC believes dependable and reliable water supplies are critical to the economic development of Idaho's cities. On December 8, 2015, AIC sent a letter ("December 8 Letter") to Governor Otter and Legislative leadership "firmly support[ing]" managed recharge, and applauding the efforts of the Idaho Ground Water Appropriators, Inc. ("IGWA") and the Surface Water Coalition ("SWC") to reach a negotiated outcome ("Settlement Agreement") in their Conjunctive Management delivery call. However, AIC disagreed with the Settlement Agreement's across-the-board percentage reduction in pumping. As stated in the December 8 Letter:

> A key component to Idaho's future economic development is the ability for Idaho's cities to have a secure source of water to attract residents, commerce, and industry. AIC recognizes that municipalities must be part of the solution to this issue, and AIC is committed to reach an agreement to mitigate municipal interests on the ESPA. . . . . However, municipalities cannot consider the permanent reductions in consumptive use to which IGWA has agreed. Idaho's cities are growing, and have an obligation to provide water to residents and customers. Idaho cities not only

> have to provide residents with water for today, but must also plan for future growth, and have the water supplies available to support such growth. . . . . While the cities were made aware of the SWC/IGWA Settlement Agreement negotiations, no city, city representative, or AIC was invited to participate in the negotiations that led to the SWC/IGWA Settlement Agreement.

The goal of the Settlement Agreement is to raise ESPA levels to the 1991-2001 average by 2026 at nineteen (19) sentinel wells that were chosen by the parties. In order to reach the agreed upon aquifer level, IGWA agreed to reduce ground water pumping by 240,000 acre-feet (an approximate 12.5% reduction), and the State agreed to average annual recharge of 250,000 acre-feet. While funding is in place for managed recharge, and AIC reiterates its firm support for managed recharge, infrastructure is not presently in place to handle the necessary volume. Therefore, AIC questions when and if the Settlement Agreement's goals can be met.

If an ESPA GWMA is created, the Director is then allowed to create a "management plan" for the designated area:

> When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water <u>management plan</u> for the area. The ground water <u>management plan</u> 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.
>
> . . . .
>
> Water right holders participating in an approved ground water <u>management plan</u> shall not be subject to administration on a time priority basis so long as they are in compliance with the ground water management plan.

Idaho Code § 42-233b (emphasis added).

At the public meetings, AIC understands the Department said the plain language of Idaho Code § 42-233b provides for a single GWMA plan ("Plan"), yet noted there could be subsets, or subparts to a Plan. As stated in the July 7 Letter, "Components of a recently completed settlement agreement between the Surface Water Coalition and the Idaho Ground Water Appropriators may be a template for an initial [GWMA] management plan." This is the same Settlement Agreement AIC voiced concern over in the December 8 Letter, as it does not account for municipal ground water needs.

Based on recent data assembled by the Department, municipal use from the ESPA accounts for approximately three (3) percent of total ESPA pumping. If only a single Plan is allowed, and if that Plan reflects the terms of the Settlement Agreement, municipalities will be unable, purely as a matter of scale, to have any meaningful influence on ESPA levels. AIC agrees that municipalities should bear their fair share of mitigation for consumptive municipal pumping that injures senior water rights.

In closing, municipalities must be allowed to control their own future, and cannot pass the responsibility to provide a water supply to their citizens to other ground water users. If an ESPA GWMA is designated, AIC supports creation of a separate Plan for municipal water users that allows for municipalities to independently mitigate their consumptive use. If a change in law is necessary to allow municipalities to self-mitigate in an ESPA GWMA, AIC stands ready to assist. However, in the end, AIC believes the current Conjunctive Administration system is a better alternative for municipalities relying on ESPA supplies.

Sincerely,

Seth Grigg
Executive Director
Association of Idaho Cities