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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 MATTER OF DESIGNATING
THE EASTERN SNAKE PLAIN
AQUIFER GROUND WATER
MANAGEMENT AREA

Docket No. AA-GWMA-2016-001

**SOUTH VALLEY GROUNDWATER
DISTRICT'S RESPONSE TO
STATEMENTS OF ISSUES**

ORIGINAL

COMES NOW, South Valley Groundwater District ("South Valley"), by and through its attorneys of record, and files this Response to the Basin 33 Water Users, Fremont Madison Irrigation District ("FMID"), Madison Ground Water District ("MGWD"), and Idaho Irrigation District's ("IID") (collectively Upper Valley Intervenor) *Joint Submission of Statement of Issues* and the Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Statement of Issues*, pursuant to the Director's Order of July 18, 2019.

I.

INTRODUCTION

South Valley concurs in the Responses filed by Water District 37B Ground Water Association (the Camas Group) on August 20, 2019, and by the City of Hailey, on August 21, 2019. These entities, like South Valley, have ground water interests in the existing Big Wood

Ground Water Management Area.

South Valley's intervention in these ESPA proceedings was based upon its desire to protect the interests of its members in the Triangle area of Blaine County in the Big Wood Ground Water Management Area and to assure that the boundaries adopted by the *Order* Designating the Eastern Snake Plain Aquifer Ground Water Management Area were not expanded to include ground water in the current Big Wood Ground Water Management Area. See Petition to Intervene (December 21, 2016). The *Joint Submission* of the Upper Valley Intervenors does not advocate such an expansion to include the Big Wood. However, IGWA clearly does. But IGWA's untimely request violates the Director's Orders in this proceeding and must be dismissed.

II.

PROCEDURAL BACKGROUND

South Valley adopts and concurs with the Background section set out in the Camas Group's Response. Of particular importance, at the Status Conference held on July 11, 2019, the Director asked if there were any objections to the formation of the ESPA GWMA. Only the two groups of Upper Valley Intervenors and McCain Foods asserted that they had any objections to the *Order* establishing the EXPA GWMA. IGWA sat silent.

The Director ordered the Objectors to file a Statement of Issues that they contended needed to be determined by August 1, 2019. IGWA remained silent at the Status Conference and did not indicate it had any issues. McCain Foods later withdrew its objections and did not file any Statement of Issues, thereby waiving any right to assert any issues should be heard. The Basin 33 Users and the Upper Valley Intervenors filed a *Joint Statement* of Issues. Without warning, IGWA filed a Statement of Issues seeking to radically transform what remained of the

proceeding following Sun Valley Company's withdrawal of its petitions.

RESPONSE TO IGWA'S STATEMENT OF ISSUES

Issue 1:

The Director's Order of June 5, 2019 limits the issues in this contested case to the "issues raised in the original petition for hearing filed by the Sun Valley Company." *Order* p.6. When IGWA petitioned to intervene, it pledged not to broaden the issues or raise new issues. Petition p. 2 (Nov. 16, 2016). Nor did IGWA previously challenge the scope of the ESPA GWMA. IGWA now seeks to "expand" the ESPA GWMA to include all potentially tributary basins, or "mountain top to mountain top," as IGWA now describes it. This is directly contrary to the issues raised by Sun Valley which repeatedly asserted that it would be improper to include the Big Wood in the ESPA GWMA. This point is articulated with great force in Sun Valley's Petition for Declaratory Relief ¶ 17, which is incorporated whole cloth into its Petition and Amended Petitions for Reconsideration. As the Camas Group notes, Sun Valley did not raise IGWA's current "mountain top to mountain top" argument. Therefore, this issue is not preserved for this proceeding.

Issue 2:

As with issue 1, here IGWA seeks to expand the boundaries of the ESPA GWMA contrary to Sun Valley's Petitions. This issue is likewise not preserved.

Issue 3:

Here, IGWA demands an advisory committee. This issue was not contained in the Director's Order establishing the ESPA GWMA and was not an issue raised by Sun Valley. This issue is not preserved.

Issue 4:

IGWA's issue # 4 deals with whether those who have entered into settlement agreements have some form of protection from management in the ESPA GWMA. This was not an issue raised by Sun Valley and so is not preserved.

Issue 5:

IGWA's last issue deals with the scope of a management plan, which was not addressed in the Director's Order or raised by Sun Valley. This issue is also not preserved.

RESPONSE TO BASIN 33 and UPPER VALLEY INTERVENORS

These parties have parroted some issues raised in Sun Valley's Petitions and added several more.

Issue 1:

These parties' first issue asserts that the Director could not issue a GWMA Order without a contested case or rule making. Sun Valley challenged whether the Director's Designation Order required a hearing, before an order could be issued, rather than a post-order contested case, or required notice and comment rulemaking. This issue was decided in *City of Pocatello v. Spackman*, CV-01-17-67, *Order* (Feb. 10, 2017) and is binding on Sun Valley, the Director, and the parties to this proceeding.

The Director acted pursuant to Idaho Code § 42-233b in issuing his *Order*. That code section, which is in part of the Idaho Ground Water Act, grants the Director the authority to designate ground water management areas within the state. He may exercise this authority when he has determined that any ground water basin or designated part thereof "may be approaching the conditions of a critical ground water area." I.C. § 42-233b. There is no requirement that the Director hold an administrative hearing prior to designating a ground water management area. Nor is there any requirement that he initiate rulemaking or a contested case proceeding under the Idaho Administrative Procedure Act ("IDAPA") prior to designating a ground water management area. The

Director may simply act upon his own initiative and discretion under the authority granted him by statute.

Order pp. 1-2.

Because Sun Valley, as a party to this appeal, could not now raise these issues, neither can parties who rely on Sun Valley to preserve their issues. These parties' claims raise the same issues, but they do not contend, as Sun Valley did, that such alleged procedural defects precluded inclusion of the Big Wood GWMA. Even if the issue could be expanded beyond whether the Big Wood could be included without a pre-order hearing or rule-making, this issue was decided by the Court, is binding on the Director and not appropriate for this proceeding.

Issue 2:

In issue # 2, these parties challenge the Director's use of the term "aquifer system" as contrary to Idaho Code § 42-233b. Sun Valley raised that issue, but only to ensure that the Big Wood GWMA was not part of the "aquifer system" referred to by the Designation Order. Since these parties do not argue for inclusion of the Big Wood, this issue is not preserved. If the Director concludes that this issue is preserved, this issue raises a purely legal issue of statutory construction than can and should be dealt with in motion practice.

Issue 3:

In issue #3, these parties depart from Sun Valley's Petition by arguing about the effects of the Great Rift and Mud Lake Barrier, issues not raised by Sun Valley. As such issue #3 is not preserved.

Issue 4:

These parties' issue # 4 argues about what a GW Management Plan can or can't do. These issues were not decided in the Director's Designation Order or raised by Sun Valley and

so are not properly before the Director in this proceeding.

Issue 5:

Sun Valley did assert that, as a matter of law, there can be no GWMA where the rights have been adjudicated and Ground Water Districts have been formed, as argued in issue #5. If this issue can be expanded beyond whether the Big Wood can be included, this is purely a legal issue for a determination by the Director on motion practice

Issue 6:

Here these parties allege that a GWMA cannot be created after Water Districts are created and point to Sun Valley's reference to the Final Order modifying the boundaries of the American Falls GWMA (August 2003). What these parties omit is that Sun Valley's citation to this issue is found in a section of Sun Valley's Petition entitled "The Proposal to Designate an ESPA GWMA Inclusive of Water District No. 37 is Contrary to Prior Decision of the Director Regarding GWMA Designations Related to the ESPA."(emphasis added) In other words, Sun Valley petitioned to prevent inclusion of Water District 37 because of the American Falls Order. That is not what these parties are requesting and so their issue # 6 is outside the proper scope of this proceeding.

CONCLUSION

South Valley requests that the scope of these proceedings be circumscribed to the issues directly raised by Sun Valley, as the Director properly Ordered. Any attempt to use Sun Valley's Petition, which sought to exclude Water District 37 and the Big Wood GWMA, to flip the issue and argue for inclusion, as IGWA has done is untimely and contrary to the Director's Order.

Most of the issues raised by IGWA and the Upper Valley Intervenors' Statement of

Issues improperly seek to expand the scope of the proceedings beyond the issues raised by Sun Valley. The Director should deny those efforts and reject all of IGWA's issues and reject the Upper Valley Intervenors efforts to raise fact-specific matters not raised by Sun Valley.

Sun Valley did raise some discrete legal issues about the power and authority of the Director. The most fundamental challenge to the Director's authority was rejected in *City of Pocatello v. Spackman*, CV-01-17-67. The other legal challenges can and should be addressed by motion practice and do not require a testimonial hearing.

In any event, no matter what is left in this proceeding, the fundamental issue raised by Sun Valley seeking exclusion of the Big Wood is no longer a live controversy and the Director should order that any future proceedings in this matter do not involve expansion of the ESPA GWMA to include the Big Wood GWMA.

Dated this 22nd day of August, 2019.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2019, I caused a true and correct copy of the foregoing **SOUTH VALLEY GROUNDWATER DISTRICT'S RESPONSE TO STATEMENTS OF ISSUES** to be served by the method indicated below, and addressed to the following:

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