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DEPARTMENT OF
WATER RESOURCES

Scott L. Campbell, ISB No. 2251
Matthew J. McGee, ISB No. 7979
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
mjm@moffatt.com
16845.0030

Attorneys for Sun Valley Company

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

SUN VALLEY COMPANY, Petitioner, vs. GARY SPACKMAN, Director of the Idaho Department of Water Resources, Respondent.	Docket No. **PETITION FOR DECLARATORY RULING REGARDING CREATION OF ESPA GROUND WATER MANAGEMENT AREA**

1. Sun Valley Company ("Sun Valley"), by and through undersigned counsel, files this Petition for Declaratory Ruling ("Petition") pursuant to Idaho Code Section 67-5232 and the Idaho Department of Water Resources Rules of Procedure, IDAPA 37.01.01.400.

2. On July 11, 2016, Sun Valley received a letter dated July 7, 2016 from Gary Spackman, Director of the Idaho Department of Water Resources (the "Letter"). The Letter provides that the Department "is considering creating a ground water management area for the Easter Snake Plain Aquifer (ESPA)," and invites "[p]otentially affected water users" to attend one or more of ten (10) meetings scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016.

3. The Letter provides that after the meetings, the Director will decide whether a ground water management area ("GWMA") should be created.

4. The Letter states that Idaho Code Section 42-233b authorizes the creation of GWMAs, which are defined as ". . . any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area."

5. The Letter notes that Idaho Code Section 42-233a defines a critical ground water area as ". . . any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources."

6. The Letter states that Idaho Code Section 42-233b identifies "several potential tools available to the Director" within a GWMA to manage the ESPA. Specifically, the Letter states that Idaho Code Section 42-233b authorizes the Director to:

(a) approve a ground water management plan to "manage ground water withdrawals on the aquifer and hydraulically connected sources to ensure a reasonably safe supply of ground water";

(b) consider new appropriations only after determining availability;

(c) require water right holders within the GWMA to report withdrawals of ground water and other information;

(d) require junior users to cease diversions "[i]f the Director determines the ground water is insufficient to meet the needs of water right holders."

7. The Letter then describes the current water administration paradigm as involving "disjointed water calls and mitigation plans," "sporadic curtailment orders and associated mitigation," and "sporadic water right administration," and asserts that management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization, although the Letter does not identify the means to achieve such goal, except by reference to the foregoing "potential tools."

8. Finally, the Letter asserts that the Department needs to consider "the areal extent of the ground water management area," and proceeds to list tributary basins the Department's technical information "suggests" impacts water stored in the ESPA, including the Big Wood River and the Little Wood River. The Letter invites water users from those tributary basins to participate in the public meetings.

9. "The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

10. "[T]he Idaho Legislature has authorized the Director 'to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.' The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994." *In re A&B Irrig. Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012) (quoting IDAHO CODE § 42-603).

11. The CM Rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].'" *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (quoting *A&B Irrigation Dist.*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

12. The CM Rules "govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

13. The CM Rules "provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . designating such areas as ground water management areas as provided in Section 42-233b, Idaho Code." IDAPA 37.03.11.020.06.

14. "The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area." IDAPA 37.03.11.050.01(d).

15. Additionally, upon the proper initiation of a contested case by a senior water right holder, and following consideration of such contested case under the Department's Rules of Procedure, the Director may, by order, ". . . [d]esignate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights." IDAPA 37.03.11.030.

16. Sun Valley owns water rights in Water District No. 37. Sun Valley owns water rights within the Big Wood River Ground Water Management Area, designated as such by the Director on June 28, 1991. Sun Valley does not own water rights in the ESPA area of common ground water supply.

17. Pursuant to Idaho Code Section 67-5232(1), Sun Valley hereby petitions the Department for a declaratory ruling as to the applicability of Idaho Code Section 42-233b to Basin 37 in the context of any proposed ESPA GWMA. Specifically, and without limitation, Sun Valley seeks a declaratory ruling that:

(a) Because the Groundwater Act, the CM Rules promulgated by the Department and approved by the Legislature, and the common law set forth by Idaho trial and appellate courts derived therefrom, apply to determining areas of the state having a common ground water supply, creating and expanding water districts, and creating GWMAs, in exercising

authority under Idaho Code Section 42-233a and 42-233b, the Director cannot act in derogation of these legal constraints.

(b) Any attempt by the Director or the Department to expand the boundaries of the ESPA area of common ground water supply to include the entirety of Basin 37 by designating Basin 37 as part of an ESPA GWMA outside the context of a formal rulemaking or contested case proceeding is in contravention of the Groundwater Act, the CM Rules, and the common law set forth by Idaho trial and appellate courts derived therefrom.

(c) The proposal to designate an ESPA GWMA inclusive of Water District No. 37 is contrary to prior decisions of the Director regarding GWMA designations related to the ESPA.

(d) Idaho Code Section 42-233b does not grant the Director authority to include other ground water basins, including Basin 37, within an ESPA GWMA.

(e) The proposal to designate an ESPA GWMA inclusive of Basin 37 for purposes of the administration of water rights therein without a procedurally proper determination of an area having a common ground water supply in Basin 37 is an invalid collateral attack upon the findings and conclusions in Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Company v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016).

(f) The Director does not have authority to designate a new GWMA inclusive of Basin 37 without conducting a hearing or rulemaking in accordance with the Department's Rules of Procedure and the applicable provisions if the Idaho Administrative Procedures Act.

(g) A "critical ground water area," and a "ground water management area," as defined in Idaho Code Section 42-233a and 42-233b respectively, are each, as a matter of law, an

"area having a common ground water supply," as defined in the CM Rules, IDAPA 37.03.11.010.01.

(h) Except for within the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must determine areas of the state that have a common ground water supply before designating such areas ground water management areas.

(i) Except for the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must conduct a rulemaking or comply with the provisions of the CM Rules in order to determine areas of the state that have a common ground water supply.

(j) The Director may not create an ESPA GWMA that geographically overlaps the existing Big Wood River GWMA.

(k) The Director has the statutory authority to approve a ground water management plan, but does not have the authority to generate or create a ground water management plan.

(l) Under Idaho Code Section 42-233b, a ground water management plan for the ESPA should provide for managing the effects of ground water withdrawals from the ESPA (a) on the ESPA, and (b) on hydraulically connected sources of water, but it cannot provide for managing the effects of ground water withdrawals from any other source.

18. In addition, pursuant to Idaho Code Section 67-5232(1), Sun Valley hereby petitions the Department for a declaratory ruling as to the applicability of IDAPA 04.11.01.420-425 to Department proceedings. Specifically, and without limitation, Sun Valley seeks a declaratory ruling that IDAPA 04.11.01.420-425 apply to Department proceedings because the Department failed to include in the Rules of Procedure of the Idaho Department of

Water Resources "a finding that states the reasons why the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." IDAHO CODE § 67-5220(5)(b).

19. Sun Valley requests that the Department set a reasonable schedule for the submission of written briefs relating to the foregoing requests for declaratory ruling.

20. Sun Valley requests oral argument relating to the foregoing requests for declaratory ruling.

DATED this 25th day of July, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm
Attorneys for Sun Valley Company

By _____
Matthew J. McGee – Of the Firm
Attorneys for Sun Valley Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2016, I caused a true and correct copy of the foregoing **PETITION FOR DECLARATORY RULING** to be served by the method indicated below, and addressed to the following:

Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St.
P.O. Box 83720
Boise, ID 83720-0098

( ) U.S. Mail, Postage Prepaid
(X) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Scott L. Campbell