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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SUN VALLEY COMPANY,

Petitioner,

vs.

GARY SPACKMAN, Director of the Idaho Department of Water Resources, and IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV01-16-23185

REPLY IN SUPPORT OF MOTION TO DETERMINE JURISDICTION

Sun Valley Company (the "Company"), by and through undersigned counsel, hereby submits its Reply in Support of Motion to Determine Jurisdiction.

I. ARGUMENT

A. The ESPA GWMA Order Is A Final Appealable Order

Without qualification or explanation, the Director states in his description of this matter's procedural background that "[o]n November 4, 2016, the Director issued the ESPA GWMA Order." Response to Motion to Determine Jurisdiction ("Response") at 2. The ESPA GWMA Order is a final order. The Director does not expressly dispute that, but, implicitly, argues against the Order's finality throughout its Response. This is critical. There are three types of orders identified in the Idaho Administrative Procedure Act—a preliminary order, a recommended order, and a final order. The Department's Procedural Rules also identify default orders and interlocutory orders. The Company is aware of no other form of order. The ESPA GWMA, issued by the agency head, is not a preliminary order, a recommended order, an interlocutory order, or a default order. It is a final order, explicitly designated so by the Director, and reconsideration has been denied. The Director offers no authority to demonstrate that his grant of a hearing destroys the finality of the ESPA GWMA Order. The Director may ultimately issue a **separate** final order after a hearing, but the ESPA GWMA Order is final and subject to review by this Court.

The authority cited by the Director for the proposition that the Company's petition for judicial review is premature for failure to exhaust administrative remedies is distinguishable. In *Wanner v. Idaho Department of Transportation*, 150 Idaho 164, 244 P.3d 1250 (2011), for example, the statutory scheme at issue makes clear that, preceding the hearing, the order suspending, revoking, cancelling or disqualifying the driving privileges of any person is not final. *See* IDAHO CODE § 49-326(4) ("Upon the hearing, the department shall either rescind its order or, with good cause, may affirm or extend the suspension or disqualification of the driver's license or revoke the driver's license."). In contrast, Idaho Code Section 42-1701A(3) does not

contain the same limitations, and more importantly, Section 42-1701A(3) clearly provides that, after the hearing, the Director is to issue a final order, not revoke the existing order or affirm the existing order. *See* IDAHO CODE § 42-1701A(3). In other words, the agency action at issue in *Wanner* was not, as it is in this case, a final order. The Company does not dispute that if the Department's action constituted something other than a final order, the exhaustion requirement would not be met, as *Wanner* illustrates. However, the Department's action was very clearly a final order.

Podsaid v. State Outfitters & Guides Licensing Bd., 159 Idaho 70, 356 P.3d 363 (2015), also cited by the Director as supportive of his exhaustion argument, presents the same distinctions as *Wanner*. In *Podsaid*, the outfitter subject to the denial of an application for license petitioned for judicial review after the receipt of a letter of denial that allowed him to correct the reasons for denial within 30 days and to request a hearing to be held in accordance with the Idaho Administrative Procedure Act (the "Act") within 21 days of receipt of the letter. *See id.* at 74, 356 P.3d at 367. Unlike this case, the letter from which the petitioner sought review was not a final order, or a final agency action at all. Again, the Company does not dispute that a person must exhaust administrative remedies prior to a final order of an agency. Those are not the fact presented in this case. Here, the Director has issued a final appealable order. The Court has jurisdiction to review the order.

B. The Company Has Exhausted Its Administrative Remedies Under the Act.

The Director asserts that the Company has no right to judicial review of the Director's decision on the Company's petition pursuant to Idaho Code Section 67-5270(3) because the Company has not complied with the requirement of Idaho Code Section 67-5271 to exhaust administrative remedies. *See* Response at 6. The plain language of that statute states: "A person is not entitled to judicial review of an agency action until that person has exhausted all

administrative remedies ***required in this chapter***." IDAHO CODE § 67-5271(1). The Director has not identified any administrative remedy required in the Act that the Company has not exhausted. Therefore, Idaho Code Section 67-5270(3) affords the Company the right to have this Court review the ESPA GWMA Order.

Alternatively, and inconsistent with the Department's statement of available procedures attached to the ESPA GWMA Order, the Director cites Section 67-5270(1) and argues that the Act does not apply at all because an "other provision of law" is applicable to the Director's decision. *See* Response at 5-7. An "other provision of law" is not applicable to the Director's decision. The statute the Director refers to—Section 42-1701A—in fact adopts the Act as the provision of law applicable to this matter. That statute, the Director argues, provides for a remedy not set forth in the Act. The plain language of Section 67-5271(1), however, makes clear that remedies required in the Act are the remedies that must be exhausted. The hearing pursuant to Section 42-1701A(3) provides a hearing, and perhaps a separate appealable order, but not a remedy for the final order at issue—in this case the ESPA GWMA Order.

Additionally, if the Idaho Legislature had desired to enact language in Idaho Code Section 67-5271(1), supporting the meanings argued by the Director, it could have easily included the phrase from Idaho Code Section 67-5270(1) "or where other provision of law is applicable to the particular matter." It did not. Or, the Legislature could have cited that section within Idaho Code Section 67-5271(1). It did not. The Director attempts to act as the Legislature, implying language that does not exist in the unambiguous sentence of Idaho Code Section 62-5271. The Court should refuse to assist the Director in this effort. *See Utah Power & Light Co. v. Idaho Pub. Util. Com'n*, 107 Idaho 47, 54, 685 P.2d 276, 283 (1984) ("[I]t is not for this Court to imply a term in the statute . . . when the legislature has not so provided. . . .").

The purported remedy upon which the Director relies—a hearing pursuant to Section 42-1701A(3)— ignores that there now exists a final and appealable order, effective 14 days after its issuance. *See* IDAHO CODE § 67 5246(5). That the Director has now granted interested persons a hearing does not destroy the finality of the order, or deprive this Court of appellate jurisdiction.

C. The Company's Petition is Not Premature, Notwithstanding Idaho Code Section 42-1701A(3).

Attempting to read Sections 42-1701A(3) and (4) *in pari materia*, the Director argues that "[t]he judicial review provision set forth in Idaho Code § 42-1701A(4) . . . refers to a final order of the Director issued following the hearing ***required*** by Idaho Code § [42-]1701A(3)." *See* Response at 7 (emphasis added). The foregoing assertion is important for three reasons, and illustrates the Director's untenable position.

First, while subsection (3) plainly refers to judicial review under subsection (4), the reverse is not true; subsection (4) does not independently limit the right of review only to those persons that have proceeded through the hearing process set forth in subsection (3). The statute states that a person "who is aggrieved by a final decision or order of the director is entitled to judicial review." IDAHO CODE § 42-1701A(4). It does not state that only a person who is aggrieved by a final order entered after a hearing is entitled to judicial review.

To that end, there is no doubt that Section 42-1701A(3) contemplates the issuance of a final order by the Director after the hearing. *See* IDAHO CODE § 67-5246(1) (if presiding officer is agency head, presiding officer must issue final order). By necessity, however, such a final order is not the same order that already issued and formed the basis for the request for hearing. The Director has issued a final order in this case, and denied reconsideration. There is no doubt that the substance of a subsequent final order may address the substance of the final

order that is presently effective, but there is also no doubt that it will be a completely new final order. A final order issued after a hearing under Section 42-1701A(3) is a separate final order, and is separately subject to judicial review pursuant to Section 42-1701A(4) and the Act.

Second, and in the alternative, if the Court agrees that subsections (3) and (4) must be read together to provide subsection (4) with meaning beyond the plain language, the Court should likewise consider the relationship between subsection (2) and (3) to provide subsection (3) with meaning. Section 42-1701A(2) grants the Director discretion to designate a hearing officer to officiate contested case hearings. Reviewed together, subsection (3) provides that the Director will hold a hearing on the merits even when he had previously exercised his discretion to appoint a hearing officer pursuant to subsection (2). Section 42-1701A(3) was clearly not meant as a remedy to address the circumstances presented here—the issuance of a final and effective order by the Director without having provided interested parties with a meaningful opportunity to participate in a formal contested case hearing before even a designated hearing officer.

Third, and critically, the Director's articulation of the argument makes clear the procedural Catch-22 it presented to interested persons in this case. If a hearing was "required" because the Director did not hold one before issuing a final order, and that hearing is an administrative remedy that must be exhausted, as the Director argues, then according to the Director, the Company's request for hearing is the only reason the Orders will be reviewed at all, by either the Department or this Court. Stated another way, if no party had requested a hearing,[1]

[1] Critically, as the Surface Water Coalition points out in a footnote in its brief in response to the Company's Motion to Determine Jurisdiction, the Company does not hold water rights within the existing ESPA GWMA. It is also the only party that requested a hearing before the Director. To the extent the Surface Water Coalition disputes the Company's standing or status as an "aggrieved" party before either the Department or this Court, the Company expects that the

according to the Director, the Orders would now be beyond review. The Director argues in favor of a vague and nonsensical administrative process that favors avoidance of any judicial intervention at all. Due to the confusion about how interested persons can exhaust administrative remedies where the Director issues a ***final order*** without first holding a contested case proceeding that involves identifiable parties, an interested person, whose status as party even remains in doubt, is left to guess whether a final order really is final and appealable, or is some type of hybrid recommendation that requires a Section 42-1701A request for hearing in order for such person to be entitled to due process and the procedural protections afforded by the Act.

Under the Director's approach, if the Company had not requested a hearing, and had simply sought reconsideration of the Declaratory Ruling Order or the ESPA GWMA Order—the approach numerous other interested persons took in this case—the denial of such petitions for reconsideration would have effectively cut off any opportunity for judicial review. The Orders would be effective, and would not be eligible for further review by either the Court or the Director. In light of what is at stake—a sea change in groundwater administration acrossIdaho--such a result is ridiculous and unjust. More importantly, it does not accord with the law.

D. Even If The Court Does Not Find It Has Jurisdiction, It Should Find That The Purported Final Order is Null and Void.

The Director closes his first argument with the following statement:

> The Court's deferral to the administrative process established by the Legislature and the Department will allow the Director to hear and address the arguments of the parties to the underlying administrative proceeding, mitigate or cure errors prior to judicial intervention, and develop a more complete agency record for judicial review.

Coalition will properly raise the issue via motion and afford the Company an opportunity to respond.

Response at 5.

If the Director were to abide by the administrative process established by the Legislature and the Department, that statement carries some weight. Here, he has not. He has issued a final order, without a hearing, and without the numerous guarantees of due process afforded by the Idaho Administrative Procedure Act. If the Court finds that it does not have jurisdiction to review the ESPA GWMA Order, it likewise should find that the ESPA GWMA Order is not a final order, and is null, void, and without force or effect. Likewise, the Court should affirm that the record, of which interested parties have no legitimate notice or knowledge, should be ignored and developed anew. The Director should not be afforded the opportunity to "develop a more complete agency record" by supplementing a record developed outside the scope of a formal contested case, and backfill a final order that was issued upon improper procedures.

An order is "[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one (1) or more specific persons." *See* IDAPA 37.01.01.005.15; IDAHO CODE § 67 5201(12). An order is the result of a contested case. *See* IDAPA 37.01.01.005.07; IDAHO CODE § 67-5201(6) (""Contested case' means a proceeding which results in the issuance of an order."). All proceedings by the Department that may result in the issuance of an order are governed by the contested case provisions of the Idaho Administrative Procedures Act. IDAHO CODE §§ 67-5240; 42-1701A. Those provisions include, without limitation, procedural requirements for hearings, *see* § 67-5242, evidentiary requirements, *see* § 67-5251, requirements for the maintenance of an official record, *see* § 67-5249, and the prohibition of ex parte communications with the hearing officer, *see* § 67-5253. The foregoing definitions and required procedures are plain and unambiguous,

and cannot simply be ignored by the Director. *See Westway Constr., Inc. v. Idaho Transp. Dep't*, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003). "[I]nformal disposition may be made of any contested case by negotiation, stipulation, agreed settlement or consent order," *see* Idaho Code § 67-5241(1)(c), but this contested case did not involve negotiation, stipulation, agreement or consent by the Company or, to the Company's knowledge, negotiation, stipulation, agreement or consent by any of the other parties the Director affirmatively selected to receive notice that he was considering designation of an ESPA GWMA. *See Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010) ("an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings").

The Director did not comply with even the most basic hearing, evidentiary or record requirements for contested case proceedings before entering the ESPA GWMA Order, and the ESPA GWMA Order was not the result of negotiation, stipulation, agreement or consent by the parties. Therefore, the Director did not have authority to enter the ESPA GWMA Order. Acts taken by an agency without statutory authority are void and must be set aside. *See A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012); *Arrow Transp. Co. v. Idaho Pub. Util. Comm'n*, 85 Idaho 307, 314-15, 379 P.2d 422, 426-27 (1963).

If the ESPA GWMA Order, and the record associated therewith, are allowed to stand and be further "develop[ed] . . . for judicial review," as the Director suggests, the Director's procedural missteps, and violations of the Company's due process rights, will simply be carried forward. The reports and conversations with Department staff, engineers and advisors, and other information reviewed by the Director prior to issuing the ESPA GWMA Order, remain unclear because there was no hearing, and the process of creating a record for

review pursuant to Idaho Code Section 67-5275 was inappropriately informal and outside the bounds of the Act. Critically, "when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process." *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000). Engaging in *ex parte* communications and failing to confine an agency decision to a record produced at a public hearing—which never even occurred in this case—deprived interested parties of the opportunity to rebut facts, and "not only created an appearance of impropriety but also underscored the likelihood that [the Director] could not fairly decide the issues in the case." *Eacret v. Bonner County*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (overruled on other grounds). The ESPA GWMA Order cannot be valid without an unbiased decision maker whose objectivity is not already contaminated by his own unilateral actions. Buttressing or back-filling the ESPA GWMA Order via a hearing to review that invalid final order pursuant to Section 42-1701A(3) only further compounds the problem.

As a practical matter, the Director has bypassed a fair de novo hearing on the merits, in favor of what is essentially a hearing which purpose will be to review existing findings and conclusions. The Director has already drawn factual and legal conclusions relating the ESPA GWMA, based on a questionable record of which interested persons never had proper notice, and to which interested persons never had full access, and memorialized them in a final order. That final order is appealable to this Court. However, in the event this Court finds it does not have jurisdiction to review the ESPA GWMA Order, it should so find because the ESPA GWMA Order is not a final order, and is null, void and without force or effect.

II. CONCLUSION

For the foregoing reasons, and for the reasons articulated in the moving papers, the Company respectfully requests that the Court find it has jurisdiction to review the ESPA GWMA Order.

DATED this 9th day of February, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2017, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DETERMINE JURISDICTION** to be served by the method indicated below, and addressed to the following:

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