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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

**SUN VALLEY COMPANY'S  
AMENDED PETITION FOR  
RECONSIDERATION OF FINAL  
ORDER DESIGNATING THE  
EASTERN SNAKE PLAIN AQUIFER  
GROUND WATER MANAGEMENT  
AREA**

COMES NOW Sun Valley Company ("Sun Valley"), by and through it attorneys  
of record and pursuant to Idaho Code Section 67-5246(4) and Rule 740 of the Rules of Procedure  
of the Idaho Department of Water Resources (IDAPA 37.01.01), and hereby petitions the Idaho

**SUN VALLEY COMPANY'S AMENDED PETITION FOR RECONSIDERATION OF  
FINAL ORDER DESIGNATING THE EASTERN SNAKE PLAIN AQUIFER GROUND  
WATER MANAGEMENT AREA - 1**

Department of Water Resources (the “Department”) for reconsideration of its final *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”), served on October 3, 2016.

## I. INTRODUCTION

The Director has designated a ground water management area in the Eastern Snake Plain Aquifer. He has done so after a number of public presentations and a short period of time to submit written comments. He has done so without providing notice of specific facts or material noticed and the source thereof. Sun Valley is presently unable to access the official record. In making his designation, the Director made several conclusions of law that contravene the plain language of Idaho Code Section 42-233b and the Department’s own rules, including the Department’s Rules for Conjunctive Management. For the reasons that follow, and for the reasons more specifically addressed in Sun Valley’s Second Amended Petition for Declaratory Ruling, IDWR Docket No. P-DR-2016-001, Sun Valley seeks reconsideration of the ESPA GWMA Order.

## II. ARGUMENT

### A. The Director Entered the ESPA GWMA Order Upon Improper Procedures.

The Director did not validly issue the ESPA GWMA Order. 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 any agency 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. 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 Sun Valley or, to Sun Valley’s knowledge, negotiation, stipulation, agreement or consent by any of the other parties the Director 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 Department 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).

Sun Valley incorporates by reference herein its arguments from the Second Amended Petition for Declaratory Ruling, IDWR Docket No. P-DR-2016-001, relating to the proper procedures, including compliance with the Department's Conjunctive Management Rules, to designate a GWMA.

**B. The ESPA GWMA Order Required Rulemaking.**

In addition to the foregoing procedural deficiencies, at least part of the Director's ESPA GWMA Order should have gone through the rulemaking process. A rule is "[t]he whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of [the Idaho Administrative Procedure Act] that implements, interprets, or prescribes (a) law or policy; or (b) the procedure or practice requirements of an agency." IDAHO CODE § 67-5201(19). The Idaho Supreme Court has recognized that, "under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures." *See Asarco Incorporated v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). The Court therefore adopted guiding considerations for a court to determine whether an agency has taken action in the nature of an administrative rule. An agency action constituting a rule has the following characteristics: "(1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Id.* (citing *Woodland Private Study Group v. State of New Jersey*, 533 A.2d 387 (N.J. 1987)).

In the ESPA GWMA Order, the Director has made a statement of general applicability that interprets and prescribes law or policy. Indeed, as he commences making that

statement, he states that “[t]he term ‘ground water basin’ is not defined in the Ground Water Act, and has not been defined by judicial decision, administrative rule, or administrative order.” *See* ESPA GWMA Order at 21, ¶ 12. The Director then describes a common understanding of the term “basin” in the context of surface water administration, and how that concept informs the undefined term “ground water basin,” as well as the distinction between a “surface water basin” and a “ground water basin.” *See id.* at ¶¶ 13-14. After that two paragraph discussion, citing a dictionary, a geology glossary, and footnoting, as an example, a report identifying two aquifers in the Big Wood River basin, the Director states:

15. In light of the foregoing, the term “ground water basin” as used in Idaho Code § 42-233b is understood as a term referring to an area in which ground water flows or moves within an aquifer or aquifers to common discharge areas, and has boundaries and areas of “recharge” that are reasonably well-defined. Like a surface water “basin,” a “ground water basin” may be either relatively large or relatively small, and encompass tributary water sources (i.e. other ground water basins).

ESPA GWMA Order at 21, ¶ 15 (hereinafter, the “New Definition”).

Thereafter, the Director applied the New Definition to the ESPA and the surrounding aquifers the Director has deemed an “aquifer system,” concluding that:

16. The ESPA and the tributary basins comprise an aquifer system within which ground water flows or moves to specific discharge areas and has reasonably well-defined boundaries. . . . The aquifer system constitutes a “ground water basin” within the meaning of Idaho Code § 42-233b.

ESPA GWMA Order at 21-22, ¶ 16.

The Director’s *application* of the New Definition to the “aquifer system” comprised of the ESPA and tributary basins suffers from the procedural deficiencies identified in Section A above. The Director’s act of legally defining “ground water basin” in the first place

suffers from an even more immediate deficiency. That act constitutes a rule requiring rulemaking in order to be valid. *See Asarco, supra*.

The considerations identified in *Asarco* demonstrate that the New Definition is a rule. It has wide coverage, governing the ESPA and any “tributary basins” encompassing the “aquifer system” as applied. It also more broadly governs the designation of any “system” of “aquifers” anywhere in the state. As the Director describes it in the ESPA GWMA Order, the New Definition is to be applied generally and uniformly, and only in future cases. It is undisputedly a definition—the embodiment of uniformity, and the Director did not indicate any intent to apply the definition to redefine or redesignate any existing GWMA.

Considerations 4-6 from *Asarco* also all indicate that the New Definition is a rule. The New Definition prescribes a legal standard not otherwise provided by the enabling statute. The enabling statute makes no reference to a plurality of “aquifers,” nor to “common discharge areas,” nor “boundaries and areas of recharge that are reasonably well-defined,” nor does it suggest that a ground water basin “encompass[es] tributary water sources.” These elements of the New Definition are not provided by the enabling statute. Further, they express agency policy not previously expressed, and interpret law. The Director acknowledges that. *See* ESPA GWMA Order at 21, ¶ 12 (“The term ‘ground water basin’ is not defined in the Ground Water Act, and has not been defined by judicial decision, administrative rule, or administrative order.”).

The New Definition is an administrative rule of general applicability disguised as a conclusion of law in a purportedly final administrative order, issued without the procedural protections provided by the Administrative Procedures Act. The Director should reconsider

issuance of the ESPA GWMA Order, which incorporates new statements of Department law and policy, and withdraw such order until such time as a formal rulemaking occurs.<sup>1</sup>

**C. The Director’s Conclusions of Law Are Erroneous, and in Contravention of the Operative Statutes, Rules, and Judicial Precedent.**

In the event the Director finds the procedure by which he has created the ESPA GWMA sound, Sun Valley seeks reconsideration of any conclusions of law inconsistent with the rulings Sun Valley sought from the Director in its Second Amended Petition for Declaratory Ruling in IDWR Docket No. P-DR-2016-001.

In addition, the Director has supplemented his reference to “tributary basins” within the Director’s letter dated July 7, 2016, with a new undefined term—“aquifer system”—in his conclusions of law interpreting Idaho Code Section 42-233b. *See* ESPA GWMA Order at 21-22, ¶ 16. (“The ESPA and the tributary basins comprise an *aquifer system* within which ground water flows or moves to specific discharge areas and has reasonably well-defined boundaries. . . . The *aquifer system* constitutes a ‘ground water basin’ within the meaning of

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<sup>1</sup> Sun Valley maintains that a “ground water basin” has already been effectively defined as an “area having a common ground water supply.” Defining the “aerial extent” of a GWMA—the “ground water basin”—requires a rulemaking or compliance with the Conjunctive Management Rules, and, in particular, requires the determination of an area having a common ground water supply. *See* Second Amended Petition for Declaratory Ruling, Docket No. P-DR-2016-001, at 20-30. In issuing the ESPA GWMA Order, the Director rejected the applicability of the CM Rules to the designation of a GWMA, notwithstanding the plain language of such rules. *See* IDAPA 37.03.11.020.06 (“These 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 42-233(b), Idaho Code.”). Instead of determining an area having a common ground water supply in accordance with the CM Rules, the Director provided a new statement of law or policy interpreting the statutory term “ground water basin,” then applied that new statement of law to the ESPA. Assuming *arguendo* the CM Rules do not provide the pertinent legal standards to determine a “ground water basin,” the Director must conduct a rulemaking to articulate such legal standards.

Idaho Code § 42-233b.”). The term “aquifer system” does not appear in that section, or anywhere else in Idaho Code. On the other hand, the statute expressly uses the singular term “the aquifer” when defining the scope of the Director’s management of ground water withdrawal. *See* IDAHO CODE § 42-233b (“The ground water management plan 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.”). *See also* Second Amended Petition at 11-20.

Notwithstanding the fact that the Big Wood River Basin is presently not subject to the ESPA GWMA, the Director’s conclusions about the scope, extent, and applicability of Section 42-233b encompassing water districts comprised of adjudicated water basins affect Sun Valley’s water rights. His interpretation of that statute allows him, in reliance upon the foregoing legal conclusions, to include the Big Wood River Basin and any other basin he deems to be part of the “aquifer system” in the ESPA GWMA. Sun Valley therefore seeks reconsideration of the Director’s conclusions.




**III. CONCLUSION**

For the reasons set forth above, Sun Valley respectfully requests that the Department reconsider its GWMA Order.

DATED this 23rd day of November, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &  
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By   
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23rd day of November, 2016, I caused a true and correct copy of the foregoing **SUN VALLEY COMPANY'S AMENDED PETITION FOR RECONSIDERATION OF FINAL ORDER DESIGNATING THE EASTERN SNAKE PLAIN AQUIFER GROUND WATER MANAGEMENT AREA** to be served by the method indicated below, and addressed to the following:

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