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**DEPARTMENT OF WATER RESOURCES  
STATE OF IDAHO**

	)	Docket No. AA-GWMA-2016-001
IN THE MATTER OF DESIGNATING	)	
THE EASTERN SNAKE PLAIN	)	<b>CITY OF POCATELLO'S</b>
AQUIFER GROUND WATER	)	<b>MEMORANDUM REGARDING</b>
MANAGEMENT AREA	)	<b>PROCEDURAL POSTURE; IN</b>
	)	<b>THE ALTERNATIVE, REQUEST</b>
	)	<b>FOR HEARING</b>

COMES NOW, City of Pocatello ("Pocatello"), by and through undersigned counsel, and submits this *Memorandum Regarding Procedural Posture; In the Alternative, Request for Hearing*.

**I. PROCEDURAL HISTORY**

On November 2, 2016 the Director of the Idaho Department of Water Resources ("IDWR" or "Department") issued an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("GWMA Order"). The final page of the GWMA Order,

entitled “Explanatory Information to Accompany a Final Order” (“Explanatory Sheet”), designated the Order as “final” and subject to judicial review.

On November 16, 2016 Sun Valley Company (“Sun Valley”) requested a hearing on the GWMA Order. Also on November 16, 2016, and pursuant to the deadlines set forth in IDWR’s Explanatory Sheet, Pocatello sought reconsideration of the GWMA Order. Pocatello then filed a petition to intervene on November 28, 2016, which described in detail Pocatello’s interests in participating in any hearing and proceedings related to the GWMA Order. The Director granted Pocatello’s intervention. *Order Granting Petitions to Intervene* (Dec. 27, 2016). Finally, and also pursuant to the deadlines set forth in the IDWR Explanatory Sheet and in the absence of an agency order on any of the previously filed motions to reconsider, Pocatello filed an appeal. *Notice of Appeal and Petition for Judicial Review*, CV-01-17-67 (Jan. 3, 2017).<sup>1</sup>

Meanwhile, on December 1, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*, assigned this matter a case number to create a contested case, and noticed all parties for a pre-hearing conference. The Director also issued an *Order Authorizing Discovery* on December 27, 2016. On January 12, 2017, IDWR held the first pre-hearing conference. At that conference, the parties and the Director discussed the process for unraveling the procedural conundrum of the GWMA Order being both on an agency hearing track and on appeal at the District Court. Sun Valley announced its intention to file a motion with the District Court to determine jurisdiction; as Pocatello also had a pending appeal, Pocatello likewise filed a motion. The pre-hearing conference was continued to March 22, 2017, in order to give the Court time to rule on the motions. *Notice of Continued Pre-Hearing Conference; Order Staying Except Intervention* (Jan. 17, 2017).

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<sup>1</sup>Sun Valley also timely filed a petition for judicial review. *Petition for Judicial Review*, CV-01-16-23185 (Dec. 23, 2016).

On February 10, 2017, the District Court dismissed Pocatello's appeal.<sup>2</sup> *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review*, CV-01-17-67 (Feb. 16, 2017) ("Jurisdiction Order"). The Court determined that the Director is "required to hold an administrative hearing on the [Sun Valley] petition and issue a written decision . . . . Until the director issues his written decision following hearing, no person aggrieved by the Director's designation is entitled to judicial review." *Id.* at 4 (citations omitted). The Court also held that the IDWR Explanatory Sheet, which offered "alternative remedies" to aggrieved entities beyond requesting a hearing, was error. *Id.* at 6-7.

On March 20, 2017, two days before the re-set March 22, 2017 pre-hearing conference, Sun Valley filed a *Notice of Request for Withdrawal of Hearing* ("Notice") in the above-captioned matter. At the pre-hearing conference on March 22, 2017, (which no Sun Valley representatives attended) the Director asked whether the captioned matter still amounted to a contested case, and sought parties' input. While IDWR's counsel argued that Sun Valley's Notice was adequate to dismiss the captioned matter without a hearing, most other intervenors in the matter argued that the case should continue to hearing. Pocatello agrees with the latter position and the basis for its position is stated below.

On April 6, 2017 the District Court issued a *Remittitur*, ordering that "[t]he Idaho Department of Water Resources shall forthwith comply with the directives of the Order Dismissing Petition for Judicial Review and corresponding Judgment, if any action is required."

## **II. THE DEPARTMENT IS REQUIRED TO RE-ISSUE THE GWMA WITH A CORRECT EXPLANATORY SHEET**

The procedural confusion in the captioned matter arose from the IDWR Explanatory Sheet, which stated that parties could file for reconsideration, for appeal, or for a hearing. On

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<sup>2</sup>The District Court also dismissed Sun Valley's petition for judicial review. *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review*, CV-01-16-23185 (Feb. 16, 2017).

appeal, the District Court found the Explanatory Sheet contained erroneous information regarding available remedies in the wake of the GWMA Order, and held the only legally available remedy pursuant to statute was to request a hearing. Jurisdiction Order at 6-7.

Now that a remittitur has been issued by the Court for the Department to “comply with the directives” of its Order, the Director must re-issue the GWMA Order with an accurate explanatory sheet that sets a deadline to request a hearing on the GWMA Order. *Remittitur* at 2, CV-01-17-67 (Apr. 6, 2017). Permitting the contested case to proceed to hearing, rather than be dismissed on questionable procedural technicalities and the Department’s own “faulty procedures”, is required by due process and Idaho law. *In re Quesnell Dairy*, 152 P.3d 562, 565, 143 Idaho 691, 694 (2006) (“[p]ermitting this appeal to proceed allows the case to be decided on the merits rather than dismissing it based on faulty procedures. This is a policy that has held to be the essence of our rules of civil procedure.” (citations omitted)).<sup>3</sup> Now that a remittitur has issued, the Department has the opportunity to correct its error, provide a proper explanatory sheet informing interested parties of the administrative remedies available to it, and permit this matter to proceed to hearing.

### **III. INTERVENORS IN THIS MATTER SHOULD BE AFFORDED AN OPPORTUNITY FOR A HEARING**

In the alternative, if the Director refuses to reissue the GWMA Order with a correct explanatory sheet, Pocatello may, as a party to the above-captioned contested case, pursue a hearing. The question of whether the Director must proceed to hearing in the contested case after Sun Valley’s Notice is not directly answered by Idaho law. However, multiple parties intervened in this matter on the strength of Sun Valley’s Notice, these intervenors have uniformly been granted party status based on their unique and independently evaluated “direct

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<sup>3</sup>*Distinguished by City of Eagle v. Idaho Dep’t. of Water Res.*, 150 Idaho 449, 452-53, 247 P.3d 1037, 1040-41 (2011) (limiting applicability where procedure involves jurisdictional deadlines, such as filing an appeal).

and substantial interest”, and the Director should proceed to schedule a hearing so that those intervenors who so desire can participate.

The Director initiated a contested case in response to Sun Valley’s request for hearing. IDAPA 37.01.01.005.07 (a contested case is “a proceeding which results in the issuance of an order”). Sun Valley’s Notice was filed pursuant to IDAPA 37.01.01.204, “Withdrawal of Parties”, permitting withdrawal from a proceeding, and states that Sun Valley will not participate in any hearing in the above-captioned contested case. *See* Notice at 1-2 (Sun Valley “withdraws from participation in the hearing granted by the Director” (emphasis added)). Importantly, Sun Valley’s Notice is not a motion to dismiss the contested case pursuant to IDAPA 37.01.01.260.

Pocatello was granted party status as an intervenor in this matter, as the Director found that it satisfied IDAPA 37.01.01.353:

The Director concludes that IGWA, the SWC, Pocatello, the Coalition of Cities, McCain, and SVGWD all have a direct and substantial interest in this matter and will not unduly broaden the issues. The Director further concludes that the interests of IGWA, the SWC, Pocatello, the Coalition of Cities, McCain, and SVGWD are not adequately represented by existing parties.

*Order Granting Petitions to Intervene* at 2 (Dec. 27, 2016). An intervenor is a party to a contested case, and as a party may “actively participate in the application process at the agency level.” *Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 874, 243 P.3d 1055, 1062 (2010) (recognizing intervenors as parties with the ability to fully participate in administrative proceedings). *See also* IDAPA 37.01.01.156 (defining “intervenors” as entities “permitted to participate as parties pursuant to Rules 350 through 354”); IDAPA 37.01.01.005.16 (a “Party” is “each person or agency named or admitted as a party”); IDAPA 37.01.01.150 (a “Party” to a contested case includes “respondents, protestants, or intervenors”); and IDAPA 37.01.01.157 (stating it is the right of all “parties” to “appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in

hearings or arguments” (emphasis added)). *See also* I.C. § 67-5201(13) (“‘Party’ means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.”).

In federal court, an intervenor can continue to litigate after dismissal of the party who originated the action, provided the intervenor can show that it fulfills the requirements of Article III of the United States Constitution. *Diamond v. Charles*, 476 U.S. 54, 68, 106 S.Ct. 1697 (1986) (“an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III”). An intervenor may continue litigation after the original party has been dismissed “where an independent basis for jurisdiction exists and unnecessary delay would otherwise result.” *GTE Cal., Inc. v. Fed. Communications Comm’n*, 39 F.3d 940, 947 (9th Cir. 1994). “Since an intervenor must show standing and may not raise new issues not brought before the court by the petitioner, we see no analytical difficulty in permitting an intervenor to substitute for a petitioner.” *S. Pac. Transp. Co. v. Interstate Commerce Comm’n*, 69 F.3d 583, 587 (D.C. Cir. 1995) (citations omitted); *see also U.S. Steel Corp. v. Envtl. Prot. Agency*, 614 F.2d 843, 845 (3d Cir.1979) (“[t]he weight of authority in the United States Courts of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action.”). Indeed, other jurisdictions have held that an action may not be dismissed to the prejudice of an intervenor. *Bates v. Dist. of Columbia Bd. of Zoning Adjustment*, 639 A.2d 607 (D.C. Cir. 1994); *Patterson v. Pollock*, 84 Ohio App. 489 (Ohio App. 1948).

The confusion in procedural posture came about through the Department’s mistake relating to the contents of the Explanatory Sheet. However, that mistake should not be used as a

basis to unsuit the intervening parties in this matter. Indeed, the Department assured the Court that “the Department is prepared to move forward with the hearing”, and that Pocatello would have an adequate remedy “to address its issues, including whether the Director erred by issuing a single final order regarding the GWMA, questions regarding a ‘reasonably safe supply’ and whether the Director followed the correct procedural requirements.” *IDWR’s Response to Motion to Determine Jurisdiction* at 7-8 (Feb. 3, 2017).

To dismiss the contested case at this time would violate the due process rights of all intervenors. As has been noted previously by Pocatello and other entities, the GWMA Order would fundamentally change administration and regulation of water rights on the Eastern Snake Plain Aquifer. The intervenors in this matter, including Pocatello, intervened to participate in the proceedings related to the GWMA Order because of concerns over the impact on vested property rights. Given the unique procedural circumstances that the parties find themselves in today, the Department should not preclude a hearing. “Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *Aberdeen–Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (internal quotations omitted). “Due process is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation.” *Id.* (internal quotations and citations omitted).

While it may be proper to allow Sun Valley to withdraw from the matter, its Notice did not request the hearing be dismissed (and in fact stated only that it would not participate in any hearing). While Sun Valley may no longer be an “aggrieved” party, Pocatello (and possibly other intervenors) is still aggrieved by the GWMA Order, should be afforded an opportunity at




hearing pursuant to Idaho Code section 42-1701A(3) and seeks an opportunity to be heard under the scope of the original notice of hearing.

### REQUEST FOR HEARING

In the event the Director does not re-issue or otherwise withdraw the GWMA Order or permit Pocatello to proceed to hearing in this contested case, Pocatello hereby requests a hearing pursuant to Idaho Code section 42-170A(3) on the GWMA Order.

Respectfully submitted this 14th day of April, 2017.

CITY OF POCATELLO ATTORNEY'S OFFICE

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### CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>th</sup> day of April, 2017 a true and correct copy of the foregoing **CITY OF POCA TELLO'S MEMORANDUM REGARDING PROCEDURAL POSTURE; IN THE ALTERNATIVE, REQUEST FOR HEARING** in Docket Nos. AA-GWMA-2016-001 was served on the following by the method indicated below:



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