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MAY 18 2017
DEPARTMENT OF
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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 **CITY OF POCATELLO'S RESPONSE BRIEF**

COMES NOW, the City of Pocatello ("Pocatello" or "City"), by and through its undersigned counsel, and submits this Response Brief pursuant to the Director's *Order Establishing Briefing Deadlines* (April 24, 2017).

INTRODUCTION

The Director's *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (November 2, 2016) ("GWMA Order") is historic in nature and creates a new paradigm for administering water rights in the Eastern Snake Plain Aquifer ("ESPA"). The import of proceeding with a fair and open process in this matter cannot be overstated—as

acknowledged by the Idaho Department of Water Resources ("Department" or "IDWR"), the ESPA is the "'sole source' of drinking water for hundreds of thousands of southern Idaho residents, and a vital resource for farmers, ranchers and others who rely upon water for a living."[1]

The Cities of Pocatello, Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell, in addition to Fremont-Madison Irrigation District, Madison Ground Water District, Idaho Irrigation District, and the Basin 33 Water Users have all requested that the Director proceed to hearing on his designation order in the interests of open and transparent administration and for the reasons set forth in Pocatello's *Memorandum Regarding Procedural Posture; In the Alternative, Request for Hearing* (April 14, 2017) ("Memorandum"). As explained therein, the Director initiated a contested case regarding the GWMA Order, the Director found that these intervenors have an independent, direct and substantial interest in the matter, and have been granted party status. Memorandum at 4–6. Therefore, an independent basis for jurisdiction exists, and Intervenors should be afforded an opportunity to pursue this matter to hearing and may step into Sun Valley's shoes. *Id.* Pocatello provides this Brief to respond to the arguments raised in the *Surface Water Coalition's Response to City of Pocatello's Memorandum & Request for Hearing/Response to Coalition of Cities Joinder and Petition for Hearing* (April 18, 2017) ("SWC Response").

[1]News Release No. 2016-18, IDWR Director Creates GWMA in the Eastern Snake Plain Aquifer Region (Nov. 4, 2016), *available at* http://www.idwr.idaho.gov/files/news-release/20161104-news-release-2016-18.pdf.

ARGUMENT

I. The GWMA Order contested case[2] cannot be "automatically dismissed"

As argued in Pocatello's Memorandum, the primary basis for the Director to continue to hearing in this matter is that the underlying dispute regarding the GWMA Order was not resolved by Sun Valley's "withdrawal" of its request for hearing. The Surface Water Coalition ("SWC") spends little time responding to this argument, and contents itself with a weak analogy to proceedings involvinga permit or transfer application where the applicant withdraws. SWC Response at 3–4. In such a proceeding, an applicant files its application for a permit or transfer with the Department, the application is published, and parties may protest the application. I.C. § 42-222(1). Such an action is wholly dependent on the actions of and relief requested by the applicant—if the applicant "withdraws" its request, there is no new water right or water right transfer for protestants to object to and the dispute is resolved.

The GWMA Order, in contrast, was entered by the Director of his own volition. Sun Valley requested a hearing, and numerous other parties protested entry of the GWMA Order and sought to intervene to participate in the hearing. In considering Pocatello's Petition to Intervene, the Director found that the City had an independent basis to participate in the dispute, and that the City's interests were not adequately represented by Sun Valley. Sun Valley's withdrawal from the proceedings does not resolve Pocatello's issues with the GWMA Order.

Finally, SWC's analogy fails under *Laughy v. Idaho Department of Transportation*, where the Idaho Supreme Court stated that in contested cases intervenors admitted as parties are

[2]Once parties were admitted to this matter and the Director initiated hearing proceedings, a contested case was created. "[T]here are only two elements to a contested case: (1) the agency must be empowered to determine the particular issue, and (2) the action must fit the statutory definition of an 'order.' This Court has never otherwise suggested that only formally adjudicated cases are contested cases. . . . it does not matter whether the agency regards a proceeding to be part of a contested case or not. Proceedings that result in the issuance of an order are contested cases." *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 872–73, 243 P.3d 1055, 1060–61 (2010) (citations omitted).

able to "actively participate in the application process at the agency level," and cannot be "wrongly denied the opportunity to take part in formal agency proceedings." 149 Idaho 867, 874, 875, 243 P.3d 1055, 1062, 1063 (2010) ("If Respondents had formally intervened, the agency could have brought its expertise to bear in considering the parties' competing interests, heard Respondents' evidence and testimony, and corrected substantive mistakes.").

II. The District Court found the procedural information in the GWMA Order, which contained erroneous information regarding the appealability of the Director's GWMA Order, to be "in error".

The SWC's position that IDWR has no duty to "advis[e] parties of their available remedies" and that the Department therefore need not re-issue the GWMA Order is incorrect as a matter of law. SWC Response at 5. Idaho Code section 67-5248(1)(b) requires that any order issued by an agency "shall include: . . . [a] statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief." (emphasis added). IDWR Procedural Rule 712 contains the same requirement. IDAPA 37.01.01.712.02 ("An order shall contain a statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief"). To comply with Idaho Code section 67-5248(1)(b) and the District Court's *Order on Motion to Determine Jurisdiction/Order Dismissing Petition for Judicial Review* (February 16, 2017) ("Jurisdiction Order"), the GWMA Order must be re-issued with a corrected list of available procedures and applicable time limits.

Reissuance of the GWMA Order is particularly important given the number of water users affected by the GWMA Order who may be *pro se*—pursuant to Idaho Code section 42-1701A(3), a party may request a hearing within fifteen days of "receipt of actual notice" of the order, and based on the copy of the GWMA Order that is currently posted on the Department's

website, those parties may have reasonably believed that they were not able to contest the GWMA Order due to the misleading explanatory sheet.

SWC further posits that despite the District Court's decision and remittitur, the Department did not err because the GWMA Order listed one correct available procedure—a request for hearing—in addition to its menu of other "available" (yet erroneous) procedures. In other words, SWC suggests that IDWR can bury within a list of legally unavailable procedures one or more available procedures. However, Idaho Code section 67-5248(1)(b) states that the agency must describe the "available" procedures and "applicable" time limits. "[A]vailable" and "applicable" procedures must be interpreted to mean those that are in fact legally available. Cf. SWC Response at 5-6. Indeed, the District Court has already decided this issue—it expressly found that the Director erred in issuing the GWMA Order as it contained incorrect information regarding time limits, remedies and administrative relief. Jurisdiction Order at 6-7.

The SWC next argues that this is not a situation in which IDWR failed to make clear whether "the decision is final, and hence, appealable", and therefore *In re Quesnell Dairy*, 143 Idaho 691, 152 P.3d 562 (2007) does not apply. SWC Response at 6 (quoting *City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 453, 247 P.3d 1037, 1041). This assertion is confounding in light of the District Court's decision, which reached this exact conclusion—that an appeal is only possible when a party has proceeded to hearing, and that the GWMA Order contained erroneous instructions to pursue two alternate remedies available to parties, both of which confused the finality and timing of any appeal of the GWMA Order. The Director's actions clearly created confusion regarding the appealability of the GWMA Order and whether the Department or the District Court retained jurisdiction—three appeals were filed, as were

petitions for reconsideration, and the Director stayed the administrative proceeding pending the appeals.

Accordingly, contrary to SWC's arguments, *In re Quesnell Dairy* is informative regarding the manner in which the Director should proceed when parties have been misled about procedure—parties should be offered the opportunity to pursue the contested case to hearing, rather than be dismissed on questionable procedural technicalities and the Department's own "faulty procedures." *In re Quesnell Dairy*, 143 Idaho at 694, 152 P.3d at 565 ("Permitting 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)).

III. A request for hearing under I.C. § 42-1701(A) is not jurisdictional.

The SWC argues that Pocatello's request for hearing, made as a request for alternative relief in Pocatello's Memorandum, is jurisdictional under Idaho Code section 42-1701(A)(3) like the filing of a petition for judicial review, and thus unavailable. SWC Response at 3–4.[3] While the filing of an appeal is "jurisdictional" pursuant to I.R.C.P. 84(n), it is jurisdictional because Rule 84 expressly states the remedy for failing to file a petition for judicial review: failure to file within time allocated "will cause automatic dismissal of the petition for judicial review." However, when a statute or rule does not "indicate the appropriate remedy for failing to follow the statutory deadline," such a deadline cannot be found to be "jurisdictional" absent legislative intent. *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103, 109–10, 244 P.3d 247, 253–54

[3]To the extent SWC's Response implies that Pocatello attempted to pursue IGWA's appeal of the Methodology Order, or that the Idaho Supreme Court's Order Granting Motion to Dismiss determined that Pocatello did not have "right to continue with IGWA's appeal", this is misstatement of fact. SWC Response at 4, n.3. Pocatello did not attempt to step into IGWA's shoes as intervenors to pursue an appeal, and in fact did not contest IGWA's motion.

(Idaho Ct. App. 2010). Indeed, the United States Supreme Court has stated that for a deadline to be found to be jurisdictional, there must be express legislative intent to limit the court's (or agency's) authority. *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 648 (2012). Further, to be jurisdictional a statutory restriction must use "'clear' jurisdictional language." *Id.* at 142, 132 S.Ct. at 649.

Idaho Code section 42-1701(A)(3) contains no "jurisdictional" language, and no indication that the Director's authority to hold a hearing expires if a hearing is not requested within fifteen days; neither does section 42-1701(A)(3) contain anything akin to the automatic dismissal language found in I.R.C.P. 84. Further, the nature of the fifteen day time period in this matter, where publication was required under Idaho Code section 42-233b, is different for different parties depending on when they received actual notice of the GWMA Order, further indicating the deadline is not of a strict "jurisdictional" nature. Particularly for pro se parties in all matters in which section 42-1701A(3) applies, and not just the GWMA Order, the importance of maintaining the Director's discretion to grant a hearing after the fifteen day period is an essential keystone of fair and open administration by the IDWR.

CONCLUSION

As explained in Pocatello's Memorandum, there is a pending active contested case in which intervenors have been found to be directly affected by the GWMA Order and have independent standing to pursue a hearing. The procedurally faulty GWMA Order should not be used as the basis to unseat intervenors in this matter and deprive them of the opportunity of a hearing. Memorandum at 4–8. Further, to comply with this statutory requirement and the District Court's *Remittitur* directing the Department to "comply with the directives" of its *Order Dismissing Petition for Judicial Review* (April 6, 2017), the GWMA Order must be re-issued

with a correct "statement of the available procedures and applicable time limits." I.C. § 67-5248(1)(b). *See* Memorandum at 4–7. Contrary to SWC's assertion, a request for hearing pursuant to Idaho Code section 42-1701(A)(3) is not "jurisdictional"—the Director has discretion to honor requests for hearing, and should do so in this case due to the unique procedural history involved.

Respectfully submitted this 18th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2017 a true and correct copy of the foregoing **CITY OF POCATELLO'S RESPONSE BRIEF** in **Docket Nos. AA-GWMA-2016-001** was served on the following by the method indicated below:

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