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DEPARTMENT OF  
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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>JOINT SUBMISSION OF</b>
AQUIFER GROUND WATER	)	<b>STATEMENT OF ISSUES</b>
MANAGEMENT AREA	)	
	)	

The Basin 33 Water Users, Fremont Madison Irrigation District ("FMID"), Madison Ground Water District ("MGWD"), and Idaho Irrigation District ("IID") by and through their undersigned counsel, hereby submit their statement of issues pursuant to the *Order Adopting Deadlines; Notice of Additional Prehearing Conference* dated July 18, 2019, as items that continue to be at issue in this matter before the Idaho Department of Water Resources ("IDWR" or

“Department”) for reconsideration of the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”) dated November 2, 2016. The issues identified below were identified in *Sun Valley Company’s Petition for Reconsideration of Final Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (dated November 16, 2016) (hereafter “Petition for Reconsideration”), *Sun Valley Company’s Petition for Declaratory Ruling Regarding Creation of the ESPA Ground Water Management Area* (dated July 25, 2016) (hereafter “Petition for Declaratory Ruling”), and *Sun Valley Company’s Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area* (dated July 29, 2016) (hereafter “Amended Petition for Declaratory Ruling”), and *Sun Valley Company’s Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area* (dated October 19, 2016) (hereafter, Second Amended Petition for Declaratory Ruling).

## STATEMENT OF ISSUES

- 1. The Director Entered the ESPA GWMA Order Upon Improper Procedure.** As set forth in the Petition for Reconsideration, the Director did not validly issue the ESPA GWMA Order. An order is the result of a contested case. While informal disposition may be made of a contested case by negotiation, stipulation, agreement, or consent, issuance of the ESPA GWMA Order did not involve negotiation, stipulation, agreement, or consent by those who contest the ESPA GWMA Order in these proceedings. 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 only engaged in public meetings for the public to learn about the ground water management area

and express views on the potential for a ground water management area, but he did not follow basic hearing, evidentiary, or record requirements before entering in the GWMA Order. Accordingly, even if the Director has authority to create the ESPA GWMA, he must comply with Idaho law, including the procedural requirements of the Conjunctive Management Rules (“CM Rules”) and the Department’s procedural rules.

2. **The Director's Conclusions of Law Are Erroneous, and in Contravention of the Operative Statutes, Rules, and Judicial Precedent.** As set forth on the Petitions for Declaratory Ruling, at least part of the actions undertaken by the Director in the ESPA GWMA Order should have gone through the rulemaking process. 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 § 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 Idaho Code § 42-233b.”) 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 ground water basin requires a rulemaking or compliance with the CM Rules, and, in particular, requires the determination of an area having a common ground water supply. See Second Amended Petition for Declaratory Ruling, at 20-30. In issuing the ESPA GWMA Order, the Director did not evaluate or consider 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.

The term “aquifer system” does not appear in Idaho Code § 42-233b, 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.” (emphasis added)); See also Second Amended Petition for Declaratory Ruling at 11-20. The Director may not simply decide under existing Idaho law whether an ESPA GWMA, inclusive of 22 tributary basins, should be created.

Even if it the procedure for creating the ESPA GWMA is proven lawful and/or appropriate, which it was not, the Director must hold a contested case hearing upon petition by a party or a rulemaking in accordance with the Idaho Administrative Procedures Act concerning the boundaries of any area of common ground water supply that will comprise such a GWMA, and otherwise comply with the CM Rules. Only then will the Director have the authority to designate an area of common ground water supply as a GWMA (if at all), subject to governance in accordance with Idaho Code Section 42-233b.

3. **A ground water management area may only be comprised of a single ground water basin, not multiple ground water basins.** This issue is described in the Second Amended Petition for Declaratory Ruling. Idaho Code Section 42-233b defines a “ground water management area” 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.” Idaho Code § 42-233b. That definition limits the “aerial extent” of the GWMA exclusively to a singular “ground water basin.” A GWMA can be a single ground water basin, or part of a single ground water basin, but a GWMA cannot be multiple basins. Fundamental concepts of hydrology support that conclusion. The term ground water basin,

consists of two separate concepts: “ground water” and “basin.” Idaho Code § 42-230(a) defines “ground water” as “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” There is geologic variability in the tributary basins covered under the ESPA GWMA, as well as geologic variability throughout the ESPA recognized by the Director, most notably the Great Rift and Mud Lake Barrier. Furthermore, the Director’s recognition of these geologic variabilities was so significant that he concluded the benefits of curtailment of pumping east of the Great Rift diminished so significantly that he did not order curtailment of pumping east of the Great Rift in his curtailment order of January 24, 2014, which was upheld by the Idaho Supreme Court in the case of *Idaho Ground Water Assoc. v. Idaho Dept. of Water Resources*, 160 Idaho 119 (2016), 369 P.3d 897.

4. **A plan approved under Idaho Code § 42-233b can only manage the effects of ground water withdrawals from the ESPA.** As described in the Second Amended Petition for Declaratory Ruling, Idaho Code § 42-223b does not state or reasonably imply that a ground water management plan can provide for managing the effects of ground water withdrawals **from** the ground water basins outside the ESPA boundaries. The focus of a ground water management area is withdrawals from “**the** aquifer,” and the effects from those withdrawals are evaluated in two places—the effects on the aquifer from which the withdrawal was made, and the effects on hydraulically connected sources of water connected to the designated aquifer. While the evaluation of effects considers tributary aquifers, the management plan does not allow for management of withdrawals from those tributary aquifers.
5. **The Director does not have authority to create the proposed ESPA GWMA because all water rights within the ESPA have been adjudicated are administered by water districts.**

As described in the Second Amended Petition for Declaratory Ruling, the Director should not create a ground water management area where all water rights have been adjudicated and are the proper subject of a newly created or modified water district, pursuant to Idaho Code § 42-604. The CM Rules provide that, upon the complete adjudication of ground water rights in the ESPA (which occurred on August 25, 2014), a water district will be created or the ESPA area of common ground water supply will be incorporated into an existing or expanded water district; or the ESPA will be designated as a ground water management area. CM Rule 50. Since all ground water rights in the ESPA are within water districts, that is the water right administration path that has been chosen, not administration by ground water management area. The disjunctive “or” in Rule 50 is clear that an ESPA GWMA is a pre-adjudication administrative tool not applicable to areas contemplated in the proposed ESPA GWMA.

Further, CM Rule 30.07(h) demonstrates that the designation of a GWMA should only occur if ground water supply is insufficient “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 37.03.11.030.07(h) (emphasis added). Water rights within the proposed ESPA GWMA have been adjudicated. The CM Rules supplement Idaho Code § 42-233b and are integral to a complete understanding of the Departments’ administration of water in Idaho. The CM Rules do not contemplate the creation of a post-adjudication GWMA. Duly created or modified water districts supplant the legal authority to create a GWMA. As a result, the proposed ESPA GWMA is not authorized under Idaho law.

6. **The Director has previously recognized that there is no need for a GWMA following the creation of water districts.** As described in the Second Amended Petition for Declaratory

Ruling, the Director previously modified the American Falls GWMA to withdraw its boundaries over lands now covered by Water District Nos. 120 and 130. See August 29, 2003 Final Order at 1. The Director stated that the GWMA was no longer needed in these areas because they were now covered by Water District Nos. 120 and 130 and its “continued existence within the Water District boundaries may cause confusion in the administration of water rights.” Therefore, consistent with the Director’s reasoning and position in his 2003 Order, because the water districts have been formed over most of the ESPA with the intent that others will be formed to cover any remaining areas, any GWMA covering the same lands would most likely “cause confusion in the administration of water right” and therefore would be a unnecessarily and perhaps conflicting layer of administration.

Respectfully submitted this 1<sup>st</sup> day of August, 2019.

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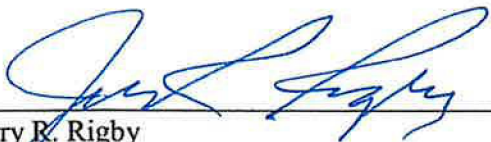
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Respectfully submitted this 1<sup>st</sup> day of August, 2019.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of August, 2019, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

**Document Served: JOINT SUBMISSION OF STATEMENT OF ISSUES**

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