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NOV 18 2019

DEPARTMENT OF  
WATER RESOURCES

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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	)	
AQUIFER GROUND WATER	)	<b>CITY OF POCATELLO'S</b>
MANAGEMENT AREA	)	<b>BRIEF IN RESPONSE TO</b>
	)	<b>BASIN 33 WATER USERS'</b>
	)	<b>AND SURFACE WATER</b>
	)	<b>COALITION'S MOTIONS FOR</b>
	)	<b>SUMMARY JUDGMENT</b>

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The City of Pocatello, by and through its undersigned counsel, hereby submits the following brief in response to the Basin 33 Water Users' Motion for Summary Judgment and Memorandum in Support ("Basin 33 Motion") and the Surface Water Coalition's Motion for Summary Judgment and Supporting Points/Authorities Re: Legal Issues ("SWC Motion") ("Response Brief"). Pocatello does not take a position on the relief requested in the Basin 33 Motion or the SWC Motion. Rather, Pocatello submits this Response Brief to provide argument relating to the interpretation of I.C. §42-233b.

**I. FACTUAL BACKGROUND AND SUMMARY OF ARGUMENT**

**a. Remaining Legal Issues to be Decided**

The Director of the Idaho Department of Water Resources ("Director") issued an order dated September 25, 2019 that identified the four remaining legal issues in this matter. Those

include: 1) “Whether the *Order Designating the ESPA GWMA* was procedurally deficient;” 2) “Whether the Director should have conducted rulemaking;” 3) “Whether the Director should have designated the ESPA GWMA in a contested case;” and 4) “Whether adjudication and the formation of ground water districts in the ESPA forecloses the designation of a GWMA.”

Deadline for IDWR’s Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery (“Pre-Hearing Order”).

**b. The Basin 33 Motion and SWC Motion Address the Director’s Discretion**

Three pleadings were filed on October 21, 2019: the Basin 33 Motion, the SWC Motion, and Fremont Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District’s Memorandum & Written Argument as to Remaining Issues Requiring Legal Argument. This Response Brief addresses the Basin 33 Motion and the SWC Motion, both of which presented arguments related to, *inter alia*, the Director’s discretion under I.C. §42-233b (“GWMA Statute”) once a designation is made.

Basin 33 Water Users (“Water Users”) argue that the Order Designating the ESPA-GWMA dated November 2, 2016 must be withdrawn based on procedural deficiencies. As part of the argument, the Water Users raise concerns that the Director will curtail ground water rights to achieve certain ground water levels, even if water supplies are adequate to satisfy senior surface water rights. *See* Basin 33 Motion, at 4-5. *See also, id.* at 8-9 (discussing ground water curtailment to satisfy unspecified goals for the ESPA).

SWC argues that the Director’s procedure was valid and supports designation of the ESPA-GWMA. In several parts of the SWC Motion, SWC refers to the Director’s discretion. *See, e.g.,* SWC Motion at 4 (noting Director’s discretion and special expertise in water appropriation and distribution); 6 (Conjunctive Management Rule 50 does not limit the

Director's discretion); 8 (discretion to designate a GWMA); 9 (GWMA Statute does not limit the Director's discretion to only areas outside adjudicated basins and water districts). To the extent SWC is arguing that the Director has unlimited discretion under the GWMA Statute, such an interpretation is inconsistent with the plain language of the statute and violates established rules of statutory interpretation. The Director's discretion is limited to the discretion granted to him or her by statute, and such discretion is limited in scope by the plain language of the enabling statute.

Pocatello does not take a position on the specific relief requested by the parties that filed motions on October 21, 2019. However, the scope of the Director's discretion under the GWMA Statute is as of yet undefined and, to the extent the ESPA-GWMA designation is in place, an important corollary determination to be made in the context of the summary judgment motions. This brief is limited to describing the legal basis and limitations of the Director's authority under the GWMA Statute.

### **c. Summary of Argument**

The plain language of the GWMA Statute requires the Director to curtail or limit withdrawals of water based on the prior appropriation doctrine when there is insufficient ground water to meet the demands of water rights in all or a portion of a ground water management area. The Director does not have discretion under the GWMA Statute to curtail or limit ground water withdrawals when senior surface water rights are fulfilled.

## **II. ARGUMENT**

### **a. The Plain Language of the GWMA Statute Confers and Expressly Defines the Director's Responsibilities and Discretion**

The Director's authority is conferred by statute and the Director must act within the scope of authority conferred on him or her. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water*

Res., 143 Idaho 862, 872 (2007). The GWMA Statute authorizes the Director to: 1) designate and publish notice of a GWMA; 2) approve a ground water management plan; 3) consider permit applications if he determines “on an individual basis that sufficient water is available and that other prior water rights will not be injured;” and 4) curtail water right holders *on a time priority basis* whenever “the ground water supply is insufficient *to meet the demands of water rights* within all or portions of a water management area” unless such water rights are participating and in compliance with a ground water management plan. I.C. § 42-233b (emphasis added). Absent from the Director’s statutory duties is the authority to curtail ground water rights on any basis to achieve specific ground water levels.

**b. The Plain Language of the GWMA Statute Requires the Director to Curtail or Limit Withdrawals of Water Based Solely on the Prior Appropriation Doctrine**

“When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.” *In re Estate of Melton*, 163 Idaho 158, 163 (2018) (quoting *State v. Dunlap*, 155 Idaho 345, 361 (2013)). By using the language, “*insufficient to meet the demands of water rights*” and “*shall order those water rights holders on a time priority basis*,” the Legislature expressed its clear intent that administration of ground water rights within a GWMA must be tied to priority administration of water rights rather than to achieving specific water levels. I.C. §42-233b (emphasis added). This is consistent with Idaho’s prior appropriation doctrine, memorialized in the State Constitution, which requires water rights to be administered based on their priority date. Idaho Const. Art. XV, §3 (“Priority of appropriations shall give the better right as between those using the water . . .”).

When the Director determines that ground water supply is insufficient to meet the demands of water rights pursuant to the GWMA Statute, the Director is required to administer water rights based on prior appropriation until there is sufficient ground water to meet demands of water rights. Any reading of the GWMA Statute that suggests the Director has discretion to curtail or limit ground water rights when senior surface water rights are fulfilled is inconsistent with legislative intent expressed in the plain language of the GWMA Statute, and beyond the discretionary powers granted to the Director by the Legislature.

**c. Nothing in the Plain Language of the GWMA Statute Authorizes the Director to Administer a GWMA Based on Water Levels or to Solve Specific Problems Outside of Priority Administration**

By its terms, a GWMA may be designated if the Director determines aquifer conditions “may be” approaching a critical ground water area. Historically, the Director has exercised authority over GWMA designations that were geographically limited in scope to discrete basins, in order to solve discrete problems. GWMA designations have historically involved significant water user cooperation and have, on several occasions, been initiated by a majority of the waters users in a GWMA area. In these instances, the local water users have identified and taken steps voluntarily (or with Department guidance) to protect a resource the water users view as at risk. These historical situations differ from the ESPA-GWMA, which was opposed by many ground water users and supported by surface water interests; it remains to be seen whether implementation of the ESPA-GWMA will be made with ground water user cooperation.

Nothing in the GWMA Statute authorizes the Director to unilaterally administer a GWMA to achieve discrete goals such as the shared voluntary goals of water users in other GWMA's. Without express statutory authority, which is absent in the GWMA Statute, the

Director is prohibited from administering a GWMA based on water levels or to solve issues within the GWMA that are beyond priority administration.

### **III. CONCLUSION**

The central question presented by the motions for summary judgment filed in this matter is the nature and extent of the Director's discretion under the GWMA. The plain language of the GWMA Statute requires the Director to curtail or limit withdrawals of water based on the prior appropriation doctrine when there is insufficient ground water to meet the demands of water rights in all or a portion of a ground water management area. The Director does not have discretion under the GWMA Statute to curtail or limit ground water withdrawals when senior surface water rights are fulfilled.

Respectfully submitted this 18<sup>th</sup> day of November, 2019.

SOMACH SIMMONS & DUNN

By  \_\_\_\_\_

Sarah A. Klahn

ATTORNEYS FOR THE CITY OF POCA TELLO


## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18<sup>th</sup> day of November, 2019, the foregoing **CITY OF POCA TELLO'S BRIEF IN RESPONSE TO BASIN 33 WATER USERS' AND SURFACE WATER COALITION'S MOTIONS FOR SUMMARY JUDGMENT** was served on the following by the method indicated:

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