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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DESIGNATING)	Docket No. AA-GWMA-2016-001
THE EASTERN SNAKE PLAIN)	
AQUIFER GROUND WATER)	
MANAGEMENT AREA)	SWC RESPONSE TO BASIN 33
)	USERS' MOTION TO DESIGNATE
)	IDWR WITNESSES
)	
)	
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COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company and Twin Falls Canal Company (collectively "Surface Water Coalition" or
"Coalition"), by and through their undersigned attorneys of record, and hereby respond to the
Basin 33 Water Users' ("Basin 33") *Motion to Designate IDWR Witnesses*.

The Basin 33 Water Users have moved the Director to designate staff who will testify “in support of the Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area.” Motion at 1. This request exceeds the scope of the hearing and the Basin 33 Users’ limited intervention status and therefore should be denied.

First, in his September 25th Order, the Director limited the scope of the hearing to the following factual issue:

Whether areas outside the ESPA area of common ground water supply, as defined by CM Rule 50 (IDAPA 37.03.11.050), but included within the ESPA GWMA, are located in tributary basins and are otherwise sufficiently remote or hydrogeologically disconnected from the ESPA to warrant exclusion from the ESPA GWMA.

Notice of Hearing and Scheduling Order at 3 (emphasis added).

The Basin 33 Users’ motion does not request staff to testify as to that question of fact, but instead as to the sufficiency of the ESPA GWMA Order itself. Such a request seeks to produce testimony and evidence beyond the scope of the factual issue set by the Director for the upcoming hearing. The above question is further limited as the only parties to submit technical evidence on the issue are the Upper Valley Water Users and Surface Water Coalition (as well as IDWR’s staff memo, Dec. 31, 2019). See *Technical Report Regarding Final Order Designating the ESPA GWMA* (Bryce Contor, Dec. 5, 2019); *Reply to IDWR Response to Expert Report Regarding GWMA* (Bryce Contor, Jan. 20, 2020); *Rebuttal to Expert Report* (Dave Colvin, Jan. 13, 2020).

Under the Idaho Rules of Evidence, a lay witness cannot testify unless their testimony is “helpful...to determining a fact in issue,” and “not based on scientific, technical, or other specialized knowledge.” I.R.E. 701(b). An expert witness cannot testify unless their knowledge “will help the trier of fact to understand the evidence or to determine a fact in issue.” I.R.E. 702.

As stated above, there is only one factual issue set for hearing. The Basin 33 Users have not produced any evidence or witnesses addressing that question. Instead, they are now apparently seeking an IDWR technical expert to testify on the sufficiency of the ESPA GWMA Order, attempting to shift the burden of proof back to IDWR. There is no basis for IDWR to produce any witnesses to testify to that issue as it is not before the Director in this hearing. As such, the testimony requested by the Basin 33 Users regarding “support of” the Order is not “helpful” to determine whether an area is a tributary basin and remote or disconnected from the ESPA to warrant exclusion from the GWMA. The Director should deny the Basin 33 Water Users’ Motion accordingly.

Moreover, in the Basin 33 Water Users’ *Responses to SWC’s First Discovery Requests*, they claim that “no [expert witness] is necessary” for the hearing because, “based on the evidence provided by the Department in this contested case, (1) there are legal restrictions—primarily the CM Rules—that prohibit the Director from doing what he has done...and (2) there is no specific evidence provided to the Basin 33 Water Users in this proceeding which supports the Director’s inclusion of Basin 33 within the ESPA GWMA area under his *Order*.” *Responses to SWC’s First Discovery Requests to Basin 33 Water Users*, at 12-13. The Basin 33 Water Users are not only advancing legal arguments outside the factual scope established by the Director, but are seemingly challenging the hearing’s premise. This position is unfounded and should be rejected. The Director has already ruled, dismissing Basin 33’s claims on the legal restrictions relating to the ESPA GWMA Order.

Furthermore, the scope and purpose of the hearing in this contested case is limited and does not involve a challenge to the sufficiency of the GWMA Order itself. Stated another way, IDWR does not have to prove the sufficiency of the Order, including the area designated in

Basin 33 as the Basin 33 Users imply. IDWR has no obligation to produce witnesses to address that issue and if it did it would only exceed the scope of the hearing previously ordered.

The Director of IDWR has limited the issue for hearing to one question of fact. In this hearing, no party may question the sufficiency of the ESPA GWMA Order. Every party is relegated to advancing argument as to whether certain areas are tributary basins and if they are sufficiently remote or hydrogeologically disconnection to warrant exclusion from the designation. As referenced above, the only party to address that question is the Upper Valley Water Users as it relates to the Rexburg Bench only.

Next, the Basin 33 Users are limited as “intervenor” in this case. The sufficiency of the GWMA Order as a whole is not on trial in this matter. The Basin 33 Users take the case “as they find it” and cannot expand the scope of their participation by seeking to have IDWR put on witnesses to produce testimony and evidence to address issues that they cannot. *See Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325, 329 (1936). To allow the Basin 33 Water Users to put on these unrelated witnesses would unduly broaden the issues of this hearing and open the floodgates to collateral attacks on the ESPA GWMA Order. The Director should reject this attempt outright. The purpose of this hearing is only to resolve a limited remaining question of fact. If IDWR designates any witnesses to address that issue the Director should make clear those witnesses are only available for information as it directly relates to the remaining question of fact, and cannot be cross-examined on any other issues including the sufficiency of the ESPA GWMA Order itself. Based on the scope of the hearing and intervenor’s limited status, any IDWR testimony must be restricted to the limited question of fact only.

In sum, the Director should deny the Basin 33 Water Users' *Motion* to the extent they are seeking to produce testimony and evidence beyond the scope of the factual issue set by the Director for hearing. This is not a hearing on the sufficiency of the GWMA, but instead on the narrow question of fact identified in the Director's pre-hearing order.

DATED this 24th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2020, I served a true and correct copy of the foregoing *SWC Response* on the following by the method indicated:

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