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DEPARTMENT OF  
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

SUN VALLEY COMPANY,

Petitioner,

vs.

GARY SPACKMAN, Director of the Idaho  
Department of Water Resources,

Respondent.

Docket No. P-DR-2016-001

**SUN VALLEY COMPANY'S PETITION  
FOR RECONSIDERATION OF FINAL  
ORDER DENYING PETITION FOR  
DECLARATORY RULING**

COMES NOW Sun Valley Company ("Sun Valley"), by and through its attorneys  
of record and pursuant to Idaho Code Section 67-5246(4) and Rule 740 of the Rules of Procedure  
of the Idaho Department of Water Resources (IDAPA 37.01.01), and hereby petitions the Idaho

Department of Water Resources (the “Department”) for reconsideration of its final *Order Denying Petition for Declaratory Rulings* (“Petition Order”), served on October 4, 2016.

## **I. INTRODUCTION**

The Director recites two reasons to dismiss or deny Sun Valley’s Petition for Declaratory Ruling, as amended (the “Petition”), without addressing the declaratory relief requested. First, the Director states that “the questions and issues raised by Sun Valley Company in its *Petitions* are inextricably intertwined with factual and technical issues that require development and such development cannot occur solely on the basis of legal briefing.” *See* Petition Order ¶ 9. Second, the Director states that “issuance of the Order [Designating the Eastern Snake Plain Aquifer Ground Water Management Area, dated November 2, 2016] creates a forum for Sun Valley Company to address the issues raised in the *Petitions* and practical considerations of efficiency and expediency necessitate that issues raised in the *Petitions* be addressed through the normal administrative review process and not the declaratory ruling process.” *Id.* For the reasons that follow, and also for the reasons articulated in the Second Amended Petition for Declaratory Ruling, which are incorporated herein by reference, Sun Valley respectfully requests that the Director reconsider his decision to deny and dismiss the Petition.

## **II. ARGUMENT**

### **A. The Rulings Requested Are Not Inextricably Intertwined With Factual Issues.**

The Director’s first reason for dismissal or denial of the Petition is conclusory, and offered without any evaluation of the rulings requested. Even a cursory review of the 14 specific declaratory rulings reveals that no development of factual or technical issues is

required. The requested rulings consist of pure issues of law. Of course, Sun Valley does not dispute that designation of a GWMA—especially one as comprehensive as the ESPA GWMA—requires the development of a significant factual and technical record. A proper proceeding designating an ESPA GWMA would necessarily apply facts developed in accordance with established administrative procedures—whether it be a formal contested case proceeding or a rulemaking—to the law. Indeed, an official agency record must be developed regardless of whether the Department takes action to create a GWMA in the form of a rule or an order. *See* IDAHO CODE §§ 67-5225, 67-5249. However, to resolve the pure legal issues set forth in the Petition, and ultimately to clarify operation and implementation of what the Director concedes amounts to a new or revised administrative paradigm, the Director needs only to evaluate the existing legislative, judicial, and administrative authority concerning water administration in Idaho.

The Director does not address or identify a single declaratory ruling that would require the development of a factual record. The question of whether the Director has statutory or other authority to designate a GWMA outside the confines of a rulemaking or proper contested case proceeding is a pure question of law. Whether Section 42-233b authorizes the creation of a GWMA comprised of tributary basins or tributary aquifers is a question of law. Whether a GWMA is an area of common ground water supply under the Department's Conjunctive Management Rules is a question of law. Whether the Conjunctive Management Rules govern the designation of a GWMA is a question of law. Whether the Conjunctive Management Rules contemplate the creation of a GWMA in a fully adjudicated basin is a legal issue also. Whether orders issued under Section 42-233b must include water rights for domestic

purposes is a question of law. None of the foregoing issues involves the development of a factual record.

There is no support for the Director's contention that the pure legal questions in the Petition—questions that are critical to water users' understanding of the scope and extent of the Director's authority—require a significant factual record. Sun Valley is entitled to more than a public question and answer session. The Director has an opportunity to set forth, in clear and unambiguous terms, how he interprets the Ground Water Act and the Conjunctive Management Rules. He should reconsider his decision not to address the substance of the Petition, especially since he has made clear his intention to employ Section 42-233b to fundamentally alter the Department's role in the administration of water in Idaho.

**B. The ESPA GWMA Order Was Entered Upon Invalid Procedure, and Does Not Provide an Adequate Forum to Address the Merits of the Petition.**

The Director's second reason for dismissal or denial of the Petition is that the Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area, dated November 2, 2016 (the "ESPA GWMA Order"), somehow creates a forum to address the legal issues raised in the petition according to the "normal administrative review process." *See* Petition Order ¶ 9. This reason relies upon the conclusion that the ESPA GWMA Order was validly issued, in accordance with "normal" administrative procedures. It was not. Indeed, among the issues Sun Valley asked the Director to resolve in the Petition was the legal mechanism by which the Director was empowered to create a GWMA in the first place, and the appropriate procedures to employ. In lieu of answering that fundamental legal question, the Director simply issued the ESPA GWMA Order.

An order is “[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one (1) or more specific persons.” *See* IDAPA 37.01.01.005.15; IDAHO CODE § 67-5201(12). An order is the result of a contested case. *See* IDAPA 37.01.01.005.07; IDAHO CODE § 67-5201(6) (“‘Contested case’ means a proceeding which results in the issuance of an order.”). All proceedings by any agency that may result in the issuance of an order are governed by the contested case provisions of the Idaho Administrative Procedures Act. IDAHO CODE § 67-5240. Those provisions include, without limitation, procedural requirements for hearings, *see* § 67-5242, evidentiary requirements, *see* § 67-5251, and the prohibition of *ex parte* communications with the hearing officer, *see* § 67-5253. The foregoing definitions and required procedures are plain and unambiguous, and cannot simply be ignored by the Director. *See Westway Constr., Inc. v. Idaho Transp. Dep’t*, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003).

The Department did not comply with even the most basic hearing and evidentiary requirements for contested case proceedings before entering the ESPA GWMA Order. Therefore, the Director did not have authority to enter the ESPA GWMA Order. Acts taken by an agency without statutory authority are void and must be set aside. *See A&B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012); *Arrow Transp. Co. v. Idaho Pub. Util. Comm’n*, 85 Idaho 307, 314-15, 379 P.2d 422, 426-27 (1963). The ESPA GWMA Order is invalid and without effect, and therefore does not create a “forum for Sun Valley Company to address the issues . . . through the normal administrative review process and not the declaratory ruling process.”

Notably, in support of his determination that the ESPA GWMA Order provides an adequate forum, the Director asserts that “the record establishes that the same questions and

issues raised by the Petitions are directly or indirectly implicated in considering whether to designate an ESPA ground water management area, a question that was already pending before the Department when the *Petitions* were filed.” See Petition Order ¶ 5.

First, the “record” to which the Director refers consists of nothing more than the Petitions themselves, the Director’s letter, dated July 7, 2016, describing a possible GWMA designation, which was incorporated into the Petitions, and several petitions from interested parties seeking to intervene. Sun Valley is aware of no other “record.”

Second, and more importantly, the “questions” of GWMA designation may have been pending before the Director, but the context and nature of that “pending” question, and the validity of its resolution, remains unclear even now. As discussed above, the Director did not initiate formal contested case proceedings and schedule a hearing to answer the question. He held voluntary “public meetings,” accepted written comments, and has now issued an “order.” He did not comply with the formal contested case procedures embodied in the Idaho Administrative Procedures Act and the Department’s Procedural Rules. See IDAHO CODE §§ 67-5240, *et seq.* Nor did he comply with formal rulemaking procedures. See IDAHO CODE §§ 67-5220, *et seq.* It appears that the Director selectively incorporated a few elements from each procedure, creating a completely new and informal process to act upon the rights of water users. Giving the Director the benefit of the doubt, his ESPA GWMA public meetings and receipt of voluntary comment, at best, constituted “informal proceedings,” as set forth in the Department’s Procedural Rules. See IDAPA 37.01.01.100-103.

Critically, the rules governing informal proceedings provide as follows:

*Unless all parties agree to the contrary* in writing, informal proceedings do not substitute for formal proceedings and do not exhaust administrative remedies, and informal proceedings are

conducted *without prejudice to the right of the parties to present the matter formally to the agency*.

IDAPA 37.01.01.103 (emphasis added). *See also* IDAHO CODE § 67-5241(1)(c) (“informal disposition may be made of any contested case by *negotiation, stipulation, agreed settlement, or consent order*”) (emphasis added); *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”).

In sum, even if the Director attempted to informally answer the question of whether to designate an ESPA GWMA, that does not in any way preclude the formal presentation of the legal issues embodied in the Petition to the Director. Sun Valley did not agree to informal resolution of the “question” before the Director. It sought a declaratory ruling pursuant to Idaho Code Section 67-5232(1) (“*Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency*”). In response, the Director could have issued a declaratory ruling, addressing the merits. He could have initiated a contested case and held a hearing or hearings to resolve the issues raised. The Director erred when he simply dismissed the petition because some of the issues in the Petition were already informally “pending.” Again, Sun Valley has provided the Director with an opportunity to formally shape the paradigm he seeks to impose informally. The Director should take that opportunity.

Moreover, as a practical matter, the GWMA paradigm, as described by the Director in his Order Designating ESPA GWMA, constitutes an attempt to move away from delivery calls and the established conjunctive management paradigm. *See* ESPA GWMA Order ¶¶ 8-11. Sun Valley questions the propriety of implementing such a dramatic paradigm shift in



such an informal, and invalid, manner. Fundamental legal questions about the interpretation of Section 42-233b, and the implementation of an ESPA GWMA, must be answered. The Petition seeks those answers. The fact that the Department has held public meetings and informally considered those “pending” questions outside the context of a rulemaking or contested case proceeding, and thereafter issued the ESPA GWMA Order upon invalid procedure, is not sufficient grounds to deny or dismiss the Petition.

### III. CONCLUSION

For the reasons set forth above, Sun Valley respectfully requests that the Department reconsider its Petition Order. It should issue a declaratory ruling addressing the merits of the Petition in full. Additionally, in conformance with Idaho Code Section 42-1701A(3) and Rule 740 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), Sun Valley hereby petitions the Department for a formal hearing.

DATED this 16th day of November, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By  /s/

Scott L. Campbell – Of the Firm  
Attorneys for Sun Valley Company

By 

Matthew J. McGee – Of the Firm  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of November, 2016, I caused a true and correct copy of the foregoing **SUN VALLEY COMPANY'S PETITION FOR RECONSIDERATION OF FINAL ORDER DENYING PETITION FOR DECLARATORY RULING** to be served by the method indicated below, and addressed to the following:

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