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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF POCATELLO, Petitioner, vs. GARY SPACKMAN, Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	**Case No. CV-01-17-00067** **SURFACE WATER COALITION'S RESPONSE TO CITY OF POCATELLO'S MOTION TO DETERMINE JURISDICTION**

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 (hereafter "Coalition"), by and through counsel of record, and hereby file this response to the City of Pocatello's ("City") *Motion to Determine*

Jurisdiction in the above-captioned matter. For the reasons set forth below, the Court should deny the City's motion.

BACKGROUND

The factual background related to the City's motion is set forth in its *Memorandum in Support of Motion to Determine Jurisdiction. See Poc. Br.* at 2-3. The Coalition adopts that information for purposes of its response brief.

ARGUMENT

I. The City Failed to Exhaust its Administrative Remedies.

The City alleges the GWMA Order is final and subject to judicial review because its *Petition for Reconsideration* was denied by operation of law. *See Poc. Br.* at 3. The City analogizes its situation to the facts in *A&B Irr. Dist. v. IDWR*, 154 Idaho 652 (2012) where the Supreme Court denied IDWR's attempt to "accept" the District's petition for reconsideration and issue a new order beyond the statutory twenty-one (21) day timeframe. *See* I.C. § 67-5246(5).

Contrary to the City's argument, the facts regarding the Director's GWMA Order are distinguishable from the situation in the *A&B* case. Notably, the Director's final order in *A&B* was issued on remand following an initial agency order (Jan. 29, 2008), an 11-day administrative hearing (held Dec. 2008), a subsequent final order (June 30, 2009), and a decision on judicial review (May 4, 2010). *See A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 503-05 (2012). In other words, the Director's order on remand was issued after a full administrative had already been held in the matter. The administrative record was established.

Here, on the other hand, no administrative hearing has been held. Instead, the administrative case has been delayed and stayed due to the appeals and present motions filed by the City and the Sun Valley Company ("SVC"). *See Notice of Continued Pre-Hearing*

Conference; Order Staying Proceedings Except Intervention (Docket Nos. AA-GWMA-2016-001; PR-DR-2016-001, Jan. 17, 2017) (continuing pre-hearing conference until March 22, 2017). Although the City did not request a hearing on the GWMA Order as provided by I.C. § 42-1701A(3), it filed and the Director granted its petitions to intervene in the administrative cases concerning SVC's petitions. *See* Ex. A; *Orders Granting Petitions to Intervene* (Docket Nos. AA-GWMA-2016-001; PR-DR-2016-00; Dec. 27, 2016).[1]

As such, the City is participating as a party in the administrative proceeding concerning SVC's challenges to the GWMA Order. Accordingly, the City will have an opportunity to raise its issues with the GWMA Order and support its challenges before the Director. In essence, the administrative case provides the City with a forum to have the Director address its alleged errors or problems with the order.

The City claims that the Director has lost jurisdiction and that any amended GWMA Order would be a "nullity" based on the *A&B* precedent. *See Poc. Br.* at 4. Again, the facts are not the same. Whereas A&B had already proceeded through an administrative hearing before seeking an appeal of IDWR's remand order, no administrative hearing has been held in this matter. That distinguishing fact cannot be overlooked in the present case. Indeed, SVC's petitions and the resulting contested cases provide an administrative forum for the City to address its grievances with the GWMA Order. This is not a case where an agency is attempting to comply with a Court ordered remand after culmination of the administrative process.

The City further alleges the Director's order is erroneous for various reasons, including technical questions concerning a "reasonably safe water supply" and regulation under the designated GWMA. *See Poc. Br.* at 5. These are preciously the type of questions that should be

[1] The City's decision not to request an administrative hearing as provided by Idaho law does not mean that it has somehow exhausted all available administrative remedies required by the Idaho APA. *See* I.C. §§ 67-5271; 5201.

first committed to the agency before engaging in judicial review. The administrative case provides the City with a form to raise these issues with the Director, the technical expert, something it cannot do in a judicial review proceeding before this Court. *See e.g. A&B Irr. Dist. v. State of Idaho (In re SRBA)*, 157 Idaho 385, 394 (2014) ("This Court has also recognized the need for the Director's specialized expertise in certain areas of water law . . .This reaffirms the need for the Director to have the technical expertise to properly administer water rights").

The Idaho APA plainly provides that a "person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1) (emphasis added). Idaho Code § 67-5270(1) further provides that "[j]udicial review of agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter." Clearly, the hearing opportunity outlined in I.C. § 42-1701A(3) is an "other provision of law" that applies to the Director's GWMA Order and the City is participating as a party in the hearings requested by SVC.

As such, the Idaho Supreme Court has held that "where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act." *Regan v. Kootenai Cty.*, 140 Idaho 721, 724 (2004). Since the City has not exhausted its administrative remedies the Court should deny the City's motion.

II. The Administrative Hearing will Provide Aggrieved Parties With a Forum to Present Evidence and Have the Director Address the Issues First.

The City's motion raises the practical issue of where this dispute should be heard first, i.e. before the Department or this Court. The City wrongly claims that the GWMA Order's alleged errors "cannot be resolved by hearing." *Poc. Br.* at 6. To the contrary, the Director routinely addresses legal issues in administrative proceedings, including through orders with conclusions of law. Once the hearing is held – and the issues raised by the City are heard and

determined by the Director – parties (including the City) will be afforded the opportunity for judicial review. *See* I.C. § 42-1701A(3) & (4). This Court will certainly be able to address any legal errors that may exist on judicial review at that time.

Moreover, the remedy for curing the errors alleged by the City would likely be a remand to the agency anyway. *See* I.C. § 67-5279(2) ("If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary"). In other words, since the City's questions about technical issues will have to be addressed by the Director at some point, it makes more sense to have the agency consider such matters in the administrative case up front, rather than later. In this regard an administrative hearing before the Director will provide the City and others an efficient forum to address lawful challenges to the GWMA Order. If the City believes it has evidence to further inform the Director's decision-making then it is certainly more practical to have the same presented to the agency for review and consideration. *See e.g. White v. Bannock Cty. Comm'rs*, 139 Idaho 396, 401-02 (2003) ("Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body").

Stated another way, the Director should hear the technical and other information first so that any future judicial review is conducted with a complete and comprehensive administrative record. The general policy behind this approach is also supported by Idaho law. *See e.g., Grever v. Idaho Tele. Co.*, 94 Idaho 900, 902 (1972) ("The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. The doctrine of primary jurisdiction is not an inflexible mandate but rather is predicated on an attitude of judicial self-

restraint, and is generally applied when the court believes that considerations of policy recommend that the issue be left to the administrative agency for initial determination."). The City has presented no valid reason why this Court at this time is in a better position to review grievances with the GWMA Order.

In short, judicial review at this point is a waste of the parties' and this court's time and resources. Since the City is participating as a party in the administrative hearing and the Director is prepared to proceed with the contested case, this Court should allow the agency to address such challenges first and then proceed with judicial review on a complete record later. Such a process provides an efficient sequence to any litigation over the GWMA Order and has already been approved by this Court in a separate action. *See e.g. Order Granting Joint Motion to Stay Proceeding* at 1, (Fourth Jud. Dist., Ada County, Case No. CV-01-16-21480, Dec. 7, 2016) ("The above-captioned proceeding is hereby stayed pending issuance of a final order by the Director following his hearing on his *Order*").[2] The Court should deny the City's motion accordingly.

CONCLUSION

SVC requested an administrative hearing on the Director's GWMA Order. The City petitioned and was granted intervention in both cases. The Director is prepared to proceed with the administrative cases and hold a hearing pursuant to Idaho law. *See* I.C. § 42-1701A(3). This administrative remedy is available to the City and there is no lawful basis to sidestep the process. Given this status, the City has failed to exhaust its administrative remedies and the Court should deny the City's motion accordingly.

[2] Even if the Court retains jurisdiction at this time, in the interest of judicial economy the Court could, in an exercise of discretion, consolidate and stay all appeals related to the GWMA Order until the administrative process is completed. *See* I.R.C.P. 84(r); 42.

Respectfully submitted this 2nd day of February, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of February, 2017, I served a true and correct copy of the foregoing to the following by the method indicated:

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Exhibit
A

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 **ORDER GRANTING PETITIONS TO INTERVENE**

BACKGROUND

On November 4, 2016, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("ESPA GWMA Order"). On November 16, 2016, the City of Pocatello ("Pocatello"), the Coalition of Cities,[1] and Sun Valley Company ("SVC") each filed petitions for reconsideration of the ESPA GWMA Order.[2] SVC also filed a *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area.*

On December 2, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*, granting SVC's request for hearing and scheduling a pre-hearing conference for January 12, 2017. Timely petitions to intervene were filed by the Idaho Ground Water Appropriators, Inc. ("IGWA"); the Surface Water Coalition ("SWC")[3]; Pocatello; the Coalition of Cities; McCain Foods USA, Inc ("McCain"); and South Valley Ground Water District ("SV GWD"). No opposition was filed to these petitions to intervene.

ANALYSIS

Rule of Procedure 353 states:

> If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable

[1] The cities participating as the Coalition of Cities in this matter are Bliss, Buhl, Burley, Carey, Delco, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell.

[2] On November 23, 2016, SVC filed an amended petition for reconsideration and a joinder in the petitions for reconsideration filed by the City of Pocatello and the Coalition of Cities.

[3] The SWC is comprised of 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.

conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

IDAPA 37.01.01.353.

The Director concludes that IGWA, the SWC, Pocatello, the Coalition of Cities, McCain, and SV GWD all have a direct and substantial interest in this matter and will not unduly broaden the issues. The Director further concludes that the interests of IGWA, the SWC, Pocatello, the Coalition of Cities, McCain, and SV GWD are not adequately represented by existing parties.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that the petitions to intervene filed by IGWA, the SWC, Pocatello, the Coalition of Cities, McCain , and SV GWD are GRANTED.

DATED this 27th day of December 2016.

Gary Spackman
Director

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF SUN VALLEY COMPANY'S PETITION FOR DECLARATORY RULING REGARDING CREATION OF ESPA GROUND WATER MANAGEMENT AREA	Docket No. P-DR-2016-001 **ORDER GRANTING PETITIONS TO INTERVENE**

BACKGROUND

On July 25, 2016, Sun Valley Company ("SVC") filed with the Idaho Department of Water Resources ("Department") a *Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area.* On July 29, 2016, SVC filed an *Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area.* On October 19, 2016, SVC filed a *Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area.*

On November 4, 2016, the Director ("Director") of Department issued an *Order Denying Petition for Declaratory Ruling.*

On November 16, 2016, SVC filed with the Department *Sun Valley Company's Petition for Reconsideration of Final Order Denying Petition for Declaratory Ruling* and a *Petition Requesting a Hearing on Order Denying Petition for Declaratory Ruling.* On December 2, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*, granting SVC's request for hearing and scheduling a pre-hearing conference for January 12, 2017.

Timely petitions to intervene were filed by the Water District 37-B Ground Water Association ("Camas Group"); the Idaho Ground Water Appropriators, Inc. ("IGWA"); the City of Pocatello ("Pocatello"); the City of Hailey ("Hailey"); the Big Wood and Little Wood Water Users Association ("BWLWWUA"); the City of Bellevue ("Bellevue"); the Surface Water Coalition ("SWC")[1]; Fremont Madison Irrigation District ("FMID"); Madison Ground Water District ("MGWD"); Idaho Irrigation District ("IID"); and South Valley Ground Water District ("SV GWD"). No opposition was filed to these petitions to intervene.

[1] The SWC is comprised of 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.

ANALYSIS

Rule of Procedure 353 states:

> If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

IDAPA 37.01.01.353.

The Director concludes that the Camas Group, IGWA, Pocatello, Hailey, the BWLWWUA, Bellevue, the SWC, FMID, MGWD, IID, and SV GWD have a direct and substantial interest in this matter and will not unduly broaden the issues. The Director further concludes that the interests of the Camas Group, IGWA, Pocatello, Hailey, the BWLWWUA, Bellevue, the SWC, FMID, MGWD, IID, and SV GWD are not adequately represented by existing parties.

ORDER

Based on and consistent with the foregoing, IT IS HEREBY ORDERED that the petitions to intervene filed by the Camas Group, IGWA, Pocatello, Hailey, the BWLWWUA, Bellevue, the SWC, FMID, MGWD, IID, and SV GWD are GRANTED.

DATED this 27th day of December 2016.

Gary Spackman
Director