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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**

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| CITY OF POCATELLO,<br><br>Petitioner,<br><br>vs.<br><br>GARY SPACKMAN, Director of the Idaho Department of Water Resources, and IDAHO DEPARTMENT OF WATER RESOURCES<br><br>Respondent. | Case No. CV-01-17-00067<br><br>**CITY OF POCATELLO'S REPLY IN SUPPORT OF MOTION TO DETERMINE JURISDICTION** |

The City of Pocatello ("City" or "Pocatello"), by and through its undersigned attorneys, submits this Reply in Support of Motion to Determine Jurisdiction in the above-captioned matter.

## I. Pocatello Appealed a Final Order to Preserve Its Issues on Appeal

On November 2, 2016 the Director of the Idaho Department of Water Resources ("Department") issued an *Order Designating the Eastern Snake Plain Aquifer Ground Water*

*Management Area* ("GWMA Order"). The Department's explanatory sheet, attached as the last page of the GWMA Order, designates the order as a "final order" issued pursuant to Idaho Code section 67-5246 and states that parties could respond to the GWMA Order with three actions: request a hearing, file for reconsideration, or appeal to district court. Exhibit A to *Pocatello's Notice of Appeal and Petition for Judicial Review* (Jan. 4, 2017) ("Notice of Appeal"). The explanatory sheet states that an appeal "must be filed within 28 days" of issuance. *Id.* The explanatory sheet does not provide any guidance as to the Department's procedure if all three of these actions occur, and in this case, they did: Sun Valley Company ("Sun Valley") requested a hearing; Pocatello, Coalition of Cities and Sun Valley filed for reconsideration; and McCain Foods USA, Inc., Pocatello, and Sun Valley filed appeals.

The Surface Water Coalition ("SWC") alleges that Pocatello has created a procedural delay and is wasting the Court's and parties' time by filing this appeal. *SWC's Response to Motion to Determine Jurisdiction* at 6 (Feb. 2, 2017). By designating the GWMA Order as final and stating parties were required to appeal within 28 days, the Department placed Pocatello in the position of having to file an appeal to preserve its right to challenge issues addressed in the GWMA Order. By contrast, the Director could have issued a preliminary or recommended order, and said order would not be subject to immediate judicial review (absent extraordinary relief). As explained below, the Department has an obligation to define a "reasonably safe supply" pursuant to statute to support any ground water management area designation, and it has failed to do so. A legally incomplete "final" order cannot be remedied by hearing, and would be a waste of agency and the parties' resources.

## II. The Director's GWMA Order May Be Appealed Pursuant to I.C. § 42-1701A

Contrary to the arguments implied in the Department's Response, Idaho Code section 42-1701A does not require parties to go through a hearing before pursuing judicial review of a final

order. *Department's Response to Motion to Determine Jurisdiction* at 6–7 (Feb. 3, 2017). Idaho Code section 42-1701A contains two provisions outlining the relief available to a party "aggrieved" by an final order by the Director. Subsection (3) states that

> [A]ny person aggrieved by any action of the director, including any decision, determination, order or other action . . . who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

(emphasis added). Subsection (4) further states that

> Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

(emphasis added). These provisions, therefore, allow any party "aggrieved" by a final order by the Director to either request a hearing (if one has not already been held) or to pursue judicial review.

The Department's own procedural rule is consistent with this interpretation—IDAPA 37.01.01.740.02 states that upon issuance of any final order, the Department must notify parties through a standard information sheet that is to be attached to final orders that parties may request reconsideration, request a hearing on said order, or may appeal to district court.

> Every final order issued by the agency head must contain or be accompanied by a document containing the following paragraphs . . .
>
> a. . . . Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. . . .
>
> b. [A]ny person aggrieved by any decision, determination, order or action of the director of the Department . . . shall be entitled to a hearing before the director . . .
>
> c. [A]ny party aggrieved by this final order or orders previously issued in this case may appeal this final order . . . .

IDAPA 37.01.01.740.02. As described above, an explanatory sheet consistent with IDAPA 37.01.01.740.02 was attached to the GWMA Order, designating it a final order and listing three alternative responses for parties. Exhibit A to Pocatello's Notice of Appeal.

In its Response, the Department argues that a hearing is required in this matter before judicial review can be pursued—contrary to the position taken in the explanatory sheet provided with the GWMA Order. Department's Response at 7. This interpretation—that only a final order following a hearing is appealable—cannot be reconciled with the plain language of the statute, IDAPA 37.01.01.740 or the GWMA Order explanatory sheet, which state that any final order is appealable.

In its Response, the Department argues that while the GWMA Order is indeed a "final" order, it is "not ripe for judicial review" until after hearing. Department's Response at 6 n.1. Pursuant to the plain language of Idaho Code section 42-1701A(4), a final order is immediately "ripe" for appeal. The Department's Response also falters by relying on two decisions—*Podsaid* and *Wanner*—which involve distinguishable statutes and administrative processes to that in question here, Idaho Code section 42-1701A. Notably, both those decisions found that pursuant to the relevant statutes, only a final order after administrative hearing is appealable.

In *Podsaid*, the Court examined Idaho Code section 36-2114(b) to determine whether Podsaid had exhausted his administrative remedies before the State Outfitters and Guides Licensing Board. *Podsaid v. State Outfitters & Guides Licensing Bd.*, 159 Idaho 70, 74, 356 P.3d 363, 367 (2015). There, the Court found that pursuant to Idaho Code section 36-2114(b), Podsaid had not exhausted his administrative remedies because he "still has an appeal process available within the agency regarding the denial of his license application." *Id.* Importantly, in contrast to the plain language of Idaho Code section 42-1701A, the Court held that section 36-

2114(b) always requires a hearing be completed before judicial review can be pursued. *Id.* ("Any applicant aggrieved by a denial of his application in whole or in part for an outfitter's or guide's license by the board shall have twenty-one (21) days . . . to submit a written request for a hearing . . . ." I.C. § 36-2114(b).).

Similarly, *Wanner* involved two statutory provisions that required parties to proceed to a mandatory hearing before judicial review could commence. *Wanner v. State Dept. of Transp.*, 150 Idaho 164, 244 P.3d 1250 (2011). In *Wanner*, the Court first examined the remedies available to parties pursuant to Idaho Code section 18-8002A, where a drivers license has been suspended. The Court noted that this "statute provides for administrative review of [a] suspension. The statute further grants the right of judicial review of the decision made by the hearing officer." *Id.* at 168, 244 P.3d at 1254 (emphasis added). Contrary to the case at hand, Idaho Code section 18-8002A requires an administrative hearing always be conducted before judicial review can be pursued; section 42-1701A contains no such requirement. The Court next examined the available remedies pursuant to Idaho Code section 49-326 that relate to potential disqualifications from operating a commercial vehicle. *Id.* at 170, 244 P.3d at 1256. The Court found that judicial review "into the matter of Wanner's disqualification . . . is premature. The statutory scheme under the motor vehicle code does not contemplate judicial review unless the administrative hearing process is complete." *Id.* (emphasis added).

Because Idaho Code section 42-1701A(4) provides a separate provision that permits appeals of final orders without a hearing prerequisite—as recognized by the Department in its explanatory sheet and IDAPA 37.01.01.740.02—the Court should find that it has jurisdiction over this appeal.

## III. Judicial Review Will Promote Judicial Economy

In the GWMA Order, the Director "concludes that the ground water basin encompassing the ESPA may be approaching a condition of not having sufficient ground water to provide a reasonably safe supply for irrigation and other uses occurring within the basin at current rates of withdrawal." Exhibit A to Pocatello's Notice of Appeal at 19. This finding is the crux of any ground water management area designation pursuant to Idaho Code section 42-233b.[1]

However, the GWMA Order does not identify a "reasonably safe supply" for water users on the ESPA. The GWMA Order establishes no ground water levels, rate of recharge, or other quantifiable description of supply (begging the question of how the Director determined conditions were close to breaching said "reasonably safe supply"). Forcing the parties to go to hearing on an incomplete order will require the parties to do the technical work that the Director has failed to do (and is required for a designation), to develop and defend their own definitions of a "reasonably safe supply", and prove that conditions are such that an as-of-yet undefined "reasonably safe supply" is not being approached. An exercise of jurisdiction by this Court to determine whether the Director can make such a designation without identifying a "reasonably safe supply" for the ESPA before conducting a hearing will promote judicial economy.

## IV. Conclusion

Pocatello's appeal was filed to preserve its appeal of issues decided in the GWMA Order pursuant to Idaho Code section 42-1701A(4). The Director chose to issue this order as a final

[1] A "ground water management area" is defined by statute 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." I.C. § 42-233b. Idaho Code section 42-233a defines a "critical ground water area" as "any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply."

order, told parties they "must" appeal the designation within 28 days. This Court should permit Pocatello's appeal.

Respectfully submitted this 8th day of February, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2017 a true and correct copy of the foregoing **CITY OF POCATELLO'S REPLY IN SUPPORT OF MOTION TO DETERMINE JURISDICTION** in **Docket No. CV-01-17-000067** was served on the following by the method indicated below:

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