Scott L. Campbell, ISB No. 2251
Matthew J. McGee, ISB No. 7979
Sarah A. McCormack, ISB No. 9683
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
mjm@moffatt.com
sam@moffatt.com
16845.0030

Schroeder, Gerald F.

Attorneys for Sun Valley Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

SUN VALLEY COMPANY,

Plaintiff,

vs.

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

Defendant.

Case No. CV01-16-23173

PETITION FOR JUDICIAL REVIEW

Sun Valley Company (the "Company"), by and through its undersigned counsel, and pursuant to Idaho Code Sections 67-5270 through 67-5279 and Rule 84 of the Idaho Rules of Civil Procedure, hereby submits this Petition for Judicial Review of an agency action by the Director of the Idaho Department of Water Resources ("Director") and the Idaho Department of Water Resources ("Department").

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Company owns and operates a resort in Sun Valley, Blaine County, State of Idaho. The Company operates the resort with water rights in the Big Wood River Valley, which the Department has identified as a "tributary basin" subject to inclusion within a ground water management area ("GWMA") for the Eastern Snake Plain Aquifer ("ESPA").

II.

The Idaho Department of Water Resources is a state agency, with its main office located at 322 E. Front Street, Boise, Idaho. Gary Spackman is the Director of the Department.

III.

On July 7, 2016, the Director sent a letter to potentially interested water users stating he intended to consider creating a GWMA ESPA. A copy of the letter is attached hereto as **Exhibit A**. The letter invited "[p]otentially affected water users" to attend one or more of ten (10) public meeting scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016.

IV.

The letter stated that Idaho Code Section 42-233b authorizes the creation of GWMAs, and that there exist "several potential tools available to the Director" within a GWMA to manage the ESPA, including approval of a ground water management plan, limiting new appropriations, implementing reporting requirements, and curtailment.

V.

The letter then described the current water administration paradigm as involving "disjointed water calls and mitigation plans," "sporadic curtailment orders and associated mitigation," and "sporadic water right administration," and asserted that management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization, although the

letter did not identify the means to achieve such goal, except by reference to the foregoing "potential tools."

VI.

In addition to the previously established ESPA area of common ground water supply ("ACGWS"), the Director considered the inclusion of 22 Department water basins within the proposed ESPA GWMA, including portions of Basin Nos. 21, 22, 23, 25, 27, 29, 31, 32, 33, 34, 35, 36, 37, 41, 43, 45, 47, and 51. The letter asserted that the Department needs to consider "the areal extent of the ground water management area," and stated that the listed tributary basins are the basins that the Department's technical information suggests impact water stored in the ESPA. The letter invited water users from those basins to participate in the scheduled public meetings.

VII.

On July 25, 2016, the day of the first public meeting, the Company filed with the Department a Petition for Declaratory Ruling, pursuant to Idaho Code Section 67-5232 and Idaho Department of Water Resources Rules of Procedure IDAPA 37.01.01.400. The Petition for Declaratory Ruling, as amended, sought an agency determination regarding a number of legal questions involving the Director's interpretation of Section 42-233b, and the applicability of certain Department rules to the creation of a proposed ESPA GWMA. A copy of the Second Amended Petition for Declaratory Ruling (without attachments) is attached hereto as **Exhibit B.**

VIII.

Between July 25, 2016 and July 28, 2016, the Department held informational public meetings in 10 locations in Idaho, during which Department representatives made

presentations and engaged in question and answer sessions. The Director invited written comments as well.

IX.

On November 2, 2016, the Director issued an Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area (the "GWMA Order"). A copy of the GWMA Order is attached hereto as **Exhibit C**.

X.

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). 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 Procedure 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.

XI.

The proceedings that resulted in the GWMA Order did not comply with the procedural or evidentiary requirements of a contested case under the Idaho Administrative Procedures Act or the Department's Procedural Rules, IDAPA 37.01.01, or with the due process requirements of the Idaho and U.S. Constitutions.

XII.

On November 3, 2016, the Director issued an Order Denying Petition for Declaratory Ruling (the "Declaratory Ruling Order"). A copy of the Declaratory Ruling Order is

attached hereto as **Exhibit D**. The Declaratory Ruling Order declined to address the merits of the Petition for Declaratory Ruling, as amended. Instead, the Director dismissed the Petition for Declaratory Ruling. He decided that the questions and issues raised therein were "inextricably intertwined with factual and technical issues that require development and such development cannot occur solely on the basis of legal briefing and oral argument." *See* Declaratory Ruling Order at 7. He also determined that issuance of the GWMA Order creates a forum to address the issues raised in the Petition for Declaratory Ruling, as amended, "through the normal administrative review process and not the declaratory ruling process." *See id.*

XIII.

The questions and issues raised in the Petition for Declaratory Ruling, as amended, do not require the development of a factual record. The questions and issues raised are questions of law relating to the interpretation of statutes and rules the Director is responsible to interpret and administer statewide, and not merely within the proposed or designated ESPA GWMA.

XIV.

The GWMA Order does not create a forum to address the issues raised in the Petition for Declaratory Ruling, as amended. In light of the Director's failure to comply with the requirements for contested case proceedings under the Idaho Administrative Procedure Act and the Department's Procedural Rules, the Director entered the GWMA Order without valid authority, the GWMA Order is void, and it must be set aside.

XV.

On November 16, 2016, the Company filed with the Department a Petition for Reconsideration of the Declaratory Ruling Order. The Director did not grant or deny the Petition for Reconsideration.

VENUE

XVI.

The Company seeks review in the district court for Ada County, Fourth Judicial District of the State of Idaho, pursuant to Idaho Code Section 67-5272, because the final agency action was taken by the Director and the Department at Department headquarters in Ada County, Idaho.

JURISDICTION

XVII.

The Company seeks judicial review of the Declaratory Ruling Order, and this Court has jurisdiction for review of such order, because it is a final order. *See* IDAHO CODE § 67-5270(3); IDAPA 37.01.01.740. The Director granted a request for hearing to the Company under Idaho Code Section 42-1701A, but failed to likewise grant the petition for reconsideration of the Declaratory Ruling Order. Therefore, pursuant to Idaho Code Section 67-5246(4) and IDAPA 37.01.01.740, the Declaratory Ruling Order remains a final order, with reconsideration deemed denied.

XVIII.

The Company has exhausted all administrative remedies required under chapter 52, title 67, Idaho Code and the Procedural Rules. *See* IDAHO CODE § 67-5271(1); IDAPA 37.01.01.740.

ISSUES ON REVIEW

XIX.

Pursuant to Idaho Code Sections 42-1701A and 67-5279, the Company seeks review of the Declaratory Ruling Order, and the findings, inferences, conclusions or decisions therein and related actions of the Department, because they were: (1) in violation of constitutional, statutory provisions, and administrative rules of the Department; (2) in excess of the Department's statutory authority and its authority under the administrative rules of the Department; (3) made upon unlawful procedure; and (4) arbitrary, capricious, and/or an abuse of the Department's discretion.

XX.

Specifically, and without limiting the foregoing, the Company requests review of, and judicial determination of the following:

1. Whether the Director erred by dismissing the Petition for Declaratory Ruling, as amended.

2. Whether the Director errs by creating a GWMA under Idaho Code Sections 42-233a and 42-233b without reference to, or application of, the remainder of the Groundwater Act, the CM Rules promulgated by the Department and approved by the Legislature, and the common law set forth by Idaho trial and appellate courts derived therefrom.

3. Whether the Director errs by expanding the boundaries of the ESPA area of common ground water supply as part of an ESPA GWMA outside the context of a formal rulemaking or contested case proceeding.

4. Whether the Director errs by designation of an ESPA GWMA inclusive of water districts such as Water District No. 37.

5. Whether the Director errs in the exercise of his authority under Idaho Code Section 42-233b, by inclusion of other ground water basins, including Basin 37, within an ESPA GWMA.

6. Whether the Director errs by including water basins or areas within an ESPA GWMA for purposes of the administration of water rights therein without a procedurally proper determination of an area having a common ground water supply.

7. Whether the Director exceeds his statutory authority by designation of a new GWMA without conducting a hearing or rulemaking in accordance with the Department's Rules of Procedure and the applicable provisions of the Idaho Administrative Procedures Act.

8. Whether the Director errs by designating areas of the state GWMAs without first determining that such areas of the state are areas having a common ground water supply, as defined within the CM Rules.

9. Whether the Director errs by determining areas of the state that have a common ground water supply without conducting a rulemaking or complying with the provisions of the CM Rules.

10. Whether the Director errs by creating overlapping GWMAs.

11. Whether the Director exceeds his statutory authority by generating or creating a ground water management plan, or dictating the procedures for potentially impacted water right owners to create such a plan.

12. Whether the Director errs by approving an ESPA ground water management plan that provides for managing the effects of ground water withdrawals from any source other than the ESPA.

13. Whether the Director errs by excluding water rights for domestic purposes from any order issued by the Director to water right holders to "cease or reduce withdrawal of water" upon making a "determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area."

Pursuant to Idaho Rule of Civil Procedure 84(d)(5), this list of issues "shall not prevent the Company from asserting other issues later discovered."

ATTORNEY FEES

XXI.

The Company respectfully requests an award of its attorneys' fees and costs pursuant to Idaho Code Section 12-117 and any other applicable statutes.

AGENCY RECORD

XXII.

The Company understands that the Department keeps and maintains a record of documents and proceedings in the above-referenced matter, and respectfully requests preparation of such record.

Petitioner CERTIFIES:

A. That the Department has been paid the costs for the preparation of Department record referenced above;

B. That the District Court's filing fee applicable to petitions for judicial review of a final decision from administrative agencies, including the Department, has been paid; and

C. That service has been made upon all parties required to be served.

DATED this 23rd day of December, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

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

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

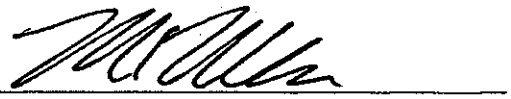
By _____
Matthew J. McGee – Of the Firm
Attorneys for Sun Valley Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2016, I caused a true and correct copy of the foregoing **PETITION FOR JUDICIAL REVIEW** to be served by the method indicated below, and addressed to the following:

Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St.
P.O. Box 83720
Boise, ID 83720-0098

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile



Matthew J. McGee

EXHIBIT A

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

July 7, 2016

Dear Interested Party:

The Idaho Department of Water Resources ("IDWR") is considering creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA). Potentially affected water users are invited to participate in upcoming public meetings to discuss the possible creation of a ground water management area for the ESPA. A schedule of the public meetings is printed at the end of this letter. A separate schedule is also enclosed.

At the public meetings: (1) the Idaho Department of Water Resources will present hydrologic data and information; (2) IDWR will discuss the legal standards for the creation of a ground water management area; and (3) potentially affected water users and interested persons and entities may interact with IDWR and express their views. After hearing from water users at the public meetings and considering the issues, I will decide whether a ground water management area should be created.

The Idaho Department of Water Resources has documented declining ESPA levels, Snake River flows, and spring discharges, particularly since the turn of this century. Holders of senior priority water rights have filed several calls for priority delivery of water. IDWR has conducted hearings, and has rendered decisions resulting in orders of curtailment of junior priority water rights and associated mitigation obligations.

A comprehensive hydrogeologic model of the aquifer has been developed and used for various purposes, including responding to water delivery calls and evaluating aquifer stabilization efforts. IDWR continues to develop data and track conditions in the ESPA.

To briefly summarize, after an extended period of increasing aquifer levels and spring discharge, ground water levels and water volume in the ESPA have been declining since about the mid 1950s. Spring discharges from the ESPA have also declined. From 1912 to 1952 the ESPA gained an estimated 17 million acre-feet of storage. Between 1952 and 2013 the aquifer lost an estimated 11 million acre-feet. There have been periods of recovery (increased aquifer levels and spring discharge) since 1952, but each subsequent recovery peak is lower than the previous peak and each declining trough is lower than the previous trough.

These trends are disturbing. It is clear that the aquifer storage has declined substantially from peak levels. Discharges from springs delivering water from the aquifer have correspondingly declined as ground water elevations in the ESPA and total water stored in the ESPA have declined.

The ESPA is a vital source of water for the State of Idaho. Its value cannot be overstated. Unless the trend that has existed since 1952 is at least arrested, the current declines in aquifer storage and spring discharge will continue. Multiple causes for the declines in aquifer storage and spring discharge include: (1) changing climate patterns; (2) increasing surface water irrigation efficiencies resulting in less incidental recharge; (3) the development of approximately one million acres of land irrigated by ground water within the ESPA; and (4) the development of a significant number of additional irrigated acres in areas that have historically contributed water to the ESPA. Water users and the Water Resources Board are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines. However, future conditions, including climate and water use practices are unknown.

Idaho Code Section 42-233b authorizes the creation of ground water management areas. It defines a ground water management area 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."

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 for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources."

The holders of senior priority water rights who filed numerous water delivery calls with IDWR have asserted that the ESPA presently does not have sufficient ground water to provide a reasonably safe supply. Without dispute, unless the trend that has existed since 1952 is at least arrested, the current conditions will be exacerbated. The question is whether the ESPA is approaching the conditions of a critical ground water area (not having sufficient ground water to provide a reasonably safe supply).

Section 42-233b identifies several potential tools available to the Director within a ground water management area to properly manage the resource:

1. Approve a ground water management plan for the area. A ground water management plan would manage ground water withdrawals on the aquifer and hydraulically connected sources to ensure a reasonably safe supply of ground water. Components of a recently completed settlement agreement between the Surface Water Coalition and the Idaho Ground Water Appropriators may be a template for an initial management plan.

2. Consider new appropriations of water only after determining that sufficient water is available. This would be consistent with current practices.

3. Require all water right holders within the area to report withdrawals of ground water and other necessary information. Many users of water from the ESPA currently or soon must measure and report their diversions of ground water.

4. If the Director determines the ground water is insufficient to meet the needs of water right holders, junior users may be required to cease diversions.

The formation of a ground water management area would have distinct advantages:

1. Rather than only administering existing disjointed water calls and mitigation plans, the Department can consider the aquifer as a whole. In contrast, under conjunctive administration the Department can only administer to individual water delivery calls. Delivery calls are manifest symptoms of a larger problem with the ESPA. The problem is the widespread and long term decline of the aquifer storage volume by over 11 million acre-feet and associated reduction in spring discharges. A ground water management area focuses treatment on the problem, not just the symptoms.

2. Conjunctive management by water right priority results in sporadic curtailment orders and associated mitigation only in years when the water supply is insufficient to satisfy the senior priority water rights. In years when the supply is sufficient, there is no curtailment or mitigation. In years when the supply is deficient, the curtailment/mitigation obligations can be very large. Sporadic water right administration does not consistently address the chronic degradation of the ESPA. Management through a ground water management area designation may better assure that the aquifer stabilization measures are achieved.

One of the issues needing consideration will be the areal extent of the ground water management area. The Department's technical information suggests that the area that impacts water stored in the ESPA and spring discharge extends into tributary basins:

Clover Creek	Birch Creek	Palisades	Bannock Creek
Thorn Creek	Medicine Lodge Creek	Willow Creek	Rock Creek
Big Wood River	Beaver Creek	Blackfoot River	Raft River
Little Wood River	Camas Creek	Ross Fork	Goose Creek
Big Lost River	Henry's Fork	Portneuf River	Big Cottonwood Creek
Little Lost River	Teton River		

Water users in those areas are invited to participate.

The Department will conduct a series of informational meetings to further inform water users of the concerns leading to this effort and to hear from them:

Meeting Date and Time	Meeting Location
July 25, 2016 at 8:30 a.m.	Minnie Moore Room, Community Campus Building 1050 Fox Acres Road Hailey, Idaho 83333
July 25, 2016 at 2:30 p.m.	Butte County High School Auditorium 120 N. Water Street Arco, Idaho 83213
July 25, 2016 at 7:00 p.m.	West Jefferson High School Auditorium 1260 East 1500 North Terreton, Idaho 83450
July 26, 2016 at 8:30 a.m.	AmericInn Lodge & Suites 1098 Golden Beauty Drive Rexburg, Idaho 83440
July 26, 2016 at 2:00 p.m.	Blackfoot Senior Center 20 East Pacific Blackfoot, Idaho 83221
July 26, 2016 at 7:00 p.m.	Best Western 1415 Bench Road Pocatello, Idaho 83201
July 27, 2016 at 9:00 a.m.	Marsh Valley Senior Center 21 S. Main Street Downey, Idaho 83234
July 27, 2016 at 3:00 p.m.	Raft River High School Auditorium 55 1st West Malta, Idaho 83342
July 27, 2016 at 7:30 p.m.	Best Western/Burley Inn & Convention Center 800 N. Overland Avenue Burley, Idaho 83318
July 28, 2016 at 9:00 a.m.	Jerome Middle School 520 10th Avenue West Jerome, Idaho 83338

The meetings will include a presentation on the aquifer by Department Staff, discussion of the Director's role and decision process, and an opportunity to hear from water users.

Sincerely,

Gary Spackman
Director

IDAHO DEPARTMENT OF WATER RESOURCES

SCHEDULE OF PUBLIC WATER MEETINGS FOR PROPOSED GROUND WATER MANAGEMENT AREA IN THE EASTERN SNAKE PLAIN AQUIFER

Meeting Date and Time	Meeting Location
July 25, 2016 at 8:30 a.m.	Minnie Moore Room, Community Campus Building 1050 Fox Acres Road Hailey, Idaho 83333
July 25, 2016 at 2:30 p.m.	Butte County High School Auditorium 120 N. Water Street Arco, Idaho 83213
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July 28, 2016 at 9:00 a.m.	Jerome Middle School 520 10th Avenue West Jerome, Idaho 83338

EXHIBIT B

Scott L. Campbell, ISB No. 2251
Matthew J. McGee, ISB No. 7979
Sarah A. McCormack, ISB No. 9683
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
mjm@moffatt.com
sam@moffatt.com
16845.0030

Attorneys for Sun Valley Company

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. **SECOND AMENDED PETITION FOR DECLARATORY RULING REGARDING CREATION OF ESPA GROUND WATER MANAGEMENT AREA**

I. PETITION

1. Sun Valley Company ("Sun Valley"), by and through undersigned counsel, files this Second Amended Petition for Declaratory Ruling ("Petition") pursuant to

Idaho Code Section 67-5232 and the Idaho Department of Water Resources Rules of Procedure, IDAPA 37.01.01.400.

2. On July 11, 2016, Sun Valley received a letter dated July 7, 2016, from Gary Spackman, Director of the Idaho Department of Water Resources (the "Letter"). A true and correct copy of the Letter is attached hereto as **Exhibit 1**. The Letter provides that the Department "is considering creating a ground water management area for the Easter Snake Plain Aquifer (ESPA)," and invites "[p]otentially affected water users" to attend one or more of ten (10) meetings scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016.

3. The Letter provides that after the meetings, the Director will decide whether a ground water management area ("GWMA") should be created.

4. The Letter states that Idaho Code Section 42-233b authorizes the creation of GWMAs, which are defined 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."

5. The Letter notes that 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 for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources."

6. The Letter states that Idaho Code Section 42-233b identifies "several potential tools available to the Director" within a GWMA to manage the ESPA. Specifically, the Letter states that Idaho Code Section 42-233b authorizes the Director to:

(a) approve a ground water management plan to "manage ground water withdrawals on the aquifer and hydraulically connected sources to ensure a reasonably safe supply of ground water";

(b) consider new appropriations only after determining availability;

(c) require water right holders within the GWMA to report withdrawals of ground water and other information;

(d) require junior users to cease diversions "[i]f the Director determines the ground water is insufficient to meet the needs of water right holders."

7. The Letter then describes the current water administration paradigm as involving "disjointed water calls and mitigation plans," "sporadic curtailment orders and associated mitigation," and "sporadic water right administration," and asserts that management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization, although the Letter does not identify the means to achieve such goal, except by reference to the foregoing "potential tools."

8. The proposed GWMA area includes the ESPA, which "is the aquifer underlying the Eastern Snake Plain." *Rangen, Inc. v. Idaho Dep't of Water Res. (In re Distrib. of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011-004)*, 367 P.3d 193, 197 (Idaho 2016). The ESPA is approximately 170 miles long and 60 miles wide, and has been designated as an area having a common ground water supply ("ACGWS"). *See id.* (citing IDAPA 37.03.11.050). The ground water in the ESPA is hydraulically connected to the Snake River and tributary springs. *Id.* The ESPA "is composed predominantly of fractured quaternary basalt, which is generally characterized by high hydraulic conductivity." *Id.*

Discharge from the ESPA "to hydraulically connected surface water sources is largely dependent on ground water elevations and hydraulic conductance." *Id.*

9. In addition to the ESPA ACGWS, the Director proposes to include 22 basins within the ESPA GWMA, including portions of Basin Nos. 21, 22, 23, 25, 27, 29, 31, 32, 33, 34, 35, 36, 37, 41, 43, 45, 47, and 51. *See* Letter at 3 (listing 22 tributary basins). The Letter asserts that the Department needs to consider "the areal extent of the ground water management area," and states that the listed tributary basins are the basins that the Department's technical information suggests impact water stored in the ESPA. The Letter also invited water users from those basins to participate in the public meetings.

10. "The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

11. "[T]he Idaho Legislature has authorized the Director 'to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.' The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994." *In re A&B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012) (quoting IDAHO CODE § 42-603).

12. The CM Rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].'" *Am. Falls*

Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (quoting *A&B Irrigation Dist.*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

13. The CM Rules "govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

14. The CM Rules "provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . designating such areas as ground water management areas as provided in Section 42-233b, Idaho Code." IDAPA 37.03.11.020.06.

15. "The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area." IDAPA 37.03.11.050.01(d).

16. Additionally, upon the proper initiation of a contested case by a senior water right holder, and following consideration of such contested case under the Department's Rules of Procedure, the Director may, by order, ". . . [d]esignate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights." IDAPA 37.03.11.030.

17. Sun Valley owns water rights in Water District No. 37. Sun Valley owns water rights within the Big Wood River Ground Water Management Area, designated as such by the Director on June 28, 1991. Sun Valley does not own water rights in the ESPA area of common ground water supply.

18. Pursuant to Idaho Code Section 67-5232(1), Sun Valley hereby petitions the Department for a declaratory ruling as to the applicability of Idaho Code Section 42-233b to Basin 37 in the context of any proposed ESPA GWMA. Specifically, and without limitation, Sun Valley seeks a declaratory ruling that:

(a) Because the Groundwater Act, the CM Rules promulgated by the Department and approved by the Legislature, and the common law set forth by Idaho trial and appellate courts derived therefrom, apply to determining areas of the state having a common ground water supply, creating and expanding water districts, and creating GWMAs, in exercising authority under Idaho Code Sections 42-233a and 42-233b, the Director cannot act in derogation of these legal constraints.

(b) Any attempt by the Director or the Department to expand the boundaries of the ESPA area of common ground water supply to include the entirety of Basin 37 by designating Basin 37 as part of an ESPA GWMA outside the context of a formal rulemaking or contested case proceeding is in contravention of the Groundwater Act, the CM Rules, and the common law set forth by Idaho trial and appellate courts derived therefrom.

(c) The proposal to designate an ESPA GWMA inclusive of Water District No. 37 is contrary to prior decisions of the Director regarding GWMA designations related to the ESPA.

(d) Idaho Code Section 42-233b does not grant the Director authority to include other ground water basins, including Basin 37, within an ESPA GWMA.

(e) The proposal to designate an ESPA GWMA inclusive of Basin 37 for purposes of the administration of water rights therein without a procedurally proper determination of an area having a common ground water supply in Basin 37 is an invalid collateral attack upon the findings and conclusions in Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Co. v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016). A true and correct copy of Judge Wildman's Memorandum Decision and Order is attached hereto as **Exhibit 2.**

(f) The Director does not have authority to designate a new GWMA inclusive of Basin 37 without conducting a hearing or rulemaking in accordance with the Department's Rules of Procedure and the applicable provisions of the Idaho Administrative Procedures Act.

(g) A "critical ground water area," and a "ground water management area," as defined in Idaho Code Sections 42-233a and 42-233b respectively, are each, as a matter of law, an "area having a common ground water supply," as defined in the CM Rules, IDAPA 37.03.11.010.01.

(h) Except for within the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must determine areas of the state that have a common ground water supply before designating such areas ground water management areas.

(i) Except for the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must conduct a rulemaking or comply with the provisions of the CM Rules in order to determine areas of the state that have a common ground water supply.

(j) The Director may not create an ESPA GWMA that geographically overlaps the existing Big Wood River GWMA.

(k) The Director has the statutory authority to approve a ground water management plan, but does not have the authority to generate or create a ground water management plan.

(l) Under Idaho Code Section 42-233b, a ground water management plan for the ESPA should provide for managing the effects of ground water withdrawals from the ESPA (a) on the ESPA, and (b) on hydraulically connected sources of water, but it cannot provide for managing the effects of ground water withdrawals from any other source.

(m) Under Idaho Code Section 42-233b, if the Director makes a "determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area" any order issued by the Director to water right holders to "cease or reduce withdrawal of water" must include water rights for domestic purposes.

19. In addition, pursuant to Idaho Code Section 67-5232(1), Sun Valley hereby petitions the Department for a declaratory ruling as to the applicability of IDAPA 04.11.01.420-425 to Department proceedings. Specifically, and without limitation, Sun Valley seeks a declaratory ruling that IDAPA 04.11.01.420-425 apply to Department proceedings because the Department failed to include in the Rules of Procedure of the Idaho Department of Water Resources "a finding that states the reasons why the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." IDAHO CODE § 67-5220(5)(b).

II. POINTS AND AUTHORITIES

Pursuant to IDAPA 37.01.01.400.01(c) and 37.01.01.400.02, Sun Valley may set forth the statutes, orders, rules, or other controlling law upon which Sun Valley relies. The following points and authorities, and discussion thereof, support each of the foregoing requested declarations, and Sun Valley respectfully requests an order from the Director confirming each.

A. The Director's Authority Is Limited.

The Department, as an administrative agency, has no authority other than that given to it by the Legislature. *See Wash. Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). "Administrative agencies are 'creature[s] of statute' and, therefore, are 'limited to the power and authority granted [them] by the Legislature.'" *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Such authority "is primary and exclusive in the absence of a clearly manifested expression to the contrary." *Roberts v. Idaho Trans. Dep't*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991). An agency "may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered." *Id.*

An administrative agency "exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction." *Henderson*, 147 Idaho at 632, 213 P.3d at 722; *see also United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). An agency's authority and jurisdiction is "dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves . . . ." *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d 126. If the provisions of governing rules or statutes are not met and complied with, no authority or jurisdiction exists. *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm'n*, 85 Idaho 307, 379

P.2d 422 (1963)). Acts taken by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012).

The Director's authority is granted and defined in Title 42 of the Idaho Code, the Idaho Administrative Procedure Act, Idaho Code Section 67-5201, *et seq.* (the "Act"), and the administrative rules promulgated in accordance therewith. However, these grants of power also properly limit jurisdiction and authority in order to comport with due process standards to protect the rights and interests of citizens. In response to a due process challenge relating to the impact of the Department's administration of an appellant's "constitutional use" water right, the Idaho Supreme Court upheld the Department's actions and recognized that "[t]he requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

To that end, all Department proceedings and hearings must be conducted in accordance with the Idaho Administrative Procedure Act. IDAHO CODE § 42-1701A. Compliance with Title 42, the Idaho Administrative Procedure Act, and the rules promulgated thereunder ensure that appropriate procedural protections are afforded to the property interests of all water right owners. The Director has specific responsibility "[t]o promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department." IDAHO CODE § 42-1805(8); *see also* IDAHO CODE § 42-603.

Valuable property rights are at issue. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law . . . ." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Procedural due process is afforded to all parties subject to the

Department's jurisdiction by virtue of compliance with Title 42 of Idaho Code and the Act. *See Nettleton, supra.* Under the Act, the Department has promulgated, and the Legislature has reviewed, the Procedural Rules and the CM Rules that supplement and implement the statutory requirements for the administration of ground water rights, pursuant to Title 42 of Idaho Code, particularly Idaho Code Section 42-233(b). *See also* IDAHO CODE §§ 67-5224; 67-5291.

The Department has no authority or jurisdiction to proceed with the creation of an ESPA GWMA that extends beyond the boundaries of the ESPA ACGWS. Even if it did, absent compliance with the clearly articulated rulemaking or contested case procedures of the Procedural Rules and the CM Rules, such action would be, and in this case is, *ultra vires*, and contravenes Sun Valley's due process rights and the procedures the Legislature and the Department have deemed mandatory. *See Henderson v. Eclipse Traffic Control*, 147 Idaho at 634-35, 213 P.3d at 724-25; *Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27. The Director threatens to exceed his authority. That is the source of this petition. The Director must follow the statutes and rules that define the Legislature's grant of authority.

B. Idaho Code Section 42-233b Does Not Grant the Director Authority to Include Other Ground Water Basins Within an ESPA GWMA.

The Director contends he has the authority to create a single GWMA that comprises not only the ESPA ACGWS, but also 22 tributary basins. *See* Letter at 2-3. An evaluation of the plain language of the statute at issue, and interpreting the statute *in pari materia* with the remainder of the Groundwater Act, demonstrates that his contention is erroneous.

First, the Director's authority under Section 42-233b to determine a GWMA makes no reference to tributary ground water basins, and indeed uses the singular term "ground water basin." Although the term "ground water basin" is not defined in the statute or the Groundwater Act, a review of the plain language and a common understanding of the term

reflects a much narrower view of the scope of a GWMA than what the Director proposes. Second, the Director presumably relies upon the term "hydraulically connected sources of water" in the second paragraph of Section 42-233b to support the inclusion of tributary ground water basins within a GWMA. As addressed below, upon evaluation, that provision concerning ground water management plans for a given GWMA actually demonstrates a geographic and hydraulic scope for a GWMA that is much more limited than that contemplated by the Director.

1. A GWMA is comprised of a single ground water basin, not multiple ground water basins.

Idaho Code Section 42-233b defines a "ground water management area" 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." IDAHO CODE § 42-233b. That definition limits the "aerial extent" of the GWMA, as the Director has termed it, exclusively to a singular "ground water basin." A GWMA can be a single ground water basin, or part of a single ground water basin, but a GWMA cannot be multiple basins.

Fundamental concepts of hydrology support that conclusion. The term, ground water basin, consists of two separate concepts: "ground water" and "basin." Idaho Code Section 42-230 defines "ground water" as, "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving." IDAHO CODE § 42-230(a). This definition confirms that ground water exists in any "geological structure in which it is standing or moving."

The Idaho Ground Water Act and the remainder of the Idaho Code do not define "basin." Consequently, other sources must be considered. One defines "basin" as:

> A region in which the strata or layers of rock dip in all directions toward a central point. Thus, it is any hollow or trough in the

> earth's crust, whether filled with water or not. A river basin is the total area drained by a river and its tributaries.

C.C. LEE, PH.D., ENVIRONMENTAL ENGINEERING DICTIONARY 56 (Government Institutes, Inc. 3d ed. 1998). Another defines "basin" as "[t]he drainage area of a lake or stream, such as a river basin." U.S. ARMY CORPS OF ENGINEERS, E.M. 1110-2-1201, Reservoir Water Quality Analysis, 2 (U.S. Dep't of Army, Jun. 30, 1987). Still another defines a "groundwater basin" as "the subsurface volume through which groundwater flows towards a specific discharge zone. It is surrounded by ground water divides." C.W. FETTER, APPLIED HYDROGEOLOGY, Univ. of Wiscon.-Oshkosh, 9 (Macmillan College Publishing Co., Inc., 3rd ed., 1994). Based on these definitions, the Director cannot legitimately determine that a proposed ESPA ground water basin includes "tributary basins," as suggested in the Letter.

No language in Idaho Code Section 42-233b says that a "ground water basin" includes basins other than the ground water basin under consideration, regardless of whether the other basins may discharge some supply into that ground water basin. State agency authority arises only from specific statutory language enacted by the Legislature, not otherwise.

The regulatory authority granted by Idaho Code Section 42-233b to determine a GWMA is limited to identifying a singular "ground water basin." The Director's letter describing "tributary basins" alone evidences a fundamental mischaracterization of the statute, and gross overreach. The regulatory authority for determining and designating a GWMA does not reference, define, or describe any circumstances where a GWMA "extends into tributary basins," nor does it reference water sources tributary to the ground water basin at issue. *See* Letter at 3. Likewise, the statute does not provide regulatory authority over any ground water basins or tributary surface water sources that contribute water to the designated ground water basin. Because the Director's regulatory power to determine a GWMA derives solely from the

language of the statute, expanding the regulatory reach beyond the area described in the statute fails to meet the constitutional standards of due process. *See Arrow Transp. Co., supra*; *A&B Irrigation Dist. v. Idaho Dep't of Water Res., supra.* Here, the Director of the Department has no authority to include "tributary basins" in the proposed ESPA Ground Water Management Area. If he proceeds to take such action, his determination will constitute a void, "ultra vires" act. *See id.*

2. A plan approved under Idaho Code Section 42-233b can only manage the effects of ground water withdrawals from the ESPA.

As the foregoing illustrates, a GWMA is a ground water basin, and not a collection of separate tributary basins ***and*** a specific ground water basin. Likewise, Idaho Code Section 42-233b provides no authority to impose regulation of water rights in Basin 37 by including the Big Wood and Little Wood River Basins within the proposed ESPA GWMA. Those basins should therefore not be included.

The second paragraph of Idaho Code Section 42-233b uses language that, out of context, might be twisted to provide arguable authority to the Director to manage a GWMA that includes tributary ground water basins. The language states:

> When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the ***effects of ground water withdrawals on the aquifer*** from which withdrawals are made and ***on any other hydraulically connected sources of water.***

IDAHO CODE § 42-233b (emphasis added).[1]

[1] It is noteworthy that this second paragraph of Section 42-233b says nothing about the process of "designation of a ground water management area." It describes what the management plan "shall provide." Only the first paragraph of the statute circumscribes the designation

A review of the statutory language contemplates the management of **one** thing—the effects of ground water withdrawals from "***the*** aquifer." Those effects are measured or evaluated in **two** places—the aquifer from which the withdrawal was made, and sources of water hydraulically connected to the designated aquifer. In long form, the plan authorized by Section 42-233b can provide for managing the ***effects on the aquifer*** of ground water ***withdrawals from the aquifer***, and can also provide for managing the ***effects on other hydraulically connected sources of water*** by ***withdrawals from the aquifer***.

This language does not state or reasonably imply that a ground water management plan can provide for managing the effects of ground water withdrawals ***from*** ground water basins outside the ESPA boundaries. At most, the language implies the management plan could provide for managing the effects of ground water withdrawals on other sources of water, hydraulically connected to the designated aquifer from which the withdrawals are made. In short, any management plan may only provide for managing effects of withdrawals from the designated aquifer and the effects of those aquifer withdrawals upon water sources that are hydraulically connected to the designated aquifer.

Logically, ground water withdrawals from the ESPA can only affect "hydraulically connected sources of water" that are fed by the ESPA. This conclusion stems from fundamentals of hydrology. Ground water withdrawals from the ESPA could not affect

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process. So, the Director cannot reasonably rely upon the phrase "hydraulically connected sources of water" in the second paragraph to conclude he has power to determine that "tributary basins" belong in the proposed ESPA GWMA.

Furthermore, the second paragraph of Section 42-233b does not grant the Director authority to create a ground water management plan. Instead, the statute gives the Director only the authority to approve a ground water management plan. Sun Valley also seeks a declaratory ruling on this point from the Director.

tributary basins that provide flow to the ESPA, because those tributary basins are up gradient. No amount of ground water withdrawal from the ESPA could affect ground water levels in those basins. Additionally, Idaho Code Section 42-233b uses the single term, "the aquifer." This connotes that the Director is empowered to manage only one aquifer per GWMA designation.

Unless the Director intends to redefine what ***the aquifer*** is—which he cannot do unilaterally—a ground water management plan in an ESPA GWMA must manage the effects of ground water withdrawals from the ESPA, as the plain language of the statute provides. This is important for two reasons. First, as set forth above, the management of ground water withdrawals from any aquifer other than the ESPA—such as the Big Wood River ground water basin—is not contemplated. Second, if a ground water withdrawal from the ESPA causes no effects in an upgradient tributary ground water basin such as the Big Wood River ground water basin, then such tributary basin should not be part of a plan and does not belong in the GWMA at all.[2]

Idaho Code Section 42-233b circumscribes the Director's authority to regulate use of ground water withdrawals within the "ground water basin" designated as a "ground water management area." Consequently, the Director has no authority to administratively regulate ground water withdrawals in any ground water basin outside of the designated basin. The regulatory authority granted by Idaho Code Section 42-233b does not include "managing the effects of ground water withdrawal on the [ESPA]" ***from*** "any hydraulically connected sources of water." Such an interpretation completely ignores the statutory phrase, "effects . . . ***on*** hydraulically connected sources of water."

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[2] The analysis that the statutory language contemplates is strikingly similar to the analysis in which the Director must engage to determine an ACGWS and create or enlarge existing water districts. *See* IDAHO CODE § 42-237a.g; IDAPA 37.03.11.031.

The regulatory authority granted by the statute does not provide for management of withdrawals in "hydraulically connected sources of water" such as the Big Wood River ground water basin. The statute grants governmental power to manage the effects ***on*** those "hydraulically connected sources of water" resulting from withdrawals from the ESPA. Again, because the Director's regulatory powers derive solely from the language of the statute, expanding the regulatory reach beyond the singular ground water basin described in the statute fails to meet the constitutional standards of due process.

C. IDWR's Inclusion of Tributary Basins in the Proposed ESPA Ground Water Management Area Would Conflict with the SRBA Final Decree.

The Snake River Basin Adjudication ("SRBA") generated more litigation than anyone predicted when the Idaho Legislature enacted Idaho Code Sections 42-1401, *et seq.* Fortunately, the SRBA District Court entered its Final Decree on August 25, 2014, thereby concluding virtually all of that litigation. The finality and integrity of that Final Decree would be attacked by the inclusion of "tributary basins" in a proposed ESPA GWMA.

This conclusion stems from analysis of Idaho Supreme Court authority and the SRBA Adjudication statutes. In *Rangen v. IDWR* (2016 Opinion No. 33), Docket Nos. 42775/42836, the Idaho Supreme Court evaluated the effect of Idaho Code Section 42-1420. It stated:

> Except for certain enumerated exceptions inapplicable here, "[t]he decree entered in a general adjudication ***shall be conclusive*** as to the nature and extent of all water rights in the adjudicated water system." IDAHO CODE § 42-1420 (emphasis added).
>
> Where the partial decrees indicate that Rangen's rights are surface water rights, that finding is conclusive in Rangen's delivery call.

Slip op. at 11.

The Idaho Supreme Court has recognized:

> A decree is important to the continued efficient administration of a water right. The watermaster ***must look to the decree for instructions as to the source of the water.*** *Stethem v. Skinner*, 11 Idaho 374, 479, 82 P. 451, 452 (1905). If the provisions define a water right, ***it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.*** I.C. § 42-607 (1997).

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (emphasis added).

This admonition applies here. Virtually all of the potentially impacted water rights in the Big Wood and Little Wood River Basins have been claimed and decreed with specific water right numbers.[3] The prefix number designates the specific water basin selected by the Department as the identifier for the water rights in that basin.

Significantly, the Department, when it was a party to the SRBA, moved to reconsider certain orders by the SRBA District Court prohibiting the filing of a Director's Report that does not consist of the three parts described in Idaho Code Section 42-1411. *See* SRBA Case No. 39576, Order Re: Idaho Department of Water Resources' Motion to Reconsider; and Order Establishing Adjudication Reporting Areas, General Sequence and Test Reporting Areas at 1 (May 19, 1992) ("May 19, 1992 Order"), a true and correct copy of which is attached hereto as **Exhibit 3.** In doing so, the Director stated that "[a]dministrative boundaries for sub-basins for the entire state of Idaho were established by IDWR in the late 1960's." *See* SRBA Case No. 39576, Director's Brief in Support of Motion to Reconsider Orders at 6 (Feb. 14, 1992), a true and correct copy of which is attached hereto as **Exhibit 4.** They were established "for ease and efficiency in the administration of Idaho's water resources." *Id.* at 7. Since that time, those administrative basins have been used for administration, "and will continue to be used after the

[3] Those water rights not decreed in the SRBA have been licensed by the Department with water right numbers indicating the same water basin prefix, i.e., 37.

conclusion of the SRBA for administration of rights determined in the SRBA, as well as for IDWR's other duties." *Id.* at 8. The Director stated that "[a]lteration of these boundaries would not only seriously impede IDWR's efforts in carrying out its duties in the SRBA, but would seriously disrupt IDWR's many other ongoing responsibilities in regulating and administering Idaho's waters." *Id.* The SRBA Court accepted this designation of separate hydrological basins and the sequencing of Director's Reports proposed by the Director. *See* May 19, 1992 Order at 2-5.

This fact is significant because of the statutory mandates of Idaho Code Section 42-1409. It required claimants for water rights in the SRBA to file a notice of claim on the Department's standard form. IDAHO CODE § 42-1409(4). The standard claim form required the claimant to include the source of water and the number of the water right, unless the right was "founded upon judicial decree not on file with the department . . . ." IDAHO CODE § 42-1409(1)(b) & (e). *See also* IDAPA 37.03.01.060.02(c) & (o) (requiring the identification of source and basis of claim, including the assigned water right number).

The water right number identified the right in the Director's Report, the subsequent partial decree, and all pleadings involving the water right in any contested subcase. In fact, the water right number was used to identify the subcase for that right in the SRBA. And, each partial decree identifies individual water rights with the basin-specific prefix number.

Consequently, since the decree is conclusive and provides the instructions for administration, the judicial determination of the water basin for each water right cannot be contested by the Director. *See State v. Nelson, supra.* As a result, the Director has no basis to determine that a water right decreed in a separate tributary basin can be administered as part of the ESPA ground water basin merely by designating a GWMA under Idaho Code

Section 42-233b. The tributary basin must be treated and administered separately, because of the conclusive effect of the SRBA Final Decree.

D. The Conjunctive Management Rules Supplement Section 42-233b and Clarify the Limitations on the Director's Authority.

In the Director's letter, he recites Idaho Code Sections 42-233a and 42-233b as the Idaho statutory provisions that grant him authority to create an ESPA GWMA. Importantly, the Director also notes that, in the exercise of such authority, "[o]ne of the issues needing consideration will be the areal extent of the groundwater management area." He then proceeds to list 22 tributary basins that the Department's technical information suggests may "impact[] water stored in the ESPA." The Director lists "several potential tools" available to address management of the ESPA (and possibly 22 additional basins), but the Director does not identify the Department's Conjunctive Management Rules.

"The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

> [T]he Idaho Legislature has authorized the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994.

In re A&B Irrigation Dist., 155 Idaho 640, 650, 315 P.3d 828, 838 (2012) (quoting IDAHO CODE § 42-603). The CM Rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent

the diversion and use of water from one source impacts [others].'" *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (quoting *A&B Irrigation Dist.*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

The Director's authority to create the proposed ESPA GWMA, and limitations related to his power, are set forth within Idaho Code Section 42-233b and within the CM Rules. Administrative rules should be "construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement." *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). "IDAPA rules and regulations are traditionally afforded the same effect of law as statutes." *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004); *see also Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2003) ("A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein.").

The CM Rules repeatedly and expressly provide that they apply to GWMAs. The CM Rules "apply to ***all situations*** in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights." IDAPA 37.03.11.020.01 (emphasis added). The CM Rules "govern the distribution of water from ground water sources and areas having a common ground water supply." *Id.* Even more explicitly, the CM Rules "provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . ***designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code***." IDAPA 37.03.11.020.06 (emphasis added).

Although Idaho Code Section 42-233b provides the Director with the authority to designate a GWMA, that authority has explicit limitations. In this case, in addition to the express language of that statute, the CM Rules provide applicable limitations.

1. The Director does not have the authority to create the proposed ESPA GWMA.

The Director should not create a GWMA where all water rights have been adjudicated and are the proper subject of a newly created or modified water district, pursuant to Idaho Code Section 42-604. The CM Rules demonstrate this limitation. First, directly on point, CM Rule 50 provides: that:

> The Eastern Snake Plain area of common ground water supply ***will*** be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, ***when the rights to the diversion and use of water from the aquifer have been adjudicated, or will*** be designated a ground water management area.

IDAPA 37.03.11.050.01(d) (emphasis added).

The CM Rules provide that, upon the complete adjudication of ground water rights in the ESPA, a water district ***will*** be created or the ESPA ACGWS ***will*** be incorporated into an existing or expanded water district. The only condition before mandatory creation or incorporation is adjudication of ESPA water rights. A GWMA only was to be created, in the event necessary, before "the rights to the diversion and use of water from the aquifer have been adjudicated." The disjunctive "or" following the statement requiring creation or expansion of a water district upon adjudication of the aquifer demands that conclusion. A GWMA is a pre-adjudication administrative tool not applicable to the areas contemplated in the proposed ESPA GWMA.

In proposing and adopting the CM Rules, the Department contemplated an "either/or" approach to water districts and GWMAs, dependent entirely upon the status of adjudication of water rights within the basin. Comparing CM Rule 30.05 and CM Rule 30.06 reveals that adjudication of the water rights at issue is the lynchpin. If "the water rights have been adjudicated," the Department may treat the delivery call as a petition to create a new water district. IDAPA 37.03.11.030.05. If "the water rights have not been adjudicated," the Department may treat the delivery call as a petition for designation of a GWMA. IDAPA 37.03.11.030.06.

Also, CM Rule 30.07(h) demonstrates that the designation of a GWMA should only occur if ground water supply is insufficient "and modification of an existing water district or creation of a new water district cannot be readily accomplished ***due to the need to first obtain an adjudication of the water rights.***" IDAPA 37.03.11.030.07(h) (emphasis added). Water rights within the proposed ESPA GWMA have been adjudicated. The CM Rules do not contemplate the creation of a post-adjudication GWMA. Duly created or modified water districts supplant the legal authority to create a GWMA.

CM Rule 41 provides further evidence of this conclusion. It requires the Director to "utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule" when he enters an order upon a delivery call in a GWMA. IDAPA 37.03.11.041. Under CM Rule 40, relating to delivery calls within organized water districts, there is no similar requirement because the water rights within a water district have been adjudicated; those within a GWMA have not. Again, a GWMA is a pre-adjudication administrative tool. It does not apply to the areas described in the proposed ESPA GWMA.

Indeed, that is exactly how the Department has interpreted the issue in the past. *See* Section II.E. *infra.*

The CM Rules supplement Idaho Code Section 42-233b. They are integral to a complete understanding of the Department's administration of Idaho waters. The CM Rules clearly provide that a GWMA is a pre-adjudication tool to be replaced by water districts. Consequently, the proposed ESPA GWMA is not authorized under Idaho law.

2. Even if the Director has the authority to create the proposed ESPA GWMA, he must comply with the procedural requirements of the CM Rules and the Department's Procedural Rules.

As discussed *supra*, the CM Rules provide the tools to determine how various water sources are interconnected, and how, when, where, and to what extent the diversion and use of water from one source impacts others. *See AFRD No. 2, supra.* The Director's proposed ESPA GWMA clearly contemplates the interconnection of various sources of water, and an evaluation of the CM Rules in the context of the ground water management statutes cited by the Director is therefore appropriate. Administrative rules and regulations are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011). Interpretation of administrative rules should begin with an examination of the literal words of the rule, and such should be given their plain, obvious, and rational meanings. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006). Again, the ***"language should be construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement."*** *Mason v. Donnelly Club*, 135 Idaho at 586, 21 P.3d at 908 (emphasis added).

Under the CM Rules, an "area having a common ground water supply" ("ACGWS") is defined as:

> A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01.

Two requirements must be satisfied. First, the ACGWS must be a ground water source. Second, the diversion of ground water from the source must affect water supply in the source or affect the flow of water in a surface water source.

A "ground water management area" is defined 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." IDAHO CODE § 42-233b. And, a "critical ground water area" is defined as:

> any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

IDAHO CODE § 42-233a.

Legally, a GWMA must be co-equal with an ACGWS, because it necessarily satisfies each requirement to constitute an ACGWS. First, for the purposes of water use and administration, a "ground water basin" is a "ground water source."[4] Second, evaluation of the sufficiency of "ground water to provide a reasonably safe supply," based on current or projected

[4] In theory, a "basin" might not be a "source," but that would suggest the water within the basin was not the subject of appropriation and beneficial use. If a basin is not a source of water subject to diversion and use, neither the statutes nor the rules at issue here would apply.

withdrawals from a ground water basin, *see* § 42-233a, clearly contemplates that diversion from the basin "affects the ground water supply available to the holders of other ground water rights." *See* IDAPA 37.03.11.010.01. It is self-evident that a GWMA must be an ACGWS.

Because a GWMA is an ACGWS, designation of an ESPA GWMA that includes tributary basins falling outside the boundaries of the existing ESPA ACGWS requires compliance with the CM Rules. Again, the CM Rules so provide. *See* IDAPA 37.03.11.020.06 ("These rules provide the basis for the designation of ***areas of the state that have a common ground water supply*** and the procedures that will be followed in . . . ***designating such areas as ground water management areas*** as provided in Section 42-233(b), Idaho Code.") (emphasis added).

In particular, because a GWMA is an ACGWS, in order to designate a GWMA, the Director must first determine the applicable ACGWS. To do that, the Director must conduct a rulemaking, as CM Rule 50 demonstrates. In the alternative, and upon an appropriate petition by a water user pursuant to CM Rule 30, the Director must comply with CM Rule 31, which provides guidance and criteria concerning determinations of an ACGWS. Importantly, CM Rule 31 states that the Director's ACGWS findings "shall be included in the Order issued pursuant to Rule Subsection 030.07." IDAPA 37.03.11.031.05. Also, CM Rule 30.07 requires consideration of a contested case under the Department's Rules of Procedure prior to entering such an order. IDAPA 37.03.11.030.07.

In sum, the Director may not, as suggested in his Letter, simply decide whether an ESPA GWMA, inclusive of 22 tributary basins, should be created "[a]fter hearing from water users at the public meetings and considering the issues." Even if it were appropriate to create the contemplated ESPA GWMA, which it is not, the Director must hold a contested case hearing

upon petition by a party or a rulemaking in accordance with the Idaho Administrative Procedures Act concerning the boundaries of any ACGWS that will comprise such a GWMA, and otherwise comply with the CM Rules. Only then will the Director have the authority to designate an ACGWS as a GWMA (if at all), subject to governance in accordance with Idaho Code Section 42-233b.

3. The Director may not ignore his obligation to determine an ACGWS by citing Idaho Code Section 42-233b.

The foregoing limitations on the Director's authority under Section 42-233b and the CM Rules are supported by Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Co. v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016) (the "Memorandum Decision"). Consequently, the Director's proposal to include Basin 37 in an enormous ESPA GWMA, without a procedurally proper determination of an ACGWS, would be an invalid collateral attack upon the findings and conclusions of the Memorandum Decision.

In that decision, the Court reversed the Director's denial of a motion to dismiss based on the calling party's failure to file a compliant petition under the CM Rules. *See* Memorandum Decision at 12-14. Among other problems with the delivery call, the calling party had failed to describe an ACGWS, as required by CM Rule 30. *See id.* The Director acknowledged that he must determine an ACGWS in order to resolve the water delivery call, but asserted he could do so under CM Rule 40, and denied the motion to dismiss. *See id.* at 8. Here, the Director has proposed an ESPA GWMA, suggesting he may create it after simply considering concerns expressed at open public meetings. In contrast to his position in *Sun Valley Co. v. Spackman*, the Director now refuses to acknowledge that he must determine an ACGWS as part of his proposed action. He does not account for the due process concerns associated with

unilaterally subjecting those within the untested and unmeasured boundaries of a proposed ESPA GWMA to curtailment.

By pointing to a different statute, the Director does not change his obligation to formally determine an ACGWS. The determination of an ACGWS was of primary importance to Judge Wildman. He stated:

> Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.
>
> . . . .
>
> The area of common ground water supply in a surface to ground water call defines the world of juniors whose rights to use ground water may be curtailed. It is paramount that junior users who may be found to be within that area be given proper notice and the opportunity to be heard.

Memorandum Decision at 9.

The fact that the proposed ESPA GWMA is not a surface to ground water delivery call made by a senior has no significance. Idaho Code Section 42-233b grants the Director curtailment authority, and subjects water users within a GWMA to additional regulatory oversight by the Department. In order to subject water users to the Director's jurisdiction and oversight in the foregoing water delivery call proceedings, Judge Wildman held that the law requires a formal pleading and determination to identify an ACGWS relative to the Big Wood and Little Wood River. The Director's attempt to simply designate a GWMA that includes, very generally, the Big Wood and Little Wood River basins is an improper collateral attack upon that holding. The Director must abide by the formalities required under Idaho law to identify and

designate an ACGWS relative to the proposed ESPA GWMA, before administering water users' withdrawal of water from the Big Wood and Little Wood River basins pursuant to Idaho Code Section 42-233b.

Commensurate with fundamental fairness and due process, if the Director intends to create a GWMA comprised of an ACGWS that includes the Big Wood River basin, the Raft River basin, the Palisades basin, and numerous others, ground water users in each basin are entitled to more than a roadshow of public meetings and a brief comment period. While there can be no dispute that informal proceedings are generally contemplated and authorized under the Idaho Administrative Procedures Act and the Department's Procedural Rules, "an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings." *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010). Here, the CM Rules do not contemplate informal proceedings to decide the boundaries of a GWMA, which is an ACGWS. They require either a contested case proceeding in accordance with the Department's Procedural Rules, *see* CM Rules 30.7 and 31, or alternatively, as CM Rule 50 illustrates, a formal rulemaking.

E. The Proposal to Designate an ESPA GWMA Inclusive of Water District No. 37 is Contrary to Prior Decisions of the Director Regarding GWMA Designations Related to the ESPA.

Idaho Code Section 42-233b was created to provide for the designation of ground water management areas as an alternative to the designation of the more serious critical ground water areas, and to allow the Director to approve permits on a controlled basis in these areas. *See* S. 7842, 47th Leg. (Idaho 1982) (statement of purpose). Through the designation of GWMAs, the Director has the power to manage the distribution of ground water resources in times of drought or decline in existing ground water. IDAHO CODE § 42-237a. Department

precedent in designating GWMAs establishes that the Director uses this power to limit or deny applications for ground water in areas where ground water is limited.

Water districts serve a similar purpose to designated GWMAs in that they allow the Director to control the distribution of water from natural water sources within an area needing management. *See* IDAHO CODE § 42-602. The procedure for establishing a water district differs from the procedure for designating a GWMA, but the result is the same; measured control and administration of water rights in a designated area. The Director describes the two as follows:

> The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights and yet allow full economic development of the state's underground water resources in the public interest. See Idaho Code §§ 42-226, 42-237a.g, and 42-602.
>
> The Director has the general responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code and IDWR regulations.

Final Order Modifying the Boundaries of the American Falls Ground Water Management Area (Aug. 29, 2003) at 2, a copy of which is attached hereto as **Exhibit 5**. Because of the similarity in function, GWMAs are not meant to overlap water districts. This is made clear in the modification of the American Falls GWMA.

The American Falls GMWA was designated by Order on August 3, 2001, pursuant to Idaho Code Section 42-233b. *See* Order Designating the American Falls Ground Water Management Area (Aug. 3, 2001), a copy of which is attached hereto as **Exhibit 6.** The Twin Falls Canal Company and the North Side Canal Company submitted a written request asking for the Director to promptly designate a GWMA for Basin 35 pursuant to Idaho Code

Section 42-233(b). *Id.* at 1. The Department considered the request to be a petition for creation of a GWMA, including all of Basin 35, in accordance with Rule of Procedure, IDAPA 37.03.11030.06. *Id.* However, the Department considered the action to designate the GWMA for this portion of the ESPA as "a result of the Director's independent initiative and . . . not . . . in response to the petition of the canal companies." *Id.*

Two years later, the Director issued a Final Order Modifying the Boundaries of the American Falls GWMA because Water District Nos. 120 and 130 were established and these districts covered portions of the GWMA in Administrative Basins 35, 36, 41, and 43. *See August 29, 2003 Final Order* at 1. The Director stated that the GWMA was no longer needed in these portions because it covered Water District Nos. 120 and 130 and its "continued existence within the Water District boundaries may cause confusion in the administration of water rights." *Id.* The Director went on to say:

> The establishment of Water District Nos. 120 and 130, which includes the area within the boundaries of the American Falls GWMA over the ESPA located in Administrative Basins 35, 36, 41, and 43, provides the Director with the more comprehensive water administration authorities available under chapter 6, title 42, Idaho Code. These authorities together with the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) make it unnecessary to retain the current boundaries of the American Falls GWMA.

Id. at 2.

The Department's attempt to designate an ESPA GWMA that overlaps established water districts is contrary to the Department's past position. The existence of a water district avoids the need for a GWMA and the existence of a GWMA within a water district will only confuse the administration of water rights in the areas. The water administration authorities

already in place give the Department the authority to manage water use, and no additional administration procedure is required.

F. Any Order to "Cease or Reduce Withdrawal of Water" Under Idaho Code Section 42-233b Must Include Water Rights for Domestic Purposes.

The Idaho Legislature enacted the Idaho Ground Water Act in 1951. *See* 1951 Idaho Sess. 423. This significant legislation provided, for the first time in Idaho, a comprehensive framework for regulation of the use of ground water. Part of this framework included the specific admonition of Idaho Code Section 42-229. It states:

> The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act; provided however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of sections 42-201 -- 42-225, Idaho Code, may be completed under the provisions of said sections and rights to use of ground water may be thereby acquired. But ***the administration of all rights to the use of ground water***, whenever or ***however acquired*** or to be acquired, ***shall, unless specifically excepted*** herefrom, ***be governed by the provisions of this act.***

(Emphasis added.)

This language affirmatively answers any question of the inclusion of domestic water rights in any "cease or reduce withdrawal of water" order under Idaho Code Section 42-233b.

Without question, Idaho Code Section 42-227 "specifically excepted" excavation and use of ground water for domestic purposes from "the permit requirement under section 42-229, Idaho Code." IDAHO CODE § 42-227. However, this exception does not extinguish the requirements of appropriation of the water by diversion and application to a

beneficial use. In fact, the last sentence of Idaho Code Section 42-227 states, "Rights to ground water for such domestic purposes may be acquired by withdrawal and use." IDAHO CODE § 42-227.

Consequently, any domestic use water rights that were decreed in the SRBA constitute water rights subject to administration under the mandate of Idaho Code Section 42-229 ("administration of all rights to the use of ground water . . . shall . . . be governed by the provisions of this act."). They all were judicially confirmed as water rights created under the constitutional method of appropriation: "withdrawal and (beneficial) use." IDAHO CODE § 42-229.

Here, there are as many as 10,724 decreed domestic ground water rights within the Director's proposed ESPA GWMA. *See* Exhibit B to the Declaration of Leni Patton. In sum, decreed domestic ground water rights in the implicated administrative basins collectively have a diversion rate of 498.117 cfs for domestic use, as well as 214.557 cfs for stockwater. *See id.* A conversion of these decreed domestic ground water rights from instantaneous flow rates to annual acre-feet reveals potential decreed water use on the order of 515,950 acre-feet of ground water annually. That sum is significant.

If the Director proceeds to create the proposed ESPA GWMA—which he should not—these decreed domestic use water rights must be subject to any order under Section 42-233b to "cease or reduce withdrawal of water," just like every other type of decreed or licensed water right. Idaho Code Section 42-233b mandates this result.

> The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, ***shall order*** those water right holders on a time priority basis, within the area determined by the director [the GWMA], to cease or reduce withdrawal of water until

> such time as the director determines there is sufficient ground water . . . .

IDAHO CODE § 42-233b (emphasis added).

This language does not exempt domestic use water rights. Consequently, if the director issues an order based on insufficiency of water, decreed or licensed domestic use water rights within the proposed ESPA GWMA must "cease or reduce withdrawal of water" along with all other water rights, upon "a time priority basis." The plain language of the Idaho Ground Water Act mandates this result.

G. IDAPA 04.11.01.420-425 Apply to Department Proceedings.

Idaho Code Section 67-5220(5)(b) requires that an agency promulgating "its own procedures shall include in the rule adopting its own procedures ***a finding that states the reasons why*** the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." IDAHO CODE § 67-5220(5)(b) (emphasis added). No such finding stating the reasons why the relevant portion of the rules were inapplicable is included within the Department's Procedural Rules. *See* IDAPA 37.01.01.050. Accordingly, IDAPA 04.11.01.423 indeed does apply to the Department. *See* IDAHO CODE § 67-5220(5)(a).

III. CONCLUSION

For the foregoing reasons, Sun Valley respectfully requests a declaration by the Director in conformance with the requested relief set forth in the Petition.

DATED this 19th day of October, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

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

By _____
Matthew J. McGee – Of the Firm
Attorneys for Sun Valley Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2016, I caused a true and correct copy of the foregoing **SECOND AMENDED PETITION FOR DECLARATORY RULING REGARDING CREATION OF ESPA GROUND WATER MANAGEMENT AREA** to be served by the method indicated below, and addressed to the following:

Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St.
P.O. Box 83720
Boise, ID 83720-0098

( ) U.S. Mail, Postage Prepaid
(X) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Courtesy copies have also been provided by the method indicated below and addressed to the following:

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
Facsimile (208) 878-2548
Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District Intervenor Surface Water Coalition

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
163 Second Ave. W.
P.O. Box 63
Twin Falls, ID 83303-0063
Facsimile (208) 735-2444
Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company Intervenor Surface Water Coalition

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
380 S. 4th St., Suite 103
Boise, ID 83702
Facsimile (208) 287-0864
Attorneys for Intervenor City of Bellevue

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Joseph F. James
BROWN & JAMES
130 4th Ave. W.
Gooding, ID 83330
Facsimile (208) 934-4101
Attorneys for Intervenor Big Wood & Little Wood Water Users Association

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Michael C. Creamer
GIVENS PURSLEY LLP
601 W. Bannock St. (83702)
P.O. Box 2720
Boise, ID 83701-2720
Facsimile (208) 388-1300
Attorneys for Intervenor City of Hailey

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

A. Dean Tranmer
POCATELLO CITY ATTORNEY'S OFFICE
911 N. 7th Ave. (83201)
P.O. Box 4169
Pocatello, ID 83205
Facsimile (208) 239-6986
Attorneys for Intervenor City of Pocatello

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI, LLP
511 16th St., Suite 500
Denver, CO 80202
Facsimile (303) 825-5632
Attorneys for Intervenor City of Pocatello

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Randall C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE & BAILEY CHARTERED
201 E. Center St. (83201)
P.O. Box 1391
Pocatello, ID 83204-1391
Facsimile (208) 232-6109
Attorneys for Intervenor Idaho Ground Water Appropriators, Inc.

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Dylan B. Lawrence
J. Will Varin
VARIN WARDWELL LLC
242 N. 8th St., Suite 220
P.O. Box 1676
Boise, ID 83701-1676
Facsimile (866) 717-1758
Attorneys for Intervenor Water District 37-B Ground Water Association

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Scott L. Campbell

EXHIBIT C

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	**ORDER DESIGNATING THE EASTERN SNAKE PLAIN AQUIFER GROUND WATER MANAGEMENT AREA**

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes and orders as follows:

FINDINGS OF FACT

Procedural Background

1. On July 7, 2016, the Director sent a letter to potentially interested water users stating that the Department "is considering creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA)." Ltr. from Gary Spackman, Dir., Idaho Dept. of Water Res. to Interested Parties 1 (July 7, 2016) ("*Letter*").[1] The *Letter* invited water users to participate in public meetings scheduled by the Director. The purpose of the public meetings was to provide water users and interested persons an opportunity to learn more about the possible ground water management area and to express their views regarding the proposal.[2] *Id.* The *Letter* stated that "[a]fter hearing from water users at the public meeting and considering the issues," the Director would "decide whether a ground water management area should be created." *Id.*

2. The *Letter* discussed historic trends of declining ESPA water levels, Snake River flows, and spring discharges that had begun in the 1950s and had continued steadily, despite brief "periods of recovery." *Id.* The *Letter* also stated that "[w]ater users and the Water Resources Board are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines," but "future conditions, including climate and water use practices are unknown." *Id.* at 2.

3. The *Letter* stated that pursuant to Idaho Code § 42-233b, the Director is authorized to designate "ground water management areas," that the statute "identifies several potential tools available to the Director within a ground water management area to properly

[1] A copy of the letter is on the Department's website at: https://www.idwr.idaho.gov/files/ground_water_mgmt/20160707-Letter-to-Waters-Users-from-Gary-Spackman-Re-Proposed-ESPA-GWMA.pdf

[2] The Department also issued a news release on July 13, 2016, regarding the meetings.

manage the resource," and that "formation of a ground water management area would have distinct advantages" over administering only through conjunctive management delivery calls, because the Department can "consider the aquifer as a whole." *Id.* at 2-3. The *Letter* stated "[t]he question is whether the ESPA is approaching the conditions of a critical ground water area (not having sufficient ground water to provide a reasonably safe supply.)." *Id.* at 2.

4. The *Letter* also stated that "[o]ne of the issues needing consideration will be the areal extent of the ground water management area," and that "[t]he Department's technical information suggests that the area that impacts water stored in the ESPA and spring discharge extends into tributary basins." *Id.* at 3. The *Letter* listed twenty-two tributary basins and stated that "[w]ater users in those areas are invited to participate" in the public meetings. *Id.* at 3. The tributary basins listed in the *Letter* included the Big Wood River basin. *Id.* at 3.

5. On July 25, 2016, the date of the first public meeting (in Hailey), Sun Valley Company filed with the Department a *Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area* ("*Petition*"). Sun Valley Company filed an *Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*, on July 29, 2016 ("*Amended Petition*"). Sun Valley Company filed a *Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*, on October 19, 2016 ("*Second Amended Petition*").[3] The *Petition*, the *Amended Petition*, and the *Second Amended Petition* (collectively, "*Petitions*") seek declaratory rulings pursuant to Idaho Code § 67-5232 and Rule 400 of the Department's Rules of Procedure (IDAPA 37.01.01.400).

6. As discussed in the *Order Denying Petition for Declaratory Rulings*, which is issued herewith, the *Petitions* raised a number of the same factual and legal issues that were already pending before the Department in considering whether to designate a ground water management area for the ESPA.

7. The Department conducted the public meetings referenced in the *Letter* on the scheduled dates (July 25-28) at the scheduled times and locations. Department staff in attendance at the public meetings included the Director, Special Advisor to the Director Rich Rigby, and Hydrogeologist Sean Vincent. The Director began each meeting with opening comments. Rich Rigby presented the legal, factual, and policy aspects of designating an ESPA ground water management area. Sean Vincent presented technical information in a presentation titled "Hydrologic Considerations for the Possible Establishment of a Ground Water Management Area for the Eastern Snake Plain Aquifer" ("ESPA GWMA Presentation"). After the Department presentations, the public commented and asked questions. At the conclusion of the public participation, the Director closed each meeting with remarks. The Director invited written comments, to be submitted by September 1. The Department recorded the audio presentations and public statements for all the public meetings except the Terreton meeting.[4]

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[3] The Sun Valley Company also filed with the Department on October 19, 2016, the *Declaration of Leni Patton* and the *Declaration of Maria Gamboa*.

[4] Due to a technical problem, there is no audio recording of the public meeting in Terreton.

8. At the public meetings, the Department presented hydrologic information about the possible "areal extent" of an ESPA ground water management area, including information about tributary basins. The Department also discussed possible administration of ground water in a ground water management area designated under Idaho Code § 42-233b. Comments and questions at the public meetings, and subsequent written comments, addressed many of these same matters. Some attendees and commenters opposed designation of an ESPA ground water management area or inclusion of tributary basins, while others supported one or both.[5]

9. Some of the comments and questions at the public meetings, and subsequent written comments, raise issues of the interpretation and application of the CM Rules and Idaho Code § 42-233b in specific and possibly unique factual circumstances. Some of the comments and questions seek further factual or technical information regarding the basis for designating an ESPA ground water management area, or assert that additional information is necessary before a ground water management area can be designated. Some of the comments and questions seek further factual or technical information regarding whether individual tributary basins (such as the Big Wood River basin) should be included in an ESPA ground water management area.

The Eastern Snake Plain Aquifer (ESPA)

10. The ESPA is defined as the aquifer underlying an area of the Eastern Snake River Plain. The ESPA is about 170 miles long and 60 miles wide as delineated in the report 'Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho,' U.S. Geological Survey Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962, In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694* (Jan. 29, 2014) ("*Final Rangen Order*") at 15; *Rangen, Inc. v. IDWR*, 159 Idaho 798, 802, 367 P.3d 193, 197 (2015); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 793, 252 P.3d 71, 74 (2011); *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, et al.* (Apr. 29, 2008) ("*SWC Delivery Call Recommendation*") at 3.

11. The ESPA is a large and highly productive aquifer composed predominantly of fractured Quaternary basalt having an aggregate thickness that in some locations may exceed several thousand feet. *Geohydrologic Framework of the Snake River Plain*, USGS Professional Paper 1408-B, Plate 3 (1992); *Final Rangen Order* at 15; *SWC Delivery Call Recommendation* at 3; William G. Graham & Linford J. Campbell, *Ground Water Resources of Idaho* (IDWR, Aug. 1981) at 16, 29; *Idaho State Water Plan* (Idaho Water Res. Bd., Nov. 2012) ("*2012 State Water Plan*") at 51; *Rangen*, 159 Idaho at 802, 367 P.3d at 197; Enhanced Snake Plain Aquifer Model Version 2.1—Final Report (IDWR 2013) ("*ESPAM 2.1 Final Report*") at 8-9, 11. The basalt generally decreases in thickness toward the margins of the aquifer. *Clear Springs Foods*, 150 Idaho at 793-94, 252 P.3d at 74-75; *ESPAM 2.1 Final Report* at 12. The fractured Quaternary

[5] Public comment letters can be viewed on the Department's website at: https://www.idwr.idaho.gov/water-rights/ground-water-management-areas/proposed.html.

basalt is generally characterized by high hydraulic conductivity. *Final Rangen Order* at 15; *Clear Springs Foods*, 150 Idaho at 793-94, 252 P.3d at 74-75. The presence of interbedded sediments, a volcanic rift zone, and less permeable basalts result in lower hydraulic conductivity in some areas of the aquifer. *Final Rangen Order* at 15; *SWC Delivery Call Recommendation* at 3. Notable areas of lower hydraulic conductivity are in the vicinity of Mud Lake and in the Great Rift zone. The Great Rift zone extends north to south across the plain from the Craters of the Moon to just west of American Falls Reservoir. *Final Rangen Order* at 15, 27; *ESPAM 2.1 Final Report* at 12. While overall ground water movement through the ESPA is from the northeast to the southwest, Aquifer Recharge Committee Minutes (May 27, 1993, App. A, C); *Hydrologic Considerations for the Possible Establishment of a Ground Water Management Area for the Eastern Snake Plain Aquifer* (IDWR, Jul. 25, 2016) ("*ESPA GWMA Presentation*") at 6; *ESPAM 2.1 Final Report* at 12, there can be local variations in the direction and rate of ground water movement. Aquifer Recharge Committee Minutes (Oct. 6, 1993 at 3); *SWC Delivery Call Recommendation* at 3. For instance, areas of lower hydraulic conductivity impede the transmission of ground water through the aquifer, and can influence the direction of ground water movement. *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, ___, 369 P.3d 897, 913 (2016); *SWC Delivery Call Recommendation* at 3.

12. The ESPA is hydraulically connected to surface water sources, including the Snake River. Aquifer Recharge Committee Minutes (Sep. 8, 1993 App. A at 3); *Final Rangen Order* at 15; *SWC Delivery Call Recommendation* at 3; *2012 State Water Plan* at 51; *Rangen*, 159 Idaho at 798, 802, 367 P.3d at 197; *Clear Springs Foods*, 150 Idaho at 793-94, 252 P.3d at 74-75. The ESPA discharges to the Snake River at several locations, notably springs in the American Falls reach above Milner Dam, and in the Thousand Springs reach below Milner Dam. Aquifer Recharge Committee Minutes (May 27, 1993, App. A, C); *id.* (Oct. 9, 1993 at 3); *Final Rangen Order* at 15; *Rangen, Inc. v. IDWR*, 159 Idaho 798, 802, 367 P.3d 193, 197 (2015); *ESPAM 2.1 Final Report* at 13. Surface water sources hydraulically connected to the ESPA may either gain water from the ESPA or lose water to the ESPA. Aquifer Recharge Committee Minutes (Aug. 5, 1993 at 13); *id.* (Sep. 8, 1993 App. A at 3); *SWC Delivery Call Recommendation* at 3; *2012 State Water Plan* at 51; *Clear Springs Foods*, 150 Idaho at 793-94, 252 P.3d at 74-75; *ESPAM 2.1 Final Report* at 14. The existence and magnitude of surface water source gains or losses in any particular location depends primarily on local ground water elevations and hydraulic conductivity of the interconnecting geologic structure. Aquifer Recharge Committee Minutes (Aug. 5, 1993 at 4); *Final Rangen Order* at 15-16; *Rangen*, 159 Idaho at 802, 367 P.3d at 197; *Clear Springs Foods*, 150 Idaho at 793-94, 252 P.3d at 74-75; *ESPAM 2.1 Final Report* at 14. Local ground water elevations, in turn, can be influenced by natural events (e.g., precipitation or drought, seepage and underflow from tributary basins), human activities (e.g., ground water withdrawals, surface water irrigation practices, or managed recharge), and the geologic structure and hydraulic conductivity of nearby portions of the ESPA and/or tributary basins. Aquifer Recharge Committee Minutes (Aug. 5, 1993 at 4-5).

13. A "tributary basin" is a basin that contributes water to the ESPA, even in small or intermittent quantities. The water in the ESPA comes primarily from tributary basins, either groundwater underflow from tributary aquifers or water in tributary streams that infiltrates directly through the streambed and into the ESPA or indirectly when it is used for irrigation. *ESPAM 2.1 Final Report* at 99, Figure 8; ESPA GWMA Presentation.

14. Ralston and others concluded that every acre-foot of water consumptively used in the tributary basins ultimately reduces the flow of the Snake River. Ralston, D. R., Broadhead, R., and Grant, D. L., 1984, Hydrologic and Legal Assessment of Ground Water Management Alternatives for Idaho: Idaho Water Resources Research Institute, Technical completion Report WRIP/371405, University of Idaho, Moscow, Idaho, 159 p. ESPA GWMA Presentation; Aquifer Recharge Committee Minutes. Consumptive use in tributary basins generally reduces storage in the ESPA because the aquifer is hydraulically connected to the Snake River.

15. The following "tributary basins" contribute water to the ESPA:

Clover Creek	Birch Creek	Palisades Creek	Bannock Creek
Thorn Creek	Medicine Lodge Creek	Willow Creek	Rock Creek
Big Wood River	Beaver Creek	Blackfoot River	Raft River
Little Wood River	Camas Creek	Ross Fork	Goose Creek
Big Lost River	Henry's Fork	Portneuf River	Big Cottonwood Creek
Little Lost River	Teton River		

ESPA GWMA Presentation; *Letter*.

16. Often aquifers in the tributary basins differ from the ESPA in that the tributary aquifers are composed primarily of materials other than Quaternary basalt, such as alluvial sediments. While all of these tributary basins are hydraulically connected to the ESPA, the nature and extent of hydraulic connection varies. Many of these tributary basins are hydraulically connected to the ESPA by a combination of ground water underflow and seepage from tributary streams. Some are connected primarily by ground water underflow while others are connected to the ESPA primarily by seepage from tributary streams. ESPA GWMA Presentation; Graham & Campbell, Ground Water Resources of Idaho.

17. In some tributary basins there are water supply, use, and management issues that are specific or unique to the individual basin. Examples are the Big Lost River basin and the Portneuf River basin. Some water supply, use, and management issues are already being addressed through local efforts. The Director has designated ground water management areas or critical ground water areas in some of the tributary basins. Examples are the Artesian City, Cottonwood, West Oakley Fan, and Oakley Kenyon Critical Ground Water Areas in the Goose Creek basin.

18. The ESPA is a vital source of water for the State of Idaho. Approximately a million acres of land on the Snake River Plain are irrigated by ground water pumped directly from the ESPA. The ESPA is hydraulically connected to the Snake River and indirectly supports surface water irrigation of roughly another million acres. ESPA-supported agriculture is crucial to Idaho's food supply and to the economies of communities across southern Idaho.

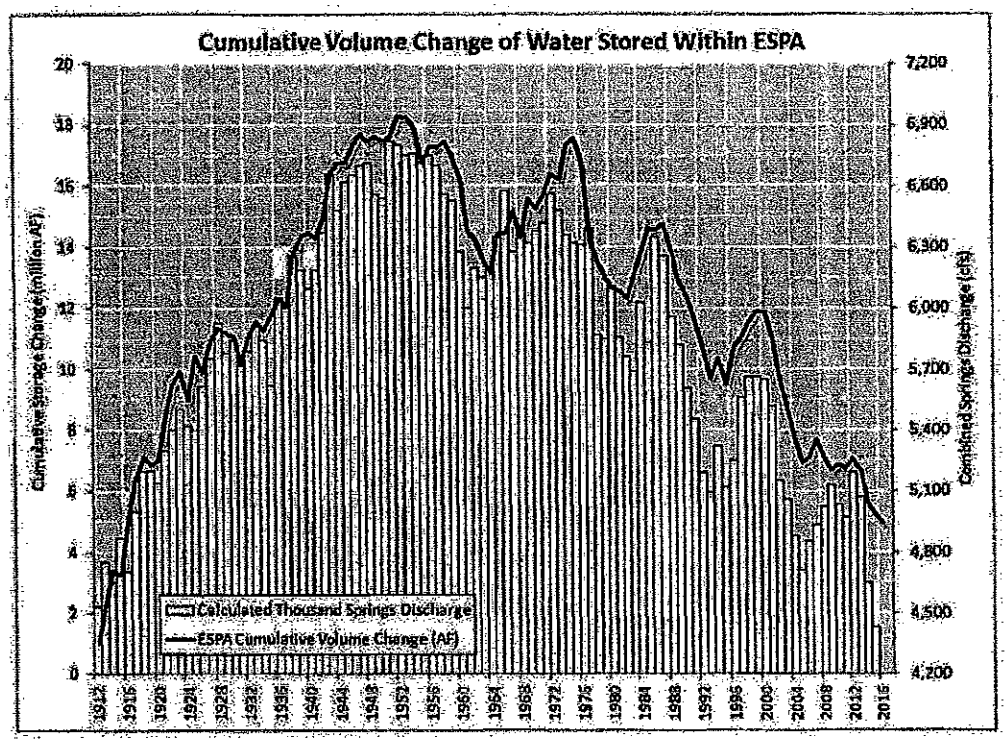
ESPA Storage & Spring Discharge Trends

19. Initial irrigation development in Idaho began in the second half of the 19th century when water was diverted from the Snake River and its tributaries by canals and ditches and delivered to crops in the field. Under this system of "gravity" or "flood" irrigation, the reliable irrigation season flow of the Snake River above Milner Dam had been fully appropriated by the early 1900s. Much of this irrigation water was not consumed by crops, however, but rather seeped into the ground. This "incidental" recharge significantly increased storage in the ESPA and spring discharges into the Snake River. Before ground water development of the ESPA began in earnest in the early 1950s, the ESPA gained an estimated 17 million acre-feet ("AF") of storage. Spring discharges into the Snake River in the canyon downstream from Milner Dam increased from their pre-irrigation era levels of approximately 4,200 cubic feet per second ("cfs") to more than 6,500 cfs. ESPA GWMA Presentation; *Letter*; 2012 State Water Plan; Aquifer Recharge Committee Minutes.

20. Large scale ground water development of the ESPA began in the late 1940s using vertical turbine pumps powered by relatively inexpensive electricity from Idaho Power Company's hydropower projects in the canyon downstream from Milner Dam. During the same period, the amount of "incidental" recharge to the ESPA began decreasing as a result of conversions from "gravity" or "flood" irrigation to more efficient systems (such as sprinklers). 2012 State Water Plan; Aquifer Recharge Committee Minutes.

21. Some individuals and entities suggest in their written comments that existing hydrologic data does not support a conclusion there is insufficient ground water to provide a reasonable safe supply for existing uses in the basin. *See* Ltr. from Rob Harris, attorney for the City of Idaho Falls, to Gary Spackman, Dir. of Idaho Dept. of Water Res. 3 (Sept. 1, 2016). Hydrologic data describing the combined ESPA Snake River system demonstrates otherwise.

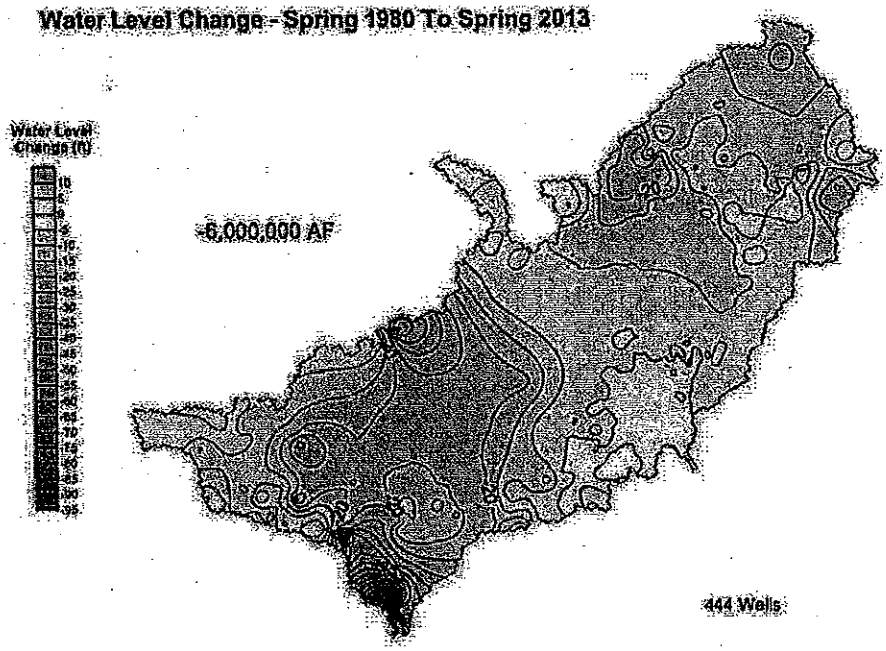
22. ESPA storage and spring discharges began to decline due in part to the increased ground water pumping and the decrease in "incidental" recharge; droughts and changes in cropping patterns also contributed to the declines. 2006 S.C.R. No. 136 (2006 Idaho Sess. Laws 1392); Aquifer Recharge Committee Minutes (May 27, 1993 & App. A, C); *id.* (Aug. 5, 1993 at 5, 13-14 & App. A at 2-3, App. C at 1, App. D at 7); *id.* (Sep. 8, 1993 App. A at 7); *Final Rangen Order* at 12 (discussing the reasons for declines in spring flows); *SWC Delivery Call Recommendation* at 5-7; *2012 State Water Plan* at 52; *ESPA GWMA Presentation* at 23; IWRB Web Page for ESPA CAMP (https://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/ESPA/default.htm); *ESPAM 2.1 Final Report* at 13-15. The following figure illustrates the change in aquifer storage content and combined spring discharges from 1912 to 2015.



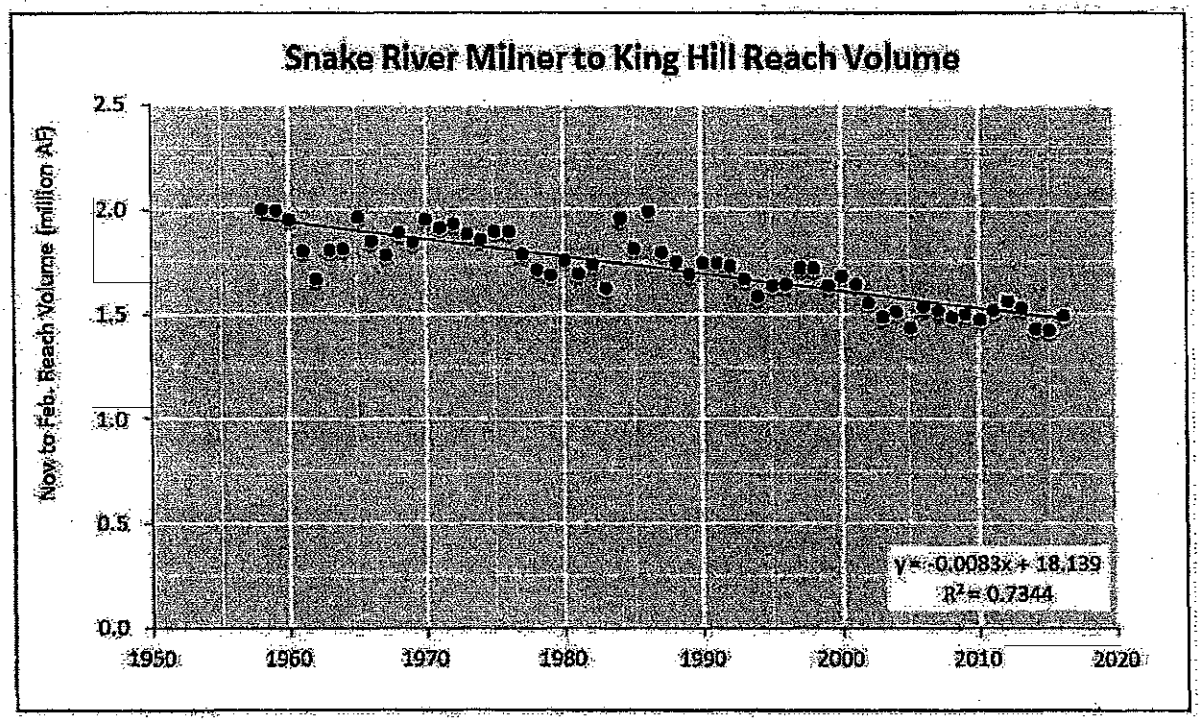
23. Between 1952 and 2013, ESPA storage decreased by an estimated 13 million AF, and spring flows at Thousand Springs dropped from a peak of approximately 6,700 cfs to 5,200 cfs. *See* Aquifer Recharge Committee Minutes (May 27, 1993, App. C) (describing declines from 1953 to 1993); *id.* (Aug. 5, 1993 App. C at 1) (describing spring discharge trends from the early 1900s to 1993); *id.* (Sep. 8, 1993 App. A at 7) (describing ESPA water levels and spring discharges); *Final Rangen Order* at 11 (stating that spring flows in the area of the Curren Tunnel "declined by over 33 cfs between 1966 and 2012"); *id.* at 16 (discussing declines in aquifer levels and spring flows from 1980 to 2008); *2012 State Water Plan* at 52; *ESPA GWMA Presentation* at 9, 10-22, 24; *Rangen*, 159 Idaho at 802, 367 P.3d at 197. From 1980 to 2013, ESPA storage declined by an even greater average of 260,000 AF annually demonstrating that declines in the aquifer are accelerating. ESPA storage and spring discharges have continued to decline since 2013. *ESPA GWMA Presentation* at 9, 10-22, 24. While there have been brief periods of recovery (increased aquifer levels and spring discharges), the overall downward trend

of decreasing ESPA storage and spring discharges has continued. 2006 S.C.R. No. 136 (2006 Idaho Sess. Laws 1392); Aquifer Recharge Committee Minutes (Sep. 8, 1993 App. A at 7) (describing ESPA water levels and spring discharges from 1900 to 1990); *ESPA GWMA Presentation* at 9, 10-22, 24. Each recovery peak is lower than the previous peak, and each declining trough is lower than the previous trough. Aquifer Recharge Committee Minutes (May 27, 1993 App. B); *ESPA GWMA Presentation* at 9, 10-22, 24.

24. The following figure illustrates spatially distributed changes in water surface elevations within ESPAM from 1980 to 2013. Changes in water surface elevations are based on mass water level measurements conducted by the IDWR and the United States Geologic Survey ("USGS") in 1980 and 2013. In that time, total aquifer content declined by approximately six million AF. Between 1980 and 2013, the average depth to water surface across the entire ESPA declined by approximately 14 feet.



25. The following figure illustrates declining discharge from the ESPA. From 1958 to present, reach gains from Milner to King Hill have been in continuous decline.[6] The gain in the Milner to King Hill reach of the Snake River is comprised primarily of ESPA spring discharge in the Thousand Springs area, but also includes contribution from sources such as surface water tributaries, irrigation return flows, and ground water discharge from sources south of the Snake River. The figure quantifies the total reach gain in acre-feet for the period November through February for years 1958 through 2016.

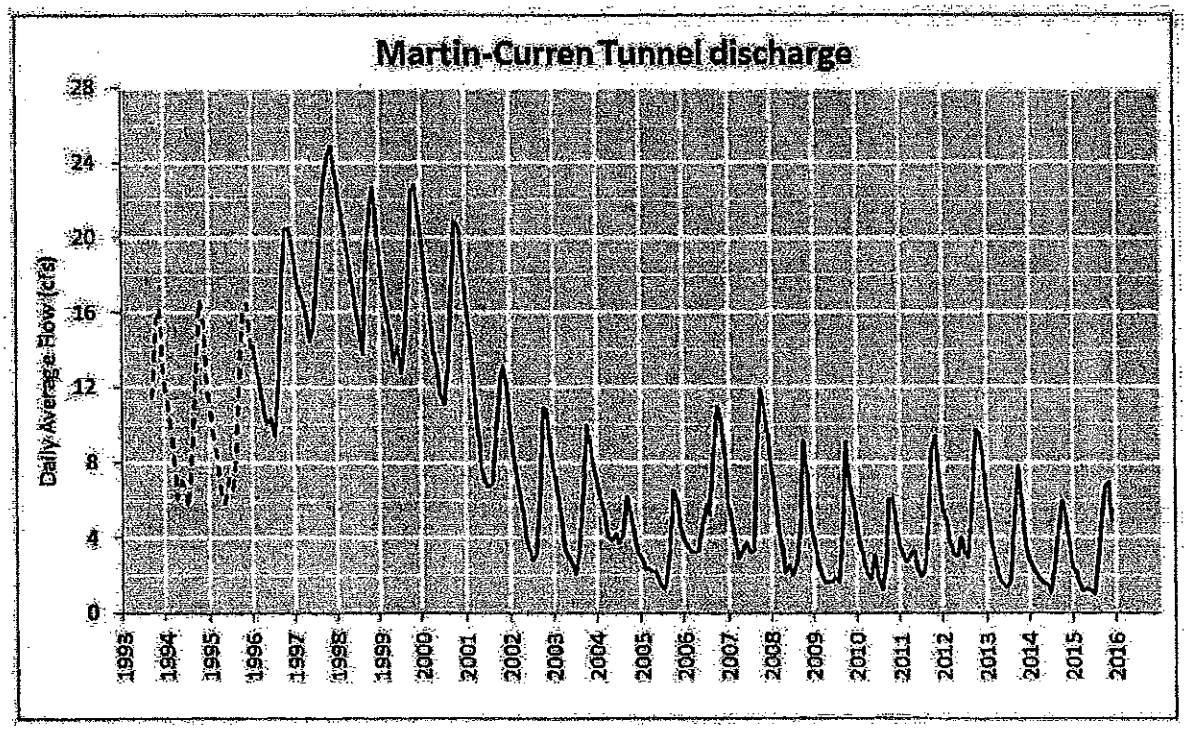


The reach gain between Milner and King Hill was calculated by subtracting flow measured at Milner from flows measured at King Hill. The total reach gain volume was quantified during the non-irrigation months when ESPA spring discharge comprises the largest contribution of the reach gains volume and minimizes the contributions from tributary inflows and impacts from irrigation practices. While there are annual fluctuations in the Milner to King Hill reach gain, the overall volume decreased at an approximate rate of 8,000 AF per year over the 59 year period. The total difference in flow from 1958 to present is approximately 500,000 AF.

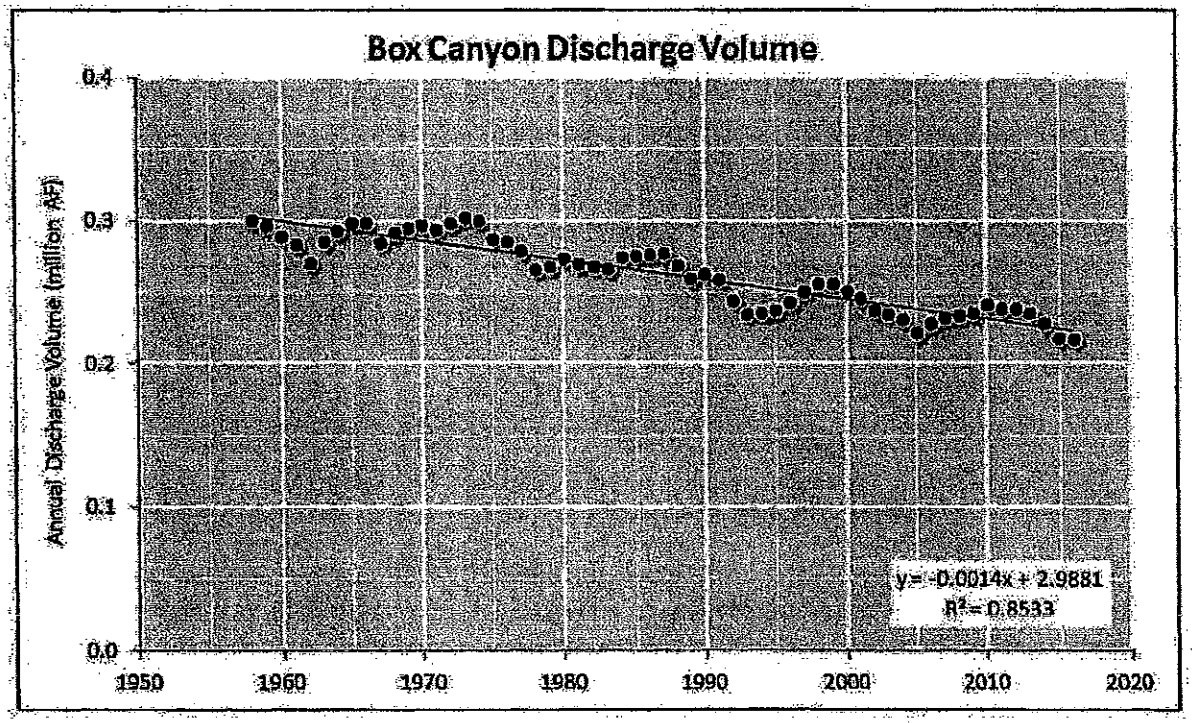
[6] 1958 to present was chosen as the period of analysis as it represents the "modern" operating conditions on the Snake River above King Hill. The "modern" designation characterizes operations as they have existed since the completion and operation of the Palisades Dam and the implementation of the Winter Water Savings agreements between the United States Bureau of Reclamation and the storage water spaceholders of American Falls, Jackson, and Palisades Reservoirs. In addition, a large number of water rights diverting ground water from the ESPA and spring water from the Thousand Springs complex were licensed and decreed after 1958 and are currently administered by the Department.

26. As part of the consideration of whether there is "sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands or other uses in the basin," other hydraulically connected sources must be considered. Hydraulically connected water sources include the Snake River and spring complexes in the American Falls and Thousand Spring areas. The aquifer discharges to the Snake River, increasing gains in the Snake River. Increased gains in the river are subsequently diverted onto the Eastern Snake River Plain for irrigation and other uses.

27. Martin-Curren Tunnel is the decreed water source for eleven irrigation water rights with a total authorized diversion rate of 11.29 cfs and three fish propagation water rights with a total authorized diversion rate of 75.99 cfs. IDWR began monitoring discharge at the Martin-Curren Tunnel in 1993, following complaints of insufficient water supply for irrigation. In 2011, tRangen, Inc., which owns and operates the Rangen Fish Hatchery, filed a delivery call against junior ground water users claiming injury from alleged reductions in discharge from the Martin-Curren Tunnel. In response to the delivery call, the Department found that Rangen, Inc. was injured in the amount of 9.1 cfs by junior ground water pumping. Tunnel discharge declined between 1993 and 2015, and tunnel discharge has continued to be insufficient to supply irrigation and fish propagation uses. In 2014 and 2015, the annual average tunnel discharge was three cfs and the monthly average flow in July was one cfs. Refer to the following figure for illustration of Martin-Curren Tunnel discharge from 1993 to 2015. Discharge measurement of the Martin-Curren Tunnel was modified in 1996 to the current practice and is illustrated in the figure by the transition from a dashed to solid line in the hydrograph.



28. Box Canyon is a large spring in the Thousand Springs complex. Flows in Box Canyon have been measured continuously beginning in 1950.[7] Box Canyon has the longest flow measurement record of any spring in the Thousand Spring complex and is an indicator spring for discharge from the Thousand Springs complex. In addition, Box Canyon discharge is a predictor variable in the Department's SWC Delivery Call Methodology Order used to compute the water supply available to the SWC for the upcoming irrigation season. Box Canyon discharge was selected as a predictor variable by a technical working group comprised of representatives from both IGWA and the SWC. Box Canyon discharge was selected by the technical working group as a predictor variable in a multi-linear regression model to represent and account for aquifer discharge to the reaches of the Snake River that supply water to the SWC. Box Canyon discharge is trending down in the period of record reviewed (1958 to present) as depicted in the figure below.

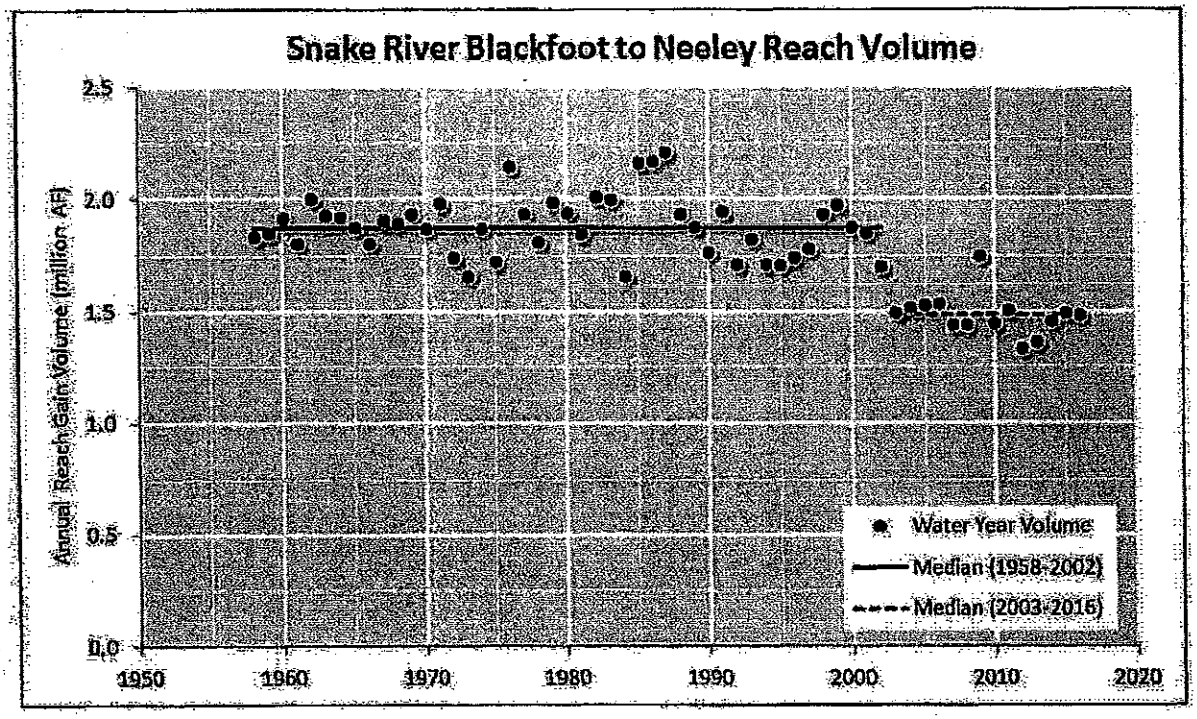


The annual Box Canyon discharge volume has decreased from approximately 301,000 AF in water year 1958 to 218,000 AF in water year 2016, a loss of 83,000 AF. The loss occurred at an average annual rate of approximately 1,370 AF.

29. In 2005 the SWC filed a delivery call against junior ground water users alleging injury to the SWC surface water rights diverted between the American Falls Reservoir Dam and the Minet Dam on the Snake River. In response to the delivery call, the Department has found that injury occurs to the SWC from junior ground water pumping during water years when the

[7] Gage 13095500 "Box Canyon Springs NR Wendell ID" is a continuous stream flow monitoring gaging station operated and maintained by the United States Geologic Survey.

SWC's reasonable in-season demand is greater than their water supply as determined by the Department SWC Delivery Call Methodology Order. The annual reach gain in the Snake River from the near Blackfoot to Neeley reach of the Snake River is commonly considered an indicator of the SWC's natural flow water supply. Reach gains from 1958 to present are illustrated in the figure below.



The annual reach gain between Blackfoot and Neeley has been calculated using the State's Reservoir Operations Planning Model[8] since the 1970s. The near Blackfoot to Neely reach gain represents the amount of flow accruing to the Snake River below the Snake River [near] Blackfoot gage[9] and above the Snake River [near] Neeley gage[10]. Inflows from the Portneuf River near Pocatello[11] are subtracted from the volume. Most of the reach gain in this estimate is discharge from the ESPA to the Snake River from a series of springs located above and within the American Falls Reservoir. Some of the reach gain is unmeasured tributary inflow. From

[8] The Department has maintained a planning model on behalf of the Idaho Water Resources Board since the 1970s to help the Board evaluate how changes in reservoir operations would impact surface water shortages in the Snake River basin. *River Operations Studies for Idaho, Idaho Water Resource Board, Boise, Id,* Idaho Water Resource Board, 1973.

[9] Gage 13069500 "Snake River nr Blackfoot, ID" is a continuous stream flow monitoring gaging station operated and maintained by the United States Geologic Survey.

[10] Gage 13077000 "Snake River at Neeley, ID" is a continuous stream flow monitoring gaging station operated and maintained by the United States Geologic Survey.

[11] Gage 13075500 "Portneuf River nr Pocatello" is a continuous stream flow monitoring gaging station operated and maintained by the United States Geologic Survey.

1958 through 2002 the total annual gains exceeded 1,600,000 AF. Since 2003, the annual reach gain has declined and in only one year, 2009, has the reach gain exceeded 1,600,000 AF.

30. As discussed below, the potential for ground water withdrawals from the ESPA to adversely affect surface water flows was recognized when large scale ground water development began. Numerous actions over the years have attempted to address the trend of declining ESPA storage and spring discharges.

31. The Idaho Legislature enacted comprehensive ground water legislation in 1951 and 1953. 1951 Idaho Sess. Laws 423-29; 1953 Idaho Sess. Laws 277-91 ("Ground Water Act."). The Ground Water Act explicitly recognized the potential for ground water use to affect stream flows and senior surface water rights, and included provisions for resolving claims that junior priority ground water rights were adversely affecting senior surface water rights. 1953 Idaho Sess. Laws 285-86, Idaho Code §§ 42-237a(g), 42-237b. The Ground Water Act authorized the Director (then the "state reclamation engineer") to designate "critical ground water areas," 1953 Idaho Sess. Laws 278, 281; Idaho Code §§ 42-226, 42-233a, and was later amended to authorize designation of "ground water management areas." 1982 Idaho Sess. Laws 165; Idaho Code § 42-233b. Subsequent amendments to the "ground water management area" provisions authorized the Director to approve ground water management plans for, among other things, managing the effects of ground water withdrawals on hydraulically connected surface waters. 2000 Idaho Sess. Laws 187; Idaho Code § 42-233b. The Department has designated a number of relatively small "critical ground water areas" and "ground water management areas" over the years.

32. In the 1960s and 70s, ground water pumping in the Cottonwood Creek, Buckhorn Creek, and Raft River areas of Cassia County resulted in disputes and litigation among ground water users. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976).

33. The Idaho Power Company filed lawsuits in the late 1970s and early 1980s that sought to protect the company's hydropower water rights at Swan Falls Dam and several other projects from upstream depletions. The resulting controversy was resolved through the settlement proposed in the 1984 Swan Falls Agreement, which among other things included a proposal that the State Water Plan be amended to increase the minimum flows at the Murphy gaging station (downstream from Swan Falls) while retaining a "zero" minimum flow at Milner Dam. 2012 State Water Plan; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *Memorandum Decision and Order on Cross-Motions for Summary Judgment, SRBA Consolidated Subcase No. 00-92023* (Apr. 18, 2008). The Swan Falls Agreement and State Water Plan recognized that Snake River flows downstream from Milner Dam "may consist almost entirely of ground-water discharge during portions of low water years," and the ESPA "which provides this water must therefore be managed as an integral part of the river system." 1986 State Water Plan at 35.[12] The State Water Plan was amended to include the Murphy and

[12] This framework was reaffirmed in the latest revision of the State Water Plan, as will be discussed.

Milner minimum flows, and the Legislature ratified the amendments. 1985 Idaho Sess. Laws 514.[13]

34. In 1982, the Idaho Legislature enacted legislation authorizing the creation of aquifer recharge districts, and declaring the appropriation and underground storage of water by aquifer recharge districts to be a beneficial use of water. 1982 Idaho Sess. Laws 538-39. In 1986, the Legislature established an interim legislative committee on ground water resources "to undertake and complete a study of the statutory framework for controlling the allocation, development, and distribution of the State's ground water resources," and to "report findings, recommendations and recommended legislation." 1986 Idaho Sess. Laws 873. In 1993, the Legislature established an interim legislative committee on aquifer recharge "to undertake and complete a study regarding recharge of Idaho's aquifers" and "make recommendations for implementation of a recharge policy." 1993 Idaho Sess. Laws 1572.

35. In 1992, Department Director R. Keith Higginson issued a moratorium order finding, among other things, that aquifers in the Snake River basin were "being stressed by the reduction in natural recharge [due to drought], from reduced recharge due to changes in diversion and use of surface waters . . . and by the increased volume of pumping." *Moratorium Order, In the Matter of Applications for Permits for Diversion and Use of Surface and Ground Water Within the Snake River Basin Upstream From the USGS Gauge on the Snake River Near Weiser* (May 15, 1992), at 1. The order found that "lowered aquifer levels in the aquifers across much of the Snake River Basin . . . have resulted in numerous wells . . . becoming unusable," and "[l]owered ground water levels also reduce spring discharge needed to maintain stream and river flows." *Id.* The Director therefore ordered that "a moratorium is established on the processing and approval of presently-pending and new applications for permits to appropriate water from all surface and ground water sources within the Snake River Basin" upstream from the USGS gage near Weiser. *Id.* at 2.[14] The moratorium has been modified but remains in place for the ESPA, as well as much of the surrounding area. *Amended Moratorium Order, In the Matter of Applications for Permits for Diversion and Use of Surface and Ground Water Within the Eastern Snake River Plain Area and the Boise River Drainage* (Apr. 30, 1993).

36. In 1993, owners of water rights for water flowing from the Martin-Curren Tunnel filed a delivery call with the Department seeking curtailment of junior-priority ground water rights diverting from the ESPA. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). The *Musser* litigation ultimately led to adoption of the Department's "Rules for Conjunctive Management of Surface and Ground Water Resources." IDAPA 37.03.11.000 –.050.

37. In 1994, A&B Irrigation District filed a conjunctive management delivery call with the Department, seeking administration of junior priority ground water rights from the

[13] The Legislature also authorized commencement of the SRBA, "'in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam.'" *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997) (citation omitted).

[14] The order recognized certain limited exceptions to the moratorium, including applications for domestic use and non-consumptives uses. *Id.* at 2-3.

ESPA. A&B, the Department, and others entered into an agreement in 1995 that, among other things, stayed A&B's delivery call until a Motion to Proceed was filed with the Director. *A & B Irr. Dist. v. IDWR*, 153 Idaho 500, 503-04, 284 P.3d 225, 228-29 (2012).[15]

38. In the late 1990s and early 2000s, surface water users and ground water users entered into negotiations in lieu of litigation regarding disagreements over the nature and extent of interconnection between surface water and ground water sources in the Snake River Basin, and alleged injuries to senior priority surface water rights resulting from ground water diversions from the ESPA. The negotiations resulted in a series of interim stipulated agreements during the period from 2000 to 2004. *See, e.g., Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36* (2001); *Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35* (2001).

39. In 2004, ground water districts and spring users in the Thousand Springs reach of the Snake River entered into an aquifer mitigation, recovery, and restoration agreement that was also signed by the Governor, the Speaker of the Idaho House Of Representatives, and the President Pro Tem of the Idaho Senate. The 2004 agreement set forth a number of legislative proposals to address disputes arising from declines in ESPA storage and spring discharges. *The Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004* (Mar. 20, 2004).

40. Concerns over declines in ESPA storage and spring discharges also led to efforts to create a ground water model of the ESPA suitable for conjunctive administration. Work began on the Enhanced Snake Plan Aquifer Model ("ESPAM") Version 1.0 in 2000. ESPAM 1.0 was almost immediately updated to ESPAM 1.1, which the Department used from 2005 to early 2012 in responding to conjunctive administration delivery calls. ESPAM 2.0 was calibrated in July 2012, and re-calibrated in November 2012, resulting in the release of ESPAM 2.1, which is the current version of the model. The Eastern Snake Hydrologic Modeling Committee participated in developing and refining ESPAM. It is anticipated that work on refining ESPAM will continue. ESPAM 2.1 Final Report.

41. While ESPAM was based on the U.S. Geological Survey's Regional Aquifer System Analysis (RASA) program, ESPAM was intended in large part to assist in conjunctive management of surface water and ground water resources under state law. The RASA boundaries were therefore modified in ESPAM 1.0 and 1.1 to include irrigated areas in the Kilgore, Rexburg Bench, American Falls, and Oakley Fan areas, and also the Big Lost River drainage up to Mackay Dam. The Twin Falls tract was excluded from ESPAM because the Snake River is deeply incised between Kimberly and King Hill, and there is little communication between the aquifers on the north and south sides of the Snake River. ESPAM 2.1 includes additional refinements to the model boundary in the Hagerman, Pocatello, Big Lost River basin, and Little Lost River basin, areas. ESPAM 2.1 Final Report.

42. In the last ten years, holders of water rights to divert from the Snake River and the tributary springs have filed or renewed delivery calls under the Conjunctive Management Rules.

[15] A&B filed a Motion to Proceed in 2007. *Id.*

See, e.g., American Falls Res. Dist. No. 2 v. IDWR, 143 Idaho 862, 154 P.3d 433 (2007); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193 (2015). The conjunctive management delivery calls have resulted in issuance of administrative curtailment orders and implementation of mitigation plans.

43. In 2006, the Idaho Legislature found that "extended drought, changes in irrigation practices, and ground water pumping have resulted in reduced spring discharges and reach gains from the [ESPA] and areas of declining aquifer levels" and "have resulted in insufficient water supplies to satisfy existing beneficial users," and "conflicts between holders of water rights diverting from surface and ground water." 2006 Idaho Sess. Laws 1392 (S.C.R. No. 136). The Legislature therefore requested that the Idaho Water Resource Board ("IWRB") pursue "development of a comprehensive aquifer management plan for the [ESPA] for submission to and approval by the Idaho Legislature." *Id.* at 1393. The IWRB developed and in 2009 submitted to the Legislature the "Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan" ("ESPA CAMP"), which the Legislature approved. 2009 Idaho Sess. Laws 703-04. The ESPA CAMP "establishes a long-term program for managing the water supply and demand in the ESPA through a phased approach to implementation, together with an adaptive management process to allow for adjustments or changes in management techniques as implementation proceeds." ESPA CAMP at 4. The ESPA CAMP program has not been fully funded, however.

44. In 2009, the State of Idaho and Idaho Power Company resolved SRBA litigation regarding the interpretation and application of the 1984 Swan Falls Agreement through the "Framework Reaffirming the Swan Falls Settlement" ("Reaffirmation Framework"). The Reaffirmation Framework proposed a number of legislative and administrative actions, including execution by the Idaho Water Resource Board and Idaho Power Company of a "Memorandum of Agreement" ("MOA") regarding aquifer recharge. The MOA recognized that the Swan Falls settlement "reconfirmed that the minimum daily flow at Milner Dam shall remain at zero," and "recognized that the establishment of a zero minimum flow at Milner Dam" meant, among other things, that Snake River flows downstream from Milner "at times may consist almost entirely of ground-water discharge" and "therefore the [ESPA] must be managed as an integral part of the Snake River." The MOA also recognized that ESPA CAMP "establishes a long-term hydrologic target for managed recharge" and that it was in the parties' mutual interest "to work cooperatively to explore and develop a managed recharge program for the Snake River Basin." Memorandum of Agreement (May 6, 2009); *A Resolution, In the Matter of a Memorandum of Agreement Regarding the Implementation of Managed Recharge Under the Eastern Snake Plain Aquifer Management Plan and State Law* (IWRB) (Apr. 30, 2009).

45. In 2012, the Idaho Water Resource Board adopted the current version of the State Water Plan, which in Policy 4D states "[t]he Eastern Snake Plain Aquifer and the Snake River below Milner Dam should be managed conjunctively to provide a sustainable water supply for all existing and future beneficial uses within and downstream of the ESPA." 2012 State Water Plan at 51. The supporting discussion states that at times "the Snake River flow at the Murphy Gage consists mostly of ESPA discharge from the Thousand Springs area," that conjunctive management is "key to meeting the Murphy minimum stream flows," and that "it is in the public

interest to conjunctively manage the ESPA and the Snake River to lessen or obviate the need for broad-scale water rights administration to accomplish general water-management goals." *Id.* & n. 6. Policy 4D of the 2012 State Water Plan "embraces the conjunctive management goals and objectives of the ESPA CAMP." *Id.* at 53.

46. In 2015, the Surface Water Coalition ("SWC")[16] entered into a historic private settlement agreement ("Settlement Agreement") where members of the Idaho Ground Water Appropriators, Inc. ("IGWA"), agreed to a series of voluntary practices intended to stabilize and reverse declining ESPA water level trends in exchange for safe harbor from curtailment under the SWC Delivery Call. Only ground water users actively participating in a ground water district on the ESPA were granted safe harbor by the agreement. *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* Voluntary on-going practices described in the settlement agreement included, among other things: a 240,000 AF per year reduction of consumptive ground water use; direct delivery of 50,000 AF of storage water to the SWC; a reduction in the duration of the irrigation season; mandatory measurement device installation; and support of an annual state recharge goal of 250,000 AF. The Settlement Agreement also established a goal of returning ground water levels to the average of the ground water levels from 1991-2001 by April 2026. In addition, intermediate ground water level benchmarks were established in the Settlement Agreement occurring at April 2020 and April 2023. Finally, the Settlement Agreement calls for "adaptive management measures" to be established and implemented if the ground water level benchmarks or goal are not achieved.

47. In 2016, the SWC and IGWA entered into a stipulated mitigation plan for purposes of resolving the SWC's delivery call under the Conjunctive Management Rules. *Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order, In the Matter of the Distribution of Water to Various Water Rights Held By and for the Benefit of A&B Irrigation District, et al.* (IDWR Docket No. CM-MP-2016-001) (Mar. 9, 2016). The stipulated mitigation plan was based on the term and conditions of the Settlement Agreement, including adoption of the management practices, ground water level goal and benchmarks, and adaptive management measures. The Director approved the stipulated mitigation plan. *Final Order Approving Stipulated Mitigation Plan, In the Matter of the Distribution of Water to Various Water Rights Held By and for the Benefit of A&B Irrigation District, et al.* (IDWR Docket No. CM-MP-2016-001) (May 2, 2016).

48. The hydrologic data demonstrates that declines in ESPA storage and spring discharges have continued steadily for the last sixty years, despite long-standing recognition of the problem and repeated attempts to address it through legislation and administration. While water users and the IWRB are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines, the ESPA CAMP has yet to be fully implemented, the proposed settlement is a private agreement that pertains only to the SWC's delivery call, and future conditions, including climate and water use practices, are unknown.

[16] The Surface Water Coalition's members are: 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.

CONCLUSIONS OF LAW

1. Idaho Code § 42-233b authorizes the Director to designate a "ground water management area" when the Director determines a ground water basin "may be approaching the conditions of a critical ground water area." The decision of whether to designate a "ground water management area" is committed to the Director's discretion. For the reasons discussed below, the Director in an exercise of his authority and discretion under Idaho Code § 42-233b designates a "ground water management area" for the ESPA that corresponds to the boundaries of ESPAM 2.1, excluding: parts of the Big Lost River Basin; the Big Wood River ground water management area; and the Artesian City, Blue Gulch, Cottonwood, West Oakley Fan and Oakley Kenyon critical ground water areas.[17]

2. Idaho Code § 42-233b is part of the Idaho "Ground Water Act." *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 506, 284 P.3d 225, 231 (2012). The Ground Water Act as enacted and amended in the early 1950s authorized two options for addressing insufficient or decreasing ground water supplies: (1) limiting or denying new ground water applications in designated "critical ground water areas," 1953 Idaho Sess. Laws 281-82; Idaho Code § 42-233a; *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968); and (2) "prohibiting or limiting" withdrawals under existing ground water rights if the withdrawals adversely affected "the present or future use of any prior surface or ground water right." 1953 Idaho Sess. Laws 285; Idaho Code § 42-237a(g).

3. Subsequent amendments to the Ground Water Act authorized a third option for addressing insufficient ground water supplies: "ground water management areas." Idaho Code § 42-233b as enacted in 1982 and amended in 2000 and 2016 authorizes the Director to designate "ground water management areas," and approve "a ground water management plan for the area" that provides "for managing the effects of ground water withdrawals on the aquifer . . . and on any other hydraulically connected sources of water." Idaho Code § 42-233b; 1982 Idaho Sess. Laws 165; 2000 Idaho Sess. Laws 187; 2016 Idaho Sess. Laws 848. Ground water users complying with an approved ground water management plan "shall not be subject to administration on a time priority basis" if the Director determines the ground water supply is insufficient to meet demands within the ground water management area. Idaho Code § 42-233b.

4. A "ground water management area" is defined 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." Idaho Code § 42-233b. A "critical ground water area," in turn, is defined as "any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits" as determined by the Director. Idaho Code § 42-233a. A "ground water management area,"

[17] While there is overlap between the ESPA ground water management area created by this order and the Twin Falls ground water management area, the Twin Falls GWMA was created to address concerns regarding the low temperature geothermal groundwater resources in the Twin Falls area. The ESPA GWMA created by this order will regulate the non-low temperature geothermal resources within the area of overlap between both GWMAs.

therefore, is a ground water basin or part thereof that the Director determines may be approaching the condition of not having sufficient ground water to provide a reasonably safe supply for irrigation and other uses in the basin under current or projected rates of withdrawal.

Reasonably Safe Supply

5. The record establishes that ESPA storage and spring discharges have been declining for more than sixty years. Since peaking in the early 1950s, ESPA storage has declined by about 13 million AF, at an average rate of approximately 200,000 AF per year. Spring discharges have dropped from peak levels of approximately 6,700 cfs. to less than 5,000 cfs. These declines have continued despite widespread recognition of the problem and repeated attempts over the years by the Legislature, the IWRB, and water users to address the problem through various agreements, enactments, and policy initiatives, including minimum flows, aquifer recharge, and the ESPA CAMP.

6. Even though ESPA storage and spring discharges have not yet dropped to pre-irrigation era levels, the declines have resulted in many years of disputes and conflicts among water users. In some cases the disputes arose between different ground water users; in others, between surface or spring water users and ground water users. In all cases senior priority water right holders alleged injury due to withdrawals from the ESPA authorized by junior priority ground water rights. These disputes and conflicts have resulted in extensive litigation and administrative action, including delivery calls, curtailment orders, and mitigation plans.

7. The record establishes that as a result of chronic declines in ESPA storage and spring discharges, in many years the ESPA ground water supply is not sufficient to satisfy senior priority water rights diverting from the ESPA and hydraulically connected sources unless ESPA withdrawals under junior priority ground water rights are curtailed, and/or the junior water right holders mitigate. 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. Idaho Code §§ 42-233b, 42-233a.

Need For ESPA Ground Water Management Area

8. The past ten years of litigation arising out of individual delivery calls under the Conjunctive Management Rules are symptoms of a larger underlying problem, i.e., continuing declines in ESPA storage and spring discharges. Delivery calls under the Conjunctive Management Rules result in sporadic curtailment orders and mitigation plans to address particular injuries in particular years. Delivery calls are not an efficient or effective means of addressing the underlying problem of chronic declines in ESPA storage and spring discharges, which have resulted from several factors and have developed over many years.[18] While the

[18] The City of Pocatello and others correctly point out in their comments that the Department took the position in previous litigation that a ground water management area is not necessary where a water district exists. Ltr. from Sarah Klahn, attorney for the City of Pocatello, to Gary Spackman, Dir. Idaho Dept. of Water Res. 7 (Sept. 2, 2016). However, as the above paragraph explains, an important management tool that a ground water management area provides is the opportunity to create a management plan to "manag[e] the effects of ground water withdrawals on

SWC and IGWA recently reached a stipulated settlement of their delivery call dispute that envisions reversing ground water declines, the settlement encompasses only part of the ESPA, and has not been fully implemented. Future conditions including climate change and water user practices are unknown, and the settlement does not preclude delivery calls by other senior water right holders.

9. Idaho Code § 42-233b identifies several potential tools available to the Director to more effectively address the larger problem of declines in ESPA storage and spring discharges, including approval of a "ground water management plan" and requiring ground water right holders to report "withdrawals of ground water and other necessary information." Idaho Code § 42-233b also authorizes the Director to require junior ground water right holders not complying with an approved ground water management plan to cease or reduce diversions if the Director determines the ground water supply is insufficient to satisfy water rights within the ground water management area. A ground water management area designation under Idaho Code § 42-233b would support attainment of the ESPA storage and spring discharge objectives of the recent settlement, the State Water Plan, the ESPA CAMP, and various legislative enactments.

10. The Director's duty under the Ground Water Act is to "to control the appropriation and use of the ground water of this state," and "do all things reasonably necessary or appropriate" to protect the people of the state from depletion of ground water resources "contrary to the public policy expressed in this act." Idaho Code § 42-231. The Ground Water Act's "public policy" includes Idaho's "traditional policy" that the state's water resources "be devoted to beneficial use in reasonable amounts through appropriation." Idaho Code § 42-226; *see also IGWA v. IDWR*, 160 Idaho 119, ___, 369 P.3d 897, 909 (2016) ("the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho."). The Ground Water Act further states "[i]t is the policy of this state to promote and encourage optimum development and augmentation of the water resources of this state," Idaho Code § 42-234, and refers to "the policy of this state to conserve its ground water resources." Idaho Code § 42-237a.

11. The Director concludes that designating a ground water management area for the ESPA is consistent with, if not required by, the Director's duties under the Ground Water Act. The Director in an exercise of his authority and discretion under Idaho Code § 42-233b will therefore designate a ground water management area for the ESPA.

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the aquifer . . . and on any other hydraulically connected sources of water." Idaho Code § 42-233b. In a conjunctive management delivery call, the primary focus is whether a junior is causing injury to the calling water right. *See* CM Rule 37.03.11.40.01. As learned through the recent Rangen delivery call, sometimes the solution to mitigate injury to the calling water right does not address underlying issues with the source of supply. In Rangen, IGWA mitigated the material injury by providing water from another spring source directly to Rangen. While this mitigated the injury to Rangen, it did not address the aquifer. A ground water management area and accompanying ground water management plan are the tools to address broader concerns with ground water aquifers such as the ESPA and allow for the focus to be broader than just mitigating injury to a calling water right.

Extent of ESPA Ground Water Management Area

12. Idaho Code § 42-233b authorizes the Director to designate all or part of a "ground water basin" as a "ground water management area." The term "ground water basin" is not defined in the Ground Water Act, and has not been defined by judicial decision, administrative rule, or administrative order. Statutory terms should generally be given their plain, usual, and ordinary meaning. *Wright v. Ada County*, 160 Idaho 491, 497, 376 P.3d 58, 64 (2016).

13. In the context of surface water administration and management, "basin" is a term that refers to the area drained by a particular river, stream, or creek system. Webster's II New College Dictionary 95 (3d Ed. 1995). A given "basin" can be either relatively large or relatively small, is generally understood in surface water administration to encompass all tributary surface water sources, and can itself be tributary to another surface water source. For instance, the Snake River "basin" includes the tributary Boise River "basin"; and the Boise River "basin," in turn, includes tributary basins such as the South Fork of the Boise River "basin" and the Mores Creek "basin."

14. While these surface water concepts inform the meaning of the term "ground water basin," there are significant differences between surface water and ground water. For instance, surface water flows within well-defined, easily identifiable creeks, streams, and rivers. Ground water flows through underground aquifers, which often extend over large areas and may not have well-defined or easily identified boundaries. In addition, the flow or movement of ground water through an aquifer or aquifer system is usually much slower and less easily described and quantified than the flow of surface water in creeks, streams, and rivers. There can also be separate aquifers at different depths in the same "basin."[19] Further, while surface water systems are usually delineated in terms of the area "drained," ground water systems are usually delineated by their constituent aquifer(s) and areas of "recharge" and "discharge." *See* GLOSSARY OF GEOLOGY 769 (Julia A. Jackson ed., Am. Geological Inst., 4th ed. 1997) (defining "ground water basin" as "[a]n aquifer or system of aquifers, whether basin-shaped or not, that has reasonably well-defined boundaries and more or less definite areas of recharge and discharge.")

15. In light of the foregoing, the term "ground water basin" as used in Idaho Code § 42-233b is understood as a term referring to an area in which ground water flows or moves within an aquifer or aquifers to common discharge areas, and has boundaries and areas of "recharge" that are reasonably well-defined. Like a surface water "basin," a "ground water basin" may be either relatively large or relatively small, and encompass tributary water sources (i.e. other ground water basins).

16. The ESPA and the tributary basins comprise an aquifer system within which ground water flows or moves to specific discharge areas and has reasonably well-defined boundaries. The aquifer system has reasonably well-defined areas of recharge: the "tributary

[19] For instance, the Bellevue triangle of the Big Wood River basin includes at least two aquifers: a deep confined (artesian) aquifer, and a shallow unconfined aquifer. James R. Bartolino & Candice B. Adkins, Hydrogeologic Framework of the Wood River Valley Aquifer System, South-Central Idaho: Scientific Investigations Report 2012-5053 at 46 (U.S. Geological Survey, 2012).

basins" are the primary source of natural recharge, and the irrigated land on the Eastern Snake River Plain is the primary source of "incidental" recharge from irrigation. The aquifer system also has reasonably well-defined areas of discharge: the springs in the American Falls and Thousand Springs reaches of the Snake River. Within the aquifer system, ground water discharges from the tributary basins directly to the ESPA as groundwater underflow or discharges to streams that recharge the ESPA via riverbed seepage. The aquifer system constitutes a "ground water basin" within the meaning of Idaho Code § 42-233b.

17. Idaho Code § 42-233b does not require the Director to designate the entirety of the aquifer system as a "ground water management area." Rather, the statute explicitly authorizes the Director to limit a "ground water management area" designation to "part" of a "ground water basin." Idaho Code § 42-233b.

ESPA Ground Water Management Area Boundary

18. The ESPAM is a calibrated regional ground water flow model representing the ESPA and is meant to simulate the effects of ground water pumping from the ESPA on the Snake River and tributary springs. *Idaho Ground Water Assoc.*, 160 Idaho at ___, 369 P.3d at 900. The Department and the Eastern Snake Hydrologic Modeling Committee ("ESHMC") began work on the ESPAM in 2000. The Department used ESPAM 1.1 from 2005 to early 2012 in responding to conjunctive administration delivery calls. ESPAM 2.0 was calibrated in July 2012, and re-calibrated in November 2012, resulting in the release of ESPAM 2.1, which is the current version of the model. The ESHMC participated in the updating the ESPAM to version 2.1. The ESPAM boundaries have been updated and revised to incorporate new data and reflect the best available science regarding the relationships between surface water and ground water on the eastern Snake Plain.

19. The ESPAM 2.1 boundary constitutes a reasonable starting point for the boundary of a ground water management area because the model was developed to facilitate management of ground water and hydraulically connected surface water resources on the eastern Snake Plain. ESPAM 2.1 is a thoroughly calibrated model of the ESPA. ESPAM 2.1 was calibrated to 43,165 aquifer water level measurements, 2,248 river gain and loss estimates, and 2,485 transient spring discharge measurements. *ESPAM 2.1 Final Report*, at 89. The ESPAM 2.1 model is the best available tool for defining and understanding the water budget in the model area and accurately predicts how changes in water budget parameters will affect aquifer storage content and ground water levels. The ESPAM 2.1 boundary is a reasonable administrative area because the Department currently lacks similar modeling tools and hydrologic data to administer outside the ESPAM 2.1 model boundary, except for the Big Wood River Basin. Moreover, most of the ground-water irrigated land within the upper Snake River basin is located within the model boundary or, in the case of the Big Wood River and Raft River basins, in established management areas outside the model boundary.

20. A few modifications of the boundary are necessary. Overlapping management areas should be avoided to prevent administrative redundancy and potential regulatory confusion. Existing management areas must be redrawn, repealed or excluded from an ESPA ground water management area. A very small portion of the Blue Gulch Critical Ground Water Area and the

Big Wood River Ground Water Management Area overlap the ESPAM 2.1 boundary. Because only a very small portion of these existing management areas overlap, the existing management area boundaries will remain as currently drawn and the lands will be excluded from an ESPA ground water management area. The Artesian City, Cottonwood, West Oakley Fan and Oakley Kenyon critical ground water areas will be excluded from an ESPA ground water management area because they are active management areas and have an approved ground water management plan. The American Falls Ground Water Management Area ("AFGWMA") is almost completely contained within the ESPAM 2.1 boundary. There is no ground water management plan for the AFGWMA. Because the AFGWMA is almost completely contained within the ESPAM 2.1 boundary and does not have an existing ground water management plan, the Director will, by separate order, rescind the AMGWMA. That portion of the AFGWMA currently within the ESPAM 2.1 boundary will be included in an ESPA ground water management area. Because the Department is considering designation of a ground water management area or a critical ground water area within the Big Lost River Basin,[20] irrigated lands in the Big Lost River Valley as delineated in Attachment B, should be excluded from the ESPA ground water management area. The boundary of the ESPA ground water management area will be modified in the future to include the Big Lost River Basin if a separate management area is not designated for the Big Lost River Basin.

21. Employing the ESPAM 2.1 boundary as modified in the preceding paragraph will help "manag[e] the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water." Idaho Code § 42-233b. The Director therefore concludes that the ESPA ground water management area should be designated on the basis of the modified ESPAM 2.1 model boundary.[21]

Ground Water Management Plan

22. Idaho Code § 42-233b authorizes the Director to approve "a ground water management plan" for a designated ground water management area. A ground water management plan for the ESPA ground water management area would provide the framework for managing ground water in the areas within the ESPAM 2.1 model boundary to ensure a reasonably safe supply of ground water for irrigation of cultivated lands or other uses in the basin. The record confirms that such an approach is necessary if the objectives of arresting and reversing chronic declines in ESPA storage and spring discharges are to be realized.

23. Participants in the public meetings and the individuals and entities submitting written comments identified three main issues with respect to a ground water management plan: (1) whether approving a ground water management plan would add an additional layer of administration; (2) the content or substance of the ground water management plan; and (3) the

[20] On September 19, 2016, the Department received a petition to designate a critical ground water area in the Big Lost River Basin.

[21] ESPAM 2.1 is an analytical tool the Department uses regularly for various purposes, and is subject to refinement in the future. This order does not preclude future refinements of ESPAM, including refinements of the model boundary. Refinement of model boundaries in future versions of ESPAM will not automatically change the boundary of the ESPA ground water management area.

appropriate procedure for developing and adopting a ground water management plan. These issues are addressed in turn below.

24. The designation of an ESPA ground water management area and adoption of a ground water management plan would not require or result in an additional layer of administration or bureaucracy. While a ground water management plan might in some instances or locations apply new standards or requirements as a means of "managing the effects of ground water withdrawals on the aquifer . . . and on any other hydraulically connected sources of water," Idaho Code § 42-233b, administration of the ground water management area and of the ground water management plan would be accomplished through the existing water districts, by the watermasters as supervised by the Director. *See generally* chapter 6, title 42, Idaho Code.

25. With respect to the question of the substance or content of an ESPA ground water management plan, the starting point is the statutory requirement that a ground water management plan "shall provide for managing the effects of ground water withdrawals on the aquifer . . . and on any other hydraulically connected sources of water." Idaho Code § 42-233b. The recent Settlement Agreement between the SWC and IGWA must be commended because it adopts important consumptive use volume reductions and adaptive management measures to manage the effects of ground water withdrawals on the ESPA. However, the Settlement Agreement was written as an agreement between the SWC and IGWA and does not constitute a comprehensive ground water management plan. Because only IGWA and the SWC are signatories to the Settlement Agreement, it is unclear how many of the provisions would apply to those water users not part of IGWA who may desire protection of participating in the ground water management plan. Furthermore, the Settlement Agreement is primarily focused on irrigators. Irrigators are only one subset of water user on the ESPA. Involvement by other water users is necessary for the development of a comprehensive ESPA ground water management plan. As discussed in the comments provided by the Association of Idaho Cities, the City of Idaho Falls, and the City of Pocatello, municipalities may wish to find alternative ways to offset the effects of their ground water withdrawals on the aquifer. The Cities should be allowed the opportunity to participate in the development of the ground water management plan. Regardless of the process, the Settlement Agreement will be a key part of any future ground water management plan and it will be appropriate to incorporate all or part of the settlement into an ESPA ground water management plan.

26. Idaho Code § 42-233b does not establish or require a specific procedure for developing a ground water management plan. The Director has previously approved ground water management plans developed by, or with the assistance of, interested water users. As discussed above, input and assistance from interested water users is important in developing a comprehensive ground water management plan. Because of the physical size of the ESPA and the number of potentially interested water users, it will be necessary for the Director to define a procedure for seeking water user input and developing a ground water management plan. The Director will address these matters in a separate order.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

1. Pursuant to Idaho Code § 42-233b, a ground water management area is hereby designated for the Eastern Snake Plain Aquifer ("ESPA Ground Water Management Area"); and

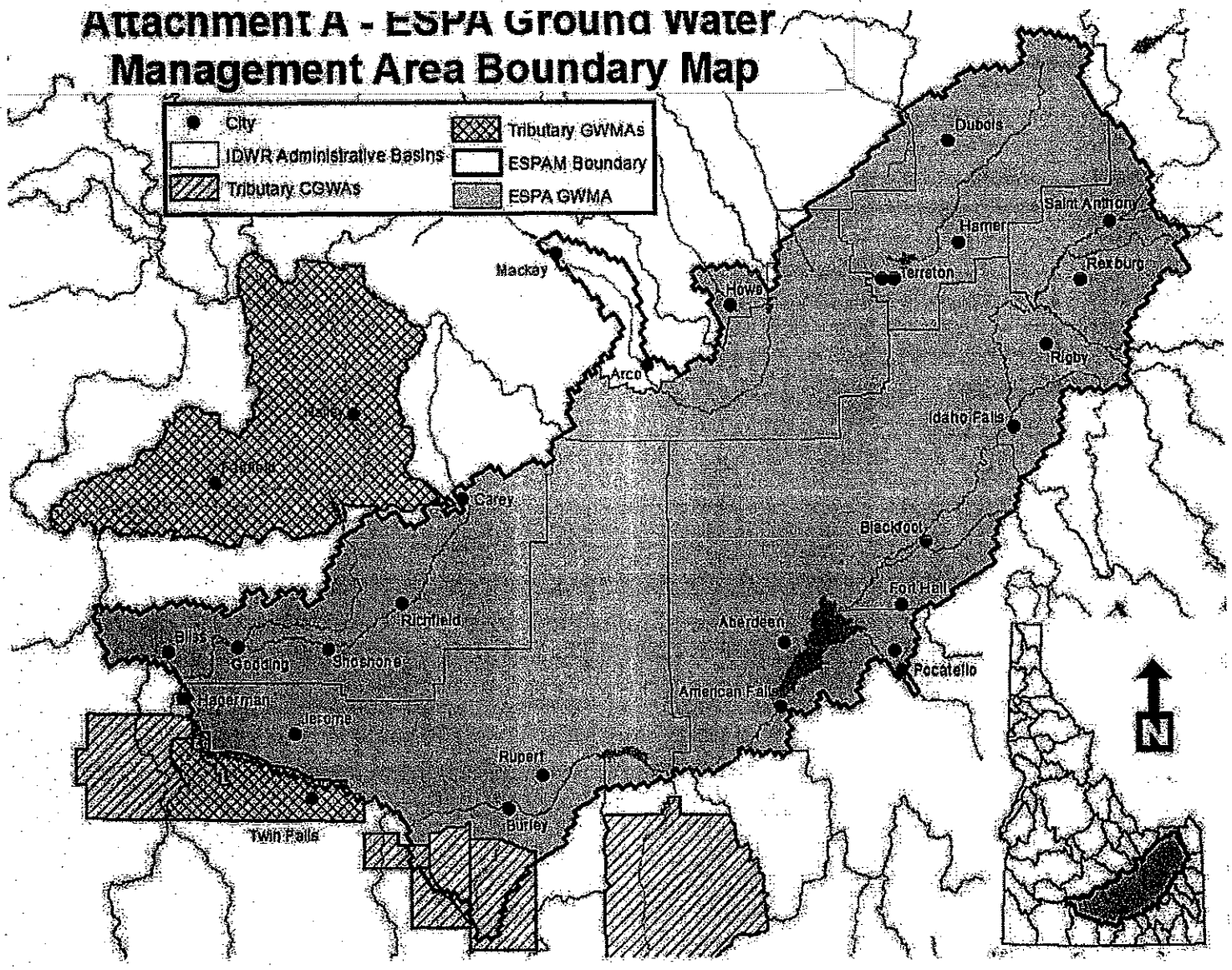
2. The boundary of the ESPA Ground Water Management Area is set forth in Attachment A. The boundary is the same boundary used in the Enhanced Snake Plan Aquifer Model Version 2.1 excluding: (1) lands in the Big Lost River Valley as delineated in Attachment B; (2) the portion of the Big Wood River ground water management area overlapping the model boundary; and (3) the portions of the Artesian City, Blue Gulch, Cottonwood, West Oakley Fan and Oakley Kenyon critical ground water areas overlapping the model boundary; and

3. The Director will issue a separate order addressing the procedure for developing pursuant to Idaho Code § 42-233b a ground water management plan for the ESPA Ground Water Management Area.

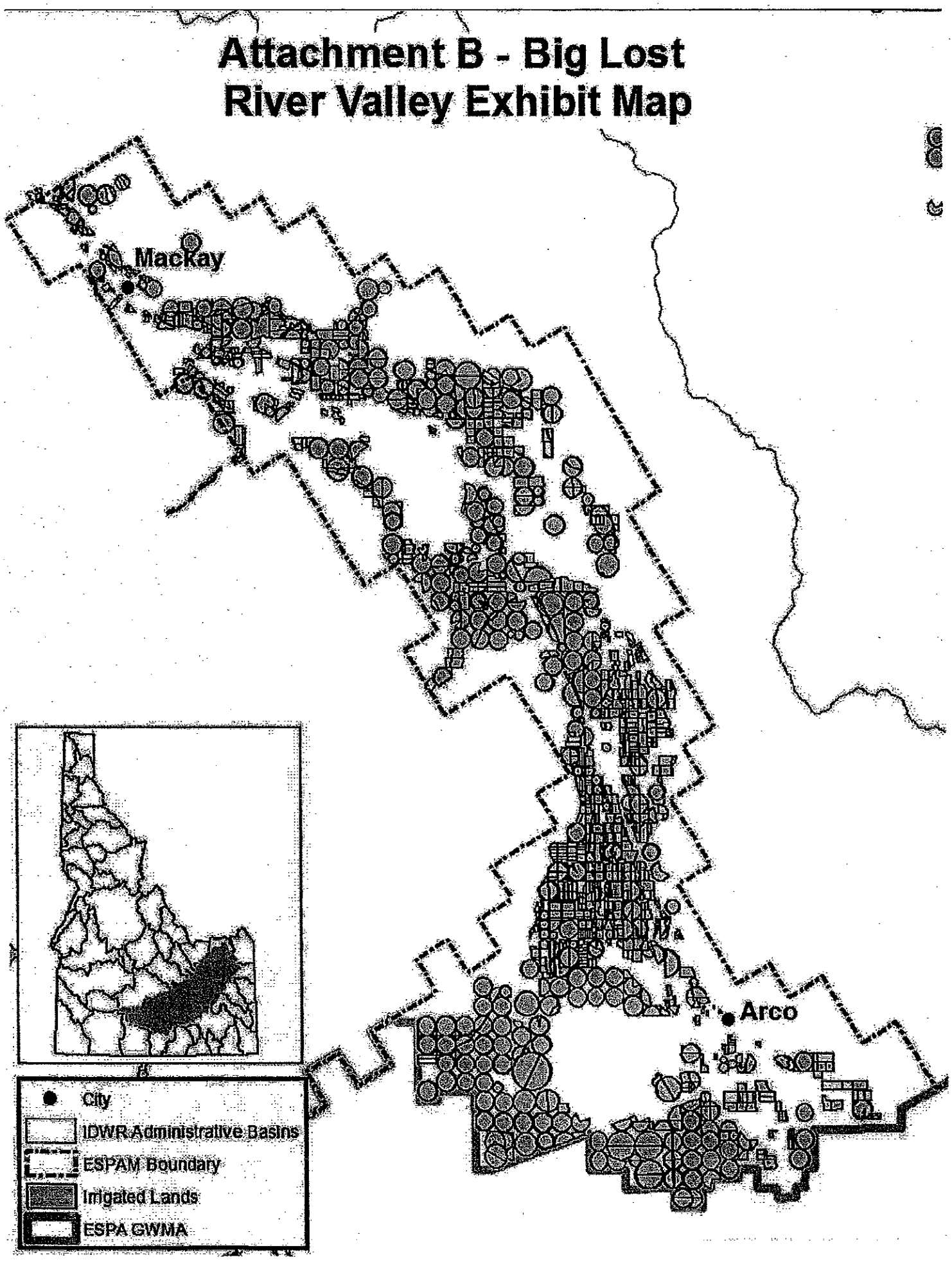
DATED this 2nd day of November, 2016.

Gary Spackman
Director

Attachment A - ESPA Ground Water Management Area Boundary Map



Attachment B - Big Lost River Valley Exhibit Map



EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a **"Final Order"** issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

EXHIBIT D

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 DENYING PETITION FOR DECLARATORY RULINGS**

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes and orders as follows:

FINDINGS OF FACT

1. On July 7, 2016, the Director sent a letter to potentially interested water users stating that the Department "is considering creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA)." Ltr. from Gary Spackman, Dir., Idaho Dept. of Water Res. to Interested Parties 1 (July 7, 2016) ("*Letter*").[1] The *Letter* invited water users to participate in public meetings scheduled by the Director. The purpose of the public meetings was to provide water users and interested persons an opportunity to learn more about the possible ground water management area and to express their views regarding the proposal.[2] *Id.* The *Letter* stated that "[a]fter hearing from water users at the public meeting and considering the issues," the Director would "decide whether a ground water management area should be created." *Id.*

2. The *Letter* discussed historic trends of declining ESPA water levels, Snake River flows, and spring discharges that had begun in the 1950s and had continued steadily, despite brief "periods of recovery." *Id.* The *Letter* also stated that "[w]ater users and the Water Resources Board are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines," but "future conditions, including climate and water use practices are unknown." *Id.* at 2.

3. The *Letter* stated that pursuant to Idaho Code § 42-233b, the Director is authorized to designate "ground water management areas," that the statute "identifies several potential tools available to the Director within a ground water management area to properly manage the resource," and that "formation of a ground water management area would have

[1] A copy of the letter is on the Department's website at: https://www.idwr.idaho.gov/files/ground_water_mgmt/20160707-Letter-to-Waters-Users-from-Gary-Spackman-Re-Proposed-ESPA-GWMA.pdf.

[2] The Department also issued a news release on July 13, 2016, regarding the meetings.

distinct advantages" over administering only through conjunctive management delivery calls, because the Department can "consider the aquifer as a whole." *Id.* at 2-3. The *Letter* stated "[t]he question is whether the ESPA is approaching the conditions of a critical ground water area (not having sufficient ground water to provide a reasonably safe supply.)." *Id.* at 2.

4. The *Letter* also stated that "[o]ne of the issues needing consideration will be the areal extent of the ground water management area," and that "[t]he Department's technical information suggests that the area that impacts water stored in the ESPA and spring discharge extends into tributary basins." *Id.* at 3. The *Letter* listed twenty-two tributary basins and stated that "[w]ater users in those areas are invited to participate" in the public meetings. *Id.* at 3. The tributary basins listed in the *Letter* included the Big Wood River basin. *Id.* at 3.

5. On July 25, 2016, the date of the public meeting in Hailey, Sun Valley Company filed with the Department a *Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area* ("*Petition*"). Sun Valley Company filed an *Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*, on July 29, 2016 ("*Amended Petition*"). Sun Valley Company filed a *Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*, on October 19, 2016 ("*Second Amended Petition*").[3] The *Petition*, the *Amended Petition*, and the *Second Amended Petition* (collectively, "*Petitions*") seek declaratory rulings pursuant to Idaho Code § 67-5232 and Rule 400 of the Department's Rules of Procedure (IDAPA 37.0101.400).

6. The *Petitions* state that Sun Valley Company received the *Letter* on July 11, 2016, and quote a number of the same passages from the *Letter* that are quoted above. *Id.* at 2-3. The *Petitions* cite and quote three Idaho Supreme Court decisions regarding the Department's Conjunctive Management Rules ("CM Rules"), and also cite and quote several provisions of the CM Rules. *Id.* at 4-5. The *Petitions* state that Sun Valley Company owns waters rights in Water District 37 and within the Big Wood River Ground Water Management Area, but "does not own water rights in the ESPA area of common ground water supply" as established by CM Rule 50. *Id.* at 5.[4]

7. The *Petitions* seek fourteen (14) specific declaratory rulings, as follows:

a. Because the Groundwater Act, the CM Rules promulgated by the Department and approved by the Legislature, and the common law set forth by Idaho trial and appellate courts derived therefrom, apply to determining areas of the state having a common ground water supply, creating and expanding water districts, and creating GWMAs [Ground Water Management Areas], in exercising authority under Idaho Code Section 42-233a and 42-233b, the Director cannot act in derogation of these legal constraints.

[3] The Sun Valley Company also filed with the Department on October 9, 2016, the *Declaration of Leni Patton* and the *Declaration of Maria Gamboa*.

[4] The Big Wood River Ground Water Management Area was designated on June 28, 1991. *Order, In the Matter of Designating the Big Wood River Ground Water Management Area* (Jun. 28, 1991).

b. Any attempt by the Director or the Department to expand the boundaries of the ESPA area of common ground water supply to include the entirety of Basin 37 by designating Basin 37 as part of an ESPA GWMA outside the context of a formal rulemaking or contested case proceeding is in contravention of the Groundwater Act, the CM Rules, and the common law set forth by Idaho trial and appellate courts derived therefrom.

c. The proposal to designate an ESPA GWMA inclusive of Water District No. 37 is contrary to prior decisions of the Director regarding GWMA designations related to the ESPA.

d. Idaho Code Section 42-233b does not grant the Director authority to include other ground water basins, including Basin 37, within an ESPA GWMA.

e. The proposal to designate an ESPA GWMA inclusive of Basin 37 for purposes of the administration of water rights therein without a procedurally proper determination of an area having a common ground water supply in Basin 37 is an invalid collateral attack upon the findings and conclusions in Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Company v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016).

f. The Director does not have authority to designate a new GWMA inclusive of Basin 37 without conducting a hearing or rulemaking in accordance with the Department's Rules of Procedure and the applicable provisions of the Idaho Administrative Procedures Act.

g. A "critical ground water area," and a "ground water management area," as defined in Idaho Code Section 42-233a and 42-233b, respectively, are each, as a matter of law, an "area having a common ground water supply," as defined in the CM Rules, IDAPA 37.03.11.010.01.

h. Except for within the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must determine areas of the state that have a common ground water supply before designating such areas ground water management areas.

i. Except for the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must conduct a rulemaking or comply with the provisions of the CM Rules in order to determine areas of the state that have a common ground water supply.

j. The Director may not create an ESPA GWMA that geographically overlaps the existing Big Wood River GWMA.

k. The Director has the statutory authority to approve a ground water management plan, but does not have the authority to generate or create a ground water management plan.

l. Under Idaho Code Section 42-233b, a ground water management plan for the ESPA should provide for managing the effects of ground water withdrawals from the ESPA (a) on the ESPA, and (b) on hydraulically connected sources of water, but it cannot provide for managing the effects of ground water withdrawals from any other source.

m. Under Idaho Code Section 42-233b, if the Director makes a "determination that the ground water supply is insufficient to meet the demands of water rights within all of portions of a water management area" any order issued by the Director to water right holders to "cease or reduce withdrawal of water" must include water rights for domestic purposes.

n. [T]hat IDAPA 04.11.01.420-425 apply to Department proceedings because the Department failed to include in the Rules of Procedure of the Idaho Department of Water Resources "a finding that states the reasons why the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." [citing Idaho Code § 67-5220(5)(b)].

8. The Department conducted the public meetings referenced in the *Letter* on the scheduled dates (July 25-28) at the scheduled times and locations. Department staff in attendance at the public meetings included the Director, Special Advisor to the Director Rich Rigby, and Hydrogeologist Sean Vincent. The Director began each meeting with opening comments. Rich Rigby presented the legal, factual, and policy aspects of designating an ESPA ground water management area. Sean Vincent presented technical information in a presentation titled "Hydrologic Considerations for the Possible Establishment of a Ground Water Management Area for the Eastern Snake Plain Aquifer" ("ESPA GWMA Presentation").[5] After the Department presentations, the public commented and asked questions. At the conclusion of the public participation, the Director closed each meeting with remarks. The Director invited written comments, to be submitted by September 1. The Department recorded the audio presentations and public statements for all the public meetings except the Terreton meeting.[6]

9. The Department's presentations at the public meetings implicated, directly or indirectly, many of the issues upon which the *Second Amended Petition* seeks declaratory rulings, including the "areal extent" of an ESPA ground water management area, the question of including tributary basins (specifically including the Big Wood River basin), questions of the Director's authority to create a ground water management area, and questions about administration of a ground water management area under Idaho Code § 42-233b. Comments and questions at the public meetings, and subsequent written comments, addressed many of these

[5] The presentation can be viewed on the Department's website at: https://www.idwr.idaho.gov/water-rights/ground-water-management-areas/proposed.html.

[6] The recorded audio is available on the Department's website at the link in footnote 5 above. Due to a technical problem, there is no audio recording of the public meeting in Terreton.

same matters. Some attendees and commenters opposed designation of an ESPA ground water management area or inclusion of tributary basins, while others supported one or both.[7]

10. Some of the comments and questions at the public meetings, and subsequent written comments, raise issues of the interpretation and application of the CM Rules and Idaho Code § 42-233b in specific and possibly unique factual circumstances. Some of the comments and questions seek further factual or technical information regarding the basis for designating an ESPA ground water management area, or assert that such information is necessary before a designation can be made. Some of the comments and questions seek factual or technical information regarding whether individual tributary basins (such as the Big Wood River basin) should be included in an ESPA ground water management area, or assert that such information is necessary before determinations can be made to include individual tributary basins (such as the Big Wood River basin).

CONCLUSIONS OF LAW

1. Idaho Code §§ 42-233b and 42-233a are statutory provisions administered by the Department. The CM Rules are administrative rules administered by the Department.

2. Idaho Code § 67-5232 authorizes petitions to state agencies for declaratory rulings as to the applicability "of any statutory provision or of any rule administered by the agency." Idaho Code § 67-5232(1). The statute also specifically authorizes agencies to address the questions raised in declaratory petitions through contested cases rather than via purely declaratory proceedings. *Id.* § 67-5232(2).

3. It appears that no Idaho appellate decision addresses Idaho Code § 67-5232, or the substantially similar IDAPA rule authorizing petitions for declaratory rulings regarding the applicability "of any order issued by the agency." Idaho Code § 67-5255.[8] Interpretations of the statute that do exist suggest it was not intended to require that the filing of a declaratory ruling petition would re-route a matter already pending before an agency into a declaratory proceeding. Commentators, for instance, have characterized the statute as a method "to initiate agency action." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer For The Practitioner*, 30 Idaho l. Rev. 273, 305 (1993/1994). In a 2005 trial order, an Ada County District Judge stated that the purpose of the statute is to allow parties to seek declaratory rulings "without having first to actually pursue the desired relief—such as file a refund request." *Baird Oil Co. v Idaho State Tax Comm'n*, No. CVOC 0305451D (4th Jud, Dist., Ada County) (Jan. 21, 2005), 2005 WL 6568938 at 6.[9] These views support a conclusion that Idaho Code § 67-5232 was intended to provide a means of requiring an agency to take up a matter that had not yet been raised, rather than requiring that a matter already pending before the agency be decided through a declaratory ruling. This conclusion is consistent with the express

[7] Public comment letters are available through the Department's website at the link in footnote 5 above.

[8] "IDAPA" refers to the Idaho Administrative Procedure Act, which is set forth in chapter 52 of title 67 of the Idaho Code.

[9] This case went to the Idaho Supreme Court, but the Court did not cite or discuss Idaho Code Section 67-5232. *Baird Oil Co. v. Idaho State Tax Comm'n*, 144 Idaho 229, 159 P.3d 866 (2007).

statutory authorization to resolve questions raised by a declaratory ruling petition through a contested case rather than through declaratory proceedings. Idaho Code § 67-5232(2).

4. This conclusion also finds support in Idaho Supreme Court decisions regarding declaratory judgment actions under chapter 12, title 10, Idaho Code. The Idaho Supreme Court has held that a declaratory judgment action may be dismissed on grounds of "practical considerations of efficiency and expediency" when another pending action (even one initiated after the declaratory judgment action) would settle the same issues and protect the interests of the party that sought a declaratory judgment. *Scott v. Agricultural Products Corp., Inc.*, 102 Idaho 147, 149-50, 627 P.2d 326, 328-29 (1981). The Idaho Supreme Court has also held that declaratory judgment proceedings are "not a freeway for the litigation of factual disputes," *County Ins. Co. v. Agricultural Dev., Inc.*, 107 Idaho 961, 972, 695 P.2d 346, 357 (1984), and "a declaratory judgment should not be allowed 'where the questions presented should be the subject of judicial investigation in a regular action.'" *Farmers Ins. Exchange v. Tucker*, 142 Idaho 191, 194, 125 P.3d 1067, 1070 (2005) (citation omitted).

5. The *Petitions* seek a number of declaratory rulings regarding the interpretation and application of Idaho Code §§ 42-233b and 42-233a, and the CM Rules, with respect to consideration of whether to designate an ESPA groundwater management area that would include the Big Wood River basin. As discussed above, 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. "[P]ractical considerations of efficiency and expediency," *Scott*, 102 Idaho at 149-50, 627 P.2d at 328-29, weigh against initiating declaratory proceedings on these matters when they are already pending before the Department.

6. This conclusion is supported by the fact that, as previously discussed, the questions and issues raised by the *Petitions* are inextricably intertwined with factual and technical issues. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to the IDWA the function of ascertaining reasonable pumping levels."); *AFRD2 v. IDWR*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007) (stating that conjunctive administration requires knowledge of "'how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.'") (citation omitted). Addressing the merits of the *Petitions* would lead to resolving these factual and technical questions through purely declaratory proceedings, solely on the basis of legal briefing and oral argument. Such proceedings should not be used to resolve matters that hinge in large part upon complex factual questions of hydrology and geology. Idaho Code § 67-5232(2); *County Ins. Co.*, 107 Idaho at 972, 695 P.2d at 357; *Farmers Ins. Exchange*, 142 Idaho at 194, 125 P.3d at 1070.

7. On November 2, 2016, the Director signed an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("Order"). The Order adopts a modified version of the Eastern Snake Plain Aquifer Model 2.1 boundary as the boundary for the ESPA

ground water management area. The ESPA ground water management area specifically excludes the Big Wood River basin.

8. Pursuant to Idaho Code § 42-1701A(3), Sun Valley Company may request a hearing before the Director on all matters addressed in the *Order* and on any of the requests for declaratory rulings in the *Petitions* Sun Valley Company asserts have not been resolved by the Order. Pursuant to the Idaho Administrative Procedure Act (Idaho Code § 67-5201 *et seq.*), Sun Valley Company may also seek judicial review of all matters addressed in the *Order* and on any of the requests for declaratory rulings in the *Petitions* Sun Valley Company asserts have not been resolved by the Order.

9. The Director should dismiss the *Petitions*: (1) because 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 and oral argument; and (2) because issuance of the Order 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.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that Sun Valley Companies' *Petitions* are denied.

DATED this 3rd day of November 2016.

Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November 2016, the above and foregoing was served on the following by the method(s) indicated below:

Scott L. Campbell
Matthew J. McGee
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
P.O. Box 829
Boise, ID 83701
slc@moffatt.com
mjm@moffatt.com

- [x] U.S. Mail, postage prepaid
- [ ] Hand Delivery
- [ ] Overnight Mail
- [ ] Facsimile
- [x] Email

Dylan B. Lawrence
J. Will Varin
Varin Wardwell LLC
P.O. Box 1676
Boise, ID 83701-1676
dylanlawrence@varinwardwell.com
willvarin@varinwardwell.com

- [x] U.S. Mail, postage prepaid
- [ ] Hand Delivery
- [ ] Overnight Mail
- [ ] Facsimile
- [x] Email

Randall C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE & BAILEY CHTD.
201 E. Center St.
P.O. Box 1391
Pocatello, ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

- [x] U.S. Mail, postage prepaid
- [ ] Hand Delivery
- [ ] Overnight Mail
- [ ] Facsimile
- [x] Email

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

- [x] U.S. Mail, postage prepaid
- [ ] Hand Delivery
- [ ] Overnight Mail
- [ ] Facsimile
- [x] Email

Sarah A. Klahn
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

- [x] U.S. Mail, postage prepaid
- [ ] Hand Delivery
- [ ] Overnight Mail
- [ ] Facsimile
- [x] Email

Michael C. Creamer
Givens Pursley LLP
601 West Bannock Street
P. O. Box 2720
Boise, ID 83701-2720
mcc@givenspursley.com

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Joseph F. James
Brown & James
130 Fourth Avenue West
Gooding, ID 83330

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Candice M. McHugh
Chris M. Bromley
McHugh Bromley, PLLC
380 S 4th Street, Suite 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson, LLP
163 South Avenue West
P.O. Box 63
Twin Falls, ID 83303-0063
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Deborah Gibson
Admin. Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director of the water resource board is otherwise provided by statute, any person 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.