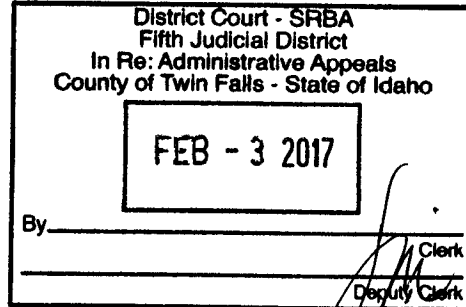


LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Attorneys for Respondents



**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCA TELLO,

Petitioner,

vs.

GARY SPACKMAN in his capacity as
Director of the Idaho Department of Water
Resources, and the IDAHO DEPARTMENT
OF WATER RESOURCES,

Respondents.

Case No. CV-01-17-67

**RESPONSE TO MOTION TO
DETERMINE JURISDICTION**

COME NOW Respondents, Gary Spackman, in his official capacity as Director (“Director”) of the Idaho Department of Water Resources (“Department”), and the Department, an executive agency of the State of Idaho, by and through their attorneys of record, and file this

response to the *City of Pocatello's Motion to Determine Jurisdiction* and the *City of Pocatello's Memorandum in Support of Motion to Determine Jurisdiction* ("Memorandum") filed by the City of Pocatello ("Pocatello") in the above-captioned matter on January 20, 2017. Pocatello requests that the Court "find it has jurisdiction to review Pocatello's appeal of the" Director's *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("ESPA GWMA Order"). *Memorandum* at 6. The Court should reject Pocatello's request because its petition for judicial review of the ESPA GWMA Order is premature and must be dismissed.

BACKGROUND

On November 4, 2016, the Director issued the ESPA GWMA Order. On November 16, 2016, Pocatello, the Coalition of Cities, and Sun Valley Company ("SVC") each filed petitions for reconsideration. SVC also filed a *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("Request for Hearing") requesting a hearing "pursuant to Idaho Code Section 42-1701A(3) and Rule 740 of the Rules of Procedure of the [Department] (IDAPA 37.01.01)." *Request for Hearing* at 1-2.

On December 2, 2016, the Director issued an order granting SVC's request for hearing and scheduling a pre-hearing conference. Timely petitions to intervene were filed by the Idaho Ground Water Appropriators, Inc.; the Surface Water Coalition; Pocatello; the Coalition of Cities; McCain Foods USA, Inc.; South Valley Ground Water District; the Basin 33 Water Users; the City of Hailey; the Big Wood and Little Wood Water Users Association; and the Water District 37-B Ground Water Association. The Director granted these petitions.

On January 4, 2017, Pocatello filed the *City of Pocatello's Notice of Appeal and Petition for Judicial Review* in the Fourth Judicial District Court, seeking judicial review of the ESPA GWMA Order. The case was reassigned to this Court that same date.

On January 20, 2017, Pocatello filed its Memorandum asking the Court to “find it has jurisdiction to review Pocatello’s appeal of the [ESPA] GWMA Order. . . .” *Memorandum* at 6. Pocatello asserts the ESPA GWMA Order is “subject to judicial review” and that “Pocatello has exhausted its administrative remedies” in accordance with Idaho Code § 67-5271. *Id.* at 3, 5.

ARGUMENT

A. **Pocatello’s appeal must be dismissed because Pocatello has not exhausted its administrative remedies.**

Pocatello’s appeal is premature because Pocatello has not exhausted its administrative remedies in compliance with the Idaho Administrative Procedure Act. Idaho Code § 67-5271(1); *see Podsaid v. State Outfitters & Guides Licensing Bd.*, 159 Idaho 70, 356 P.3d 363 (2015); *see also Wanner v. State, Dep’t of Transp.*, 150 Idaho 164, 244 P.3d 1250 (2011). “The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act.” *Regan v. Kootenai Cty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

In *Wanner*, the Idaho Supreme Court analyzed whether the petition for judicial review filed by Wanner was premature and must be dismissed. The Court explained that Idaho Code § 49-326(4) provides the opportunity for a person affected by disqualification of driving privileges to request an administrative hearing related to that disqualification. *Wanner*, 150 Idaho at 168, 244 P.3d at 1254. The Court also explained that Idaho Code § 49-330 provides the affected driver the right of judicial review from an adverse decision by the administrative hearing officer pursuant to the Idaho Administrative Procedure Act. *Id.* at 169, 244 P.3d at 1255. After citing the above-described provisions of law, the Court held that, pursuant to Idaho Code § 67-5271(1), “Wanner is not entitled to judicial review unless he has exhausted all administrative options available to him.” *Id.* at 168, 244 P.3d at 1254. The Court determined “[t]he statutory scheme

under the motor vehicle code does not contemplate judicial review unless the administrative hearing process is complete.” *Id.* at 170, 244 P.3d at 1256. The Court concluded that, because Wanner had requested a hearing, “[u]ntil such time as that hearing is conducted, judicial intervention into the matter of Wanner’s disqualification from operating a commercial vehicle is premature.” *Id.* Because Wanner failed to exhaust the administrative remedy “applicable to his concern,” the Court dismissed Wanner’s petition for judicial review. *Id.* The Court noted that this dismissal did not impact Wanner’s right to judicial review of any decision ultimately rendered. *Id.*

In *Podsaid*, the Court addressed a decision by the Idaho Outfitters and Guides Licensing Board (“Board”) to deny Podsaid’s guide license application. Podsaid timely requested a hearing from the Board regarding that denial pursuant to Idaho Code § 36-2114(b), but filed a petition for judicial review before the Board conducted the hearing. *Podsaid*, 159 Idaho at 74, 356 P.3d at 367. The Court concluded that, because Podsaid requested a hearing, but appealed before the Board conducted the hearing, Podsaid failed to exhaust his administrative remedies as required by Idaho Code § 67-5271(1). *Id.* Because Podsaid did not complete his appeal process within the agency, the Court remanded the matter to the Board. *Id.* at 75, 356 P.3d at 368.

Pocatello’s appeal is premature and must be dismissed. As in *Wanner* and *Podsaid*, Pocatello is not entitled to judicial review of an agency action until it “has exhausted all administrative options available” to it. *Podsaid*, 159 Idaho at 74, 356 P.3d at 367; *Wanner*, 150 Idaho at 168, 244 P.3d at 1254. There is an administrative remedy available to Pocatello that it must exhaust prior to seeking judicial review, namely, the administrative hearing SVC requested, the Director granted, and Pocatello intervened in. As in *Wanner*, the applicable statutory scheme (in this case, Idaho Code § 42-1701A(3) & (4)) does not contemplate judicial review of the

Director's decision regarding the ESPA GWMA unless the administrative hearing process is complete. The administrative hearing process will be complete once the hearing requested by SVC is held and the Director issues a final order. *See* Idaho Code § 42-1701A(3) & (4). Until such hearing is held, judicial intervention into the matter of the Director's decision regarding the ESPA GWMA is premature and Pocatello's appeal must be dismissed. *See Wanner*, 150 Idaho at 170, 244 P.3d at 1256. Such dismissal will not impact Pocatello's right to judicial review of any decision rendered by the Director following the hearing. *See id.*

Important policy considerations recognized by the Idaho Supreme Court underscore why Pocatello must exhaust its administrative remedies prior to seeking judicial review. These include "providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative process established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *Regan*, 140 Idaho at 725, 100 P.3d at 619. The Court's deferral to the administrative process established by the Legislature and the Department will allow the Director to hear and address the arguments of the parties to the underlying administrative proceeding, mitigate or cure errors prior to judicial intervention, and develop a more complete agency record for judicial review.

B. Should the Court decide Pocatello must not exhaust its administrative remedies as required by Idaho Code § 67-5271, Pocatello is still not entitled to judicial review of the ESPA GWMA Order because another provision of law applies.

Idaho Code § 67-5270(1) states that, "[j]udicial review of agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter." Idaho Code § 42-1701A is an "other provision of law" that addresses judicial review of the Director's actions. Idaho Code § 42-1701A(3) states that, "any person aggrieved by any action of the director . . . who has not previously been afforded an opportunity for hearing

on the matter shall be entitled to a hearing before the director to contest the action.” Idaho Code § 42-1701A(3) & (4) together establish that, only after the Director issues a final order following the requested hearing will any person “aggrieved” by that final order be “entitled to judicial review . . . in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.” Once SVC timely filed its request for hearing pursuant to Idaho Code § 42-1701A(3), and the Director granted that request, Idaho Code § 42-1701A became the relevant “provision of law” governing judicial review of the Director’s decision regarding the ESPA GWMA. Idaho Code § 67-5270(1). Until the Director issues a final order following the hearing, Pocatello’s appeal of the Director’s decision is premature.

C. Pocatello’s arguments do not establish that the Court may review the ESPA GWMA Order before the Director holds the hearing requested by SVC and issues a final order.

Pocatello argues that the Court “has jurisdiction to consider” the ESPA GWMA Order because it “is a final, effective order,” Pocatello’s petition for reconsideration “was denied,” and “Pocatello’s appeal [was] timely filed.” *Memorandum* at 3, 5. Pocatello’s argument overlooks that, while the ESPA GWMA Order is a “final” and “effective” order by definition pursuant to Idaho Code §§ 67-5246(1), (4), and (5)(b),¹ Pocatello’s right to judicial review of the ESPA GWMA Order is governed by Idaho Code § 67-5270, not the twenty-eight day period identified in Idaho Code § 67-5273(2). As discussed above, according to Idaho Code § 67-5270(3), Pocatello has no right to judicial review of the Director’s decision regarding the ESPA GWMA because Pocatello has not complied with the requirement of Idaho Code § 67-5271 to exhaust the

¹ Pocatello asserts “[t]he Director argued in its Response to the Coalition of Cities’ Petition for Clarification that the [ESPA] GWMA Order is not final for purposes of judicial review because of [SVC’s] request for hearing.” *Memorandum* at 5. A review of the response, attached to Pocatello’s petition for judicial review at Exhibit F, reveals that the Director did not argue the ESPA GWMA Order is not a final order. Instead, the Director concluded, as here, that the ESPA GWMA Order is not ripe for judicial review until the Director issues a final order following the hearing requested by SVC.

administrative remedy SVC requested, the Director granted, and Pocatello intervened in.

Alternatively, according to Idaho Code § 67-5270(1), because Idaho Code § 42-1701A(3) is an “other provision of law” applicable to the Director’s decision, Pocatello has no right to judicial review of that decision until the Director issues a final order following the hearing requested by SVC.

Citing *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 653, 301 P.3d 1270, 1271 (2012) and *Syth v. Parke*, 121 Idaho 156, 157, 823 P.2d 760, 761, *on reh'g*, 121 Idaho 162, 823 P.2d 766 (1991), Pocatello argues that the “Director has lost jurisdiction” to hold the hearing requested by SVC and issue an order thereafter. *Memorandum* at 4-5. In *A & B Irr. Dist.*, the Court held that, because the Department did not issue a written decision disposing of A&B’s petition for reconsideration within twenty-one days from its filing, the Department “no longer had jurisdiction” to issue a written decision disposing of the petition on its merits. *A & B Irr. Dist.*, 154 Idaho at 656, 301 P.3d at 1274. The circumstances of *A & B Irr. Dist.* and this case are distinguishable. There was no pending hearing when A&B filed its petition for reconsideration and no allegation that A&B had failed to exhaust its administrative remedies prior to seeking judicial review. Here, the Director granted SVC’s request for hearing, Pocatello intervened, and the Department is prepared to move forward with the hearing. Unlike in *A & B Irr. Dist.*, an administrative remedy is available to Pocatello that it must exhaust prior to seeking judicial review.

Similarly, the circumstances of *Syth* and this case are distinguishable. In *Syth*, the Court determined the district court lost jurisdiction to reconsider its order granting a new trial after an appeal of that order had been taken to the Idaho Supreme Court pursuant to the Idaho Appellate Rules. *Syth*, 121 Idaho at 158, 823 P.2d at 762. Idaho Appellate Rule 11(a)(5) provides that an

order granting a new trial is appealable to the Idaho Supreme Court “as a matter of right.” Here, a different provision of law governs the right of judicial review, Idaho Code § 67-5270. Pocatello’s appeal is premature as SVC requested a hearing, Pocatello intervened in that hearing, and the hearing has not yet been held. Neither *A & B Irr. Dist.* nor *Syth* establish that the Director may not hold the hearing requested by SVC and issue an order thereafter.

Finally, Pocatello asserts that its issues “cannot be resolved by hearing” and, absent this Court’s review, Pocatello is without “an adequate remedy.” *Memorandum* at 6. Pocatello is not without an adequate remedy. SVC requested a hearing pursuant to Idaho Code § 42-1701A(3), the Director granted that hearing, and Pocatello intervened. The hearing provides Pocatello an appropriate forum to address its issues, including whether the Director erred by issuing a single final order regarding the ESPA GWMA, questions regarding “a reasonably safe supply,” and whether the Director followed the correct procedural requirements. *Memorandum* at 2, 6; see *City of Pocatello’s Notice of Appeal and Petition for Judicial Review* at 4. These are the type of issues that can and should be raised at the hearing to give the Director the opportunity to consider the arguments of the parties, mitigate or cure errors prior to judicial intervention, and develop a more complete agency record for judicial review. See *Regan*, 140 Idaho at 725, 100 P.3d at 619. Again, dismissal of Pocatello’s appeal will not impact Pocatello’s right to judicial review of any decision rendered by the Director following the hearing.

CONCLUSION

Based upon and consistent with the foregoing, the Respondents respectfully request that the Court conclude Pocatello’s petition for judicial review is premature pursuant to the Idaho Administrative Procedure Act and issue an order dismissing Pocatello’s appeal.

DATED this 3rd day of February 2017.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'G. Baxter', written over a horizontal line.

GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:

SRBA DISTRICT COURT
253 3RD AVENUE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

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

A DEAN TRANMER
CITY OF POCA TELLO
PO BOX 4169
POCA TELLO ID 83201
dtranmer@pocatello.us

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

SARAH A KLAHN
MITRA M PEMBERTON
WHITE & JANKOWSKI LLP
511 16TH STREET STE 500
DENVER CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

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

ROBERT E WILLIAMS
WILLIAMS MERSERVY &
LOTHSPEICH LLP
153 EAST MAIN STREET
PO BOX 168
JEROME ID 83338
rewilliams@wmlattys.com

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

CHRIS M BROMLEY
CANDICE MCHUGH
MCHUGH BROMLEY PLLC
380 S 4TH ST STE 103
BOISE ID 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

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

RANDALL C BUDGE
THOMAS J BUDGE
RACINE OLSON NYE BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net

- 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 SECOND AVENUE WEST
PO 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
PO BOX 248
BURLEY ID 83318
wkf@pmt.org

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

SCOTT L CAMPBELL
CAMPBELL LAW CHARTERED
PO BOX 170538
BOISE IDAHO 83717
scott@slcexh2o.com

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

MATTHEW J MCGEE
MOFFATT THOMAS BARRETT ROCK
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE ID 83701
mjm@moffatt.com

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

ALBERT P BARKER
BARKER ROSHOLT & SIMPSON LLP
1010 W JEFFERSON STE 102
PO BOX 2139
BOISE ID 83701-2139
apb@idahowaters.com

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



Garrick L. Baxter
Deputy Attorney General