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DEPARTMENT OF
WATER RESOURCES

September 1, 2016

VIA EMAIL AND FACSIMILE ONLY

Gary Spackman, Director
Idaho Department of Water Resources
c/o Deborah Gibson
Administrative Assistant for the Director
322 Front Street
Boise, ID 83720-0098
Fax No: (208) 287-6700
Deborah.Gibson@idwr.idaho.gov

RE: City of Idaho Falls Comments on Proposed Eastern Snake River Plain Aquifer Ground Water Management Area.

Dear Director Spackman:

I am writing on behalf of the City of Idaho Falls (the "City") to respond to the Idaho Department of Water Resources' ("IDWR" or "Department") invitation to submit comments regarding the proposed Ground Water Management Area ("GWMA") for the Eastern Snake Plain Aquifer ("ESPA"). I attended the public meetings held in Mud Lake on July 25th and Blackfoot on July 26th, considered the items the Department presented on the establishment of a GWMA, and then discussed these matters with City representatives who have authorized the submission of these comments.

The City supports efforts to protect the ground water supply contained within the ESPA, and believes that the Department possesses the same belief and motivation to protect ESPA ground water supplies. However, for five primary reasons, the City respectfully asserts that establishment of a GWMA is not the proper vehicle at the present time to address ground water supply within the ESPA and therefore opposes establishment of a GWMA for the entire ESPA.

1. A GWMA would either duplicate or replace conjunctive administration.

First, the GWMA would either duplicate or replace the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* (the "CM Rules") that have been extensively litigated over the past decade and resulted in an established process reviewed and refined by the Idaho Supreme Court. With a known process, currently set forth in the Department's *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (the "*Methodology Order*"), the

application of that process should be given time to encourage or force junior-priority ground water rights to involve themselves in an approved mitigation plan, primarily through a contract or membership in a ground water district in order to participate in the *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.* (the "*Settlement Agreement*") entered into only recently in 2015. My own experience is that many ground water users joined ground water districts by contract or full district membership because of the application of the *Methodology Order* in 2016. Likewise, the City—along with other municipalities—participated in a separate city-focused mitigation plan approved under the CM Rules once the *Methodology Order* was amended in 2015.

Furthermore, we note that the written explanation for considering a GWMA contained in the director's July 7, 2016 letter appears to be for a stated purpose of satisfying senior surface water users' demands for water. This stated purpose confirms the City's concern that a GWMA is a duplicative administrative process as described above. But even more concerning to the City is that when viewed at a more nuanced level, a GWMA would actually change the legal standard for how water rights are to be managed on the ESPA. The current state of Idaho law is a rejection of "shut and fasten" administration for the ESPA—a position long advocated by the Surface Water Coalition—and an express acceptance of maximum utilization and beneficial use of the resource as additional considerations under the banner of "priority administration." Under a GWMA, the actual need and use by senior users that serve as foundational principles under priority administration will no longer be considered. Instead, a GWMA will focus on ESPA water levels alone, *regardless* of senior needs and actual beneficial use. And if those water level goals are not being met, Idaho Code § 42-233b mandates that the director "*shall* order those water right holders on a time priority basis . . . to cease or reduce withdrawal of water under such time as the director determines there is sufficient ground water." (emphasis added). It is therefore possible, and likely, that a situation presents itself where the senior surface users could experience a full supply under the *Methodology Order* and yet ground water users would still be curtailed or remain curtailed under a GWMA management regime. Overall, a GWMA may be appropriately utilized to protect ground water supplies for ground water users, as evidenced by Idaho law stating that the Ground Water Act (which Idaho Code § 42-233b is a part of) applies only to appropriators of ground water. But it is not the appropriate legal mechanism to resolve water shortages to senior surface right holders.

On this first point, it is also worth noting there has been no commitment from the Surface Water Coalition that it will withdraw its delivery call if a GWMA is established. When asked this question at the Mud Lake public meeting, Garrick Baxter indicated that the GWMA would not replace the processes established under the CM Rules. Therefore, ground water users will be subject to new uncertainties of a GWMA, ***and*** remain subject to the CM Rules and/or the

provisions of an approved mitigation plan under those rules for the benefit of the Surface Water Coalition, ***as well as*** possibly other senior surface users who assert delivery calls. In addition to these overlaps, it is also worth noting that there are some water users currently within the American Falls GWMA that would overlap with the ESPA GWMA and it is unclear how overlapping goals between two GWMAs would be addressed. This adds another layer of complexity to ground water users in the American Falls area. Overall, if switching to a GWMA regime cannot lessen uncertainty for water users, then it is not the optimal management regime.

2. It is not good public policy to use the GWMA designation for the purpose of involving the other "10%."

Secondly, there is a perception perpetuated by many that there are approximately 10% of ground water users that are not members of ground water districts. The Department has likewise indicated that one of its motivations for possible establishment of a GWMA is the lack of participation in mitigation actions by these 10%. However, when I asked about whether the Department had any specific data to support this assertion of the 10% at the Mud Lake public meeting, the Department and IGWA representatives only had estimated information and no actual data on those users. If IGWA's motivation for supporting a GWMA, and the Department's motivation for exploring establishment of a GWMA, is based on this perception, there does not appear to be sufficient data on this particular issue to support moving forward on such a significantly different ground water management regime than the well-established principles under the CM Rules.

Further, even if there are 10% of ground water users not participating in a mitigation plan, this relatively small number of users does not warrant the unprecedented step of establishing a GWMA for such a large geographic area. Rather, the Department should allow the recently agreed-to *Settlement Agreement* provisions and provisions of other approved mitigation plans—such as the plan the City is a party to—to be effectuated in order to evaluate whether more users are participating in mitigation before moving on to a GWMA regime. The parties to the *Settlement Agreement* are only a half season into their reduction plans and the State of Idaho has only begun moving forward on its commitment to recharge 250,000 AF on an average annual basis to aid in aquifer recovery. It is not good public policy for a small minority of water users—10%—to dictate policy for the remaining 90% majority.

3. There is an insufficient technical basis for the director to conclude that the ESPA is approaching the conditions of a critical ground water area.

The third primary reason the City is concerned with establishment of a GWMA is that the plain language of Idaho Code § 42-233b requires specific factual findings before a GWMA can be

established, and additionally, a GWMA vests the director with significant discretion in how a GWMA operates. Idaho Code § 42-233b in its entirety and with our emphasis, provides:

> **"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. Upon designation of a ground water management area the director shall publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area.
>
> 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.
>
> Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.
>
> The director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.
>
> *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, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Water right holders participating in an approved ground water management plan shall not be subject to administration on a time priority basis so long as they are in compliance with the ground water management plan.*

A GWMA can only be established when the director "has determined" that ground water in a basin is approaching the conditions of a critical ground water area. This is a significant conclusion that should only be reached after careful study on all areas of the ESPA where there are regionally specific situations and it is unclear how those specific situations can each be addressed under a single ESPA ground water management plan. Further, it is my understanding from the public meetings that IDWR and others have not undertaken studies for the specific purpose of determining whether the conditions required under Idaho Code § 42-233b are upon us.

The proponents of a GWMA bear the burden of proof for such a conclusion, either as justification for establishment of a GWMA or in a contested case on this issue. Additionally, there remains uncertainty as to whether the *Settlement Agreement* and other mitigation plans—which are approved CM Rule ***mitigation*** plans—will also be considered ground water ***management*** plans. Because a mitigation plan and a management plan have different titles, they do not appear to be the same thing even though it was suggested at the public meetings that the mitigation plans could serve as a template for a management plan.

4. A GWMA designation for the ESPA will place significant discretion and authority with the IDWR director.

The fourth primary concern of the City is that a GWMA designation will place significant discretion and authority in the hands of the IDWR director without any express checks on that discretion and authority. While a majority of water users may trust the current director, there is no avoiding the fact that the IDWR director is a political appointment. There are no clear statutory limitations or promulgated administrative rules limiting the director's authority under a GWMA designation. For such a large area like the ESPA, this will effectively allow the director—whoever he or she may be—to function as a water czar. This means that the lives, livelihoods, and property rights of hundreds of thousands of Idaho citizens will be concentrated in one person's hands. Certainly such a major policy decision to vest that much discretion and authority in one person to thereafter preside over Idaho's most important resource must be approached with extreme caution. As has been explained above, more time is needed to allow the current mitigation plans and the *Settlement Agreement* to be followed under their plain terms before considering whether to switch to a new management regime.

5. A GWMA will limit the ability for the City to obtain new municipal water rights.

Fifth and finally, a GWMA will make it much more difficult—if not impossible—for municipalities to appropriate new water rights to support new growth. Idaho Code § 42-233b provides the following:

> Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.

Currently, even under the Department's moratorium on new irrigation ground water rights, municipalities can submit applications for permit for new municipal water rights and are exempt from the moratorium. Establishment of a GWMA will result in a heightened evidentiary burden for municipalities because they will need to mitigate for all impacts to other water rights even though most water right holders will not protest the applications, whereas the municipalities

currently only have to address injury issues raised by specific protests. It is unclear how municipalities could grow under a GWMA management regime, but in terms the legal standard set forth in Idaho Code § 42-233b, the above-quoted language suggests it will be very difficult.

Thank you for considering the City's comments. The City intends to be a part of voluntary actions to enhance water supplies within the ESPA as we work toward solutions that meet the needs of all Idaho citizens who are dependent upon the ESPA. However, the City does not believe that the information on declining ground water levels presented by IDWR at the public meetings is sufficient to unquestionably demonstrate that the ESPA is approaching the levels of a critical ground water area. Such a significant determination—one that would send a chilling message to businesses looking to come to Idaho to further economic development—must be approached thoughtfully and carefully. This cannot be overstated—a public perception that Idaho's entire ESPA is approaching critical water level status will result in lost economic opportunity for Idaho. While we need to work to enhance water supplies and address the ground water level situation that is the result of many factors, hastily placing an "approaching critical" label on the situation is not the answer. There is currently an established management regime under the CM Rules that protects water supplies for senior water rights, and with the *Settlement Agreement* and other mitigation plans seeking to enhance water levels in the ESPA, the City suggests that the more prudent approach is to allow time for the actions undertaken by water users and the State of Idaho under these plans to be implemented. Once we have results from these actions—good or bad—water users can evaluate what the next steps should be. For all of these reasons, we request that the Department not move forward with establishment of a GWMA at the present time.

As to the area which the Director should include within a GWMA, the City is already within the boundary of the ESPA and prefers to only focus on its water rights and not the water rights of others. Therefore, the City takes a neutral position on whether areas outside of the current ESPA boundary should be included within a GWMA if a GWMA is designated.

Best Regards,

Robert L. Harris

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

cc: Mayor Rebeca Casper (via email)

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