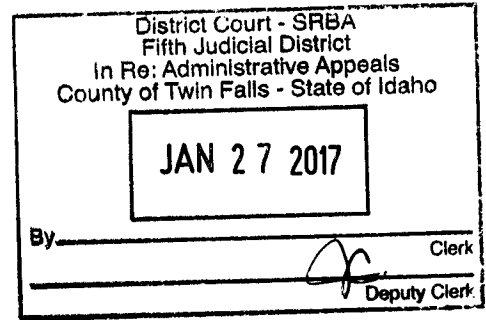


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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

SUN VALLEY COMPANY,

Petitioner,

vs.

GARY SPACKMAN in his capacity as
Director of the Idaho Department of Water
Resources,

Respondent.

Case No. CV-01-16-23173

**RESPONSE TO MOTION TO
DETERMINE JURISDICTION**

COMES NOW Gary Spackman, in his official capacity as Director ("Director") of the Idaho Department of Water Resources ("Department"), by and through his attorneys of record, and files this response to the January 13, 2017, *Motion to Determine Jurisdiction* and *Memorandum in Support of Motion to Determine Jurisdiction* ("Memorandum") filed by Sun

Valley Company (“SVC”) in the above-captioned matter. SVC asks the Court to find it “has jurisdiction” to consider the Director’s *Order Denying Petition for Declaratory Ruling* (“Declaratory Ruling Order”). *Memorandum* at 3, 5. The Court should reject SVC’s request because SVC’s *Petition for Judicial Review* of the Declaratory Ruling Order is premature and must be dismissed.

BACKGROUND

On July 25, 2016, SVC filed with the Department a *Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*.¹ On November 4, 2016, the Director issued the Declaratory Ruling Order denying SVC’s petition. On November 16, 2016, SVC filed with the Department *Sun Valley Company’s Petition for Reconsideration of Final Order Denying Petition for Declaratory Ruling* and a *Petition Requesting a Hearing on Order Denying Petition for Declaratory Ruling*. On December 2, 2016, the Director issued order granting SVC’s request for hearing and scheduling a pre-hearing conference.

Timely petitions to intervene were filed by the Water District 37-B Ground Water Association; the Idaho Ground Water Appropriators, Inc.; the City of Pocatello; the City of Hailey; the Big Wood and Little Wood Water Users Association; the City of Bellevue; the Surface Water Coalition; Fremont Madison Irrigation District; Madison Ground Water District; Idaho Irrigation District; South Valley Ground Water District; and the Basin 33 Water Users. The Director granted these petitions.

On December 23, 2017, SVC filed its *Petition for Judicial Review* of the Declaratory Ruling Order. The case was reassigned to this Court on January 4, 2017.

¹ On July 29, 2016, SVC filed an *Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*. On October 19, 2016, SVC filed a *Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*.

On January 13, 2017, SVC filed its Memorandum asking the Court to find that it “has jurisdiction” to review the Declaratory Ruling Order. *Memorandum* at 3, 5. SVC asserts it “is entitled to judicial review” of the Declaratory Ruling Order because “it has complied with the requirements of Sections 67-5271 through 67-5279, Idaho Code,” including that it has exhausted all required administrative remedies. *Id.* at 4.

ARGUMENT

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

SVC’s appeal is premature because SVC 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.

SVC’s appeal is premature and must be dismissed. As in *Wanner* and *Podsaid*, SVC 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 SVC that SVC must exhaust prior to seeking judicial review, namely, the administrative hearing SVC requested and the Director granted pursuant to Idaho Code § 42-1701A(3). 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 on SVC's petition for declaratory ruling 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 on SVC's petition for declaratory ruling is premature and SVC's appeal must be dismissed. *See Wanner*, 150 Idaho at 170, 244 P.3d at 1256. Such dismissal will not impact SVC'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 SVC 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 SVC must not exhaust its administrative remedies as required by Idaho Code § 67-5271, SVC is still not entitled to judicial review of the Declaratory Ruling 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 on SVC’s petition for declaratory ruling. Idaho Code § 67-5270(1). Until the Director issues a final order following the hearing, SVC’s appeal of the Director’s decision is premature.

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

SVC argues the Court “has jurisdiction to review” the Declaratory Ruling Order because it is a “final and effective” order, “the Director has denied reconsideration thereof, and the 28 day period in which to seek judicial review has now run.” *Memorandum* at 5. SVC’s argument overlooks that, while the Declaratory Ruling Order is a “final” and “effective” order by definition pursuant to Idaho Code §§ 67-5246(1), (4), and (5)(b), SVC’s right to judicial review of the Declaratory Ruling 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), SVC has no right to judicial review of the Director’s decision on SVC’s petition for declaratory ruling because SVC has not complied with the requirement of Idaho Code § 67-5271 to exhaust the administrative remedy it requested and the Director granted. 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, SVC has no right to judicial review of that decision until the Director issues a final order following the hearing requested by SVC.

SVC suggests its appeal is not premature because Idaho Code § 42-1701A(4) refers to any final decision or order of the Director and not to a final order of the Director following the hearing required by Idaho Code § 42-1701A(3). *Memorandum* at 4. SVC’s suggestion ignores that SVC must exhaust its administrative remedies in accordance with Idaho Code § 67-5271(1) before SVC has the right to judicial review of the Director’s decision on SVC’s petition for declaratory ruling. Further, Idaho Code § 42-1701A(3) specifically states that “[j]udicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.” The judicial review provision set forth in Idaho Code § 42-1701A(4), therefore, refers to a final order of the Director issued following the hearing required by Idaho Code § 1701A(3). This conclusion is supported by the Court’s decision in *Wanner*, which, as discussed above, demonstrates the applicable statutory scheme (in this case, Idaho Code § 42-1701A(3) & (4)) does not contemplate judicial review of the Director’s decision on SVC’s petition for declaratory ruling unless the administrative hearing process is complete. Idaho Code § 42-1701A(4) does not entitle SVC to judicial review of the Director’s decision at this time.

SVC also suggests the Director could have “granted the hearing for the purpose of reconsidering” the Director’s decision on SVC’s petition for declaratory ruling. *Memorandum* at 4. SVC’s suggestion runs afoul of the Idaho Supreme Court’s decision in *A & B Irr. Dist. v. Idaho Dep’t of Water Res.*, 154 Idaho 652, 653, 301 P.3d 1270, 1271 (2012). In that case, the Department argued it could grant a petition for reconsideration to gain “additional time to consider the petition’s merits.” *Id.* The Court rejected that argument, holding that the Director must decide the petition on its merits within twenty-one days of its filing. *Id.* at 655, 301 P.3d at

1273. The only way the Director could have granted a hearing for the purpose of reconsidering the Declaratory Ruling Order as SVC suggests is if the Director granted SVC's petition for reconsideration, held the hearing, and issued a decision all within twenty-one days of the submission of SVC's petition. Given the scope of the issue and the number of parties, such action would be impossible. The Director could not have granted SVC's petition for reconsideration to hold a hearing as SVC suggests.

SVC asserts that, "if the Court fails to exercise jurisdiction, the only meaningful opportunity for judicial review of the" Director's decision on SVC's petition for declaratory ruling "will have been denied" and that "aggrieved parties are left without an adequate remedy absent appeal." *Memorandum* at 4-5. SVC's assertion is misplaced. As discussed above, dismissal of this appeal will not impact SVC's right to judicial review of any decision ultimately rendered by the Director following the hearing requested by SVC pursuant to Idaho Code 42-1701A(3). *See Wanner*, 150 Idaho at 170, 244 P.3d at 1256. SVC and other parties to the underlying administrative matter will have the opportunity for judicial review of the Director's decision on SVC's petition for declaratory ruling after the Director holds the hearing requested by SVC and issues a final order.

SVC also asserts that the Department's position that SVC's appeal is premature is inconsistent with the Department's position in *City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 452, 247 P.3d 1037, 1040 (2011). In that case, the Department successfully argued that the City of Eagle's appeal should be dismissed because the City did not file an appeal within the twenty-eight day period for appeal from the Department's order on reconsideration. The *City of Eagle* case is distinguishable as there was no request for hearing pursuant to Idaho Code § 42-1701A(3) in that case and no allegation that the City of Eagle had failed to exhaust its

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administrative remedies prior to seeking judicial review. The Department's positions in *City of Eagle* and this matter are not inconsistent, but rather based upon the different factual scenarios of the cases.

Citing *H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Engineers & Land Surveyors*, 113 Idaho 646, 647, 747 P.2d 55, 56 (1987) and the Department's Rule of Procedure 760 ("Rule 760"), SVC argues that the Director "does not have jurisdiction" to hold the hearing SVC requested. The *H&V Eng'g, Inc.*, case is distinguishable. In *H & V Eng'g, Inc.*, the Court considered whether a district court's remand decision was appealable to the Idaho Supreme Court pursuant to Idaho Appellate Rule 11(a)(1). *H & V Eng'g, Inc.*, 113 Idaho at 648, 747 P.2d at 57. Here, a different provision of law governs the right of judicial review, Idaho Code § 67-5270. For reasons discussed above, SVC's appeal is premature as SVC requested a hearing and the hearing has not yet been held. Similarly, while Rule 760 permits the Director to modify or amend a final order of the agency "at any time before notice of appeal to the District Court has been filed or the expiration of the time for appeal to District Court," Rule 760 would only apply if SVC had complied with Idaho Code § 67-5270 and then timely filed a petition for judicial review. Neither *H&V Eng'g, Inc.*, nor Rule 760, establish that SVC's appeal prevents the Director from holding the hearing SVC requested and issuing a final order.

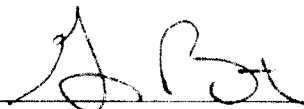
CONCLUSION

Based upon and consistent with the foregoing, the Respondent respectfully requests that the Court issue an order dismissing SVC's appeal because SVC's appeal is premature.

DATED this 27TH day of January 2017.

LAWRENCE G. WASDEN
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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
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27TH day of January 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:

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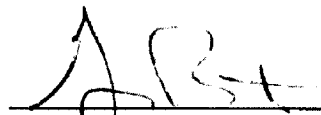
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