

**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

Docket No. AA-GWMA-2016-001

**ORDER ON BRIEFING; NOTICE
OF ADDITIONAL PREHEARING
CONFERENCE**

This Order addresses the following issue: When (1) a sole entity timely petitioned the Idaho Department of Water Resources (“Department”) for a hearing regarding an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, (2) the Department granted several petitions to intervene in the contested case, and (3) the sole petitioner for a hearing subsequently withdrew the request for a hearing, is there a contested case, and, if so, what is the party status of the intervenors in the contested case? The Director concludes that, under the specific facts and procedural posture of this case, the intervenors remain as parties in the contested case, but the intervenors participation in the contested case is limited to the issues raised by the initiating Petitioner, the Sun Valley Company (“SVC”).

BACKGROUND

On November 4, 2016, the Director of the Department issued an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”). No hearing was held before the issuance of the ESPA GWMA Order.

On November 16, 2016, SVC filed a *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“SVC’s Petition”), requesting a hearing on the ESPA GWMA Order pursuant to Idaho Code § 42-1701A(3).¹ On December 2, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*.

Timely petitions to intervene were filed by Pocatello; the Coalition of Cities; the Idaho Ground Water Appropriators, Inc. (“IGWA”); the Surface Water Coalition (“SWC”); McCain Foods USA, Inc.; South Valley Ground Water District; Basin 33 Water Users; City of Hailey; Big Wood & Little Wood Water Users Association; Water District 37-B Ground Water

¹ Concurrently, petitions for reconsideration of the ESPA GWMA Order were filed by SVC, the City of Pocatello (“Pocatello”), and the Cities of Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell (together “Coalition of Cities”).

Pocatello, SVC, and McCain Foods USA, Inc., also filed petitions for judicial review in District Court. The District Court dismissed the petitions, ruling that it lacked jurisdiction because persons aggrieved by the ESPA GWMA Order had not exhausted available administrative remedies, namely participating in the hearing requested by SVC pursuant to Idaho Code § 42-1701A(3). *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review*, CV-01-17-67; *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review*, CV-01-16-23173; *Order Sua Sponte Dismissing Petition for Judicial Review*, CV-01-16-2180.

Association; Idaho Power Company; Clear Springs Foods, Inc.; and Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District (together “Upper Valley Intervenor”). All of the petitions to intervene were granted by the Director.²

On March 20, 2017, SVC filed a *Notice of Withdrawal of Request for Hearing* (“SVC Withdrawal Request”) stating it “hereby withdraws its request for hearing and also withdraws from participation in the hearing granted by the Director” pursuant to Department Rule of Procedure 204. *SVC Withdrawal Request* at 1-2.

On March 22, 2017, the Director held a prehearing conference. All parties were present except SVC. The Director inquired of the parties whether he should hold a hearing on the ESPA GWMA Order given SVC’s withdrawal request. The parties and Director reached no conclusion regarding the issue. Instead, the parties and the Director agreed the prehearing conference should be continued to April 20, 2017. The Director also agreed to extend the time for filing petitions to intervene to April 20, 2017. Consistent with these agreements, the Director issued an *Order Extending Deadline for Petitions to Intervene; Notice of Continued Prehearing Conference* on March 30, 2017.

On April 14, 2017, Pocatello filed with the Department the *City of Pocatello’s Memorandum Regarding Procedural Posture; In the Alternative, Request for Hearing* (“Pocatello Memo”). Pocatello requested the Director “re-issue or otherwise withdraw the [ESPA GWMA Order] or permit Pocatello to proceed to hearing in this contested case” or grant Pocatello’s new request for hearing on the ESPA GWMA Order pursuant to Idaho Code § 42-1701A(3). *Pocatello Memo* at 8. The Coalition of Cities subsequently filed *Coalition of Cities Joinder in Pocatello’s Memo; In the Alternative, Request for Hearing*. The Basin 33 Water Users filed *Basin 33 Water Users’ Joinder in Pocatello’s Memo; and in the Alternative Petition for Hearing*.

On April 20, 2017 SWC filed a response to Pocatello’s memorandum, arguing that, because SVC withdrew its request for hearing, there was no outstanding petition or request that would allow for an administrative hearing on the ESPA GWMA Order. *SWC’s Response to Pocatello’s Memo/Response to Coalition of Cities’ Joinder and Petition for Hearing* at 3–4, 7–8 (“SWC’s Response”).

On April 20, 2017, the Director held a continued prehearing conference. The Director discussed the above filings and issued a briefing schedule, allowing the intervenors to address the issue of whether the Director should hold a hearing on the ESPA GWMA Order. *Continued Pre-Hearing Conference Recording*. The briefing schedule was issued on April 24, 2017 *Order Establishing Briefing Deadlines*.

On May 4, 2017, the Upper Valley Intervenor filed *Upper Valley Intervenor’s Memorandum Supporting the Need to Proceed to Hold a Hearing on the ESPA GWMA Order*, a

² *Order Granting Petitions to Intervene (IGWA, SWC, Coalition of Cities, McCain, and SV GWD)* (December 27, 2016); *Order Granting Petition To Intervene (Basin 33 Water Users and City of Hailey)*(January 12, 2017); *Order Granting Petition to Intervene (Big Wood and Little Wood Water Users Association)* (January 27, 2017); *Order Granting Petitions to Intervene (Clear Springs Foods, Inc. and Idaho Power Company)* (March 9, 2017); *Order Granting Petitions to Intervene (Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District)* (April 6, 2017).

memorandum arguing that the Director should hold the hearing despite SVC's withdrawal, and joining with other intervenors who previously requested a hearing.

On May 18, 2017, Pocatello filed *Pocatello's Response Brief*. The Coalition of Cities' subsequently filed *Coalition of Cities' Joinder in Pocatello's Response Brief*.

The matter was informally stayed from 2017 to 2019 while certain cities (including the City of Pocatello and cities within the Coalition of Cities) discussed settlement with the SWC related to the SWC delivery call. In early 2019, a settlement was finalized. The signatory cities agreed to “withdraw their opposition to the ESPA-GWMA Order that is subject to a contested case before IDWR (Docket No. AA-GWMA-2016-001), provided, however, that all Parties may remain as parties to the contested case to monitor the proceedings and participate as necessary.” *Settlement Agreement Between the Surface Water Coalition, Participating Members of Idaho Ground Water Appropriators, Inc., and Signatory Cities* at 5.³

On January 30, 2019, the Director convened a status conference to determine whether the intervenors wanted a hearing in light of the settlement agreement. Counsel for the Basin 33 Water Users and counsel for the Upper Valley Intervenors stated they still wanted the Director to conduct a hearing.

THE BRIEFS

1. *Pocatello Memo*

Pocatello argues: (a) as a result of the District Court's dismissal of Pocatello's petition for judicial review, the Department must re-issue the ESPA GWMA Order with a correct explanatory sheet, which would have the effect of resetting the deadline to request a hearing; and (b) in the alternative, the intervenors—who have been uniformly granted party status by showing a direct and substantial interest in the matter—should be able to proceed to hearing in spite of SVC's voluntary withdrawal from the case. *Pocatello Memo* at 3-8. Pocatello argues it should retain party status because: (a) Pocatello is aggrieved by the ESPA GWMA Order, and (b) due process requires the Director to recognize intervenors as parties even without SVC's participation. *Id.* at 4-7.

2. *SWC's Response*

SWC argues “[a]ny person aggrieved by the Director's order had an exclusive remedy at that point to request an administrative hearing pursuant to I.C. §§ 42-237e and 42-1701A(3). Only [SVC] availed itself of the statutory remedy and filed a request for hearing” *SWC Response* at 3. Therefore, “[s]ince Sun Valley has withdrawn its request, there is no outstanding petition or request that would allow for an administrative hearing to ‘contest’ the Director's *Final Order*.” *Id.* SWC argues the case should be dismissed on jurisdictional grounds, likening it to the untimely filing of an appeal, or other jurisdictional defect. *Id.* at 4.

³ A copy of the settlement agreement is located at: <https://idwr.idaho.gov/files/legal/swc-igwa-cities-settlement/SWC-IGWA-CITIES-Settlement-20190101-Cities-Settlement-Agreement-with-signatures.pdf>

SWC further argues that “[c]ontrary to Pocatello’s argument, the Department is not responsible for interpreting the law and advising parties of their available remedies” in terms of the re-issuance of the explanatory sheet, especially in light of the fact that the explanatory sheet correctly advised “that any aggrieved person could file a written petition requesting a hearing” *Id.* at 5. SWC argues there was no procedural due process violation because there was no deprivation of a liberty or property interest. *Id.* at 6.

3. *Upper Valley Intervenor’s Memo*

The Upper Valley Intervenor’s “fully join in the [sic] Pocatello’s arguments set forth in [The Pocatello Memo].” *Upper Valley Intervenor’s Memo* at 2. They assert that party status as intervenors means they “are entitled to fully participate and be heard, including as to the procedural issues addressed by the withdrawal of Sun Valley from the matter, in that . . . they are ‘aggrieved’ parties as a result of the GWMA Order.” *Id.* They present arguments that they would present at hearing related to deficiencies in the ESPA GWMA designation itself. In the alternative, they joined with those who have already requested a hearing pursuant to Idaho Code § 42-1701A(3). *Id.* at 4.

4. *Pocatello’s Response Brief*⁴

Pocatello responded:

[T]he Director initiated a contested case regarding the GWMA Order, the Director found that the [] intervenors have an independent, direct and substantial interest in the matter, and have been granted party status. [. . .] Therefore, an independent basis for jurisdiction exists, and Intervenor should be afforded an opportunity to pursue this matter to hearing and may step into Sun Valley’s shoes.

Pocatello Response Brief at 1.

Pocatello argues the SWC’s comparison of the establishment of the ESPA GWMA to an application for a permit of or transfer is not correct because “[t]he GWMA Order . . . was entered by the Director of his own volition.” *Pocatello Response Brief* at 3. Pocatello argues the Director found independent bases to allow Pocatello to participate in the ESPA GWMA dispute. Therefore, Pocatello’s interests were not resolved when SVC withdrew from the case. *Id.*

Pocatello argues SWC’s arguments also fail under *Laughy v. Idaho Department of Transportation*, in that intervenors to contested cases are “admitted as parties [and] able to ‘actively participate in the application process at the agency level,’ and cannot be ‘wrongly denied the opportunity to take part in formal agency proceedings.’” *Id.* at 3-4.

Pocatello reiterates “[t]o comply with Idaho Code section 67-5248(1)(b) and the District Court’s Order on Motion to Determine Jurisdiction/Order Dismissing Petition for Judicial Review (February 16, 2017) . . . the GWMA Order must be re-issued with a corrected list of available procedures and applicable time limits.” *Pocatello Response Brief* at 4.

⁴ On May 18, 2017, the Coalition of Cities filed a *Joinder in City of Pocatello’s Response Brief*.

Finally, Pocatello argues that, contrary to SWC’s claims, Idaho Code § 42-1701(A)(3) “contains no ‘jurisdictional’ language, and no indication that the Director’s authority to hold a hearing expires if a hearing is not requested within fifteen days; neither does section 42-1701(A)(3) contain anything akin to the automatic dismissal language found in, for example, Idaho Rules of Civil Procedure Rule 84.” *Id.* at 7.

DISCUSSION AND FINDINGS

This is a contested case proceeding initiated by the filing of a petition requesting a hearing pursuant to Idaho Code § 42-1701A(3)⁵, which states:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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.

Idaho Code § 42-1701A(3). Therefore, an aggrieved 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.” *Id.*

Under the Idaho Administrative Procedures Act and the Department’s Procedural Rules, a “party” is “each person or agency named or admitted as a party, or properly seeking an entitled as of right to be admitted as a party.” IDAPA 37.01.01.16; Idaho Code § 67-5201(13). The Department’s Procedural Rules specifically list an intervenor as a party and do not differentiate between the rights of intervenors and other parties, except insofar as an intervenor’s rights are conditioned in the order granting the petition to intervene. IDAPA 37.01.01.150; IDAPA 37.01.01.353. Where an intervenor’s rights have not been conditioned as parties, as is the case here, they “may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise *fully participate* in hearings or arguments.” IDAPA 37.01.01.157 (emphasis added).

Idaho Code § 42-1701A(3) also states:

The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding.

The Director has the authority to recognize other affected persons as parties and to grant to intervenor-parties the opportunity to participate in a proceeding, even if the original petition initiating the proceeding is withdrawn.

⁵ Where a hearing has not been held in the Director’s establishment of a GWMA, Idaho Code § 42-237e allows a hearing pursuant to Idaho Code § 42-1701A(3).

The Director concludes in this case, and under this specific set of facts, that when intervenors have been granted party status, and the original petition initiating the contested case is withdrawn, the intervenors remain parties to a contested case pending before the Director.⁶ The issues that may be litigated in the contested case are limited to the issues raised by the original petition creating the contested case.

ORDER

IT IS HEREBY ORDERED that intervenors in this contested case remain parties to the contested case pending before the Director. The issues addressed and evidence submitted at the hearing will be limited to the issues raised in the original petition for hearing filed by the Sun Valley Company. The contested case will be scheduled for a hearing.

The Director will set this matter for an additional prehearing conference to establish a hearing schedule.

IT IS FURTHER ORDERED that, on or before June 14, 2019, the parties shall communicate with the Director's assistant, Rosemary DeMond, either by telephone or by email, **unavailable dates** for a prehearing conference through July 26, 2019. Shortly after June 14, 2019, the Director will issue a Notice of Additional Prehearing Conference.

Rosemary DeMond

Email: rosemary.demond@idwr.idaho.gov

Telephone: 208 287-4803

DATED this 5th day of June, 2019.



GARY SPACKMAN
Director

⁶ The findings made herein will not allow any party to file late or untimely petitions or request for hearing going forward. These findings are limited to a situation where parties have timely and properly intervened, creating a contested case and the original hearing petitioner removes itself at some point prior to hearing, as it is allowed to do under Rule 204.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of June 2019, the above and foregoing was served on the following by the method(s) indicated below:

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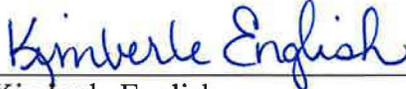
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