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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
	)	**SURFACE WATER COALITION'S RESPONSE TO CITY OF POCATELLO'S MEMORANDUM & REQUEST FOR HEARING / RESPONSE TO COALITION OF CITIES JOINDER AND PETITION FOR HEARING**

COME NOW, 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 (hereafter collectively referred to as "Surface Water Coalition" or "Coalition"), by and through counsel of record, and files this response to the *City of Pocatello's Memorandum Regarding Procedural Posture; in the alternative, Request for Hearing* (April 14, 2017) ("*Poc. Memo.*") and the Coalition of Cities' *Joinder and Petition for*

Hearing ("*CoC Joinder*") (collectively hereafter referred to as "the Cities"). For the reasons set forth below the Director should dismiss the administrative case for lack of jurisdiction and deny Pocatello's and the Coalition of Cities' untimely requests for hearing.

PROCEDURAL BACKGROUND

On November 2, 2016, the Director issued his *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("*Final Order*"). Thereafter, Sun Valley Company, the City of Pocatello, and the Coalition of Cities all filed petitions for reconsideration.[1] Only Sun Valley filed a petition requesting a hearing under Idaho Code § 42-1701A(3). The Cities did not file a timely request for a hearing under the statute.

IGWA, Surface Water Coalition, Pocatello, Coalition of Cities, McCain Foods, South Valley Ground Water District, Basin 33 Water Users, Big Wood & Little Wood River Water Users Associations, Water District 37-B Water Users Association, Clear Springs Foods, Idaho Power Company, Fremont-Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District all petitioned and were granted intervention in the matter.

Sun Valley, Pocatello, the Coalition of Cities, and McCain Foods also filed separate petitions for judicial review. The Director continued the pre-hearing conference while the District Court heard Sun Valley's and Pocatello's motions to determine jurisdiction. On February 16, 2017, the Court issued its orders on the motions to determine jurisdiction and dismissed the petitions for judicial review with prejudice.[2] *See Order on Motion to Determine Jurisdiction / Order Dismissing Petition for Judicial Review* (Case Nos. CV-01-16-23173, CV-01-16-23185, and CV-01-17-00067) (order in 23185 hereafter referred to as "*Jurisdiction*

[1] The Director did not issue an order on the petitions for reconsideration.

[2] In the McCain Foods appeal (CV-01-16-21480) the Court issued its *Order Sua Sponte Dismissing Petition for Judicial Review* and *Judgment* on April 10, 2017.

Order"). On March 20, 2017, Sun Valley filed a notice of withdrawal of its request for hearing. The Director then held a pre-hearing conference on March 22, 2017 and reset the conference for April 20, 2017 to give the parties time to consider the effect of Sun Valley's withdrawal. No party appealed the Court's decision dismissing Sun Valley's and Pocatello's petitions for judicial review, hence the Court issued remittiturs on April 6, 2017.

RESPONSE

I. Since Sun Valley has Withdrawn its Request, the *Final Order* is Not Subject to a Timely Request for Hearing and the Case Should be Automatically Dismissed.

The Director issued the ESPA GWMA *Final Order* on November 2, 2016. Idaho's Ground Water Act authorized the Director to issue such a final order without holding an administrative hearing first. *See* I.C. §§ 42-233b; 42-237e; *Jurisdiction Order* at 2-3. Any 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 Sun Valley availed itself of the statutory remedy and filed a request for hearing within fifteen (15) days. All other intervenors who wanted to "contest" the Director's order, including Pocatello and the Coalition of Cities, failed to file a timely request for hearing.

Since 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*. *See Jurisdiction Order* at 4 ("The Legislature instructs that such 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 . . . This procedural step is mandatory.").

Similar to an application for permit or transfer, once an applicant withdraws, there is no matter to pursue and the contested case before the Department is automatically dismissed. The

present case should now be automatically dismissed on jurisdictional grounds. The failure to request a mandatory hearing is similar to the failure to timely "appeal" an agency decision to district court. When parties fail to timely appeal a district court has no jurisdiction to consider the challenge. *See e.g.* I.R.C.P. 84(n); *Cobbley v. City of Challis*, 143 Idaho 130, 133 (2006); *City of Eagle v. IDWR*, 150 Idaho 449, 454 (2011); *Hansen v. Denney*, 158 Idaho 304, 308 (Ct. App. 2015). Similarly, when parties fail to timely appeal a district court judgment to the Supreme Court, an untimely appeal is a jurisdictional defect. *See* I.A.R. 14, 21; *State v. Schultz*, 147 Idaho 675, 677 (2009) ("An appellant's failure to file a timely notice of appeal deprives the appellate court of jurisdiction and requires dismissal of the appeal.").[3] The same reasoning applies to the failure to file a timely request for hearing on the Director's *Final Order*. While all aggrieved persons, including the Cities, had an opportunity to contest the Director's decision and request an administrative hearing, none except Sun Valley did so. Sun Valley's actions cannot enlarge the mandatory time to request a hearing. *See e.g. City of Eagle v. IDWR*, 150 Idaho 449, 453 (2011). The Director should adhere to the statutory timeframe set by the Legislature.[4]

In sum, Sun Valley's withdrawal has effectively ended the administrative proceeding before the Department. The Director should deny Pocatello's *Memorandum* and dismiss the proceeding accordingly.

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[3] The present situation is analogous to IGWA's and the City of Pocatello's attempted appeal of the Director's methodology order in the SWC Delivery Call case (S. Ct. Docket Nos. 42776-2015 and 42778-2015). In that matter Pocatello filed an untimely appeal, 43 days after the district court's judgment. Pocatello then filed a motion to dismiss its appeal, but reserved the right to participate in IGWA's appeal as a "respondent." *See City of Pocatello's Motion to Withdraw Notice of Appeal* (Jan. 22, 2015). IGWA later withdrew its appeal. Pocatello, even though it was a party to the underlying case, did not have a "right" to continue with IGWA's appeal. *See Order Granting Motion to Dismiss* (Apr. 20, 2015). Similarly, nothing gives Pocatello or the Cities the "right" to continue with Sun Valley's withdrawn petition requesting a hearing to "challenge" the *Final Order*.

[4] Just as the Director cannot enlarge a protest deadline or appeal deadline, the same principle of law applies to a request for hearing pursuant to I.C. § 42-1701A(3). Indeed, if the Director allows late requests for hearing in this case, what is to prevent aggrieved persons from filing late protests or petitions in the future? Under such a scenario no statutory deadline would be secure.

II. Pocatello's Arguments are Without Merit and Should be Denied.

Pocatello argues that the Department is "required" to re-issue the *Final Order* with a correct "explanatory sheet." *Poc. Memo.* at 3-4. Pocatello alleges the action is required by "due process and Idaho law." *Id.* at 4. Pocatello's argument fails.

First, there is no statute, rule, or case that requires the Department to "re-issue" the *Final Order* with a corrected "explanatory sheet." The referenced explanatory sheet is not part of the agency's decision and amounts to nothing more than the agency's perceived interpretation of what procedures applied at the time of the order's issuance. The "explanatory sheet" or instructions accompanying the *Final Order* were partly wrong in advising that a party could file a petition for reconsideration or appeal the order under the Idaho APA.[5] *See Jurisdiction Order* at 6-7. As found by the District Court, "IDAPA and its remedies have not been implemented in this matter." *Id.* at 6. Instead, the exclusive remedy set forth in Idaho Code §§ 42-237e and 42-1701A(3) was the only statutory remedy available. *See id.* at 7.

Contrary to Pocatello's argument, the Department is not responsible for interpreting the law and advising parties of their available remedies. The applicable statutes plainly required any aggrieved person to contest the *Final Order* through a timely filed petition with the Director. *See* I.C. § 42-237e; 42-1701A(3). Information accompanying the Department's order, even if it is wrong, does not excuse what is required by law. *See e.g.*, *City of Eagle*, 150 Idaho at 453 ("While IDWR made legally erroneous statements concerning the running of the appeal period, we find that IDWR clearly stated that the issuance for the Order on Reconsideration was July 3, 2008.").

[5] However, the explanatory sheet did correctly advise that any aggrieved person could file a written petition requesting a hearing pursuant to I.C. § 42-1701A(3). Accordingly, there is no question the Cities and their counsel were advised of the proper remedy that could have been pursued under the law. The Cities fail to provide a meritorious reason as to why they did not file a request for hearing.

Furthermore, Pocatello cannot credibly claim the agency's mistake violated its right to "due process." *Poc. Memo.* at 4. Presumably Pocatello is alleging that the Department's "explanatory sheet" violated its procedural due process rights. However, Pocatello does not dispute that it received notice of the *Final Order* or that it was somehow prevented from filing a timely request for hearing pursuant to I.C. § 42-1701A(3). As noted by the Idaho Supreme Court, "[a] procedural due process inquiry is focused on determining whether the procedure employed was fair." *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 72 (2001). Pocatello has not shown that having a statutory right to request a hearing before the Director was "unfair." Moreover, the Director's *Final Order* designating the ESPA Ground Water Management Area did not deprive Pocatello of a "liberty" or "property" interest. Indeed, the Director has not ordered Pocatello or any other water user to "cease or reduce withdrawal of water" at this time.[6] I.C. § 42-233b. As such, there was no procedural due process right at issue in the designation order. *See* 136 Idaho at 73 ("Only after a court finds a liberty or property interest will it reach the next step of analysis in which it determines what process is due.").

Further, this is not like the situation in *Petersen v. Franklin County*, 130 Idaho 176 (1997) or *In re Quesnell Dairy*, 143 Idaho 691 (2007). The Idaho Supreme Court has clarified that those cases "provide relief only when the agency fails to make clear when the decision is final and hence, appealable." *See City of Eagle*, 150 Idaho at 453. Here the Director issued an "order" designating the ESPA as a Ground Water Management Area. *See Final Order* at 25. The Director included a sheet that stated it was "explanatory information to accompany a final order" that was "to be used in connection with actions when a hearing was not held." The Ground Water Act plainly provided that when such an order was issued, an aggrieved person

[6] Moreover, the Director's designation is an action under the Ground Water Act to protect the aquifer, or the source of supply that the Cities rely upon to provide water to their citizens.

could contest the action and request a hearing pursuant to I.C. § 42-1701A(3). Unlike the facts in *Quesnell Dairy* there was no confusion about the effective date of the *Final Order*. Indeed, the Cities all filed petitions for reconsideration within 14 days of the order's issuance. While the application of the Idaho APA was in error, they failed to file a request for hearing as provided by I.C. § 42-1701A(3) and as referenced in the "explanatory sheet."

Although Pocatello claims it was confused by the "explanatory sheet" it did file a petition for reconsideration on November 16, 2016. Although that remedy was inapplicable, it shows Pocatello was aware of the *Final Order* and could have filed a timely petition requesting a hearing as required by I.C. § 42-1701A(3). The fact that Pocatello chose not to file the appropriate request is not the agency's fault and certainly did not mean the agency violated the city's right to due process.

III. The Cities Do Not Have a Right to Request a Hearing at this Time.

As explained above, Idaho law provided any "aggrieved person" with the opportunity to file a written petition requesting a hearing before the Director. *See* I.C. § 42-237e; 42-1701A(3). The statutory deadline was mandatory. *See Jurisdiction Order* at 4. The Cities consciously chose not to pursue their exclusive administrative remedy. Instead, the Cities erroneously filed petitions for reconsideration, a petition for judicial review, and relied upon the "strength" of Sun Valley's filing. *See Poc. Memo.* at 4. The fact that the Cities and others intervened in the matter did not change the jurisdictional requirement to request a hearing within the statutory timeframe. *See e.g. City of Eagle*, 150 Idaho at 454 ("The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition.").

Although Pocatello claims that intervenors in federal court can continue litigation after dismissal of the original party, that situation is not analogous to the present matter before the

Director. First, this is not a situation where a plaintiff files a complaint and other litigants have similar claims. Moreover, even that example requires an intervenor to meet fundamental "Article III" standing requirements.[7] *See id.* at 6. The Ninth Circuit case relied upon by Pocatello plainly states that litigation can be continued "where ***an independent basis for jurisdiction exists***...." *See GTE Cal., Inc. v. Fed. Comm. Comm'n*, 39 F.3d 940, 947 (9th Cir. 1994) (emphasis added). Even if the federal litigation example applied, no such "independent basis for jurisdiction" exists in this case. Again, none of the intervenors filed timely requests for hearing as required by I.C. § 42-237e and 42-1701A(3). The deadline was jurisdictional and prohibits a late challenge to contest the Director's *Final Order* at this time.

Again, Pocatello only points to the mistaken "explanatory sheet" to justify its failure to request a hearing as provided by law. *Poc. Memo.* at 6-7. However, similar to the facts in the *City of Eagle* case, the Department's error does not extend or expand the statute's explicit timeframe or justify a party's mistaken reliance upon what the agency stated. *See* 150 Idaho at 453. In the *City of Eagle* case the Department served an order on reconsideration with a letter advising of an erroneous date of service. *See* 150 Idaho at 450. Eagle claimed that it was "misled" by the Department and therefore its deadline to appeal should have been extended. The Idaho Supreme Court disagreed and found that the date of issuance for purposes of appeal was clear and that the Court had a sua sponte duty to determine whether the appeal was timely filed. *See* 150 Idaho 453-54. The same reasoning applies here.

The Cities had no basis to rely upon the Department's "explanatory sheet" to justify untimely requests for hearing. The 15-day mandatory deadline provided by I.C. § 42-1701A(3)

[7] Given the failure to comply with the applicable statutory deadline (i.e. 15-days to request hearing), none of the intervenors have "legal standing" to contest the Director's *Final Order*.

was jurisdictional and the Department has no authority to extend that deadline now.[8] Consequently, the Cities' untimely requests for hearing are without merit and should be denied. *See Poc. Memo.* at 8; *CoC Joinder* at 2.

CONCLUSION

Pocatello and the Coalition of Cities failed to file timely requests for hearing to contest the Director's *Final Order*. Although they requested reconsideration, the District Court determined that the Idaho APA remedies were inapplicable. The Director's designation of the ESPA Ground Water Management Area was made pursuant to the Ground Water Act. As such, the available remedy was plainly defined by I.C. §§ 42-237e and 42-1701A(3).

Sun Valley's withdrawal of its request for hearing is jurisdictional and should result in an automatic dismissal of this case. The Coalition requests the Director to deny the Cities' requests and dismiss this matter accordingly.

DATED this 18th day of April, 2017.

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[8] The Coalition of Cities points to no statute, rule, or case that would show the District Court's *Remittitur* in the referenced appeal by Pocatello enlarges or expands the 15-day deadline in I.C. § 42-1701A(3). The Director should reject this argument accordingly.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2017, I served a true and correct copy of the foregoing *Surface Water Coalition's Response* on the following by the method indicated:

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