

Jerry R. Rigby, ISBN 2470
RIGBY, ANDRUS & RIGBY LAW, *PLLC*
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208-356-3633
jrigby@rex-law.com

Attorneys for Fremont Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

	)	Docket No. AA-GWMA-2016-001
)	
IN THE MATTER DESIGNATING THE	)	FREMONT MADISON
EASTERN SNAKE PLAIN AQUIFER GROUND	)	IRRIGATION DISTRICT,
WATER MANAGEMENT AREA	)	MADISON GROUND WATER
	)	DISTRICT AND IDAHO
	)	IRRIGATION DISTRICT'S
	)	MEMORANDUM & WRITTEN
	)	ARGUMENT AS TO REMAINING
	)	ISSUES REQUIRING LEGAL
_____	)	ARGUMENT

COMES NOW Fremont Madison Irrigation District ("FMID"), Madison Ground Water District ("MGWD") and Idaho Irrigation District ("IID"), acting for and on behalf of their members, by and through undersigned counsel, and submits this Memorandum and Written Argument as to Director Spackman's order of deadline for motions and/or briefing related to Sun Valley Company's preserved and remaining issues requiring legal argument, which are set forth in the Director's order entitled "Deadline for IDWR's Submittal of Materials; Order on Motion

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 1

sb/fmidgwma.legalissues.wpd

Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery”, dated and filed the 25th day of September, 2019.

PRESERVED LEGAL ISSUES

Pursuant to Director’s determination that only four remaining Legal Issues were preserved in Sun Valley Company’s (“SVC”) original petitions, this memorandum is intended to re-assert those legal positions and arguments made by SVC in which FMID, MGWD and IID (collectively “UV”) now join since their Petition to Intervene, filed March 23, 2017.

Initially, UV’s continued participation in the above entitled matter is simply that UV do not believe that 42-233b, referred to as the Ground Water Management Area statute, was ever intended to apply to such a large multifaceted and multilayered aquifer as is the Eastern Snake Plain Aquifer (“ESPA”). Furthermore, UV’s believe the GWMA statute was intended to be applied to a rapidly depleting aquifer on the verge of requiring to be named a “critical ground water area” under 42-233a, instead of what is being played out in the ESPA with ground water levels increasing, especially in certain areas of the ESPA where the aquifer could actually be said to be healthy. Finally, UV maintain and intend to show that areas outside of the present ESPA boundary, including the Rexburg Bench, do not withdraw from the ESPA “aquifer from which withdrawals are made” or from a “hydraulically connected sources of water” as is the initial requirement of I.C. 42-233b.

Therefore, it is unfortunate that these responding parties are now limited to addressing only those remaining four (4) issues now ordered by the Director as reserved by the Sun Valley Company’s (“SVC”) original petition and filings, to which UV joined in their Petition to

UV’S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 2

sb/fmidgwma.legalissues.wpd

Intervene, as did several other entities. However, due to the extensive briefing and arguments made by SVC in the above current matter as well as in the matter P-DR-2016-001, which dealt with most of the same issues involved in the current matter, this UV Memorandum will quote extensively from the filings of SVC, most particularly in its filings entitled, “Sun Valley Company’s Amended Petition for Reconsideration of the Final Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area” filed on November 23, 2016, in this matter AA-GWMA-2016-001 (hereinafter “**SVC Amended Petition**”); “Sun Valley Company’s Petition For Reconsideration of Final Order Denying Petition for Declaratory Ruling” filed on November 16, 2016, in the matter P-DR-2016-001 (hereinafter “**SVC Petition**”) and SVC’s “Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Groundwater Management Area, filed on October 19, 2016, in the matter P-DR-2016-001 (hereinafter “**SVC 2nd Amended Petition**”).

ISSUES AND LEGAL ARGUMENT

Remaining Issue 1. Whether the ESPA GWMA Final Order was Procedurally Deficient.

UV assert the legal position and argument taken by SVC in its **SVC Amended Petition** as follows:

BEGINNING EXCERPT FROM SVC AMENDED PETITION, Pages 2-4:

A. The Director Entered the ESPA GWMA Order Upon Improper Procedures.

The Director did not validly issue the ESPA GWMA Order. An order is “[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one (1) or more specific persons.” See IDAPA 37.01.01.005.15; IDAHO

UV’S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 3

sb/fmidgwma.legalissues.wpd

CODE§ 67-5201(12). An order is the result of a contested case. See IDAPA 37.01.01.005.07; IDAHO CODE§ 67-5201(6) ("Contested case' means a proceeding which results in the issuance of an order."). All proceedings by any agency that may result in the issuance of an order are governed by the contested case provisions of the Idaho Administrative Procedures Act. IDAHO CODE § 67-5240. Those provisions include, without limitation, procedural requirements for hearings, see § 67-5242, evidentiary requirements, see § 67-5251, requirements for the maintenance of an official record, see § 67-5249, and the prohibition of ex parte communications with the hearing officer, see § 67-5253. The foregoing definitions and required procedures are plain and unambiguous, and cannot simply be ignored by the Director. See *Westway Constr., Inc. v. Idaho Transp. Dep't*, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003). "[I]nformal disposition may be made of any contested case by negotiation, stipulation, agreed settlement or consent order," see IDAHO CODE § 67-5241(1)(c), but this contested case did not involve negotiation, stipulation, agreement or consent by Sun Valley or, to Sun Valley's knowledge, negotiation, stipulation, agreement or consent by any of the other parties the Director selected to receive notice that he was considering designation of an ESPA GWMA. See *Laughy v. Idaho Dep 't of Transp.*, 149 Idaho 867, 872, 243 P .3d 1055, 1060 (2010) ("an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings").

Sun Valley incorporates by reference herein its arguments from the Second Amended Petition for Declaratory Ruling, IDWR Docket No. P-DR-2016-001, relating to the proper procedures, including compliance with the Department's Conjunctive Management Rules, to designate a GWMA.

END OF EXCERPT FROM SVC AMENDED PETITION, Pages 2-4

BEGINNING OF EXCERPT FROM SVC 2ND AMENDED PETITION, Pages 24-27

2. Even if the Director has the authority to create the proposed ESPA GWMA, he must comply with the procedural requirements of the CM Rules and the Department's Procedural Rules.

As discussed supra, the CM Rules provide the tools to determine how various water sources are interconnected, and how, when, where, and to what extent the diversion and use of water from one source impacts others. See AFRD No. 2, supra. The Director's proposed ESPA GWMA clearly contemplates the interconnection of various sources of water, and an evaluation of the CM Rules in the context of the ground water management statutes cited by the Director is therefore appropriate. Administrative rules and regulations are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011). Interpretation of administrative rules should begin with an examination of the literal words of the rule, and such should be given their plain, obvious, and rational meanings. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006). Again, the "language should be construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement." *Mason v. Donnelly Club*, 135 Idaho at 586, 21 P.3d at 908 (emphasis added).

Under the CM Rules, an "area having a common ground water supply" ("ACGWS") is defined as:

A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 5

sb/fmidgwma.legalissues.wpd

the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01.

Two requirements must be satisfied. First, the ACGWS must be a ground water source. Second, the diversion of ground water from the source must affect water supply in the source or affect the flow of water in a surface water source.

A "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." IDAHO CODE § 42-233b.

And, a "critical ground water area" is defined as:

any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

IDAHO CODE § 42-233a.

Legally, a GWMA must be co-equal with an ACGWS, because it necessarily satisfies each requirement to constitute an ACGWS. First, for the purposes of water use and administration, a "ground water basin" is a "ground water source."⁴ Second, evaluation of the sufficiency of "ground water to provide a reasonably safe supply," based on current or projected⁴ withdrawals from a ground water basin, see § 42-233a, clearly contemplates that diversion from

⁴ In theory, a "basin" might not be a "source," but that would suggest the water within the basin was not the subject of appropriation and beneficial use. If a basin is not a source of water subject to diversion and use, neither the statutes nor the rules at issue here would apply.

the basin "affects the ground water supply available to the holders of other ground water rights."

See IDAPA 37.03.11.010.01. It is self-evident that a GWMA must be an ACGWS.

Because a GWMA is an ACGWS, designation of an ESP A GWMA that includes tributary basins falling outside the boundaries of the existing ESPA ACGWS requires compliance with the CM Rules. Again, the CM Rules so provide. See IDAPA 37.03.11.020.06 ("These rules provide the basis for the designation of **areas of the state that have a common ground water supply** and the procedures that will be followed in ... **designating such areas as ground water management areas** as provided in Section 42-233(b), Idaho Code.") (emphasis added).

In particular, because a GWMA is an ACGWS, in order to designate a GWMA, the Director must first determine the applicable ACGWS. To do that, the Director must conduct a rulemaking, as CM Rule 50 demonstrates. In the alternative, and upon an appropriate petition by a water user pursuant to CM Rule 30, the Director must comply with CM Rule 31, which provides guidance and criteria concerning determinations of an ACGWS. Importantly, CM Rule 31 states that the Director's ACGWS findings "shall be included in the Order issued pursuant to Rule Subsection 030.07." IDAPA 37.03.11.031.05. Also, CM Rule 30.07 requires consideration of a contested case under the Department's Rules of Procedure prior to entering such an order. IDAPA 37.03.11.030.07.

In sum, the Director may not, as suggested in his Letter, simply decide whether an ESPA GWMA, inclusive of 22 tributary basins, should be created "[a]fter hearing from water users at the public meetings and considering the issues." Even if it were appropriate to create the

contemplated ESP A GWMA, which it is not, the Director must hold a contested case hearing upon petition by a party or a rulemaking in accordance with the Idaho Administrative Procedures Act concerning the boundaries of any ACGWS that will comprise such a GWMA, and otherwise comply with the CM Rules. Only then will the Director have the authority to designate an ACGWS as a GWMA (if at all), subject to governance in accordance with Idaho Code Section 42-233b.

END OF EXCERPT FROM SVC 2ND AMENDED PETITION, Pages 24-27

The above argument is especially pertinent to what UV maintain and intend to show that areas outside of the present ESPA boundary, including the Rexburg Bench, do not withdraw from the ESPA “aquifer from which withdrawals are made” or from a “hydraulically connected sources of water” as is the initial requirement of I.C. 42-233b. Instead, Rexburg Bench is in a “tributary basin” by several lines of reasoning, including but not limited to: 1) Neither the USGS RASA 1408-F groundwater model (RASA), the 1999 University of Idaho Snake River Plain Aquifer Model (SRPAM), the Idaho Department of Water Resources (IDWR) Enhanced Snake Plain Aquifer Model Version 1.1 (ESPAM1.1) nor the IDWR Enhanced Snake Plain Aquifer Model Version 2.1 (ESPAM2.1) indicate that the Rexburg Bench is part of the Snake Plain Aquifer. The latter two models do include it within the model domain, “to support later administrative decisions.” And 2) Groundwater elevations from IDWR well logs show a distinct discontinuity in the upper-most potentiometric surface, consistent with the discontinuity in land form and ground surface elevations associated with the geologic distinctions related to the Rexburg Bench.

Remaining Issue 2. Whether the Director Should Have Conducted Rulemaking.

UV join in the legal analysis and arguments of SVC regarding this 2nd remaining issue, as addressed in **SVC Amended Petition**, most particularly as follows:

BEGINNING OF EXCERPT FROM SVC AMENDED PETITION, Pages 4-7:

B. The ESPA GWMA Order Required Rulemaking.

In addition to the foregoing procedural deficiencies, at least part of the Director's ESPA GWMA Order should have gone through the rulemaking process. A rule is "[t]he whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of [the Idaho Administrative Procedure Act] that implements, interprets, or prescribes (a) law or policy; or (b) the procedure or practice requirements of an agency." IDAHO CODE § 67-5201(19). The Idaho Supreme Court has recognized that, "under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures." See *Asarco Incorporated v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). The Court therefore adopted guiding considerations for a court to determine whether an agency has taken action in the nature of an administrative rule. An agency action constituting a rule has the following characteristics: "(1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy." *Id.* (citing *Woodland Private Study Group v. State of New Jersey*, 533 A.2d 387 (N.J. 1987)).

In the ESPA GWMA Order, the Director has made a statement of general applicability that interprets and prescribes law or policy. Indeed, as he commences making that statement, he states that "[t]he term 'ground water basin' is not defined in the Ground Water Act, and has not been defined by judicial decision, administrative rule, or administrative order." See ESPA GWMA Order at 21, ¶ 12. The Director then describes a common understanding of the term "basin" in the context of surface water administration, and how that concept informs the undefined term "ground water basin," as well as the distinction between a "surface water basin" and a "ground water basin." See *id.* at ¶¶ 13-14. After that two paragraph discussion, citing a dictionary, a geology glossary, and footnoting, as an example, a report identifying two aquifers in the Big Wood River basin, the Director states:

15. In light of the foregoing, the term "ground water basin" as used in Idaho Code § 42-233b is understood as a term referring to an area in which ground water flows or moves within an aquifer or aquifers to common discharge areas, and has boundaries and areas of "recharge" that are reasonably well-defined. Like a surface water "basin," a "ground water basin" may be either relatively large or relatively small, and encompass tributary water sources (i.e. other ground water basins).

ESPA GWMA Order at 21, ¶ 15 (hereinafter, the "New Definition").

Thereafter, the Director applied the New Definition to the ESPA and the surrounding aquifers the Director has deemed an "aquifer system," concluding that:

16. The ESPA and the tributary basins comprise an aquifer system within which ground water flows or moves to specific discharge areas and has reasonably well-defined boundaries The aquifer system constitutes a "ground water basin" within the meaning of Idaho Code § 42-233b.

ESPA GWMA Order at 21-22, ¶ 16.

. . . The Director's act of legally defining "ground water basin" in the first place suffers from an

even more immediate deficiency. That act constitutes a rule requiring rulemaking in order to be valid. *See Asarco, supra*.

The considerations identified in *Asarco* demonstrate that the New Definition is a rule. It has wide coverage, governing the ESPA and any "tributary basins" encompassing the "aquifer system" as applied. It also more broadly governs the designation of any "system" of "aquifers" anywhere in the state. As the Director describes it in the ESPA GWMA Order, the New Definition is to be applied generally and uniformly, and only in future cases. It is undisputedly a definition--the embodiment of uniformity, and the Director did not indicate any intent to apply the definition to redefine or redesignate any existing GWMA.

Considerations 4-6 from *Asarco* also all indicate that the New Definition is a rule. The New Definition prescribes a legal standard not otherwise provided by the enabling statute. The enabling statute makes no reference to a plurality of "aquifers," nor to "common discharge areas," nor "boundaries and areas of recharge that are reasonably well-defined," nor does it suggest that a ground water basin "encompass[es] tributary water sources." These elements of the New Definition are not provided by the enabling statute. Further, they express agency policy not previously expressed, and interpret law. The Director acknowledges that. *See* ESPA GWMA Order at 21, ¶ 12 ("The term 'ground water basin' is not defined in the Ground Water Act, and has not been defined by judicial decision, administrative rule, or administrative order.").

The New Definition is an administrative rule of general applicability disguised as a conclusion of law in a purportedly final administrative order, issued without the procedural protections provided by the Administrative Procedures Act. The Director should reconsider

issuance of the ESPA GWMA Order, which incorporates new statements of Department law and policy, and withdraw such order until such time as a formal rulemaking occurs.

END OF EXCERPT FROM SVC AMENDED PETITION, Pages 4-7

UV full concur with SVC's footnote on page 7 of **SVC AMENDED PETITION** which states as follows:

Sun Valley maintains that a "ground water basin" has already been effectively defined as an "area having a common ground water supply." Defining the "aerial extent" of a GWMA the "ground water basin"- requires a rulemaking or compliance with the Conjunctive Management Rules, and, in particular, requires the determination of an area having a common ground water supply. See Second Amended Petition for Declaratory Ruling, Docket No. P-DR2016-001, at 20-30. In issuing the ESPA GWMA Order, the Director rejected the applicability of the CM Rules to the designation of a GWMA, notwithstanding the plain language of such rules. See ID APA 3 7 .03 .11.020.06 ("These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in ...designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code."). Instead of determining an area having a common ground water supply in accordance with the CM Rules, the Director provided a new statement of law or policy interpreting the statutory term "ground water basin," then applied that new statement of law to the ESPA. Assuming arguendo the CM Rules do not provide the pertinent legal standards to determine a "ground water basin," the Director must conduct a rulemaking to articulate such legal standards.

The above argument is continues to be pertinent to what UV maintain and intend to show that areas outside of the present ESPA boundary, including the Rexburg Bench, do not withdraw from the ESPA "aquifer from which withdrawals are made" or from a "hydraulically connected sources of water" as is the initial requirement of I.C. 42-233b as described in Remaining Issue Number 1 above.

Remaining Issue 3. Whether the Director should have Designated the ESPA GWMA in a Contested Case.

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 12

sb/fmidgwma.legalissues.wpd

UV join in the legal analysis and arguments of SVC regarding this 3rd remaining issue, as addressed in **SVC Petition**, most particularly as follows:

BEGINNING OF EXCERPT FROM SVC PETITION, Pages 4-8:

B. The ESPA GWMA Order Was Entered Upon Invalid Procedure, and Does Not Provide an Adequate Forum to Address the Merits of the Petition.

The Director's second reason for dismissal or denial of the Petition is that the Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area, dated November 2, 2016 (the "ESPA GWMA Order"), somehow creates a forum to address the legal issues raised in the petition according to the "normal administrative review process." See Petition Order ¶ 9. This reason relies upon the conclusion that the ESPA GWMA Order was validly issued, in accordance with "normal" administrative procedures. It was not. Indeed, among the issues Sun Valley asked the Director to resolve in the Petition was the legal mechanism by which the Director was empowered to create a GWMA in the first place, and the appropriate procedures to employ. In lieu of answering that fundamental legal question, the Director simply issued the ESPA GWMA Order.

An order is "[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one (1) or more specific persons." See IDAPA 37.01.01.005.15; IDAHO CODE§ 67-5201(12). An order is the result of a contested case. See IDAPA 37.01.01.005.07; IDAHO CODE§ 67-5201(6) ("Contested case" means a proceeding which results in the issuance of an order."). All proceedings by any agency that may result in the issuance of an order are governed by the contested case provisions of the Idaho Administrative

Procedures Act. IDAHO CODE § 67-5240. Those provisions include, without limitation, procedural requirements for hearings, *see* § 67-5242, evidentiary requirements, *see* § 67-5251, and the prohibition of ex parte communications with the hearing officer, *see* § 67-5253. The foregoing definitions and required procedures are plain and unambiguous, and cannot simply be ignored by the Director. *See Westway Constr., Inc. v. Idaho Transp. Dep't*, 139 Idaho 107, 113-14, 73 P.3d 721, 727-28 (2003).

The Department did not comply with even the most basic hearing and evidentiary requirements for contested case proceedings before entering the ESPA GWMA Order. Therefore, the Director did not have authority to enter the ESPA GWMA Order. Acts taken by an agency without statutory authority are void and must be set aside. *See A&B Irrigation Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012); *Arrow Transp. Co. v. Idaho Pub. Util. Comm'n*, 85 Idaho 307, 314-15, 379 P.2d 422, 426-27 (1963). The ESPA GWMA Order is invalid and without effect, and therefore does not create a "forum for Sun Valley Company to address the issues ... through the normal administrative review process and not the declaratory ruling process."

Notably, in support of his determination that the ESPA GWMA Order provides an adequate forum, the Director asserts that "the record establishes that the same questions and issues raised by the Petitions are directly or indirectly implicated in considering whether to designate an ESPA ground water management area, a question that was already pending before the Department when the Petitions were filed." *See* Petition Order ¶ 5.

First, the "record" to which the Director refers consists of nothing more than the Petitions themselves, the Director's letter, dated July 7, 2016, describing a possible GWMA designation, which was incorporated into the Petitions, and several petitions from interested parties seeking to intervene. Sun Valley is aware of no other "record."

Second, and more importantly, the "questions" of GWMA designation may have been pending before the Director, but the context and nature of that "pending" question, and the validity of its resolution, remains unclear even now. As discussed above, the Director did not initiate formal contested case proceedings and schedule a hearing to answer the question. He held voluntary "public meetings," accepted written comments, and has now issued an "order." He did not comply with the formal contested case procedures embodied in the Idaho Administrative Procedures Act and the Department's Procedural Rules. *See* IDAHO CODE §§ 67-5240, et seq. Nor did he comply with formal rulemaking procedures. *See* IDAHO CODE §§ 67-5220, et seq. It appears that the Director selectively incorporated a few elements from each procedure, creating a completely new and informal process to act upon the rights of water users. Giving the Director the benefit of the doubt, his ESPA GWMA public meetings and receipt of voluntary comment, at best, constituted "informal proceedings," as set forth in the Department's Procedural Rules. *See* IDAPA 37.01.01.100-103.

Critically, the rules governing informal proceedings provide as follows:

Unless all parties agree to the contrary in writing, informal proceedings do not substitute for formal proceedings and do not exhaust administrative remedies, and informal proceedings are conducted **without prejudice to the right of the parties to present the matter formally to the agency.**

IDAPA 37.01.01.103 (emphasis added). *See also* IDAHO CODE § 67-5241(1)(c) ("informal

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 15

sb/fmidgwma.legalissues.wpd

disposition may be made of any contested case by **negotiation, stipulation, agreed settlement, or consent order**") (emphasis added); *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010) ("an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings").

END OF EXCERPT FROM SVC PETITION, Pages 4-8

As was argued by SVC, these responding UV also did not agree to informal designation of an ESPA GWMA and would argue that they are prejudiced without the ability to “present the matter formally to the agency.” SVC sought a declaratory ruling as per I.C. 67-5232(1) to which the Director should have initiated a contested case in order to resolve the issues raised. UV argue that the Director erred in failing to do so.

Remaining Issue4. Whether Adjudication and the Formation of Ground Water Districts in the ESPA Forecloses the Designation of a GWMA.

UV fully join in the legal analysis and arguments of SVC regarding this 4th remaining issue, as addressed in **SVC 2nd Amended Petition**, most particularly the following:

BEGINNING OF EXCERPT FROM SVC 2nd AMENDED PETITION, Pages 22-24

Although Idaho Code Section 42-233b provides the Director with the authority to designate a GWMA, that authority has explicit limitations. In this case, in addition to the express language of that statute, the CM Rules provide applicable limitations.

1. The Director does not have the authority to create the proposed ESPA GWMA.

The Director should not create a GWMA where all water rights have been adjudicated and are the proper subject of a newly created or modified water district, pursuant to Idaho Code Section

42-604. The CM Rules demonstrate this limitation. First, directly on point, CM Rule 50 provides:
that:

The Eastern Snake Plain area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, **when the rights to the diversion and use of water from the aquifer have been adjudicated, or will** be designated a ground water management area.

IDAPA 37.03.11.050.01(d) (emphasis added).

The CM Rules provide that, upon the complete adjudication of ground water rights in the ESPA, a water district will be created or the ESPA ACGWS will be incorporated into an existing or expanded water district. The only condition before mandatory creation or incorporation is adjudication of ESP A water rights. A GWMA only was to be created, in the event necessary, before "the rights to the diversion and use of water from the aquifer have been adjudicated." The disjunctive "or" following the statement requiring creation or expansion of a water district upon adjudication of the aquifer demands that conclusion. A GWMA is a preadjudication administrative tool not applicable to the areas contemplated in the proposed ESPA GWMA.

In proposing and adopting the CM Rules, the Department contemplated an "either/or" approach to water districts and GWMAs, dependent entirely upon the status of adjudication of water rights within the basin. Comparing CM Rule 30.05 and CM Rule 30.06 reveals that adjudication of the water rights at issue is the lynchpin. If "the water rights have been adjudicated," the Department may treat the delivery call as a petition to create a new water district. IDAPA 37.03.11.030.05. If "the water rights have not been adjudicated," the Department may treat the delivery call as a petition for designation of a GWMA.

IDAPA 37.03.11.030.06.

Also, CM Rule 30.07(h) demonstrates that the designation of a GWMA should only occur if ground water supply is insufficient "and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights." IDAPA 37.03.11.030.07(h) (emphasis added). Water rights within the proposed ESPA GWMA have been adjudicated. The CM Rules do not contemplate the creation of a post-adjudication GWMA. Duly created or modified water districts supplant the legal authority to create a GWMA.

CM Rule 41 provides further evidence of this conclusion. It requires the Director to "utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule" when he enters an order upon a delivery call in a GWMA. IDAPA 37.03.11.041. Under CM Rule 40, relating to delivery calls within organized water districts, there is no similar requirement because the water rights within a water district have been adjudicated; those within a GWMA have not. Again, a GWMA is a pre-adjudication administrative tool. It does not apply to the areas described in the proposed ESPA GWMA. Indeed, that is exactly how the Department has interpreted the issue in the past. See Section ILE. *infra*.

The CM Rules supplement Idaho Code Section 42-233b. They are integral to a complete understanding of the Department's administration of Idaho waters. The CM Rules clearly provide that a GWMA is a pre-adjudication tool to be replaced by water districts. Consequently, the proposed ESPA GWMA is not authorized under Idaho law.

END OF EXCERPT FROM SVC 2nd AMENDED PETITION, Pages 22-24

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 18

sb/fmidgwma.legalissues.wpd

For the forgoing reasons, the Director should vacate his *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Plan*.

Dated this 21st day of October, 2019.

RIGBY, ANDRUS & RIGBY LAW, PLLC

By:


Jerry R. Rigby, Esq.

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 21st day of October, 2019.

RIGBY ANDRUS & RIGBY LAW, PLLC



Jerry R. Rigby

Director, Gary Spackman
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Rosemary.DeMond@idwr.idaho.gov

☒ [X] Mail
☐ [] Hand Delivery
☐ [] Facsimile
☒ [X] Electronic Mail

Dylan B. Lawrence
J. Will Varin
Varin Ward Well, LLC
P.O. Box 1676
Boise, ID 83701-1676
dylanlawrence@varinwardwell.com
willvarin@varinwardwell.com

☐ [] Mail
☐ [] Hand Delivery
☐ [] Facsimile
☒ [X] Electronic Mail

Randall C. Budge
TJ Budge
P.O. Box 1391
Pocatello, ID 83204
tjb@racinelaw.net
rcb@racinelaw.net

☐ [] Mail
☐ [] Hand Delivery
☐ [] Facsimile
☒ [X] Electronic Mail

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 20

sb/fmidgwma.legalissues.wpd

Sarah Klahn
Somach, Simmons & Dunn
2033 11th St., Ste. 5
Boulder, CO 80302
sklahn@somachlaw.com
dthompson@somachlaw.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

John K. Simpson
Travis L. Thompson
Albert P. Barker
Barker, Rosholt & Simpson, LLP
195 River Vista Place, Ste. 204
Twin Falls, ID 83301
tltp@idahowaters.com
jks@idahowaters.com
jf@idahowaters.com
apb@idahowaters.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

Joseph F. James
125 5th Ave. West
Gooding, ID 83330
joe@jamesmvlaw.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

Candice McHugh
Chris M. Bromley
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

Michael C. Creamer
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701-2720
mcc@givenspursley.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

UV'S MEMORANDUM & WRITTEN ARGUMENT AS TO REMAINING ISSUES -

Page 21

sb/fmidgwma.legalissues.wpd

Robert L. Harris
Holden Kidwell
P.O. Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com
arawlings@holdenlegal.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

Robert E. Williams
Williams, Merservy & Lothspeich, LLP
153 E. Main St.
P.O. Box 168
Jerome, ID 83338
rewilliams@wmlattys.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail

Kirk Bybee
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
kibybee@pocatello.us

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Electronic Mail