

**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 LEGAL ISSUES**

**BACKGROUND**

On November 4, 2016, the Director (“Director”) of the Idaho Department of Water Resources (“Department” or “IDWR”) issued an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”). On November 16, 2016, the City of Pocatello (“Pocatello”), the Coalition of Cities,<sup>1</sup> and Sun Valley Company (“SVC”) each filed petitions for reconsideration of the ESPA GWMA Order.

SVC also filed a *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*. On December 2, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*, granting SVC’s request for hearing and scheduling a prehearing conference for January 12, 2017.<sup>2</sup>

At the prehearing conference, the parties and Director agreed that the prehearing conference should be continued to March 22, 2017.<sup>3</sup> The parties and Director also agreed that proceedings in this matter should be stayed until March 22, 2017, except that the Director would extend the time for filing petitions to intervene to March 22, 2017, and would accept and potentially address such petitions during the stay. Consistent with these agreements, the Director

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<sup>1</sup> The cities participating as the Coalition of Cities in this matter are Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell.

<sup>2</sup> Timely petitions to intervene were filed by the Idaho Ground Water Appropriators, Inc. (“IGWA”); the Surface Water Coalition (“SWC”); Pocatello; the Coalition of Cities; McCain Foods USA, Inc. (“McCain”); the Basin 33 Water Users Water Users (“Basin 33 Water Users”); the South Valley Ground Water District, the City of Hailey, the Big Wood and Little Wood Water Users Association, and the Water District 37-B Ground Water Association. The Director issued orders granting these petitions to intervene.

<sup>3</sup> On January 4, 2017, the City of Pocatello filed a *Petition for Judicial Review* in the Fourth Judicial District, Case No. CV-01-17-67, in relation to this matter. The Court concluded it lacked jurisdiction to determine the matter prior to the Director’s holding a hearing and dismissed the petition for judicial review. *Order on Motion to Determine Jurisdiction*, Case No. CV-01-17-67 (4<sup>th</sup> Jud. Dist. Ct. 2017). The opinion is discussed in more detail below and a copy of it can be found on the Department’s website: <https://idwr.idaho.gov/files/legal/CV01-17-00067/CV01-17-00067-20170216-Order-on-Mtn-to-Determine-Jurisdiction-Order-Dismissing-Petition-for-Judicial-Review.pdf>.

issued a *Notice of Continued Pre-Hearing Conference; Order Staying Proceedings Except Intervention* on January 17, 2017.<sup>4</sup>

On March 20, 2017, SVC filed a *Notice of Withdrawal of Request for Hearing*.

On March 22, 2017, the Director held the continued prehearing conference. All parties were present except SVC. The Director questioned whether he should proceed to hold a hearing on the ESPA GWMA Order given SVC's withdrawal of its request for hearing. The parties and the Director agreed the prehearing conference should be continued to April 20, 2017. The Director extended the time for filing petitions to intervene to April 20, 2017.<sup>5</sup>

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). The Coalition of Cities subsequently filed *Coalition of Cities Joinder in Pocatello's Memo; In the Alternative, Request for Hearing*. 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").

On April 20, 2017, the Director held a continued prehearing conference. The Director discussed the Pocatello Memo and the SWC's response 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.

On May 4, 2017, the Upper Valley Irrigators filed *Upper Valley Intervenors' Memorandum Supporting the Need to Proceed to Hold a Hearing on the ESPA GWMA Order*, a 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 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

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<sup>4</sup> Clear Springs Foods, Inc. and Idaho Power Company filed timely petitions to intervene on February 28, 2017. The Director issued an order granting these petitions to intervene.

<sup>5</sup> Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District ("Upper Valley Irrigators") filed a timely petition to intervene on March 23, 2017, which the Director granted.

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.” *Cities Settlement Agreement* at 5.<sup>6</sup>

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 Irrigators requested the Director conduct a hearing.

On July 11, 2019, the Director held an additional prehearing conference. All parties were at the conference except for the Big Wood & Little Wood Water Users Association and were either represented in person or by phone. The participating parties discussed, among other issues, how the case should proceed to hearing. As a result of the conference, those parties who still maintain opposition to the ESPA GWMA Order and a desire to present argument and evidence at hearing were identified. The parties still in opposition were: the Upper Valley Irrigators, Basin 33 Water Users, and McCain Foods.<sup>7</sup>

After the additional prehearing conference, the Director issued an *Order Adopting Deadlines; Notice of Additional Prehearing Conference*. The order set deadlines for submission of party issue statements along with response deadlines and an additional prehearing conference for September 23, 2019.

On September 23, 2019, the Director held the scheduled prehearing conference. All parties were represented either in person or by phone. The Director and parties discussed the scope of potential issues and agreed upon a schedule for disposition of legal issues through briefing and factual issues through live hearing.

On September 25, 2019, the Director issued the *Deadline for IDWR's Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery* (“Legal Issues and Hearing Order”). In the order, the Director established: (a) a deadline for IDWR to disclose all relevant materials used or considered in issuance of the *ESPA GWMA Order*, including any additional, pertinent information compiled after issuance of the final order; (b) a motion and briefing schedule for disposition of legal issues; (c) notice and the scope of hearing for the remaining factual issue(s); and (d) dates for the hearing and all relevant hearing preparation deadlines. The order also authorized discovery.

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<sup>6</sup> 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>.

<sup>7</sup> McCain Foods subsequently withdrew its opposition to the ESPA GWMA Order. *McCain Foods USA, Inc.'s Notice of Withdrawal of Opposition to the Order Designating the Eastern Snake Plain Aquifer GWMA and Request to Remain as Intervenor* at 2 (July 30, 2019).

Based on party briefing and argument, the Legal Issues and Hearing Order delimited the following factual issue for hearing:

Whether areas outside of the ESPA area of common ground water supply, as defined by CM Rule 50 (IDAPA 37.03.11.050), but included within the ESPA GWMA, are located in tributary basins and are otherwise sufficiently remote or hydrogeologically disconnected from the ESPA to warrant exclusion from the ESPA GWMA.

Based on party briefing and argument, the Legal Issues and Hearing Order also delimited the scope of legal issues as follows:

1. Whether the Order Designating the ESPA GWMA was procedurally deficient;
2. Whether the Director should have conducted rulemaking;
3. Whether the Director should have designated the ESPA GWMA in a contested case; and
4. Whether adjudication and the formation of ground water districts in the ESPA forecloses the designation of a GWMA.

On October 21, 2019, the Upper Valley Irrigators timely submitted *Fremont Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District's Memorandum & Written Argument as to the Remaining Issues Requiring Legal Argument* ("Upper Valley Memo") and Basin 33 Water Users submitted *Basin 33 Water Users' Motion for Summary Judgment and Memorandum in Support* ("Basin 33 Water Users Memo"). On the same day, the SWC submitted *Surface Water Coalition's Motion for Summary Judgment and Supporting Points/Authorities Re: Legal Issues* ("SWC Memo"). Various parties filed responses to the initial briefs and replies.

## **RELEVANT LEGAL PROVISIONS / ANALYSIS**

### **Enabling Statutes**

Idaho Code § 42-231 states, in relevant part:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.



Idaho Code § 42-233b states:

“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.

### **Summary Judgment**

Pursuant to I.R.C.P. 56(c), summary judgment must be entered when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” The record will be liberally construed “in favor of the party opposing the motion for summary judgment and draws any reasonable inferences and conclusions in that party’s favor.” *Asarco* at 4, 981 P.2d 239. If the evidence shows no disputed issues of fact, what remains is a question of law. *Farm Credit Bank of Spokane*, 125 Idaho at 272, 869 P.2d at 1367.

## ANALYSIS

### Whether the Order Designating the ESPA GWMA Was Procedurally Deficient

The Upper Valley Irrigators and Basin 33 Water Users assert the Director erred by issuing the ESPA GWMA Order because the Director did not adhere to the procedural requirements of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11, “CM Rules”) and/or IDWR’s Rules of Procedure (IDAPA 37.01.01, “Rules of Procedure”). Upper Valley Memo at 5-8; Basin 33 Water Users Memo at 6-22.

Idaho Code § 42-233b was enacted in 1982. Ch. 90, § 1, 1982 Idaho Sess. Laws 164, 165. Section 42-233b grants the Director the authority to designate a ground water management area when he determines that a “ground water basin . . . may be approaching the conditions of a critical ground water area.” In contrast, the statute authorizing the Director to designate a critical ground water area (Idaho Code §42-233a) was enacted in 1951, approximately 30 years before enactment of the ground water management area statute. When the Director designates a critical ground water area, the Director must find that the “ground water basin, or designated part thereof, [does not have] sufficient ground water to provide a reasonable 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.

Former Directors of IDWR created several critical ground water areas prior to enactment of Section 42-233b (Ground Water Management Area Statute).<sup>8</sup> By enacting Section 42-233b, the legislature recognized the need for the Director to act before the rates of withdrawal exceeding the reasonably safe supply. Following enactment of Section 42-233b, former Directors of IDWR began designating ground water management areas instead of critical ground water areas. To date, twelve ground water management areas have been created.<sup>9</sup> The ground water management areas were created with the vision of addressing predicted, imminent imbalance in the water budget that, unchecked, would lead to critical ground water management area conditions. In addition, critical ground water area conditions might trigger delivery calls by senior priority water right holders that would lead to costly litigation and societal and economic upheaval resulting from curtailment of junior priority water rights to balance the imbalance in the water budget.

In 1994, after the enactment of Section 42-233b, the Idaho Supreme Court affirmed a decision of District Court Judge Daniel Hurlbutt in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). *Musser* called for delivery of an early priority surface water right against junior priority ground water rights. The *Musser* decision required the Director of IDWR to

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<sup>8</sup> A list of all critical ground water areas can be found on the Department’s website at: <https://idwr.idaho.gov/water-rights/critical-groundwater-areas/designated.html>.

<sup>9</sup> A list of all ground water management areas can be found on the Department’s website at: <https://idwr.idaho.gov/water-rights/groundwater-management-areas/designated.html>.

“immediately comply with I.C. § 42-602” and conjunctively “distribute water” in accordance with the prior appropriation doctrine. *Id.* at 393, 871 P.2d at 810. The Musser delivery call for conjunctive management was the impetus to promulgate IDWR’s Conjunctive Management rules in 1994. Clive J. Strong, *The First Twenty Years of the Snake River Basin Adjudication: Is There an End in Sight?*, 50 Advocate 14, 15 (2007).

### Interaction between Idaho Code § 42-233a and the Conjunctive Management Rules

The promulgation of conjunctive management rules did not subsume the larger need for the management of ground water to address impending imbalances in ground water budgets. In fact, the Director of IDWR designated two ground water management areas for portions of the ESPA in 2000<sup>10</sup> during ongoing conjunctive management litigation brought by delivery calls under the conjunctive management rules.

In conjunctive management litigation brought by the SWC, a consortium of Snake River surface water delivery organizations holding senior priority surface water rights, the administrative decisions of IDWR concluded that the water supply for the holder of the senior surface water right holders depended on both surface water flows resulting from snow pack and spring flows emitting to the Snake River from the ESPA. Because the water supply could not be reliably predicted until near the end of the snow accumulation period, the predicted water supply for the senior priority surface water rights could not be determined until the spring preceding the irrigation season.

At the time of the administrative decisions for conjunctive management delivery calls by the SWC establishing a spring determination of water supply, Idaho Code § 42-233b (Ground Water Management Area statute) required the Director to notify junior ground water users before September 1 of the year preceding the growing season when the holders of junior ground water rights must cease or reduce diversions. This notice requirement would have dictated a notice of curtailment approximately seven months before the spring date when water supply for satisfaction of the senior priority surface water rights could be reasonably predicted. As a result, the laws governing administration of water in the American Falls Groundwater Management Area conflicted with the specifics of conjunctive management. The then Director of IDWR issued a *Final Order Modifying the Boundaries of the American Falls Groundwater Management Area* (August 29, 2003). The order eliminated most of the American Falls Groundwater Management Area, leaving a small portion on the southeast side of the Snake River. In 2016, the Idaho Legislature removed the language from Section 42-233b requiring notice of curtailment of junior ground water right holders before September 1, eliminating the specific conflict with the conjunctive management rules. Ch. 297, § 1, 2016 Idaho Sess. Laws 848, 849.

IDWR’s decision to modify the American Falls Groundwater Management area was based on: (1) the establishment of water districts for regulation, and (2) “the continued existence [of the ground water management area] within the Water District boundaries may cause confusion in the administration of water rights.” *Final Order Modifying the Boundaries of the*

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<sup>10</sup> *Order In the Matter of Designating the American Falls Ground Water Management Area* (August 3, 2001) and *Order In the Matter of Designating the Thousand Springs Ground Water Management Area* (August 3, 2001).



American Falls Groundwater Management Area (August 29, 2003) The order was based partially on the conflict in the timing of the notice of curtailment and was not issued on the basis alleged by the Upper Valley Irrigators and Basin 33 Water Users that the CM Rules somehow supplanted and superseded Section 42-233b.

The purpose and scope of the conjunctive management rules are clearly stated in CM Rule 001, captioned “TITLE and SCOPE.” (IDAPA 37.03.11.001):

The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.

The conjunctive management rules have a narrow focus and purpose – to “prescribe procedures for responding to a deliver call made by the holder of a senior-priority . . . water right . . .” The CM Rules are employed when the holder of a senior water right requests administration of water rights asserting that holders of junior priority water users are depriving the holder of the senior priority water right of the water to which the senior is entitled. The conjunctive management rules describe in detail how IDWR and the holders of both senior and junior priority water rights should address the petition for delivery call. *See* CM Rules 30-42 (IDAPA 37.03.11.030-042).

The Upper Valley Irrigators quote Rule 20 of the CM Rules: “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 following in . . . **designating such areas as ground water management areas** as provided in Section 42-233(b), Idaho Code.” (IDAPA 37.03.11.020). The Upper Valley Irrigators do not emphasize the important language of the rule which states that the conjunctive management rules “**provide the basis** for designating . . . ground water management areas.” Providing a basis for creation does not equate to a conclusion that the conjunctive management rules are the sole procedural mechanism for creation of a ground water management area.

CM Rule 5 (IDAPA 37.03.11.05) also states, “Nothing in these rules shall limit the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.” The plain language of the CM Rules establishes the CM Rules do not preclude the Director from taking action consistent with Idaho Code § 42-233b.

In conclusion, the CM Rules do not prevent the Director from creating the ESPA GWMA by order without hearing. Designation of a ground water management area is intended to be a preemptive action to address predicted, imminent imbalances in water budgets that, unchecked, would lead to critical ground water management area conditions. The designation is also meant to forestall or prevent delivery calls. The Director may include areas within a ground water basin in a ground water management area that may not be included in an “area of common ground water supply,” as discussed in the conjunctive management rules.

The Director was not required to follow the conjunctive management rules in designating a ground water management area.



### Following IDWR's Rules of Procedure

The Director issued an order designating the ESPA GWMA without first holding a formal administrative hearing. The Upper Valley Irrigators and Basin 33 Water Users argue the Administrative Procedure Act, and the Rules of Procedure require the Director to initiate a contested case and hold a hearing before issuance of an order creating a ground water management area. *Upper Valley Memo* at 3-7; *Basin 33 Water Users Memo* at 20-23. This argument is contrary to the plain language of Idaho Code § 42-233b.

In designating the ESPA GWMA, the Director was not required to initiate a proceeding under the Administrative Procedure Act and IDWR's Rules of Procedure.

As Judge Wildman stated in his order dismissing Pocatello's petition for judicial review, Idaho Code § 42-233b authorizes the Director to designate a ground water management area without hearing:

There is no requirement [in Idaho Code § 42-233b] that the Director hold an administrative hearing prior to designating a ground water management area. Nor is there any requirement that he initiate rulemaking or a contested case proceeding under the Idaho Administrative Procedure Act ("IDAPA") prior to designating a ground water management area. The Director may simply act upon his own initiative and discretion under the authority granted to him by statute.

*Order on Motion to Determine Jurisdiction* at 2.

The Director designated the ESPA GWMA according to the Ground Water Act's enabling statutory authority.

Basin 33 Water Users argue because water rights are property rights, right holders are guaranteed due process before the Director's designation of a GWMA. Basin 33 Water Users argue the water rights of its users are property interests worthy of due process protection, and therefore the "process employed by the Department is not a lawful substitute for a contested case hearing." Basin 33 Water Users argue *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007) requires the Director to apply a three prong test to determine whether sufficient due process was afforded by IDWR to affected holders of ground water rights. The three tests of *Rogers*, quoting *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) are:

First, the private interest private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Rogers* at 740.

Basin 33 Water Users then paraphrase these tests, attempting to apply them to the present matter:

(1) the official action of the GWMA designation affects private interests and the current prior appropriation administrative regime; (2) the Director's procedure in designating the ESPA GWMA cannot substitute for a contested case administrative hearing "where a proponent of the GWMA must satisfy applicable burdens of proof"<sup>11</sup>; and (3) it would not have been a burden to the Department to have held an administrative hearing.

*State v. Rogers* was a criminal case in which the criminal defendant entered into a plea agreement. The defendant agreed to plead guilty in return for admission into a drug court program and, upon completion, the state agreed to dismiss the case altogether. Because of the defendant's subsequent activities, the drug court terminated the defendant's participation in the program, convicted him, and sentenced him to a prison term. The Idaho Supreme Court held that the defendant had a "liberty interest at stake" and that the court "must determine what process is due to protect that interest." The Supreme Court then articulated the standards paraphrased by Basin 33 Water Users.

The Director acknowledges water rights are property rights, and the holders of water rights are entitled to due process for "deprivation of life, liberty, or property, without due process of law." As a threshold matter, however, Basin 33 Water Users have failed to establish that the designation of a ground water management area has deprived them of property. Basin 33 Water Users have speculated about possible deprivation, but the water rights held by the Basin 33 Water Users water users will be intact before and after designation of a ground water district. The Basin 33 Water Users water users are attempting to anticipate the components of a ground water management plan that may be adopted by the Director after the designation of a ground water management area that may affect their water rights. The argument is premature.

In addition, Basin 33 Water Users were afforded the opportunity to request a hearing when the Order was first issued. The order insert accompanying ESPA GWMA Order states:

Any person who is aggrieved by the action of the director, 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. The 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.

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<sup>11</sup> Here Basin 33 Water Users alludes to IDWR's prior attempt to "expand the CM Rule 50 boundary with a final order to amend CM Rule 50 . . . after engaging in a formal rulemaking process" and the Legislature's rejection thereof. *Id.* at 22. Basin 33 Water Users equates IDWR's attempt to modify CM Rule 50 through formal rulemaking to its conclusion that a formal hearing should have been held prior to designation of the ESPA GWMA. *Id.* However, in this case the Director did not enter into rulemaking related to the CM Rules, he designated a ground water management area according to Idaho Code § 42-233b.

*Explanatory Information to Accompany a Final Order*, issued with ESPA GWMA Order on November 2, 2016.

The only party to request a hearing when the order was issued was SVC. Basin 33 subsequently moved to intervene in the matter. Now that SVC has withdrawn the request for hearing, the Director has held that Basin 33 and other intervenors do have standing to continue forward with the arguments first raised by SVC, but the intervenors are limited to the issues raised by SVC. Because Basin 33 had an opportunity to request a hearing in the matter when the ESPA GWMA Order was issued, they were not denied due process.

Judge Wildman affirmed this reasoning in his *Order on Motion to Determine Jurisdiction* (Case no. CV-01-16-23185, Feb 16, 2017)

The Director acted pursuant to Idaho Code § 42-233b in issuing the [Final Designation Order]. That code section, which is part of the Idaho Ground Water Act, grants the Director the authority to designate ground water management areas within the state. He may exercise this authority when he has determined that any ground water basin or designated part thereof ‘may be approaching the conditions of a critical ground water area.’ I.C. § 42-233b. There is no requirement that the Director hold an administrative hearing prior to designating a ground water management area. Nor is there any requirement that he initiate rulemaking or a contested case proceeding under the Idaho Administrative Procedure Act (‘IDAPA’) prior to designating a ground water management area. The Director may simply act upon his own initiative and discretion under the authority granted by statute

In this case, the Director designated a ground water management area for the [ESPA] without a hearing. He made his designation via the issuance of an order. He then styled that order as a final order. The fact that the Director styled his designation as a final order is what has caused much of the confusion regarding the issue of jurisdiction in this matter. However, how the Director chooses to style his designation of a ground water management area does not control the remedies available to an aggrieved person under the facts and circumstances present here. Rather, as will be shown, what controls is the fact that the Director made his designation without a hearing.

### **Whether the Director Should Have Conducted Rulemaking**

The Upper Valley Irrigators and Basin 33 Water Users argue the Director was required to conduct rulemaking prior to creating the ESPA GWMA. *Upper Valley Memo* at 9-13; *Basin 33 Water Users Memo* at 23-24. In his *Order on Motion to Determine Jurisdiction*, Judge Wildman addressed the rulemaking argument and stated, “Nor is there any requirement that [the Director] initiate rulemaking or a contested case proceeding under the Idaho Administrative Procedure Act (‘IDAPA’) ... prior to designating a ground water management area. The Director may simply act upon his own initiative and discretion under the authority granted by statute.” *Order on*

*Motion to Determine Jurisdiction* at 2-3. In this case, the Director is acting consistent with the authority granted to the Director by the legislature in Idaho Code § 42-233b.

Moreover, the designation of the ESPA GWMA does not qualify as a “rule” under the criteria of *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003)(“*Asarco*”). The following are characteristics of agency action indicative of a rule:

(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.* at 723, 69 P.3d at 143.

The designation of a ground water management area does not require rulemaking. First, the determination of each ground water basin or designated part thereof for inclusion into a ground water management area depends on unique facts for each individual proposed area. Each basin is unique. Hydrogeology in basins is heterogeneous. Each has unique characteristics, such as:

- Ground water recharge amounts and locations
- Aquifer conditions, whether confined or unconfined
- Ground water gradient and direction of ground water flow
- Travel times and quantities of water movement
- Isolation of ground water resources
- Aquitards that slow or impede water movement
- Relationships between ground water and hydraulically connected surface water sources

The factors listed above and others may be given different weight to determine the boundaries of a ground water basin for inclusion in a ground water management area. There are no easily stated tests that could be applied “generally and uniformly,” or that would have “wide coverage.”

In designating the ground water management area, the Director expressly relied on the standard provided by the enabling statute and did not prescribe a legal standard or directive not otherwise provided by the enabling statute. Furthermore, the Director did not express agency policy not previously expressed and did not rely on an interpretation of law or general policy but applied the plain language of the statute.

Action by the Director to fulfill his statutory duty does not require rules in all instances. In this case, the promulgation of rules is not required.

### **Whether the Director Should Have Designated the ESPA GWMA in a Contested Case**

This issue aligns with the portion of issue number one questioning whether the Rules of Procedure require the Director to hold a hearing and whether water users were afforded sufficient due process. The Director concludes, based on previous determinations in this decision, that (1)



the Director did not have to initiate a contested case prior to designating the ESPA GWMA, and (2) water users were afforded sufficient opportunity to create a contested case by requesting a hearing. Furthermore, the water users are currently participating in a contested case.

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

Although the issue statement above identifies the formation of ground water districts as a possible impediment to creation of a ground water management area, the Upper Valley Irrigators and Basin 33 Water Users argue that inclusion of decreed water rights into a water district should prevent creation of a ground water management area. *Upper Valley Memo* at 16-18; *Basin 33 Water Users Memo* at 13-16.

The method of confirmation of water rights, whether by decree or by administrative license, does not affect the authority of the Director to manage the ground water resource. Furthermore, the appointment of a watermaster to administer the water rights does not limit the Director's authority to manage a ground water aquifer. This argument is without merit.

### **SUMMARY JUDGMENT**

In the Director's Legal Issues and Hearing Order, the Director identified four legal issue and one factual issue. The SWC and the Basin 33 Water Users both moved the Director for summary judgment.

The Basin 33 Water Users moved for summary judgment, requesting that the order creating the ESPA GWMA be "withdrawn." The requested withdrawal of the order on the basis of an alleged legal deficiency would avoid the factual issue identified by the Legal Issues and Hearing Order.

The SWC moved for summary judgment regarding the legal issues identified by the Legal Issues and Hearing Order. No facts were identified by the SWC to which the Director could apply the standard legal tests of summary judgment, i.e.: Viewing facts most favorably to the nonmoving party; Determining there are not material issues of fact in dispute, and finally, as a result of the analysis; The moving party is entitled to judgment as a matter of law.

The Director's order addressing the legal issues (this order) is a determination of legal issues. The order is not a determination regarding asserted issues of fact. Because, as stated by the Basin 33 Water Users, "there is no specific rule in the Department's procedural rules concerning summary judgment," and because Idaho Code § 42-1701a(3) grants a statutory right to a hearing for a person aggrieved by an action of the Director, summary judgment in an IDWR contested case should be an extraordinary remedy. At least for this contest, the Director will not consider the briefing and argument by the parties as motions for summary judgment, but rather, arguments to resolve legal issues. This order is not a determination of underlying facts to which the law is applied. As a result, both motions for summary judgment will be denied.

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the **legal challenges** to the ESPA GWMA Order are **Without Merit**, and the Director **will not** reinstitute the process for issuance of or amend the Order Designating the ESPA GWMA.

IT IS FURTHER ORDERED that there remains an issue of fact about hydrogeologic connectivity previously stated in this document that must be resolved at hearing.

IT IS FURTHER ORDERED that, when the evidence is viewed most favorably to the parties supporting designation of the ESPA GWMA, the Basin 33 Water Users are not entitled to a summary judgment as a matter of law, and the Basin 33 Water Users' Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that, when the evidence is viewed most favorably to the parties opposing designation of the ESPA GWMA, the SWC is not entitled to summary judgment as a matter of law, and the SWC's Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that this is an Interlocutory Order.

IT IS FURTHER ORDERED that this order does not resolve the remaining factual issue identified in the Legal Issue and Hearing Order. The Parties shall adhere to all previous hearing preparation deadlines and shall be prepared to appear and present factual evidence on **February 18-21, 2020**, as required by the Legal Issue and Hearing Order.

DATED this 9<sup>th</sup> day of January, 2020.

  
\_\_\_\_\_  
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 9<sup>th</sup> day of January 2020, the above and foregoing was served on the following by the method(s) indicated below:

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