

**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 PARTIALLY DENYING
BASIN 33 WATER USERS' MOTION
TO DESIGNATE IDWR WITNESSES;
ORDER IDENTIFYING WITNESS**

FINDINGS OF FACT

On January 17, 2020, the Basin 33 Water Users ("Basin 33") filed a *Motion to Designate IDWR Witnesses* ("Motion"). *Motion* at 1. Basin 33 moves the Idaho Department of Water Resources ("IDWR" or "Department") "to designate Department staff who will testify in support of the Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area ["ESPA GWMA Designation Order"] dated November 2, 2016." *Id.*

In the alternative, Basin 33 asks that if IDWR does not plan to have Department staff testify in support of the ESPA GWMA Designation Order, IDWR should "designate Department Staff who participated in or provided information for the bases described in the ESPA GWMA Order so that such individuals may be called and cross-examined by the Basin 33 Water Users as adverse witnesses as part of the Basin 33 Water Users case-in-chief." *Id.*

On January 24, 2020, the Surface Water Coalition ("SWC") filed its *SWC Response to Basin 33 Users' Motion to Designate IDWR Witnesses* ("SWC Response"). SWC argues the Director limited the scope of the hearing to one factual question, namely, whether areas outside of the ESPA area of common ground water supply included in the ESPA GWMA are located in a tributary basin and are otherwise sufficiently remote or hydrogeologically disconnected from the ESPA to warrant exclusion from the ESPA GWMA. *Id.* at 2.

SWC argues the Motion asks the Department to testify related to the sufficiency of the ESPA GWMA Designation Order itself, not the remaining factual issue. *Id.* SWC argues the hearing has been further limited as the only parties to submit technical evidence on the remaining factual issue were the Upper Valley Water Users ("UV") and SWC, as well as IDWR's staff memorandum. *Id.* at 2.

SWC next argues the Idaho Rules of Evidence prevent a lay witness from testifying unless their testimony is "helpful . . . to determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge." *Id.* at 2 *quoting* I.R.E. 701(b). SWC argues Basin 33 is now foreclosed from offering testimony because Basin 33 did not produce any evidence or witnesses addressing the single remaining factual issue. *Id.* SWC argues Basin 33 instead

appears to be seeking an IDWR technical expert to testify on the sufficiency of the ESPA GWMA Order itself, which would have the effect of “shifting the burden of proof back to the IDWR.” *Id.* 3.

Finally, SWC argues Basin 33’s status as an intervenor limits its attempt to expand the scope of the hearing. *Id.* “The Basin 33 Users take the case ‘as they find it’ and cannot expand the scope of their participation by seeking to have IDWR put on witnesses to produce testimony and evidence to address issues that they cannot,” specifically evidence related to the underlying sufficiency of the ESPA GWMA Designation Order. *Id.*

CONCLUSIONS OF LAW

IDWR will offer one technical witness at hearing but otherwise denies Basin 33’s Motion. The remaining factual issue at hearing was delineated in the Director’s *Deadline for IDWR’s Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery* (“Scheduling Order”). The Department will not otherwise offer or designate its staff to testify in generalized support of the ESPA GWMA Designation Order, nor will it offer or designate staff who simply participated in or provided information for the bases described in the ESPA GWMA Designation Order. In these respects the Motion attempts to broaden the scope of the hearing and is denied.

As an intervenor, and because Basin 33’s arguments related to the legal sufficiency of the ESPA GWMA Designation Order have already been decided¹, Basin 33 cannot now collaterally attack the ESPA GWMA Designation Order outside the scope of the remaining limited factual issue. The Director will partially grant the Motion and designate Jennifer Sukow as the sole Department witness.

ORDER

The Director PARTIALLY GRANTS Basin 33’s Motion by identifying an IDWR witness. Jennifer Sukow will be called as a witness following presentation of evidence by Basin 33 and the Upper Valley Water Users. Sukow will present evidence and testimony and be subject to examination at hearing related to the specific factual issue discussed above. The Director DENIES the remaining portion of Basin 33’s Motion to Designate.

Dated this 6th day of February, 2020.



Gary Spackman
Director

¹ Legal aspects of this matter, including whether the ESPA GWMA Designation Order was procedurally proper, have been separately decided in the Director’s *Order on Legal Issues* (January 9, 2020). Legal argument will not be permitted at the hearing in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 6th day of February 2020, the above and foregoing was served on the following by the method(s) indicated below:

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