

DISTRICT COURT OF THE STATE OF IDAHO

FOURTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF ADA

<p>BASIN 33 WATER USERS, a coalition of water right holders, and the UPPER VALLEY WATER USERS, a coalition of water right holders,</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>SURFACE WATER COALITION, a coalition of water right holders,</p> <p style="text-align: center;">Cross Petitioner,</p> <p>v.</p> <p>THE IDAHO DEPARTMENT OF WATER RESOURCES,</p> <p style="text-align: center;">Respondent,</p> <p>and</p> <p>CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, AND WENDELL; SOUTH VALLEY GROUND WATER DISTRICT; IDAHO GROUND WATER APPROPRIATORS, INC.; IDAHO POWER COMPANY; CLEAR SPRINGS FOODS, LLC; AND CITY OF POCATELLO,</p> <p style="text-align: center;">Intervenors.</p>	<p>Case No. CV01-20-8069</p> <p>INTERVENOR CITY OF POCATELLO'S RESPONSE IN OPPOSITION TO CROSS-PETITIONER'S BRIEF</p> <p>Fee Category: Exempt Idaho Code § 67-2301</p>
<p>IN THE MATTER OF DESIGNATING THE EASTERN SNAKE PLAIN AQUIFER GROUND WATER MANAGEMENT AREA</p>	

**CITY OF POCATELLO’S RESPONSE IN OPPOSITION
TO CROSS-PETITIONER’S BRIEF**

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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CITY OF POCA TELLO, by and through its attorney of record, Sarah A. Klahn, files this *Response in Opposition to Cross-Petitioner’s Brief*, limited to the Additional Issues Presented on Appeal by cross-petitioner Surface Water Coalition (“SWC”).

I. STATEMENT OF THE CASE

A. Nature of Case

Pocatello was an intervenor in the contested case initiated in this matter by Sun Valley Company’s (SVC) request for hearing. Pocatello was also among the municipal entities that entered into a settlement with SWC and Idaho Ground Water Appropriators in January of 2019 regarding, *inter alia*, the Director’s designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area; as noted in SWC’s Cross-Petition, Pocatello did not participate in the hearing in this matter. SWC Cross-Petition/Response Brief at 4, n.4. However, in its cross-petition SWC argues that the Director’s June 5, 2019 Order (R. at 2615) continuing the contested case in this matter after SVC withdrew its request for a hearing was erroneous. Because any decision on this procedural issue has potential application to future agency matters, Pocatello offers its arguments in opposition to SWC’s position.

According to SWC, this “appeal is about the Director’s management of an aquifer pursuant to Idaho’s Ground Water Act.” SWC Cross-Petition/Response Brief at 1. However, SWC’s cross-petition seeks interpretation of Idaho Code 42-1701(A)(3), which provides for the right to a hearing in front of the Director so long as the aggrieved party files its request within fifteen days of written (or actual) notice of the Director’s decision. SWC argues that 42-1701(A)(3) is jurisdictional, and that the Director cannot hold a hearing unless a petition is timely filed; SWC also argues that a timely filed petition that is subsequently withdrawn requires

the Director to dismiss the contested case, even if the dispute invoked by the timely filed petition is not resolved and intervenors stand ready to litigate.

The Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area (“Final Order”) that was the subject of the contested case in this matter (R. at 1) sought to manage the ground water resources of the entire ESPA, which underlies 10,800 square miles—an area roughly the size of the State of Massachusetts. As the Department noted in a press release around the time of the issuance of the Final Order, the ESPA is the “sole source of drinking water for hundreds of thousands of southern Idaho residents, and a vital resource for farmers, ranchers, and others who rely upon water for a living.”¹ With the Final Order, the Director was proposing modification of water management and administration on a vast level involving thousands of water users.²

In this matter, SVC filed a timely request for hearing in November of 2016 and, prior to SVC’s withdrawal of its request, 14 entities were allowed to intervene as parties.³ While some, such as SWC, intervened to support the Final Order, most intervened to contest the Director’s determinations in the Final Order. SVC’s withdrawal of its timely request for hearing did not resolve concerns raised by intervenors contesting the substance of the Final Order.

To adopt SWC’s argument requires the court to find that the legislature intended 42-1701A(3) to be jurisdictional, not just in the sense of establishing the requirements for when the Director must hold a hearing, but also jurisdictional by establishing requirements for when the

¹ As quoted in the City of Pocatello’s May 18, 2017, Response Brief at 2, n.1, R. at 2552.

² A review of the Idaho Department of Water Resources (“IDWR”) map of all Ground Water Management Areas suggests that the ESPA-GWMA is the largest in the state. <https://idwr.maps.arcgis.com/apps/webappviewer/index.html?id=c9c65a636adb478fbc63057bc267d741&find=Bear%20River>

Last visited on October 5, 2020.

³ Review of the filings associated with previously designated GWMA’s suggests that no hearings were requested in prior designations. <https://idwr.idaho.gov/water-rights/groundwater-management-areas/designated.html>

Last visited on October 5, 2020.

Director must dismiss a contested case. However, 42-1701A(3) is devoid of statutory language to suggest the legislature intended to limit the Director’s discretion to holding a hearing only when the entity that timely requested the hearing is a party to the case. The Director had discretion to continue the contested case over the Final Order, even after SVC signaled it would not participate in a hearing in this matter, and the Director’s decision was correct. The court should reject the relief requested in the SWC’s cross-petition.

B. Course of Proceedings

Pocatello’s summary of the course of the proceedings is limited to the procedural history of this case from the issuance of the Final Order on November 2, 2016 (R. at 1) until the Director announced his determination to continue the contested case in his June 5, 2019 Order. R. at 2615.

The Director’s Final Order in this matter was issued on November 2, 2016. R. at 1. The last page of the Final Order was entitled “Explanatory Information to Accompany a Final Order” (R. at 28) describing the Final Order as “final” and subject to judicial review, and offering two additional remedies to aggrieved persons: (1) to file a petition for reconsideration, and (2) to request a hearing.

Pocatello sought reconsideration (R. 2281) and also filed an appeal with the district court.⁴ Pocatello also sought to participate in the contested case by filing a motion to intervene (R. at 2330) on November 29, 2016, in the contested case initiated by SVC’s request for hearing.

⁴ Pocatello’s petition for judicial review was heard by this district court, and designated Case No. CV-01-17-67. On February 16, 2017, the court dismissed Pocatello’s appeal of the Final Order finding it lacked jurisdiction; this district court also found that because the Final Order was issued without a hearing, the only remedy available for aggrieved parties was a Request for Hearing. Thus, the Director had erred by including the three remedies for aggrieved parties on the Explanatory Sheet attached to the Final Order. Notably, in Case No. CV-01-17-67 the district court was not asked and did not answer the question posed by the cross-petition—whether a timely requested hearing must be dismissed if the dismissal would not resolve all issues in the contested case because intervenors remained to litigate.

Numerous other entities also intervened⁵—the final motion to intervene was filed on March 23, 2017. R. at 2481.

Pursuant to the statutory requirements in I.C. § 42-233b, the Department published notice of the Final Order for two consecutive weeks between the dates of November 20 and November 29, 2016 in papers of record throughout the ESPA. R. at 2326, 2327, and 2329.

Pocatello’s petition to intervene was granted by the Department on December 27, 2016. R. at 2396.

On March 20, 2017, SVC filed “Notice of Withdrawal of Request for Hearing”, and indicated in that pleading it would not participate in any hearing in this matter. R. at 2474.

On March 30, 2017, the Director issued his *Order Extending Deadlines for Petitions to Intervene; Notice of Additional Prehearing Conference*. R. at 2489.

On April 14, 2017, Pocatello filed its “Memo Re Procedural Posture—In the Alternative Request for Hearing.” R. at 2501. Numerous entities filed briefs in support (R. at 2512, 2516); SWC opposed (R. at 2522).

On April 24, 2017, the Director entered an *Order Establishing Briefing Deadlines*, R. at 2533, to allow parties an opportunity to brief the question of whether or not the withdrawal of SVC’s request for hearing required the Director to dismiss the contested case. More briefing ensued.

On June 5, 2019, the Director issued the *Order on Briefing; Notice of Additional Prehearing Conference*, finding that the contested case would be continued. R. at 2616.

⁵ Intervenors were Idaho Ground Water Appropriators, Inc., Surface Water Coalition; City of Pocatello, Coalition of Cities; McCain Foods USA, Inc.; Basin 33 Water Users; South Valley Ground Water District, City of Hailey, Big Wood and Little Wood Water Users Association, Water District 37-B Ground Water Association; Clear Springs Foods, Inc.; and Idaho Power Company. (R. at 2533 n.2 and n.3.)

C. Statement of Facts

Because Pocatello's brief is limited to issues related to the scope of the Director's discretion to continue a contested case to allow intervenors to litigate issues raised in a timely request for hearing when the petitioner withdraws its request, the facts relevant to Pocatello's argument in response to SWC's cross-petition are contained in the Course of Proceedings above.

II. STANDARD OF REVIEW

In Idaho, judicial review of a final agency decision is governed by the state's Administrative Procedure Act (I.C. § 67-5201, *et seq.*, hereinafter the "Act"). Idaho Code § 42-1701(A) makes this applicable to final agency actions of the Department of Water Resources ("IDWR" or "Department"). Where a court must decide whether an agency complied with the Act in issuing an order, the court must affirm the agency's action unless the agency's findings, inferences, conclusions, or decisions: (1) violate constitutional or statutory provisions; (2) exceed the statutory authority of the agency; (3) are made upon unlawful procedure; (4) are not supported by substantial evidence on the records as a whole; or (5) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *North Snake Ground Water Dist. v. Idaho Dep't of Water Res. (In re Permit No. 36-16979)*, 160 Idaho 518, 522 (2016). Moreover, the aggrieved party must prove the agency's action prejudiced a substantial right. I.C. § 67-5279(4).

Unlike questions of fact where the court gives substantial deference to the district court's findings, statutory interpretation is a question of law in which the court reviews *de novo*. *Saint Alphonsus Reg'l Med. Ctr. v. Raney*, 163 Idaho 342, 345 (2018); *Hayes v. City of Plummer*, 159 Idaho 168, 170 (2015). While a strong presumption of validity favors an agency's interpretation of its own rule or statute, the court takes into consideration the following four factors in determining how much deference to afford: (1) whether the agency is responsible for administration of the rule in issue; (2) whether the agency's construction is reasonable;

(3) whether or not the language of the rule expressly treats the matter at issue; and (4) whether any of the rationales underlying the rule of agency deference are present. *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

III. RESPONSE TO SURFACE WATER COALITION'S CROSS-PETITION

A. The Statutory Language Of I.C. § 42-1701(A)(3) Does Not Require Dismissal Of A Contested Case When A Request For Hearing Is Timely Filed, Then Withdrawn, And Intervening Parties Seek To Continue The Case.

SWC argues that the Director exceeded his authority in continuing the hearing after SVC's withdrawal of its request for hearing because the Petitioners and other intervenors did not *also* request a hearing pursuant to I.C. § 42-1701(A)(3). Ignoring the fact that SVC *did* timely request a hearing, SWC argues that I.C. § 1701(A)(3) is jurisdictional in both directions—in other words, that the Director cannot hold a hearing unless timely requested, **and** the Director also cannot hold a hearing if the petitioner withdraws a timely filed contested case which numerous intervenors seek to continue. In fact, taken to its logical conclusion, the SWC's interpretation would mean the Director's consideration of petitions to intervene would have to be accompanied by a limitation on the intervenors' participation in the contested case only so long as the original entity requesting the hearing remains a party. It is undisputed that the Director's Orders authorizing intervention did not limit intervenors' participation in this fashion. *See, e.g.,* R. at 2396; 2432.

SWC's interpretation conditions the Director's discretion on the continued presence and participation of the party timely requesting the hearing, rather than on the fact of a timely filed request for a hearing. The language of I.C. § 42-1701(A)(3) does not support such a reading. If a request for hearing is timely filed, the Director has discretion to take all the facts and circumstances into account to determine whether the contested case should move forward.

As an initial matter, the deadline for a timely filed request for hearing I.C. § 42-1701(A)(3) is not jurisdictional. Under Idaho law, when a statute or rule does not "indicate the appropriate remedy for failing to follow the statutory deadline," the statutory deadline is not "jurisdictional" absent express legislative intent to limit the court's (or agency's) authority. *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103, 109-10, 244 P.3d 247, 253-54 (Idaho Ct. App. 2010). For example, the filing of an appeal pursuant to I.R.C.P. 84(n) is jurisdictional because Rule 84 expressly states that failure to file within the time allotted "will cause automatic dismissal of the petition for judicial review." *See also, Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S. Ct. 641, 648 (2012). Under *Gonzalez*, the Supreme Court also held that to be jurisdictional, a statute must use "clear jurisdictional language." *Id.* at 142, 132 S. Ct. at 649.

This court found in Case No. CV-01-17-67, Pocatello's untimely petition for judicial review of the Final Order, that the only remedy for an aggrieved party when an IDWR decision is issued without a hearing is to timely request a hearing under I.C. § 42-1701(A)(3). The SWC highlights the language in Section 42-1701(A)(3): an aggrieved party "shall file with the Director, within 15 days of actual notice" of the Final Order. But there is no dispute that SVC timely filed its request for hearing. The statutory language does not speak to the situation where a timely request for hearing is withdrawn and intervenors remain ready to litigate.

More than ten parties intervened in this matter on the strength of SVC's Notice. The Director uniformly granted party status based on each entity's unique and independently evaluated "direct and substantial interest" and that the intervenors' interests were not adequately represented by SVC. (R. 2396, 2432, 2452, 2470, 2494.) When SVC later withdrew its request for hearing, the Director appropriately held briefing on the question of whether or not the contested case was disposed of by the withdrawal of SVC's request for hearing.

Under Idaho law, an intervenor is a party to a contested case, and as a party may “actively participate in the application process at the agency level.” *Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 874, 243 P.3d 1055, 1062 (2010) (recognizing intervenors as parties with the ability to fully participate in administrative proceedings). *See also* IDAPA 37.01.01.156 (defining “intervenors” as entities “permitted to participate as parties pursuant to Rules 350 through 354”); IDAPA 37.01.01.005.16 (a “Party” is “each person or agency named or admitted as a party”); IDAPA 37.01.01.150 (a “Party” to a contested case includes “respondents, protestants, or intervenors”); and IDAPA 37.01.01.157 (stating it is the right of all “parties” to “appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments” (emphasis added)). *See also* I.C. § 67-5201(13) (“‘Party’ means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party”). After briefing, the Director determined to continue the case and found that intervenors have the same rights as any other party. “[Intervenors] may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments.” R. 2619; IDAPA 37.01.01.150, 37.01.01.157.

In the absence of statutory language requiring the Director to *limit* hearings to situations where a party timely requests a hearing AND remains a party to litigate the case, the Director has discretion to determine whether or not to continue a contested case upon the withdrawal of a request for hearing.

B. The Director Did Not Err By Continuing To The Hearing Because Withdrawal Of The Request For Hearing Did Not Resolve The Issues In Dispute.

SWC argues that the Director should have dismissed the contested case when SVC withdrew its request for hearing because the Director dismissed the petition to designate the Big

Lost Critical GWMA. However, the procedural posture associated with these two GWMA designations was different. Unlike the ESPA GWMA, which was imposed on water users by the Director, ground water users in the Big Lost petitioned for designation of the Big Lost Critical GWMA. When the Big Lost Critical GWMA petitioners withdrew their petition, there was no longer anything for the Director to consider and dismissal was appropriate. SVC was not a petitioner for the ESPA-GWMA; it timely sought a hearing to challenge the Final Order. When SVC withdrew its request for hearing, the intervenors remained to litigate issues raised by SVC and signaled their interest in keeping the case alive. SWC's comparison to proceedings involving the Big Lost CGMWA is unpersuasive.

Similarly, SWC's analogy to permit and transfer proceedings is unpersuasive because in such a proceeding, an applicant files its application for a permit or transfer with the Department, the application is published, and parties may protest the application. I.C. § 42-222(1). A contested case in the context of a permit application or transfer is wholly dependent on the actions of and relief requested by the applicant. Thus, if the applicant withdraws its application for permit or transfer, there is no new water right or water right transfer for protestants to object to, and the dispute is resolved for all parties.

SVC's request for a hearing in this matter is not analogous to that of an applicant for a permit or transfer. SVC requested a hearing to air its disputes over the Final Order, and numerous entities with the same issues regarding the Final Order, intervened to participate. The Director properly exercised his discretion when he continued the contested case after SVC withdrew its request for hearing.

IV. CONCLUSION

SWC's request that the Court find the Director erred in continuing the contested case should be rejected. First, SWC fails to offer any authority that I.C. § 42-1701(A)(3) requires

dismissal of a contested case when the proponent of a timely filed request for hearing withdraws and intervenors remain to litigate the disputed issues. There simply is no statutory bar to the Director exercising his discretion in this manner. SVC timely requested a hearing and numerous entities intervened. Under the Department's procedural rules, intervenors are entitled to fully participate in hearings or arguments in the same manner as the party that initiated the contested case, and withdrawal of SVC'S request for hearing meant only that the intervenors were left to continue the litigation. Second, SWC's analogy to Big Lost Critical GWMA designation and the permit and transfer application process is unpersuasive because in each of these examples, withdrawal of the petition or application resolved disputed matters; here, withdrawal of SVC's request for hearing only reflected SVC's decision to not participate, and did not resolve the disputed matters which intervenors sought to litigate.

The Director has discretion to continue contested cases under these facts, and properly did so given the unique procedural history of the Final Order.

Dated this 6th day of October, 2020

CITY OF POCOTELLO

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2020, I caused to be served a true and correct copy of the foregoing **CITY OF POCA TELLO’S RESPONSE IN OPPOSITION TO CROSS-PETITIONER’S BRIEF**, by the method indicated below, addressed to the following:

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