

EXHIBIT

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BASIN 33 WATER USERS, a coalition of  
water right holders, and the UPPER VALLEY  
WATER USERS, a coalition of water right  
holders,

Petitioners,

vs.

SURFACE WATER COALITION, a coalition  
of water right holders,

Cross Petitioner,

vs

THE IDAHO DEPARTMENT OF WATER  
RESOURCES,

Respondent,

and

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; CITY OF POCATELLO, and  
SNAKE RIVER STORAGE,

Intervenors.

IN THE MATTER OF DESIGNATING THE  
EASTERN SNAKE PLAIN AQUIFER  
GROUND WATER MANAGEMENT AREA

) Case No. CV01-20-8069

) **MEMORANDUM DECISION  
) AND ORDER**

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
NOV - 6 2020	
By _____	Clerk
_____	Deputy Clerk

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DEPARTMENT OF  
WATER RESOURCES

**I.**  
**BACKGROUND**

On November 2, 2016, the Director of the Idaho Department of Water Resources issued an *Order* (“*Designation Order*”) designating a ground water management area for the Eastern Snake Plain Aquifer (“ESPA”). R., 1. The Court will refer to the ground water management area as the “ESPA GWMA.”

On November 16, 2016, the Sun Valley Company filed a petition with the Department requesting an administrative hearing to contest the designation (“*Petition to Contest*”). *Id.* at 2302. Soon thereafter, the Sun Valley Company and the City of Pocatello filed petitions seeking judicial review of the *Designation Order* with this Court. The petitions resulted in Ada County cases CV-01-16-23185 and CV-01-17-67. Because the Director had not acted on the *Petition to Contest*, the Court held it lacked jurisdiction over the petitions for judicial review under Idaho Code §§ 42-237e, 42-1701A(3), and the doctrine of exhaustion. *Order Dismissing Petition for Judicial Review*, Ada County Case CV-01-16-23185 & CV-01-17-67 (Feb. 16, 2017). The Court therefore dismissed the petitions. *Id.*

On March 20, 2017, the Sun Valley Company withdrew its *Petition to Contest*. R., 2474. By that time, the Basin 33 Water Users had been granted leave to intervene in the administrative hearing.<sup>1</sup> *Id.* at 2432. Soon thereafter, the Upper Valley Water Users were also granted leave to intervene.<sup>2</sup> *Id.* at 2494. An issue arose as to whether the Director could continue with an administrative hearing on the issues raised in *Petition to Contest* given its withdrawal. On June 5, 2019, the Director issued his *Order on Briefing*, concluding that the intervening parties could proceed on the issues raised in the *Petition to Contest*. *Id.* at 2615. The Director identified those legal issues as follows:

- (1) whether the *Designation Order* 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

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<sup>1</sup> The term “Basin 33 Water Users” refers collectively to those water users listed on Exhibit A to the *Petition for Judicial Review* filed in this matter on May 26, 2020.

<sup>2</sup> The term “Upper Valley Water Users” refers collectively to the Fremont-Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District.

(4) whether the adjudication and the formation of ground water districts in the ESPA forecloses the designation of a GWMA.

*Id.* at 2692-2693.

On January 9, 2020, the Director issued his *Order on Legal Issues*. *Id.* at 2977. He determined the issues raised by the *Petition to Contest* to be without merit and declined to revisit the *Designation Order*. *Id.* at 2990. The Director's *Order on Legal Issues* was treated as an interlocutory order as it did not resolve a remaining factual issue.<sup>3</sup> *Id.* A hearing on that issue occurred on February 18, 2020. *Id.* at 3265. On April 21, 2020, the Director issued his *Final Order on Fact Issue*, resolving all issues before the Department. *Id.* at 3264.

This case originated on May 26, 2020, when the Basin 33 Water Users and Upper Valley Water Users filed a *Petition* seeking judicial review of the Director's *Designation Order* and *Order on Legal Issues*. The Petitioners assert the two *Orders* are contrary to law and ask the Court to set them aside and remand the matter to the Department for further proceedings. On June 2, 2020, the Surface Water Coalition filed a *Cross-Petition* seeking judicial review of the Director's *Order on Briefing*.<sup>4</sup> They assert the Director's *Order on Briefing* is contrary to law and asks the Court to set it aside. Neither the Petitioners nor the Cross-Petitioners challenge the Director's *Final Order on Fact Issue*. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petitions* was held before the Court on October 15, 2020.

## II.

### STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on

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<sup>3</sup> The remaining factual issue was "whether areas outside of the ESPA area of common ground water supply, as defined by [Rules for the Conjunctive Management of Surface and Ground Water Resources ("CM Rules") 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." R., 3266. This issue is not before the Court on judicial review.

<sup>4</sup> The term "Surface Water Coalition" refers collectively to the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

### III. ANALYSIS

In 1951, the legislature enacted the Idaho Ground Water Act. The Act tasks the Director with the management of ground water within the state. I.C. §§ 42-231 & 42-237a.g. It directs him "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." I.C. § 42-231. The public policies expressed by the Act include the "traditional policy . . . requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation," as well as the state's policies to "conserve its ground water resources" and "promote and encourage the optimum development and augmentation of the water resources of this state." I.C. §§ 42-234 & 42-237a. One tool the Director may utilize in furtherance of his duties is set forth in Idaho Code § 42-233b. That code section authorizes the Director to designate ground water management areas within the state. I.C. §42-233b.

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." *Id.* A critical ground water area is defined as:

[A]ny 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.

I.C. § 42-233a. Therefore, when the Director determines a ground water basin is approaching the point having insufficient ground water to provide a reasonably safe supply for irrigation or other uses, the Act vests him with the discretionary authority to designate a ground water management area for that basin. I.C. § 42-233b.

The utility in designating a ground water management area is it allows the Director to avail himself of several of the Act's water management mechanisms. These include: (1) the ability to approve a ground water management plan for the area; (2) the ability to require all water right holders in the area to report withdrawals of ground water and other necessary information; and (3) the ability to order water right holders in the area to cease or reduce withdrawals on a time priority basis upon the determination that the supply is insufficient to meet the demands of water rights within the area. I.C. § 42-233b.

The Director's *Designation Order* finds the ESPA may be approaching the conditions of a critical ground water area:

The record establishes that ESPA storage and spring discharges have been declining for more than sixty years. Since peaking in the early 1950s, ESPA storage has declined by about 13 million AF, at an average rate of approximately 200,000 AF per year. Spring discharges have dropped from peak levels of approximately 6,700 cfs to less than 5,000 cfs. These declines have continued despite widespread recognition of the problem and repeated attempts over the years by the Legislature, the IWRB, and water users to address the problem through various agreements, enactments, and policy initiatives, including minimum flows, aquifer recharge, and the ESPA CAMP.

...

The record establishes that as a result of chronic declines in ESPA storage and spring discharges, in many years the ESPA ground water supply is not sufficient to satisfy senior priority water rights diverting from the ESPA and hydraulically connected sources unless ESPA withdrawals under junior priority ground water rights are curtailed, and/or the junior water right holders mitigate. The Director concludes that the ground water basin encompassing the ESPA may be approaching a condition of not having sufficient ground water to provide a reasonably safe supply for irrigation and other uses occurring within the basin at current rates of withdrawal. Idaho Code §§ 42-233b, 42-233a.

R., 19. Based on this finding, which is not challenged by any party, the Director designated the ESPA GWMA under Idaho Code § 42-233b. *Id.* at 20. The boundaries of the ESPA GWMA correspond with the Enhanced Snake Plain Aquifer Model Version 2.1 (“ESPAM 2.1”) model boundary for the ESPA, save a few modifications.<sup>5</sup> *Id.* at 22-23. At this stage, the Director has not approved a ground water management plan for the ESPA GWMA. *Id.* at 23-25.

The Petitioners challenge the procedures utilized by the Director in designating the ESPA GWMA. They assert he erred in failing to hold an administrative hearing, or in the alternative initiate rulemaking, prior to the designation. Petitioners also assert the designation exceeded limitations placed upon the Director by Idaho’s *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”) and that the designation violated their due process rights. Each will be addressed below.

**A. The Director’s determination that the Ground Water Act does not require an administrative hearing prior to the designation of a ground water management area is affirmed.**

The Director determined the Ground Water Act does not require an administrative hearing prior to designating a ground water management area. The Court has previously addressed this issue. When the Director issued his *Designation Order*, the Sun Valley Company and the City of Pocatello each filed a petition for judicial review before the Court. The petitions resulted in Ada County cases CV-01-16-23185 and CV-01-17-67. In its *Order* dismissing the petitions, the Court evaluated the Ground Water Act and held:

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 him by statute.

*Order Dismissing Petition for Judicial Review*, Ada County Case CV-01-16-23185, pp.2-3 (Feb. 16, 2017).<sup>6</sup>

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<sup>5</sup> ESPAM 2.1 “is a calibrated regional ground water flow model representing the ESPA and is meant to simulate the effects of ground water pumping from the ESPA on the Snake River and tributary springs.” R., 22.

<sup>6</sup> The Court’s decisions in the Ada County cases were not appealed and the time for doing so has expired.

The Court's decision was based on the plain language of the Act – specifically, Idaho Code §§ 42-233b and 42-237e. The language of Idaho Code § 42-233b is plain. It does not require a hearing prior to designating a ground water management area. It requires only that upon designation, the Director publish notice of the same “in two (2) consecutive weekly issues of a newspaper of general circulation in the area.”<sup>7</sup> I.C. § 42-233b. The Act then provides an express remedy for persons aggrieved by the designation under Idaho Code § 42-237e:

Any person dissatisfied with any decision, determination, order or action of the director of the department of water resources . . . pursuant to this act may, if a hearing on the matter already has been held, seek judicial review pursuant to section 42-1701A(4), Idaho Code. *If a hearing has not been held, any person aggrieved by the action of the director . . . may contest such action pursuant to section 42-1701A(3), Idaho Code.*

I.C. § 42-237e (emphasis added). In turn, Idaho Code § 42-1701A(3) entitles aggrieved persons “to a hearing before the director to contest the action” upon the filing of a timely written petition.

In this case, the Director published notice of the ESPA GWMA designation for two consecutive weeks in newspapers throughout the ESPA. R., 2326-2358. The Sun Valley Company was aggrieved by the designation. It filed its *Petition to Contest* and requested an administrative hearing pursuant to Idaho Code §§ 42-237e and 42-1701A(3). Given the filing of the *Petition to Contest*, the Court addressed the procedure going forward before the Department:

IDAPA will be implemented in the underlying matter going forward as the Director proceeds on the Sun Valley Company's written petition and request for hearing. Idaho Code § 42-1701A(3) requires the Director hold an administrative hearing on the petition in accordance with the hearing procedures set forth in the IDAPA. This will require the implementation of IDAPA, the initiation of a contested case proceeding, and the designation of “parties.”

*Order Dismissing Petition for Judicial Review*, Ada County Case CV-01-16-23185, pp.2-3 (Feb. 16, 2017).

In sum, the Court finds the language of the Ground Water Act to be plain. It does not require the Director to hold an administrative hearing prior to designating a ground water management area. Rather, following notice, it permits any person aggrieved by the designation to file a petition requesting an administrative hearing to contest the designation. The filing of a

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<sup>7</sup> Compare Idaho Code § 42-233a, which governs the Director's designation of critical ground water areas under the Act. It requires that upon designation of a critical ground water area, the Director must conduct a public hearing in the area concerned. No such public hearing is required under Idaho Code § 42-233b.



petition to contest triggers the implementation of IDAPA, the initiation of a contested case proceeding, and the designation of parties. That is what occurred in this case. The Court finds the procedures utilized by the Director in designating the ESPA GWMA were thus consistent with the Ground Water Act. Because the Director acted within his statutory authority, the *Designation Order* and *Order on Legal Issues* must be affirmed.

**B. The Director’s determination the CM Rules do not apply is affirmed.**

Notwithstanding the plain language of the Ground Water Act, the Petitioners argue the CM Rules preclude the Director from exercising his authority under the Act. They assert a ground water management area cannot be designated under the CM Rules given the entry of the *Final Unified Decree* in the Snake River Basin Adjudication (“SRBA”):

[T]he CM Rules describe a binary choice for water right administration on the ESPA: (1) GWMA prior to completion of the adjudication where no completely accurate or recent water rights list exists; or (2) prior appropriation administration post-adjudication with a newly-completed accurate list of water rights.

*Petitioners’ Br.*, pp.27-28. In this respect, the Petitioners argue the CM Rules limit and supersede the Director’s authority under the Ground Water Act in this case. The Court disagrees.

**i. The CM Rules have a defined and limited scope.**

The error in Petitioners’ argument is the assumption that the CM Rules are implicated. They are not. Rule 1 defines the scope of the CM Rules. It provides:

001. TITLE AND SCOPE (RULE 1)

These rules may be cited as “Rules for Conjunctive Management of Surface and Ground Water Resources.” *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.* It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.

37.03.11.001 (emphasis added). The Court finds the language of Rule 1 to be plain. Under its terms, the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls made by the holder of a senior surface or ground water right against the holder of a

junior ground water right in an area having a common ground water supply.<sup>8</sup> IDAPA 37.03.11.001. No such delivery call has been made in this case. Therefore, the Court finds the Director's designation of the ESPA GWMA does not implicate the CM Rules. It follows that his determination the CM Rules do not apply here must be affirmed.

**ii. The facts under which the CM Rules may be implicated are not present.**

There is a scenario in which the CM Rules may be implicated when the Director designates a ground water management area. As dictated by CM Rule 1, that scenario is contingent upon the filing of a delivery call under those rules. Where such a delivery call is filed, and it pertains to an area of the state where water rights are not yet adjudicated, CM Rule 30 gives the Director the option to designate a ground water management area in response to the call. IDAPA 37.03.11.030.06.h. *Id.* In this scenario, Rule 30 states the Director may consider the delivery call to be a petition for the designation of a ground water management area. IDAPA 37.03.11.030.06. Since such circumstances do not present themselves in this case, the CM Rules are not implicated. That said, the Court will address the CM Rules cited by the Petitioners in support of their argument to the contrary.

The Petitioners rely primarily on CM Rules 20.06. It provides:

Areas Having a Common Ground Water Supply. 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 incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.

IDAPA 37.03.11.020.06. The Court's reading of Rule 20.06 is informed by CM Rule 1. CM Rule 1 limits the scope of the CM Rules to setting forth the procedures for responding to a delivery call. The Court must read CM Rule 20.06 within that limitation. Thus, the Court finds CM Rule 20.06 provides the basis for designating a ground water management area in response to a delivery call made under the CM Rules.<sup>9</sup> Reading CM Rule 20.06 in this manner allows it to be read harmoniously with CM Rule 1, and avoids needlessly rendering the two Rules in conflict with one another.

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<sup>8</sup> A delivery call is "[a] request from the holder of a water right for administration of water rights under the prior appropriation doctrine." IDAPA 37.03.11.010.04.

<sup>9</sup> Designating a ground water management area is one possible response to a delivery call under CM Rule 30.

The circumstances under which a ground water management area may be designated under the CM Rules are set forth in CM Rule 30. As set forth above, that Rule allows the Director to designate a ground water management area in response to a delivery call made within an area of the State where water rights have not been adjudicated. IDAPA 37.03.11.030.06.h. Where no adjudication has occurred, it may be infeasible for the Director to respond to a call through curtailment of individual water rights. This is because a tabulation of existing water rights simply does not exist in areas of the state where an adjudication has not been conducted. CM Rule 30 permits the Director to designate a ground water management area to manage the water source in response to the call instead of curtailment. If the Director determines to consider the delivery call to be a petition for designation of a ground water management area, he is required “to consider the matter under the Department’s Rules of Procedure.” IDAPA 37.03.11.030.06. Aside from Rule 30, the CM Rules provide no other procedures for the designation of a ground water management area.

Given that CM Rules 20.06 and 30 apply only to the designation of a ground water management area as a response to a delivery call in an area of the state where water rights have not been adjudicated, the Court finds they do not limit the Director’s statutory authority under the Ground Water Act. That is expressly affirmed and recognized by CM Rule 3, which provides:

003. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 3).

Nothing in these rules limits the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.

IDAPA 37.03.11.003. Rule 3 makes clear the CM Rules do not limit the Director’s ability to exercise the authority granted to him under the Ground Water Act.

**iii. The promulgation of the CM Rules did not subsume the Director’s duty to manage ground water resources under the Ground Water Act.**

The Petitioners’ assert the CM Rules provide a binary choice for water right administration and that a ground water management area is only a pre-adjudication mechanism. They argue once an adjudication is completed the ground water resources in that area may only be managed by the Director through CM Rules when responding to a delivery call. In part, the Petitioners rely on the decision of former Department Director David Tuthill in 2008 that a