

ground water management area was not required for the ESPA.¹⁰ At the time, there was an assumption that ground water management areas would not be necessary in areas of the state where adjudications had been completed and water districts created. This assumption was based on the belief that following an adjudication that the creation of water districts and the filing of delivery calls would work to protect the underlying water resource from depletion. Groundwater management would therefore be accomplished through the CM Rules exclusive of the Ground Water Act. In practice this assumption proved to be incorrect.

In his *Designation Order*, the Director concedes the data shows this assumption was incorrect. R., 19 & fn.18. In response to the Petitioner's argument, the Director held the promulgation of the CM Rules did not subsume the separate need to manage ground water resources under the Ground Water Act, despite the completion of the SRBA and creation of water districts. R., 2983. The Director set forth the following illustration in support of his conclusion:

The past ten years of litigation arising out of individual delivery calls under the Conjunctive Management Rules are symptoms of a larger underlying problem, i.e., continuing declines in ESPA storage and spring discharges. Delivery calls under the Conjunctive Management Rules result in sporadic curtailment orders and mitigation plans to address particular injuries in particular years. Delivery calls are not an efficient or effective means of addressing the underlying problem of chronic declines in ESPA storage and spring discharges, which have resulted from several factors and have developed over many years.

...

The City of Pocatello and others correctly point out in their comments that the Department took the position in previous litigation that a ground water management area is not necessary where a water district exists. Ltr. from Sarah Klahn, attorney for the City of Pocatello, to Gary Spackman, Dir. Idaho Dept. of Water Res. 7 (Sept. 2, 2016). However, as the above paragraph explains, an important management tool that a ground water management area provides is the opportunity to create a management plan to "manag[e] the effects of ground water withdrawals on the aquifer ... and on any other hydraulically connected sources of water." Idaho Code§ 42-233b. In a conjunctive management delivery call, the primary focus is whether a junior is causing injury to the calling water right. See

¹⁰ The Director's decision was made in response to a petition for delivery call filed by the A&B Irrigation District. In its petition, A&B requested that the Director create a GWMA for the ESPA. In 2010, this Court upheld the Director's decision that a GWMA for the ESPA was not required at that time. *Memorandum Decision*, Minidoka County Case CV-2009-647 (2010). While the Court agreed the Director did not abuse his discretion in failing to designate a GWMA for the ESPA at that time, it did not conclude that a GWMA could never be designated for the ESPA under the Ground Water Act. To the extent the Petitioners assert the Court's prior decision states otherwise, they are incorrect.

CM Rule 37.03.11.40.01. As learned through the recent Rangen delivery call, sometimes the solution to mitigate injury to the calling water right does not address underlying issues with the source of supply. In Rangen, IGWA mitigated the material injury by providing water from another spring source directly to Rangen. While this mitigated the injury to Rangen, it did not address the aquifer. A ground water management area and accompanying ground water management plan are the tools to address broader concerns with ground water aquifers such as the ESPA and allow for the focus to be broader than just mitigating injury to a calling water right.

R., 19 & fn.18.

In addition, other delivery calls on the ESPA brought pursuant to the CM Rules have been resolved through water right buyout agreements or monetary arrangements that satisfy injury and allow junior ground water pumping to continue unabated. Once the injury is satisfied no further remedial action is taken to address the declining ground water levels that were the basis for initiating the delivery call. Nor do the CM Rules require or even authorize such further remedial action. Absent the Ground Water Act, the Director's only option for addressing continuing ground water declines is to wait for the next delivery call. However, once again any remedial action at the Director's disposal is limited by the means in which the delivery call is resolved. In theory, the pattern could continue until the ground water reaches critical levels or worse.

These examples demonstrate in practical terms the fallacy of the assumption and the shortcoming of relying exclusively on the CM Rules for ground water management. They further demonstrate that the Director's duty to manage ground water under the Act does not cease when an adjudication is completed or when a delivery call is resolved. They show that when a call is addressed through mitigation or some other monetary agreement, as opposed to curtailment, the continued depletion of the underlying water source is not addressed. When that occurs, the Director's express duty under the Act "to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources" remains unfulfilled.

In addition, the Ground Water Act is silent on any legislative intent to limit its application or to modify the Director's express duty post-adjudication. Since adoption of the CM Rules in 1994, the Ground Water Act has been amended various times. Therefore, the Idaho legislature has had multiple opportunities to limit its application to areas of the state that have not been

adjudicated were that indeed its intent. That has not been done. Similarly, nowhere in the CM Rules is it expressly provided that their application is intended to supersede or limit application of the Ground Water Act. Accordingly, despite whatever assumptions may have previously been made concerning the CM Rules, such assumptions are not grounded in law.

Therefore, the Director's determination that the CM Rules do not apply to, limit, or supersede his authority under the Ground Water Act in this case must be affirmed.

C. The Director's determination he was not required to initiate rulemaking is affirmed.

The Petitioners argue the Director was required to initiate rulemaking prior to his designation of the ESPA GWMA. The Petitioners concede the designation of a ground water management area would not normally require rulemaking. *Petitioners' Brief*, p.40 ("we agree that designation of a ground water management area outside of the ESPA does not require rulemaking"). However, they argue CM Rule 50 requires the Director to engage in rulemaking prior to designating a ground water management for the ESPA.

CM Rule 50 governs areas determined to have a common ground water supply. It provides:

AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River.

b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply.

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30.

d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water

district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area.

IDAPA 37.03.11.050.

Previously, in Section III.A, the Court examined the plain language of the Ground Water Act and held it does not require the Director to hold an administrative hearing or engage in rulemaking prior to designating a ground water management area. In Section III.B, the Court found the CM Rules do not apply to, limit, or supersede the Director's authority under the Ground Water Act. The analyses set forth in those sections apply equally here. The Court thus rejects the Petitioners' rulemaking argument for the reasons set forth in those sections.

In addition, the Court finds that the Director's designation of the ESPA GWMA does not constitute a rule under the criteria set forth in *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003). In that case, the Idaho Supreme Court directed that the following characteristics of agency action are 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.

Asarco Inc., 138 Idaho at 723, 69 P.3d at 143.

The *Asarco Inc.* characteristics are not present. The Director's designation is not a statement of wide coverage or general applicability, but rather is specific to the ESPA. It does not govern the designation of other ground water management areas within the state. As stated by the Director, the determination of each ground water basin for inclusion into a ground water management area depends on unique facts for each individual proposed basin, as the hydrogeology of each basin is unique. R., 2988. The Court also finds the Director's designation does not prescribe a legal standard or directive not otherwise provided by the enabling statute. To the contrary, his designation relies on the standards and directives provided in Idaho Code § 42-233b. Nor does it express an agency policy not previously expressed. Therefore, the designation does not constitute a rule under *Asarco Inc.*

Last, the assertion the Director's designation is in effect an amendment to CM Rule 50 is unavailing. CM Rule 50 defines an area of common ground water supply for the ESPA, not a ground water management area for the ESPA. The two are not synonyms. For instance, the

designation of a ground water management area is limited to a ground water basin or part thereof that “may be approaching the conditions of a critical ground water area.” I.C. § 42-233b. The designation of an area of common ground water supply contains no such limitation. I.C. § 42-237a.g.; IDAPA 37.03.11.010.01. It also does not avail the Director of the management mechanisms available to a ground water management area. Since the Director’s designation does not change the area of common ground water supply for the ESPA under the CM Rules it is not an amendment to CM Rule 50. For the foregoing reasons the Director’s determination he was not required to initiate rulemaking is affirmed.

D. Due Process.

The Petitioners assert the *Designation Order* violates due process. To make a claim grounded in constitutional due process, the Petitioners must demonstrate they have a property interest at issue and that the Director’s designation will deprive them of that interest. *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009). Idaho law recognizes a water right “is a property interest for purposes of the Fourteenth Amendment and, therefore, due process of law must be provided before the state deprives a citizen of a water right.” *Id.* Members of the Petitioners hold water rights and therefore have a property interest. However, the Court finds the Director’s designation of the ESPA GWMA did not violate due process or deprive them of that interest.

First, the Petitioners’ argument the Director was required to hold an administrative hearing and/or conduct rulemaking prior to making his designation are rejected for the reasons set forth herein. The Petitioners were not deprived of due process on those grounds. To the contrary, the Ground Water Act provides due process by permitting parties aggrieved by the Director’s designation to file a petition for hearing to contest. I.C. § 42-237e. A *Petition to Contest* was filed in this case and the Director held hearings on the *Petition*. R., 2302. The Petitioners were permitted to participate as parties, present evidence, and be heard on the issues raised in the *Petition to Contest*. *Id.* at 2433, 2495, & 2620. Therefore, the Petitioners had notice and an opportunity to be heard before the Director.

Second, in its review of the record the Court finds no evidence the Petitioners’ water rights have been deprived. Rather, the Petitioners speculate about possible deprivation should the Director enact a ground water management plan for the ESPA GWMA to manage the ESPA

water resource.¹¹ Speculation concerning possible regulation of water resources under Idaho law does not equate to the deprivation of a property interest. *Cf., In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (“[a] water user has no property interest in being free from the State’s regulation of water distribution in accordance with the prior appropriation doctrine.”). It follows the *Designation Order* and *Order on Legal Issues* must be affirmed.

E. Substantial right.

The Petitioners argue their substantial rights were prejudiced by the Director’s *Designation Order* and *Order on Legal Issues*. The Petitioners have failed to show the Director exceeded his authority in designating the ESPA GWMA. They have also failed to show their water rights have been deprived or that the *Designation Order* was made upon unlawful procedure. Therefore, the Petitioners have not established that their substantial rights were prejudiced. It follows the *Designation Order* and *Order on Legal Issues* must be affirmed.

E. The Director’s Order on Briefing is affirmed.

The administrative proceeding before the Director originated when the Sun Valley Company filed its *Petition to Contest*. In filing its *Petition*, the Sun Valley Company availed itself of the remedy available to it under the Ground Water Act to contest the *Designation Order*. The Petitioners subsequently intervened in the administrative proceeding to protect their interests, as did other entities aggrieved by the *Designation Order*. However, they did not file their own petition to contest under the Ground Water Act. Prior to an administrative hearing on the merits, the Sun Valley Company withdrew its *Petition*. R., 2474. The issue thus arose as to whether the intervenors could continue to press the issues raised in the *Petition to Contest* to protect their interests as intervening parties. In his *Order on Briefing*, the Director held they could. *Id.* at 2615. The Cross-Petitioners argue the Director erred in so holding on the basis he lost jurisdiction over the issues raised in the *Petition to Contest* upon its withdrawal.

The Court finds the rationale set forth in *United States Steel Corp. v. Environmental Protection Agency*, 614 F.2d 843 (1979) on this issue to be persuasive. In that case, U.S. Steel

¹¹ At this time the Director has not enacted a ground water management plan for the ESPA GWMA. As such, no plan is presently before the Court to review.

timely petitioned for review of an Environmental Protection Agency order and Scott Paper Company was granted leave to intervene as a party. *Id.* at 844. Shortly thereafter, U.S. Steel moved for and obtained dismissal of its petition for review. *Id.* The issue before the court was whether “an intervenor can continue to press its claims before this court after the original petitioner is dismissed from the case.” *Id.* at 844-845. The court permitted Scott Paper Company to continue to press its claims, even though it had not timely filed a petition for review:

The weight of authority in the United States Courts of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action. See *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214 (5th Cir. 1955); *Hunt Tool Company v. Moore, Inc.*, 212 F.2d 685 (5th Cir. 1955). Cf. *Fuller v. Volk*, *supra* at 328-29.

Here jurisdiction properly attached when U.S. Steel filed its petition for review. Scott’s intervention was not an attempt to cure a jurisdictional defect. Rather, it was an explicit attempt to ensure that Scott’s interests, which were related but not identical to those of U. S. Steel, were adequately represented in the ongoing proceeding. . . .

In light of this record and the factors discussed above, we believe that the proper course here is to allow U. S. Steel to dismiss its petition for review and to allow Scott to proceed with the challenge to the regulations at issue.

Id. at 845-846.

Based on the rationale of *United States Steel Corp.*, the Court finds that jurisdiction was properly established before the Director when the Sun Valley Company filed its *Petition to Contest*. The Petitioners moved to intervene while the Director had jurisdiction in an effort to protect their interests. Therefore, it cannot be said their request to intervene was an improper effort to bestow belated jurisdiction upon the Director. Moreover, there does not appear to be a dispute that the Petitioners, whose members hold ground water rights within the ESPA GWMA, possess sufficient interests to be permitted intervention before the Director. Therefore, the Court finds the issue of whether the Petitioners could continue to press the issues in the *Petition to Contest* to lie within the discretion of the Director. The Court finds the Director did not abuse his discretion in permitting the Petitioners to press those claims on the facts of this case given the rationale set forth in *United States Steel Corp.* It follows the Director’s *Order on Briefing* must be affirmed.

F. Attorney fees.

The Department and the Surface Water Coalition seek an award of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds “that the nonprevailing party acted without a reasonable basis in fact or law.” The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a “legitimate question for this Court to address.” *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the issues presented to this Court are largely issues of first impression concerning the interpretation of the Ground Water Act in light of the CM Rules. The Court holds that the Petitioners have presented legitimate questions for this Court to address on those issues of first impression. Therefore, an award of attorney fees under Idaho Code § 12-117 is not warranted.

Alternatively, the Surface Water Coalition seeks an award of attorney fees under Idaho Code § 12-121. The Idaho Supreme Court has held that “[a]ttorney’s fees are not available under Idaho Code section 12-121 on petitions for judicial review” *In Re Idaho Workers Compensation Bd.*, 167 Idaho 13, 24, 467 P.3d 377, 388 (2020). As such, the request for fees under Idaho Code § 12-121 is denied.

In their reply brief, the Petitioners seek an award of attorney fees under Idaho Code §§ 12-117(1) and 12-121. The Petitioner failed to timely raise the issue of attorney fees in their opening brief. As such, their request for attorney fees must be denied. *See e.g.*, I.A.R. 35(a)(5); *Mulford v. Union Pacific R.R.*, 156 Idaho 134, 142, 321 P.3d 684, 692 (2014) (“In order to be entitled to attorney fees on appeal, authority and argument establishing a right to fees must be presented in the first brief filed by a party with this Court). Alternatively, their request is denied for the reasons stated above.

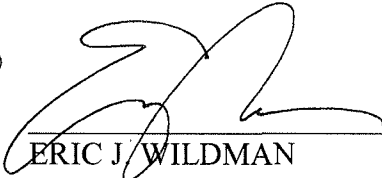
**IV.
ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the Director’s *Designation Order* dated November 2, 2016, is hereby affirmed.

IT IS FURTHER ORDERED that the Director’s *Order on Legal Issues* dated January 9, 2020, is hereby affirmed.

IT IS FURTHER ORDERED that the Director's *Order on Briefing* dated June 5, 2019, is hereby affirmed.

Dated November 6, 2020



ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

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MEMORANDUM DECISION AND ORDER

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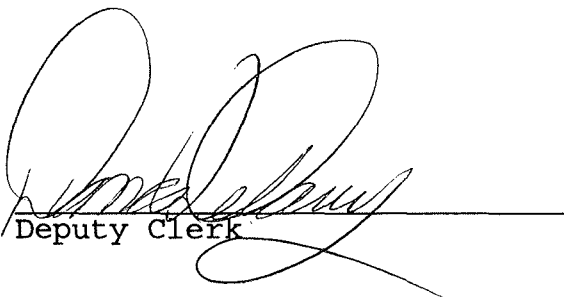
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