

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF SUN VALLEY
COMPANY'S PETITION FOR DECLARATORY
RULING REGARDING CREATION OF ESPA
GROUND WATER MANAGEMENT AREA

Docket No. P-DR-2016-001

**ORDER DENYING PETITION
FOR DECLARATORY RULINGS**

The Director ("Director") of the Idaho Department of Water Resources ("Department") finds, concludes and orders as follows:

FINDINGS OF FACT

1. On July 7, 2016, the Director sent a letter to potentially interested water users stating that the Department "is considering creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA)." Ltr. from Gary Spackman, Dir., Idaho Dept. of Water Res. to Interested Parties 1 (July 7, 2016) ("*Letter*").¹ The *Letter* invited water users to participate in public meetings scheduled by the Director. The purpose of the public meetings was to provide water users and interested persons an opportunity to learn more about the possible ground water management area and to express their views regarding the proposal.² *Id.* The *Letter* stated that "[a]fter hearing from water users at the public meeting and considering the issues," the Director would "decide whether a ground water management area should be created." *Id.*

2. The *Letter* discussed historic trends of declining ESPA water levels, Snake River flows, and spring discharges that had begun in the 1950s and had continued steadily, despite brief "periods of recovery." *Id.* The *Letter* also stated that "[w]ater users and the Water Resources Board are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines," but "future conditions, including climate and water use practices are unknown." *Id.* at 2.

3. The *Letter* stated that pursuant to Idaho Code § 42-233b, the Director is authorized to designate "ground water management areas," that the statute "identifies several potential tools available to the Director within a ground water management area to properly manage the resource," and that "formation of a ground water management area would have

¹ A copy of the letter is on the Department's website at: https://www.idwr.idaho.gov/files/ground_water_mgmt/20160707-Letter-to-Waters-Users-from-Gary-Spackman-Re-Proposed-ESPA-GWMA.pdf.

² The Department also issued a news release on July 13, 2016, regarding the meetings.

distinct advantages” over administering only through conjunctive management delivery calls, because the Department can “consider the aquifer as a whole.” *Id.* at 2-3. The *Letter* stated “[t]he question is whether the ESPA is approaching the conditions of a critical ground water area (not having sufficient ground water to provide a reasonably safe supply.)” *Id.* at 2.

4. The *Letter* also stated that “[o]ne of the issues needing consideration will be the areal extent of the ground water management area,” and that “[t]he Department’s technical information suggests that the area that impacts water stored in the ESPA and spring discharge extends into tributary basins.” *Id.* at 3. The *Letter* listed twenty-two tributary basins and stated that “[w]ater users in those areas are invited to participate” in the public meetings. *Id.* at 3. The tributary basins listed in the *Letter* included the Big Wood River basin. *Id.* at 3.

5. On July 25, 2016, the date of the public meeting in Hailey, Sun Valley Company filed with the Department a *Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area* (“*Petition*”). Sun Valley Company filed an *Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*, on July 29, 2016 (“*Amended Petition*”). Sun Valley Company filed a *Second Amended Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area*, on October 19, 2016 (“*Second Amended Petition*”).³ The *Petition*, the *Amended Petition*, and the *Second Amended Petition* (collectively, “*Petitions*”) seek declaratory rulings pursuant to Idaho Code § 67-5232 and Rule 400 of the Department’s Rules of Procedure (IDAPA 37.0101.400).

6. The *Petitions* state that Sun Valley Company received the *Letter* on July 11, 2016, and quote a number of the same passages from the *Letter* that are quoted above. *Id.* at 2-3. The *Petitions* cite and quote three Idaho Supreme Court decisions regarding the Department’s Conjunctive Management Rules (“CM Rules”), and also cite and quote several provisions of the CM Rules. *Id.* at 4-5. The *Petitions* state that Sun Valley Company owns waters rights in Water District 37 and within the Big Wood River Ground Water Management Area, but “does not own water rights in the ESPA area of common ground water supply” as established by CM Rule 50. *Id.* at 5.⁴

7. The *Petitions* seek fourteen (14) specific declaratory rulings, as follows:

- a. Because the Groundwater Act, the CM Rules promulgated by the Department and approved by the Legislature, and the common law set forth by Idaho trial and appellate courts derived therefrom, apply to determining areas of the state having a common ground water supply, creating and expanding water districts, and creating GWMA’s [Ground Water Management Areas], in exercising authority under Idaho Code Section 42-233a and 42-233b, the Director cannot act in derogation of these legal constraints.

³ The Sun Valley Company also filed with the Department on October 9, 2016, the *Declaration of Leni Patton* and the *Declaration of Maria Gamboa*.

⁴ The Big Wood River Ground Water Management Area was designated on June 28, 1991. *Order, In the Matter of Designating the Big Wood River Ground Water Management Area* (Jun. 28, 1991).

- b. Any attempt by the Director or the Department to expand the boundaries of the ESPA area of common ground water supply to include the entirety of Basin 37 by designating Basin 37 as part of an ESPA GWMA outside the context of a formal rulemaking or contested case proceeding is in contravention of the Groundwater Act, the CM Rules, and the common law set forth by Idaho trial and appellate courts derived therefrom.
- c. The proposal to designate an ESPA GWMA inclusive of Water District No. 37 is contrary to prior decisions of the Director regarding GWMA designations related to the ESPA.
- d. Idaho Code Section 42-233b does not grant the Director authority to include other ground water basins, including Basin 37, within an ESPA GWMA.
- e. The proposal to designate an ESPA GWMA inclusive of Basin 37 for purposes of the administration of water rights therein without a procedurally proper determination of an area having a common ground water supply in Basin 37 is an invalid collateral attack upon the findings and conclusions in Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Company v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016).
- f. The Director does not have authority to designate a new GWMA inclusive of Basin 37 without conducting a hearing or rulemaking in accordance with the Department's Rules of Procedure and the applicable provisions of the Idaho Administrative Procedures Act.
- g. A "critical ground water area," and a "ground water management area," as defined in Idaho Code Section 42-233a and 42-233b, respectively, are each, as a matter of law, an "area having a common ground water supply," as defined in the CM Rules, IDAPA 37.03.11.010.01.
- h. Except for within the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must determine areas of the state that have a common ground water supply before designating such areas ground water management areas.
- i. Except for the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must conduct a rulemaking or comply with the provisions of the CM Rules in order to determine areas of the state that have a common ground water supply.
- j. The Director may not create an ESPA GWMA that geographically overlaps the existing Big Wood River GWMA.

- k. The Director has the statutory authority to approve a ground water management plan, but does not have the authority to generate or create a ground water management plan.
- l. Under Idaho Code Section 42-233b, a ground water management plan for the ESPA should provide for managing the effects of ground water withdrawals from the ESPA (a) on the ESPA, and (b) on hydraulically connected sources of water, but it cannot provide for managing the effects of ground water withdrawals from any other source.
- m. Under Idaho Code Section 42-233b, if the Director makes a “determination that the ground water supply is insufficient to meet the demands of water rights within all of portions of a water management area” any order issued by the Director to water right holders to “cease or reduce withdrawal of water” must include water rights for domestic purposes.
- n. [T]hat IDAPA 04.11.01.420-425 apply to Department proceedings because the Department failed to include in the Rules of Procedure of the Idaho Department of Water Resources “a finding that states the reasons why the relevant portion of the attorney general’s rules were inapplicable to the agency under the circumstances.” [citing Idaho Code § 67-5220(5)(b)].

8. The Department conducted the public meetings referenced in the *Letter* on the scheduled dates (July 25-28) at the scheduled times and locations. Department staff in attendance at the public meetings included the Director, Special Advisor to the Director Rich Rigby, and Hydrogeologist Sean Vincent. The Director began each meeting with opening comments. Rich Rigby presented the legal, factual, and policy aspects of designating an ESPA ground water management area. Sean Vincent presented technical information in a presentation titled “Hydrologic Considerations for the Possible Establishment of a Ground Water Management Area for the Eastern Snake Plain Aquifer” (“ESPA GWMA Presentation”).⁵ After the Department presentations, the public commented and asked questions. At the conclusion of the public participation, the Director closed each meeting with remarks. The Director invited written comments, to be submitted by September 1. The Department recorded the audio presentations and public statements for all the public meetings except the Terreton meeting.⁶

9. The Department’s presentations at the public meetings implicated, directly or indirectly, many of the issues upon which the *Second Amended Petition* seeks declaratory rulings, including the “areal extent” of an ESPA ground water management area, the question of including tributary basins (specifically including the Big Wood River basin), questions of the Director’s authority to create a ground water management area, and questions about administration of a ground water management area under Idaho Code § 42-233b. Comments and questions at the public meetings, and subsequent written comments, addressed many of these

⁵ The presentation can be viewed on the Department’s website at: <https://www.idwr.idaho.gov/water-rights/ground-water-management-areas/proposed.html>.

⁶ The recorded audio is available on the Department’s website at the link in footnote 5 above. Due to a technical problem, there is no audio recording of the public meeting in Terreton.

same matters. Some attendees and commenters opposed designation of an ESPA ground water management area or inclusion of tributary basins, while others supported one or both.⁷

10. Some of the comments and questions at the public meetings, and subsequent written comments, raise issues of the interpretation and application of the CM Rules and Idaho Code § 42-233b in specific and possibly unique factual circumstances. Some of the comments and questions seek further factual or technical information regarding the basis for designating an ESPA ground water management area, or assert that such information is necessary before a designation can be made. Some of the comments and questions seek factual or technical information regarding whether individual tributary basins (such as the Big Wood River basin) should be included in an ESPA ground water management area, or assert that such information is necessary before determinations can be made to include individual tributary basins (such as the Big Wood River basin).

CONCLUSIONS OF LAW

1. Idaho Code §§ 42-233b and 42-233a are statutory provisions administered by the Department. The CM Rules are administrative rules administered by the Department.

2. Idaho Code § 67-5232 authorizes petitions to state agencies for declaratory rulings as to the applicability “of any statutory provision or of any rule administered by the agency.” Idaho Code § 67-5232(1). The statute also specifically authorizes agencies to address the questions raised in declaratory petitions through contested cases rather than via purely declaratory proceedings. *Id.* § 67-5232(2).

3. It appears that no Idaho appellate decision addresses Idaho Code § 67-5232, or the substantially similar IDAPA rule authorizing petitions for declaratory rulings regarding the applicability “of any order issued by the agency.” Idaho Code § 67-5255.⁸ Interpretations of the statute that do exist suggest it was not intended to require that the filing of a declaratory ruling petition would re-route a matter already pending before an agency into a declaratory proceeding. Commentators, for instance, have characterized the statute as a method “to initiate agency action.” Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer For The Practitioner*, 30 Idaho L. Rev. 273, 305 (1993/1994). In a 2005 trial order, an Ada County District Judge stated that the purpose of the statute is to allow parties to seek declaratory rulings “without having first to actually pursue the desired relief—such as file a refund request.” *Baird Oil Co. v Idaho State Tax Comm’n*, No. CVOC 0305451D (4th Jud. Dist., Ada County) (Jan. 21, 2005), 2005 WL 6568938 at 6.⁹ These views support a conclusion that Idaho Code § 67-5232 was intended to provide a means of requiring an agency to take up a matter that had not yet been raised, rather than requiring that a matter already pending before the agency be decided through a declaratory ruling. This conclusion is consistent with the express

⁷ Public comment letters are available through the Department’s website at the link in footnote 5 above.

⁸ “IDAPA” refers to the Idaho Administrative Procedure Act, which is set forth in chapter 52 of title 67 of the Idaho Code.

⁹ This case went to the Idaho Supreme Court, but the Court did not cite or discuss Idaho Code Section 67-5232. *Baird Oil Co. v. Idaho State Tax Comm’n*, 144 Idaho 229, 159 P.3d 866 (2007).

statutory authorization to resolve questions raised by a declaratory ruling petition through a contested case rather than through declaratory proceedings. Idaho Code § 67-5232(2).

4. This conclusion also finds support in Idaho Supreme Court decisions regarding declaratory judgment actions under chapter 12, title 10, Idaho Code. The Idaho Supreme Court has held that a declaratory judgment action may be dismissed on grounds of “practical considerations of efficiency and expediency” when another pending action (even one initiated after the declaratory judgment action) would settle the same issues and protect the interests of the party that sought a declaratory judgment. *Scott v. Agricultural Products Corp., Inc.*, 102 Idaho 147, 149-50, 627 P.2d 326, 328-29 (1981). The Idaho Supreme Court has also held that declaratory judgment proceedings are “not a freeway for the litigation of factual disputes,” *County Ins. Co. v. Agricultural Dev., Inc.*, 107 Idaho 961, 972, 695 P.2d 346, 357 (1984), and “a declaratory judgment should not be allowed ‘where the questions presented should be the subject of judicial investigation in a regular action.’” *Farmers Ins. Exchange v. Tucker*, 142 Idaho 191, 194, 125 P.3d 1067, 1070 (2005) (citation omitted).

5. The *Petitions* seek a number of declaratory rulings regarding the interpretation and application of Idaho Code §§ 42-233b and 42-233a, and the CM Rules, with respect to consideration of whether to designate an ESPA groundwater management area that would include the Big Wood River basin. As discussed above, the record establishes that the same questions and issues raised by the *Petitions* are directly or indirectly implicated in considering whether to designate an ESPA ground water management area, a question that was already pending before the Department when the *Petitions* were filed. “[P]ractical considerations of efficiency and expediency,” *Scott*, 102 Idaho at 149-50, 627 P.2d at 328-29, weigh against initiating declaratory proceedings on these matters when they are already pending before the Department.

6. This conclusion is supported by the fact that, as previously discussed, the questions and issues raised by the *Petitions* are inextricably intertwined with factual and technical issues. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (“Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to the IDWA the function of ascertaining reasonable pumping levels.”); *AFRD2 v. IDWR*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007) (stating that conjunctive administration requires knowledge of “how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.”) (citation omitted). Addressing the merits of the *Petitions* would lead to resolving these factual and technical questions through purely declaratory proceedings, solely on the basis of legal briefing and oral argument. Such proceedings should not be used to resolve matters that hinge in large part upon complex factual questions of hydrology and geology. Idaho Code § 67-5232(2); *County Ins. Co.*, 107 Idaho at 972, 695 P.2d at 357; *Farmers Ins. Exchange*, 142 Idaho at 194, 125 P.3d at 1070.

7. On November 2, 2016, the Director signed an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“Order”). The Order adopts a modified version of the Eastern Snake Plain Aquifer Model 2.1 boundary as the boundary for the ESPA

ground water management area. The ESPA ground water management area specifically excludes the Big Wood River basin.

8. Pursuant to Idaho Code § 42-1701A(3), Sun Valley Company may request a hearing before the Director on all matters addressed in the *Order* and on any of the requests for declaratory rulings in the *Petitions* Sun Valley Company asserts have not been resolved by the Order. Pursuant to the Idaho Administrative Procedure Act (Idaho Code § 67-5201 *et seq.*), Sun Valley Company may also seek judicial review of all matters addressed in the *Order* and on any of the requests for declaratory rulings in the *Petitions* Sun Valley Company asserts have not been resolved by the Order.

9. The Director should dismiss the *Petitions*: (1) because the questions and issues raised by Sun Valley Company in its *Petitions* are inextricably intertwined with factual and technical issues that require development and such development cannot occur solely on the basis of legal briefing and oral argument; and (2) because issuance of the Order creates a forum for Sun Valley Company to address the issues raised in the *Petitions* and practical considerations of efficiency and expediency necessitate that issues raised in the *Petitions* be addressed through the normal administrative review process and not the declaratory ruling process.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that Sun Valley Companies' *Petitions* are denied.

DATED this 3rd day of November 2016.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November 2016, the above and foregoing was served on the following by the method(s) indicated below:

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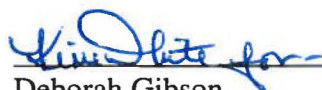
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Deborah Gibson
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, 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. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.