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

MCCAIN FOODS USA, INC.,	)	Case No. CV-01-16-21480
	)	
Petitioner,	)	**ORDER *SUA SPONTE* DISMISSING PETITION FOR JUDICIAL REVIEW**
	)	
vs.	)	
	)	
GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES.	)	
	)	
Respondents.	)	

I.
BACKGROUND

1. On November 17, 2016, McCain Foods USA, Inc. ("McCain Foods") filed a *Petition for Judicial Review* in the above-captioned matter. The *Petition* seeks review of the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("*Order*") issued by the Director of the Idaho Department of Water Resources ("Department") on November 2, 2016. The Court has stayed the above-captioned proceeding pursuant to joint motion of the parties.

2. Petitions for judicial review of the Director's *Order* were also filed in Ada County Case No. CV-01-16-23185 and CV-01-17-67 by the Sun Valley Company and the City of Pocatello respectively. The Court will refer to those cases collectively herein as the "Ada County Cases."

3. McCain Foods moved to intervene as a party in the Ada County Cases. The Court granted McCain Foods' requests and it was permitted to appear as an intervenor in both proceedings. The Department was also a party to both Ada County Cases.[1]

4. The Petitioners in the Ada County Cases moved this Court to decide whether it had jurisdiction over their petitions for judicial review. After briefing and argument, the Court entered *Orders Dismissing Petition for Judicial Review*, holding that it lacked jurisdiction over the petitions in both cases.

5. The Court entered its *Judgments* in the Ada County Cases on February 16, 2017. No parties appealed the Court's decision in either case and the time for filing appeals has expired. As a result, *Remittiturs* were issued in the Ada County Cases on April 6, 2017.

6. On that same date, McCain Foods filed a *Motion* in the above-captioned matter requesting that this Court lift the stay and issue a procedural order setting deadlines in this matter.

II.
ANALYSIS

Under Idaho law, the question of subject matter jurisdiction may be raised by the Court at any time *sua sponte*. *In Re Quesnell Diary*, 143 Idaho 691, 693, 152 P.3d 562, 564 (2006). The Court elects to do so here with respect to McCain Foods' *Petition for Judicial Review*. In the Ada County Cases the Court examined whether it had jurisdiction over two petitions seeking judicial review of the Director's *Order*. It held it did not under the plain language of Idaho Code §§ 42-237e and 42-1701A(3) and the doctrine of exhaustion. *Orders Dismissing Petition for Judicial Review,* Ada County Case No. CV-01-16-23185 & CV-01-17-67 (Feb. 16, 2017). The *Petition* filed by McCain Foods here seeks judicial review of the same *Order* as those petitions filed in the Ada County Cases. Likewise, the procedural posture of the *Petition* in this proceeding is similar to the posture of the petitions in the Ada County Cases. It suffers the same jurisdictional deficiencies as the petitions in the Ada County Cases. For the same reasons the Court did not have jurisdiction over the petitions in the Ada County Cases, and pursuant to the

[1] As in this case, the Department was a Respondent in the Ada County Cases.

same grounds, the Court holds it lacks jurisdiction over the *Petition* filed by McCain Foods in this matter.

The Court will not repeat the jurisdictional analysis set forth in the *Orders Dismissing Petition for Judicial Review* issued in the Ada County Cases. Both McCain Foods and the Department were parties to those cases. They had the opportunity to brief and argue the issue of jurisdiction in those proceedings. Furthermore, both were served with copies of the Court's *Orders Dismissing Petition for Judicial Review* and corresponding *Judgments*, and are apprised of the legal analysis and conclusions of law set forth therein.[2] Therefore, the Court will simply incorporate the *Orders Dismissing Petition for Judicial Review* herein by reference. Copies of the *Orders* are attached hereto as Exhibits A and B.

Therefore, for the reasons set forth in its *Orders Dismissing Petition for Judicial Review* issued in the Ada County Cases on February 17, 2017, the Court *sua sponte* finds that it lacks jurisdiction over the *Petition for Judicial Review* filed by McCain Foods in this matter. The Court basis its finding upon the plain language of Idaho Code §§ 42-237e and 42-1701A(3) and the doctrine of exhaustion. McCain Foods' request that this Court issue a procedural order in this matter is denied. The Court will lift the stay previously entered in this matter for the purpose of issuing this *Order* and a corresponding *Judgment*.

III.
ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The stay previously entered by this Court **is hereby lifted.**

2. McCain Foods' request that this Court issue a procedural order in this matter **is hereby denied**.

3. McCain Foods' *Petition for Judicial Review* **is hereby dismissed with prejudice**.

Dated April 10, 2017

ERIC J. WILDMAN
District Judge

[2] Both McCain Foods and the Department were served with copies of the Court's *Orders Dismissing Petition for Judicial Review* and *Judgments*. Neither appealed in either case.

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

SUN VALLEY COMPANY, Petitioner, vs. GARY SPACKMAN, Director of the Idaho Department of Water Resources. Respondent, and SOUTH VALLEY GROUND WATER DISTRICT, MCCAIN FOODS USA, INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, CITY OF POCATELLO, CITY OF BLISS, CITY OF BUHL, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF WENDELL, CITY OF HAILEY, WATER DISTRICT 37B GROUNDWATER ASSOCIATION, and THE IDAHO GROUND WATER APPROPRIATORS, INC., Intervenors.	Case No. CV-01-16-23185 **ORDER ON MOTION TO DETERMINE JURISDICTION** **ORDER DISMISSING PETITION FOR JUDICIAL REVIEW**

I.

BACKGROUND

1. On December 23, 2016, the Sun Valley Company filed a *Petition for Judicial Review* in the above-captioned matter. The *Petition* seeks review of the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("*Order*") issued by the Director of the Idaho Department of Water Resources ("Department") on November 2, 2016.

2. On January 13, 2017, the Sun Valley Company filed a *Motion to Determine Jurisdiction*, requesting that the Court determine it has jurisdiction over its *Petition*. A response in support of the *Motion* was filed by the City of Pocatello. Responses in opposition to the *Motion* were filed by the Department and the Surface Water Coalition.[1] A hearing on the *Motion* was held before the Court on February 13, 2017.

II.

ANALYSIS

The issue presented is whether the Court has jurisdiction over the *Petition* filed by the Sun Valley Company. The Court holds it lacks jurisdiction under the plain language of Idaho Code §§ 42-237e and 42-1701A(3) as well as the doctrine of exhaustion.

A. The Court lacks jurisdiction under the plain language of Idaho Code §§ 42-237e and 42-1701A(3).

The Director acted pursuant to Idaho Code § 42-233b in issuing his *Order*. That code section, which is part of the Idaho Ground Water Act, grants the Director the authority to designate ground water management areas within the state. He may exercise this authority when he has determined that any ground water basin or designated part thereof "may be approaching the conditions of a critical ground water area." I.C. § 42-233b. 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

[1] 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.

management area. The Director may simply act upon his own initiative and discretion under the authority granted him by statute.[2]

In this case, the Director designated a ground water management area for the Eastern Snake Plain Aquifer without a hearing.[3] He made his designation vla the issuance of an order. He then styled that order as a final order. The fact that the Director styled his designation as a final order is what has caused much of the confusion regarding the issue of jurisdiction in this matter. However, how the Director chooses to style his designation of a ground water management area does not control the remedies available to an aggrieved person under the facts and circumstances present here. Rather, as will be shown, what controls is the fact that the Director made his designation without a hearing.

Idaho Code § 42-1701A governs hearings before the Director. Subsection (1) provides that when the Director is required to hold a hearing prior to taking an action, he must conduct it in accordance with the provisions of the IDAPA. Subsection (2) permits the Director to appoint a hearing officer to conduct such a hearing and make a complete record of the evidence presented. Subsection (3) governs the situation where the Director takes an action without a hearing. It is this subsection that is implemented under the facts and circumstances present here. In fact, the plain language of Idaho Code § 42-237e specifically directs that subsection (3) applies where the Director takes any action without a hearing under the Idaho Ground Water Act:

> 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).[4]

---

[2] That said, the Director is required to "publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area" upon his designation of a ground water management area. I.C. § 42-233b.

[3] The Director did hold several public meetings prior to his designation "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." *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, p.1. (Nov. 2, 2016).

[4] The term "act" as used in Idaho Code § 42-237e refers to the Idaho Ground Water Act, I.C. §§ 42-226 to 42-239.

Subsection (3) provides that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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." I.C. § 42-1701A(3). The Legislature instructs that such an aggrieved 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." *Id.* (emphasis added). This procedural step is mandatory. *See e.g., Twin Falls County v. Idaho Com'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (the term "shall" when used in a statute is mandatory); *see also* I.C. § 42-237e. The Director will then hold an administrative hearing on the matter in accordance with the procedures set forth in IDAPA. I.C. § 42-1701A(3). Finally, subsection (3) instructs that "[j]udicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section." *Id.* Subsection (4) provides for the right of judicial review in accordance with the standards set forth in IDAPA. I.C. §§ 42-1701A(4).

It is undisputed that the Director acted in this case without a hearing. Therefore, subsection (3) of Idaho Code § 42-1701A controls. I.C. § 42-237e. The Sun Valley Company, which is aggrieved by the Director's action, has not previously been afforded the opportunity for an administrative hearing on the matter. The plain language of subsection (3) therefore requires that it file a written petition with the Director stating the grounds for contesting his action and request a hearing. Indeed, the Sun Valley Company has done just that. On November 16, 2016, it filed a petition and request for hearing with the Department pursuant to Idaho Code § 42-1701A(3). Its petition is presently pending before the Director unresolved. The Director is required to hold an administrative hearing on the petition and issue a written decision. I.C. § 42-1701A(3). This has not occurred at this time. Until the Director issues his written decision following hearing, the Sun Valley Company is not entitled to judicial review under the plain language of Idaho Code §§ 42-237e and 42-1701A(3). It follows that the Sun Valley Company's *Petition* must be dismissed.

B. The Court lacks jurisdiction under the doctrine of exhaustion.

Under Idaho law, the pursuit of statutory remedies is a condition precedent to judicial review. *Park v. Banbury,* 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). The doctrine of exhaustion requires a case "run the *full gamut* of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004) (emphasis added). Important policy considerations underlie this requirement. It protects agency autonomy by allowing the agency to develop the record and mitigate or cure errors without judicial intervention. *See e.g., Park*, 143 Idaho at 578-579, 149 P.3d at 853-854. It also defers "to the administrative process established by the Legislature." *Id.* Consistent with these principles, "courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive." *Id.*

As established in the preceding section, the Sun Valley Company has an administrative remedy available to it under Idaho Code § 42-1701A(3) which has not been exhausted. It may, and indeed is required to, file a petition and request for hearing before the Director challenging his designation. This remedy has not been exhausted. Although the Sun Valley Company has filed such a petition and request for hearing before the Department, the Department has not completed its proceeding on that petition at this time.

The policy considerations underlying the doctrine of exhaustion require that the Director be given the opportunity to address the issues raised by the Sun Valley Company prior to this Court. As an initial matter, it is the Director and his agency that must develop the factual and evidentiary record in this matter. Both the Idaho Supreme Court and the U.S. Supreme Court have instructed that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *See e.g., Regan*, 140 Idaho at 725, 100 P.3d at 619 (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973)). Since there has been no administrative hearing or proceeding before the Director at this time pertaining to his designation, there is no factual or evidentiary record for the Court to review. There is certainly no record pertaining to the issues raised by the Sun Valley Company, as the Director has yet to consider those issues. As a reviewing body, this Court is not in the position to create a new record on the issues raised by the Sun Valley Company.

Moreover, it is the Director's prerogative to designate ground water management areas. The Legislature has vested this responsibility in the Director because he has the specialized knowledge and expertise necessary to make such a designation. It follows that the Director should be given the opportunity to apply his knowledge and expertise to the issues raised by the Sun Valley Company prior to this Court's review of those issues. The sense of comity the judiciary has for the quasi-judicial functions of the Director requires this courtesy to allow him the first opportunity to detect and correct any errors that may pertain to his designation. *See e.g., White v. Bannock County Commissioners*, 139 Idaho 396, 401-402, 80 P.3d 332, 337-338 (2003) (one policy consideration underlying the doctrine of exhaustion is "the sense of comity for the quasi-judicial functions of the administrative body").

In sum, since the Sun Valley Company has an adequate administrative remedy available to it which has not been exhausted its *Petition* must be dismissed. *See e.g., Regan*, 140 Idaho at 724, 100 P.3d at 618 ("if a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted").

C. The Director erred in providing alternative remedies in his *Order*.

In his *Order*, the Director advised that any person aggrieved by his designation shall file a written petition with him under Idaho Code § 42-1701A(3) and seek a hearing. This is the correct administrative remedy available to an aggrieved person under the facts and circumstance of this case under the plain language of Idaho Code §§ 42-237e and 42-1701A(3).

He also alternatively advised that "any party may filed a petition for reconsideration" under Idaho Code § 67-5246(4). The Director erred in this respect. Much of the confusion in this case arises from the fact that the Director styled his designation as a final order. There is no instruction in Idaho Code § 42-233b as to how the Director must issue and/or style his designation of a ground water management area. Issuing a document styled as an "order" or a "final order" is certainly one reasonable way the Director may go about making such a designation. However, in styling the document as a "final order" there were some assumptions various provisions and remedies in IDAPA were ostensibly triggered, such as the right to file a petition for reconsideration under Idaho Code § 67-5246(4). These assumptions were mistaken.

IDAPA and its remedies have not been implemented in this matter. First, IDAPA "controls agency decision-making procedures only in the absence of more specific statutory

requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1993). The Legislature has enacted a specific statutory scheme to provide aggrieved persons an administrative remedy where the Director takes an action without a hearing. That scheme is found in Idaho Code §§ 42-237e and 42-1701A. Since the provisions of those statutes apply to the specific facts and circumstances of this case (i.e., the Director taking action without a hearing), they control the remedies available to aggrieved persons, not IDAPA. *See also* I.C. § 42-237e.

Additionally, the Director did not initiate rulemaking or a contested case proceeding in this matter that would implicate IDAPA. IDAPA provides that "*a proceeding* by an agency . . . that may result in the issuance of an order is a contested case and is governed by the provisions of this chapter, except as provided by other provisions of law." I.C. § 67-5240 (emphasis added). In this case, there has been no "proceeding." Nor were there any "parties," as the term is defined in IDAPA, when the Director issued his *Order*. The remedy provided in Idaho Code § 67-5246(4) contemplates a "proceeding" has occurred and by its terms is limited to "parties" to that proceeding. It is not available to "aggrieved persons" such as the Sun Valley Company.[5]

Last, the Director also advised that any party aggrieved by his order may file a petition for judicial review. Again the Director erred. For the reasons set forth above, the filing of a petition for judicial review is not an available remedy until the Director acts upon the written petition and request for hearing filed by the Sun Valley Company. I.C. §§ 42-237e & 42-1701A(3).

[5]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." Once the Director holds the administrative hearing and issues his order the parties may file a petition for reconsideration under Idaho Code § 67-5246(4) at that time.

III.

ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The Sun Valley Company's *Motion to Determine Jurisdiction* **is hereby denied**.

2. The Sun Valley Company's *Petition for Judicial Review* **is hereby dismissed with prejudice.**

Dated February 16, 2017

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO DETERMINE JURISDICTION / ORDER DISMISSING PETITION FOR JUDICIAL REVIEW was mailed on February 16, 2017, with sufficient first-class postage to the following:

A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83201
Phone: 208-234-6148

ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

CANDICE M MCHUGH
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

CHRIS M BROMLEY
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

JOHN K SIMPSON
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

MATTHEW J MC GEE
101 S CAPITOL BLVD, 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

MCCORMACK, SARAH A
MOFFATT THOMAS
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701
Phone: 208-345-2000

MICHAEL C CREAMER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

MICHAEL P LAWRENCE
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

MITRA M PEMBERTON
WHITE & JANKOWSKI LLP
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

PAUL L ARRINGTON
163 2ND AVENUE WEST
PO BOX 63
TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

RANDALL C BUDGE
201 E CENTER ST STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS ET AL
PO BOX 168
JEROME, ID 83338
Phone: 208-324-2303

SARAH A KLAHN
WHITE & JANKOWSKI LLP
KITTREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FL
PO BOX 829

(Certificate of mailing continued)

BOISE, ID 83701-0829
Phone: 208-345-2000

THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

TRAVIS L THOMPSON
163 2ND AVENUE WEST
PO BOX 63
TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318-0248
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

 Deputy Clerk Julie Murphy

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

CITY OF POCATELLO, Petitioner, vs. GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES. Respondents, and SOUTH VALLEY GROUND WATER DISTRICT, SUN VALLEY COMPANY, MCCAIN FOODS USA, INC., A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, CITY OF BLISS, CITY OF BUHL, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF WENDELL, and THE IDAHO GROUND WATER APPROPRIATORS, INC. Intervenors.	Case No. CV-01-17-67 **ORDER ON MOTION TO DETERMINE JURISDICTION** **ORDER DISMISSING PETITION FOR JUDICIAL REVIEW**

I.

BACKGROUND

1. On January 4, 2017, the City of Pocatello filed a *Petition for Judicial Review* in the above-captioned matter. The *Petition* seeks review of the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("*Order*") issued by the Director of the Idaho Department of Water Resources ("Department") on November 2, 2016.

2. On January 20, 2017, the City of Pocatello filed a *Motion to Determine Jurisdiction*, requesting that the Court determine it has jurisdiction over its *Petition*. Responses in opposition to the *Motion* were subsequently filed by the Department and the Surface Water Coalition.[1] A hearing on the *Motion* was held before the Court on February 13, 2017.

II.

ANALYSIS

The issue presented is whether the Court has jurisdiction over the *Petition* filed by the City of Pocatello. The Court holds it lacks jurisdiction under the plain language of Idaho Code §§ 42-237e and 42-1701A(3) as well as the doctrine of exhaustion.

A. The Court lacks jurisdiction under the plain language of Idaho Code §§ 42-237e and 42-1701A(3).

The Director acted pursuant to Idaho Code § 42-233b in issuing his *Order*. That code section, which is part of the Idaho Ground Water Act, grants the Director the authority to designate ground water management areas within the state. He may exercise this authority when he has determined that any ground water basin or designated part thereof "may be approaching the conditions of a critical ground water area." I.C. § 42-233b. 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

[1] 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.

management area. The Director may simply act upon his own initiative and discretion under the authority granted him by statute.[2]

In this case, the Director designated a ground water management area for the Eastern Snake Plain Aquifer without a hearing.[3] He made his designation via the issuance of an order. He then styled that order as a final order. The fact that the Director styled his designation as a final order is what has caused much of the confusion regarding the issue of jurisdiction in this matter. However, how the Director chooses to style his designation of a ground water management area does not control the remedies available to an aggrieved person under the facts and circumstances present here. Rather, as will be shown, what controls is the fact that the Director made his designation without a hearing.

Idaho Code § 42-1701A governs hearings before the Director. Subsection (1) provides that when the Director is required to hold a hearing prior to taking an action, he must conduct it in accordance with the provisions of the IDAPA. Subsection (2) permits the Director to appoint a hearing officer to conduct such a hearing and make a complete record of the evidence presented. Subsection (3) governs the situation where the Director takes an action without a hearing. It is this subsection that is implemented under the facts and circumstances present here. In fact, the plain language of Idaho Code § 42-237e specifically directs that subsection (3) applies where the Director takes any action without a hearing under the Idaho Ground Water Act:

> 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).[4]

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[2] That said, the Director is required to "publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area" upon his designation of a ground water management area. I.C. § 42-233b.

[3] The Director did hold several public meetings prior to his designation "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." *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, p.1. (Nov. 2, 2016).

[4] The term "act" as used in Idaho Code § 42-237e refers to the Idaho Ground Water Act, I.C. §§ 42-226 to 42-239.

Subsection (3) provides that "any person aggrieved by any action of the director, including any decision, determination, order or other action . . . 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." I.C. § 42-1701A(3). The Legislature instructs that such an aggrieved 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." *Id.* (emphasis added). This procedural step is mandatory. *See e.g., Twin Falls County v. Idaho Com'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (the term "shall" when used in a statute is mandatory); *see also* I.C. § 42-237e. The Director will then hold an administrative hearing on the matter in accordance with the procedures set forth in IDAPA. I.C. § 42-1701A(3). Finally, subsection (3) instructs that "[j]udicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section." *Id.* Subsection (4) provides for the right of judicial review in accordance with the standards set forth in IDAPA. I.C. §§ 42-1701A(4).

It is undisputed that the Director acted in this case without a hearing. Therefore, subsection (3) of Idaho Code § 42-1701A controls. I.C. § 42-237e. The City of Pocatello, which is aggrieved by the Director's action, has not previously been afforded the opportunity for an administrative hearing on the matter. The plain language of subsection (3) therefore requires that it file a written petition with the Director stating the grounds for contesting his action and request a hearing. This is the administrative remedy available to an aggrieved person. Indeed, one such aggrieved person, the Sun Valley Company, has done just that. On November 16, 2016, it filed a petition and request for hearing with the Department pursuant to Idaho Code § 42-1701A(3). Its petition is presently pending before the Director unresolved. The Director is required to hold an administrative hearing on the petition and issue a written decision. I.C. § 42-1701A(3). This has not occurred at this time. Until the Director issues his written decision following hearing, no person aggrieved by the Director's designation is entitled to judicial review under the plain language of Idaho Code §§ 42-237e and 42-1701A(3). It follows that the City of Pocatello's *Petition* must be dismissed.[5]

[5] Although the City of Pocatello did not timely file a written petition and request for hearing under Idaho Code § 42-1701A(3), it will be afforded the opportunity to participate in the proceeding the Director will hold on the Sun

B. The Court lacks jurisdiction under the doctrine of exhaustion.

Under Idaho law, the pursuit of statutory remedies is a condition precedent to judicial review. *Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). The doctrine of exhaustion requires a case "run the *full gamut* of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004) (emphasis added). Important policy considerations underlie this requirement. It protects agency autonomy by allowing the agency to develop the record and mitigate or cure errors without judicial intervention. *See e.g., Park*, 143 Idaho at 578-579, 149 P.3d at 853-854. It also defers "to the administrative process established by the Legislature." *Id.* Consistent with these principles, "courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive." *Id.*

As established in the preceding section, persons aggrieved by the Director's designation had an administrative remedy available to it under Idaho Code § 42-1701A(3). This remedy has not been exhausted. Although one such aggrieved person (i.e., the Sun Valley Company) has filed such a petition and request for hearing before the Department, the Department has not completed its proceeding on that petition at this time.

The policy considerations underlying the doctrine of exhaustion require that the Director be given the opportunity to address issues raised by aggrieved persons prior to this Court. As an initial matter, it is the Director and his agency that must develop the factual and evidentiary record in this matter. Both the Idaho Supreme Court and the U.S. Supreme Court have instructed that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *See e.g., Regan*, 140 Idaho at 725, 100 P.3d at 619 (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973)). Since there has been no administrative hearing or proceeding before the Director at this time pertaining to his designation, there is no factual or evidentiary record for the Court to review. As a reviewing body, this Court is not in the position to create a new record on the issues raised by the Sun Valley Company.

Moreover, it is the Director's prerogative to designate ground water management areas. The Legislature has vested this responsibility in the Director because he has the specialized

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Valley Company's petition. I.C. § 42-1701A(3) (stating that the "Director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding").

knowledge and expertise necessary to make such a designation. It follows that the Director should be given the opportunity to apply his knowledge and expertise to the issues raised by aggrieved persons prior to this Court's review of those issues. The sense of comity the judiciary has for the quasi-judicial functions of the Director requires this courtesy to allow him the first opportunity to detect and correct any errors that may pertain to his designation. *See e.g., White v. Bannock County Commissioners*, 139 Idaho 396, 401-402, 80 P.3d 332, 337-338 (2003) (one policy consideration underlying the doctrine of exhaustion is "the sense of comity for the quasi-judicial functions of the administrative body").

In sum, since the City of Pocatello had an adequate administrative remedy available to it which has not been exhausted its *Petition* must be dismissed. *See e.g., Regan*, 140 Idaho at 724, 100 P.3d at 618 ("if a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted").

C. The Director erred in providing alternative remedies in his *Order*.

In his *Order*, the Director advised that any person aggrieved by his designation shall file a written petition with him under Idaho Code § 42-1701A(3) and seek a hearing. This is the correct administrative remedy available to an aggrieved person under the facts and circumstance of this case under the plain language of Idaho Code §§ 42-237e and 42-1701A(3).

He also alternatively advised that "any party may filed a petition for reconsideration" under Idaho Code § 67-5246(4). The Director erred in this respect. Much of the confusion in this case arises from the fact that the Director styled his designation as a final order. There is no instruction in Idaho Code § 42-233b as to how the Director must issue and/or style his designation of a ground water management area. Issuing a document styled as an "order" or a "final order" is certainly one reasonable way the Director may go about making such a designation. However, in styling the document as a "final order" there were some assumptions various provisions and remedies in IDAPA were ostensibly triggered, such as the right to file a petition for reconsideration under Idaho Code § 67-5246(4). These assumptions were mistaken.

IDAPA and its remedies have not been implemented in this matter. First, IDAPA "controls agency decision-making procedures only in the absence of more specific statutory requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1993). The Legislature has enacted a

specific statutory scheme to provide aggrieved persons an administrative remedy where the Director takes an action without a hearing. That scheme is found in Idaho Code §§ 42-237e and 42-1701A. Since the provisions of those statutes apply to the specific facts and circumstances of this case (i.e., the Director taking action without a hearing), they control the remedies available to aggrieved persons, not IDAPA. *See also* I.C. § 42-237e.

Additionally, the Director did not initiate rulemaking or a contested case proceeding in this matter that would implicate IDAPA. IDAPA provides that "*a proceeding* by an agency . . . that may result in the issuance of an order is a contested case and is governed by the provisions of this chapter, except as provided by other provisions of law." I.C. § 67-5240 (emphasis added). In this case, there has been no "proceeding." Nor were there any "parties," as the term is defined in IDAPA, when the Director issued his *Order*. The remedy provided in Idaho Code § 67-5246(4) contemplates a "proceeding" has occurred and by its terms is limited to "parties" to that proceeding. It is not available to "aggrieved persons" such as the Sun Valley Company.[6]

Last, the Director also advised that any party aggrieved by his order may file a petition for judicial review. Again the Director erred. For the reasons set forth above, the filing of a petition for judicial review is not an available remedy until the Director acts upon the written petition and request for hearing filed by the Sun Valley Company. I.C. §§ 42-237e & 42-1701A(3).

[6]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." Once the Director holds the administrative hearing and issues his order the parties may file a petition for reconsideration under Idaho Code § 67-5246(4) at that time.

III.

ORDER

THEREFORE, BASED ON THE FOREGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The City of Pocatello's *Motion to Determine Jurisdiction* **is hereby denied.**

2. The City of Pocatello's *Petition for Judicial Review* **is hereby dismissed with prejudice.**

Dated February 16, 2017

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO DETERMINE JURISDICTION / ORDER DISMISSING PETITION FOR JUDICIAL REVIEW was mailed on February 16, 2017, with sufficient first-class postage to the following:

A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83201
Phone: 208-234-6148

ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

CANDICE M MCHUGH
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

CHRIS M BROMLEY
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

JOHN K SIMPSON
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

MATTHEW J MC GEE
101 S CAPITOL BLVD, 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

MCCORMACK, SARAH A
MOFFATT THOMAS
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701
Phone: 208-345-2000

MITRA M PEMBERTON
WHITE & JANKOWSKI LLP
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

PAUL L ARRINGTON
163 2ND AVENUE WEST
PO BOX 63
TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

RANDALL C BUDGE
201 E CENTER ST STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS ET AL
PO BOX 168
JEROME, ID 83338
Phone: 208-324-2303

SARAH A KLAHN
WHITE & JANKOWSKI LLP
KITTREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

TRAVIS L THOMPSON
163 2ND AVENUE WEST
PO BOX 63

(Certificate of mailing continued)

TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318-0248
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Julie Murphy
Deputy Clerk

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER SUA SPONTE DISMISSING PETITION FOR JUDICIAL REVIEW was mailed on April 10, 2017, with sufficient first-class postage to the following

MCCAIN FOODS USA INC
Represented by:
CANDICE M MCHUGH
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

GARY SPACKMAN IN HIS OFFICIAL
Represented by:
GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

SUN VALLEY COMPANY
Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

IDAHO GROUND WATER
Represented by:
THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

/S/ JULIE MURPHY
Deputy Clerk