

**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

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.¹ *Id.* at 2432. Soon thereafter, the Upper Valley Water Users were also granted leave to intervene.² *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

¹ 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.

² 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.³ *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*.⁴ 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

³ 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.

⁴ 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.⁵ *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).⁶

⁵ 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.

⁶ 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.”⁷ 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

⁷ 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.⁸ 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.⁹ 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.

⁸ 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.

⁹ 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

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 aground 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 generally 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.

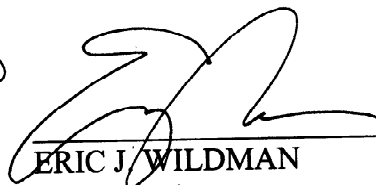
**IV.
ORDER**

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

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on November 06, 2020, with sufficient first-class postage to the following:

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MEMORANDUM DECISION AND ORDER

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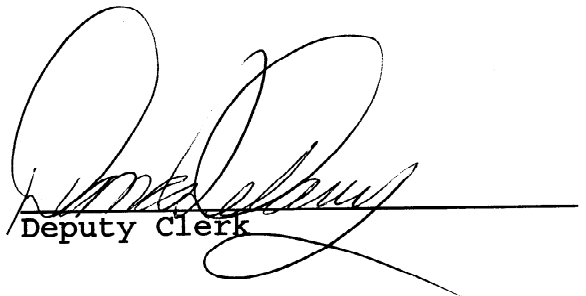
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A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of the Deputy Clerk.