

OCT 06 2020

By _____ Clerk

(Deputy Clerk)

**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, RIVERENCE PROVISIONS 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. CV01-20-08069

**RESPONDENT IDWR'S BRIEF IN
RESPONSE TO SWC'S CROSS-
PETITION**

RESPONDENT IDWR'S BRIEF IN RESPONSE TO SWC'S CROSS PETITION

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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The Idaho Department of Water Resources (“Department” or “IDWR”), by and through its counsel, hereby submits *Respondent IDWR’s Brief in Response to SWC’s Cross-Petition*.

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The issue herein is whether an intervening party to a contested case proceeding may step into the shoes of the original petitioner, when the original petitioner withdraws its request for hearing. This is an issue of first impression as Idaho appellate courts have not addressed whether intervening parties may continue to hearing after the original petitioner subsequently withdraws. In this case, the Director concluded intervening parties to the contested case were allowed to fully participate in the contested case upon successful intervention, and, therefore, could continue to hearing despite the original petitioner’s withdrawal of its request for hearing.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND¹

The Director of IDWR issued the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”) on November 2, 2016. No hearing was held prior to issuance of the ESPA GWMA Order. On November 16, 2016, the Sun Valley Company (“SVC”) filed its *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“SVC’s Petition”) pursuant to Idaho

¹ For a full statement of facts and procedural history in this matter see *Respondent IDWR’s Brief in Response to Petitioners’ Brief*, filed with the Court in this docket on September 10, 2020.

Code § 42-1701A(3).² R. 2294-2301. On December 2, 2016, the Director granted SVC's Petition in the *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*. R. 2352-55.³

Petitions to intervene were filed by City of Pocatello ("Pocatello"); the Cities of Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert and Wendell ("Coalition of Cities"); the Idaho Ground Water Appropriators, Inc. ("IGWA"); the Surface Water Coalition ("SWC"); McCain Foods USA, Inc.; South Valley Ground Water District; Basin 33 Water Users ("Basin 33"); City of Hailey; Big Wood & Little Wood Water Users Association; Water District 37-B Ground Water Association; Idaho Power Company; Riverence Provisions LLC;⁴ and Fremont Madison Irrigation District, Madison

² Petitions for reconsideration of the ESPA GWMA Order were filed by SVC, the City of Pocatello, and the Cities of Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert and Wendell. See *Coalition of Cities' Petition for Reconsideration* (R. 2276-2280); *Pocatello's Petition for Reconsideration* (R. 2281-2293); and *SVC's Petition for Reconsideration of GWMA Order* (R. 2294-2301). This Court held in its *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review*, at 6-7, Case No. CV 01-17-67 (4th Jud. Dist. Ct. 2017) that a petition for reconsideration was not an available remedy in response to the Director's issuance of the ESPA GWMA Order. Thus, no action was taken on the petitions for reconsideration.

³ On January 4, 2017, Pocatello filed a *Petition for Judicial Review* with this Court which sought judicial review of the Director's ESPA GWMA Order. The Court issued its *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review* on February 16, 2017, which concluded the Court lacked jurisdiction to review the ESPA GWMA Order until such time as the Director acted upon SVC's request for hearing. That decision was not appealed.

⁴ Clear Springs, LLC is now known as Riverence Provisions, LLC. See *Riverence Provisions LLC's Joinder in the Surface Water Coalition Response Brief* at 2.

Ground Water District, and Idaho Irrigation District (collectively “UV Irrigators”).⁵ All of the petitions to intervene were granted by the Director.⁶

On March 20, 2017, SVC withdrew its petition requesting a hearing and withdrew from participation in the hearing pursuant to IDWR Procedural Rule 204 (IDAPA 37.01.01.204). R. 2474-79. A prehearing conference was held March 22, 2017, and the effect SVC’s withdrawal had on the underlying contested case proceeding was discussed with no decision being made. *Prehearing Conference Recording Audio* (March 22, 2017). The prehearing conference was continued to April 20, 2017, to allow the parties to contemplate the effect of SVC’s withdrawal on the contested case. *Id.*

On April 14, 2017, Pocatello filed its *Memorandum Regarding Procedural Posture; In the Alternative, Request for Hearing* (“Pocatello’s Memorandum”) with the Director, arguing the contested case proceeding should continue to hearing because the intervenors were parties and had an interest in continuing the contested case. R. 2501-2511. The Coalition of Cities (R. 2512-2515) and Basin 33 (R. 2516-2521) joined in Pocatello’s Memorandum.

On April 18, 2017, SWC filed its *Response to City of Pocatello’s Memorandum & Request for Hearing / Response to Coalition of Cities Joinder and Petition for Hearing* (“SWC’s Response”), where it argued because SVC had withdrawn its request for hearing, there was no

⁵ See *IGWA’s Petition to Intervene* (R. 2307-2310); *SWC’s Petition to Intervene* (R. 2338-2343); *Pocatello’s Petition to Intervene* (R. 2330-2336); *Coalition of Cities Petition to Intervene* (R. 2359-2363); *McCain Foods USA, Inc.’s Petition for Intervention* (R. 2375-2378); *South Valley Ground Water District’s Petition to Intervene* (R. 2387-2391); *Basin 33 Water Users’ Petition to Intervene* (R. 2410-2421); *City of Hailey’s Petition to Intervene* (R. 2422-2427); *Big Wood & Little Wood Water Users Association’s Petition to Intervene* (R. 2428-2431); *Water District 37B’s Petition to Intervene* (R. 2443-2451); *Clear Springs’ Petition to Intervene* (R. 2457-2462); *Idaho Power’s Petition to Intervene* (R. 2463-2468); *Upper Valley’s Petition to Intervene* (R. 2481-2488).

⁶ See *Order Granting Petitions to Intervene* (IGWA, SWC, Pocatello, McCain & SV GWD) (R. 2396-2399); *Order Granting Petitions to Intervene* (Basin 33 & Hailey) (R. 2432-2436); *Order Granting Petitions to Intervene* (Big Wood/Little Wood) (R. 2452-2456); *Order Granting Petitions to Intervene* (BWLW WUA & WD37-B GWA) (R. 2432-2436); and *Order Granting Petitions to Intervene* (CSF & IPC) (R. 2469-2473); and *Order Granting Petitions to Intervene* (FMID, MGWD & IID “Upper Valley”) (R. 2494-2498).

outstanding petition or request that would allow for an administrative hearing on the ESPA GWMA Order. R. 2522-2531.

At the April 20, 2017, prehearing conference, the Director and parties discussed the above filings and the Director decided to issue a briefing schedule in order to give all intervening parties an opportunity to address the issue of whether they may continue to hearing in light of SVC's withdrawal. *Prehearing Conference Recording Audio* (April 20, 2017). Thereafter, the UV Irrigators filed a memorandum joining in Pocatello's Memorandum. R. 2539-2546. Pocatello filed a response to the SWC's Memorandum, and the Coalition of Cities joined in Pocatello's response. R. 2551-2561; R. 2547-2550.

Pocatello and joinder parties argued the intervenor-parties may be allowed to substitute in for the original party in federal courts and the Director should apply the same reasoning because intervenors are considered parties under the Idaho Administrative Procedures Act ("the APA") and IDWR's Procedural Rules (IDAPA 37.01.01 *et seq.*). R. 2504-2508.

SWC argued the withdrawal of SVC's request for hearing removed jurisdiction for the entire contested case, and, therefore, intervenors—none of whom filed a separate timely request for hearing—could not establish a basis for jurisdiction independent of SVC's Petition. R. 2524-2525, 2527-2528.

The matter was informally stayed from 2017 to 2019 while settlement discussions occurred between certain parties to the SWC delivery call. R. 2978-79. In January 2019, a settlement in that matter was finalized. R. 2579-81. On January 30, 2019, the Director convened a status conference to determine whether the intervenors still wanted to proceed to hearing in light of the settlement agreement. Counsel for Basin 33 and counsel for UV Irrigators requested that a hearing be held. R. 2979.

Based on legal briefing filed by parties in 2017, on June 5, 2019, the Director issued the *Order on Briefing; Notice of Additional Prehearing Conference*. R. 2615-20. The Director concluded intervening parties could remain as parties and fully participate in the contested case despite SVC's withdrawal. R. 2620.

On September 25, 2019, the Director issued the *Deadline for IDWR's Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery*, which established the remaining legal and factual issues in the contested case.⁷

On January 9, 2020, the Director issued the *Order on Legal Issues*. R. 2977-2993. The Director's *Order on Legal Issues* was interlocutory. See IDAPA 37.01.01.710. Therefore, the Director's April 21, 2020, *Final Order on Fact Issue*, which resolved all previously undecided issues in the matter, made the interlocutory *Order on Legal Issues* final and subject to reconsideration or judicial review.

On May 26, 2020, Basin 33 and the UV Irrigators jointly filed for judicial review. See *Basin 33 Water Users and Upper Valley Water Users Joint Notice of Appeal and Petition for Judicial Review of Final Agency Action*. On June 2, 2020, SWC filed its *Cross-Petition for Judicial Review*. In its cross-petition, SWC stated its intent to assert the following issue on judicial review: "a. Whether the Director erred in ruling that intervenors in the contested case remained parties to the pending action after the original petition filed by Sun Valley Company was withdrawn." *SWC's Cross-Petition for Judicial Review* at 3-4. On September 10, 2020,

⁷ For a full procedural background as to legal issues, see *Order in Legal Issues* at 1-4. R. 2977-80. While Petitioners do not challenge the Director's decisions related to the factual issue, a full procedural background on the factual issue is available at pages 1-4 of the *Final Order on Fact Issue*. R. 3264-65.

SWC filed its *Cross-Petition / Response Brief* (“SWC’s Cross-Petition Brief”). Respondent IDWR files this response to *SWC’s Cross-Petition Brief*.

C. ISSUES ON CROSS-PETITION

Cross-Petitioner SWC identifies the following additional issues for judicial review:

1. Whether the Director erred in ruling that intervenors in the contested case remained parties capable of challenging the ESPA GWMA Order after the original petition filed by SVC was withdrawn.
2. Whether the Director erred in proceeding to a hearing despite the Petitioners not requesting a hearing on the ESPA GWMA Order pursuant to Idaho Code § 42-237e and Idaho Code § 42-1701A(3).

SWC’s Cross-Petition Brief at 7.

D. STANDARD OF REVIEW

Judicial review of a final decision by the Department is governed by the Idaho APA, Idaho Code § 67-5201 *et seq.*, and Idaho Code § 42-1701A(4). Under the APA, courts undertake judicial review of agency decision making based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless the court finds 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Court exercises free review over questions of law. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as

necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

II. ARGUMENT

A. THE DIRECTOR DID NOT ERR BY ALLOWING INTERVENORS IN THE CONTESTED CASE TO CONTINUE AS PARTIES CAPABLE OF CHALLENGING THE ESPA GWMA ORDER AFTER SVC'S WITHDRAWAL OF ITS REQUEST FOR HEARING.

To answer the question of whether the intervening parties could continue to hearing despite SVC's withdrawal, the Director's *Order on Briefing; Notice of Additional Prehearing Conference* looked to the plain language of the APA and the Department's Procedural Rules. The Department's Procedural Rules define intervenors as "*persons*, not applicants or claimants or appellants, complainants, respondents, or protestants to a proceeding, *who are permitted to participate as parties* pursuant to Rules 350 through 354...." IDAPA 37.01.01.156 (emphasis added). Intervenors must petition the Director for an order granting intervention by claiming "a direct and substantial interest in the proceeding." IDAPA 37.01.01.350. A "party" is defined as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." IDAPA 37.01.01.005.16; Idaho Code § 67-5201(13).

The Director concluded that intervenors to the contested case properly intervened and were entitled as of right to be admitted as parties and fully participate in the contested case because each had a direct and substantial interest in the proceeding. R. 2619-20. Thus, because the APA and the Department's Procedural Rules specifically list an intervenor as a party and do not differentiate between the rights of intervenors and other parties, the intervenors, "may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise *fully participate* in hearings or arguments." R. 2619. (emphasis in original).

Based on these authorities, the Director concluded he “has the authority to recognize other affected persons as parties and to grant intervenor-parties the opportunity to fully participate in a proceeding, even if the original petition initiating the proceeding is withdrawn.” *Id.* at 5.⁸ R. 2619.

1. The Director Did Not Err in Concluding Intervening Parties May Continue Under SVC’s Withdrawn Request for Hearing.

SWC’s Cross-Petition argues the Director erred in allowing intervenors to proceed as parties without SVC because:

[SVC]’s withdrawal effectively ended the administrative proceeding before the Department in the spring of 2017. As supported by past actions of the Director, the Director had no authority to continue the contested case and hold a hearing on the Petitioners’ challenges when they failed to file the required petition under section 42-1701A(3). The Director simply had no authority to enlarge the time period to request a hearing and give the Petitioners the right to continue Sun Valley’s case. The Court should find the Director erred, that his interlocutory order continuing the case proceeding to a hearing was unlawful, and dismiss the present appeal accordingly.

SWC Cross-Petition Brief at 13.

a. *Intervenors Are Not Required to Have Requested a Hearing to Continue Without SVC.*

SWC argues any person aggrieved by the Director’s order had an exclusive remedy to request a hearing within 15 days from issuance of the ESPA GWMA Order pursuant to Idaho Code §§ 42-237e⁹ and 42-1701A(3). *SWC Cross-Petition Brief* at 9. SWC argues since SVC

⁸ The Director did delimit this outcome, concluding it “will not allow any party to file late or untimely petitions or request[s] for hearing going forward. These findings are limited to a situation where parties have timely and properly intervened, creating a contested case and the original hearing petitioner removes itself at some point prior to hearing, as it is allowed to do under Rule 204 [IDAPA 37.01.01.204].” *Order on Briefing; Notice of Additional Prehearing Conference* at 6, fn. 6. R. 2620.

⁹ Idaho Code § 42-237e states: “Any person dissatisfied with any decision, determination, order or action of the director of the department of water resources, watermaster, or of any local ground water board made pursuant to th[e] Ground Water 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 or watermaster may contest such action pursuant to section 42-1701A(3), Idaho Code.”

was the only party to avail itself of this remedy, when it withdrew its request, “there was no outstanding petition or request that would allow for an administrative hearing to ‘contest’ the GWMA Order.” *Id.* SWC argues the Director acted arbitrarily when he ignored the 15-day timeframe and instead exercised his discretion to continue the contested case and allow a hearing. *Id.* In other words, SWC argues Petitioners failed to make a timely request for hearing pursuant to Idaho Code § 42-1701A(3), meaning their continued presence rendered the contested case jurisdictionally defective.

SWC’s arguments are unavailing because the intervenors were not required to also file a request for hearing. The question in this case is not whether a request for hearing was filed within 15 days of the order’s issuance; a timely request for hearing was made by SVC. Rather, the question in this case is what happens *after* a timely request is made. The Director correctly concluded the APA and the Department’s Procedural Rules govern what happens *after* a timely request is made.

A plain reading of the APA’s definition of “party” and IDWR’s Procedural Rule’s definition of “intervenor” support the Director’s conclusion that an intervening party’s rights are not subordinate to an original party once the petition to intervene is granted. Once an intervenor becomes party to a contested case—in other words once an intervenor has shown it is “entitled as of right to be admitted as a party”—that right to participate in the contested case is coequal to the originating party. IDAPA 37.01.01.005.16; Idaho Code § 67-5201(13); *see also* Wright & Miller, 7c Fed. Prac. & Proc. Civ. § 1920 (3d ed.) (Similarly at the federal level, “[u]nless conditions have been imposed, the intervenor is treated as if the intervenor were an original party and has equal standing with the original parties”).

Therefore, where no conditions to intervention are present, as was the case here, a plain reading of the APA and IDWR's Procedural Rules support a conclusion that the intervenor's participatory rights in the contested case are not subordinate to the original parties once the petition to intervene is granted. It follows that where the original requestor subsequently withdraws, an intervening party who has been found to be "entitled as of right" to participate in the matter should be able to continue forward in order to protect its acknowledged rights and interests without also having filed a request for hearing. IDAPA 37.01.01.005.16; Idaho Code § 67-5201(13).

While there is no Idaho case law directly on point, federal case law supports this outcome. In *United States Steel Corp. Environmental Protection Agency*, 614 F.2d 843, 844, 28 Fed.R.serv.2d 1052 (3d Cir. 1979). U.S. Steel timely filed a petition for judicial review of an action of the EPA and Scott Paper Company ("Scott") timely intervened. However, after Scott's motion to intervene was granted, U.S. Steel sought to voluntarily dismiss the petition. *Id.* EPA then argued the entire case should be dismissed because "Scott's failure to file its own timely petition for review necessitates the dismissal of Scott, as well as U.S. Steel, from this proceeding." *Id.* at 845. The Third Circuit disagreed, holding "jurisdiction properly attached when U.S. Steel filed its petition for review." *Id.* at 846. "Scott's intervention was not an attempt to cure a jurisdictional defect. Rather, it was an explicit attempt to ensure that Scott's interests . . . were adequately represented in the ongoing proceeding." *Id.* The Third Circuit concluded EPA was on notice of Scott's position because Scott had submitted comments objecting to the proposed regulations and the same issues were raised in Scott's motion to intervene. *Id.*

Additionally, as articulated by the Ninth Circuit, the harm to adverse parties or the Department in allowing an intervening party to proceed are minimal where the intervenor is limited to issues raised in the original petition. *In re Molasky*, 843 F.3d 1179, 1183, 63 Bankr.Ct.Dec 126 (9th Cir. 2016) (intervenor can continue to litigate as party in a bankruptcy proceeding involving his own nondischargeability claim, when the original party's timely complaint he adopted without filing his own, was dismissed for failure to prosecute). Here, in the situation presented by this record, intervening parties explicitly intervened in an attempt to ensure their interests were adequately represented. Therefore, jurisdiction properly attached when the Director granted the petitions to intervene.

SWC contrasts the Director's decision to allow Petitioners to continue under SVC's hearing request with that of the Big Lost River Basin Petition for Critical Groundwater Area ("CGWA") contested case.¹⁰ *SWC's Cross-Petition Brief* at 11. In that case, the Director was petitioned by over 130 well owners to designate the Big Lost CGWA. The Director granted the petition, created a contested case, set a status conference, and granted numerous petitions to intervene. *Id.* The petitioners in that case subsequently withdrew their petition and three days afterward the Director dismissed the contested case. *Id.* SWC argues the Director's dismissal of that case, where intervening parties were present, illustrates the arbitrary nature of his decision to allow intervening parties to continue on in this matter. *Id.* at 11-12.

SWC's arguments are not analogous. In the Big Lost CGWA matter, the petition to designate a CGWA was first filed by the petitioners and then withdrawn by the petitioners themselves. When the petitioners in that matter withdrew their petition, there was no designated

¹⁰ Docket No. P-CGWA-2016-001 is available at: <https://idwr.idaho.gov/legal-actions/administrative-actions/big-lost-river-basin-CGWA-petition.html>.

CGWA left behind to contest. If a party desired to continue on to a hearing related to designation of a Big Lost CGWA, they could have simply filed their own petition. In fact, one could file a petition for the Director to designate a Big Lost CGWA today, tomorrow or years down the road. By contrast, the Director's order designating the ESPA GWMA remains intact and the legal arguments regarding it raised by intervenors continue despite SVC's withdrawal.

SWC also cites to the conditional withdrawal of a protest in a contested case involving Ark Properties, LLC, Permit No. 61-12318. *See* Addendum B to *SWC's Cross-Petition Brief*. In that case, Idaho Power filed a protest to the application, triggering contested case procedures. Double Anchor Ranches, Inc. then successfully intervened in the matter. Subsequently, a settlement agreement between the applicant and Idaho Power resolved Idaho Power's protest. While intervenor Double Anchor Ranches, Inc. was not party to the settlement, the hearing officer concluded "the Settlement resolves the protest that created the contested matter to which Double Anchor Ranches, Inc. intervened." *Id.* That outcome is also distinguishable.

In this matter, there was no settlement or resolution of the issues raised by SVC at the time of its withdrawal. The issues raised by SVC in its original petition are live and continue to be litigated by the intervenors. Additionally, the issue of whether Double Anchor Ranches wanted to continue to hearing despite the settlement agreement was not brought before the hearing officer in that matter. Here, the issue of whether or not to continue to hearing was raised by the parties, forcing the Director to consider it.

In this case Petitioners intervened to protect their distinct rights, and SVC's removal of itself from the hearing process did not negate the Petitioners' rights as related to the ESPA GWMA under the APA or the Department's Rules of Procedure. Nor did SVC's withdrawal from the hearing process have any effect on the underlying ESPA GWMA designation. The

ESPA GWMA designation remains in place. The fact that SVC withdrew its request for hearing did not require the Director to automatically dismiss the underlying contested case. SVC filed a timely request for hearing and Petitioners properly and timely intervened in order to protect their rights and interests. Simply because Petitioners relied on SVC's original request does not mean the Petitioners cannot continue to hearing.

Intervenors made a reasonable showing of a substantial interest in the matter and were granted the right to fully participate in the contested case. The fact that parties made a variety of filings after issuance of the ESPA GWMA Order—including to this Court—also shows there was procedural confusion at the time of ESPA GWMA Order issuance. The Director decided to address the various legal and factual disputes using the hearing procedure typically followed by the Department. SVC's withdrawal of the solely filed request for hearing did not create a jurisdictional bar to coequal parties continuing on to a hearing on the underlying record.

b. *SVC's Withdrawal is Not Akin to an Applicant Withdrawing its Application for Permit or Application for Transfer.*

SWC argues SVC's request to withdraw its hearing request is "similar to an application for permit or transfer, once an applicant withdraws, there was no matter to pursue and the contested case before the Department should have been dismissed." *Id.* at 12. SWC's arguments are again unavailing.

The ESPA GWMA Order is not akin to an application for permit or transfer before the Department. An application for permit is filed, public notice is provided, and parties may then protest the application. Idaho Code § 42-203A. Likewise, when a transfer application is filed, public notice is provided, and parties may protest the application. Idaho Code § 42-222(1). In either of these scenarios, an applicant is bringing itself before the Department in order to attempt to obtain a permit to use, or change its use of, a portion of the State's water resources. If either

type of applicant decides it no longer desires to pursue a new permit or transfer, it may withdraw its application at any time. *See* IDAPA 37.01.01.204 (“Any party may withdraw from a proceeding in writing or at hearing.”). If the application is withdrawn, there is nothing left before the Department and the entire justification for the action goes away. If another party protested and intervened prior to the applicant’s withdrawal—triggering contested case procedures—and the original applicant subsequently withdraws the application, no independent claim of right exists that would allow the protestant or intervenor to somehow force the applicant to finish, for example, a contemplated irrigation project or to transfer a place of use. The application in that case is controlled by the actions of the applicant toward the appropriation of water; not an expression of the Director’s delegated authority.

In this case, the Director controlled the designation of the ESPA GWMA based on his authority under the Ground Water Act. This case is distinguishable from a contested case involving an application for permit or a transfer because here the underlining reason for the request for hearing has not been withdrawn. Here, the ESPA GWMA designation remains in place regardless of SVC’s withdrawal. The ESPA GWMA Order represents the Director’s explicit authority to implement additional management of ESPA groundwater levels. The Director’s actions controlled the designation and the Director did not withdraw the ESPA GWMA Order. Therefore, a party allowed to remain an active participant at hearing in this matter can be distinguished from a party being allowed to somehow force an applicant for a water permit or transfer to continue forward under a withdrawn request.

III. CONCLUSION

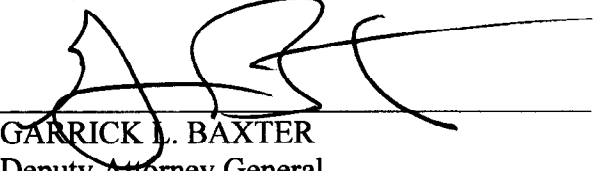
For the reasons so stated, and based on the record before the Court, the Director did not err or act arbitrarily in concluding intervenors in the contested case remained parties capable of challenging the ESPA GWMA Order after the original petition filed by SVC was withdrawn.

Neither did the Director err or act arbitrarily in proceeding to a hearing despite Petitioners not requesting a hearing on the ESPA GWMA Order pursuant to Idaho Code § 42-237e and Idaho Code § 42-1701A(3).

RESPECTFULLY SUBMITTED this 6TH day of October, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2020, I caused a true and correct copy of the foregoing **RESPONDENT IDWR'S BRIEF IN RESPONSE TO SWC'S CROSS-PETITION** to be filed with the Court and served on the following parties by the indicated methods.

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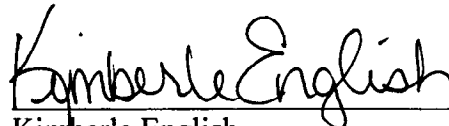
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