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.

IN THE MATTER OF DESIGNATING THE EASTERN SNAKE PLAIN AQUIFER GROUND WATER MANAGEMENT AREA

Case No. CV01-20-8069

SURFACE WATER COALITION'S CROSS-PETITION / RESPONSE BRIEF

SURFACE WATER COALITION'S CROSS-PETITION / RESPONSE BRIEF

Judicial Review of the Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area (dated November 2, 2016), entered by the Idaho Department of Water Resources; Hearing Officer Director Gary Spackman, Director, Presiding.

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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 (collectively the "Surface Water Coalition" or "Coalition"), by and through undersigned counsel, hereby jointly submit this *Cross-Petition / Response Brief.*

STATEMENT OF THE CASE

I. Nature of the Case.

This appeal is about the Director's management of an aquifer pursuant to Idaho's Ground Water Act, I.C. §§ 42-226 et seq. Faced with a perpetual loss of aquifer storage and continued declining spring flows and reach gains, the Director exercised his statutory authority to designate a groundwater management area under I.C. § 42-233b. R. 1. The plain and unambiguous language of the statute prescribed the procedure for the Director to follow. Upon designation, the Director was required to publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area. The Director followed the law and published the required notice. R. 2326-29, 2337, 2344-51, 2356-58, 2366-67, 2384-85.

Since no formal hearing had been held prior to the order's issuance, Idaho law provided an express remedy for any person claiming to be aggrieved by the Director's action. *See* I.C. §§ 42-237e. The Director's order included explanatory information, clarifying the order to be a "Final Order" pursuant to I.C. § 67-5246. The order further explained that as a "Final Order" "Any party may file a petition for reconsideration" and a request for hearing, thereby providing notice of that available remedy. R. 28. Only the Sun Valley Company ("Sun Valley" or "SVC"), an entity with limited water rights located well outside the designated GWMA, filed a petition requesting such a hearing. R. 2302.

Despite the statutory remedy, the Basin 33 and Upper Valley Water Users (collectively "Petitioners") filed no petition with the Director, and made no request for a contested case hearing. Instead, the Petitioners consciously chose to intervene at a later date and rely upon the limited status Idaho law affords such parties.[1] In other words, despite now claiming prejudice to "substantial rights," the Petitioners took no action to protect those "rights" under applicable provisions of Idaho law.

Whereas the Director properly exercised his statutory authority and discretion to protect and conserve a dwindling ground water supply, the Petitioners have failed to show any legal error in that decision. The alleged procedural errors rely upon a strained interpretation of unrelated administrative rules and misconstrue what is required for constitutional due process. Losing on the facts, the Petitioners attempt to create a new narrative of "water right administration" in an effort to misdirect the Court from the issue of the Director's authority to engage in lawful ground water management.

Since the Director properly followed the governing provisions of Idaho's Ground Water Act in designating the Eastern Snake Plain Aquifer ("ESPA") Groundwater Management Area ("GWMA"), there is no procedural error to correct on appeal. The Court should deny the petition for judicial review accordingly. Further, as the Director erred by continuing with a contested case hearing after Sun Valley withdrew its request, the Court should grant the Coalition's petition and dismiss the Petitioners' appeal on those grounds as well.

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[1] The Director limited the scope of the proceeding to the issues raised in SVC's original petition. The Petitioners, as intervenors, were bound by that decision and could not expand the scope of the case. *See* R. 2621; *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325, 328 (1936) (an intervenor takes the case as he or she finds it); *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Ct. App. 1984), *overruled on other grounds* (an intervenor "is not entitled to raise new claims outside of the original parties' pleadings"). The Petitioners did not appeal the Director's order determining the scope of the factual hearing. R. 3284 ("This appeal only seeks review of the legal matters decided by Director Spackman's *Order on Legal Issues*"); *see also*, *Pet. Br.* at 8 (statement of issues).

II. Course of Proceedings.

The Director held ten (10) public meetings spanning eight (8) counties across southern and eastern Idaho in July 2016. R. 2226-2275. Hundreds of interested people attended these education sessions, including members of Petitioners' organizations. R. 2231-46. The Director further invited written public comment and allowed interested persons over a month to submit those comments to the agency. R. 2. Although no statute or regulation required the Director to engage in such a process, the agency clearly went above and beyond what normally occurs prior to such a designation. After receiving public testimony and twenty-nine (29) written comment letters, the Director designated the ESPA GWMA on November 2, 2016 ("GWMA Order"). R. 1. The Director published notice of the order in fifteen (15) public newspapers across the state. R. 2326-29, 2337, 2344-51, 2356-58, 2366-67, 2384-85.

Only Sun Valley exercised its right to file a petition requesting a formal contested case hearing before the agency. R. 2302. Various petitions for reconsideration and intervention were filed thereafter. Over two months after issuance of the order, the Basin 33 Water Users petitioned to intervene on January 6, 2017. R. 2410. The Upper Valley Water Users petitioned to intervene on March 23, 2017. R. 2494. The Director granted these petitions specifically finding that the Petitioners' intervention would not "unduly broaden the issues" that had been previously raised by SVC.[2] R. 2432-33, 2494-95.

Sun Valley, the sole petitioner, withdrew its request for hearing on March 20, 2017. R. 2474. Subsequently the Director requested briefing on whether or not the hearing should

[2] The Petitioners have not challenged the Director's orders granting their intervention and limited party status in the administrative case.

continue in the matter.[3] R. 2533. On June 5, 2019 the Director issued an interlocutory order deciding to proceed with the contested case on the following stated basis:

> The Director has the authority to recognize other affected persons as parties and to grant intervenor-parties the opportunity to participate in a proceeding, even if the original petition initiating the proceeding is withdrawn.
>
> The Director concludes in this case, and under this specific set of facts, that when intervenors have been granted party status, and the original petition initiating the contested case is withdrawn, the intervenors remain parties to a contested case pending before the Director. The issues that may be litigated in the contested case are limited to the issues raised by the original petition creating the contested case.

R. 2619-20.

After additional pre-hearing conferences, the Director issued an order establishing a hearing schedule on September 25, 2019. R. 2692-98. The Director provided for a briefing schedule on the legal issues raised by Petitioners in this appeal. *See id.* The Petitioners participated and submitted written memorandums in support of their positions. R. 2701-27, 2740-61, 2874-95, 2912-21. After considering the various briefs and legal positions, the Director issued an interlocutory *Order on Legal Issues* ("Legal Order") denying the procedural challenges to the GWMA Order. R. 2977-2993.

The hearing on the factual issue was held on February 18, 2020. Only the Upper Valley Water Users, the Surface Water Coalition, the Coalition of Cities, McCain Foods, Idaho Power Company and Clear Springs Foods, LLC participated. R. 3265. Despite designating witnesses, the Basin 33 Users voluntarily chose to withdraw from participating just days before the hearing.[4] R. 3101.

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[3] The contested case was informally stayed for approximately fourteen months when the Director resumed the matter with a notice of a status conference. R. 2575.

[4] McCain Foods had withdrawn its opposition and IGWA and the City of Pocatello filed notices of non-participation at the hearing as well. R. 2634 (McCain Foods), 3253 (IGWA), 3257 (City of Pocatello).

After considering extensive expert testimony and exhibits, the Director issued the *Final Order on Fact Issue* ("Final Order") on April 21, 2020. R. 3264. The Director rejected the Upper Valley Water Users' challenge and found that the Rexburg Bench was properly included in the GWMA due to among other things: "1. Significant amount of ground water development; 2. Thorough hydrogeologic characterization of the area; 3. Significant hydrogeological connection; 4. Is included in the ESPA Ground Water Model (ESPAM 2.1) area; 5. Is not already designated as a critical ground water area or ground water management area; and 6. Is not presently considered for separate ground water management designation."[5] R. 3275-76. No petitions for reconsideration were filed.

On May 15, 2020, the Petitioners filed the present notice of appeal and petition for judicial review. R. 3282. The Petitioners do not challenge the Director's factual findings underlying the GWMA Order and the Final Order, instead they only seek "review of the legal matters addressed and decided in the Legal Order."[6] *See Pet. Br.* at 7-8.

III. Statement of Facts.

The findings of fact set forth in the GWMA Order and Final Order are undisputed. R. 1-17, 3264-76. Notably, the Director carefully analyzed declining trends in aquifer levels, Snake River flows, and spring discharges that had continued steadily from the 1950s. R. 6-12. Between 1952 and 2013, ESPA storage dropped by an estimated 13 million acre-feet and spring flows at Thousand Springs plummeted from approximately 6,700 cfs to 5,200 cfs. R. 7. Median

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[5] By choosing not to participate at the hearing, the Basin 33 Water Users failed to present any evidence to demonstrate that the designated area of Basin 33 was "sufficiently remote or hydrogeologically disconnected from the ESPA to warrant exclusion from the ESPA GWMA." R. 3266. Despite being provided the opportunity, the Basin 33 Water Users waived their right to participate.

[6] Petitioners have not alleged and cannot show that the Director's GMWA or Final Orders constitute an abuse of discretion or are arbitrary or capricious. *See* I.C. § 67-5279(3).

reach gains to the Snake River in the Blackfoot to Neeley reach fell over 500,000 acre-feet annually comparing 1958-2002 with the 2003-2016 timeframe. R. 12.

The Director also identified past actions aimed at addressing the trend of declining aquifer storage and spring discharges.[7] R. 13-17. Despite the Swan Falls Agreement, aquifer recharge districts, moratoriums, delivery call litigation, CAMP, and other agreements, the Director found the following:

> 5. 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.
>
> * * *
>
> 7. 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 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.
>
> * * *
>
> 11. The Director concludes that designating a ground water management area for the ESPA is consistent with, if not required by, the Director's duties under the Ground Water Act. The Director in an exercise of his authority and discretion under Idaho Code § 42-233b will therefore designate a ground water management area for the ESPA.

R. 19-20.

[7] In addition to those actions identified in the GWMA Order, the Director also created several water districts across the ESPA between 2002 and 2017. https://idwr.idaho.gov/water-rights/water-districts/active.html. Specifically, water districts 100, 110, 120, 130, and 140.

The boundary for the designated GWMA was set forth in Attachment A to the order. R. 26. Although the Petitioners disputed inclusion of certain areas in the GWMA (notably part of Basin 33 around Howe, Idaho, and an area east of Rexburg known as the Rexburg Bench), the Director rejected those challenges based upon the evidence in his Final Order. R. 3264-76.

ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether the Director erred in ruling that intervenors in the contested case remained parties capable of challenging the GMWA Order after the original petition filed by Sun Valley Company was withdrawn.

B. Whether the Director erred in proceeding to a hearing despite the Petitioners not requesting a hearing on the GWMA Order pursuant to I.C. §§ 42-237e and I.C. § 42-1701A(3).

C. Whether the Coalition is entitled to an award of attorneys' fees pursuant to I.C. § 12-117 and other applicable law.

STANDARD OF REVIEW

Idaho's APA sets forth the standard of judicial review of a final agency order. A court must affirm an agency action unless the court finds that the agency's findings, inferences, conclusions or decisions: 1) violate constitutional or statutory provisions; 2) are in excess of statutory authority; 3) are made upon unlawful procedure; 4) are not supported by the evidence; or 5) are arbitrary, capricious, or an abuse of discretion. *See* I.C. § 67-5279(3). A party must also show that a substantial right has been prejudiced. *See* I.C. § 67-5279(4); *Sylte v. IDWR*, 165 Idaho 238, 246, 443 P.3d 252, 260 (2019).

The interpretation of a statute is a question of law subject to the court's free review. *See Saint Alphonsus Reg. Med. Ctr. v. Raney*, 163 Idaho 342, 345, 413 P.3d 742, 745 (2018). Normally, an agency's interpretation of its own rules is entitled to deference. *See Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 4, 232 P.3d 322, 325 (2010). However, when an agency interprets a rule, the Court applies a four-pronged test to determine the level of deference asking

whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. *See id.* at 3.

CROSS PETITION ARGUMENT

I. The Director Erred by Allowing the Petitioners to Continue Sun Valley's Contested Case and Statutory Request for Hearing.

Idaho law provided an exclusive remedy for Petitioners to challenge the GWMA Order.[8] *See* I.C. § 42-237e, 42-1701A(3). When the Director issued the GMWA Order, Idaho law required any aggrieved person to file a petition and request a hearing on the decision within fifteen (15) days. *See* I.C. § 42-1701A(3). The Petitioners failed to exercise this remedy. Instead, only Sun Valley filed such a petition which was later withdrawn. R. 2302, 2474.

Following Sun Valley's withdrawal, the Director held a status conference and inquired of the parties whether he should proceed to hold a hearing. R. 2534. The parties reached no conclusion and the Director set a schedule for briefing on the issue. R. 2534-35. After reviewing briefs submitted by the intervening Petitioners, City of Pocatello, Coalition of Cities, and Surface Water Coalition, the Director ultimately concluded the case would proceed to a hearing. R. 2619. After evaluating the standard for intervention, the Director offered the following reasons to continue with the case despite his earlier reluctance:

> The Director has the authority to recognize other affected persons as parties and to grant intervenor-parties the opportunity to participate in a proceeding, even if the original petition initiating the proceeding is withdrawn.

[8] Sun Valley and the City of Pocatello attempted to sidestep the administrative process by filing actions in district court. Both cases were dismissed with prejudice. *See Order on Motion to Determine Jurisdiction et al.* (Ada County Dist. Ct., Fourth Jud. Dist., CV-01-16-23173, Feb. 16. 2017; *Order on Motion to Determine Jurisdiction et al.* (Ada County Dist. Ct., Fourth Jud. Dist., CV-01-17-67, Feb. 16, 2017).

> The Director concludes in this case, and under this specific set of facts, that when intervenors have been granted party status, and the original petition initiating the contested case is withdrawn, the intervenors remain parties to a contested case pending before the Director. The issues that may be litigated in the contested case are limited to the issues raised by the original petition creating the contested case.

R. 2619-20.

The Director cited no statute or case that would authorize continuation of the contested case. In essence he failed to provide any legal basis for enlarging the position of the intervenors to that of the original petitioner. The Director ignored section 42-1701A(3) which expressly required the following:

> . . . any person aggrieved by any action of the director, including any decision, determination, order or other action... and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person **shall file** with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing.

I.C. § 42-1701A(3) (emphasis added).

By using the word "shall," the Legislature prescribed a specific timeframe for any aggrieved person to challenge the Director's decision. *See Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549-50, 149 P.3d 822, 825 (2006) ("The word *shall*, when used in a statute, is mandatory. . . . Thus, the employer does not have discretion to pay wages in a manner other than as directed by the statute"). The Director ignored the mandatory timeframe and essentially claimed he had "discretion" to continue the contested case. R. 2620 ("The Director concludes in this case, and under this specific set of facts, that when intervenors have been granted party status, and the original petition initiating the contested case is withdrawn, the intervenors remain parties to a contested case pending before the Director") (emphasis added). The Director erred by framing the issue as "factual" (i.e." "under this specific set of fact") rather than a purely

"legal" question in light of the Ground Water Act's and section 42-1701A(3)'s unambiguous provisions.

Contrary to this reasoning, the Director had no authority to ignore the statute and allow parties who did not request a hearing an opportunity to continue once Sun Valley withdrew its petition. *See Roberts v. Idaho Trans. Dept.*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991) (an agency "may not exercise its sublegislative powers to modify, alter, enlarge or diminish the provisions of a legislative act which is being administered").

As an agency with limited jurisdiction, the Director exceeded his statutory authority in this regard. *See Wash. Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979); *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009). Where the statute required aggrieved persons to file a request for hearing within a specific timeframe (15 days), the Petitioners admittedly failed to do so. Instead, they chose to rely upon Sun Valley's petition and the procedure to intervene in the proceeding on Sun Valley's challenge.[9]

When Sun Valley withdrew its request, there was no outstanding petition or request that would allow for an administrative hearing to "contest" the GWMA Order. *See Order on Motion to Determine Jurisdiction / Order Dismissing Petition for Judicial Review* at 4 (Ada County Dist. Ct., Fourth Jud. Dist., Case Nos. CV-01-16-23173, CV-01-16-23185, CV-01-17-67) ("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

[9] Petitioners, without any support or citation to the record, suggest they "assumed that a formal contested case process would be undertaken" prior to the issuance of the GWMA Order. *Pet. Br.* at 3. The Court should strike or disregard this claim as it is an unlawful attempt to introduce evidence not in the administrative record. *See McCandless v. Pease*, 166 Idaho 865, 465 P.3d 1104, 1121 (2020).

requesting a hearing . . . This procedural step is mandatory"). By allowing the Petitioners to continue with their "challenges" to the GWMA Order as intervenors, the Director implicitly enlarged the timeline to request a hearing contrary to the statute's deadline.

The Director's arbitrary refusal to dismiss the case is highlighted by the way he handled a similar situation with the Big Lost GWMA contested case. As referenced in the GWMA Order, the Director was also considering designating the Big Lost River Basin as a separate critical or ground water management area in the fall of 2016. R. 23. The Director had before him at the time a petition signed by over 130 well owners in the basin requesting designation of a critical ground water area.[10] The Director created a contested case, set a status conference, and then granted numerous petitions to intervene.[11] The petitioners then filed a withdrawal of their petition before the agency on June 20, 2017.[12] Just three days after receiving the withdrawal the Director dismissed the contested case on his own initiative. The Director described the action as follows:

> The Director will grant the Petitioners' request to withdraw their petitions and will dismiss the contested case. The Director will also vacate the dates scheduled for the second prehearing conference and hearing and the schedule adopted in the Scheduling Order.

See Order at 2. Addendum A.

Although numerous entities and individuals had intervened and were granted "party" status, the Director did not continue with the case. The fact the Director dismissed the Big Lost

[10] Copy of petition found at https://idwr.idaho.gov/files/legal/P-CGWA-2016-001/P-CGWA-2016-001-20160919-Petition-to-designate-the-Big-Lost-River-Basin-as-a-CGWA.pdf.

[11] Documents found at https://idwr.idaho.gov/legal-actions/administrative-actions/big-lost-river-basin-CGWA-petition.html.

[12] Copy found at https://idwr.idaho.gov/files/legal/P-CGWA-2016-001/P-CGWA-2016-001-20170620-Notice-of-Withdrawal-of-Petitions.pdf.

GMWA case while continuing with Sun Valley's ESPA GWMA case further demonstrates the arbitrary nature of the decision here.

Moreover, 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. *See e.g.* Addendum B. The Petitioners' failure to request a mandatory hearing is similar to the failure to timely "appeal" an agency decision to district court. When parties fail to timely appeal a district court has no jurisdiction to consider the challenge. *See e.g.* I.R.C.P. 84(n); *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006); *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037, 1042 (2011); *Hansen v. Denney*, 158 Idaho 304, 308, 346 P.3d 321, 325 (Ct. App. 2015).

Similarly, when parties fail to timely appeal a district court judgment to the Supreme Court, an untimely appeal is a jurisdictional defect. *See* I.A.R. 14, I.A.R. 21; *State v. Schultz*, 147 Idaho 675, 677, 214 P.3d 661, 663 (2009) ("An appellant's failure to file a timely notice of appeal deprives the appellate court of jurisdiction and requires dismissal of the appeal.").[13]

The same reasoning applies to the failure to file a timely request for hearing on the GWMA Order. While all aggrieved persons, including the Petitioners, had an opportunity to contest the Director's decision and request an administrative hearing, none except Sun Valley did so. Sun Valley's petition did not enlarge the mandatory timeframe to request a hearing. *See e.g.*

[13] The present situation is analogous to IGWA's and the City of Pocatello's unsuccessful attempted appeal of the Director's methodology order in the SWC Delivery Call case (S. Ct. Docket Nos. 42776-2015 and 42778-2015). In that matter Pocatello filed an untimely appeal, 43 days after the district court's judgment. Pocatello then filed a motion to dismiss its appeal, but reserved the right to participate in IGWA's appeal as a "respondent." *See City of Pocatello's Motion to Withdraw Notice of Appeal* (Jan. 22, 2015). IGWA later withdrew its appeal. Pocatello, even though it was a party to the underlying case, did not have a "right" to continue with IGWA's appeal. *See Order Granting Motion to Dismiss* (Apr. 20, 2015). Similarly, nothing gave the Petitioners the "right" to continue with Sun Valley's withdrawn petition requesting a hearing to "challenge" the GMWA Order.

City of Eagle v. IDWR, 150 Idaho 449, 453, 247 P.3d 1037, 1041 (2011). The Director was required to follow the statutory timeframe set by the Legislature.[14]

In sum, Sun Valley'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.

RESPONSE TO PETITIONERS' APPEAL

If the Court denies the Surface Water Coalition's Cross-Petition it should still affirm the GWMA Order and deny the Petitioners' appeal for the reasons set forth below. The Coalition provides the following argument in response to the *Petitioners' Brief* ("*Pet. Br.*"). In short, the Petitioners have failed to show the Director committed any procedural error or prejudiced any substantial right in designating the ESPA ground water management area. The Court should uphold the agency's actions accordingly.

Petitioners are critical of the Director's decision to base the designation of the GWMA on the Ground Water Act, allegedly in violation of the Department's own Conjunctive Management Rules and Procedural Rules. However:

[14] Just as the Director cannot enlarge a protest deadline or appeal deadline, the same principle of law applies to a request for hearing pursuant to I.C. § 42-1701A(3). Indeed, if the Director allows late requests for hearing in this case, what is to prevent aggrieved persons from filing late protests or petitions in the future? Under such a scenario no statutory deadline would be secure.

> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998).

Duncan v. State Bd. of Accountancy, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

The Director's action survives the four-prong *Duncan* test: 1. IDWR is the agency responsible for administration of both the CM Rules and the Procedural Rules; 2. The Director's construction is reasonable; 3. Neither the CM Rules nor Procedural Rules expressly treat the matter; and 4. The decision must meet any of the "rationales" requirements, which are:

> There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation. *Id.* at 505, 960 P.2d at 188.

Duncan, 149 Idaho at 3, 232 P.3d 324.

The Director's decision must meet any of the above "rationales." The Director, in his decision to designate the GWMA pursuant to section 42-233b, determined that the Department's Conjunctive Management Rules and Procedural Rules did not apply to his designation of the GWMA, let alone prescribe procedural requirements not required by the statute. The scope of the rules supported the practical interpretation provided by the Director and it was reasonable to rely upon his expertise in interpreting those rules. Since the Director's decision satisfies the requirements of the *Duncan* test, this Court owes that decision deference in its review.

I. Aquifer Management vs. Water Right Administration.

The Petitioners allege this case is about "water administration."[15] *Pet. Br.* at 1. Noticeably absent from their brief is any discussion or citation to Idaho's Ground Water Act, or the applicable sections that squarely address the Director's actions in this matter. Contrary to the Petitioners' repeated moniker, the Director's designation of a ground water management area was not conditioned upon procedures in the CM Rules (*Pet. Br.* at 11-13, 18-20, 27-29), did not require a contested case hearing before issuance of the order (*Id.* at 36-39), and the designation did not replace or fundamentally change "priority administration" (*Id.* at 15-16).

At its core, the Petitioners' argument completely misses the mark of ground water management, and the Director's vested statutory authorities and obligations to protect the State's ground water resources.

The Legislature first enacted the Ground Water Act in 1951. *See* I.C. § 42-226 et seq., 1951 Idaho Sess. Laws, ch. 200. Although the Act included sections related to water right administration, it also contained key provisions aimed squarely at ground water management. The following illustrate duties of the Director in that regard:

> Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director . . .

I.C. § 42-226.

> In addition to other duties prescribed by law, it shall be the duty of the director of the department of water resources to conduct investigations, surveys and studies

[15] While the terms water "management" and "administration" have been confusingly interchanged in various cases and most notably in the title of the agency's "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11 et seq.) ("CM Rules"), it is clear that the Director has broader authority to "manage" the ground water resources of the state pursuant to Idaho's Ground Water Act in a manner that is not limited to administration of water rights as provided by Chapter 6, Title 42 and its implementing regulations (i.e. the CM Rules). In other words, "managing" a water resource is not synonymous with "administration" of individual water rights. Pursuant to the Petitioners' reasoning the Director would be powerless to manage an aquifer unless an individual water right holder filed a delivery call. In the event no call was filed the Petitioners would tie the Director's hands until the wells ran dry.

> relative to the extent, nature and location of the ground water resources of the state; . . . It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and 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 (emphasis added).

Ground Water Recharge Program – Negotiations with Bureau of Reclamation

I.C. § 42-232.

Low Temperature Geothermal Resource.

I.C. § 42-233.

Critical Ground Water Area Designation.

I.C. § 42-233a.

Ground Water Management Area Designation.

I.C. § 42-233b.

Ground Water Recharge.

I.C. § 42-234.

Drilling Permits.

I.C. § 42-235.

> In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:
>
> [List of actions and authorities]

I.C. § 42-237a.

Well Drillers' Licenses and Operator Permits.

I.C. § 42-238.

In all, the above statutes cover a wide range of activities and policies that impact the state's ground water resources. The statutes go beyond "water distribution" or the specifics of individual water right administration within water districts that is covered in Chapter 6, Title 42. Through these provisions, the Legislature chose to implement specific policies and provide the Director with certain authorities to protect groundwater. *See Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1975) ("Idaho's Ground Water Act forbids 'mining' of an aquifer. . . . [The Act] clearly prohibits the withdrawal of ground water beyond the average rate of future recharge").

It is against this backdrop that Idaho's ground water management area statute provides further direction for the Director to designate and protect the state's aquifers. Upon designation of a GWMA, the Director may: 1) approve a groundwater management plan; 2) only approve new permits upon a finding of sufficient water and no injury to prior rights; 3) require reporting of withdrawals and other information necessary for determining available ground water; and finally 4) upon a finding of insufficient supply to meet the demands of water rights within all or a portion of the area, order water right holders on a time priority basis to cease or reduce withdrawals for a specific time. The Director's powers and authorities are not contingent upon an individual filing a "delivery call" for purposes of water right administration.

The designation does not usurp "water distribution" or water right administration set forth in Chapter 6, Title 42 and the CM Rules. Rather, the designation provides the Director with additional authorities to protect the ground water resource, including the ability to approve a plan to manage "the effects of ground water withdrawals on the aquifer from which the withdrawals are made and on any other hydraulically connected sources of water." In summary, water

resource management within a GWMA does not, as the Petitioners suggest, replace or supersede administration of individual water rights.[16]

II. The Director Did Not Violate IDWR's CM Rules or Procedural Rules in Designating the ESPA GWMA.

An overarching theme of Petitioners' argument is that the CM Rules "apply to" and "limit" the Director's ability to designate the ESPA GWMA. *See Pet. Br.* at 11. The Petitioners ignore the plain language of the Ground Water Act itself and engage in a strained regulatory analysis that would ultimately foreclose the Director from regulating and managing the ground water where their water users pump. Outside of the CM Rule 50 boundary, the Petitioners claim immunity from any regulation, even though they divert water from what the best science has shown is the Eastern Snake Plain Aquifer. The Petitioners' water users deplete the aquifer and hydraulically connected surface water sources such as the Snake River, and other springs throughout the plain.

The errors in the Petitioners' arguments are exposed by a plain reading of section 42-233b, authorizing groundwater management areas, and the CM Rules.

First, the statute expressly provides:

> "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. Upon designation of a ground water management area the director shall publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area.

[16] Quite the opposite there are numerous critical or ground water management areas that overlap water districts throughout the state. *See* Big Wood GWMA / Water District No. 37; Oakley Valley CGWAs / Water District No. 140; Bancroft-Lund GWMA / Water District No. 13-T; Cinder Cone CGWA and Mountain Home GWMA / Water District No. 161. The Petitioners would have the CM Rules control over all aspects of ground water management in these areas.

I.C. § 42-233b. The statute is plain and unambiguous. The Director's designation is not conditioned upon procedures in the Department's Conjunctive Management or Procedural Rules. Instead, "upon designation" of a groundwater management area, the Director is only required to publish notice of the designation for two weeks, which he did. R. 2326-29, 2337, 2344-51, 2356-58, 2366-67, 2384-85.

This section of the statute is distinguished from I.C. § 42-233a, which controls the creation of critical ground water areas. Under that section, the Director must conduct a public hearing and publish two notices of hearing. There is no such requirement for the creation of a groundwater management area under I.C. § 42-233b. Pursuant to well-established statutory interpretation law, the Court's inquiry should end here. *See Melton v. Alt*, 163 Idaho 158, 163, 408 P.3d 913, 918 (2018); *Bright v. Maznik*, 162 Idaho 311, 315, 396 P.3d 1193, 1197 (2017) ("If that language is clear and unambiguous, 'the Court need merely apply the statute without engaging in any statutory construction'").

Further, the Ground Water Act provides an express remedy for any person dissatisfied with the Director's decision. *See* I.C. § 42-237e ("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."). The Petitioners completely overlook the Ground Water Act's remedy in their procedural argument.

Instead, ignoring the relevant statutes and their plain language, the Petitioners ask this Court to judicially amend I.C. § 42-233b by finding the Director's actions were procedurally limited by unrelated agency regulations. The Petitioners point to the Department's Procedural Rules (IDAPA 37.01.01 et seq.) and Conjunctive Management Rules (IDAPA 37.03.11 et seq.)

in support of this theory. However, the Petitioners fail to acknowledge the stated scope of those rules.

The Director has the authority to manage ground water resources within the state. *See* I.C. §§ 42-226, 231, 237a.g; *see e.g. In re SRBA*, 157 Idaho 385, 393-94, 336 P.3d 792, 800-801 (2014) (noting Director's discretion and special expertise in water appropriation and distribution). The Idaho Supreme Court has recognized the need for the Director's specialized expertise in ground water management. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (relating to the Court's need for the Director's highly technical expertise to accurately measure complex ground water data). The Idaho State Legislature has similarly recognized the need for the Director's expertise. Idaho Code § 42-1701 requires that a Director "shall be: a licensed civil or agricultural engineer, a registered geologist, or a hydrologist holding a hydrology degree from an accredited college or university." The Idaho Supreme Court has noted that these statutory qualifications reaffirm "the need for the Director to have the technical expertise." I.C. § 42-1701(2); *see also*, 157 Idaho at 394, 336 P.3d at 801.

Idaho Code § 42-233b states that a groundwater 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." The statute only requires the Director to publish notice of the designation in two consecutive weekly issues of a newspaper. *See* I.C. § 42-233b.[17]

Besides the published notice, there are no other procedural requirements that must be followed with respect to designating a groundwater management area. The statute is unambiguous and does not predicate a GWMA designation upon any further procedure. Because

[17] Although the Director was not required to hold a public hearing, he nonetheless held several public hearings on the proposed designation during the summer of 2016. R. 2226-2275.

the Director complied with all statutory requirements when designating the ESPA GWMA, there is no procedural error. Nothing in the Department's Conjunctive Management Rules or Rules of Procedure requires anything different. The Court can and should deny the Petitioners' appeal on this basic premise. Regardless, a careful evaluation of the rules cited further shows that the Petitioners' arguments fail and should be denied.

A. The Conjunctive Management Rules Do Not Preclude Designation of GWMA.

First, the Conjunctive Management Rules have a defined and limited scope. Rule 1 plainly states:

> 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.

CM Rule 1 (emphasis added). The Director did not issue the GWMA Order as a response to a delivery call, rather he issued the order upon his own statutory authority based upon the state of the persistent declining state of the aquifer. R. 3-17 (Noting loss in ESPA of 13 million acre-feet from 1952 to 2013, changes in ground water levels, spring flow and reach gain declines); R.2984 ("The conjunctive management rules have a narrow focus and purpose . . .").

Furthermore, although the rules give the Director an option to consider such delivery calls as a "petition" for designating a GWMA in areas where water rights are not yet adjudicated, those facts were not present here.[18] *See* CM Rule 30.06.

[18] Petitioners have not alleged their water rights were not adjudicated or that the Director was responding to a delivery call (petition) against those rights in order to trigger the related GWMA provisions. The SRBA issued the *Final Unified Decree* in 2014, therefore the option to consider any alleged "petition" under Rule 30.06 has no application to this matter whatsoever. Petitioners' reliance upon the CM Rules "general policy" statements has no application when one looks at the actual rule that discusses a GWMA option in a pre-adjudicated state. *See Pet. Br.* at 18-19.

Indeed, nothing in the Conjunctive Management Rules can limit the Director's statutory authority to act under section 42-233b. *See Roeder Holdings, LLC v. Bd. of Equalization of Ada Cty.*, 136 Idaho 809, 814, 41 P.3d 237, 242 (2001) ("Where the legislature enacted a statute requiring that an administrative agency carry out specific functions, that agency cannot validly subvert the legislation by promulgating contradictory rules").[19]

The Conjunctive Management Rules expressly recognize this principle. *See* CM Rule 5 ("Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.") (emphasis added). The Petitioners brush off CM Rule 5 and applicable caselaw for three erroneous reasons.

First, Petitioners claim CM Rule 5 doesn't apply because of the Director's previous effort to amend CM Rule 50. Petitioners now go so far to claim the Director "cannot administer water under the CM Rules outside the Rule 50 boundary." *Pet. Br.* at 22. What rule applies in the context of conjunctive water right administration does not bar or limit the Director from designating a GWMA under section I.C. § 42-233b. The Legislature's rejection of a proposed rule in 2014 did not alter or affect the Director's other authorities under the Ground Water Act.[20] *See* I.C. §§ 42-231, 233b, 237a.g.

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[19] That the Legislature did not "reject, amend or modify" any part of the CM Rules in 1995 does not mean those rules rise to the level of a statute or effect an amendment of I.C. § 42-233b. *See* I.C. § 67-5291 (amended since 1995 eliminating "amended or modified"); *see also, Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 866-867, 154 P.3d 433, 437-438 (2007) ; *James v. City of Boise*, 160 Idaho 466, 485, 376 P.3d 33, 52 (2016) ("Amending a statute by implication is disfavored and will not be inferred absent clear legislative intent").

[20] *See e.g. Memorandum Decision and Order* at 7 (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV-WA-2015-14419, Apr. 22, 2016) ("Rulemaking may be inconclusive. It requires the involvement of the Legislature, which may decide to reject a rule promulgated by an agency. . . . Indeed, it may reject such a rule for many reasons, including reasons that are political rather than factual"). The Petitioners' argument would have the Legislature replace the Director as the new technical expert for water management.

Next, Petitioners claim that Conjunctive Management Rule 5 is a "general" rule that is trumped by the more "specific" CM Rule 50. *Pet. Br.* at 22. With this argument Petitioners wrongly allege that Conjunctive Management Rule 50 was meant to "implement" or "supplement" section 42-233b.[21] To the contrary, the Conjunctive Management Rules were promulgated pursuant to I.C. § 42-603, which provides the Director is authorized "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." *See* CM Rule 0 (emphasis added).

The Conjunctive Management Rules prescribe procedures for responding to a "delivery call" and the agency intended that they "be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently." *See* CM Rule 1 (emphasis added); *see also*, *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 866-867, 154 P.3d 433, 437-438 (2007) ("the CM Rules provide the procedures for responding to delivery calls . . . These Rules attempt to provide a structure by which the IDWR can jointly administer rights in interconnected surface water (diverting from rivers, streams and other surface water sources) and ground water sources") (emphasis added).

Based on the above there is no question the CM Rules were intended to implement water right administration under Chapter 6, not general ground water management under Chapter 2. *See also*, *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011) ("there is nothing in the statute [Ground Water Act] regarding the administration of surface water rights"). That the Idaho Supreme Court has refused to find the Ground Water Act applies to

[21] The Petitioners' reliance upon a new summary sheet that is now included with the CM Rules is misplaced. *See Pet. Br.* at 20. The general information page is not part of the CM Rules, was not promulgated in 1994, and was never approved by the Legislature. As such, the page does not accurately depict the "legal authority" for the CM Rules which is expressly stated in Rule 0 (referencing section 42-603 and section 52-1805(8)).

conjunctive administration is dispositive of the Petitioners' argument. *See Clear Springs*, 150 Idaho at 804, 85 ("The Spring Users are not appropriators of ground water, . . .The district court did not err in holding that the curtailment orders do not violate Idaho Code §§ 42-226 and 42-237a." and *Id.*, at 808, 89 "As explained above, Idaho Code § 42-226 has no application in this case. It only modifies the rights of ground water users with respect to being protected in their historic pumping levels").

In support of this theory the Petitioners place great emphasis on the Supreme Court's decision in *Huyett v. Idaho State Univ.*, 140 Idaho 904, 104 P.3d 946 (2004). *See Pet. Br.* at 25. The contract in *Huyett* was conditioned upon state board of education approval. *See* 140 Idaho at 908, 104 P.3d at 950. The rules in effect prevented the university from having actual authority to enter into a multi-year contract with the appellant. *See id.* Unlike the facts here where the Director had express statutory authority, the facts in *Huyett* are distinguishable and do not stand for the principle that a rule somehow controls over a statute.

Finally, Petitioners wrongly claim that the CM Rules provide a "binary" choice for water right administration and that a GWMA is only a "pre-adjudication" mechanism. *Pet. Br.* at 27-28. Again, the Petitioners misapply the rule as somehow limiting or amending I.C. § 42-233b. Idaho law forbids such a result. *See Roeder Holdings*, 136 Idaho at 813-14, 41 P.3d at 241-242 (abrogated on other grounds); *Levin v. Idaho State Board of Medicine*, 133 Idaho 413, 418, 987 P.2d 1028, 1033 (1999). Although CM Rule 50 references incorporation of the ESPA area of common ground water supply into a water district "or" a GWMA, the rule does not limit the

Director's statutory authority and discretion.[22] The Director properly explained the same in his Legal Order:

> Designation of a ground water management area is intended to be a preemptive action to address predicted, imminent imbalances in water budgets that, unchecked, would lead to critical ground water management area conditions. The Director may include areas within a ground water basin in a ground water management area that may not be included in an "area of common ground water supply," a discussed in the conjunctive management rules.

R. 2984.

The Petitioners rely upon the decades' old definition of the ESPA embodied in CM Rule 50, which was adopted well before completion of the SRBA (*Final Unified Decree* issued in 2014). Whereas the rule acknowledged different regimes of administration depending upon the existence of a "water district," the rule did not abrogate the Director's statutory responsibility to protect ground water, including through designation of a GWMA.[23]

The Petitioners further allege that by reason of CM Rule 50, the Director's statutory authority is constrained, and he has no ability to manage the ESPA outside of the rule's definition. Not only does this argument contradict the best available science, it would unlawfully elevate the rule to the equivalent of a statute. *See Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 136, 369 P.3d 897, 914 (2016) ("The Director found that ESPAM 2.1 was the best available scientific tool . . . All of the parties agree that ESPAM 2.1 was the best scientific tool available."); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011) ("The district court did not err in upholding the Director's reliance upon the

[22] Even under the Upper Valley Users' reasoning CM Rule 50 would not apply for purposes of designating a GWMA under the CM Rules since all of the water rights on the ESPA have been adjudicated in the Snake River Basin Adjudication (SRBA). The Court issued the *Final Unified Decree* in August 2014.

[23] The Petitioners' argument would undermine the SRBA Court's *Final Unified Decree* that includes the "connected sources" general provision that was litigated and resolved in Basin-Wide Issue. No. 5.

model"); *Mead v. Arnell*, 117 Idaho 660, 665, 791 P.2d 410, 415 (1990) (describing agency rules as "less than the equivalent of statutory law").

In this regard, the Petitioners allege that an agency can restrict its own Director in carrying out his or her statutory duties in protecting the State's ground water resources contrary to what the Legislature has prescribed. The argument is unavailing and should be rejected.

Moreover, if a "water district" was the only mechanism for water management, then juniors could simply mitigate a senior's injury and proceed to mine the aquifer to oblivion without consequence. Notably, the creation of water districts across the ESPA beginning in 2002 did not stop continued declines in the aquifer. R. 7 ("ESPA storage and spring discharges have continued to decline since 2013"). Moreover, a watermaster, unlike the Director, is required to distribute water pursuant to decrees, he or she is not charged with protecting and conserving the state's ground water resources. *See* I.C. § 42-607; *Jones v. Big Lost River Irr. Dist.*, 93 Idaho 227, 229, 459 P.2d 1009, 1011(1969) (watermaster is a "ministerial officer").

The Petitioners' argument is the other side of the coin the Idaho Supreme Court squarely rejected in *Clear Springs Foods*. In that case groundwater users argued that as long as the aquifer was not "mined," that they were free from curtailment in administration. The Court disagreed:

> It would, in essence, preclude conjunctive management of the Aquifer. Conflicts between senior surface water users and junior ground water users would be ignored as long as withdrawals from the Aquifer and recharge were in balance. . . . As we held in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), hydrologically connected surface and ground water users must be managed conjunctively.

Clear Springs Foods, 150 Idaho at 808, 252 P.3d at 89.

Here, the Petitioners implicitly argue that as long as seniors are mitigated in a water district, then the aquifer could still be depleted without consequence. In other words, although

the Director found the ESPA was losing on average over 200,000 acre-feet per year, the agency would be powerless to implement any aquifer management since seniors were mitigated. This argument is without merit and does nothing to protect the resource, particularly when junior ground water users purchased or leased several senior spring users' water rights and facilities in the Thousand Springs area as the form of mitigation.[24]

The Petitioners' argument is particularly troubling in light of where their water users pump on the aquifer, i.e. outside the CM Rule 50 boundary. Although hydraulically and legally connected by the SRBA Court's "connected sources" general provision, the Petitioners claim that CM Rule 50 provides a "King's X" against any groundwater management in these geographic areas. Although the Petitioners' water users irrigate tens of thousands of acres, consuming over 100,000 acre-feet of groundwater annually, they nonetheless claim blanket immunity from any GWMA designation simply by reason of CM Rule 50. R. 3273 ("Ground water extracted from the underneath the Bench affects water levels in the ESPA").[25] Such an argument is contrary to the plain language of I.C. § 42-233b as well as other important policy directives required of the Director. *See* I.C. §§ 42-231 (director shall "do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources"); I.C. § 42-237a ("it is the policy of this state to conserve its ground water resources").

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[24] For example, *see e.g.* https://idwr.idaho.gov/files/legal/CM-MP-2018-001/CM-MP-2018-001-20190311-Order-Approving-IGWAS-2018-Mitigation-Plan.pdf; https://idwr.idaho.gov/files/legal/CM-DC-2011-002/CM-DC-2011-002-20120518-Jones-Final-Order-Approv-Mit-Plan.pdf; https://idwr.idaho.gov/files/legal/CM-DC-2014-002/CM-DC-2014-002-20150226-Final-Order-Approving-Mitigation-Plan-and-Dismissing-DC-Order-Vacating-Status-Conference.pdf.

[25] IDWR has mapped the irrigated acreage outside of the CM Rule 50 boundary that is part of the ESPA as defined by ESPAM 2.1. These maps include the extensive areas irrigated by Petitioners' water users. *See* https://idwr.idaho.gov/files/legal/CMR50/CMR50-201405-ESPA-gw-pous-2.pdf. https://idwr.idaho.gov/files/legal/CMR50/CMR50-201405-ESPA-gw-pous-3a.pdf.

For the reasons set forth above the Director properly rejected the argument that the CM Rules affected or prevented the GWMA designation. The Court should affirm the Director's actions accordingly.

B. The Procedural Rules Did Not Preclude the Director's GWMA Designation.

The Petitioners vaguely claim that the Director's designation of the GWMA in this matter is subject to compliance with "contested case procedures of the Procedural Rules." *Pet. Br.* at 15. The Petitioners assert the Procedural Rules "supplement and implement the statutory requirements for the administration of ground water rights, pursuant to Title 42 of Idaho Code, particularly Idaho Code § 42-233b." *Id.* Again, the Petitioners wrongly equate ground water management with water right administration as the foundation for their argument.

Similar to the Conjunctive Management Rules, the Department's Procedural Rules did not limit the Director's ability to designate the ESPA GWMA either. First, on their face the rules only apply to "contested case proceedings before the Department of Water Resources and the Water Resource Board of the state of Idaho." Procedural Rule 01.02. The Director's designation was not issued as part of a contested case and he was under no statutory requirement to initiate such a case. Whereas the Director was faced with a declining ground water supply and acted in accordance with his authorities to protect the resource, the Petitioners would tie the Director's hands and subject such authority to months and years of administrative litigation. The result is impractical and would threaten proper management of the state's groundwater resources.

Since no "contested case" was ongoing prior to the designation of the GWMA, the Procedural Rules simply did not apply to the Director's designation. Because I.C. § 42-233b did not require the Director to initiate formal proceedings prior to designating the ESPA GWMA, there was no error in designating the area without conducting a contested case first. The Court should reject the Petitioners' argument accordingly.

III. Director's GWMA Designation Did Not Violate Petitioners' Due Process Rights.

The Petitioners further allege a contested case was required to satisfy their procedural due process rights. *See Pet. Br.* at 36-40. The Petitioners support this theory on the false premise that the Director was implementing a "new water right administration regime." *Id.* As explained above, *supra* at Argument Part I, managing the state's ground water resources is not the equivalent of water right administration.[26]

The Petitioners' argument is essentially a facial constitutional attack on I.C. § 42-233b. The Petitioners have failed to meet their burden under this standard. *See Guzman v. Piercy*, 155 Idaho 928, 934, 318 P.3d 918, 924 (2014) ("To prevail, a challenger must show that the statute is 'unconstitutional as a whole, without any valid application.' This Court makes 'every presumption [ ] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger.'"). Notably, the Idaho Supreme Court has instructed that there is a strong presumption that a statute is valid. *See State v. Larsen*, 135 Idaho 754, 756, 24 P.3d 702, 704 (2001). Moreover, under Idaho law, if a statute can be construed in a manner which is constitutional, it will withstand a constitutional challenge. *See Lochsa Falls, LLC v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968 (2009); *see also*, *State v.*

[26] In the context of water right administration, the Supreme Court concluded that junior groundwater users were entitled to notice and a hearing prior to actual curtailment of their water rights. *See Clear Springs*, 150 Idaho at 815, 252 P.3d at 96. However, the Court upheld the curtailment orders since the juniors were given notice and a hearing before the final order was issued. *See id.* at 815-16 ("That they may have initially been denied due process with respect to the curtailment orders issued in May and July 2005 does not invalidate the final order issued in July 2008 after the hearing"). Here, no curtailment has been ordered so there is no due process violation. R. 2986. The Petitioners have not shown that the designation actually deprived them of any "life, liberty, or property" interest. Regardless, under the same analysis set forth in *Clear Springs*, any alleged error outset does not invalidate the Director's final order in this case which was issued after notice and an opportunity for a hearing. If this case truly addresses "water right administration" as Petitioners' suggest, the Court's *Clear Springs* analysis shows no due process error. Further, the Basin 33 Users cannot legitimately complain of a constitutional due process violation when they failed to exercise a statutory remedy to contest the Director's GMWA Order and further voluntarily chose not to participate in the hearing that was provided. R. 3101.

Tryon, 164 Idaho 254, 260, 429 P.3d 142, 148 (2018) (constitutional question avoided when case can be decided on other grounds).

Admitting the GWMA Order does not "deprive" them of their water rights, the Petitioners allege their rights are "implicated . . . in how they will be administered" thus requiring a contested case hearing prior to the designation. *See Pet. Br.* at 38. Again, the GWMA is not replacing or determining particular "administration" of the Petitioners' water rights. Regardless, the Director did not violate any of their procedural due process rights. The Petitioners' reliance upon the analysis in *State v. Rogers* is misplaced as that case addressed procedural due process provided for a criminal defendant who pled guilty and entered a diversionary program.[27] *See* 144 Idaho 738, 741-43, 170 P.3d 881, 884-886. The issues related to such processes in criminal law are not on point.

Instead, the analysis provided in the *Thompson Creek Mining Co.* and the challenge to the creation of water district no. 170 is a much better analogy for comparison. In *Thompson Creek* the Idaho Supreme Court held the following with regard to a procedural due process claim:

> To make a claim grounded in constitutional due process [Petitioners] must demonstrate: (1) that [Petitioners] ha[ve] a property interest at issue, and (2) that the proposed state action **will deprive** [Petitioners] of that property interest.

In re IDWR Amended Final Order Creating Water District No. 170, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (emphasis added).

Here, Petitioners identify the first required element, their users' water rights as property right interests. *See Pet. Br.* at 38. However, they fail to meet the second element as they cannot show that the Director's GMWA Order "will deprive" them of those water rights. Just like the creation of an administrative water district in *Thompson Creek*, the GWMA designation itself

[27] The Director recognized this distinction in his Legal Order. R. 2986.

"does not deprive [Petitioners] of a water right." 148 Idaho at 213, 220 P.3d at 331. The Director recognized the same and explained:

> Basin 33 Water Users have failed to establish that the designation of a ground water management area has deprived them of property. Basin 33 Water Users have speculated about possible deprivation, but the water rights held by the Basin 33 Water Users water users will be intact before and after designation of a ground water [management area].

R. 2986.

Notably, the Director's designation occurred nearly four years ago and yet no water rights have been taken. As such, the Petitioners have no valid procedural due process argument on appeal. And any alleged error in not having an opportunity for a hearing was cured when the Director allowed the contested case to continue.

IV. Director Was Not Required to Designate a GWMA Through Rulemaking.

In their final argument the Petitioners claim the Director erred by not conducting formal rulemaking to amend or repeal CM Rule 50.01.d prior to the GWMA designation. *See Pet. Br.* at 40-41. The Petitioners' arguments should be rejected for the following reasons.

First, the Petitioners provide no analysis to show how the Director's designation would qualify as an agency rule. The Petitioners have not even attempted to show that the GWMA Order meets the criteria for an "agency rule" as set forth in *Asarco Inc. v. State* ("agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law. *See* I.C. § 67-5231 (declaring rules void unless adopted in substantial compliance with the requirements of the IAPA)"). *Asarco Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139 (2003). The Director rightly noted that the designation of the GWMA did not qualify as a "rule" under these criteria. R. 2988.

Next, the Petitioners "agree that designation of a ground water management area outside of the ESPA does not require rulemaking." *Id.* Presumably, the "ESPA" refenced by Petitioners

is that area defined by CM Rule 50, which excludes Basin 33 and the Rexburg Bench. R. 26 (map showing different boundaries). If that is the case, then by the Petitioners' own argument the Director was authorized to designate those areas of Basin 33 and the Rexburg Bench as a GWMA without conducting rulemaking.

However, Petitioners go on to claim that the CM Rule 50 boundary somehow binds the Director's actions with respect to the connected portions of the aquifer outside that definition (including the Basin 33 area and the Rexburg Bench). *See Pet. Br.* 41. The Petitioners fail to acknowledge that the Director did not amend CM Rule 50 with his GWMA designation. That rule and its 1994 definition of the aquifer does not apply to the Director's authority to designate a GWMA under I.C. § 42-233b.

Charged with protection and conservation of the state's ground water resources, the Director is authorized to designate a ground water management area without initiating formal rulemaking under Idaho law. *See* I.C. § 42-231, 42-233b; *see also*, *Order on Motion to Determine Jurisdiction* (Ada County Dist. Ct., Fourth Jud. Dist., CV-01-16-23815, Feb. 16, 2017) ("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").

While the Petitioners repeatedly assert that any ESPA GWMA is limited by the Conjunctive Management Rules' definition of the aquifer for purposes of water right administration, they have no statute or case to support that theory. Further, the Petitioners provide no argument or authority to demonstrate that rulemaking was required in this case.

V. Petitioners Have Failed to Show Prejudice to Any Substantial Rights.

In addition to showing an error set forth in I.C. § 67-6279(3), the Petitioners must also show that the Director prejudiced a "substantial right" in order to prevail in this appeal. *See* I.C.

§ 67-5279(4); *Sytle*, 165 Idaho at 246, 443 P.3d at 260. The Petitioners cannot meet this standard, hence the Court should deny their petition.

Petitioners first claim that "property rights, such as [water] rights, are substantial rights." *Pet. Br.* at 42. While a water right is a protectable property right interest in Idaho, the Director's GWMA designation did not deprive or violate the Petitioners' water rights in any way. R. 2986 ("Basin 33 Water Users have failed to establish that the designation of a ground water management area has deprived them of property").

The Petitioners apparently admit this since they vaguely claim that they "have a substantial right to have the Director follow the law . . . in undertaking actions that will impact administration of their water rights." *Id.* Regardless of the mistaken reference to "water right administration," the Petitioners' reliance upon land use cases and related procedures under the Local Land Use Planning Act are inapplicable. Indeed, those cases concerned a party's right to develop his or her property or the harm caused to property values or use and enjoyment.

The designation of a GWMA to protect the state's most valuable resource, water, is simply not analogous. It could be argued that the Director's actions will actually protect the Petitioners' water rights by ensuring their water supply does not fall to a critical state. Moreover, no case or statute provides the Petitioners with a "substantial right" to a particular process as is described in the cited land cases. Compare *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011); *Hungate v. Bonner Cty.*, 166 Idaho 388, 458 P.3d 966 (2020).

As such, Petitioners have failed to articulate any substantial right that has been prejudiced by the Director's actions here. Their appeal should be denied accordingly.

VI. The Court Should Award the Coalition Attorneys' Fees.

As discussed above, the Petitioners are not contesting any of the Director's factual findings and the laws governing the issues presented in this appeal are unambiguous. Petitioners disregard the plain language of the law and advance an argument asking this Court to ignore provisions of the Ground Water Act and judiciously amend provisions of the law that do not fit their arguments. Although the Director previously addressed Petitioners' arguments, the Petitioners continue to force this matter by appealing and then making the same failed arguments. The continued pursuit of this matter is unreasonable and not founded by law. As such, fees should be awarded on appeal. *See* I.A.R. 41.

Idaho Code § 12-117(1) provides the following:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency ... and a person ... the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees ... if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

In *Rangen, Inc. v. IDWR*, the Idaho Supreme Court described the reasonableness standard of section 42-117(1) as follows:

> In an appeal where the prevailing party sought attorney fees under section 12–117, the Court granted fees where the nonprevailing party ***continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision***. Although the [nonprevailing parties] may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, [they] were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. ***Nevertheless, [they] chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and [the prevailing party] is awarded its reasonable attorney fees***.

Rangen, Inc. v. IDWR, 159 Idaho at 812, 367 P.3d at 207 (emphasis added).

In *Rangen*, the Department prevailed on appeal. There, Rangen had challenged decisions before the Department (through a petition for reconsideration before the Director), before the District Court (through a petition for judicial review of the Director's decision) and before the Idaho Supreme Court on appeal. *See* 159 Idaho at 803, 367 P.3d at 198. Rangen did not prevail in any of those challenges. *Id.* In granting the Department's request for fees, the Idaho Supreme Court determined: "Rangen asserted substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its arguments." *Id.* at 812, at 207.

The same reasoning was used in support of an award of attorney's fees by the Idaho Supreme Court in *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2016):

> Thus, because the City failed to add any significant new analysis or authority to its arguments, and failed to appeal both the Director's decision not to include recharge as a beneficial use and the partial decree, which also did not include recharge as a beneficial use, we award the Coalition fees under section 12-117(1).

162 Idaho at 311, 396 P.3d at 1193.

The same analysis applies here and compels an award of attorneys' fees. Indeed, a review of the briefing shows that the Petitioners have advanced the same, failed arguments as those advanced to the agency. The Director considered and addressed the Petitioners' arguments in a detailed order. R. 2977-2993. The Petitioners have not added any "significant new analysis or authority to support their arguments" – rather, they rely on the same cases and arguments as in prior briefing. The Petitioners have failed to show how the Director erred in the legal analysis in his decisions. Since Petitioners have not advanced any new arguments or analysis, the Court should award the Coalition attorneys' fees on appeal under Idaho Code § 12-117.

In addition, Idaho Code § 12-121 further provides the judiciary with discretion to "award reasonable attorney's fees to the prevailing party or parties." Like the situation in *Rangen*, here the

Petitioners are simply asking the Court to improperly "second-guess" the Director and his well-reasoned analysis. The Court recently rebuked such an attempt in *Frantz v. Hawley Troxell Ennis & Hawley, LLP*, 161 Idaho 60, 383 P.3d 1230 (2016), and found that attorneys' fees were warranted under section 12-121.

In *Frantz*, the Court noted:

> Section 12-121 allows an award of attorney fees to a prevailing party where "the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Idaho Military Historical Soc'y v. Maslem*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law." *Snider v. Arnold*, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012). Further attorney fees on appeal have been awarded under Section 12-121 when appellants "'failed to add any new analysis or authority to the issues raised below' that were resolved by the district court's well-reasoned authority." *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016) (quoting *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

Frantz v. Hawley Troxell Ennis & Hawley, LLP, 161 Idaho 60, 66, 383 P.3d 1230, 1236 (2016).

Like the appellant in *Frantz*, the Petitioners have failed to show that the Director incorrectly applied the law. Further, the Petitioners have not added "any new analysis or authority" to issues that were raised before the Director and resolved by his well-reasoned decisions. The circumstances further warrant an award of fees to the Coalition under section 12-121.

In sum, the Petitioners' continued appeal is unreasonable and without a legal foundation. The Director applied well-established law and analysis in his decision. The Court should enter an order awarding attorneys' fees to the Coalition under sections 12-117 and 121.

CONCLUSION

As a threshold matter, this Court should hold that the Director erred in allowing this case to proceed after Sun Valley's withdrawal of the one timely petition to the GWMA Order. In

allowing the case to continue where no remaining petitioners had filed a timely request for hearing, the Director violated I.C. § 42-1701(A)(3). Therefore, the Court should dismiss this matter outright.

However, should the Court decline to dismiss this action on the above grounds, the Court should hold the Director properly exercised his authority and discretion in designating the ESPA GWMA under Idaho's Ground Water Act. This Court should not be swayed by the Petitioners' erroneous assertions that the Director was confined in his duty to protect the state's aquifers by the procedural constraints imposed by the Conjunctive Management Rules and/or the Department's Procedural Rules. The plain language of section 42-233b clearly delegates the Director the authority for implementing that statute, and lays out the basic steps required prior to designation of a groundwater management area, which he followed.

Finally, because the Petitioners' continued appeal of this issue is unreasonable and without foundation in law, this Court should award attorneys' fees to the Coalition.

DATED this 10th day of September, 2020.

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ADDENDUM
A

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WHETHER TO DESIGNATE THE BIG LOST RIVER BASIN A CRITICAL GROUND WATER AREA OR A GROUND WATER MANAGEMENT AREA	Docket No. P-CGWA-2016-001 **ORDER GRANTING REQUEST TO WITHDRAW PETITIONS AND DISMISSING CONTESTED CASE; ORDER VACATING HEARING DATES AND SCHEDULE**

BACKGROUND

On September 19, 2016, Rose Bernal, Butte County Commissioner, submitted a letter to the Director ("Director") of the Idaho Department of Water Resources ("Department") including a petition requesting the Director "designate a critical ground water area in the Big Lost River Basin." The petition was signed by over 200 water users in support of the request.

On January 9, 2017, the Director received a letter from Moj Broadie, Chairman of the Big Lost River Ground Water District ("BLRGWD"), opposing the petition to designate the Big Lost River Basin as a critical ground water area and requesting the Director "allow the BLRGWD to have broad participation" in the consideration of designating the Big Lost River Basin a critical ground water area or ground water management area. On January 23, 2017, the Director received another letter from Moj Broadie, asking the Director to consider designating the Big Lost River Basin a ground water management area "with due process procedures that would enable all interested parties to participate. . . ."

The above-described letters are petitions as defined by the Department's Rule of Procedure 230. IDAPA 37.01.01.230. On March 23, 2017, the Director issued a *Notice of Prehearing Conference* scheduling a prehearing conference regarding the petitions on May 3, 2017. The Director also sent a letter to people holding or having an interest in a water right the Department identified may be impacted by a critical ground water area or ground water management area designation, informing them of the prehearing conference and a May 3, 2017, deadline for filing petitions to intervene.

The Director held a prehearing conference on May 3, 2017. Based upon and consistent with discussions at the prehearing conference, on May 9, 2017, the Director extended the deadline for filing petitions to intervene to May 24, 2017; authorized discovery; adopted a schedule; ordered the manner by which documents shall be served; and scheduled a second

prehearing conference and hearing. *See Order Extending Deadline for Petitions to Intervene; Order Authorizing Discovery; Order Regarding Service of Documents; Notice of Second Prehearing Conference; and Notice of Hearing* ("Scheduling Order").

On June 5, 2017, the Director issued an order granting petitions to intervene filed by the following:

- USDA Forest Service
- Bruce Blackmer
- Warm Springs Creek Ranch, LLC, Big Lost Ranch, LLC, and 6X Ranch, LLC
- Upper Big Lost River Ground Water Association
- Big Lost River Irrigation District
- Nelson Mackay Ranch LLC, Notch Butte Farms, LLC, Last Ranch, LLC, John Lezamiz Family Partnership, and Loy Pehrson
- Val and Heather Carter
- Melvin Marx Hintze
- Lyn F. Hintze
- Nancy McCaslin and Rick Mauthe
- Rick E. Reynolds
- James Rindfleisch

On June 20, 2017, the Director received a *Notice of Withdrawal of Petitions* ("Withdrawal") from Rose Bernal and Moj Broadie (collectively, "Petitioners"). The Petitioners state they "believe the costs of arguing about what type of basin 'designation' . . . is less important than the development of a legitimate ground water management plan." *Withdrawal* at 2. Attached to the Withdrawal is a *Stipulation Agreement* executed by the Petitioners that "defines mutually agreeable terms and conditions the Petitioners believe would be the most effective manner for them to use their limited financial resources and time." *Id.* The Petitioners state in the *Stipulation Agreement* they agree to cooperate in developing "a proposed ground water management plan for the Big Lost River Basin" that will be submitted for the Director's review. The Petitioners also state they believe "a 'designation' is essential in moving the management of the basin's water resources forward" and acknowledge the Director "has the statutory authority to do so without either of the pending petitions." *Withdrawal* at 2. Therefore, the Petitioners agree to "support the Director if he elects to exercise his authority in designating the Big Lost River Basin as a Ground Water Management Area" pursuant to Idaho Code § 42-233b and seek to withdraw their respective petitions. *Id.*

The Director will grant the Petitioners' request to withdraw their petitions and will dismiss this contested case. The Director will also vacate the dates scheduled for the second prehearing conference and hearing and the schedule adopted in the Scheduling Order.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Petitioners' request to withdraw their respective petitions is GRANTED and the contested case in this matter is DISMISSED.

IT IS FURTHER ORDERED that the dates scheduled for the second prehearing conference and hearing and the schedule adopted in the Scheduling Order are VACATED.

DATED this 23rd day of June 2017.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June 2017, the above and foregoing was served on the following by U.S. mail, postage pre-paid.

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ADDENDUM
B

State of Idaho
DEPARTMENT OF WATER RESOURCES
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May 2, 2018

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RE: Conditional Protest Withdrawal – Ark Properties, LLC 61-12318

Dear Parties:

The Department of Water Resources ("Department") acknowledges receipt of the *Stipulation for Withdrawal of Protest* ("Settlement") filed in the matter of application for permit no. 61-12318 ("Application") on March 12, 2018. The Department will consider the Settlement pursuant to the Department's Rule of Procedure 612 (IDAPA 37.01.01.612).

The Settlement states that Idaho Power Company agrees to withdraw its protest against the Application provided any approval of the Application is conditioned substantially as follows:

> "This right is for the use of trust water which is identified and defined in the 1984 Swan Falls Agreement and subsequent Settlement. The right shall be subject to review <5> years after its initial approval (date of permit approval) to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water. This right shall remain subject to review by the Director consistent with the terms and limits imposed upon trust water rights issued by the State and arising out of the 1984 Swan Falls Settlement."

The proposed condition is similar to an existing standard Department condition. The Department accepts the Settlement's proposal to include a substantially similar condition on any permit issued pursuant to the Application. Pursuant to the Settlement, the Department will consider Idaho Power Company's protest to be conditionally withdrawn. Idaho Power Company will receive a copy of any decision approving or denying the Application.

Intervenor Double Anchor Ranches, Inc. was not a party to the Settlement. However, the Settlement resolves the protest that created the contested matter to which Double Anchor Ranches, Inc. intervened. Accordingly, the Department will proceed to review the Application pursuant § 42-203A without conducting a hearing. Double Anchor Ranches, Inc. will receive a copy of any decision approving or denying the Application.

Please contact this office if you have further questions regarding this matter.

Sincerely,

Nick Miller
Manager, IDWR Western Region