

RECEIVED

MAY 13 2021

DEPARTMENT OF
WATER RESOURCES

Albert P. Barker [ISB No. 2867]
Travis L. Thompson [ISB No. 6168]
Michael A. Short [ISB No. 10554]
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
PO Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-07000
Facsimile: (208) 344-6034
Email: apb@idahowaters.com
tlt@idahowaters.com
mas@idahowaters.com

Attorneys for South Valley Ground Water District

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**SOUTH VALLEY GROUND
WATER DISTRICT'S MOTION TO
DISMISS / SUPPORTING POINTS
& AUTHORITIES / MOTION TO
SHORTEN TIME FOR RESPONSE /
REQUEST FOR ORAL
ARGUMENT**

COMES NOW, the SOUTH VALLEY GROUND WATER DISTRICT ("SVGWD"), by and through its attorneys of record, BARKER ROSHOLT & SIMPSON LLP, and pursuant to Rule 260 of the Department's Rules of Procedure (IDAPA 37.01.260) hereby moves for dismissal of the above-captioned contested case on the basis the Director's *Notice* and the procedure set out for the hearing of the proposed contested case violates: 1) the Director's requirement to administer water rights in Basin 37 pursuant to the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) ("CM Rules"); 2) the

provisions of the Ground Water Act, specifically IC § 42-237a.g et seq.; 3) a prior district court decision and final judgment; and 4) SVGWD’s constitutional right to due process.

SVGWD further respectfully moves the Director to shorten the time to respond and dispose of this motion and requests oral argument.

INTRODUCTION

The Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11 et seq.) (“CM Rules”) implement Idaho law with respect to administration of surface and ground water rights. Department, district court, and Idaho Supreme Court precedent identify a detailed process and sequence of events for the agency to follow. Yet, the *Notice* ignores the CM Rules and this established process and relies exclusively on I.C. § 42-237a.g. to initiate this proceeding to conjunctively administer surface and ground water rights. This is proposed even though a prior district court final judgment requires the Director to follow CM Rule 30 procedures for administration of ground water rights in Basin 37, a region where ground water rights are included within a water district but where no “area of common ground water supply” has been designated. Disregarding the agency’s rules promulgated over twenty-five years ago, the Director has attempted to initiate a truncated administrative proceeding as a surrogate for what is required under Idaho law. For the reasons set forth below, the Director should dismiss the proceeding as a matter of law.

BACKGROUND

IDWR designated the Big Wood River Groundwater Management Area (BWRGWMA) on June 28, 1991. Although the order included a “management policy,” it did not establish either a “reasonable groundwater pumping level” or a “reasonably anticipated rate of future natural recharge.” Moreover, the designation did not determine an “area of common ground water

supply.” Since that time, aquifer levels in the Big Wood River Basin have remained fairly stable and there is no evidence of aquifer mining. *See* Ex. A. Two years later IDWR issued an *Amended Moratorium Order* affecting all applications for permit proposing a consumptive use of water within the trust water area.

Historically ground water rights in Basin 37 were not included within an established water district. That changed with the culmination of the Snake River Basin Adjudication (SRBA) and the court’s order authorizing the Director to distribute water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director’s Reports and partial decrees that superseded the reports for those surface and ground water rights located in Basin 37, part 2 (Camas and Clover Creek drainage areas) and part 3 (Upper Big and Little Wood River drainage areas). *See Preliminary Order* at 2 (In the Matter of the Proposed Combination of Water District Nos. 37 et al.) (Sept. 17, 2013) (hereinafter “*WD37 Order*”). At the time, the Department explained:

The proposed combination of water districts and inclusion of surface water and ground water rights in one district will provide for proper conjunctive administration of surface and ground water rights and the protection of senior priority water rights.

WD37 Order at 3 (emphasis added).

In the conclusions of law regarding the combination of the water districts and inclusion of surface and ground water rights, the Department found:

4. Idaho Code § 42-604 mandates the Director form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. . . . Efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users. *Id.* The combination and revision of water

districts within Basin 37, parts 2 and 3 is necessary for the reasons set forth in Finding of Fact 13 and for the efficient administration of water rights in general.

* * *

16. . . . Adversarial tensions between ground water and surface water users resulting from potential conjunctive administration of water rights should not negatively affect water district operations given the limited regulatory scope of the water district and the fact that conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR's) (IDAPA 37.03.11).

17. . . . The Department is statutorily obligated to create or modify water districts largely to provide a regulatory structure to address water distribution problems and minimize potential conflicts. Water districts are not authorized to address potential mitigation requirements of junior ground water right holders but they are authorized to enforce mitigation requirements that may be required pursuant to orders of the Director under the CMRs.

* * *

24. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should take the following actions:

- i. Combine WD37 and WD37M into one water district to be designated as WD37;
- ii. Combine ground water rights in the Upper Wood River Valley and Silver Creek/Bellevue triangle area with surface water rights in a combined WD37 to regulate water rights, and protect senior priority water rights in Basin 37;

WD37 Order at 8, 10, 12 (emphasis added). Thus, when groundwater rights were brought into WD 37, that decision was based on the Department's representation that conjunctive administration would occur under the CM Rules.

Shortly after IDWR combined the various water districts and included ground water rights in WD 37, the Department addressed conjunctive administration and the formation of ground water districts at a public meeting in Hailey, Idaho on March 7, 2014. Questions

surrounding inclusion of ground water rights in the water district were understandable given historic administration. The Department's presentation identified the following with respect to proposed conjunctive administration in Basin 37:

Does ground water pumping cause injury to water rights diverted from the stream?

Idaho has a process to address this question.

Idaho CM Rules and Ground Water District Formation at 8 (3/7/14 PowerPoint); Ex. B.

Conjunctive Management of Surface and Ground Water Resources

- Conjunctive Management Rules
 - o IDAPA 37.03.11
 - o Authorized by I.C. § 42-603
- IDWR Adopted 1994
 - o (approved by Legislature 1995)

Id. at 9; Ex. B.

Specifically, as to procedure and how the agency intended to distribute water to the various rights within the water district, IDWR represented the following:

Delivery Calls and Mitigation in a Water District (process/timeframe)

- Senior must submit petition alleging injury by junior users and identify senior rights being injured
- Initial investigation by Water District watermaster and IDWR
 - o Director may request additional information from Senior (senior does not bear burden to determine/prove injury)
- IDWR Director considers factors to determine material injury
 - o Matter generally handled as contested case as per IDAPA Rules
 - o Pre-hearing schedule
 - information gathered/provided by both senior and junior right holders; expert reports/analyses; motions; depositions etc.
 - o Hearing scheduled and held
- Time from Delivery Call Petition to Hearing
 - o May take up to one year or more:
 - May depend on complexity of case and parties
 - May depend on availability of ground water model

Id. at 15-17 (emphasis added); Ex. B.

As set forth in the Department’s representations to the water users within WD 37, conjunctive administration was to follow the CM Rules, with a senior filing a petition, the Director determining “material injury,” and a contested case that would be expected to last a year or more. Having addressed calls throughout the ESPA, IDWR understood the complexity and time needed to address conjunctive administration in an orderly and fair process. The Department failed to mention that a separate process under I.C. § 42-237a.g. would ever be utilized.

On February 23, 2015, less than a year after IDWR’s presentation, members of the Big Wood and Little Wood River Water Users Association (“Association”) submitted letters to the Director requesting priority administration. *See Memorandum Decision and Order* at 3 (*Sun Valley Co. v. Spackman*, Ada County Dist. Ct., Fourth Jud. Dist., Apr. 22, 2016) (hereinafter “*Order*”). The Director created contested cases and proceeded to consider the Association’s delivery calls under CM Rule 40. The Director held a status conference on May 4, 2015, and then a pre-hearing conference on June 3, 2015. The Director also requested detailed information and data from staff in the form of a memorandum that was due by August 21, 2015.

Sun Valley Company (SVC) moved to dismiss the calls for the Association’s failure to comply with the procedure of CM Rule 30. The Director denied the motion to dismiss but certified that decision as a final order for purposes of judicial review. On appeal, Judge Wildman set aside the Director’s decision and remanded the case for proceedings consistent with his *Order*. The Court found the Director’s decision violated the CM Rules and the substantial rights of the junior ground water right holders. The Court noted that since there was no defined “area of common ground water supply” IDWR was required to process the delivery call under CM Rule 30. The Court further found that the determination of an “area of common ground

water supply” had to be determined pursuant to CM Rules 30 and 31 with proper notice and service to all potential junior priority ground water right holders that might be affected. IDWR did not appeal the district court’s final judgment.

On March 6, 2017, the Association filed a *Petition for Administration* with IDWR. The Director authorized discovery and then held a pre-hearing conference on May 11, 2017. SVGWD filed a motion to dismiss that was joined by other parties. After further briefing by the parties, the Director entered an order dismissing the petition on standing grounds on June 7, 2017. *See Order Dismissing Petition for Administration* (Docket No. CM-DC-2017-001). The Director concluded that CM Rules 30 and 42 require submittal of specific information unique to each senior surface water user, including water right numbers, delivery systems, beneficial use, and alternate water supplies. The Association did not appeal or seek further review of the Director’s order.

In the fall of 2020, IDWR appointed an advisory committee for the Big Wood River Basin Groundwater Management Area. The committee met over several months addressing a variety of topics and issues. In the spring of 2021, senior surface water users on the committee identified alleged injuries and so-called “quasi-injuries” for the upcoming irrigation season. At the April 7, 2021 meeting, a representative for the senior surface water users requested the following:

The lower valley surface water users made a counter proposal that included limiting groundwater within the Galena Groundwater District to 12,000 acre feet, limiting groundwater pumping within the South Valley Groundwater District to 25,000 acre feet, an August 15th end date for groundwater irrigation pumping, a minimum flow target of 50 cfs on the Little Wood River at Station 10

...
Ex. C (Minutes of April 7, 2021 Meeting).

At the April 15, 2021 meeting, the representative for the senior surface water users made the following statements' regarding alleged material injury:

Cooper Brossy then provided an update on the lower valley surface water users' projected 2021 shortfalls. He indicated that they estimate a system injury of 38,850 acre-feet, with injury to individual users totaling 18,210 acre-feet (11,460 acre-feet for Big Wood Canal Company/Magic Reservoir and 6,750 acre-feet for decree users, including 3,000 acre-feet for Big Wood River decreed rights, and 3,771 acre-feet for Little Wood River decreed rights).

Ex. D (Minutes of April 15, 2021 Meeting).

At that same meeting, the Director stated that he was "ready to act" and warned groundwater users that they may be required "to reduce pumping much more than the amounts identified by the groundwater districts." *Id.* After the Director's pronouncement, the Association rejected the proposal from the ground water users. Thereafter, the Association members did not file a delivery call that satisfied the requirements of CM Rule 30.

On May 4, 2021, the Director issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* ("Notice"). The Director stated that he "believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season." *Notice* at 1. The *Notice* was accompanied by cover letter stating the following:

A drought is predicted for the 2021 irrigation season and the water supply in the Little Wood River-Silver Creek drainage may be inadequate to meet the needs of surface water users in that area. Therefore, the Director of the Department has initiated an administrative proceeding to determine if the surface water rights in the Little Wood-Silver Creek drainage will be injured in the 2021 irrigation season by pumping from junior-priority ground water rights in the Wood River Valley south of Bellevue. The administrative proceeding could result in curtailment of junior-priority ground water rights south of Bellevue this irrigation season.

Director May 4, 2021 Letter to “Water Right Holder” (emphasis added).¹

The *Notice* does not identify which surface or groundwater water rights are affected, or by how much. The Director stated at the April 15th meeting that “the impact of groundwater pumping on surface water flows varies by location, with some pumpers impacting surface flows more than others.” *See* Ex. D (Minutes of April 15, 2021 Meeting). However, the *Notice* does not identify the surface water rights that are or may be injured. Further, the *Notice* provides no indication of any injury standard, including “material injury” required under the CM Rules. The *Notice* references groundwater model “curtailment runs” but does not identify those runs, the results, or supporting background data. Significantly, the *Notice* only references potential impacts on “senior surface rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Notice* at 1 (emphasis added). The *Notice* makes no reference whatsoever to senior surface water rights on the Little Wood or Big Wood Rivers.

ARGUMENT

Idaho law prescribes a careful and detailed process for conjunctive administration of surface and ground water rights. The agency’s CM Rules are the centerpiece of this process and provide critical due process for affected water right holders. The CM Rules and the process to administer conjunctively has been tested through decades of litigation and multiple Supreme Court decisions. Where determinations of “an area of common ground water supply” and “material injury” are critical for orderly administration, the Director has unilaterally cast the Department’s rules, and a prior district court judgment, aside in the present matter. The agency

¹ The original letter and *Notice* included an address list with errors. Consequently, IDWR revised its address list and resent the letter and *Notice* on May 7, 2021. *See Tim Luke May 7, 2021 Email to BWRGWMA Advisory Committee Members*; Ex. E.

does not have authority to disregard its rules, violate a prior court judgment, or violate the constitutional protection of due process. For the reasons set forth below the Director should dismiss the *Notice* as a matter of law.

I. Idaho Law Requires Compliance with the CM Rules for Conjunctive Administration of Surface and Ground Water Rights in Basin 37.

Idaho’s water distribution statutes require administration of water rights in accordance with the prior appropriation doctrine. *See* I.C. §§ 42-602, 607. In carrying out this duty the Department “shall equally guard all the various interests involved.” I.C. § I.C. 42-101. The Legislature authorized the Director 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 rights of the users thereof.” I.C. § 42-603 (emphasis added). Pursuant to that legislative authorization, IDWR promulgated the CM Rules, which were approved by the Legislature and became effective on October 7, 1994. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650 (2013) (quoting I.C. § 42-603 and describing the rules as part of “developing a water allocation plan for an up-coming irrigation season”).

The Idaho Supreme Court has explained that the CM Rules “give the Director the tools by which to determine ‘how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].’” *See AFRD#2 v. IDWR*, 143 Idaho 862, 877 (2007) (quoting *A&B Irr. Dist.*, 131 Idaho 411, 422 (1997)). The Court further observed “[t]hat is precisely the reason for the CM Rules and the need for analysis and administration by the Director.” *Id.* (emphasis added). The Court has also noted that the CM Rules integrate “all elements of the prior appropriation

doctrine as established by Idaho law,” and that hydrologically connected surface and ground waters must be managed conjunctively. *See IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897, 908 (2016).

In general, the CM Rules should be “construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.” *Mason v. Donnelly Club*, 135 Idaho 581, 586 (2001). The CM Rules, as administrative rules of IDWR, have “the force and effect of law” and are integral to orderly conjunctive administration of surface and ground water rights as they were promulgated pursuant to and complement the water distribution statutes. *See* I.C. §§ 42-602, 603, 607; *see e.g. Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 174 (2019); *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908-909 (2004) (“IDAPA rules and regulations are traditionally afforded the same effect of law as statutes”).

In addition to the water distribution statutes, the Legislature codified the Ground Water Act. At the time of the original act and amendments in the early 1950s, ground water rights were not managed conjunctively within surface water districts. Accordingly, the act contains various statutes regarding well drilling, recharge, designation of special management areas, general authorities, and determination of adverse claims. *See* I.C. § 42-226 et seq. With respect to administration, the local ground water board statutes provided a procedure to address claims by a senior surface or ground water user. *See* I.C. § 42-237b. However, the local ground water board statutes were recently prospectively repealed during the 2021 Legislative Session pursuant to House Bill 43 (effective July 1, 2021).² The bill, proposed by IDWR, included the following

² The local ground water board statutes are effective as of the filing of this motion and will be the date of the proposed hearing set in the contested case proceeding. If senior surface water users are claiming an adverse effect

Statement of Purpose:

Consistent with the Governor’s Red Tape Reduction Act, this bill seeks to eliminate inactive provisions of law. The legislation eliminates outdated and obsolete sections of Idaho Code related to water delivery calls. The procedures outlined in these sections are obsolete since the adoption of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11).

H0043 Statement of Purpose (emphasis added).

Having just told the Legislature that procedures for conjunctive administration are to be handled under the CM Rules, the Department cannot simply abandon the CM rules. Indeed, the CM Rules reference and implement various provisions of Idaho’s Ground Water Act. *See* CM Rule 010.01, 02, 09, 10, 18, 20, 30.06, and 31. Notably, in this case, the rules provide a detailed procedure for implementing the statute and determining “an area of common ground water supply.” *See* I.C. § 42-237a.g; CM Rule 31. The Director cannot conjunctively administer surface and ground water rights without first determining such an area. *See Memorandum Decision and Order* at 9 (“a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood River and Little Wood Rivers and the junior ground water users located therein”); *see also*, CM Rule 30.07 (“Following consideration of the contested case under the Department’s Rules of Procedure, the Director may, by order, take any or all of the following actions: . . . c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district”); *see also*, CM Rule 31.01 (“The Director will consider all available data and information that

on their water rights, the Director must review whether that claim complies with the statute and set the matter for hearing before a local ground water board. *See* I.C. § 42-237b. The Director’s *Notice* includes no discussion of this provision of the Ground Water Act or whether he is required to follow its provisions as well (at least until July 1, 2021).

describes the relationship between ground water and surface water in making a finding of an area of common ground water supply”).

These statutes and rules must be read together to ascertain what is required for lawful conjunctive administration in Basin 37. *See State v. Garner*, 161 Idaho 708, 711 (2017) (“Statutes and rules that can be read together without conflicts must be read in that way.”). Idaho’s water distribution statutes, Ground Water Act, and CM Rules “should not be read in isolation, but must be interpreted in the context of the entire document.” *Idaho Power Co. v. Tidwell*, 164 Idaho 571, 574 (2018). Reading the relevant statutes and rules together leads to one conclusion, conjunctive administration of junior groundwater and senior surface water rights must proceed under the Department’s CM Rules.

A. Section 42-237a.g Does Not Give the Director Authority to Initiate a Contested Case for Conjunctive Administration Outside the CM Rules.

Despite the CM Rules, the Director has attempted to initiate administration of ground water rights in a limited region of Basin 37 (Bellevue Triangle) on the theory that he can *sua sponte* initiate a contested case and regulate solely under I.C. § 42-237a.g. without following the CM Rules. However, the Director’s authority with respect to “administration” of water rights is further informed by the CM Rules and specific processes approved by the agency, the Legislature, and importantly the Idaho Supreme Court.

In *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011), junior priority ground water users objected to the Director’s orders in response to the spring users’ delivery calls and claimed curtailment was precluded as long as they were not “mining” an aquifer. The Court analyzed their argument in the context of I.C. § 42-237a.g and noted:

The statute merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface

or ground water right or (b) result in withdrawals from the aquifer exceeding recharge.

150 Idaho at 804.

The Court's interpretation of the statute is binding upon the Department. Specifically, the Court recognized the Director could prohibit ground water diversions under the statute in only two scenarios: 1) where pumping is found to cause material injury; or 2) to prevent aquifer mining. The "material injury" inquiry leads to administration and the processes provided for under the CM Rules.

In this matter, the Director is not seeking to regulate or enforce the use of water "at a rate beyond the reasonably anticipated rate of future natural recharge." I.C. § 42-237a.g. The Department has not made a determination of what the average annual recharge rate is. The *Notice* doesn't mention average annual recharge and the Director's request for staff report doesn't ask for an analysis of average annual recharge either. Instead, according to the *Notice*, the Director has initiated this proceeding to determine the second element referenced by the statute, whether junior ground water use is causing injury, or more correctly, "material injury" to senior surface water rights. *See Notice* at 1; *see also, Cover Letter*.

The Director's inquiry into "material injury" depends upon a number of factors specifically set out in the CM Rules. *See* CM Rule 42. Moreover, given that the Department has not designated an "area of common ground water supply," that material injury inquiry must follow the requirements of CM Rule 30. The Idaho Supreme Court has instructed IDWR how to implement lawful conjunctive administration pursuant to the CM Rules. In *A&B*, the Court set out a three-part process for IDWR to follow in irrigation administration cases:

1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which

methodology must comport in all respects with the requirements of Idaho's prior appropriation doctrine, be made available in advance of the applicable irrigation season, and be promptly updated to take into account changing conditions.

2. A senior right holder may initiate a delivery call based on allegations that specified provisions of the management plan will cause it material injury. The baseline serves as the focal point of such delivery call. The party making the call shall specify the respects in which the management plan results in injury to the party. While factual evidence supporting the plan may be considered along with other evidence in making a determination with regard to the call, the plan by itself shall have no determinative role.
3. Junior right holders affected by the delivery call may respond thereto, and shall bear the burden of proving by clear and convincing evidence that the call would be futile or is otherwise unfounded. A determination of the call shall be made by the Director in a timely and expeditious manner, based on the evidence in the record and the applicable presumptions and burdens of proof.

315 P.3d at 841 (emphasis added).

The *Notice* wholly ignores steps 1 and 2 of the Supreme Court's procedure and instead leap-frogs straight to step 3. Setting aside the failure to follow CM Rule 30 and 31, the Director has not provided a proposed management plan "in advance of the irrigation season" as required by the Supreme Court. Waiting until after the irrigation season is well underway, when crops are in the ground, expressly violates the Supreme Court's procedure.

Moreover, only weeks ago the Department represented to the Legislature that conjunctive administration of ground water rights is covered by the CM Rules, not the Ground Water Act. Notably, the Statement of Purpose for House Bill 43 provides that the statutes for administration under local ground water boards are "obsolete since the adoption of" the CM Rules. *See Statement of Purpose H0043*. The Director presented the bill to the House Resources & Conservation Committee on February 3, 2021 and specifically explained the statutes could be repealed since conjunctive administration is handled under the CM Rules. It follows that the

Director has no authority to disregard the agency's own rules that cover the exact matter at issue. *See Mason*, 135 Idaho at 585 (“The Commission, therefore, does not have discretion to disregard the rule based on its own policy considerations”).

Pursuant to well-established canons of statutory construction, IDWR must read the relevant statutes and rules together to arrive at a lawful outcome for conjunctive administration. *See Rangen, Inc. v. IDWR*, 160 Idaho 252, 256 (2016) (“Administrative rules are interpreted the same way as statutes”). As the CM Rules implement the water distribution statutes and relevant portions of the Ground Water Act, the Department is bound to follow the procedures and regulations it has promulgated. *See State v. Garner*, 161 Idaho 708, 711 (“Statutes and rules that can be read together without conflicts must be read that way”); *Idaho Power Co. v. Tidwell*, 164 Idaho 571, 574 (2018) (statute and rules “should not be read in isolation, but must be interpreted in the context of the entire document”); *see also, Farber v. Idaho State Ins. Fund*, 147 Idaho 307 (2009) (“Courts must give effect to all the words and provisions of [the rules] so that none will be void, superfluous or redundant”).

The Director has never previously proposed to conjunctively administer surface and ground water rights through a short-cut process relying solely on I.C. § 42-237a.g. By ignoring the relevant water distribution statutes and CM Rules, which define a clear process for conjunctive administration of water rights in Basin 37, the Director's *Notice* is legally flawed and should be dismissed.

II. The Director's Administrative Proceeding is a Collateral Attack on Judge Wildman's Order for Conjunctive Administration in Basin 37.

The proper process for conjunctive administration in Basin 37 was already decided by Judge Wildman in 2016. *See Memorandum Decision and Order; Judgment (Sun Valley Co. v.*

Spackman, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV-WA-2015-14500, Apr. 22, 2016). IDWR and its Director were party respondents to that case. Pursuant to Idaho’s *res judicata* doctrine, the Director cannot collaterally attack that final judgment and evade what the court has required for conjunctive administration. Accordingly, IDWR should dismiss the *Notice* and proceeding on *res judicata* grounds.

The doctrine of *res judicata* covers both claim preclusion and issue preclusion. *See Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC*, 164 Idaho 555, 560 (2019). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. *See id.* A claim is precluded where; 1) the original action ended in a final adjudication on the merits; 2) the present claim involves the same parties as the original action; and, 3) the present claim arises out of the same transaction or series of transactions as the original action. *See id.* at 560-61. When the three elements are established, claim preclusion bars “every matter offered and received to sustain or defeat the claim *but also as to every matter which might and should have been litigated* in the first suit.” *Id.* at 561 (italics in original) (quoting *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437 (1993)).

The first question is whether the original action ended in a final judgment on the merits. It did. Judge Wildman entered a final judgment on April 22, 2016. The Court set aside the Director’s decision denying Sun Valley’s motion to dismiss and remanded the matter to the agency for further proceedings as necessary, specifically to process conjunctive administration in Basin 37 under CM Rule 30.

The next inquiry is whether the present claim involves the same parties. Here, the agency has sent the *Notice* to 1,100 ground water right holders in Basin 37. SVGWD has appeared on

behalf of its members and was a party to the *Sun Valley* proceeding on judicial review. IDWR and the Director were a party to the proceeding.

Finally, the present claim arises out of the same transaction or series of transactions as the original case. The first action concerned the Director's effort to conjunctively administer surface and ground water rights in the Basin 37. The Director attempted to address the senior's request for administration through CM Rule 40. The Director erred as a matter of law. In commenting on what is required for lawful conjunctive administration, the District Court held:

As will be shown below, the fact that juniors are in organized water districts is not necessarily relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water. Much more relevant, in fact critical, to processing such a call is identifying that area of the state which has a common ground water supply relative to the senior's surface water source and the junior ground water users located therein. Since it is Rule 30 that provides the procedures and criteria for making this determination, the Court, for the reasons set forth herein, holds that the Director's determination that Rule 40 governs the calls must be reversed and remanded.

* * *

Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.

* * *

Therefore, to process the Association's calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.

* * *

Therefore, the Court finds that Rule 30 provides the procedures and processes necessary to safeguard juniors' due process rights. It follows that when a call is

made by a senior surface water user against junior water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.

* * *

Therefore, the Court finds that it is Rule 30 that provides the Director the authority to determine an area of common ground water supply. It follows the procedures set forth in Rule 30 must be applied to govern the calls. . . . Since the procedures and criteria for making this determination are associated with Rule 30, **it is Rule 30 that must govern a call where a senior surface water user seeks to curtail junior ground water users in an area of the state that has not been designated as an area having a common ground water supply.**

* * *

The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudge any issues relevant to the contested case proceeding. . .

Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association.

Memorandum Decision and Order at 8-11, 14 (emphasis added).

This proceeding also involves the proper procedure for conjunctive administration in Basin 37. Here, the Director issued the *Notice* in direct response to claims of material injury made by senior surface water users in the Advisory Committee meetings held in mid-April. The Director stated he “was ready to act.” How the Director is required to act to conjunctively administer surface and ground water rights in Basin 37 is plainly governed by the District Court’s decision and final judgment. Although the Court advised that proper and orderly conjunctive administration requires a determination of “an area of common ground water supply,” the Director has failed to make that determination for over five years. Whereas the agency used rulemaking to define the Eastern Snake Plain Aquifer area of common ground water supply (CM Rule 50.01), the agency has refused to employ that process as well for Basin 37.

The present *Notice* purports to determine if water is available to fill certain ground water rights on the basis of whether those junior rights “would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Notice* at 1. The issue is plainly conjunctive administration of surface and ground water rights. Again, the Director has not initiated a proceeding to identify a “reasonable ground water pumping level” or the “reasonably anticipated rate of future natural recharge,” but he has initiated this matter solely on the basis of administration of water rights. *See* I.C. § 42-237a.g. Since the District Court has already ruled that the Director is bound to follow CM Rule 30 and make a determination of “an area of common ground water supply,” the Director’s *Notice* and its pre-determined area of curtailment (see map attached to *Notice*) should be dismissed pursuant to Idaho’s *res judicata* doctrine. SVGWD requests the Director to dismiss the case accordingly.

III. The *Notice* and Contested Case Violates SVGWD’s Due Process Rights

The Director issued the *Notice* on May 4, 2021. The service list contained errors so the agency remailed the *Notice* on May 7, 2021. Most affected junior ground water right holders only received an actual copy of the *Notice* by mail during the week of May 10th. The CM Rules contain important due process safeguards for purposes of conjunctive administration where “an area of common ground water supply” has not been designated. The current process disregards those procedures, and prejudices the rights of SVGWD’s members. Even if the process were proper, the schedule for this case is unprecedented and is contrary to any other conjunctive administration case that the agency has ever considered. The Department previously represented that a contested case for conjunctive administration in Basin 37 could take a “year or more.” Now, the Director has short-circuited the established process, ignored his recent representations to the Legislature, and set a contested case hearing to begin and in less than a month. Moreover,

the Director has just requested that IDWR provide a staff report explaining IDWR (or the Director's) position about certain highly technical information, and that staff report will not be provided by staff until May 17th. Affected junior ground water users and their technical experts will have less than 3 weeks to review and analyze this highly technical material and prepare any opinions and defenses. Given the unique circumstances and complexity of such cases, the Director's action violates SVGWD's constitutional right to due process. The Director should dismiss the proceeding accordingly.

Procedural due process requires that there be some process to ensure that an individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. *See Newton v. MJK/BJK, LLC*, 167 Idaho 236, 244 (2020). Determining whether an individual's Fourteenth Amendment due process rights have been violated requires a two-step analysis: 1) determining whether the individual is threatened with deprivation of a liberty or property interest; and 2) determining what process is due. *See id.*

Water rights are real property right interests in Idaho. I.C. § 55-101. Water right holders, like the SVGWD members, must be afforded due process before the right can be taken by the State. *See Clear Springs Foods, Inc.*, 150 Idaho at 814; *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651 (1915). The Supreme Court has found that issuing curtailment orders without prior notice and an opportunity for hearing can constitute an abuse of discretion and violation of the right to process. *See* 150 Idaho at 815 ("Under these circumstances, the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for hearing"). SVGWD's members, holders of real property interests in their water rights, meet the first step of the due process analysis.

In determining what process is due, the Supreme Court has observed that “[p]rocedural due process is an essential requirement of the administrative process, and notice is a critical aspect of that due process.” *City of Boise v. Industrial Com’n*, 129 Idaho 906, 910 (1997). Due process requires that parties “be provided with an opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.* The concept is flexible, “calling for such procedural protections as are warranted by the particular situation.” *Id.* The Idaho Supreme Court has used the U.S. Supreme Court’s balancing test in evaluating the adequacy a particular process:

Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . Due process is flexible and calls for such procedural protections as the particular situation demands . . . Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Ayala v. Robert J. Meyers Farms, Inc., 165 Idaho 355, 362 (2019).

In this case the Department is not without guidance on what procedures are due. Here, Judge Wildman explained how procedural due process safeguards are protected by the procedures of CM Rule 30:

More troubling, however, is the fact that the letters were not served by the seniors on the juniors they seek to curtail. This lack of service violates Rule 30, which expressly requires that “[t]he petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, ‘Rules of Procedures of the Department of Water Resources.’” IDAPA 37.03.11.030.02. It also raises issues regarding due process of law. The Director engaged in correspondence with counsel for the seniors regarding the calls, including a request for further information and clarification, before junior users had notice the calls had been filed. . . .

The Director attempted to address the notice and service concerns by taking it upon himself to provide notice of the calls to the juniors. . . . To do this,

the Department undertook the exercise of identifying those junior water right users in those areas of the state it believed may be affected by one or both of the calls. *Id.* These included junior ground water users in water district 37 and water district 37B. *Id.*

At the time, no explanation was given as to how the Director determined whom to serve, or as to what areas of the State may be affected by the calls. Nor was an explanation given as to why junior users in other organized water districts within Basin 37 (i.e., water district 37N, 37O and 37U) were not served. However, the exercise undertaken by the Director leads Sun Valley and other juniors to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers to be the boundaries of water district 37 and 37B. They assert this determination was made without notice to them and without an opportunity for them to present evidence and be heard on the issue. The Director denies these allegations, but the Court understands the concerns of the juniors. . . . The Director, as the decision maker, should not have been placed in the position of appearing to have made these kinds of determinations prior to the juniors having been given notice of the calls. The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudge any issues relevant to the contested case proceeding.

Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association. These include the right to have the seniors comply with the mandatory filing and service requirements of Rule 30. *See e.g. Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (holding that due process rights are substantial rights). Since the seniors' requests for administration fail to meet these mandatory requirements of Rule 30, the Director's decision to deny Sun Valley's motion to dismiss is in violation of the CM Rules and violates the substantial rights of the juniors.

Memorandum Decision and Order at 13-14.

Judge Wildman's decision leaves no doubt that CM Rule 30 is the proper due process to apply for conjunctive administration in this case. The Director has disregarded this ruling and has proceeded to initiate a case with the same errors present in the *Sun Valley* case. Notably, the Director has not required the seniors to follow the filing and service requirements of CM Rule 30. This is an about-face from his position in the spring of 2017, where he dismissed the

Association's petition for failing to comply with CM Rule 30. *See Order Dismissing Petition for Administration* (CM-DC-2017-001, June 7, 2017). Instead, IDWR has once again taken it upon itself to serve various junior water right holders of its own choosing in Basin 37. There is no notice to the water users of the boundaries of an "area of common groundwater supply." Furthermore, it appears that the Director has implicitly pre-judged an area of common ground water supply by identifying a limited area of potential curtailment (Bellevue Triangle) without following the requirements of the CM Rules in making that determination. *See Notice*, Attachment A (identifying "potential area of curtailment").

In addition to failing the due process notice requirements set forth by Judge Wildman, the Director's *Notice* fails the balancing test identified by the Supreme Court in *Ayala*. First, the private interests affected by this case are the individual ground water rights of the members of SVGWD. The Director is threatening to curtail those water rights during the middle of the 2021 irrigation season, despite crops having already been planted, and substantial private investment into property, equipment, infrastructure, and livestock.

Next, the risk of an erroneous deprivation of the water right interest is extremely high given the procedures proposed to be used. As noted, the Director has noticed up a hearing to begin within a month. The *Notice* contains no information required by the CM Rules necessary to make a "material injury" determination. The Director just recently requested a *Staff Memorandum* detailing requested information on at least 16 different subjects to be provided on May 17th, or three weeks from the date of the start of the proposed hearing. The request for data and technical reports is expected to span thousands of pages. There likely will be a significant amount of background information and data to examine. Significantly, the staff report requests information on injury but does not include all the factors that should be considered when making

a “material injury” determination under CM Rules. Having sufficient time to evaluate and review such information is critical for SVGWD’s ability to prepare expected defenses to the delivery calls and “material injury” determinations.

Whereas every other conjunctive administration contested case has taken months, not weeks, the Director’s truncated schedule does not satisfy SVGWD’s right to due process. For example, the following outlines the various delivery call cases and their timeframes to complete discovery, motion practice, and hold an administrative hearing on the issues raised by seniors and juniors:

| | |
|---|-------------------------------|
| Spring Users (Blue Lakes / Clear Springs) | May 2005 to November 2007 |
| Surface Water Coalition | January 2005 to February 2008 |
| A&B Irrigation District | January 2008 to June 2009 |
| Rangen, Inc. | Sept. 2011 to March 2014 |

The use of experts, evaluation of complex hydrologic systems, and evaluation of hundreds of water rights and their individual uses is a time-consuming and intense endeavor. But, the CM Rules make it clear that those evaluations are necessary under the prior appropriation doctrine to determine when there has been a material injury. *See AFRD#2*, 143 Idaho at 875 (“It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts”).

As illustrated in the Director’s *Request for Staff Memorandum*, there are numerous reports and extensive data and information to compile and review. Forcing junior ground water users affected by the *Notice* to absorb this information (without knowing how complete and comprehensive the information will be) and then come prepared to a hearing to debate and review this highly technical information, in two and a half weeks, is highly prejudicial. *See e.g.*

State v. Doe, 147 Idaho 542, 546 (2009) (“In addition, notice must be provided at a time which allows the person to reasonably be prepared to address the issue”). Since SVGWD will not have a reasonable time to prepare for hearing, the risk of curtailment without a meaningful and fair process is high. *See Declaration of David B. Shaw in Support of Motion for Continuance of Hearing*.

Moreover, the shortcomings of the current hearing schedule are further exposed when compared to a typical application for permit or transfer contested case. Even in that example where a proceeding only evaluates one or a few water rights, the Department routinely provides at least three months from the pre-hearing conference to the hearing date. While there is no defined timetable that applies to every case, counsel for the SVGWD is aware of no proceeding where the Department has forced litigants to go to hearing in less than one month.

Finally, there is little fiscal or financial burden on the Department to provide for the proper procedure and hearing as required by the CM Rules. Indeed, as Judge Wildman has noted, the burden of filing and service is on the senior users, not IDWR. Whereas the agency has once again erroneously taken up this effort on its own to provide notice to some subset of juniors, that can be corrected by dismissing this case and requiring the seniors to follow CM Rule 30. Any proper hearing process will inevitably involve the same issues, parties, and facts. *See Citizens Allied for Integrity and Accountability, Inc. v. Schultz*, 335 F.Supp.3d 1216, 1228 (D. Idaho 2018). Ensuring the hearing complies with the CM Rules and due process will “set an example for future hearings and thereby reduce the probability of further litigation.” *Id.*

Evaluated in context, it is clear the process provided for by the *Notice* does not satisfy constitutional due process rights and provide for a “meaningful opportunity to be heard.” It is just this type of action “that undermines public confidence in a fair and impartial tribunal” and

should be dismissed. *See e.g. Ayala*, 165 Idaho at 363. In summary, the Director should dismiss this matter for violating SVGWD’s due process rights.

IV. The Notice is Defective and Warrants Dismissal of this Case.

As a corollary to due process, a person has a right to have proper notice of proceedings. Here, the Director’s *Notice* indicates that the “water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users” and that certain ground water rights could be curtailed during the 2021 irrigation season. *Notice* at 1 (emphasis added). SVGWD is unaware of any senior surface water right holders on Silver Creek or its tributaries (i.e. Loving Creek, Stalker Creek) that are seeking conjunctive administration of junior ground water rights. The cover letter references the “Little Wood River-Silver Creek drainage,” a larger area than what is provided for in the formal *Notice*, but that larger area is not included in the *Notice*. It is the formal *Notice* that triggers the proceeding and by its own terms, the *Notice* purporting to initiate the contested case is directed at surface water sources that do not have seniors calling for water right administration. The cover letter is not a pleading or filing in the contested case.

The Idaho Supreme Court has stated that “the content of the notice must be such as to fairly advise the person of its subject matter and the issues to be addressed.” *State v. Doe*, 147 Idaho at 546. Moreover, the Court held that “[n]otice must be clear, definite, explicit and unambiguous.” *Id.* In this case the *Notice* does not apply to the Little Wood River or the senior water rights requesting conjunctive administration and asserting injury at the April Advisory Committee meetings. By limiting the *Notice* to “Silver Creek and its tributaries,” the Director is proposing to administer to a surface water source where no calling seniors are present. As such, the *Notice* is defective and must be dismissed.

//

MOTION TO SHORTEN TIME FOR RESPONSE

Given the extremely short schedule, SVGWD moves the Director to shorten the time to file responses to this motion from fourteen (14) days to three (3) business days. *See* IDAPA 37.01.01.270.02; 565. SVGWD has presented good cause to shorten the time to respond, since allowing the full 14 days to respond would likely mean that a decision on this motion would not be issued until right before the hearing is set to begin. Rather than forcing the parties to expend extensive time and resources on a proceeding that may be moot as a matter of law, the Director should address this motion as soon as possible.

Moreover, the Director represented to water users at the Advisory Committee meetings in April that he had already instructed the Department's deputy attorneys general to address his authority for taking such action. Presumably, shortening the time for response and disposing of this motion can be resolved in an expedient manner given that ongoing research and work for the Director. As such, SVGWD moves for an order shortening time to respond pursuant to Rule 270 and 565 of the Department's Rules of Procedure.

REQUEST FOR ORAL ARGUMENT

Pursuant to IDAPA 37.01.01.260.03, SVGWD hereby requests oral argument on this motion.

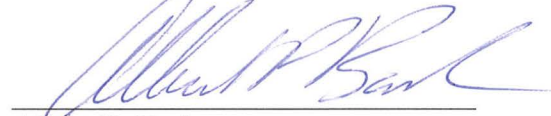
CONCLUSION

Idaho's water distribution statutes and CM Rules prescribe an orderly and proper procedure to address conjunctive administration. Judge Wildman has already ruled that the procedure set forth in CM Rule 30 must be followed in Basin 37. Due process requires IDWR provide a hearing to be held in a "meaningful time and in a meaningful manner." The May 4th

Notice plainly violates these precepts of Idaho law and therefore SVGWD respectfully moves for an order dismissing the case as a matter of law.

Dated this 13th day of May, 2021.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in blue ink, appearing to read "Albert P. Barker", is written over a horizontal line.

Albert P. Barker

Attorney for South Valley Ground Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2021, the foregoing was filed, served, and copied as shown below.

IDAHO DEPARTMENT OF WATER RESOURCES
 P.O. Box 83720
 Boise, ID 83720-0098
 Hand delivery or overnight mail:
 322 East Front Street
 Boise, ID 83702

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Fax
- E-mail

Gary L. Spackman
 Director
 IDAHO DEPARTMENT OF WATER RESOURCES
 PO Box 83720
 Boise, ID 83720-0098

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Fax
- E-mail

Sarah A. Klahn
 SOMACH SIMMONS & DUNN
 2033 11th St., #5
 Boulder, CO 80302

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Fax
- E-mail

Candice McHugh
Chris Bromley
 MCHUGH BROMLEY, PLLC
 Attorneys at Law
 380 S. 4th St., Ste. 103
 Boise, ID 83702

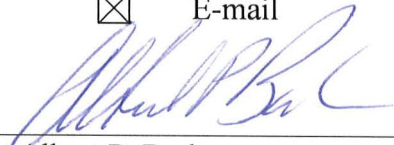
- U. S. Mail
- Hand Delivered
- Overnight Mail
- Fax
- E-mail

Heather O'Leary
 LAWSON LASKI CLARK PLLC
 PO Box 3310
 Ketchum, ID 83340

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Fax
- E-mail

Matthew A. Johnson
Brian T. O'Bannon
 WHITE, PETERSON, GIGRAY & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Fax
- E-mail



 Albert P. Barker

Exhibit

A



Ground Water Conditions Throughout Idaho

IWUA Annual Conference

Craig Tesch, P.G.

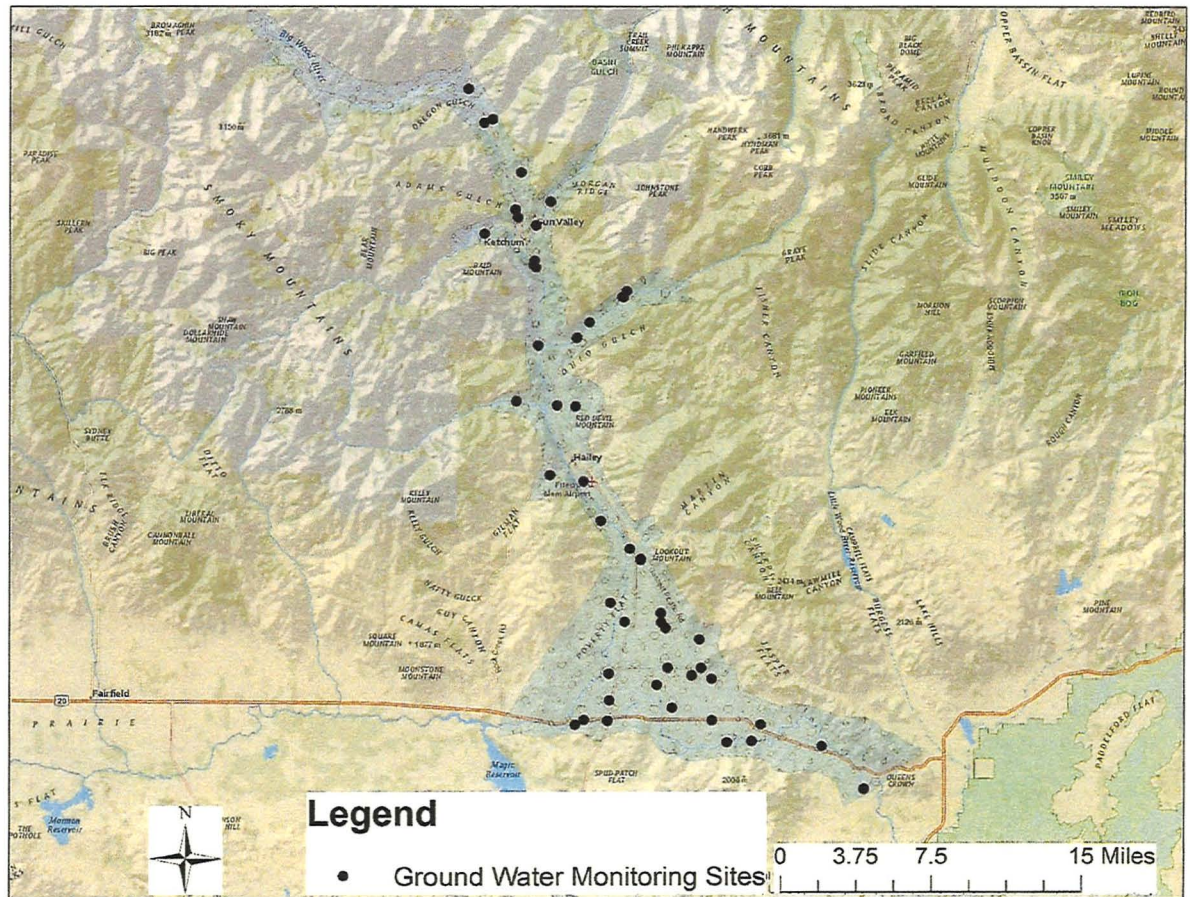
IDWR

January 21, 2020



Big Wood

- GWMA (1991, includes Camas Prairie)
- Model Developed (2016)
- ESPA Tributary
- ~ 25 wells monitored





Big Wood - Hydrographs

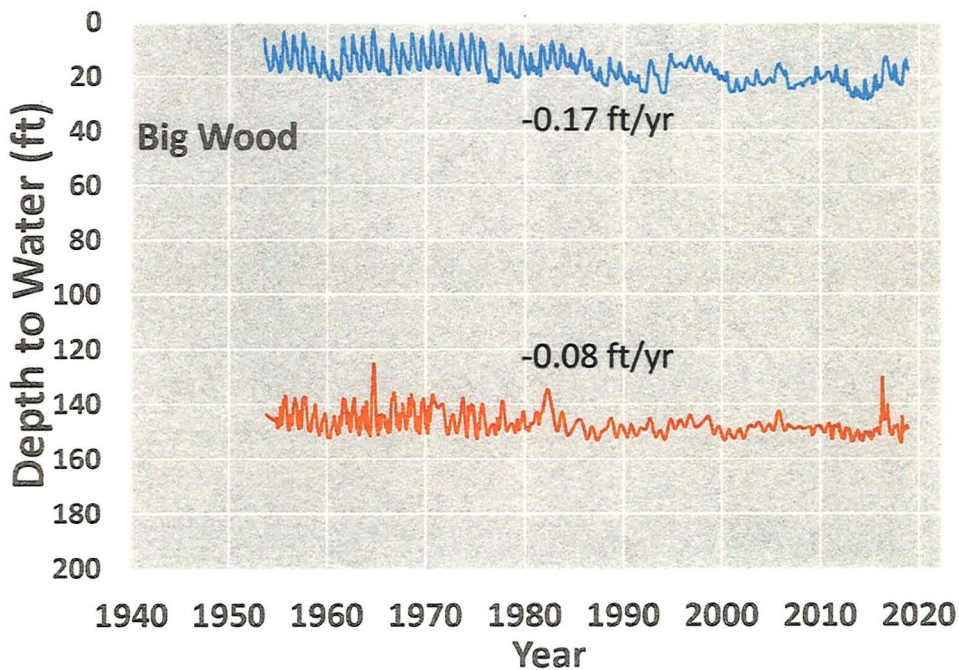
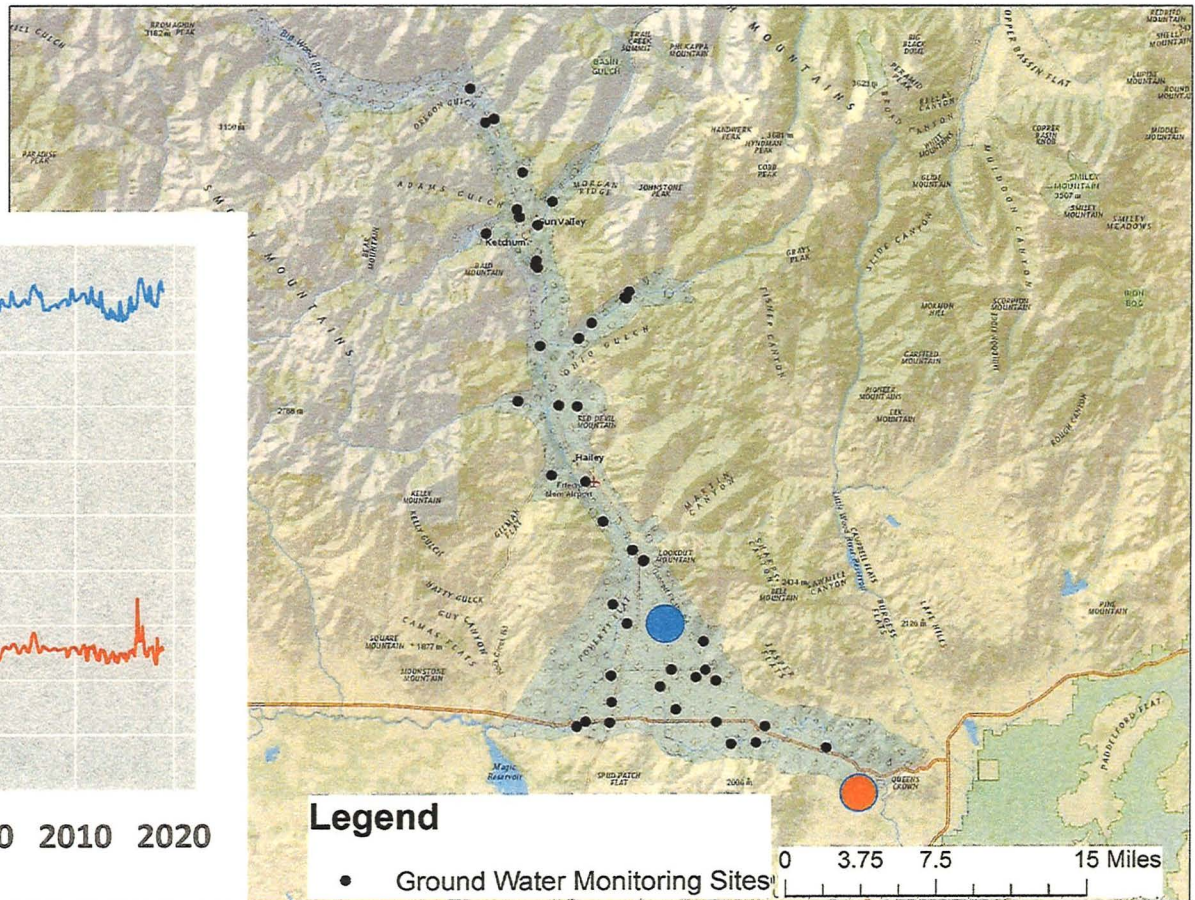
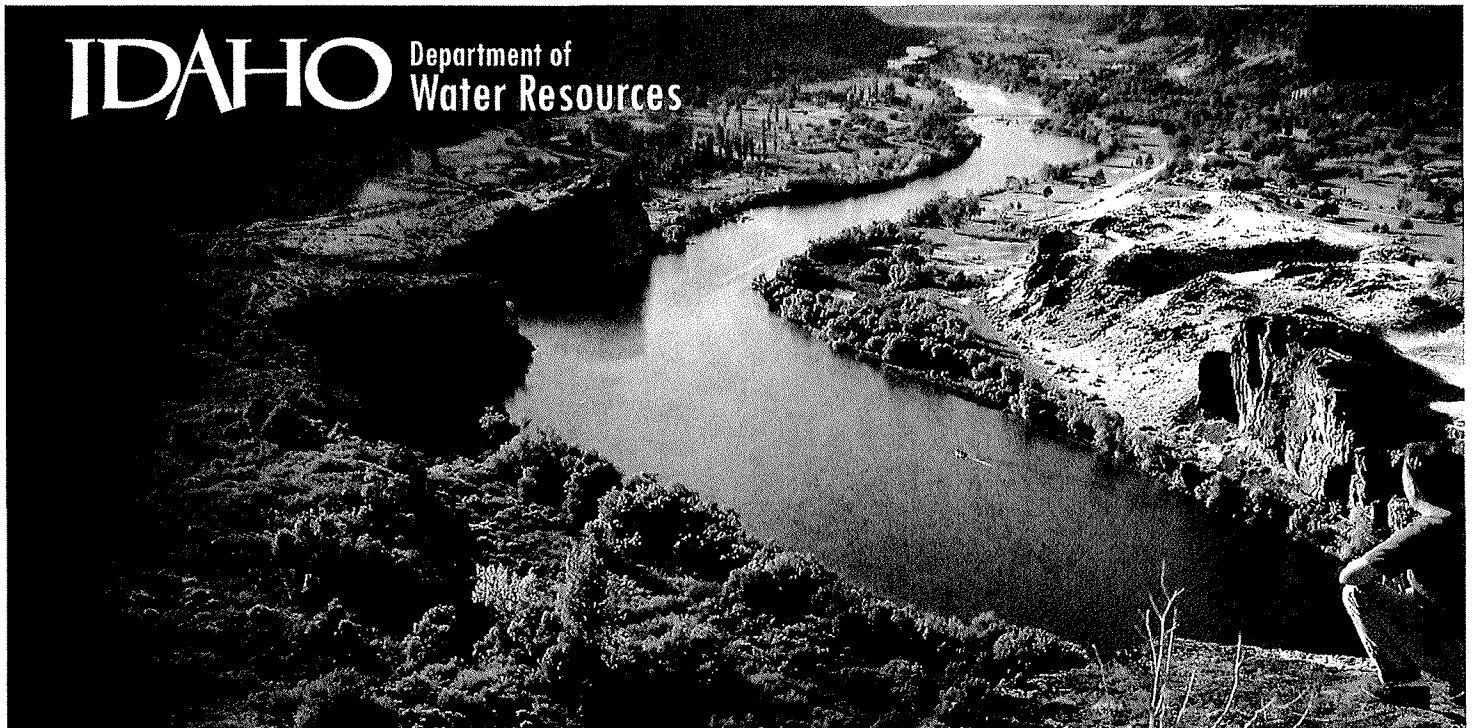


Exhibit B

IDAHO Department of
Water Resources



Idaho Conjunctive Management Rules & Ground Water District Formation

Boise, Idaho

March 7, 2014

Tim Luke, IDWR



Conjunctive Management of Surface and Ground Water Resources

- Conjunctive Management Rules
 - IDAPA 37.03.11
 - Authorized by I.C. § 42-603
- IDWR Adopted 1994
 - (approved by Legislature 1995)

Delivery Calls and Mitigation in a Water District (process/timeframe)

- Senior must submit petition alleging injury by junior users and identify senior rights being injured
- Initial investigation by Water District watermaster and IDWR
 - Director may request additional information from Senior (senior does not bear burden to determine/prove injury)

Delivery Calls and Mitigation in a Water District (process/timeframe)

- IDWR Director considers factors to determine material injury
 - Matter generally handled as contested case as per IDAPA Rules
 - Pre-hearing schedule
 - information gathered/provided by both senior and junior right holders; expert reports/analyses; motions; depositions etc.
 - Hearing scheduled and held

Delivery Calls and Mitigation in a Water District (process/timeframe)

- Time from Delivery Call Petition to Hearing
 - May take up to one year or more:
 - May depend on complexity of case and parties
 - May depend on availability of ground water model
- Post Hearing
 - Director review and consideration
 - May require use of ground water model
 - Injury determination does not require model but model may be necessary to determine extent of injury & complete order

Exhibit C

Meeting Minutes
Big Wood River Ground Water Management Area Advisory Committee
IDWR State Office at Idaho Water Center, Boise, Idaho
April 7, 2021

The meeting started at 1:35 p.m. Director Gary Spackman, Deputy Director Mat Weaver, Tim Luke, and Shelley Keen attended at the IDWR State Office in Boise. Other attendees participated via Zoom video conferencing or telephone. See the attached list of attendees.

After a brief introduction, old business items were discussed. Comments were solicited regarding IDWR's response to questions/comments from the Galena and South Valley Groundwater Districts relating to IDWR's March 17th observations, but no comments were given. Cooper Brossy gave an update from surface water users on predicted shortfalls. Cooper's update prompted discussion about BOR-AFRD2-BWCC exchange contracts, river rights with exchange conditions, and supplemental AFRD2 water. Tim Luke said he will draft watermaster instructions regarding delivery of water rights with exchange conditions. . The instructions will be shared with the committee. Sean Vincent of IDWR updated the committee on 2021 hydrologic conditions and the predicted water supply. IDWR staff then reported on its' review of BWRGWMA groundwater rights having supplemental use conditions. On April 8, 2021, IDWR will send notice to holders of supplemental groundwater rights summarizing their groundwater use and reminding them of the requirement to use their surface water supplies before using groundwater.

After the discussion of old business, the meeting transitioned to discussing mitigation proposals that the Wood River Valley groundwater districts may take during the 2021 irrigation season. The South Valley Groundwater District offered a 10% reduction in pumping compared to its five year average excluding 2017 (resulting average = 33,569 acre-feet) and recharge of 3,500 acre-feet to the aquifer using recharge pits located in the southern area of the Bellevue Triangle. The Galena Groundwater District also offered a 10% pumping reduction, plus \$50,000 for the one year purchase of water and an additional \$10,000 to complete an engineering study for a water conservation/pipeline conveyance project within the Big Wood Canal Company North Shoshone tract.

The lower valley surface water users made a counter proposal that included limiting groundwater within the Galena Groundwater District to 12,000 acre feet, limiting groundwater pumping within the South Valley Groundwater District to 25,000 acre feet, an August 15th end date for groundwater irrigation pumping, a minimum flow target of 50 cfs on the Little Wood River at Station 10, increased monitoring and enforcement by the groundwater districts, monetary penalties of \$40 per acre-foot for exceeding pumping reduction limits and for pumping after the August 15th date, and \$200 per cfs for not meeting the proposed minimum flow target on the Little Wood River. The lower valley surface water users also proposed an 800 acre-foot allowance that could be utilized by the districts after the August 15th shutoff date.

These proposals led to further discussion but not to agreement among the committee members. When it was clear that there would not be agreement between the ground water users

and the surface water users, Director Spackman addressed the committee. The Director stated that the previously submitted groundwater management plans lacked details and metrics, and that we now have an inadequate water supply for the 2021 irrigation season. He stated that for 2021 he is exploring all options, consistent with the prior appropriation doctrine, to protect water users having senior priority water rights.’ The Director further stated that the proposed mitigation proposals and counter proposals made by both the groundwater districts and lower valley surface water users were either inadequate or unreasonable. He said that he may move forward with administrative actions that will not likely meet the full objectives of either side.

IDWR staff and committee members discussed potential next steps, including reconsideration of the mitigation proposals for the 2021 season. Reconsideration would require the groundwater districts and the surface water users to confer with their members over the following week. After further discussion, the committee proposed meeting again on April 15, 2021 .

The meeting adjourned at 4:35 p.m.

Next Committee Meeting: April 15, 2021, 1:00 p.m., IDWR State Office at IDWR Water Center – Boise, with Zoom and teleconference participation.

Big Wood River Ground Water Management Area Advisory Committee
April 7, 2021 Attendance

Advisory Committee

Corey Allen
Cooper Brossy
Rod Hubsmith
Sharon Lee
Pat McMahon
Kristy Molyneux
Carl Pendleton
Pat Purdy
Bill Simon
Nick Westendorf
Brian Yeager

IDWR Staff

Tim Luke
Cherie Palmer
Corey Skinner
Gary Spackman
Jennifer Sukow
Sean Vincent
Shelley Keen
Nathan Erickson
Mat Weaver

Members of the Public

Kevin Lakey
Larry Schoen
Mary Beth Collins
Zach Hill
Al Barker
Chris Bromley
Dave Shaw
Eric Miller
Jim Speck
Judd McMahan
Erick Powell
Chris Simms
Jim Bartolino
Dennis Strom
Mark Johnson
Travis Thompson
Thomas Beck
Kent Fletcher
Megan Stevenson
W. Strasley
Neil Crescent
Michael Lawrence
Sunny Healy

Exhibit D

Meeting Minutes
Big Wood River Ground Water Management Area Advisory Committee
IDWR State Office at Idaho Water Center, Boise, Idaho
April 15, 2021

The meeting started at 1:02 p.m. Director Gary Spackman, Tim Luke, Sean Vincent, Cherie Palmer, and Shelley Keen attended at the IDWR State Office in Boise. Other attendees participated via Zoom video conferencing or telephone. See the attached list of attendees.

After a brief introduction and taking of attendance, Sean Vincent of IDWR updated the committee on 2021 hydrologic conditions and the predicted water supply. Sean stated that the NRCS has now published the April Snow Water Supply Index (SWSI). He indicated that the anticipated water supply continues to decrease, and it now appears that 2004 might be a more appropriate analog year for 2021. Previous discussions used 2002 and 2014. Sean stated that in 2002 and 2014 the Magic Reservoir was empty in mid-July, and the current forecast suggests the water supply will last two weeks less than suggested by the last forecast. In 2004, Magic Reservoir was empty on July 1st. Magic Reservoir currently has a storage volume of 38,549 acre-feet with predictions indicating 50-70 days of water supply.

Cooper Brossy then provided an update on the lower valley surface water users' projected 2021 shortfalls. He indicated that they estimate a system injury of 38,850 acre-feet, with injury to individual users totaling 18,210 acre-feet (11,460 acre-feet for Big Wood Canal Company/Magic Reservoir and 6,750 acre-feet for decree users, including 3,000 acre-feet for Big Wood River decreed rights, and 3,771 acre-feet for Little Wood River decreed rights). Ground water users asked Kevin Lakey, Water District 37 watermaster, several questions about how he estimated the 2021 shortfalls.

After Cooper Brossy's presentation, the meeting transitioned into discussions about the proposed actions by the groundwater districts for the 2021 irrigation season. Since the last (April 7th) committee meeting, the South Valley Groundwater District increased its offer to a 17% reduction in pumping and monitoring of pumping on a bi-weekly basis. The Galena Groundwater District also proposed a 17% pumping reduction, \$50,000 for the purchase of water, and an additional \$10,000 for a Big Wood Canal Company (BWCC) project engineering feasibility study. Discussion among committee members followed on how the money offered by the Galena Groundwater District could be spent. One idea was to use the money to pay for renting water, infrastructure costs, and power costs for a project to use Snake River water in the Dietrich area. Carl Pendleton indicated that the BWCC has recently received a \$10,000 grant from another funding source for the BWCC project and inquired about the possibility of using the \$10,000 offered by the Galena Groundwater District for other purposes. The committee also discussed surface water flow targets in Silver Creek or the Little Wood River. The groundwater districts expressed reluctance to agree to flow targets, but they are open to the idea of monitoring and reporting of surface water flows. After discussion of these offers, Carl Pendleton stated that he thought that the Big Wood Canal Company would be on board. Cooper Brossy indicated that he would need more time to discuss the offers with other lower valley surface water users.

The meeting was opened for public comment and discussion. Robin Lezamiz and Fred Brossy expressed concerns about the 2021 water supply and suggested the groundwater districts' proposals might not be enough to help surface water users.

Director Spackman also spoke. He stated that he is ready to act and that further delays will not help in the 2021 season. He also provided clarification on the percent reduction amounts that have been proposed. He stated that the groundwater-flow model of the Wood River Valley Aquifer system will likely show that the impact of groundwater pumping on surface water flows varies by location, with some pumpers impacting surface flows more than others. Consequently, some groundwater pumpers could be required to reduce their pumping much more than the amounts that have been proposed by the groundwater districts

The meeting wrapped up with Cooper Brossy stating that the lower valley surface water users would have their response to the groundwater districts' proposal by mid-day on April 16 (next day).

The meeting adjourned at 3:47 without a follow up meeting being scheduled.

**Big Wood River Ground Water Management Area Advisory Committee
April 15, 2021 Attendance**

Advisory Committee

Corey Allen
Cooper Brossy
Rod Hubsmith
Sharon Lee
Pat McMahon
Kristy Molyneux
Carl Pendleton
Pat Purdy
Bill Simon
Nick Westendorf
Senator Michelle Stennett
Brian Yeager

IDWR Staff

Tim Luke
Cherie Palmer
Corey Skinner
Gary Spackman
Sean Vincent
Jennifer Sukow
Shelley Keen
Nathan Erickson
Alex Moody

Members of the Public

Kevin Lakey
Mary Beth Collins
Zach Hill
Al Barker
Chris Bromley
Dave Shaw
Eric Miller
Jim Speck
Judd McMahan
Chris Simms
Travis Thompson
Sunny Healy
Pete Van Der Meulen
Greg Loomis
Kira Finkler
Justin Stevenson
Chris Johnson
Norm Semanko
Fred Brossy
Robin Lezamiz
Kent Fletcher

Exhibit E

Travis Thompson

From: Albert Barker
Sent: Friday, May 7, 2021 12:31 PM
To: Travis Thompson
Subject: FW: Notice of Basin 37 Administrative Proceeding
Attachments: 20210507_Basin 37 Notice.pdf

From: Sharon Lee <slee247@mac.com>
Sent: Friday, May 7, 2021 12:28 PM
To: Dave Shaw <dshaw@erresources.com>; Albert Barker <apb@idahowaters.com>
Subject: Fwd: Notice of Basin 37 Administrative Proceeding

Sent from my iPhone

Begin forwarded message:

From: "Luke, Tim" <Tim.Luke@idwr.idaho.gov>
Date: May 7, 2021 at 11:25:22 AM PDT
To: brian.yeager@haileycityhall.org, callen@sunvalley.com, cooper.brossy@gmail.com, jkmoly78@gmail.com, kaysi10@live.com, mstennett@senate.idaho.gov, nick@4lfarms.com, pat@purdyent.com, pat@svwsd.com, pendletonranch@hotmail.com, slee247@mac.com, wasimon9@gmail.com
Cc: "Van Der Meulen, Peter (IWRB Member)" <vandermeulenpete@yahoo.com>, watermanager@cableone.net, Rusty Krame <waterdistrict37b@outlook.com>, "Skinner, Corey" <Corey.Skinner@idwr.idaho.gov>, "Erickson, Nathan" <Nathan.Erickson@idwr.idaho.gov>, MDavis@house.idaho.gov, SToone@house.idaho.gov, Dick Fosbury <dfosbury@co.blaine.id.us>, "Carter, Meghan" <Meghan.Carter@idwr.idaho.gov>, "Baxter, Garrick" <Garrick.Baxter@idwr.idaho.gov>, "Weaver, Mathew" <Mathew.Weaver@idwr.idaho.gov>, "Spackman, Gary" <Gary.Spackman@idwr.idaho.gov>, "Whitney, Rob" <Rob.Whitney@idwr.idaho.gov>
Subject: Notice of Basin 37 Administrative Proceeding

Dear BWRGWMA Advisory Committee Members,

On May 4, 2021, I sent you an email with a copy of *Notice of Basin 37 Administrative Proceeding, Pre-hearing Conference and Hearing* and cover letter issued by IDWR Director Spackman. My email stated that the notice was sent to over 1,100 water right holders in Water Districts 37 and 37B on May 4th.

The purpose of this email is to let you know that IDWR had a glitch in its mailing of the above referenced notice. Many of the notices sent had an error in the address and were not deliverable. Consequently, IDWR is resending the notice today to the correct and complete addresses for all 1,100 plus water right holders. All notices will be delivered to the US Postal Service today. An updated and complete service list showing all mailing recipients should be posted on IDWR's website by close of business on Monday, May 10, 2021.

We apologize for the delay in receipt of the notices and any inconvenience caused by the error. A copy of the notice, cover letter and updated Certificate of Service document is attached again for your reference. The only change between the notice attached and the one sent to you by email on May 4th is the updated Certificate of Service (last page of the notice).

Respectfully,

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959