IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BASIN 33 WATER USERS, a coalition of water right holders, and the UPPER VALLEY WATER USERS, a coalition of water right holders,

Petitioners,

vs.

SURFACE WATER COALITION, a coalition of water right holders,

Cross Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

And

CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, AND WENDELL; SOUTH VALLEY GROUND WATER DISTRICT, IDAHO GROUND WATER APPROPRIATORS, INC.; IDAHO POWER COMPANY; CLEAR SPRINGS FOODS, LLC; CITY OF POCATELLO, and SNAKE RIVER STORAGE,

Intervenors.

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

Case No. CV01-20-8069

PETITIONERS' RESPONSE TO SURFACE WATER COALITION'S CROSS-PETITION BRIEF

PETITIONERS' RESPONSE TO SURFACE WATER COALITION'S CROSS-PETITION 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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The Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District (collectively the "Upper Valley Irrigators"), and the Basin 33 Water Users, by and through their undersigned counsel (collectively, "Petitioners") hereby submit *Petitioners' Response to Surface Water Coalition's Cross-Petition Brief*. This brief responds to the Cross-Petition Argument portion of the *Surface Water Coalition's Cross-Petition/Response Brief* ("*Coalition Response*"). For the sake of clarity and brevity, Petitioners will use terms as defined in *Petitioners' Brief* and *Petitioners' Reply Brief*.

I. STATEMENT OF THE CASE

A. Nature of the Case.

Petitioners have already set forth their view of the nature of this case in both *Petitioners' Opening Brief* and *Petitioners' Reply Brief*. *See, e.g., Petitioners' Opening Brief* at 1-2. The cross-appeal filed by the Surface Water Coalition asserted two additional issues on appeal:

a. Whether the Director erred in ruling that intervenors in the contested case remained parties to the pending action after the original petition filed by the Sun Valley Company was withdrawn.

b. Whether the Director erred in ruling that intervenors remained parties to the pending action despite not requesting a hearing in the pending action.

Surface Water Coalition's Cross-Petition for Judicial Review at 3-4.

The crux of the Coalition's argument is that an intervenor in a contested case before the Department cannot maintain the contested case unless the original instigator of a contested case remains as a party.

B. Course of Proceedings.

This matter was not initiated in a traditional manner. It was not initiated as a contested case after a petition was filed and a hearing held in front of the Department. Rather, it was initiated by a letter dated July 7, 2016 (the "Letter") from the Director announcing IDWR's consideration

of "creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA)," and inviting "[p]otentially affected water users" to "participate in upcoming public meetings" at one or more of ten meetings scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016 "to discuss the possible creation of a ground water management area for the ESPA." R. 1 (referring to the July 7, 2016 letter, which is available at https://idwr.idaho.gov/files/groundwater-mgmt/20160707-Letter-to-Waters-Users-from-Gary-Spackman-Re-Proposed-ESPA-WMA.pdf.). As we have previously explained, it was presumed by Petitioners that a formal contested case process would be undertaken if the Director decided to move forward on establishment of an ESPA GWMA (presumably based on the public comments), but no such hearing occurred. [1]

Instead, on his own, the Director issued his *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("ESPA GWMA Order") on November 2, 2016. R. 1. This spawned several legal proceedings summarized in the ESPA GWMA Order as follows:

> On November 16, 2016, the City of Pocatello ("Pocatello"), the Coalition of Cities, and Sun Valley Company ("SVC") each filed petitions for reconsideration of the ESPA GWMA Order.
>
> SVC also filed a *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area.* On December 2, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference,* granting SVC's request for hearing and scheduling a prehearing conference for January 12, 2017.
>
> At the prehearing conference, the parties and Director agreed that the prehearing conference should be continued to March 22, 2017. The parties and Director also agreed that proceedings in this matter should be stayed until March 22, 2017, except that the Director would extend the time for filing petitions to intervene to March 22, 2017, and would accept and potentially address such petitions during the stay. Consistent with these agreements, The Director issued a *Notice of Continued Pre-Hearing Conference; Order Staying Proceedings Except Intervention* on January 17, 2017.

[1] In footnote 9 in the *Coalition's Response Brief*, the Coalition asserts that the Court should strike a statement of Petitioners because it was not in the administrative record. This is simply incorrect. *See* R. 2705 (Petitioners summary judgment brief before the agency stating this same position).

On March 20, 2017, SVC filed a *Notice of Withdrawal of Request for Hearing.*

On March 22, 2017, the Director held the continued prehearing conference. All parties were present except SVC. The Director questioned whether he should proceed to hold a hearing on the ESPA GWMA Order given SVC's withdrawal of its request for hearing. The parties and the Director agreed the prehearing conference should be continued to April 20, 2017. The Director extended the time for filing petitions to intervene to April 20, 2017.

On April 14, 2017, Pocatello filed with the Department the *City of Pocatello's Memorandum Regarding Procedural Posture; In the Alternative, Request for Hearing* ("Pocatello Memo"). Pocatello requested the Director "re-issue or otherwise withdraw the [ESPA GWMA Order] or permit Pocatello to proceed to hearing in this contested case" or grant Pocatello's new request for hearing on the ESPA GWMA Order pursuant to Idaho Code § 42-1701A(3). The Coalition of Cities subsequently filed *Coalition of Cities Joinder in Pocatello's Memo; In the Alternative, Request for Hearing.* Basin 33 Water Users filed *Basin 33 Water Users' Joinder in Pocatello's Memo; and in the Alternative Petition for Hearing.*

On April 20, 2017 SWC filed a response to Pocatello's memorandum, arguing that, because SVC withdrew its request for hearing, there was no outstanding petition or request that would allow for an administrative hearing on the ESPA GWMA Order. ("SWC's Response").

On April 20, 2017, the Director held a continued prehearing conference. The Director discussed the Pocatello Memo and the SWC's response and issued a briefing schedule, allowing the intervenors to address the issue of whether the Director should hold a hearing on the ESPA GWMA Order.

On May 4, 2017, the Upper Valley Irrigators filed *Upper Valley Intervenors' Memorandum Supporting the Need to Proceed to Hold a Hearing on the ESPA GWMA Order*, a memorandum arguing that the Director should hold the hearing despite SVC's withdrawal, and joining with other intervenors who previously requested a hearing.

On May 18, 2017, Pocatello filed *Pocatello's Response Brief.* The Coalition of cities subsequently filed *Coalition of Cities' Joinder in Pocatello's Response Brief.*

The matter was informally stayed from 2017 to 2019 while cities (including the City of Pocatello and cities within the Coalition of Cities) discussed settlement with the SWC related to the SWC delivery call. In early 2019, a settlement was finalized. The signatory cities agreed to "withdraw their opposition to the ESPA-GWMA Order that is subject to a contested case before IDWR (Docket No. AA-GWMA-2016-001), provided, however, that all Parties may remain as parties to the

> contested case to monitor the proceedings and participate as necessary." *Cities Settlement Agreement* at 5.
>
> On January 30, 2019, the Director convened a status conference to determine whether the intervenors wanted a hearing in light of the settlement agreement. Counsel for the Basin 33 Water Users and counsel for the Upper Valley Irrigators requested the Director conduct a hearing.

R. 2977-2980.

The Upper Valley Irrigators and Basin 33 Water Users filed timely petitions to intervene, R. 2410, 2481. These petitions to intervene were granted. R. 2432, 2495. On March 20, 2017, SVC filed a *Notice of Withdrawal of Request for Hearing* where it indicated it would not participate in any hearing in this matter. R. 2474. On March 30, 2017, the Director issued his *Order Extending Deadlines for Petitions to Intervene; Notice of Additional Prehearing Conference*. R. 2489. Subsequently, on April 14, 2017, Pocatello filed a *Memo Re Procedural Posture—In the Alternative Request for Hearing*. R. 2501. On April 24, 2017, the Director entered an *Order Establishing Briefing Deadlines*, R. 2533, to allow parties an opportunity to brief the question of whether or not the withdrawal of SVC's request for hearing required the Director to dismiss the contested case. Many entities filed briefs in support, including the Basin 33 Water Users. R. 2516. The Upper Valley Irrigators also submitted briefing in support of holding a hearing on the ESPA GWMA Order. R. 2539.

On June 5, 2019, the Director issued the *Order on Briefing; Notice of Additional Prehearing Conference* finding that the contested case would be continued. R. 2615. With specific regard to the Coalition's Cross-Appeal issues now before this Court, the Director analyzed the Coalition's arguments and concluded as follows:

DISCUSSION AND FINDINGS

This is a contested case proceeding initiated by the filing of a petition requesting a hearing pursuant to Idaho Code § 42-1701A(3)[5], which states:

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, 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.

Idaho Code § 42-1701A(3). Therefore, an aggrieved person "shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing." *Id.*

Under the Idaho Administrative Procedures Act and the Department's Procedural Rules, a "party" is "each person or agency named or admitted as a party, or properly seeking an entitled as of right to be admitted as a party." IDAPA 37.01.01.16; Idaho Code § 67-5201(13). The Department's Procedural Rules specifically list an intervenor as a party and do not differentiate between the rights of intervenors and other parties, except insofar as an intervenor's rights are conditioned in the order granting the petition to intervene. IDAPA 37.01.01.150; IDAPA 37.01.01.353. Where an intervenor's rights have not been conditioned as parties, as is the case here, they "may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise *fully participate* in hearings or arguments." IDAPA 37.01.01.157 (emphasis added).

Idaho Code § 42-1701A(3) also states:

> The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding.

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

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[5] Where a hearing has not been held in the Director's establishment of a GWMA, Idaho Code § 42-237e allows a hearing pursuant to Idaho Code § 42-1701A(3).

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.[6] The issues that may be litigated in the contested case are limited to the issues raised by the original petition creating the contested case.

ORDER

IT IS HEREBY ORDERED that intervenors in this contested case remain parties to the contested case pending before the Director. The issues addressed and evidence submitted at the hearing will be limited to the issues raised in the original petition for hearing filed by the Sun Valley Company. The contested case will be scheduled for a hearing.

R. 2619-20.

C. Statement of Facts.

The Petitioners have no additional facts to add other than the items described in the Course of Proceedings section herein.

II. ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL

A. Whether the Petitioners are entitled to an award of attorneys' fees pursuant to Idaho Code §§ 12-117 and 12-121 and other applicable law.

III. APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedures Act (Idaho Code § 67-5201, *et seq.*, hereinafter the "Act"). Idaho Code § 42-1701A. Under the Act, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). Here, where the agency "was required ... to issue an order," the Court must affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or
(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. Further, the party challenging the decision must also show that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4).

IV. LEGAL ARGUMENT

A. The Petitioners and other intervenors are each considered a "party" to this matter under the adopted Department rules found at IDAPA 37.01.01 (the "Procedural Rules"), and as a party, may "fully participate" in the matter, including participation in a hearing.

The issue raised on appeal by the Coalition is easily answered by considering the plain language of the Procedural Rules, which were promulgated by the Department pursuant to Idaho Code § 42-1701A and have the self-described scope of "contain[ing] the rules of procedure that govern contested case proceedings before the Department . . ." IDAPA 37.01.01.001.02. Instead of addressing these rules, the Coalition asserts that because Idaho Code § 42-1701A(3) has a 15-day deadline for filing a request for hearing, the Director's decision to allow intervenors to proceed in this contested case "implicitly enlarged the timeline to request a hearing contrary to the statutes' deadline." *Coalition Response* at 11.

The Coalition downplayed the legal significance of the CM Rules in response to Petitioners' issues on appeal, and based on the similar logic, altogether ignores the Procedural Rules in its briefing[2] in the cross-appeal despite the Director's reliance upon the Procedural Rules in his analysis and decision. The Coalition unreasonably failed to consider administrative rules as part of applicable Idaho law, arguing:

> 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 petition.

Coalition's Response at 9.

Administrative rules are a well-accepted source of legal authority under Idaho law. Idaho law consists of "[t]he constitution, statutes, administrative rules and case law of Idaho." IDAPA 37.03.11.010.12. A position that the Director "[i]n essence . . . failed to provide any legal basis"

[2] There are no citations to any of the Procedural Rules in the Cross Petition Argument portion of the *Coalition's Response*.

makes no sense. There is no such thing as "in essence" failing to provide any legal basis for a decision. Either there is a legal basis or there is not, and, as Petitioners have previously explained, administrative rules are binding legal authority that the Coalition has failed to address. "A **rule** or regulation of a public administrative body ordinarily **has the same force and effect of law** and is an integral part of the statute under which it is made just as though it were prescribed in terms therein." *Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 174 (2019) (quoting *Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004) (emphasis added). "IDAPA rules and regulations are traditionally afforded the same effect of law as statutes." *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004).

The Director has specific responsibility "[t]o promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department." Idaho Code § 42-1805(8); *see also* Idaho Code § 42-603. The Director's authority is granted and defined in the Act and the administrative rules promulgated in accordance therewith. Administrative 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, 21 P.3d 903, 908 (2001) (emphasis added).

The Procedural Rules (just like the CM Rules) are rules of a public administrative agency—IDWR—and they have the same force and effect of law as statutes because they are an integral part of Idaho's water law. The IDAPA rules described above are specific and binding on the Director. They cannot simply be ignored by the Coalition.

The plain language of the Procedural Rules provides that an intervenor is a party in an IDWR contested case and has the right to fully participate in the proceedings. A "party" is defined as "[e]ach person or agency named **or admitted as a party**, or properly seeking and entitled as of

right to be admitted as a party." IDAPA 37.01.01.005.16 (emphasis added). Rule 150 the Procedural Rules is consistent with this definition, and specifically provides that "intervenors" are "parties":

150. PARTIES TO CONTESTED CASES LISTED (RULE 150).
Parties to contested cases before the agency are called applicants or claimants or appellants, petitioners, complainants, respondents, protestants, or intervenors. On reconsideration or appeal within the agency parties are called by their original titles listed in the previous sentence. (3-20-20)T

IDAPA 37.01.01.150. Rule 156 further provides that intervenors are "[p]ersons . . . permitted to participate as parties . . .":

156. INTERVENORS (RULE 156).
Persons, not applicants or claimants or appellants, complainants, respondents, or protestants to a proceeding, who are permitted to participate as parties pursuant to Rules 350 through 354 are called "intervenors." (3-20-20)T

IDAPA 37.01.01.156. Additionally, the Procedural Rules further explain the level of participation a party such as an intervenor enjoys, which is full participation:

157. RIGHTS OF PARTIES AND OF AGENCY STAFF (RULE 157).
Subject to Rules 558, 560, and 600, all parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments. (3-20-20)T

IDAPA 37.01.01.157.

The Procedural Rules have specific rules on how a person becomes a party through intervention. Rule 350 provides that "[p]ersons not applicant or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding **who claim a direct and substantial interest in the proceeding** may petition for an order for an order form the presiding officer granting intervention **to become a party**, . . ." IDAPA 37.01.01.350 (emphasis added).

A party designation is a designation of *status*, not merely a label given to the original instigator of a contested case. The status designation of a party is further evident when considering Rule 158—if you are not a party to a contested case, you are merely an "interested person":

158. PERSONS NOT PARTIES -- INTERESTED PERSONS (RULE 158).
Persons other than the persons named in Rules 151 through 156 are not parties for the purpose of any statute or rule addressing rights or obligations of parties to a contested case. Persons not parties who have an interest in a proceeding are called "interested persons." Interested persons may participate in a proceeding as "public witnesses" in accordance with Rule 355. (3-20-20)T

IDAPA 37.01.01.158.

As stated above, the Coalition makes no attempt to address the above rules, but indirectly asserts that these rules are not consistent with a statute by asserting that "[t]he Director ignored section 42-1701A(3) . . ." *Coalition Response* at 9. However, the Coalition makes no attempt to read this statute and the Procedural Rules without conflict, which is required. The Idaho Supreme Court has held that "[s]tatutes and rules that can be read together without conflicts **must** be read in that way." *State v. Garner*, 161 Idaho 708, 711,290 P.3d 434, 437 (2017) (emphasis added). Statutes and rules "build upon each other" with the statute being "the starting point." *Id*. Idaho Code § 42-1701A and the Procedural 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, 434 P.3d 175, 178 (2018), *reh'g denied* Feb. 22, 2019 (footnote omitted). Indeed, Idaho Code § 42-1701A provides that hearings before the director shall be conducted in accordance with the Act "and rules of procedure promulgated by the director." Idaho Code § 42-1701A(1). The Procedural Rules even cite directly to this statute. *See* IDAPA 37.01.01.000 (legal authority).

Accordingly, the real question raised by the Coalition is whether Idaho Code § 42-1701A can be interpreted without conflict with the applicable Procedural Rules. Petitioners assert that they certainly can. Idaho Code § 42-1701A(3) sets the deadline for requesting a hearing. This statute simply describes the deadline that the *original* party must meet by filing a petition for hearing. It is silent on the rights of *subsequent* persons or entities that achieve party status. The

Procedural Rules (along with civil litigation rules, such as the Idaho Rules of Civil Procedure[3]) allow persons to intervene and obtain party status.

There is no language in the applicable statutes or Procedural Rules prohibiting or even suggesting that the rights of subsequent intervenors are limited to less-than-full-party status. Once party status is obtained, then those persons or entities can fully participate, and there is no language in the statute suggesting or intimating that an intervenor is merely a parasite to the original action. The very basis for granting intervention is that the intervenor-party "claims a **direct and substantial interest** in the proceeding." IDAPA 37.01.01.350 (emphasis added). That interest is related to the issues originally raised or the relief originally sought, but an intervenor has an independent "direct and substantial interest" to protect, and once intervention is granted, the intervenor may "otherwise fully participate." IDAPA 37.01.01.157. The direct and substantial interest that permits intervention is the independent basis to continue in the action. *FDIC v. United States*, No. CV-96-98-ST, 1996 U.S. Dist. LEXIS 19644, at *15, 79 A.F.T.R.2d (RIA) 1997-426 (D. Or. Nov. 18, 1996) ("**If a permissive intervenor has an independent basis for jurisdiction, then it has an independent claim to pursue which the original parties cannot prejudice through dismissal.** Similarly, an intervenor of right may continue to litigate after settlement by the original parties if it has an independent claim." (emphasis added)). Under the Procedural Rules, there is no differentiation between the rights of intervenors and other parties, and where the statute is silent on the rights of intervenors, there is no conflict. Accordingly, both the statute and rules can be read without conflict, and that interpretation must govern.

The Coalition asserts that the Director's analysis is flawed because he has not cited to any cases. *Coalition's Response* at 9. There are several cases that address the issue the Coalition raises

[3] *See, e.g.*, Rule 24 of the Idaho Rules of Civil Procedure.

on cross-appeal.

In addition to IDWR, other agencies of the State of Idaho have virtually identical procedural rules governing their contested cases. The rights of a person or entity who have achieved party status under these rules, as well as the binding nature of these rules, was recently addressed on a challenge to an action of the Idaho Department of Transportation ("ITD") in *Laughy v. Idaho DOT*, 149 Idaho 867, 874, 243 P.3d 1055, 1062 (2010). In this case, ITD granted oversize load permits to ConocoPhillips. Business owners objected to issuance of the permits, and the district court reversed the grant of permits. On appeal, the Idaho Supreme Court reversed the district court and reinstated the permits, explaining that the business owners were not parties before ITD because they had not filed a petition to intervene. Citing to identical three-digit rule numbers in ITD's procedural rules that match with IDWR's Procedural Rules, the Court reasoned:

> Rule 150 states that "[p]arties to contested cases before the agency are called applicants or claimants or appellants, petitioners, complainants, respondents, protestants, or intervenors." IDAPA 04.11.01.150. People who "seek any right, license, award or authority from the agency are called 'applicants' or 'claimants' or 'appellants.'" IDAPA 04.11.01.151. **To oppose an applicant, anyone can petition to become an "intervenor" under Rule 156, a blanket term that applies to a person who does not fall into a specific category and who is nonetheless permitted to participate as a party.** IDAPA 04.11.01.156. Persons petitioning for intervenor status are admitted as parties if they can demonstrate a "substantial interest in the proceeding." IDAPA 04.11.01.350, .353.
> . . .
> Being admitted as parties would have enabled Respondents to actively participate in the application process at the agency level. *Shokal v. Dunn*, 109 Idaho 330, 334, 707 P.2d 441, 445 (1985). **If Respondents had formally intervened, the agency could have brought its expertise to bear in considering the parties' competing interests, heard Respondents' evidence and testimony, and corrected substantive mistakes.** Instead, Respondents sought to circumvent the administrative process by going directly to the district court to block ConocoPhillips's overlegal permits from issuing.
> . . .
> Being admitted as parties would have enabled Respondents to actively participate in the application process at the agency level.
> . . .

> Respondents are not entitled to **party status** unless granted leave to intervene, and were therefore never wrongly denied the opportunity to take part in formal agency proceedings.

Id. 874-75, 243 P.3d at 1062-63 (emphasis added). Accordingly, the Idaho Supreme Court held that "[b]ecause the Respondents were not parties, and because there was no final order issued, there is no jurisdiction under I.C. § 67-5270(3)." *Id*. at 1064, 243 P.3d at 876.

Once party status is obtained, "[i]t is well established in the law that an intervening party has the right to **litigate fully all issues relating to a pending action**." *Idaho v. Freeman*, 507 F. Supp. 706, 712, (D. Idaho 1981) (emphasis added) (citing to 3B Moore's Federal Practice, P 24.16(5) (1980); Wright & Miller, Federal Practice and Procedure: Civil § 1920 (1972)). Party status even allows an intervenor to request a jury trial upon intervention, even if the original parties did not request one. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 397, 111 P.3d 73, 82 (2005) ("An intervenor has a right to demand a jury trial upon intervention because, unlike the existing parties in the suit, it has not had the opportunity to assert that right." citing *U.S. v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1378 (9th Cir. 1997) ("After intervention, the parties to the litigation have changed. Indeed, intervening parties have full party status in the litigation commencing with the granting of the motion to intervene.") (internal citations omitted)).

Indeed, the answer to the question of whether an intervenor's action continues appears to have been well-settled for quite some time. In *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994), the Ninth Circuit explained:

> Approximately half the other circuits have addressed the question, and all have reached the same conclusion. **"The weight of authority in the United States Court of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action.**" *United States Steel Corp. v. E.P.A.*, 614 F.2d 843, 845 (3d Cir. 1979).

Id. at 830-31. The *United States Steel Corp. v. Environmental Protection Agency* case cited to is instructive of this well-established principle.

In *United States Steel Corp. v. Environmental Protection Agency,* 614 F.2d 843 (3d Cir. 1979), U.S. Steel filed a petition for review of a new EPA administrative ruling one day prior to the expiration of 60-day period allowed by the Clean Air Act. Scott Paper Company filed a motion to intervene 27 days after U.S. Steel filed its petition. Although Scott's motion was filed 86 days after notice was provided—and hence, filed after the 0-day statutory time period—the motion was granted without objection from either U.S. Steel or the EPA. However, one month after Scott's motion to intervene was granted, U.S. Steel (with EPA's support) moved to dismiss its petition for review. The motion was based on the same argument the Coalition asserts in this matter, which is non-compliance with a filing deadline described by statute. The Court concluded:

> EPA argues that, although Scott's motion to intervene was timely, **Scott's failure to file its own timely petition for review necessitates the dismissal of Scott**, as well as U.S. Steel, from this proceeding.
>
> **Such a result is unwarranted in these circumstances**.

Id. at 845 (emphasis added).

Perhaps most importantly for purposes of responding to the Coalition's enlargement of statute argument, the Court stated "there is no statutory provision prescribing a different method of intervention" other than under procedural rules. *Id*. at 844. "In fact," the Court continued, "the statute involved, § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), **is <u>silent</u> with regard to intervention**." *Id*. at 844-45 (emphasis added).

In the ESPA GWMA matter, the Petitioners' concerns are related to those expressed by SVC, but they are not identical. Granting party status to an intervenor was permitted in order to allow Petitioners the right to protect their "direct and substantial interest." Notably, the Court in

United States Steel stated that Scott's intervention "was not an attempt to cure a jurisdiction defect. Rather, it was an explicit attempt to ensure that Scott's interests, **which were related <u>but not identical</u> to those of U.S. Steel**, were adequately represented in the ongoing proceeding." *Id.* (emphasis added). Like the Clean Air Act statute, Idaho Code § 42-1701A is silent on intervention, and there is no other applicable Idaho statute addressing intervention. As a result, the Procedural Rules describe the process and rights of an intervenor. The Coalition's arguments otherwise—which are precisely the same as those advanced by EPA in *United States Steel*—are unavailing.

Further, the Coalition provides two examples it believes supports its argument, namely, (1) in another GWMA contested case, because the Director dismissed the petition to designate the Big Lost Critical GWMA when the petitioners withdrew their petition, he should have dismissed the contested case in this matter when SVC withdrew its request for hearing; and (2) once an applicant for a water right permit or transfer withdraws such application, the contested case is dismissed. However, these examples are clearly distinguishable from the ESPA GWMA matter.

In the Big Lost Critical GWMA matter, it was the very original parties that initiated the contested case that withdrew the petition.[4] When the proponent that initiates a contested case withdraws, then of course the matter is dismissed because the proposed action that was subsequently contested is no longer a proposed action. In the ESPA GWMA matter at issue here, if the Director voluntarily withdrew the ESPA GWMA order, then the matter would be over because the ESPA GWMA designation would go away. Petitioners could not thereafter insist on a hearing because there is no longer a case or controversy to address. Similarly, an application for

[4] The Big Lost Critical GWMA matter was initiated as a contested case by the Director once a petition was filed, and the matter was scheduled for hearing. *See* 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. Petitioners assert that this was the proper procedure for proceeding to designate a GWMA or a Critical GWMA. The ESPA GWMA was not initiated after a petition was filed.

a water right permit or a transfer proposes either a new water right permit or a change to an existing water right. After protests are filed, and the application is withdrawn, there is no longer a proposed water right permit or a proposed change to a water right pending. There is no case or controversy to address and the parties and their water rights all go back to the way they were prior to the filing.

In the ESPA GWMA proceeding, there remains a case or controversy to address by the intervenor-parties, even though the original party that requested a hearing has withdrawn from the proceedings because, unlike the Big Lost Critical GWMA matter, the withdrawn party was not the proponent of agency action. The Coalition's arguments on this issue are unavailing as they ignore important distinctions between these proceedings.

There is ample legal authority in support of the Director's decision to allow Petitioners and other intervenor-parties to continue with the ESPA GWMA matter after SVC withdrew its request for a hearing. The decision to allow the contested case to proceed with intervenor-parties even after SVC withdrew its petition for hearing was not an abuse of discretion by the Director and should be upheld on appeal. Because the proper procedure was followed, no substantial rights of the Coalition have been violated.

B. The Court should award Petitioners attorneys' fees.

Given the clear status of the law as contained in the above-described cases, the plain language of the Procedural Rules discussed by the Director in his underlying decision, the absence of any provision addressing intervention in Idaho Code § 42-1701A, and the Coalition's failure to attempt to read administrative rules consistent with Idaho statutes, the Coalition's arguments on this issue lack a reasonable basis in fact or law. The Coalition has requested fees against Petitioners on their appeal, claiming that the same issues and arguments raised before the Director have been made again on appeal. *Coalition's Response* at 35. However, the Director's ESPA GWMA Order

did not address the arguments that rules and statutes must be construed without conflict if they can be, nor did the Director specifically CM Rule 50. It is not an unreasonable argument to assert that administrative rules and case law are part of Idaho law that must be adhered to. Idaho law consists of "[t]he constitution, statutes, administrative rules and case law of Idaho." IDAPA 37.03.11.010.12 (emphasis added). Accordingly, it is fair and reasonable to have this Court review that decision when there was deficient analysis of those issues, and attorney fees should not be awarded to either the Coalition or the Department.

The same cannot be said of this cross-appeal. The Coalition failed to address the plain language of the Procedural Rules which the Director clearly based his original decision upon, R. 2619-20, or address Idaho case law on the proper interpretation of rules and its enabling statutes as described in *Petitioners' Brief*. The enabling statute at issue on the cross-appeal—which the Coalition asserts the Director ignored—is silent as to the rights of subsequent persons or entities to a contested case to intervene and acquir party status. Those rights—outlined in procedural rules promulgated by administrative agencies—have been described by the Idaho Supreme Court such that "**anyone** can petition to become an 'intervenor' under Rule 156, a blanket term that applies to a person who does not fall into a specific category and who is nonetheless **permitted to participate as a party**." *Laughy v. Idaho DOT*, 149 Idaho 867, 874, 243 P.3d 1055, 1062 (2010).

Accordingly, the Coalition acted without a reasonable basis in fact or law, and the Petitioners should be awarded their attorney fees in addressing the cross-appeal under Idaho Code § 12-117 and 12-121. *See, e.g.*, *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193 (award of attorney fees was proper in the appeal of an IDWR decision).

V. CONCLUSION

For the reasons set forth above, the Court should find that the Director did not violate Idaho law by allowing Petitioners and other intervenors to continue in this action despite SVC's withdrawal of its request for a hearing. Additionally, Petitioners should be awarded their attorney fees in responding to the Coalition's cross-appeal.

Respectfully submitted this 6th day of October, 2020.

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of October, 2020, true and correct copies of *Petitioners' Response to Surface Water Coalition's Cross-Petition/Response Brief* were served via Email and USPS Delivery, on the following:

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