IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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

Petitioners,

vs.

SURFACE WATER COALITION, a coalition of water right holders,

Cross-Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

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

Case No. CV01-20-8069

SURFACE WATER COALITION'S REPLY BRIEF

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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 irrigation entities comprising the Surface Water Coalition, by and through their undersigned counsel, hereby jointly submit this *Reply Brief*. This reply addresses the responses filed by the Idaho Department of Water Resources ("*IDWR Br.*"), the Basin 33 / Upper Valley Water Users ("*Pet. Br.*"), and the City of Pocatello ("*Poc. Br.*") (collectively these parties are hereinafter referred to as "Cross-Respondents").[1]

INTRODUCTION

The Coalition's cross-petition presents a basic issue of statutory interpretation. The question, a matter of first impression in Idaho, is whether the Director can allow aggrieved persons that failed to request a hearing within the statutory timeframe continue with a contested case they did not initiate.[2] The Coalition submits that answer is "no." The issue concerns the agency's authority and jurisdiction to address a person's challenge that was not filed within the required 15-day timeframe pursuant to section 42-1701A(3). While cases involving civil rules and courts may answer the matter differently, the Department is not a court, and has only limited authority specified by the Idaho Legislature. When an "aggrieved person" fails to exercise an express remedy provided by law, the Director cannot excuse that failure under the guise of agency discretion. If so, the agency and its director, not the plain language of the law, becomes the sole arbiter of who has the right to an administrative hearing. This is not the result intended by the governing statutes, and to the Coalition's knowledge has never been allowed by IDWR before. *See* I.C. §§ 42-237e, 42-1701A(3).

[1] No other parties filed responses to the Coalition's cross-petition.

[2] In resolving a matter of statutory construction, a court must first determine if binding authority exists construing the statute; if not, the court must then undertake its own effort to discover the statute's meaning. *See State v. Climer*, 127 Idaho 20, 22 (Ct. App. 1995); *see also, IDWR Br.* at 15 ("there is no Idaho case law directly on point . . .").

Since sections 42-237e and 42-1701A(3) plainly require any aggrieved person to file a request for hearing within fifteen (15) days, and no other party except Sun Valley Company (SVC) filed such a request, the Director erred in continuing the contested case over the ESPA GWMA. The Director, contrary to his own orders allowing intervention, expanded the scope of the proceeding by allowing the Intervenors to proceed to hearing despite SVC's withdrawal. The Court should grant the Coalition's cross-petition and dismiss the Petitioners' appeal accordingly.

ARGUMENT

I. The Administrative Procedures Act and IDWR Procedural Rules Do Not Override the Statutory Deadline Set Forth in Idaho Code §§ 42-237e and 42-1701A(3).

Relying upon the regulatory definition of an "intervenor," the Cross-Respondents all argue that the Director had discretion to continue the contested case after SVC withdrew its petition. *See IDWR Br.* at 14-16 ("Director's decision to allow Petitioners to continue under SVC's hearing request"), *Pet. Br.* at 16 ("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"), *Poc. Br.* at 8-9 ("the Director has discretion to determine whether or not to continue a contested case upon the withdrawal of a request for hearing"). The Cross-Respondents claim that as "parties," they assumed SVC's right to continue the challenge to the GWMA Order and proceed to SVC's requested hearing. The Department's Procedural Rules' definitions do not usurp or replace the statute's mandatory deadline. Further, the APA and Procedural Rules do not address the situation where the sole original petitioner subsequently withdraws its request for a hearing.

While the Procedural Rules define an "intervenor" as a "party," becoming an intervenor does not then cure the failure to exercise an express statutory remedy in the first place. There is

no dispute the Director followed the Ground Water Act in designating the ESPA GWMA and provided the required published notice. R. 2326-29, 2337, 2344-51, 2356-58, 2366-67, 2384-85.

Upon that public notice, any person claiming to be "aggrieved" by that action was required to file a petition with the agency requesting a hearing within fifteen (15) days. I.C. § 42-1701A(3).[3] SVC's petition and request for hearing set the parameters and entire basis of the contested case before the Department in the first place. R. 2620 ("The issues that may be litigated in the contested case are limited to the issues raised by the original petition creating the contested case"). Only SVC met the statutory deadline and filed the required petition challenging the GWMA Order. R. 2302. While various entities were allowed to "intervene" in the case and became "parties," they chose not to exercise the express statutory remedy by filing an initial request for hearing with the Director. I.C. §§ 42-237e, 42-1701A(3).

The statute does not say "any aggrieved person except an intervenor shall" file a request for a hearing within 15 days, yet that is the result the Cross-Respondents' seek. *See In the Matter of Adoption of Chaney*, 126 Idaho 554, 558 (1995) ("we [court] have held that we cannot insert into statutes terms or provisions which are obviously not there"); *State v. Maynard*, 139 Idaho 117, 120 (Ct. App. 2003) ("It is the duty of the court to construe the law as it is, not as some would like to have it").

The Coalition's question turns on the Director's authority and jurisdiction to continue a proceeding where the only party that complied with the statutory requirement to challenge the

[3] Section 42-1701A(3) was amended in 2003. The amendment stated: "The person shall file with the director, within fifteen (15) days after receipt of written notice of the ~~denial or conditional approval~~ 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." 2003 Sess. Laws, chp. 139, p. 403 (emphasis and strikethrough in original). The term "person" is broad and thus includes any subsequent "intervenors" or "parties" as defined in the Department's Procedural Rules. Just because an entity intervenes and becomes a "party" to an administrative proceeding doesn't mean that entity satisfies the statute's jurisdictional deadline required of any "person."

action later withdraws that petition. The Director admittedly did not have clear authority to continue as he requested briefing from the parties on whether or not the case should continue. R. 2533. Further, the Department cannot point to any other example where IDWR has allowed only intervenors to take a matter to hearing before the agency. *See generally, IDWR Br.*

Without any governing Idaho administrative or judicial precedent, IDWR now turns to federal authority to argue in support of its claimed jurisdiction in this case. *IDWR Br.* at 15-16. However, that authority is mixed and does address the specific question of the deadline to initiate an administrative case before the Idaho Department of Water Resources.[4] *See e.g., G.T.E. California, Inc. v. F.C.C.*, 39 F.3d 940, 947 (9th Cir. 1994) (Although 'there are instances when an intervenor's claim does not rise and fall with the claim of the original party,' *United States Steel v. Environmental Protection Agency*, 614 F.2d 843, 845 (3d Cir.1979), this is not one of them") (emphasis added); *Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 421 (8th Cir. 1999) (Art. III standing is a prerequisite for intervention in a federal lawsuit); *Building and Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d, 1275, 1282 (D.C. Cir. 1994) (intervenor must satisfy same Art. III standing requirements as original parties); *GTE Cal., Inc. v. Fed. Comm. Comm'n*, 39 F.3d 940, 947 (9th Cir. 1994) (independent basis for jurisdiction must exist); *Zwetchkenbaum v. Operations, Inc.*, 165 F.Supp. 449, 454 (D. Rhode Island 1958) (dismissal of the action requires dismissal of an intervenor's complaint if no independent ground of federal jurisdiction exists); *Chavis v. Whitcomb*, 57 F.R.D. 32, 36 (S.D. Indiana, 1972) ("Intervention contemplates an existing lawsuit and cannot be permitted to breathe life into a non-existent suit").

[4] The Petitioners' reliance upon *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994) has no application as that case concerned a bankruptcy proceeding where the specific filing deadline was discretionary, not mandatory like I.C. § 42-1701A(3). *See In re Molasky*, 492 Fed. Appx. 805 (9th Cir. 2012) ("failure to meet the § 523 deadline is not a mandatory jurisdictional bar").

Further, Cross-Respondents rely upon *United States Steel Corp. v. EPA*, 614 F.2d 843 (3rd Cir. 1979) as persuasive authority for their arguments supporting an intervenor continuing a case after the original party withdraws. *See IDWR Br.* at 15; *Pet. Br.* at 14. Despite the Third Circuit's ruling in that Clean Air Act case, there is contrary authority concerning other federal administrative cases which hinge upon the intervenor complying with jurisdictional requirements. *See Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1366-67 (D.C. Cir. 1988) ("To permit either substitution or intervention in these circumstances would be to condone the impermissible—an evasion of clear jurisdictional requirements ordained by Congress for obtaining judicial review"); *Simmons v. I.C.C.*, 716 F.2d 40, 46 (D.C. Cir. 1983) ("An intervenor lacking an independent jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction"); *Horn v. Eltra Corp.*, 686 F.2d 439, 441, n. 2 (6th Cir. 1982) ("Absent a similar statute, nothing in Spangler can be read as conferring original party status upon the EEOC [intervenor] in the present matter. . . . U.S. Steel, which involved intervention into appellate proceedings and which involved substantially different facts from those sub judice, is obviously intended to be confined to its facts").

In this case the Intervenors had no "independent basis" or "standing" to challenge the Director's GWMA Order since they failed to comply with the governing statutes and request a hearing within the requisite 15-day timeframe. *See* I.C. §§ 42-237e, 42-1701A(3). The Director was without statutory authority to continue SVC's petition, or request for hearing, and allow the Intervenors to litigate SVC's challenge to the GWMA Order. Although the Petitioners claim they had an "independent 'direct and substantial interest' to protect," the Director limited the hearing to those factual issues raised by SVC. R. 2694. Accordingly it was not their "interest" that created the case. Still, despite this limitation, the Director allowed the case to proceed to a

factual hearing on the Rexburg Bench, an area far removed from SVC's interests. Contrary to the Cross-Respondents' arguments, the Department's own Procedural Rules cannot enlarge the agency's authority or change what the statute clearly requires. *See Roberts v. Idaho Trans. Dept.*, 121 Idaho 727, 732 (Ct. App. 1991).

Moreover, unlike the federal cases where the intervening litigants' claims were not barred on jurisdictional grounds, like a statute of limitation, here the Intervenors failed to file a timely request for hearing. In other words, the Intervenors' independent basis to challenge the Director's order had passed. The Intervenors chose to wholly rely upon SVC's request and stated bases for its petition, which was ultimately withdrawn.

Pocatello alleges that section 42-1701A is not jurisdictional based upon its reading of *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103 (Ct. App. 2010). However, that case concerned a court's jurisdiction in connection with the timeframe to hold various hearings concerning specific child protection statutes, not IDWR's. The case does not apply to agency tribunals, which unlike courts are specifically limited by enabling statutes. More importantly, the case does not address the specific petition deadline set forth in section 42-1701A(3).

In *IDHW* the Court of Appeals analyzed the Child Protective Act and noted: "where none of the statutes implicated prescribe consequences for timeliness deviations—jurisdictional or otherwise—this is an issue of statutory interpretation as well as an issue of first impression in Idaho." *See* 150 Idaho at 109. The Court analyzed a variety of other states' decisions and concluded: "the alleged failures to hold the shelter care hearing and adjudicatory hearing within the statutory timeline, as well as to deliver the investigation report to Parents in a timely manner, are not jurisdictional issues that may be raised for the first time on appeal and which require reversal of the magistrate's subsequent actions." 150 Idaho at 111. The Court acknowledged

contrary authority in New Hampshire and Wisconsin but followed other states' interpretation of similar statutes.

The Court's decision in *IDHW* was specific to the unique facts and statutes involving the magistrate court and the Child Protective Act, and is distinguishable from the facts here. Notably, the case concerned the powers of the judiciary, not a state agency. Further, unlike the parents in *IDHW* who never objected to the alleged errors at the time they occurred before the court, here the Coalition raised objections to the Director's decision to continue the contested case at the time SVC withdrew its petition. R. 2522-31. Since the Director decided to continue the matter through an interlocutory order, the Coalition had to wait to raise their issue through a cross-petition on judicial review. R. 2615.

The Petitioners allege this independent basis or jurisdiction is irrelevant once a person achieves "party" status in a case. *Pet. Br.* at 10. This is just another way of claiming the statutory deadline to request a hearing does not matter and can be ignored. While the Director found the Intervenors had "direct and substantial interests" in SVC's case, that interest did not provide an "independent basis for jurisdiction," since without SVC's original petition there would have been no contested case. In other words, the Director could not have entertained the Intervenors' challenge if they would have filed such a request after the 15-day deadline ran. *See Pet. Br.* at 11 (arguing the "direct and substantial interest that permits intervention is the independent basis to continue in the action"). The Director violated his own intervention orders in this regard as the Intervenors broadened the scope of the case by being allowed to continue to hearing. When SVC withdrew its request in the spring of 2017, the issues it raised were withdrawn as well. R. 2396, 2432, 2494. Stated another way, the Director impermissibly allowed the Intervenors "to breathe life into a non-existent case." *Chavis*, 57 F.R.D. at 36.

The Petitioners' reliance upon *Laughy v. Idaho DOT*, 149 Idaho 867 (2010), is misplaced as well since the Court there found the Respondents were not parties and there was no final agency order to appeal. *See* 149 Idaho 875. The Idaho Supreme Court concluded the district court had no jurisdiction to entertain a petition for judicial review. *See id.* Here, the Coalition challenges the Director's decision to continue the administrative proceeding when the only party to challenge that order withdrew its timely petition.

The Petitioners' reliance upon the civil rules and federal case law regarding the rights of an intervenor are not on point. *See Pet. Br.* at 13-14. Again, this issue does not concern a lawsuit before a court with inherent equitable jurisdiction provided by the Constitution, but rather concerns an administrative tribunal with limited statutory jurisdiction. The Director cannot excuse the statutory deadline in section 42-1701A(3) when the original party requesting the hearing withdraws its petition.

Finally, the Cross-Respondents fail to acknowledge the Director's error when compared to his handling of the Big Lost River CGWA proceeding. Again, IDWR has failed to identify any case where it allowed only intervenors to proceed to hearing. Instead, IDWR claims the Big Lost case is distinguishable because when the petitioners withdrew their petition "there was no designated CGWA left behind to contest." *IDWR Br.* at 16-17. The Petitioners allege it was proper for the Director to dismiss because "it was the very original parties that initiated the contested case that withdrew the petition." *Pet. Br.* at 15. Although the Director had not yet designated a critical or groundwater management area, there was still a contested case pending in before the agency. Like the ESPA case, the Director received and had granted petitions to intervene in the Big Lost matter. *See* Addendum A at 2, *Coalition Op. Br.* (listing intervenors). Intervenors presumably had interests in the proceeding. The fact the Director granted petitions

to intervene but then unilaterally dismissed the case after the original petitioners withdrew is the critical point that is missed by Cross-Respondents. Not all intervenors or "parties" in the Big Lost case were given the opportunity to continue the matter as the Director made the sole decision to dismiss the proceeding.

Here, in contrast, the Director let the intervenors continue with the case. What is the standard for the Director's action in such a circumstance? If it is truly discretionary as the Cross-Respondents suggest, then the deadline imposed by section 42-1701A(3) is meaningless and can be circumvented by merely intervening in such actions.

The Cross-Respondents also fail to address the example of the Ark Properties LLC application for permit 61-12318. *See* Addendum B, *Coalition Op. Br.* In that proceeding the applicant and protestant entered into a settlement, but the intervenor (Double Anchor Ranches, Inc.) did not. *See id.* The Department noted that the settlement "resolves the protest that created the contested matter to which Double Anchor Ranches, Inc. intervened." *Id.* Here, SVC withdrew its petition and request for hearing that "created" the contested case in which the various parties intervened. SVC's withdrawal "resolved" the challenge and request for hearing on the GWMA Order. Since the Intervenors were limited to the issues raised by SVC, the withdrawal of the petition should have precluded Intervenors from continuing to pursue those issues. Instead, the Director did not dismiss the contested case but allowed the Intervenors to proceed as if they had equal standing with SVC.

In sum, SVC's withdrawal effectively ended the administrative proceeding and the Director had no statutory authority or jurisdiction to continue the contested case. The Court should find the Director erred, that his interlocutory order continuing the case proceeding to a hearing was unlawful, and dismiss the present appeal accordingly.

II. The Court Should Deny the Petitioners' Request for Attorneys' Fees.

Only the Petitioners have requested attorneys' fees in response to the Coalition's cross-petition. *See Pet. Br.* at 16. The Petitioners claim the Coalition acted "without a reasonable basis in fact or law" in pursuing the issue on cross-appeal despite no controlling Idaho precedent and the fact the Director questioned his own jurisdiction to continue the matter back in the spring of 2017. *Id.* at 17. Again, the agency has not shown or provided any examples of a case where a sole petitioner withdraws but IDWR then proceeds to hold a hearing for intervenors only. Just the opposite, the Big Lost CGWA example shows the Director has instead dismissed such actions.

The Coalition submits that the issue in its cross-petition in not unreasonable or frivolous based upon the plain language of section 42-1701A(3) and the facts of this case. The Coalition has advanced good faith and reasonable arguments regarding the Director's statutory authority. Further, while there is no Idaho case law on point, and the federal authorities are mixed, the Director's authority and jurisdiction is a question of law over which Idaho's judiciary has the ultimate responsibility to interpret and define. *See Saint Alphonsus Reg. Med. Ctr. v. Raney*, 165 Idaho 342, 345 (2018). Where the same Director and agency have dismissed other cases after a petition is withdrawn or where an application is settled without participation by an intervenor, it was reasonable to appeal this issue of first impression to this Court for careful analysis and resolution. *See Climer*, 127 Idaho at 22.

The Coalition respectfully requests the Court deny Petitioners' request for attorneys' fees under I.C. § 12-117 and 12-121.

III. Other Matters Raised by Petitioners.

The Petitioners have also erroneously attempted to seek attorneys' fees through their *Reply Brief* on their petition for judicial review, instead of their opening brief on appeal. *See Pet. Reply* at 26-29 (filed Oct. 1, 2020). This request violates Idaho's civil and appellate rules. *See* I.R.C.P.

84(r); I.A.R. 35(a)(5) ("if the [petitioner] is claiming attorney fees on appeal the [petitioner] must so indicate in the division of issues on appeal that [petitioner] is claiming attorney fees and state the basis for the claim."). In *Mulford v. Union Pac. R.R.*, 156 Idaho 134, 142 (2014), the Idaho Supreme Court held: "[I]n order to be entitled to attorney fees on appeal, authority and argument establishing a right to fees must be presented in the first brief filed by a party with this Court. A citation to statutes and rules authorizing fees, without more, is insufficient." (emphasis added) (citing *Carroll v. MBNA America Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009)). Since the Petitioners made no request for fees in their opening brief on appeal, the Court should prohibit their erroneous attempt in the reply brief.

The Petitioners' disregard of the appellate rules is a recurring theme as they have also attempted to introduce evidence not in the administrative record by cutting and pasting certain graphs into their argument. *See Pet. Reply* at 14-15. The Petitioners have not followed the APA (I.C. § 67-5276) or the appellate rules in attempting to introduce this material and therefore the Coalition objects to this extra-record evidence. The graphs presented were not part of the agency record on the GWMA Order and the Court should therefore strike it from this record on appeal accordingly. *See McCandless v. Pease*, 166 Idaho 865 (2020); *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 430-31 (2012).

CONCLUSION

The Department's jurisdiction in this matter was defined by section 42-1701A(3). Only SVC availed itself of the remedy provided by law and requested a hearing on the GWMA Order. Once SVC withdrew its request the Director should have dismissed the contested case. By allowing the Intervenors to proceed to a hearing, the Director exceeded his authority and disregarded the plain language of the statute.

DATED this 13th day of October, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of October, 2020, I served true and correct copies of the foregoing upon the following by the method indicated:

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