



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 uses 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.