

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Memorandum Decision and Order at 13-14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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MOTION TO SHORTEN TIME FOR RESPONSE

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

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

REQUEST FOR ORAL ARGUMENT

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

CONCLUSION

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

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

Dated this 13th day of May, 2021.

BARKER ROSHOLT & SIMPSON LLP

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

Albert P. Barker

Attorney for South Valley Ground Water District

CERTIFICATE OF SERVICE

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

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Albert P. Barker

Exhibit A



Ground Water Conditions Throughout Idaho

IWUA Annual Conference

Craig Tesch, P.G.

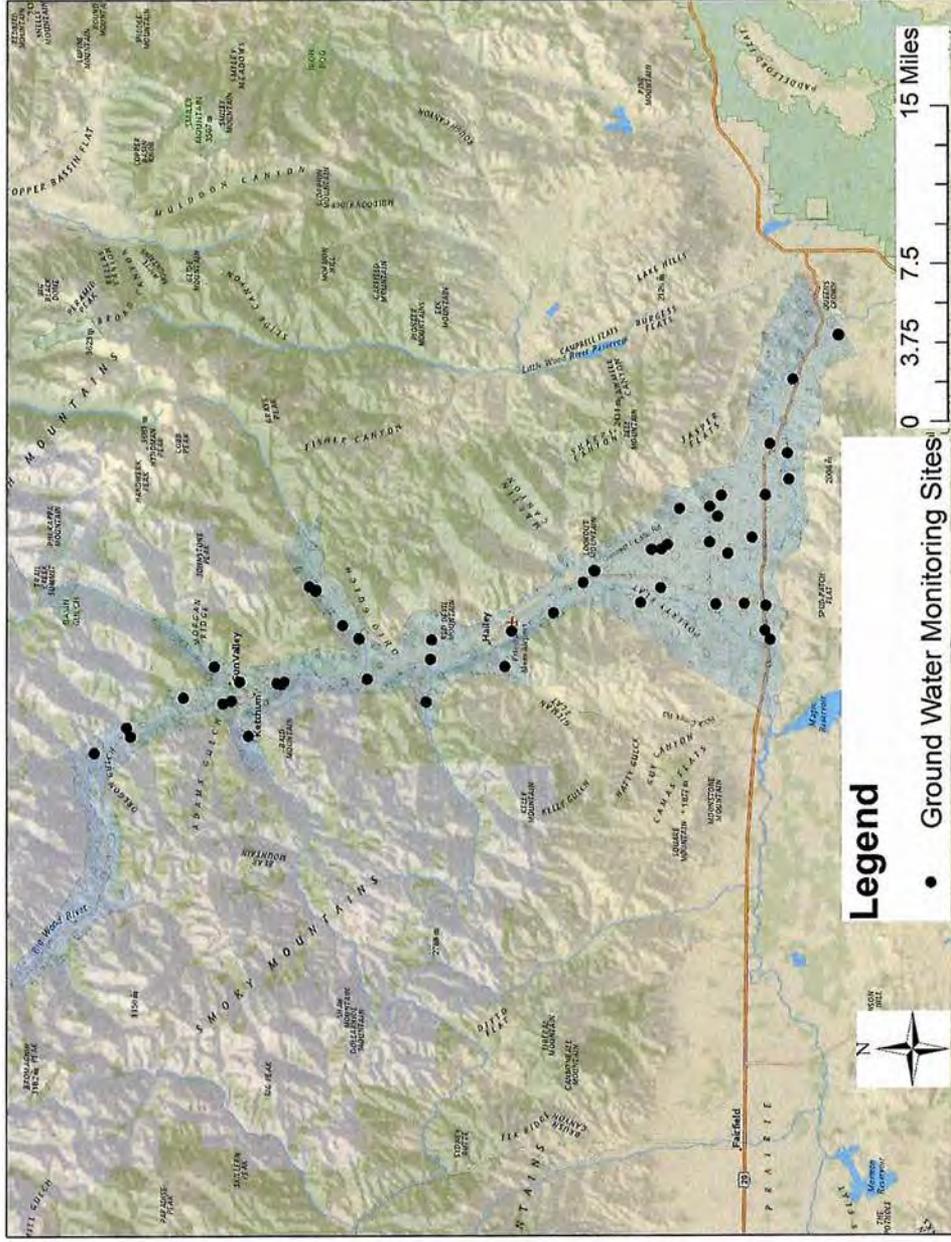
IDWR

January 21, 2020



Big Wood

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





Big Wood - Hydrographs

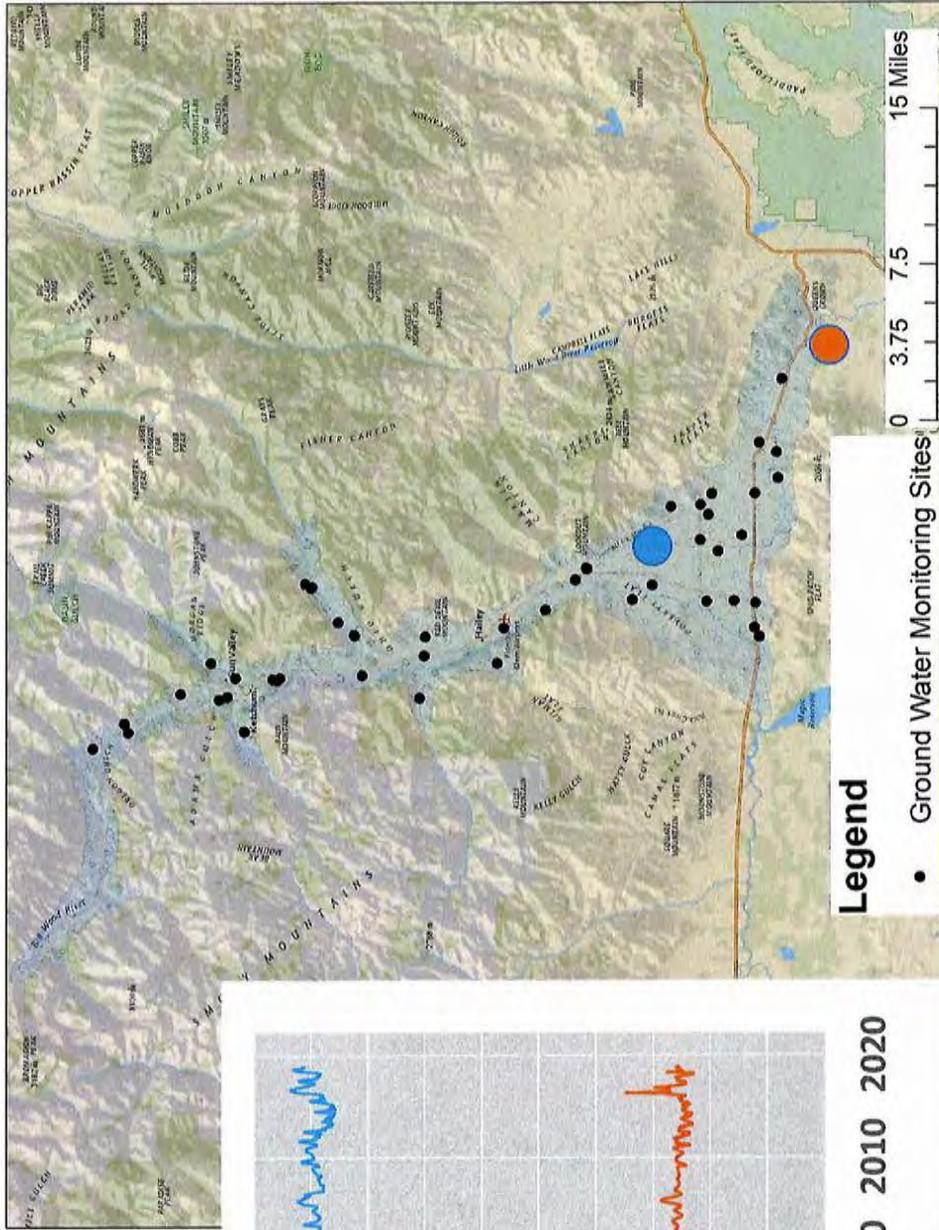
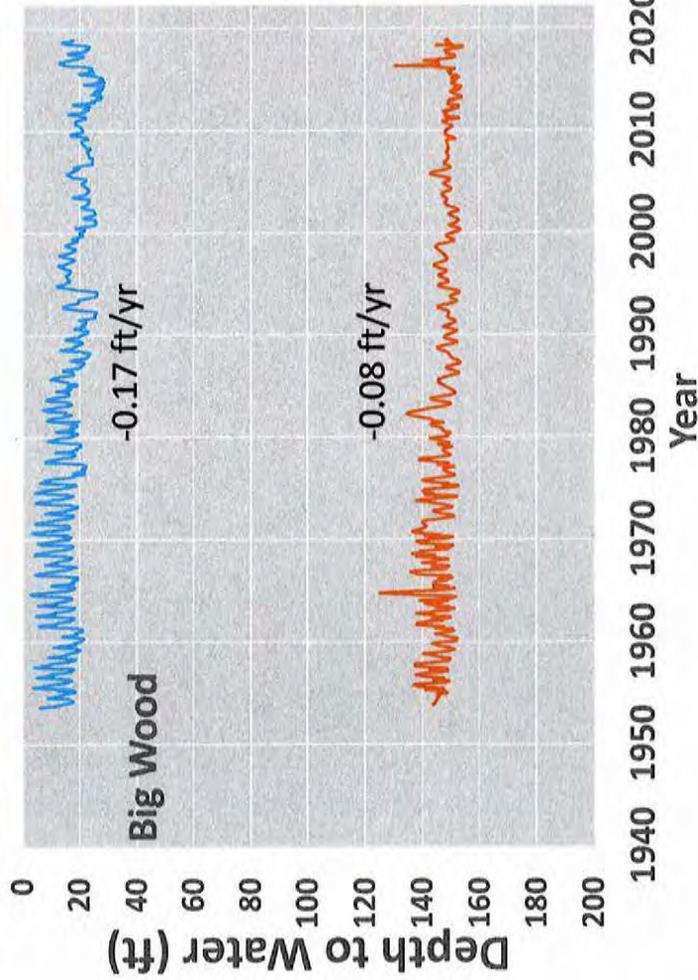
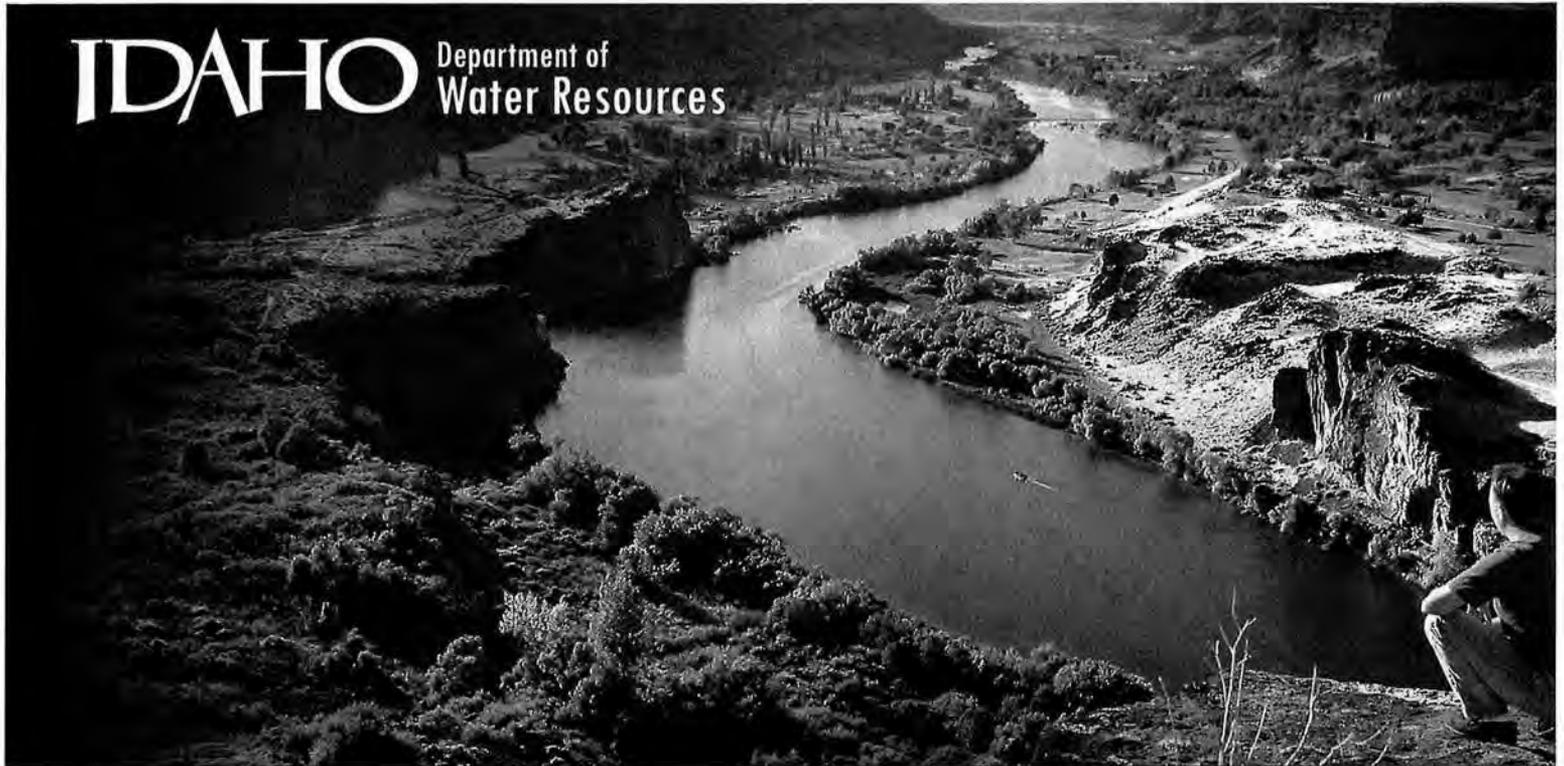


Exhibit B

IDAHO Department of
Water Resources



Idaho Conjunctive Management Rules & Ground Water District Formation

Pocatello, Idaho

March 7, 2014

Tim Luke, IDWR



Conjunctive Management of Surface and Ground Water Resources

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

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

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