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Idaho Supreme Court
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IN THE SUPREME COURT FOR THE STATE OF IDAHO

Supreme Court Docket No. 49632-2022

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT,

Petitioners-Respondents-Cross Appellants,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources,

Respondents-Appellants-Cross Respondents,

and

SUN VALLEY COMPANY, CITY OF BELLEVUE, BIG WOOD CANAL COMPANY, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, CITY OF POCATELLO, CITY OF KETCHUM, and CITY OF HAILEY,

Intervenors-Respondents.

IDWR APPELLANTS' BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, Case No. CV07-21-00243

Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

This case is about the authority of the Director of the Idaho Department of Water Resources to order in-season administration of closely interconnected surface and ground water rights during a deep and worsening drought. Anticipating unprecedented surface water shortage in the Wood River Valley in 2021, Gary Spackman, acting in his capacity as the Director of the Department, initiated an administrative proceeding under Idaho Code § 42-237a.g. Consistent with the statute's plain text, the proceeding aimed to determine whether water was "available to fill" junior ground water rights in the aquifer beneath the Bellevue Triangle, the primary source of water for Silver Creek and the Little Wood River. After a six-day hearing, the Director concluded water was not available to fill the junior rights because pumping from the aquifer was affecting the use of senior surface water rights in violation of Idaho's prior appropriation doctrine. Accordingly, the Director issued a *Final Order* curtailing the junior rights. The curtailment lasted eight days, ending when the Director approved a negotiated plan to mitigate the adverse effects of ground water pumping on the use of senior surface water rights.

Junior ground237 water appropriators associated as Respondents-Cross Appellants South Valley Ground Water District and Galena Ground Water District ("Districts") petitioned for judicial review of the *Final Order*. On review, the district court rejected the Districts' claim that the Director lacked authority under Idaho Code § 42-237a.g to initiate the administrative proceeding. The district court also rejected the Districts' argument that the administrative proceeding was subject to, and the Director's statutory authority limited by, the Department's Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11

("CM Rules"). However, the district court set aside and remanded the *Final Order*, deeming it contrary to the prior appropriation doctrine because the Director did not (a) formally designate an area of common ground water supply and (b) determine "material injury" to senior surface water rights according to standards in the CM Rules. The Director and Department bring this appeal because neither Idaho Code § 42-237a.g, nor Idaho's prior appropriation doctrine make such findings perquisites for in-season administration of interconnected surface and ground water rights. The Director complied with the prior appropriation doctrine by finding injury to surface water users under the statutory test for curtailment and faithfully applying the prior appropriation doctrine's longstanding presumptions, burdens, and evidentiary standards. This Court should reverse the district court and affirm the *Final Order*.

A. Factual Background

The *Final Order* includes extensive findings of fact. AR. 1884–1900.[1] The findings cover the "require[d] knowledge" for administering interconnected surface and ground water rights, including "relative priorities of the ground and surface water rights, 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 the water flows in that source and other sources." *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997), *accord Am. Falls Reservoir Dist. No. 2* ("*AFRD2*") *v. IDWR*, 143 Idaho 862,

[1] Throughout this brief, citations to the Clerk's Record on Appeal are denoted with "R." Citations to the separately paginated Agency Record (lodged in "CD 1") are denoted with "AR." Citations to the Reporter's Transcript on Appeal, which contains only the transcript of the district court oral argument, are denoted "Tr." Citations to transcripts from the underlying administrative proceeding before the Department (also lodged in "CD 1") are denoted "ATr."

877, 154 P.3d 433, 448 (2007). Specifically, the findings address the hydrology of the Wood River Basin, the history of water development and water rights in the basin, the Wood River Valley Groundwater Flow Model v.1.1 ("Model") used to predict the effects of ground water pumping and curtailment, the exceptional water supply challenges created by the 2021 drought, and injury to senior surface water rights on Silver Creek and the Little Wood River caused by ground water pumping in the Bellevue Triangle.[2] Below is a summary of the key findings. These findings show the Director properly applied the prior appropriation doctrine and made appropriate findings on injury to surface water users.

1. *Surface water rights diverting from Silver Creek and the Little Wood River are senior to ground water rights in the Bellevue Triangle.*

The earliest surface water rights in the Wood River Valley date back to the 1870s and 1880s. AR. 1885. These include water rights authorizing diversion and beneficial use from Silver Creek and the Little Wood River. *Id*. Most surface water rights on the Little Wood River and Silver Creek and its tributaries have priority dates earlier than 1925. AR. 2370–71. The most senior rights are located on Silver Creek and its tributaries. *Id.* These rights have priority dates of 1883 or earlier. *Id*.

The Water District 37 watermaster routinely curtails these surface rights in order of priority based on available surface water supply. *See* I.C. § 42-602. Before widespread ground water development, rights on Silver Creek and the Little Wood bearing 1884 priority dates

[2] The Bellevue Triangle is a portion of the Wood River Valley located south of Bellevue. "The vertices of the Triangle are roughly located at Bellevue on the north, Stanton Crossing (where Highway 20 crosses the Big Wood River) on the southwest, and Picabo, Idaho on the southeast." AR. 1884.

enjoyed full supplies or experienced only a few days of curtailment, even in dry years. AR. 2382–88. Since ground water development, however, rights with 1884 priority dates are deliverable in an average water year until mid to late July—about halfway through the April to October irrigation season. AR. 1886 (citing AR. 2373, 2376). Thus, 1884 priority rights have been curtailed "more frequently and longer" in the years since widespread ground water development. AR. 2384. This trend accelerated during the 2021 drought. The watermaster began curtailing 1880's-vintage surface rights in late May and predicted that early 1883 priority rights would be curtailed by the end of June for the remainder of the irrigation season. AR. 2989–91; ATr. vol. IV, 771–72.

Ground water rights in the Bellevue Triangle are junior to the surface rights that faced early curtailment in 2021. *Compare* AR. 2370 (cumulative Silver Creek and Little Wood River surface water diversion rates graphed by priority date) *with* 2104 (same for ground water rights). Ground water rights in the Bellevue Triangle began developing around 1930, and most have priority dates later than 1940. AR. 1893 (citing AR. 2104). The advent of modern drilling technology, rural electrification, and efficient pumps brought steadily increasing ground water development until the early 1990s. AR. 1886.

Starting in 1991, the Department completed a series of regulatory actions to address concerns about the impact of ground water diversions on both surface and ground water sources in the Wood River Basin. AR. 1886–88. In June 1991, former Director Keith Higginson issued an order designating the Big Wood River Ground Water Management Area, based in part on findings that "surface and ground waters of the Big Wood River drainage are interconnected"

and the "[d]iversion of ground water from wells can deplete surface water flow in streams and rivers." AR. 1886. Through this order, the Department stated it would not approve new applications for consumptive use unless there was a showing that the new use would not injure existing water rights. AR. 1887. Approvals of new applications for consumptive ground water use largely ceased after issuance of the order. *Id*. Since the 1991 order, a long-term declining trend in aquifer levels has stabilized, but recent low-water years have resulted in further declines. AR. 2093–98. Concerns about the impact of ground water pumping thus remain.

Aware of these concerns and its duty to manage interconnected surface and ground water rights conjunctively, the Department issued an order in September 2013 revising the boundaries of Water District 37. The order combined several water districts covering the Big Wood River, the lower Little Wood River, and Silver Creek into Water District 37. AR. 1887; *see also* AR. 2482–98 (2013 order). The order also added into Water District 37 all the ground water rights within its boundaries, placing both surface and ground water rights under the supervision of the watermaster. AR. 1887.

The effects of ground water pumping in Water District 37 also sparked clashes between senior surface water and junior ground water appropriators. Senior surface water users filed delivery calls under the CM Rules in 2015 and 2017, but both were dismissed on procedural grounds. *Id*. Before this case, ground water rights pumping from the Bellevue Triangle had never been curtailed on a priority basis. ATr. vol. IV, 764:10–16.

2. *The aquifer beneath the Bellevue Triangle is hydraulically interconnected with Silver Creek and the Little Wood River.*

It is undisputed that Silver Creek and the Little Wood River share a hydraulic connection with the shallow aquifer beneath the Bellevue Triangle. *See* AR. 1885. The aquifer feeds the network of springs that are the primary source of water for Silver Creek and its tributaries above the Sportsman Access gage near Picabo. AR. 1885, 1888. Except in high water events, Silver Creek sustains flows in the Little Wood River between the Silver Creek confluence and the Milner-Gooding Canal crossing in Shoshone. AR. 1885. Consequently, "[w]ater use within the Wood River Valley aquifer system affects Silver Creek reach gains from ground water, and thus affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek." AR. 1888 (citing AR. 2093).

Decades' worth of studies have identified, delineated, and, more recently, modeled this hydraulic connection. AR. 2124–25 (collecting references). These studies refined the Department's understanding of whether and how the area's various surface and ground water sources interact. *See* AR. 2094. Leveraging this knowledge, in 2016 a team of United States Geological Survey and Department staff published the first version of the Wood River Valley Groundwater-Flow Model. AR. 2105. Both the first version and Model version 1.1 employed in this case were developed through an open and transparent process that included 22 meetings with stakeholders on the Model Technical Advisory Committee. *Id.* The Model was developed with stakeholder input as a tool for water rights administration. AR. 2106. According to Alan Wylie, one of the Model developers:

> Although every groundwater model is a simplification of a complex hydrologic system, WRV Aquifer Model Version 1.1 is the best available tool for evaluating the interaction between groundwater and surface water in the Wood River Valley. The science underlying the production and calibration of the WRV Aquifer Model Version 1.1 reflects the best knowledge of the aquifer system available at this time. The WRV Aquifer Model Version 1.1 was calibrated to 1,314 aquifer water-level measurements and 1,026 river gain-and loss calculations. Calibration statistics indicate a good fit to the observed data, providing confidence that the updated model provides an acceptable representation of the hydrologic system in the Wood River Valley.

AR. 2106 (italics omitted). At the administrative hearing, the Districts' and Wood River Valley cities' expert witnesses agreed the Model was "the best" tool available for evaluating the effect of ground water pumping on flows in Silver Creek. ATr. vol. V, 1320:2–4; vol. IV, 1452:16–20.

3. *The 2021 irrigation season was an extreme drought that brought severe water scarcity for surface water users on Silver Creek and the Little Wood River.*

The Wood River Valley faced unprecedented drought and water scarcity in 2021. Heading into the irrigation season, snowpack and precipitation were exceptionally low while temperatures were unusually high. The April Surface Water Supply Index, or SWSI,[3] predicted inadequate water supply across Water District 37. AR. 1889 (citing AR 2089–91). This was the state of knowledge in early May when the Director issued the notice of the administrative proceeding. AR. 1. By June, when the hearing was held, the water supply picture was even bleaker. The SWSI for June through September was worse than any of the previous 30 years—a value of -4.0 on an index ranging from +4.1 (extremely wet) to -4.1 (extremely dry). AR. 1889

[3] SWSI "is a predictive indicator of surface water availability in a basin compared to historic supply." AR. 2089. "The SWSI for the Big Wood River above Hailey is a good predictor of the available supply for surface water users in the Wood River Valley as well as downstream users that don't have access to water from Magic Reservoir but instead divert water from Silver Creek or the Little Wood River." AR. 1889 (citing AR. 2090).

(citing ATr. vol. I, 48, 50; AR. 2190). Simply put, the 2021 water supply was predicted, and proved, to be among the worst in a record spanning over a century. AR. 2382–83.

The watermaster had not seen worse supply conditions in 18 years on the job. ATr. vol. IV, 766:11–13. Gages on Silver Creek and the Little Wood River recorded lower flows than comparable dates in any analogous year. *Id*. at 766:7–10. Surface water users whose senior surface rights almost always afforded them adequate supply for their crops had already experienced or were anticipating curtailment. AR. 1894–1900 (summarizing testimony). Despite their efforts to improve irrigation efficiencies and extend limited supplies, the surface water users faced the prospect of losing production and revenue or incurring extra costs to obtain supplemental water in a tight market. *Id*. One Silver Creek water user offered the stark example of watching a well "across the road" with "a water right 94 years junior" pump unabated while his 1886 and 1887 rights were curtailed in early June. ATr. vol. II, 395:3–9. Most of surface water users who testified believed that pumping in the Bellevue Triangle was reducing the supply of water available to their senior rights. AR. 1894–1900. Moreover, the watermaster and several surface water users testified that flows in the Little Wood River and Silver Creek respond to changes in ground water pumping in the Bellevue Triangle, with the response time ranging from a few days to two weeks. AR. 1891 (citing ATr. vol. II, 404; vol III. 493–94, 612–13; vol. IV, 785–87).

4. *Curtailing junior ground water rights in the Bellevue Triangle quickly yields useable water to senior surface water users.*

Model results corroborate the surface water users' observations. The results are summarized in the record in a memorandum prepared by Jennifer Sukow, one of the Model's developers. AR. 2092–2178. Specifically, Sukow compared results from two curtailment scenarios simulated with the Model, which predicted the benefits of curtailment would accrue to Silver Creek within days. AR. 2111 (first scenario benefits), 2115 (second scenario benefits). Both scenarios simulated the "impact of curtailing consumptive use of groundwater for agricultural, municipal, residential, commercial, and irrigation uses during the 2021 irrigation season." AR. 1890 (citing AR. 2108). The first scenario examined curtailment of all such rights within the whole Model boundary. The second examined curtailment of all such rights within a smaller area south of the Glendale Bridge roughly corresponding to the Bellevue Triangle. AR. 2110.

Sukow determined that curtailing rights within the smaller area south of the Glendale Bridge would provide senior surface water users with "99% of the predicted in-season benefit to Silver Creek" versus curtailing all ground water users within the Model boundary. AR. 2113. Nearly all the benefit predicted in the first scenario could be achieved by limiting curtailment to that smaller area south of the Glendale Bridge. The smaller curtailment area includes 70% of the consumptive ground water use within the Model boundary, meaning nearly identical benefits could be achieved by curtailing 30% less consumptive ground water use. AR. 2113–14. The smaller curtailment area also had the advantage of focusing the predicted benefits on Silver

Creek by excluding pumping that predominantly impacts flow in the Big Wood River or underflow to the Eastern Snake Plain Aquifer ("ESPA"). *Id*. Moreover, the Model predicted that the second curtailment scenario would yield substantial additional flow to Silver Creek *during the 2021 irrigation season*—22.7 cubic feet per second ("cfs") on average in July, 28 cfs in August, and 26.5 cfs in September. AR. 2116. Even if these values are discounted due to the Model's predictive uncertainty, they still amount to double-digit flow increases in the middle of the parched 2021 irrigation season. AR. 1904.

The additional flow would be available for beneficial use by surface water appropriators in priority. Numerous surface water users testified that curtailing ground water use would provide them additional water to use. AR. 1894–1900. For example, Fred Brossy testified that curtailing ground water pumping on July 1 would provide water in time to save his crops. AR. 1894 (citing ATr. vol. III, 467–71). Donald Taber likewise testified that he could beneficially use water generated from curtailment even if it was not available to him until August. AR. 1899 (citing ATr. vol. III, 697–98). And the watermaster explained that extra water generated by curtailment would be available for diversion by any surface water user on Silver Creek or the Little Wood whose priority remained "on"—not just the individuals who testified at the hearing. ATr. vol. IV, 898. Not only did the Model show that curtailment would quickly generate useable quantities of surface water, the testimony established seniors were ready and able to use it.

B. Course of Proceedings

As authorized by Idaho Code § 42-237a.g, the Director initiated the underlying administrative proceeding through a notice dated May 4, 2021. The notice was published in

several newspapers and mailed to all holders of surface and ground water rights included in Water District 37 and neighboring Water District 37B. AR. 1–43, 46–85, 212–13, 317, 457–58. The notice explained that drought was predicted for the 2021 irrigation season, water supplies in Silver Creek and its tributaries may be inadequate for surface water users, and the Model indicated that pumping from wells in the Bellevue Triangle would affect the use of senior surface rights on the Little Wood River and Silver Creek and its tributaries. AR. 1. The notice also stated that the proceeding would be used to "determine whether water is available to fill the ground water rights" in a "Potential Area of Curtailment" shown in the attached map. AR. 1, 43. Because this was the first time the Director had initiated an administrative proceeding under Idaho Code § 42-237a.g, numerous parties sought, and were allowed to, participate in the proceeding, including entities such as the Idaho Ground Water Users Appropriators, Inc. ("IGWA") that do not hold water rights in the Wood River Valley.

On May 11, the Director issued a request for staff memoranda pertaining to ten categories of factual and technical information potentially relevant to the proceeding. AR. 98–100. Staff submitted the responsive memoranda on May 17, and they were posted to the Department's website on May 18. AR. 1883. The staff memoranda included Sean Vincent's SWSI analysis (AR. 2089–91); Tim Luke's analysis of historical priority administration in Water District 37 and potential injury to surface water rights (AR. 2362–2402); and Jennifer Sukow's analysis of Wood River Valley hydrology and hydrogeology, ground water use, and Model results (AR. 2092–2178 (as corrected June 8, 2021)).

Prehearing motions were filed, including two motions to dismiss the proceeding, a motion to appoint an independent hearing officer, motions to continue or postpone the hearing, and a motion to authorize discovery. The Director granted the motion to authorize discovery but denied the other motions in orders dated May 21 and May 22. AR. 400–06, 407–14, 419–26, 436–52. The Director also denied the Districts' motion to designate as final the order denying their motion to dismiss. AR. 497–506. Following the prehearing conference on May 24, a six-day hearing was held June 7 through 12. A variety of lay and expert witnesses testified at the hearing, including the Department's subject matter experts who authored staff memoranda. Several parties filed post-hearing briefs. AR. 1487–1539, 1597–1648, 1806–26, 1833–81.

The Director issued the *Final Order* on June 28, 2021. AR. 1882–1932. Applying the curtailment test in Idaho Code § 42-237a.g, as well as longstanding prior appropriation doctrine presumptions, burdens, and evidentiary standards, the Director concluded that ground water pumping in the Bellevue Triangle was contrary to the doctrine that "first in time is first in right" and should therefore be curtailed. AR. 1900–11. Accordingly, the *Final Order* required curtailment of specified ground water rights from July 1 through the remainder of the irrigation season, unless the order was modified or rescinded. AR. 1919. The Districts submitted a proposed mitigation plan negotiated with surface water users on July 7. AR. 2001–08. The Director approved the mitigation plan and stayed curtailment on July 8. AR. 2029–35.

The Districts filed a petition for judicial review, and the case was reassigned to District Judge Eric J. Wildman. Following oral argument in January 2022, the district court issued its *Memorandum Decision and Order* on February 10, 2022. The district court (1) affirmed that the

Director had the authority to initiate the administrative proceeding under Idaho Code § 42-237a.g. (R. 681–84), (2) affirmed that the Department's CM Rules did not limit or supersede the Director's statutory authority in the proceeding (R. 685–86), but (3) determined the *Final Order* was not consistent with the prior appropriation doctrine because it did not (a) formally designate an "area of common ground water supply" and (b) "conjunctively administer to material injury" as defined in the CM Rules (R. 687–91). The district court also concluded that the *Final Order* prejudiced the Districts' substantial rights. R. 691. Thus, the district court affirmed in part and set aside and remanded in part the *Final Order*. This appeal followed.

II. ISSUES PRESENTED ON APPEAL

The Department presents the following issues for review in this appeal:

A. Whether the district court erred by concluding the *Final Order* is not consistent with the prior appropriation doctrine.

B. Whether the district court erred by concluding the prior appropriation doctrine mandates an area of common ground water supply when establishing such an area is discretionary under Idaho Code § 42-237a.g.

C. Whether the district court erred by concluding the prior appropriation doctrine requires a finding of "material injury" as defined in the CM Rules rather than findings under the statutory test for curtailment in Idaho Code § 42-237a.g.

D. Whether the district court erred in suggesting the Director based curtailment on "depletions to the source" when, in fact, the curtailment remedied injury to the use of senior water rights.

E. Whether the district court erred in concluding the *Final Order* prejudiced the substantial rights of junior ground water appropriators.

III. STANDARD OF REVIEW

The Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code, governs judicial review of the Director's final orders. I.C. § 42-1701A(4). The Administrative Procedure Act requires the reviewing court to affirm agency action unless the agency's

> findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the 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.

I.C. § 67-5279(3). On appeal, this Court reviews the agency record independently to determine if the district court correctly decided the issues presented to it. *Rangen, Inc. v. IDWR*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016).

The Court freely reviews questions of law. *Id*. However, the Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67–5279(1). The "agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 506, 284 P.3d 225, 231 (2012) (cleaned up). "Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Rangen*, 159 Idaho at 804, 367 P.3d at 199 (cleaned up).

IV. ARGUMENT

The district court erred by concluding that the *Final Order* is contrary to the prior appropriation doctrine. The *Final Order* not only includes all factual findings and legal conclusions necessary to satisfy the standard for curtailment in Idaho Code § 42-237a.g, it details how the curtailment fulfills the Director's duty to "distribute water in water districts in accordance with the prior appropriation doctrine." I.C. § 42-602. The district court nevertheless held the Director could not order curtailment in the middle of a deep drought unless he first formally established an area of common ground water supply. This was error because the designation of such areas is expressly discretionary under § 42-237a.g, no such mandate exists in this Court's precedent, and an area of common ground water supply is not necessary for administration in Water District 37. It also was error for the district court to set aside the *Final Order* for lack of findings under the CM Rules' "material injury" standard and the Director's alleged focus on "depletions to the source." The Director's well-supported findings establish injury to senior surface water *rights*, satisfying the statutory curtailment test and justifying the decision to curtail junior rights. This Court should reverse the district court and affirm the *Final Order*.

A. The *Final Order* is consistent with the prior appropriation doctrine.

The drafters of the Idaho Constitution "intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right." *AFRD2 v. IDWR*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). "Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water." *Id.* at 875, 153 P.3d at 446. This case

demonstrates that Idaho's Ground Water Act (Idaho Code §§ 42-226 et seq.) likewise promotes timely resolution of disputes over interconnected surface and ground water sources.

The Ground Water Act vests the Director with the "discretionary power" to "initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available." I.C. § 42-237a.g. Here, the Director used that power to provide in-season relief to senior appropriators, avoiding unnecessary delay in conjunctively administering a drought-limited water supply. The district court, however, concluded the Director did not comply with the prior appropriation doctrine. Sections IV.B and IV.C of this brief address the district court's specific reasons for setting aside the *Final Order*. This section first details how the *Final Order* met all of doctrine's requirements by applying the statutory test for curtailment and the longstanding burdens, presumptions, and evidentiary standards established by this Court's prior appropriation precedents.

As the 2021 drought began to manifest, the Director faced the question of whether water was "available to fill" ground water rights in the Bellevue Triangle. *Id*. Under Idaho Code § 42-237a.g, water is not "available to fill" a ground water right if using that right "would affect, contrary to the declared policy of [the Ground Water Act], the present or future use of any prior surface or ground water right." *Id*. This statutory test for curtailment thus has two elements: (1) whether well withdrawals authorized by ground water rights "would affect" the "present or future use" of any senior water right, and, if so, (2) whether that effect on a senior right is "contrary to the declared policy" of the Ground Water Act. I.C. § 42-237a.g. The first element

calls for analysis of how ground water withdrawals affect the use of interconnected senior water rights. The second element depends on whether the effect on senior rights is consistent with the Ground Water Act's declared policy: "beneficial use in reasonable amounts through appropriation" and "the doctrine of 'first in time is first in right.'" I.C. § 42-226. As detailed in the *Final Order*, substantial evidence in the record satisfies both statutory elements.

First, pumping under junior ground water rights in the Bellevue Triangle would—and does—adversely affect the use of senior surface water rights on Silver Creek and the Little Wood River. AR. 1884–1900. The aquifer underlying the Bellevue Triangle is the primary source of water for Silver Creek, which in turn sustains the flow of the Little Wood River. AR. 1885. The use of water from the aquifer, therefore, "affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek." AR. 1888 (citing AR. 2093). The Model predicted that curtailing pumping in the Bellevue Triangle will deliver "significant" additional flow to Silver Creek in a matter of days. AR. 2114, 2115. The watermaster and local water users corroborated this prediction. AR. 1891 (citing ATr. vol. II, 404; vol III. 493–94, 612–13; vol. IV, 785–87).

Moreover, the Director found that the severe shortage of water in 2021 probably would cause "significant economic injury" to multiple senior surface water users on Silver Creek and the Little Wood River. AR. 1894–1900. Further, the Director's findings on the physical and economic effects of ground water pumping in the Bellevue Triangle support his conclusion that allowing pumping to continue during the worsening 2021 drought would injuriously affect the use of senior rights. AR. 1903–04. The Director also determined that additional surface water

would defray the seniors' injuries. AR. 1907–11. These determinations are supported by substantial evidence and are therefore binding in this appeal. I.C. § 67-5279 (1).

Second, it is contrary to the declared policy of the Ground Water Act for 1880s-vintage surface rights to be curtailed early in the irrigation season while pumping under decades-junior rights continues unabated. AR. 1900–07. To determine the relevant policies, the Director looked to Idaho Code § 42-226, which affirms that Idaho's water resources are "to be devoted to beneficial use in reasonable amounts though appropriation" and recognizes that "first in time is first in right." AR. 1900–02. These "two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use"—derive from the Idaho Constitution. *In re Distrib. of Water to Various Water Rts. ex rel. A&B Irr. Dist.* ("*In re A&B*"), 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) (citing Idaho Const. Art. XV, 3). The record established that ground and surface water users alike were making beneficial use of reasonable amounts of water under valid appropriations. AR. 1902. The Director thus concluded there was no violation of the beneficial use policy. But there was an undeniable violation of "first in time is first in right"—ground water pumping under junior rights went on while connected senior surface rights were being shut off in May and June. AR. 1903–07. With both elements of the curtailment test satisfied, the Director was authorized to limit or prohibit the withdrawal of ground water from wells in the Bellevue Triangle.

Even so, the Director further considered whether curtailment was appropriate under the well-established presumptions, burdens, and evidentiary standards of Idaho's prior appropriation doctrine. AR. 1903–11, 1913, 1916. As the Director explained in the *Final Order*, it would have

been "contrary to Idaho law" to ignore these principles. AR. 1913. Water rights administration starts with the "presumption under Idaho law . . . that the senior is entitled to his decreed water right," which precludes the Director from "forc[ing] the senior to demonstrate an entitlement to water in the first place." *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. The Director determined that water users on Silver Creek and the Little Wood River were diverting water under valid, senior water rights and that ground water withdrawals under junior rights were adversely affecting the use of water under those senior rights, contrary to the "rule that 'first in time is first in right.'" AR. 1902–04. Much of the evidence supporting these findings was introduced by the senior surface water users, who therefore carried their minimal burden of supporting an initial determination of injury to their rights. AR. 1894–1900, 1903–04; *see also AFRD2*, 143 Idaho at 873, 154 P.3d at 444 (explaining it is permissible to require a senior to provide information that will "assist the Director in his fact-finding"). Injury to senior rights was not merely presumed but established by substantial evidence in the record.

Once an initial showing of injury to a senior right is made, junior appropriators have the burden of disproving injury or proving some other defense to curtailment. *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. This Court's precedents also emphasize that the evidentiary standard for the juniors' proof is exacting. A junior's defense must be proved with "clear and convincing evidence," meaning "evidence indicating that a thing to be proved is highly probable or reasonably certain." *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 516, 284 P.3d 225, 241 (2012) (cleaned up). The *Final Order* thoroughly applies these precedents to the ground water appropriators various defenses. AR. 1904–11.

For example, the *Final Order* explains the Districts failed to present clear and convincing evidence that their members' pumping does not injure senior surface water rights. AR. 1904–06. In addition, the *Final Order* includes a detailed analysis of the Districts' futile call defense. AR. 1907–10; *see also Sylte v. IDWR*, 165 Idaho 238, 245, 443 P.3d 252, 259 (2019) (describing the futile call doctrine). The Director concluded that curtailment of consumptive ground water pumping[4] in the Bellevue Triangle would not be futile because it "will help minimize surface water users' crop and revenue losses, by preventing curtailment of some surface water rights and allowing some surface water rights that have been curtailed to come back on sooner than would otherwise have been the case." AR. 1910. The Districts thus had the opportunity but failed to show by clear and convincing evidence that curtailment would not yield a sufficient quantity of water for at least some of the senior surface water users to apply to beneficial use. *Sylte*, 165 Idaho at 245, 443 P.3d at 259. The Director's nuanced analysis honors the evidentiary burdens and standards of proof this Court has long relied on to resolve competing claims to interconnected sources. *E.g.*, *A&B*, 153 Idaho at 518–20, 284 P.3d at 243–45 (collecting Idaho cases from 1904 to 1964).

The *Final Order* also honors the "beneficial use" policy declared in Idaho Code § 42-226, by limiting the geographic scope of curtailment to the Bellevue Triangle. *See IGWA v. IDWR*, 160 Idaho 119, 132, 369 P.3d 897, 910 (2016) (holding that limiting a curtailment area is

[4] Ground water rights for *de minimis* domestic and stock watering uses as defined in Idaho Code §§ 42-111 and -1401A(11), respectively, are not subject to administration in Water District 37. AR. 2494. Accordingly, such rights were excluded from the proceedings from the beginning (AR. 1), and were not curtailed under the *Final Order* (AR. 1919).

consistent with the "policy of beneficial use"). The *Final Order* compares Model results for two curtailment simulations—one encompassing the entire Model boundary and the second focused on the Bellevue Triangle. AR. 1890 (citing AR. 2108–16). Both simulations predicted that curtailment would yield significant quantities of water to Silver Creek during the 2021 irrigation season. But, relative to the first simulation, the second achieved 99% of the predicted in-season benefit to Silver Creek while curtailing 30% less consumptive ground water use. Thus, 30% of the consumptive ground water use within the Model boundary was not curtailed because, the Director found, "it has minimal impact on Silver Creek." *Id*.

The prior appropriation doctrine "contemplates a balance between the 'bedrock principles' of priority of right and beneficial use." *IGWA*, 160 Idaho at 132, 369 P.3d at 910 (quoting *In re A&B*, 155 Idaho at 650, 315 P.3d at 838). This case exemplifies how "very difficult" it is to strike that balance when water is scarce, and why it is necessary to preserve the Director's discretion to do so "subject to the limitations of Idaho law." *Id*. The Director, mindful of those limitations, concluded the balance in this case tipped toward protecting senior appropriators' first rights to a drought-limited supply.

B. An area of common ground water supply is a statutory option, not a mandatory prior appropriation requirement nor a practical necessity.

Despite the expressly discretionary language in § 42-237a.g, the district court held that the prior appropriation doctrine requires the Director to establish an "area of common ground water supply" before he may curtail ground water pumping. The district court stated that Idaho's prior appropriation doctrine is "set forth in this state's Constitution, statutes, and caselaw,"

implying this mandate comes from one or more of these authorities. R. 687. Yet it did not cite the Idaho Constitution, the governing statute, or any of this Court's decisions as the legal basis for its new-found mandate. The district court instead relied on the CM Rules, one of its own decisions in a delivery call under the CM Rules, and unfounded concerns about notice and "the proper order of curtailment." R. 688–90.

As a legal matter, the district court's analysis is incompatible with the text of § 42-237a.g and this Court's prior appropriation caselaw. In addition, the district court's reliance on the CM Rules and related cases cannot be squared with its well-reasoned holding that the CM Rules do not "limit or supersede" the Director's authority under the Ground Water Act. R. 685. As a factual matter, the district court overlooked or ignored the existence of Water District 37 and its significance for the notice and curtailment analysis in this proceeding. The district court erred by imposing a limitation on the Director's authority found nowhere in the governing law.

1. *Idaho Code § 42-237a.g makes the establishment of an area of common ground water supply discretionary.*

By holding that the prior appropriation doctrine mandates an area of common ground water supply, the district court failed to effectuate the Ground Water Act's plain language. Section 42-237a grants the Director the "sole discretion" to administer, enforce, and effectuate the policies of the Ground Water Act. Doubling down on this unambiguous grant of discretion, § 42-237a.g further emphasizes the Director's "discretionary power" to "initiate administrative proceedings." And the statute recognizes the Director may, not must, establish an area of common ground water supply if it will be of assistance:

> To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he *may establish* a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided.

I.C. § 42-237a.g. (emphasis added).

"When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'" *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). The other language in § 42-237a.g addressing areas of common ground water supply is equally permissive: "In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also *have the power to determine* what areas of the state have a common ground water supply . . . ." I.C. § 42-237a.g. (emphasis added). The statute does not require this determination; it unambiguously empowers the Director to make the determination "in his sole discretion." I.C. § 42-237a.

According to the Ground Water Act's express text and structure, areas of common ground water supply are discretionary. Yet the district court held, in essence, that a mandate emanating from the prior appropriation doctrine overrides the statute's plain language. This was error. Statutory interpretation "begins with the literal language of the statute" and "must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Melton v. Alt*, 163 Idaho 158, 162–63, 408 P.3d 913, 917–18 (2018) (cleaned up). The district court's conclusion that an area of common ground water supply is mandatory voids the statute's permissive language and usurps the "sole discretion" the Legislature granted the Director. I.C. § 42-237.a.

2. *Caselaw demonstrates that the prior appropriation doctrine does not require an area of common ground water supply as a prerequisite for curtailing ground water pumping.*

The district court did not cite any of this Court's precedents for the proposition that the "prior appropriation doctrine requires establishment of an area of common ground water supply." R. 688 (bold omitted). In fact, no decision of this Court supports that proposition. This Court's decisions do, however, demonstrate that an area of common ground water supply is not a prerequisite for prohibiting or limiting ground water pumping.

This Court first held the Ground Water Act authorized an injunction against ground water pumping in *State ex rel. Tappan v. Smith*, 92 Idaho 451, 458, 444 P.2d 412, 420 (1968). The injunction prohibited pumping from a well within a designated critical ground water area in the Raft River Basin. On appeal, the ground water pumpers challenged the factual and legal basis for the injunction. This Court noted there was conflicting evidence on whether pumping the well had a significant effect on the ground water supply of the basin as a whole. *Tappan*, 92 Idaho at 457–58, 444 P.2d at 418–19. But nothing in *Tappan* suggests that the establishment of an area of common ground water supply was a prerequisite for the injunction. Evidence of a "dangerous depletion of the underground water supply *in the area of the wells in question*" was sufficient to sustain the injunction under Idaho Code § 42-237a.g and other Ground Water Act provisions. *Id.* at 458, 444 P.2d at 419 (emphasis added).

Five years after *Tappan*, this Court again held the Ground Water Act authorized an injunction against pumping 20 irrigation wells in Cassia County. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). *Baker* addressed the statutory "prohibition of ground water

'mining,'" *id*. at 583, 513 P.2d at 635, which is one of two circumstances where "[w]ater in a well shall not be deemed available to fill a water right therein" under Idaho Code § 42-237a.g. Importantly, the ground water mining prohibition applied in *Baker* is codified in the same sentence as the prohibition at issue here—i.e., the prohibition against pumping that "would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right." I.C. § 42-237.a.g. The Ground Water Act authorizes the Director to "prohibit or limit the withdrawal of water from any well" if there is a violation of either prohibition. *Id*. Because of this shared subject matter, the two prohibitions are to be "taken together and construed as one system" to effectuate the legislative policy underlying the Ground Water Act. *Saint Alphonsus Reg'l Med. Ctr. v. Elmore Cnty.*, 158 Idaho 648, 653, 350 P.3d 1025, 1030 (2015) (cleaned up). It follows that the Director's discretion to limit or prohibit well withdrawals is subject to the same limitations in either circumstance when water is not available to fill a ground water right.

It is therefore significant that *Baker* does not hold that an area of common ground water supply is a perquisite for curtailing ground water pumping. Indeed, *Baker* charts the development of Idaho's prior appropriation doctrine in the ground water context from the Institutes of Justinian through enactment of the Ground Water Act and beyond, yet it does not mention, let alone mandate, an area of common ground water supply. This Court upheld the injunction because the seniors showed that the juniors violated the § 42-237a.g's ground water mining prohibition. *Baker*, 95 Idaho at 583–85, 513 P.2d 635–37. Thus, in any case where water is not

"available to fill" a ground water right under § 42-237a.g, pumping may be curtailed without first establishing an area of common ground water supply.

More recently, this Court has upheld the Director's discretion to determine curtailment areas in delivery calls by senior surface water users against juniors pumping ground water from the ESPA. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016). Both *Clear Springs* and *IGWA* were proceedings under the CM Rules, which, unlike § 42-237a.g, make an "area having a common ground water supply in an organized water district" a prerequisite for a delivery call. IDAPA 37.03.11.040; *see also* IDAPA 37.01.11.050.01 (rule establishing the ESPA area of common ground water supply). But neither case holds that the prior appropriation doctrine mandates such a procedure. Nor do they hold that curtailment must be coextensive with the established area of common ground water supply. Rather, both indicate the Director has the discretion to delineate the area of curtailment based on ground water model results.

For example, this Court upheld the Director's use of a "trim line" that limited curtailment to an area far smaller than the established ESPA area of common ground water supply. *IGWA*, 160 Idaho 119, 369 P.3d 897. Just like the curtailment area in the present case, the trim line in *IGWA* was based on ground water modeling that showed the "benefits of curtailment diminished significantly" beyond the line. *Id.* at 124, 369 P.2d at 902. While the district court ruled the Director had no choice but to order curtailment across the entire ESPA area of common ground water supply, this Court recognized the "Director had discretion to implement the trim line based on the policy of beneficial use." *Id*. at 129, 369 P.3d at 907. Further, the Director properly

exercised his discretion by relying on record evidence, including Department staff analysis of modeling results, that showed a "stark reduction in the benefit of the curtailment" beyond the trim line. *Id*. at 135, 369 P.3d at 913. Similarly, in *Clear Springs*, the Court held the Director did not abuse his discretion in applying a trim line to account for the margin of error in stream gages at issue in the delivery call. 150 Idaho at 816–17, 252 P.3d at 97–98. The reasoning and results in *Clear Springs* and *IGWA* undermine the district court's conclusion that "an area of common groundwater supply is a necessary pre-condition to conjunctive administration . . . under the prior appropriation doctrine." R. 690.

All these cases include in-depth analysis of Idaho's prior appropriation doctrine. Yet none hold that an area of common ground water supply is a mandatory prerequisite for curtailing junior ground water pumping. No such area was necessary to sustain the injunctions in *Tappan* and *Baker*. And, in *Clear Springs* and *IGWA*, the Court affirmed the Director's discretion to tailor the curtailment area based on case-specific ground water model analysis. The *IGWA* Court specifically rejected the district court's conclusion that the Director's curtailment had to be coextensive with the existing ESPA area of common ground water supply. These cases demonstrate that an area of common ground water supply is neither a prerequisite for curtailment under the prior appropriation doctrine, nor a limit on the Director's discretion to determine an appropriate curtailment area.

3. *Because Water District 37 administers the surface and ground water rights at issue, the lack of an area of common ground water supply did not, as the district court feared, prevent the Director from providing adequate notice or determining the proper order of curtailment.*

The district court broke from this Court's precedent and adopted a narrow view of the Director's discretion under the Ground Water Act. Although the district court stated it was applying the prior appropriation doctrine, the only authority it cited was *one* of its own decisions concerning the CM Rules. R. 688 (citing Mem. Decision & Order at 9–12, *Sun Valley Co. v. Spackman*, No. CV-WA-2015-14500 (Ada Cnty. Dist. Ct. Idaho Apr. 22, 2016)).[5] The dispositive analysis in that decision is confined to the CM Rules—the same rules that, the district court in this case held, do not "limit or supersede" the Director's authority under the Ground Water Act. R. 685. The district court cited no other supporting authority for its theory. The court instead declared the area must be established to assuage two generalized concerns: (1) notifying "the world of ground water right holders who are potentially subject to curtailment," and (2) ensuring "the proper order of curtailment of junior rights." R. 689. In the context of this case, these concerns are unfounded.

Regarding the first concern, Water District 37 encompasses every surface and ground water right at issue in this proceeding. Water districts exist to facilitate "the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho." I.C. § 42-604. To that end, the Ground Water Act provides, "whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams

[5] Available at: http://srba.state.id.us/Images/2016-04/0080044xx00103.pdf.

in an organized water district," the Director "shall also have the power to . . . incorporate such area in said water district." I.C. § 42-237a.g. The purpose of designating areas of common ground water supply under the Ground Water Act is to facilitate the incorporation of those areas into water districts.[6] *Id*. The Department accomplished that purpose years before this case began.

In 2013, the Department incorporated ground water rights, including those diverting from beneath the Bellevue Triangle, into Water District 37. AR. 2482–98. As noted in the *Final Order*, this combined "water districts for the Big Wood River, the Little Wood River, and Silver Creek" and added "ground water rights from the Upper Big Wood River Valley above Magic Reservoir and the Silver Creek drainage to" Water District 37. AR. 1887. Preceding this modification of the water district, the Department in 1991 created the Big Wood River Ground Water Management Area, in part because "surface and ground waters of the Big Wood River drainage are interconnected." AR. 2483. And, given that well-known interconnection, "proper conjunctive administration of surface and ground water rights and the protection of senior priority water rights" were key reasons for the decision to include ground water rights in the water district. AR. 2484. Designating an area of common ground water supply in this context would be superfluous and would hamper timely, in-season relief to injured seniors in cases like this one.

[6] The Act has a second purpose for such areas: The Director "may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided." I.C. § 42-237a.g. However, this Court has held this language is also discretionary. *A&B*, 153 Idaho at 511, 284 P.3d at 236. And in any event, the Districts conceded in the district court that this "proceeding was not initiated to establish a 'reasonable pumping level,'" R. 332, and the district court, appropriately, did not address the subject. *See also* Notice of Cross Appeal, S.C. Docket No. 49632-2022, at 3–4 (issues on cross-appeal do not include any alleged error regarding pumping levels under § 42-237a.g).

The district court feared inadequate notice to "the world of ground water right holders who are potentially subject to curtailment" but failed to recognize they are a subset of the holders governed by Water District 37. R. 689. As stated in the *Final Order*, the "Bellevue Triangle is within Water District 37 and the Big Wood Ground Water Management Area." AR. 1900. In fact, the Model boundary, the Potential Area of Curtailment identified in the Department's notice of the administrative proceeding, AR. 43, and the *Final Order*'s list of curtailed water rights (AR. 1924–30) are all *entirely* inside the larger boundary of Water District 37. *Compare* AR. 2110 (map of Model boundary and simulated curtailment areas), *with* AR. 2496 (map of Water District 37). Contrary to the district court's conclusion, the record *does* establish that the Department notified "*all* ground water rights which affect the flow of the subject surface water source, as required by the prior appropriation doctrine." R. 690. Those water rights are all included in Water District 37, AR. 2494, and notice of the proceeding was not limited to rights in the Potential Area of Curtailment. By notifying every water user governed by Water District 37, the Department necessarily notified the subset of those water users who were potentially subject to curtailment.

In fact, pre-hearing notice went well beyond Water District 37. The Department published notice in three area newspapers and sent individual notices to every holder of surface and ground water rights included in Water District 37, as well as neighboring Water District 37B. AR. 1–43, 46–85, 212–13, 317, 478–58. How the Department identified those individuals is no mystery. It was a straightforward ministerial act because the Department had previously done so in 2013 and, of course, maintains comprehensive water right records. *See* I.C. § 42-604

(requiring notice to be mailed to "each water user in the district or proposed district" before issuance of an order creating, modifying, or abolishing a water district). In the context of Water District 37, the lack of an area of common ground water supply did not prevent the Department from identifying, notifying, and affording an opportunity to be heard to all potentially affected water right holders.

The water district also resolves the district court's second concern—the proper order of curtailment. Adjudicated "priorities of appropriation" are a prerequisite for a water district. *Thompson Creek Mining Co. v. IDWR*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009) (citing I.C. § 42-604). The SRBA had decreed or was in the process of decreeing surface and ground water rights when the Department incorporated ground water rights into Water District 37. AR. 2489; *see also Eden v. State*, 164 Idaho 241, 244, 429 P.3d 129, 132 (2018) (explaining the SRBA *Final Unified Decree* "would allow for the creation of an accurate schedule of water rights to assure the proper delivery of water in times of shortage"). Rights appropriated after the SRBA are subject to the mandatory water right licensing regime administered by the Department and incorporated into the district. I.C. § 42-201(1), (7). The relative priorities of all the rights subject to administration in Water District 37 were thus matters of public record before the administrative proceeding began. *See, e.g.,* AR. 3150–6605 (officially noticed documents including reams of water right records). Because Water District 37 encompasses all the relevant water sources and because the rights diverting from those sources all have adjudicated or licensed priority dates, the Department knew and implemented the proper order of curtailment.

The record makes this clear. Tim Luke's staff memorandum disclosed the Department's knowledge of priority administration in Water District 37 before the administrative hearing. AR. 2362–2402. His memorandum describes priority-based surface water delivery practices and analyzes possible injury to senior rights. *Id*. The Department's knowledge of relative priorities also was integral to Jennifer Sukow's staff memorandum, which summarized the development of ground water in the Bellevue Triangle, the Model, and the Model-based curtailment analysis for this proceeding. AR. 2092–2178. Sukow's memorandum charts the growth in ground water development relative to water right priority dates, demonstrating the Department's knowledge of ground water right priorities in Water District 37. AR. 2103–05. The *Final Order*'s list of curtailed rights is likewise drawn from the Department's records of licensed or decreed ground water rights in Water District 37. *See* AR. 1924–30. Once the geographic scope of curtailment was determined through the Department's modeling and the Director's legal analysis of injury to senior rights, the Department's records of water rights within Water District 37 ensured that the order of curtailment was proper.

Significantly, the district court did not hold that notice was inadequate or that the order of curtailment was improper. But the court was concerned that the Director was administering water rights under an "undefined metric." R. 689. This ignores the legal standards the Director correctly recognized and applied in the *Final Order*. The Ground Water Act supplies the standard for curtailment in this case. Longstanding prior appropriation caselaw sets the presumptions, burdens, and evidentiary standards, which the Director adhered to despite objections from multiple parties. AR. 1913. Moreover, the Department's procedural rules and

multiple Idaho Code provisions governed the proceeding, allowing for extensive motion practice, pre-hearing discovery, questioning of lay and expert witnesses over a six-day hearing, as well as post-hearing briefing. AR. 2 (citing Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and IDAPA 37.01.01); *see also* AR. 400–06 (*Order Authorizing Discovery*), 436–52 (*Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement*), 1202–07 (*Order on Pre-Hearing Motions*). The *Final Order* is the product of deliberately applying all this substantive and procedural law—none of which mandates an area of common ground water supply.

4. *An area of common ground water supply was not necessary because the Director used the best available science for determining if water was available to fill ground water rights in the Bellevue Triangle.*

The scientific tools used in this case demonstrate that an area of common ground water supply also was not a practical necessity. The Director convened the administrative proceeding under § 42-237a.g to determine "whether water is available to fill the ground water rights" in a Potential Area of Curtailment "within the Wood River Valley south of Bellevue." AR. 1. The Director identified the Potential Area of Curtailment based on Model results that "show[ed] curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season." *Id*. The Model's predictions of ground water pumping impacts were front and center from the beginning of the proceeding. Considering that the statutory curtailment standard focuses on how ground water withdrawals "affect" prior rights, this only makes sense. I.C. § 42-237a.g.

This Court has long recognized that "[c]onjunctive administration 'requires knowledge by the IDWR of,'" among other factors, "'how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.'" *AFRD2*, 143 Idaho at 877, 154 P.3d at 448 (quoting *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)). Such impacts depend on physical phenomena that can be measured, calculated, and simulated with numerical models. *See generally* Gary S. Johnson, *Hydrologic Complications of Conjunctive Management*, 47 IDAHO L. REV. 205 (2011), *cited with approval in 3G AG LLC v. IDWR*, 170 Idaho 251, —, 509 P.3d 1180, 1191 (2022). The complexity and uncertainty associated with modeling these subsurface phenomena have not dissuaded this Court from upholding the Director's reliance on ground water models. *E.g.*, *Clear Springs*, 150 Idaho at 812–14, 252 P.3d at 93–95; *IGWA*, 160 Idaho at 134–36, 369 P.3d at 912–14. The Director is, after all, the "expert on the spot" with the "primary responsibility for proper distribution of the waters of the state" and "technical expertise to properly administer water rights." *In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) (cleaned up).

Here, the Director found that the Model "is the best available tool to evaluate the effects of ground water pumping on flows in Silver Creek." AR. 1889 (citing testimony from the Districts' and Wood River Valley cities' expert witnesses); *see also* AR. 1904–06 (concluding juniors failed to present clear and convincing evidence that the Model is not sufficiently accurate or reliable). Apparently unconvinced, the district court asserted it was "unknown how the 'potential area of curtailment' was derived, or whether it is consistent with an area of common

ground water supply for Silver Creek and/or the Little Wood River." R. 689. This assertion is contrary to the record—particularly, the staff memorandum and testimony of Jennifer Sukow. In fact, at oral argument the district court asked the Department's counsel how the Director determined the Potential Area of Curtailment, and counsel, aptly, pointed to Sukow as "the subject matter expert." Tr. 56:13–18; *see also* AR. 1904 (citing AR. 2113 and explaining the "modeled area of curtailment is based on the ground water hydrology of the Wood River basin").

Sukow's work supplied the Director with substantial—indeed, uncontradicted—evidence that "Silver Creek and its tributary spring creeks derive their waters *from the shallow aquifer underlying the Bellevue Triangle*." AR. 1885 (emphasis added). Critically, Sukow ruled out every other ground water supply: "Other aquifers within Basin 37, including the Camas prairie aquifer system and the Eastern Snake Plain Aquifer, *do not interact* with Silver Creek or the Little Wood River; therefore, water use within the other aquifers *does not affect* streamflow in Silver Creek or the Little Wood River below Silver Creek." AR. 2093 (emphasis added); *see also* AR. 2094 (map of regional aquifers and their interaction with surface water), 2124–36 (summarizing studies and data concerning surface-to-ground water interconnections in the Wood River Valley region). Substantial evidence in the record establishes the Wood River Valley Aquifer is the only ground water supply relevant to this proceeding.

That is why the Model boundary encompasses the Wood River Valley Aquifer system and excludes all other aquifers. *Compare* AR. 2110 (Model boundary) *with* AR. 2094 (regional aquifer locations). In addition, the modeling scenario that identified the Potential Area of Curtailment focused solely on pumping that primarily affects flows in Silver Creek, excluding

"areas where pumping primarily impacts underflow to the ESPA or the Big Wood River below the Dry Bed . . . ." AR. 2113. The absence of a hydraulic connection with any other aquifer also explains why the Potential Area of Curtailment in the pre-hearing notice and the *Final Order*'s list of curtailed rights both include only rights diverting from the Wood River Valley Aquifer. *See* AR. 2114. Sukow's work explains how the Model was used to examine whether water was available to wells that affect the flow of Silver Creek.

The Model and the extensive body of scientific data and literature supporting it gave the Director vital insight. It was the basis for determining how, when, where and to what extent the diversion and use of water from the Wood River Valley Aquifer impacts connected surface water flows. *See AFRD2*, 143 Idaho at 877, 154 P.3d at 448. That factual understanding—not the formality of an area of common ground water supply—is "require[d] knowledge" for conjunctive administration. *Id*. (cleaned up). The district court erred by demanding a designated area of common ground water supply when the record and *Final Order* demonstrate the Director had the requisite knowledge, appropriate process, and legal authority to proceed without one.

C. "Material injury," as defined in the CM Rules, is not the standard for curtailment in proceedings under Idaho Code § 42-237a.g.

The Ground Water Act does not require the Director to find material injury before he may prohibit or limit the withdrawal of water from wells. "Material injury," the district court noted, "is a term of art" in the CM Rules that "is not used or defined in Idaho Code § 42-237a.g." R. 690. But, instead of assessing the Director's actions under the governing statutory text, the district court interpreted dicta in *Clear Springs* to mean the Director's curtailment authority in

Idaho Code § 42-237a.g is "contingent upon a finding that the ground water withdrawal would cause 'material injury' to a senior water right." *Id*. This was error.

Section 42-237a.g plainly authorizes curtailment when withdrawals from a well "would affect, contrary to the declared policy of [the Ground Water Act], the present or future use of any prior surface or ground water right." "Material injury," as defined in the CM Rules, does not override or modify the Director's statutory authority, and *Clear Springs* does not hold otherwise. The Director's extensive findings on injury to senior water users were, considering the lack of clear and convincing evidence to the contrary, sufficient to meet the Ground Water Act's standard for curtailment. These findings also demonstrate that the Director did not, as the district court suggested, "base[] his curtailment on depletions to the source (i.e., Silver Creek and the Little Wood River) caused by ground water use." R. 691. As the *Final Order* states, the Director ordered curtailment "to protect senior surface water *rights* diverting from Silver Creek and the Little Wood River." AR. 1908 (emphasis added).

1. *Section 42-237a.g sets the standard for curtailment.*

"Material injury," as defined in the CM Rules, is not the statutory test for curtailment in Idaho Code § 42-237a.g. The statutory test, as noted in Part IV.A above, has two elements: (1) whether well withdrawals authorized by ground water rights "would affect" the "present or future use" of any senior water right, and, if so, (2) whether that effect on a senior right is "contrary to the declared policy" of the Ground Water Act. I.C. § 42-237a.g. According to the statute's plain terms, neither element requires an assessment of material injury. The first element instead requires the Director to examine how ground water withdrawals "affect" senior rights. *Id*.

And the second element depends on how the effects of withdrawals square with the "declared policy" of the Ground Water Act. *Id*. The *Final Order* correctly identifies and applies the standard for curtailment in statute. AR. 1900–11.

In contrast, the district court's material-injury requirement is unmoored from § 42-237a.g's plain text. The district court recognized as much, stating that "'[m]aterial injury' is a term of art" that is "defined in the CM Rules" but not "used or defined" in statute. R. 690. Yet, despite holding the "Director is not required to apply the CM Rules when conjunctively administering water rights under the Ground Water Act," R. 687, the district court deemed the *Final Order* "contrary to law" because it contained "no finding of material injury" or "analysis of the factors listed in CM Rule 42." R. 691. This is not only illogical, it also impermissibly rewrites the statutory test for curtailment. Idaho courts "cannot add by judicial interpretation words that are not found in the statute as written." *City of Huetter v. Keene*, 150 Idaho 13, 15, 244 P.3d 157, 159 (2010). Therefore, the district court was not empowered to reword the statutory test for curtailment.

2. *Clear Springs does not change the statutory curtailment standard.*

The district court nevertheless believed it was bound by a single sentence in this Court's *Clear Springs* decision. To be sure, this Court did reference "material injury" in the portion of *Clear Springs* rejecting the ground water users' contention that Idaho Code § 42-226 affords them "protect[ion] from delivery calls as long as they are maintaining reasonable pumping levels." 150 Idaho at 803–04, 252 P.3d at 84–85. To support that contention, the juniors cited § 42-237a.g., claiming it precludes curtailment so long as well withdrawals do not exceed the rate

of natural recharge. *Id*. Explaining that the juniors had "simply misread[] the statute," this Court quoted the relevant language and then summarized as follows: "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." *Id.* at 804, 252 P.3d at 85. The district court believed that lone sentence meant this Court "has directed [the Director] must administer to material injury"—regardless of whether the proceeding is under the CM Rules or the Ground Water Act. R. 690.

But that sentence should not be viewed as a binding construction of the Ground Water Act for three reasons. First, it is inconsistent with the plain text of § 42-237a.g. Second, it is dicta. And third, *Clear Springs* addressed a delivery call on the ESPA under the CM Rules and is thus distinguishable from this proceeding in the Wood River Valley under the Ground Water Act.

As noted above, the Ground Water Act's curtailment test is whether the use of ground water rights "would affect" senior rights and whether the effect is contrary to the Ground Water Act's "declared policy." I.C. § 42-237a.g. Just as there was "absolutely nothing in the statute" that supported the juniors' argument in *Clear Springs*, there is, as the district court acknowledged, nothing in the statute that refers to material injury. 150 Idaho at 804, 252 P.3d at 85. But the district court did not consider the statutory test for curtailment because it apparently believed *Clear Springs* authoritatively interpreted the statute. This Court can set the record straight by construing the statute "as written." *City of Huetter*, 150 Idaho at 15, 244 P.3d at 159.

The Court is free to do so because the statement about material injury was "not necessary to decide" any issue presented in *Clear Springs*. *State v. Hawkins*, 155 Idaho 69, 78, 305 P.3d 513, 518 (2013). The statement comes near the end of section B.1 of the opinion, which rejected the juniors' argument that a curtailment order violated the "full economic development" language in Idaho Code § 42-226. *Clear Springs*, 150 Idaho at 800–04, 252 P.3d at 81–85. Based on analysis of § 42-226's text, history, and related caselaw, the Court held the juniors' "argument misinterprets the statute." *Id*. at 801, 803, 252 P.3d at 82, 84. None of the arguments in *Clear Springs* raised the question presented here—whether "material injury" is a prerequisite to curtailing pumping under § 42-237a.g. Therefore, the *Clear Springs* Court's statement about material injury constitutes non-binding dicta.

The context of *Clear Springs* further undermines its applicability to this case. *Clear Springs* addressed a delivery call under the CM Rules. The Rules expressly require "a finding by the Director as provided in Rule 42 that material injury is occurring." IDAPA 37.03.11.040.01; *see also* IDAPA 37.03.11.042 (factors for "determining whether the holders of water rights are suffering material injury and using water efficiently and without waste"). The Rule 42 standard, however, applies in delivery call proceedings under the CM Rules only. IDAPA 37.03.11.001. Thus, the *Clear Springs* Court's statement about "material injury" is best understood as a reflection of the particular legal standard governing the case. In a CM Rules delivery call, it is accurate to say, "well water cannot be used to fill a ground water right if doing so would . . . cause material injury to any prior surface or ground water right." *Clear Springs*, 150 Idaho at 804, 252 P.3d at 85. But the CM Rules expressly state that they do not limit the Director's other

authorities, as the district court specifically recognized: "'Nothing in these rules limits the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.'" R. 686 (quoting language now codified at IDAPA 37.03.11.002). Caselaw involving the CM Rules must be read in light of that proviso.

In addition, it must be recognized that *Clear Springs* was a delivery call amongst water rights connected to the ESPA, a resource "about 170 miles long and 60 miles wide" that holds "roughly the amount of water contained in Lake Erie." *Clear Springs*, 150 Idaho at 793–94, 252 P.3d 74–75. "Although ground water in the ESPA is hydraulically connected to water in the spring tributaries, the impact of ground water pumping in the ESPA on discharge in the springs is *attenuated*." *IGWA v. IDWR*, 160 Idaho 119, 132, 369 P.3d 897, 910 (2016) (emphasis added). Consequently, conjunctive administration on the ESPA "involves a large disparity between the number of acres curtailed and the accrued benefit to a senior surface right." *Id*. at 132, 369 P.3d at 910. For example, the Rangen delivery call under the CM Rules resulted in "curtailment of 17,000 acres per cfs predicted to benefit Rangen." *Id*. at 135, 369 P.3d at 913. Given the size of the resource and potential scope of curtailment on the ESPA, the CM Rules' detailed procedures are critical, as "[i]t 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." *AFRD2*, 143 Idaho at 875, 154 P.3d at 446.

But what is critical in ESPA context may unnecessarily delay "timely resolution of disputes relating to water" in other settings. *Id*. Compared to rights connected to the ESPA, the connection between the Wood River Valley Aquifer system and the springs feeding Silver Creek

is far more immediate. On the ESPA, it can take *years* for the benefits of curtailment to be realized. *See, e.g., Clear Springs*, 150 Idaho at 811–12, 252 P.3d at 92–93. Here, by contrast, the Model results and water user testimony both established that curtailment of ground water pumping would yield significant, useable volumes of water for senior appropriators within *days*. AR. 1890–91. And with the pressing need for relief from the 2021 drought, it was not only feasible, but desirable, for the Director to use his discretionary power under the Ground Water Act to provide immediate relief to injured seniors.

The vivid distinctions between CM Rules proceedings on the ESPA and the exigencies of this case, justify limiting *Clear Springs* to its facts. The Court's statement about "material injury" is best read as a reflection of the "material injury" standard in the CM Rules—not, as the district court took it, an invitation to read that standard into the Ground Water Act. Accordingly, this Court should clarify that *Clear Springs* does not change the statutory curtailment standard. Consistent with its usual approach to statutory construction, the Court should recognize and apply the statutory test for curtailment as written in § 42-237a.g.

3. *The Director's findings on injury to senior water rights are supported by substantial evidence and satisfy the statutory curtailment standard.*

Following statute's lead, the Director expressly recognized the "central legal inquiry in this case is whether withdrawals of ground water from wells in the Bellevue Triangle 'would affect, contrary to the declared policy of [the Ground Water Act],' the present use of senior water rights diverting from Silver Creek and the Little Wood River, or their future use during the remainder of the 2021 irrigation season." AR. 1901 (quoting I.C. § 42-237a.g) (alteration in

original). The Director's injury analysis thus focused on how pumping affected senior *rights*, not, as the district court presumed, mere "depletions to the source . . . caused by ground water use." R. 691.

The *Final Order* synthesizes a variety of historical, technical, and testimonial evidence of injury to the use of senior surface water rights in Silver Creek and the Little Wood River. AR. 1891–1900. For example, a comparison of historical water right priority cuts showed that 1884-vintage surface water rights in Silver Creek and the Little Wood River "'were cut more frequently and longer'" after ground water development for irrigation in the Bellevue Triangle. AR. 1892 (quoting AR. 2384). Corroborating this analysis, surface water users on Silver Creek and the Little Wood River testified, one after another, about the early priority cuts and resulting water supply shortfalls they faced in 2021. AR. 1894–1900. They projected hundreds of thousands of dollars in lost revenue and added expense to secure supplemental water because they expected insufficient surface water to fill their senior rights during the parched 2021 growing season. *Id*.

In stark contrast, interconnected junior ground water rights had apparently never been curtailed before this proceeding. This resulted in the perverse situation described by one senior appropriator who watched "a well 'across the road' with a 'water right 94 years junior' to his . . . pump water when his rights are curtailed." AR. 1900 (quoting ATr. vol. II, 395:7–9). Such diminishment of water right priority "works an undeniable injury to that water right holder," *Jenkins v. IDWR*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982), because the "presumption under Idaho law is that the senior is entitled to his decreed water right . . . ." *AFRD2*, 143 Idaho

at 878, 154 P.3d at 449. An *undeniable* injury to a senior water right holder suffices for purposes of the Ground Water Act and the prior appropriation doctrine.

That said, "there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id*. "The prior appropriation doctrine sanctifies priority of right, but subject to limitations imposed by beneficial use." *IGWA*, 160 Idaho at 132, 369 P.3d at 910. Indeed, Idaho Code § 42-226 enshrines this consideration in the Ground Water Act's declared policy, requiring water to be "devoted to beneficial use in reasonable amounts through appropriation."

It is therefore significant that substantial evidence in the record shows all appropriators in the proceeding, both surface and ground water, were "'putting water to beneficial use in reasonable amounts through appropriation.'" AR. 1902 (quoting I.C. § 42-226). Equally significant is the Director's recognition that "the junior appropriator bears the burden of proving that curtailment would be futile, or otherwise challenging the injury determination," by clear and convincing evidence. AR. 1903. The juniors here simply failed to carry their burden. AR. 1903–11. In particular, the juniors failed to present clear and convincing evidence that their pumping was not adversely affecting the seniors' water supplies, that the Model was unreliable, or that curtailment would be futile. *Id*. Considering that the Model predicted curtailing pumping in the Bellevue Triangle would increase Silver Creek flows by 23 to 28 cfs in July, August, and September, the record painted a clear picture. AR. 1890 (citing AR. 2113–14).

Surface and ground water appropriators alike were beneficially using water under valid appropriations. Pumping within the Bellevue Triangle was nevertheless affecting the use of

senior rights in Silver Creek and the Little Wood River by intercepting a substantial amount of water that the seniors were entitled to divert in priority. Surface water users on Silver Creek and the Little Wood River were thus suffering undeniable injury to their decreed senior rights. According to the best available scientific tool, curtailment within the Bellevue Triangle would address that injury by providing the seniors useable quantities of water *during the irrigation season*. Unlike delivery call proceedings on the ESPA, this was not a case where "the impact of ground water pumping . . . on discharge in the springs is attenuated" or the "disparity between the number of acres curtailed and the accrued benefit to a senior right" is impermissible. *IGWA*, 160 Idaho at 132, 369 P.3d at 910; *see also* AR. 1909 (explaining "many fewer acres must be curtailed 'per cfs,' evening using [the Districts'] numbers" compared to the 17,000 acre per cfs ratio upheld in the Rangen delivery call). Rather, this case epitomizes when "[w]ater in a well shall not be deemed available to fill a right therein . . . ." I.C. § 42-237a.g.

The district court, however, disagreed based on a material injury standard this Court has never endorsed outside of delivery calls under the CM Rules. Parting from the statutory text and its own holding on the inapplicability of the CM Rules, the district court concluded the "process and the results under each should be substantially similar" regardless of whether the case is under the CM Rules or the Ground Water Act. R. 687. This is not a principle rooted in this Court's prior appropriation caselaw, let alone the governing statutory text. It is, in effect, a policy directive from the district court to the Director.

This Court, however, long ago "'realize[d] . . . that judges are not super engineers'" and has consistently preserved, within legal bounds, the Director's discretion. *In re SRBA*, 157 Idaho

385, 394, 336 P.3d 792, 801 (2014) (quoting *Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968)). Thus, in matters of water rights administration the law must be followed and the "[d]etails are left to the Director." *Id*. at 393, 336 P.3d at 800. The details of this case—particularly the pressing need for action occasioned by the worsening 2021 drought, the clear and close hydraulic connection between the rights at issue, and the Model results showing that curtailment would provide injured seniors relief *in-season*—demanded swift action.

The Director, in his discretion, employed the broad powers granted in the Ground Water Act and initiated the administrative proceeding early in the irrigation season. The record developed over the six-day hearing gave the Director a substantial factual basis for concluding that the statutory test for curtailment was satisfied. No law required him to address the material injury criteria in the CM Rules because, as the district court recognized, "the [Ground Water] Act provides him separate authority from that found in the CM Rules." R. 687. Because the Director made sufficient injury findings to the satisfy the prior appropriation doctrine, the district court's holding to the contrary is in error and must be reversed.

D. Curtailing junior water rights during an extreme drought is not prejudicial to junior appropriators' substantial rights.

Curtailment in the context of the 2021 drought and consistent with both the Ground Water Act and prior appropriation doctrine does not prejudice substantial rights within the meaning of Idaho Code § 67-5279(4). The district court, however, concluded that the *Final Order* prejudiced the Districts' substantial rights based solely on its erroneous analysis of the

prior appropriation doctrine. R. 691. The court's prior appropriation analysis must be reversed for the aforementioned reasons and so must its substantial rights analysis.

Water rights are real property. I.C. § 55-101. But a water right is a usufruct and does not "constitute ownership of the water." *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). Rather, "[a]ll waters within the state when flowing in their natural channels and all ground waters are property of the State." *Clear Springs*, 150 Idaho at 815, 252 P.3d at 96 (citing I.C. §§ 42-101, -226). The State has the "duty to supervise their appropriation and allotment to those diverting such waters for any beneficial purpose." *Id*. That supervision, as the Director recognized here, must accord with the prior appropriation doctrine. AR. 1900 (citing I.C. § 42-602). Indeed, the doctrine of "first in time is first in right" took root because individuals and governments alike "recognized that the that the only way the arid lands of the west could be settled and turned to agricultural use was to officially recognize the law of appropriation as the law of the land." *Clear Springs*, 150 Idaho at 815, 252 P.3d at 96 (cleaned up). Water rights, therefore, are intrinsically subject to regulation and may not be exercised regardless of others' rights. I.C. § 42-226.

That is true even for the ground water rights in the Bellevue Triangle, which despite their junior priority "apparently ha[d] never been curtailed" before this case. AR. 1904. Through the administrative proceeding, the Director determined that water was not available to fill those rights because they were being exercised contrary to the bedrock principle that "first in time is first in right." AR. 1903–07. The traditional remedy for out-of-priority diversions is curtailment *in-season* because, as the district court explained in another surface-and-ground water

controversy, "'[c]urtailing water rights the following irrigation season is too late.'" AR. 1907 (quoting Mem. Decision & Order at 10*, Rangen, Inc. v. IDWR*, No. CV-2014-2446 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014)).[7] The Director, cognizant of the deep and worsening drought, his duty to administer water, his authority to prohibit the withdrawal of water from any well under § 42-237a.g, and the best available science for evaluating the situation, appropriately exercised his discretion to protect senior rights. He did so in accordance with statute and the prior appropriation doctrine and, therefore, did not prejudice the juniors' substantial rights.

V. CONCLUSION

The *Final Order* faithfully applied the prior appropriation doctrine to closely interconnected ground and surface water rights during an extreme drought. The doctrine incorporated in the Ground Water Act and memorialized in this Court's decisions empowers the Director to protect senior rights when, not after, they need water. The district court's decision, in stark contrast, promises to dilute the Director's discretion and withhold needed relief, nullifying the Ground Water Act's plain grant of discretionary power to limit or prohibit the withdrawal of water from any well. That decision cannot be reconciled with the water distribution regime envisioned by Idaho's Founders, codified by its Legislature, and affirmed by this Court. This Court should reverse the district court and affirm the *Final Order*.

[7] Available at: http://srba.state.id.us/Images/2014-12/0080029xx00042.tif

DATED this 5th day of August 2022.

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