

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 49632-2022

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND
WATER DISTRICT
Petitioners-Respondents-Cross Appellants,

v.

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,

v.

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,

IGWA's Amicus Brief

Appeal from Twin Falls County case no. CV07-21-00243

Honorable Eric J. Wildman, District Judge, Presiding.

Attorneys for Petitioners-Respondents-Cross Appellants

Albert P. Barker, Travis L. Thompson, Sarah W. Higer, Barker Rosholt & Simpson LLP
Representing South Valley Ground Water District

James R. Laski, Heather E. O’Leary, Lawson Laski Clark, PLLC
Representing Galena Ground Water District

Attorneys for Respondents-Appellants-Cross Respondents

Garrick Baxter, Mark Cecchini-Beaver, Idaho Dept. of Water Resources, Boise, Idaho
Representing Idaho Department of Water Resources (IDWR)

Attorneys for Intervenors-Respondents

Chris M. Bromley, McHugh Bromley, PLLC
Representing Sun Valley Company

Candice McHugh, McHugh Bromley, PLLC
Representing the City of Bellevue and the Coalition of Cities

W. Kent Fletcher, Fletcher Law Office
Representing Big Wood Canal Company

Sarah Klahn, Somach Simmons & Dunn
Representing the City of Pocatello

Matthew Johnson, Brian O’Bannon, White Peterson
Representing the City of Ketchum

Michael P. Lawrence, Givens Pursley, LLP
Representing the City of Hailey

Joseph F. James, James Law Office, PLLC
Jerry R. Rigby, Chase Hendricks, Rigby, Andrus & Rigby Law, PLLC
Representing Big Wood & Little Wood Water Users Association

Attorneys for Amicus Curiae

Thomas J. Budge, Racine Olson, PLLP
Representing Idaho Ground Water Appropriators, Inc. (IGWA)

TABLE OF CONTENTS

IDAHO APPELLATE RULE 8(c) STATEMENT..... 5

INTRODUCTION 6

ARGUMENT 9

 A. The CM Rules are not an alternative to, but are rather an effectuation of, the Department’s powers under the Ground Water Act..... 9

 B. The district court misconstrued Idaho Code § 42-237a.g as authorizing the Department to curtail groundwater use in the absence of adverse claims to water. . 10

 1. The plain language of § 42-237a.g does not authorize the Department to curtail groundwater use in the absence of adverse claims to water..... 11

 2. The prior appropriation doctrine does not permit the Department to curtail groundwater use in the absence of adverse claims to water..... 11

 3. The district court relied upon a false dichotomy between Idaho Code § 42-237a.g and repealed §§ 42-237b-d. 12

CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

<i>Am. Falls Reservoir Dist. No. 2 v. IDWR</i> , 143 Idaho 862 (2007).....	6, 11
<i>Clear Springs Foods, Inc. v. Spackman</i> , 150 Idaho 790 (2011)	6
<i>IGWA v. IDWR</i> , 160 Idaho 119 (2016).....	6
<i>In the Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A&B Irr. Dist.</i> , 155 Idaho 640 (2013).....	6
<i>Musser v. Higginson</i> , 125 Idaho 392 (1994).....	7
<i>Rangen, Inc. v. IDWR</i> , 159 Idaho 798 (2016).....	6
<i>Rangen, Inc. v. IDWR</i> , 160 Idaho 251 (2016).....	6

Statutes

Idaho Code § 42-226.....	6
Idaho Code § 42-230.....	9
Idaho Code § 42-233a.....	6
Idaho Code § 42-233b.....	6, 9
Idaho Code § 42-234.....	9
Idaho Code § 42-237a.g.....	passim
Idaho Code § 42-237b-d	11, 12, 13
Idaho Code § 42-602.....	12
Idaho Code § 42-607.....	6

Regulations

CM Rule 0.....	9, 10
CM Rule 10.01.....	9
CM Rule 10.09.....	9
CM Rule 10.10.....	9
CM Rule 10.18.....	9
CM Rule 2.....	10
CM Rule 20.01.....	10, 13
CM Rule 20.06.....	9
CM Rule 20.08.....	9
CM Rule 30.06.....	9
CM Rule 30.07g-h.....	9

Constitutional Provisions

Idaho Const., Art. 15, § 3.....	11
---------------------------------	----

Idaho Ground Water Appropriators, Inc., (IGWA) submits this amicus brief pursuant to Rule 8 of the Idaho Appellate Rules and the *Amended Order Granting in Part and Denying in Part IGWA’s Verified Petition for Relief to Intervene or, in the Alternative, Appear as Amicus Curiae* entered June 23, 2022.

IDAHO APPELLATE RULE 8(c) STATEMENT

IGWA makes the following statement pursuant to Rule 8(c) of the Idaho Appellate Rules:

A. Filing authority

IGWA’s authority to file this brief derives from the *Amended Order Granting in Part and Denying in Part IGWA’s Verified Petition for Relief to Intervene or, in the Alternative, Appear as Amicus Curiae* issued by this Court on June 23, 2022.

B. Identity of Amicus Curiae

IGWA consists of nine ground water districts and one irrigation district¹ whose members collectively irrigate approximately one million acres of farmland on the Eastern Snake River Plain using groundwater diverted from the Eastern Snake Plain Aquifer.

C. Interests of Amicus Curiae

IGWA is interested in this appeal because it will set precedent that directly affects IGWA and its members. IGWA’s members have been the primary target of the Idaho Department of Water Resources’ (“IDWR” or “Department”) venture into conjunctive management of surface and ground water resources, and IGWA’s members have been and continue to be subject to curtailment orders issued by the Department under its Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”).²

¹ North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Southwest Irrigation District, American Falls-Aberdeen Area Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry’s Fork Ground Water District.

² IDAPA 37.03.11.

The Department developed the CM Rules in 1994 in response to a water right delivery call filed against ground water users who are now members of IGWA. IGWA and its members have since endured numerous delivery calls and extensive litigation over the proper interpretation and application of the CM Rules, including more than a dozen contested cases before the Department, several district court actions, and five appeals to this Court. *Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862 (2007); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011); *In the Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A&B Irr. Dist.*, 155 Idaho 640 (2013); *IGWA v. IDWR*, 160 Idaho 119 (2016); *Rangen, Inc. v. IDWR*, 159 Idaho 798 (2016); *Rangen, Inc. v. IDWR*, 160 Idaho 251 (2016). In fact, IGWA was involved in all of the cases that the district court relied upon to conclude in this case that the Department must establish an area of common ground water supply and evaluate material injury before curtailing junior-priority groundwater rights.

D. Authorship

IGWA's counsel authored this brief in whole.

E. Financial Contributions

IGWA paid all legal fees incurred to prepare this brief. No person or entity besides IGWA contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

Surface water and ground water exist in two very different hydrologic environments, and Idaho has adopted two different schemes for administering them. Surface water is administered under Idaho Code § 42-607 by opening and closing headgates and shepherding water among appropriators through defined channels (rivers, canals, ditches). Ground water is administered under Idaho Code §§ 42-226, 42-233a, 42-233b by managing diversions based on the elevation of the water table to maximize beneficial use of the resource. Water is distributed by priority under both schemes, but how that occurs differs greatly.

Until 1994, surface water and ground water were administered independently of each other. That changed when this Court's decision in *Musser v. Higginson*, 125 Idaho 392 (1994) directed the Department to administer them conjunctively. Of course, the disparate hydrologic environments in which surface and ground water exist had not changed, nor had the different laws governing surface and ground water. Attempting to meld them created a host of challenges and required developing an entirely new set of rules—the CM Rules. It was in many ways an exercise in joining a square peg with a round hole, and it left many questions unanswered. Consequently, water users spent a decade litigating over the proper interpretation and application of the CM Rules. Eventually, judicial guidance brought enough clarity to the CM Rules that senior and junior water users were able to resolve their differences through settlement agreements and mitigation plans approved under the CM Rules.

IGWA's members have dried up farmland, purchased fish farms, installed infrastructure, converted farmland from groundwater to surface water irrigation, developed groundwater recharge sites, implemented groundwater conservation programs, leased reservoir storage water, and taken other actions in reliance on, and in accordance with, the CM Rules. The cost of such actions is approaching \$100 million.

After all that, the Department has in this case thrown the CM Rules out the window, deciding they are merely optional when it comes to conjunctive management of surface and ground water resources. The Department claims that, as an alternative to the CM Rules, it has independent authority under the Ground Water Act (specifically, Idaho Code § 42-237a.g) to pursue conjunctive management, free from the procedural safeguards and legal precedent embodied in the CM Rules. This shocking assertion threatens to dismantle the established legal framework of conjunctive management and replace it with an undefined and untested surrogate. It places IGWA's members in the untenable position of having all they've worked for cast aside as the Department pursues conjunctive management on its own terms, untethered and untamed.

Fortunately, the district court pulled back the reins on the Department. The court held that the Department does have authority to undertake conjunctive management under the Ground Water Act independently of the CM Rules, but that in doing so the Department must honor the

procedural safeguards and judicial precedent embodied in the CM Rules. The Department has appealed this ruling, arguing that it should be free under the Ground Water Act to do as it pleases, without constraint. The Department's argument must be rejected.

While the district court ruling importantly requires the Department to honor judicial precedent, it mistakenly treats the Ground Water Act as an alternative to the CM Rules. By allowing the Department to operate outside the bounds of the CM Rules, water users are again left to question the rules of the game. For instance, does the Department have authority under the Act to curtail junior groundwater users who are not subject to curtailment under the CM Rules? Are mitigation plans allowed under the Act? Is the Department required, when undertaking conjunctive management under the Act, to honor mitigation plans approved under the CM Rules? What procedural and substantive parameters govern conjunctive management under Act, and how do they differ from the CM Rules?

The district court acknowledged that the CM Rules set forth extensive rules, definitions, and procedures for conjunctive management, while the Ground Water Act does not. (Clerk's R., pp. 687.) Nevertheless, the court concluded that conjunctive administration in either case "should be substantially similar." *Id.* This ruling begs the question: if there is no material difference between conjunctive management under the CM Rules versus the Act, is the Act truly an alternative to the CM Rules? As explained below, it is not. The CM Rules are not an alternative to, but are rather an effectuation of, the Department's powers under the Act. Simply put, the CM Rules implement the Department's powers under the Act.

IGWA agrees with South Valley Ground Water District and Galena Ground Water District that the Act does not allow the Department to operate outside the bounds of the CM Rules. The district court's treatment of the Act as an alternative to the CM Rules leads to an untenable result where conjunctive management under one set of laws (the CM Rules) may produce different results than another (the Act), and where water users are left to guess (or lobby for) which laws should apply in a given circumstance.

This Court should uphold the district court decision in part and reverse it in part. The Court should uphold the ruling that the Final Order does not comply with Idaho's prior appropriation

doctrine. The Court should reverse the ruling that the CM Rules are an alternative to the Act, and rule instead that the CM Rules are an effectuation of the Department's authority under the Act, and that the Department must comply with the CM Rules any time it undertakes conjunctive management. Such a ruling is both pragmatic and legally correct.

ARGUMENT

The district court's determination that the Ground Water Act provides an alternative process for conjunctive management, separate and apart from the CM Rules, is based upon mistaken interpretations of the CM Rules and the Act, as explained below.

A. The CM Rules are not an alternative to, but are rather an effectuation of, the Department's powers under the Ground Water Act.

The CM Rules were promulgated for the purpose of "implementing or effectuating the powers and duties of the department." (CM Rule 0.) Among those powers, the Ground Water Act authorizes the Department 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." Idaho Code § 42-237a.g. The CM Rules effectuate the Department's exercise of this power by prescribing rules, definitions, and procedures for determining when water is available to divert from a well under conjunctive management of surface and ground water resources.

The CM Rules explicitly integrate the Act. CM Rules 10.01, 10.09, 10.10, and 10.18 define terms that derive from the Act under Idaho Code §§ 42-230, 233b, 234, 237a.g. CM Rules 20.06 and 20.08 explain the policies governing conjunctive management and cite to sections of the Act (Idaho Code §§ 42-233b and 237a.g). And CM Rules 30.06 and 30.07g-h dictate how the Department will implement certain actions that are authorized by the Act (Idaho Code §§ 42-233b and 237a.g). Thus, the CM Rules are an effectuation of the Department's powers under the Act, not an alternative thereto.

Instead of treating the Act and the CM Rules as integrated, the district court decision treats them as alternatives. The court cited CM Rule 2 which states: "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," then concluded that "the CM Rules do not limit the Director's authority under the Ground Water Act." (Clerk's R., p. 686.) While it is true that the CM Rules do not limit the Department's legal authorities, that does not mean that the Act and the CM Rules provide alternative tools for conjunctive management. As explained above, CM Rule 0 makes it clear that the Rules were promulgated to be an effectuation of, not an alternative to, the Department's power to regulate groundwater diversions under the Act.

CM Rule 20.01 confirms that the CM Rules and the Act are not alternative tools for conjunctive management. It states: "These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights." (Emphasis added.) Since the CM Rules govern all conjunctive management situations, the Act cannot be treated as an alternative tool.

The district court decision contradicts CM Rule 20.01 by allowing the Department to pick and choose which conjunctive management situations will be governed by the CM Rules and which will be governed by the Act. This Court should reverse this ruling and hold instead that the CM Rules are an effectuation of the Department's powers under the Act, and that the Department must comply with the CM Rules any time it performs conjunctive management.

B. The district court misconstrued Idaho Code § 42-237a.g as authorizing the Department to curtail groundwater use in the absence of adverse claims to water.

The district court's rationale for treating the CM Rules and the Ground Water Act as alternative tools for conjunctive management is based partly on the court's conclusion that Idaho Code § 42-237a.g authorizes the Department to undertake conjunctive management "when no adverse claim is made by one water user against another." (Clerk's R., p. 683.) Since the CM Rules govern adverse claims to water, the court concluded that Idaho Code § 42-237a.g allows the Department to curtail groundwater use when no adverse claims exist. *Id.* This ruling should be reversed because it (a) is not supported by the plain language of § 42-237a.g, (b) contradicts

the prior appropriation doctrine, and (c) is predicated upon a false dichotomy between § 42-237a.g and repealed §§ 42-237b-d.

1. The plain language of § 42-237a.g does not authorize the Department to curtail groundwater use in the absence of adverse claims to water.

The express language of Idaho Code § 42-237a.g does not authorize the Department to curtail groundwater use in the absence of adverse claims to water. It states simply that the director of the Department may “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.” It is silent as to whether an adverse claim to water is not required for the director to curtail groundwater use. Thus, the district court’s conclusion that § 42-237a.g allows conjunctive management in the absence of adverse claims is not grounded in the plain language of the statute. It is grounded in mistaken interpretations of § 42-602 and the Act.

2. The prior appropriation doctrine does not permit the Department to curtail groundwater use in the absence of adverse claims to water.

The Idaho Constitution grants an affirmative right to appropriate water: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.” Idaho Const., Art. 15, § 3. This right is tempered, however, by the prior appropriation doctrine: “Priority of appropriation shall give the better right as between those using the water.” *Id.* Under the doctrine, vested water rights may be curtailed during times of water shortage in order to satisfy the water needs of senior-priority users. Inherent in the doctrine is the existence of adverse claims to water. If seniors do not need additional water to accomplish their beneficial use, the prior appropriation doctrine does not permit curtailment of juniors. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880 (2007) (“Concurrent with the right to use water in Idaho ‘first in time,’ is the obligation to put that water to beneficial use”).

The district court determined that Idaho Code § 42-237a.g empowers the Department to curtail juniors in the absence of adverse claims to water by analogizing it to Idaho Code § 42-602 which governs water distribution within water districts. The district court decision states that §

42-602 “does not limit the Director’s duty [to regulate water diversions] to circumstances involving adverse claims between water users within the district.” (Clerk’s R., p. 685, FN6.) This presumption is mistaken, however. Even in a water district, the prior appropriation doctrine does not permit the Department to curtail junior-priority diversions unless a senior user is short of water that is needed to accomplish their beneficial use—i.e. unless an adverse claim exists.

While water distribution within a water district may not be driven by the filing of adverse claim paperwork, the existence of adverse claims is at the heart of the process. The watermaster curtails junior diversions only to the extent required to meet the needs of seniors. For instance, if a senior has water rights to irrigate a hay field, and the hay has been cut but not yet baled, the watermaster does not deliver water to the senior, making that water available to juniors. Similarly, if a senior irrigates a grain field, and the grain is harvested at the end of July, the watermaster does not continue delivering water after the beneficial use has ceased, making that water available to juniors. The watermaster cannot curtail a junior if there is no adverse claim to water by a senior user.

Since curtailment within a water district implicitly requires adverse claims to water by senior users, analogizing § 42-237a.g to § 42-602 means that the Department’s authority to curtail groundwater diversions under § 42-237a.g likewise requires adverse claims to water. Implicit in the Department’s authority 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” is a prerequisite that water is needed by a senior-priority user to accomplish their beneficial use—that an adverse claim exists.

3. The district court relied upon a false dichotomy between Idaho Code § 42-237a.g and repealed §§ 42-237b-d.

The district court’s determination that Idaho Code § 42-237a.g authorizes the Department to curtail groundwater use in the absence of adverse claims to water was based partly upon a false dichotomy between § 42-237a.g and repealed §§ 42-237b-d. Sections 42-237b-d allowed water users to file a claim of injury with the Department if they believed their water supply was being adversely affected by junior-priority groundwater diversions. In response, the Department

could form a local groundwater board to resolve the claim. Since §§ 42-237b-d clearly involve adverse claims to water, the district court construed § 42-237a.g as an inverse process that allows curtailment “when no adverse claim is made by one water user against another.” (Clerk’s R., p. 683.) This dichotomy is mistaken.

The defining distinction between Idaho Code §§ 42-237b-d and § 42-237a.g is not that one process allows curtailment in response to adverse claims while the other does not; it is that one grants general authority to the Department to regulate groundwater diversions (§ 42-237a.g) while the other prescribes a specific process involving a local ground water board (§§ 42-237b-d). There is no dichotomous relationship.

When the Department developed the CM Rules, it did so under its general authority to regulate groundwater wells under § 42-237a.g. And since the CM Rules expressly apply to “all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights,” CM Rule 20.01, the local ground water board process under §§ 42-237b-d became obsolete. This is the reason why §§ 42-237b-d were repealed. By repealing those sections, the Legislature did not leave the Department with authority under § 42-237a.g to curtail groundwater use in the absence of adverse claims, it left the Department with authority to continue regulating groundwater use in response to adverse claims under the CM Rules.

CONCLUSION

For the foregoing reasons, IGWA respectfully requests that this Court (i) uphold the district court’s determination that the Final Order does not comply with Idaho’s prior appropriation doctrine, and (ii) reverse the district court’s determination that the CM Rules are an alternative to the Act, and rule instead that the CM Rules are an effectuation of the Department’s powers under the Act, and that the Department must comply with the CM Rules any time it undertakes conjunctive management.

RESPECTFULLY SUBMITTED this 23rd day of September, 2022.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorney for IGWA

CERTIFICATE OF SERVICE

I certify that on this 23rd day of September, 2022, the above document was served on the following persons through the iCourt system.


THOMAS J. BUDGE

IDAHO SUPREME COURT

Garrick L. Baxter
Mark Cecchini-Beaver
OFFICE OF THE IDAHO ATTORNEY GENERAL
Attorneys for the Idaho Department of Water Resources

Albert P. Barker
Travis L. Thompson
Sarah W. Higer
BARKER ROSHOLT & SIMPSON LLP
Attorneys for South Valley Ground Water District

James R. Laski
Heather E. O’Leary
LAWSON LASKI CLARK, PLLC
Attorneys for Galena Ground Water District

Chris M Bromley
McHUGH BROMLEY, PLCC
Attorney for Sun Valley Company

Candice McHugh
McHUGH BROMLEY, PLLC
Attorney for the City of Bellevue and the Coalition of Cities

W. Kent Fletcher
FLETCHER LAW OFFICE
Attorney for Big Wood Canal Company

Sarah Klahn
SOMACH SIMMONS & DUNN
Attorney for the City of Pocatello

Matthew Johnson
Brian O'Bannon
WHITE PETERSON
Attorneys for the City of Ketchum

Michael P. Lawrence
GIVENS PURSLEY, LLP
Attorney for the City of Hailey

Joseph F. James
JAMES LAW OFFICE, PLLC
Attorneys for Big Wood & Little Wood Water Users Association