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IN THE SUPREME COURT FOR THE STATE OF IDAHO

Supreme Court Docket No. 49632-2022

SOUTH VALLEY GROUNDWATER DISTRICT and GALENA GROUNDWATER 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.

SOUTH VALLEY GROUNDWATER DISTRICT AND GALENA GROUNDWATER DISTRICT RESPONDENTS' AND CROSS APPELLANTS' COMBINED 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

A. Nature of the Case.

The Idaho Department of Water Resources ("IDWR" or the "Department") and its Director, Gary Spackman ("Director"), appealed the district court's February 10, 2022 *Judgment*, R. 695,[1] and *Memorandum Decision and Order*, R. 678-96, which affirmed in part and reversed in part the Director's June 28, 2021 *Final Order*, AR. 1882, and June 29, 2021 *Final Order Denying Mitigation Plan*, AR. 1948.[2]

IDWR asks this Court to cast aside decades of history, precedent, and effort that went into creating rules for conjunctive administration of surface and groundwater rights. The Department drafted, and the Legislature approved, the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11, *et seq.*) ("CM Rules") because the agency insisted that it needed rules to implement conjunctive administration. *See e.g. Musser v. Higginson*, 125 Idaho 392, 393, 871 P.2d 809, 810 (1994) (IDWR argued the "proposed rules would allow the director to respond to the Musser's demands by providing for the conjunctive management of the aquifer and the Snake River").

IDWR promulgated the CM Rules because conjunctive administration of surface and groundwater rights is vastly more complex than traditional surface-to-surface water right administration. Consequently, the Department repeatedly advised water users that it would rely on the CM Rules to administer surface and groundwater rights together in Water District No. 37. Now the Director asks this Court's blessings to give the agency unlimited authority to decide

[1] This brief follows the conventions of the IDWR's brief and will denote the Clerk's Record on Appeal with an "R," the Agency Record with an "AR," the Reporter's Transcript on Appeal (containing the district court's oral argument) with a "Tr," and the transcripts from the administrative proceedings before the Department with an "ATr." Additionally, this brief will denote the administrative prehearing transcript as "PATr."

[2] Respondents here are South Valley Ground Water District and Galena Ground Water District who appealed the Director's Orders to the district court ("Districts" or "Respondents").

when to follow the CM Rules or not, or to simply conjunctively administer without any rules or defined procedures at all.

A constant drumbeat for strict priority administration has reverberated around Basin 37 for years from surface water users demanding junior groundwater use be curtailed to benefit their senior water rights. Substituting the well-established CM Rules for conjunctive administration, the Director exhumed a statute passed seventy years ago by pointing to a provision added in 1994 to address management outside water districts.[3] *See* I.C. § 42-237a.g.

IDWR asserts on appeal that the Director is free to ignore the CM Rules because a shortage of water was expected in the Little Wood River in 2021. But, that argument makes no sense. Water right administration between seniors and juniors is only necessary when there is a shortage. *See* I.C. § 42-607 (it shall be the duty of the watermaster to distribute water, under the direction of the department of water resources "during times of water scarcity, in order to supply the prior rights of others from such stream or water supply"). Casting aside the CM Rules whenever there is a water shortage, renders the rules a dead letter.

At the prehearing conference in this administrative hearing, the Director acknowledged that the CM Rules "are a guide, certainly a very important guide, in the establishment and putting on the burden of proof." PATr. 50:13-20. Nevertheless, the Director, as all parties and the district court agree, failed to follow the CM Rules. The Director curtailed, with immediate effect, over 300 groundwater rights that were providing irrigation water to approximately 23,000 acres in Blaine County. ATr. 139:12-16; 1163:16-20. This unprecedented, unilateral curtailment was based solely upon "strict priority" and "depletion to the source," without any finding of material injury as required by Idaho's prior appropriation doctrine. Further, without any opportunity for

[3] The Director has never before invoked this statute. R. 681 (section 42-237a.g "has not been previously used for such purposes").

hearing, the Director summarily rejected the Districts' proposed mitigation plan for those senior water users who may have benefited from the curtailment. Instead of evaluating and finding material injury, the Director required the Districts to mitigate for "depletion effects" to the source to avoid injury to water right holders who had not appeared at the hearing or had not put on any evidence of their water use needs. *See* AR. 1950. This finding was completely opposite of what the Department had repeatedly asserted: that under the prior appropriation doctrine, "depletion does not equate to material injury." *See e.g.*, *Amended Order* at 43, *SWC Delivery Call* (IDWR. May 2, 2005).[4]

On appeal from the Director's orders here, the district court held that the Director could rely on section 42-237a.g to initiate proceedings to conjunctively administer interconnected ground and surface water in time of shortage; and, that the CM Rules, did not preclude the Director from initiating a proceeding under the statute. *See* R. 681-86. However, the district court set aside the Director's orders because he failed to comply with Idaho's prior appropriation doctrine. R. 687. Specifically, his orders violated Idaho's prior appropriation doctrine because the Director had not established an area of common groundwater supply before conjunctively administering surface and ground water resources and because the Director had failed to find material injury to a senior water right. R. 688-91.

IDWR now claims that, even though they are key elements of the CM Rules, neither material injury nor an area of common groundwater supply are elements of the prior appropriation doctrine, and that its Director is free to ignore both concepts when conjunctively administering surface and groundwater under section 42-237a.g. That is the crux of IDWR's appeal.

[4] Relevant excerpts of the Director's 2005 *Amended Order* are provided *infra* at Addendum A.

B. Factual Background.

1. History of conjunctive administration in Basin 37.

The Department designated the Big Wood River Groundwater Management Area ("BWRGWMA") in 1991. AR. 2420-39. The primary concern was "potential injury to senior surface and groundwater rights." AR. 5989. At that time, IDWR did not develop or approve a ground water management plan. AR. 2430-39; *see also* I.C. § 42-233b. The Director also did not determine (and still has not determined): 1) an area of common ground water supply for this Ground Water Management Area; 2) the reasonably anticipated average rate of future natural recharge; or 3) a reasonable groundwater pumping level. *See* I.C. §§ 42-226, 42-237a.g.

Surface and ground water rights were decreed in Basin 37 between 2005 and 2010. In 2013, IDWR combined water districts in Basin 37 and added ground water rights to Water District 37. AR. 2482-98. When groundwater rights were incorporated into Water District 37, the Director made no determination of an area of common groundwater supply, even though section 42-237a.g authorized him to do so. The Department's 2013 order explained:

> Water rights not currently included in a water district whose sources of water have been adjudicated **must be placed in a water district** pursuant to Idaho Code § 42-604 **"to properly administer uses of the water resource."**
>
> The proposed combination of water districts and inclusion of surface water and ground water rights in one district **will provide for proper conjunctive administration of surface and ground water rights and the protection of senior priority water rights.**

AR. 2484 (emphasis added). The Department also determined:

> …Adversarial tensions between ground water and surface water users resulting from potential conjunctive administration of water rights should not negatively affect water district operations **given** the limited regulatory scope of the water district and **the fact that conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules** (CMR's) (IDAPA 37.03.11). . . Moreover, the CMRs have been implemented and mitigation has been successfully implemented within WD130 without disruption to the operations of

> the water district despite the fact both surface water and ground water rights are included in the district.

AR. 2491 (emphasis added).

Thus, groundwater rights were incorporated into Water District 37 based upon the Department's express representation that conjunctive administration would be handled pursuant to chapter 6, title 42 and the CM Rules. Not once did IDWR suggest that the Director would use section 42-237a.g to implement a "strict priority" version of administration separate and apart from the CM Rules.

2. The Department's public presentations.

Shortly after IDWR's 2013 order, AR. 2482-98, the Department addressed conjunctive administration and the formation of ground water districts at a public meeting in early 2014. Again, the Department explained that conjunctive administration would follow the CM Rules, with a senior filing petition, the Director determining "material injury," and a contested case that could be expected to last several months depending upon the circumstances and complexity. AR 162-165. IDWR never indicated that section 42-237a.g would be the vehicle for conjunctive administration within the district. Having responded to delivery calls throughout the ESPA, IDWR was aware of the process, complexity, and time needed to evaluate and process conjunctive administration in an orderly and fair manner, including providing juniors with the ability to file mitigation plans to address material injury and avoid curtailment.

3. Seniors' prior delivery calls in Water District 37.

On February 23, 2015, less than a year after IDWR's presentation, members of the Big Wood and Little Wood River Water Users Association ("Association")[5] submitted letters to the Director requesting priority administration. *See* AR. 2403-19. The Director created a contested

[5] This is the same Association that is an intervenor-respondent in this appeal.

case and processed the Association's delivery call under CM Rule 40. *Id*. The Director also requested detailed information and data from IDWR staff. Sun Valley Company objected to this process on due process grounds and moved to dismiss the case for failure to comply with CM Rule 30. *See id*. The Director denied the motion but certified that decision as final for purposes of judicial review. On appeal, *Sun Valley v. Spackman*, No. CV-WA-2015-14500 (Ada Cnty. Dist. Ct.), the district court set aside the Director's decision to use CM Rule 40 instead of CM Rule 30.[6]

In *Sun Valley v. Spackman*, the court held that the Director's decision to use CM Rule 40 violated the CM Rules and the substantial rights of the junior ground water right holders. The Department argued that since the groundwater rights were in a water district that it need not determine an area of common groundwater supply. AR. 2410. The court rejected that argument, found that the boundary of the district was not coextensive with the area of common groundwater supply, and further noted that the Director didn't even contend that was the case in Basin 37. *Id.* Since no "area of common ground water supply" had been determined, IDWR was required to process the delivery call under Rule 30. AR. 2408. The court also held that the determination of an "area of common ground water supply" had to be made pursuant to CM Rules 30 and 31 with proper notice and service to all potential junior priority ground water right holders that might be affected. AR. 2413-14.

Neither IDWR nor the Association appealed the district court's final judgment. Accordingly, IDWR remains bound by that decision today. On remand, the Director dismissed the contested case. Neither the Director nor the Association attempted to convert the proceeding to a Rule 30 contested case or determine an area of common groundwater supply.

[6] *See* AR 2403-18 (*Memorandum Decision and Order, Sun Valley v. Spackman*, No. CV-WA-2015-14500 (Ada Cnty. Dist. Ct. April 22, 2016)).

On March 6, 2017, the Association filed a second petition requesting priority administration.[7] South Valley Ground Water District filed a motion to dismiss that was joined by other parties. On June 7, 2017, the Director entered an order dismissing the petition on standing grounds.[8] The Director also concluded that CM Rules 30 and 42 require submittal of specific information unique to each senior surface water user, including water rights numbers, delivery systems, beneficial use, and alternate water supplies. The Association did not appeal.

Between 2017 and 2020, IDWR undertook no conjunctive administration within Water District 37. Even though the district court determined that establishing an "area of common ground water supply" was "the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water," AR. 2411, the Director did nothing to comply with that decision. As a result, there is no "area of common ground water supply" for Water District 37 today. *See* ATr. 317-38.

4. The Advisory Committee for the BWRGWMA.

In September 2020, the Districts submitted a draft ground water management plan for IDWR's consideration. The Director convened an advisory committee a month later to develop a groundwater management plan. AR. 5960, 6003. At the initial meeting, the surface water users provided a letter and draft agreement explaining that they expected any management plan would

[7] A copy the Association's *Petition for Administration*, No. DC-2017-001 (March 6, 2017) is publicly available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2017-001/CM-DC-2017-001-20170306-BWLW-WUAs-Petition-for-Administration.pdf.

[8] A copy of the *Order Dismissing Petition for Administration*, No. DC-2017-001 (IDWR June 7, 2017) is publicly available at: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2017-001/CM-DC-2017-001-20170607-Order-Dismissing-Petition-for-Administration.pdf.

focus on priority administration.[9] At the second meeting in November 2020, IDWR formally presented the difference between "water right administration" under the CM Rules and water management under a groundwater management plan. AR. 5963-6007. IDWR made no mention of section 42-237a.g as an alternative for conjunctive administration.[10] The committee met at least monthly into April 2021. AR. 5956-6477, 6540-83.

In January 2021, the senior water users presented alleged "injury" claims to the advisory committee. The Director attended this meeting and was advised of the seniors' claims of "injury." AR. 6272, 6275. At the March 3, 2021 meeting, IDWR reported that the seniors had made written demands for priority administration, claiming that junior groundwater rights should be curtailed to benefit senior surface water rights. AR. 6413. During January through April of 2021, prospects for the water year looked increasingly bleak. *See* R. 411-32.

The Director emailed staff in March advising that he was "thinking a lot about the possibility of initiating conjunctive water administration in the Wood River basin during the irrigation season of 2021. Megan Carter confirms I have the authority to initiate the administration under Idaho code section 42-237a.g." AR. 2335 (emphasis added). IDWR's modeler, Jennifer Sukow, responded to this email stating that she could generate simulated response functions but that "it would take about two weeks to set up and run" as "the Wood River model is more complex and has a higher computational demand than the ESPAM." AR. 2334 (emphasis added). Ms. Sukow explained that the Wood River model had approximately 59,000 individual cells compared to about 11,000 for the entire Eastern Snake Plain Model. AR.

[9] A copy of the *Proposal For Elements Of Big Wood Ground Water Management Plan Big Wood Little Wood Water Users Association And Big Wood Canal Company* is publicly available at https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/big-wood-gwma-advisory-comm/BWLWWUA_BWCC_ProposedPlanElements_102921.pdf.

[10] IDWR explained at the hearing section 237a.g. was not mentioned was because the Department had not even thought of using it at that time. ATr. 345:7-16.

2334. Thus, IDWR began working on modeling and technical analysis in March, but the Department did not disclose that fact to anyone for nearly two months, until information was posted on the Department's website on May 18 and 20, 2021—just two and a half weeks before the hearing was to begin on June 7. *See* ATr. 173-74.

While IDWR undertook these technical tasks behind closed doors, the advisory committee met again in mid-April. At that meeting, the senior water users reiterated their claims of injury and updated their "projected 2021 shortfalls." AR. 6580. The Director was present at this April meeting and again heard the seniors' injury claims. *Id.* The meeting continued with a management proposal from the Districts and concluded with the Director stating that "the groundwater-flow model of the Wood River Valley Aquifer system will likely show that the impact of groundwater pumping on surface water flows varies by location, with some pumpers impacting surface flows more than others." AR. 6581. Two days later, the seniors rejected the Districts' proposal.

C. Course of proceedings.

On May 4, 2021, approximately three weeks after the start of the irrigation season, the Director issued a notice of an administrative proceeding and hearing. AR.1 ("Notice"). The contested case was called to address the 2021 irrigation season impacts to Silver Creek; nothing more. *Id.* The Notice identified a pre-selected area of potential curtailment in the Bellevue Triangle of the Big Wood basin. *Id.* This curtailment zone did not correspond to the Ground Water Management Area, the boundary of Water District 37, or the Big Wood Groundwater Model. Only ten senior surface water users petitioned to participate in the contested case. *See generally* AR. 333-69. The Director denied motions to dismiss or continue the case, to appoint an independent hearing officer, and to certify those orders as final. AR. 427-46, 497-500.

The Districts sought immediate relief from the district court. *See* R. 11-39. On May 27, 2021, the district court issued an *Order Denying Application for Temporary Restraining Order* explaining that until "such a determination is made and/or curtailment ordered, any injury, loss or damage to the Petitioners is speculative." R. 67.

After limited discovery the Director presided over an administrative hearing from June 7-12, 2021. The Director received exhibits and testimony into evidence and the parties submitted post-hearing briefing. *See generally,* AR. 1487-1539; 1548-59; 1597-1648; 1800-26; 1833-81; 2086-3148. The Districts also filed a proposed mitigation plan on June 24, 2021. AR. 1649-1799.

The Director issued a *Final Order* on June 28, 2021, ordering curtailment of all groundwater rights in the pre-determined area of the Bellevue triangle, beginning July 1, 2021. AR. 1882-1932. On June 29, 2021, the Districts filed a petition to stay curtailment and requested an expedited hearing on their previously filed mitigation plan. AR. 1934-47. The Director summarily denied the stay and mitigation plan that same day, without any due process.

The Districts again requested injunctive relief from the district court. *See* R. 130-78. After a hearing, the court issued its *Order Denying Second Application for Temporary Restraining Order et. al*. R. 220-28. The court found the Petitioners had not met the standard for a preliminary injunction, but observed the case involves both "complex issues of law" and "complex issues of fact… that are not free from doubt." R. 223, 225. The Director sent a letter to Governor Brad Little and Speaker Scott Bedke on July 3, 2021 stating that, unless a "mutually acceptable" groundwater management plan was submitted to him by December 1, 2021, he would "immediately schedule a hearing for the Basin 37 Proceeding that is currently pending. . . to determine the actions the Director should take to ensure that the groundwater diversions in the Wood River Basin do not negatively affect the present or future use of any prior surface or

ground right."[11] AR. 2000.

The Parties then negotiated an amended mitigation plan and filed it with the Director on July 7, 2021. AR. 2001-08. The Director approved the plan for the remainder of the season on July 8, 2021. AR. 2009-27.[12] Meanwhile, groundwater rights were curtailed by IDWR on July 1, 2021, during one of the hottest and driest weeks of summer.

The Districts appealed the Directors' orders. R. 11-29, 135-54. The district court affirmed the Director's order in part, reversed in part, and vacated the curtailment order. R. 678-92. On March 24, 2022, the Department filed its *Notice of Appeal*. R. 698-704. The Districts filed their *Notice of Cross-Appeal* on April 14, 2022. R. 726-30.

II. ADDITIONAL ISSUES PRESENTED ON CROSS APPEAL

1. Whether the district court erred in finding the Director was authorized to pursue conjunctive administration of water rights in Water District 37 under section 42-237a.g and outside of chapter 6, title 42 and the CM Rules, particularly when the water rights are all in a common, established water district;
2. Whether the district court and the Director erred in concluding that the senior surface water users had not made a delivery call under the Department's CM Rules;
3. Whether the district court erred in not finding the Director violated the Districts' right to due process by, *inter alia*, denying the mitigation plan without an opportunity for a hearing and ignoring the CM Rules;
4. Whether the district court erred by holding that Idaho Code § 42-237b, *et seq.* did not apply when those procedures were in effect at the time of the hearing; and,

[11] The Director issued this ultimatum even though the "pending" Basin 37 proceedings had only been called for the 2021 irrigation season.

[12] The Director issued an order approving an amendment to the mitigation plan on August 15, 2021. AR. 2036-38.

5. Whether the Districts are entitled to an award of reasonable attorneys' fees and costs pursuant to Idaho Code § 12-117.

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 reviewing court shall affirm the 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). 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). This Court may affirm the district court on a different legal theory. *Edged in Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 181, 321 P.3d 726, 731 (2014).

The Court freely reviews questions of law. *Rangen*, 159 Idaho at 804, 367 P.2d at 199. 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 v. IDWR*, 153 Idaho 500, 506. 284 P.3d 225, 231 (2012). "Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Rangen*, 159 Idaho at 804, 367 P.2d at 199 (cleaned up); *see also N. Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 523-24, 376 P.3d 722, 727-28 (2016) (affirming the district court's finding that substantial evidence did not support the Director's denial of a water permit application).

IV. ARGUMENT

A. Administration to material injury and establishment of an area of common ground water for conjunctive administration are elements of the prior appropriation doctrine.

Idaho's prior appropriation doctrine developed through the mid-to-late nineteenth century under the exigencies of mining in the arid, desert west. *See* Paul R. Harrington, *The Establishment of Prior Appropriation in Idaho*, 49 Idaho L. Rev. 23 (2012). Early on, Idaho's prior appropriation doctrine departed from common law, recognizing the need to use water on non-riparian land, developing a system for the acquisition and recording of water rights, and acknowledging the principle of forfeiture of a water right due to non-use. *Id.* at 26-28.

In 1881, Idaho's territorial legislature adopted a law (the "1881 Act") that diverged from the riparian doctrine and recognized local principles developed in the preceding decades. *See* 1881 Idaho Terr. Sess. Laws 267. The 1881 Act codified the prior appropriation doctrine, including "first in time is first in right." *Id.* at § 1. The doctrine was embraced by the territorial Supreme Court and eventually enshrined in the state's constitution. *See Malad Valley Irr. Co. v. Campbell*, 2 Idaho 378, 18 P. 52, 53 (1888); Idaho Const., Art XV, § 3; *see also*, *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909); I.C. § 42-106.

The prior appropriation doctrine is comprised of two core principles, "that the first appropriator in time is the first in right and that water must be placed to a beneficial use." *A&B v. Spackman*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013); *see also*, *Washington State Sugar v. Goodrich*, 27 Idaho 26, 147 P. 1073, 1079 (1915); *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912). IDWR itself has previously stated that priority of right "is not the only fundamental or important principle," equally fundamental are the principles that "a water right is limited to the reasonable and efficient diversion and use of water for beneficial purposes, without

waste." *Defendants' Memo in Response to Motion for Summ. Judg.* at 8, *AFRD#2*, No. CV-2005-600 (Gooding Cnty. Dist. Ct. Dec. 6, 2005).[13] IDWR further represented to this Court that "[r]ote, priority administration to decreed diversion rates is not the law in Idaho: 'Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.'" R. 669 (*IDWR Resp. Br. on Appeal* at 24, *A&B v. IDWR*, No. 38191-2010 (Idaho S. Ct., Sept. 22, 2011)).

In addition to "first in time, first in right" and "beneficial use," the doctrine is comprised of rights and obligations of the appropriator, including: water appropriation procedures; priority date; point and means of diversion; period of use; place of use; conveyance loss; duty to not waste water; economical and reasonable use; the sale, transfer, or rental of water rights; and, the administration and distribution of water rights. *See* Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 37-57, 90 (1968).

In *AFRD#2 v. IDWR*, this Court held that the CM Rules incorporate concepts of the prior appropriation doctrine such as: "material injury; reasonableness of the senior water right diversion; whether a senior right can be satisfied using alternate points and/or means of diversion; full economic development; compelling a surface user to convert his point of diversion to a ground water source; and reasonableness of use." 143 Idaho 862, 869-70, 154 P.3d 433, 440-41 (2006) (emphasis added). "The [CM] Rules recognize well-respected principles of water law developed . . . over the past one hundred years plus to secure the maximum benefit

[13] Relevant excerpts of the Department's 2005 *AFRD#2* summary judgment response memorandum are provided *infra* at Addendum B.

from the state's scarce water resources."[14] Addendum B at 6.

These concepts dovetail with other express policies set forth in the constitution and the Ground Water Act. *See* Idaho Const. Art XV, § 7; I.C. § 42-226; *see also, Baker v. Ore-Idaho Foods, Inc.*, 96 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7"); *Parker v. Wallentine,* 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) ("[I]t is clearly state policy that water be put to its maximum use and benefit . . . That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution"); *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 443, 319 P2d 965, 969 (1957).

1. The district court properly held that the prior appropriation doctrine requires administration to material injury.

The district court determined that whether the Director conjunctively administers water rights under the Ground Water Act or the CM Rules, "the prior appropriation doctrine provides the parameters through which conjunctive administration must occur." R. 687 (*citing* Idaho Const., Art XV, § 3; I.C. § 42-106). Because the prior appropriation doctrine includes the principles of injury to water rights and reasonable beneficial use, material injury is a critical component of Idaho law that cannot be disregarded by the Director. IDWR asks this Court to believe there are two different "injury" standards, one under the Ground Water Act, and one under the CM Rules. *See generally IDWR Appellants' Brief* ("*App. Br.*") at 15-21, 36-42. Not so, as explained below.

[14] Idaho Code § 42-602 states that "The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." Because the Director is mandated to "distribute water . . . in accordance with the prior appropriation doctrine," every facet of the doctrine must be considered during conjunctive administration, not just "priority only" as IDWR suggests here.

i. CM Rule 42 articulates factors for determining injury and reasonable use of water historically extant in the prior appropriation doctrine.

Injury to a water right is an important element of the prior appropriation doctrine. But injury is not an abstract notion. *In re Johnson,* 50 Idaho 573, 300 P. 492, 494 (1931) ("The term 'injured'. . . applies to injury to the water right of another"). Injury to other water rights must be substantial, that is, "not merely a fanciful injury but a real and actual injury." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7, 154 P.2d 507, 513 (1944).

In addition to beneficial use, economy and reasonable use of water are required of the appropriator, "[e]conomy must be required and demanded in the use and application of water." *Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 535, 102 P. 481 (1909). Reasonable use of water is a question of fact. *Beasley v. Engstrom,* 31 Idaho 14, 168 P. 1145 (1917); *Graham v. Leek,* 65 Idaho 279, 144 P.2d 475, 485 (1943). This means any injury determination must take these factors into account.

That is why the CM Rules define material injury as a "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." IDAPA 37.03.11.10.14 (emphasis added). CM Rule 42 provides a list of factors to determine whether a senior water right is injured and whether the senior is using water "efficiently and without waste." IDAPA 37.03.11.42. The factors "incorporate" essential components of the priority doctrine, including *inter alia*: the amount of water available from the source; effort and expense of diverting water; whether the exercise of junior rights "affects" the quantity and timing of water availability; comparison of rate of diversion and acres irrigated; amount of water being diverted; and, the existence of measuring devices. *See* IDAPA 37.03.11.42.1.a-h. Thus, the Department's CM Rules incorporate existing legal requirements under Idaho's prior appropriation doctrine.

Further, as this Court has recognized, the CM Rules "integrate all elements of the prior appropriation doctrine as established by Idaho law. [15] *IGWA v. IDWR*, 160 Idaho 119, 130, 369 P.3d 897, 908 (2016). IDWR has previously advocated this very point, explaining that the CM Rules "incorporate these time-tested principles and provide a systematic method to administer ground water rights in conjunction with senior surface rights and other ground water rights," and that "Rule 42 factors are facially and substantively consistent with the prior appropriation doctrine as established by Idaho law." Addendum B at 6, 57 (emphasis added).

Accordingly, "material injury" and the factors used in its evaluation are well-established principles of the prior appropriation doctrine, not just ornaments tacked onto IDWR's CM Rules. Therefore, IDWR's attempt to shelve the "material injury" from conjunctive administration in Water District 37 should be soundly rejected as the district court rightly determined.

ii. Idaho's prior appropriation doctrine requires administration to material injury, not depletion to the water source.

Administration of water rights requires the Director to apply all principles of the prior appropriation doctrine. As an element of the prior appropriation doctrine, material injury to a senior water right must be evaluated, and the Department's own CM Rule 42 explains how that evaluation is to be carried out. Whether administration is initiated *sua sponte* by the Director under section 42-237a.g, or under the CM Rules, material injury must be carefully evaluated and established.

Section 42-237a.g provides that water in a well is deemed unavailable if withdrawal from a well "would affect [senior rights] contrary to the declared policy of this act." The policy of the Ground Water Act includes the entire prior appropriation doctrine. I.C. § 42-226. Thus, under

[15] "These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.20.02

section 42-237a.g's definition, water is unavailable if withdrawal would "affect" senior water rights contrary to the prior appropriation doctrine. This means that, water is unavailable if withdrawal would injure senior right such that the withdrawal will cause material injury to senior right holders.

In *Clear Springs Inc. v. Spackman*, this Court recognized these principles of the prior appropriation doctrine when holding that section 42-237a.g "merely provides that well water cannot be used to fill a groundwater right if doing so would . . . cause material injury to any prior surface or groundwater right." 150 Idaho 790, 804, 252 P.3d 71, 85 (2011). This recognition, that "unavailability of well water" that would affect senior water rights means "material injury," is consistent with the statutory language and Idaho's prior appropriation doctrine. Hence, the district court correctly held that "whether the Director conjunctively administers interconnected ground and surface water rights under the Ground Water Act or the CM Rules, the Idaho Supreme Court has directed he must administer to material injury." R. 691.

IDWR asks this Court to reject its prior holding in *Clear Springs* as *dicta,* inconsistent with the Ground Water Act's declared policy. *App. Br.* at 39-40. IDWR claims that this Court's interpretation of section 42-237a.g should be ignored because *Clear Springs* arose under the CM Rules and this case did not. *Id.* at 40. IDWR is wrong. In *Clear Springs*, junior groundwater users specifically argued that the statute was a defense to curtailment as long as they were maintaining reasonable pumping levels and not mining the aquifer. [16] 150 Idaho at 803, 252 P.3d at 84. The Court rejected the defense and found section 42-237a.g did not allow a junior ground water user to cause "material injury" even when maintaining a reasonable pumping level. *Id.*

[16] Unlike in *Clear Springs*, the Districts here are not contending that the Director is limited to enforcing a "reasonable pumping level." There is no dispute that no reasonable pumping level has ever been established in Basin 37 – or to the Districts' knowledge – anywhere in the State.

Thus, this Court's discussion of what section 42-237a.g means was necessary to address defenses raised in that case. Clearly the Court's holding, that the statute prohibited "material injury," was not a slip of the pen as IDWR now claims. *See App. Br.* at 38-40 (arguing this Court can "set the record straight" on *Clear Springs*).

The better question is: why does IDWR and its Director believe they can ignore this Court's precedent and act directly contrary to this Court's holding? It is not up to the Director to decide that the Court was wrong. The law of *stare decisis* plainly requires the agency and its Director follow the Court's determination. *See State v. Forbes*, 152 Idaho 849, 852, 275 P.3d 864, 867 (2012) ("Where this Court has previously interpreted a statute, the rule of stare decisis dictates that this Court follow controlling precedent, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice") (cleaned up); *Ithaca College v NLRB*, 623 F.2d 224, 228 (7th Cir. 1980) ("agency is bound to follow the law of the Circuit").

Since this Court previously interpreted the very statute at issue in this case, and has held that it requires "material injury" for administration, IDWR is bound to follow that decision. *See e.g.*, *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) ("The Director also 'shall distribute water in water districts in accordance with the prior appropriation doctrine.' This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law").

Section 42-237a.g does authorize the Director to determine that sufficient water is not available to fill the ground water right because pumping from a well would "result in withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of natural recharge." I.C. § 42-237a.g. Notably, the Director did not find that the Bellevue Triangle

wells would have withdrawn water in 2021 at a rate that exceeds the anticipated rate of future natural recharge. *See* AR. 1914-1915. Indeed, the record conclusively shows that it would not.[17]

Rather, IDWR contends for the first time ever, that "affect, contrary to the declared policy of the Act," means "strict priority administration." This is wrong. IDWR relies upon *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982), for the proposition that injury to the priority of a water right is an undeniable injury. *App. Br*. at 43-44. From there, IDWR leaps to the conclusion that the only factor that matters for conjunctive administration is priority of water rights. But *Jenkins* does not go that far. *Jenkins* held that moving a water right to a lower step in order of priority would be an undeniable injury. *Jenkins* says nothing about abolishing the material injury standard for conjunctive administration.

The Ground Water Act explicitly declares a broad State policy. Idaho Code § 42-226 provides that the "traditional policy of the State" requires two things. First, water must be put to beneficial use in reasonable amounts. Second, while first in time is recognized, a reasonable application of that doctrine shall not block full economic development of ground water resources. In other words, the legislature rejected the rote "strict priority administration" demanded by the surface water users and applied by the Director here in favor of requiring proof of beneficial use by the senior and protection of the right to develop groundwater resources. Administering to material injury accomplishes all of those declared policies—IDWR's claim that administering to the "affect" of depletion to a source, without regard to material injury, does not.

Thus, even assuming for argument's sake that the Director can administer under section 237.a.g instead of the CM Rules, he must still abide by the material injury standard required by

[17] *See* AR. 158-59, 2093("water level trends appear to have stabilized"); 6046-6105; *see also* ATr. 115: 4-7 ("Q. [MR. BARKER]: So would you agree that, that the water-level trends have stabilized since 1991? A. [MS. SUKOW]: I agree that the overall trend has stabilized since 1991").

Idaho's prior appropriation doctrine. By abjuring the rules and failing to administer to material injury, the Director failed to administer water in accordance with the prior appropriation doctrine, contrary to the declared policy of the state.

iii. The Director's findings and conclusions do not equate to a material injury determination.

IDWR attempts to justify the Director's actions on a new theory that even though the Director did not find "material injury" under the CM Rules, he came close enough. *See generally App. Br.* at 36-42. IDWR's new position—that something close to "material injury" is enough to justify massive, system-wide curtailment—finds no support in Idaho law or this Court's precedents, and conflicts with IDWR's prior representations.

First, the Court has held that an existing junior ground water right may not be curtailed unless the senior has suffered an injury that is "material and actual, and not fanciful, theoretical or merely possible." *Bower v. Moorman*, 27 Idaho 162, 182, 147 P. 496, 503 (1915).[18] "The well-established rule is that a senior appropriator can close an existing junior diversion only if it materially interferes with the senior's right." Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63, 81 (1987) (emphasis added).

IDWR, arguing in favor of the constitutionality of the CM Rules, previously explained that the definition of "material injury" is also consistent with the term "affect" in the Ground Water Act. Notably, the agency represented to the Gooding County district court that:

> The Rules' requirements of a delivery call and material injury determinations are entirely consistent with this procedure, and the definition of material injury as a "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person," Rule 10.14, is similarly consistent with the GWA requirement of a finding that use under the junior right "affects" use under the

[18] *See also*, *Noh v. Stoner*, 53 Idaho 651, 655, 26 P.2d 1112, 1113 (1933); *Jones v. Vanausdeln*, 28 Idaho 743, 749, 156 P. 615, 617 (1916); *Bailey v. Idaho Irr. Co.*, 39 Idaho 354, 358, 227 P. 1055, 1056 (1924).

senior right."

Addendum B at 22 (emphasis added).

Given IDWR's prior position, it is understandable that the Director could not identify a difference between "injury" or "affects" and "material injury" when advising the parties of the applicable standard in this case just days before the contested case hearing:

> MR. BARKER: This is Al Barker. I just have one question about the injury analysis. And that is, are we looking at – are we looking at material injury, or are we looking at something other than material injury as the burden of proving what, I guess is the question.
>
> DIRECTOR SPACKMAN: Well, I don't know what the difference is, Al.

PATr. 49:10-17. The Director continued: "I would say that those factors [in CM Rule 42] are a guide, certainly a very important guide, in the establishment and putting on the burden of proof." PATr. 50:17-20 (emphasis added). Despite these representations, the Director failed to evaluate material injury or use the rules' factors in his final order.

On appeal, the agency has abandoned the Director's prehearing statements and argues that "material injury . . . is not the statutory test for curtailment," and that the Director's "findings on injury to the senior water users were . . . sufficient to meet the Ground Water Act's standard for curtailment." *App. Br.* at 37. IDWR does not explain what its new "injury" standard means, where it comes from (other than strict priority), and what factors are to be considered if the guidelines in CM Rule 42 are ignored.[19]

Since IDWR previously represented the Ground Water Act's terms were consistent with

[19] IDWR never identified a different "injury" standard in the administrative case below. It cannot credibly claim such a distinction in its post-hoc argument to the Court now. *See e.g. American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981) ("Whether these arguments have merit, and they very well may, the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"); *see also*, *Dept. of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1909 (2020) ("The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted").

the definition of "material injury," it should now be estopped from arguing the very opposite position to this Court.[20] "Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Safaris Unlimited, LLC v. Jones*, 169 Idaho 644, 650, 501 P.3d 334, 340 (2021). One purpose is to avoid the perception that the first or second court was misled. *Id*.

On appeal, IDWR agrees that there was no finding of "material injury" below, but contends the Director found enough of an injury in the form of depletion to the source to justify upholding his decision. Depletion to a water source alone however, does not constitute material injury to a senior water right. This has been IDWR's own position for decades.[21] Yet the Director held for the first time here that curtailment was justified because of depletion to the source. AR. 1949.

The Department argues that curtailment of all junior groundwater users would "yield substantial flow" to surface water users. *App. Br.* at 10. However, the undisputed facts show that only three surface water users would have benefited from 100% curtailment for the remainder of the 2021 irrigation season. ATr. 833-34.[22] The Department's internal modeling showed that full curtailment of 23,000 acres would potentially supply 22.7 cfs, 28.0 cfs, and 26.5 cfs for the months of July–September.[23] AR. 2116 (Table 2). After applying the agency's estimated stream

[20] While estoppel ordinarily doesn't apply to state agencies, "it may apply where required by notions of justice and fair play. *Hollingsworth v. Thompson*, 168 Idaho 13, 21-22, 478 P.3d 312, 321 (2020).

[21] The Director's "priority only" administration was rejected in *AFRD#2 v. IDWR*, 143 Idaho at 870, 154 P.3d at 441 ("The district court rejected American Falls' position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis").

[22] Two other users, who were members of the SVGWD, would possibly benefit and they were not making a call. ATr. 833-34; 1405 (i.e. Purdy Land & Livestock has over 25 cfs of 1883 and perpetual rights).

[23] IDWR's own staff report showed that 67% of the water curtailed would remain in the aquifer and not be put to beneficial use by any water users, senior or junior. AR. 2116.

losses, those amounts dropped to 15.7 cfs, 22.4 cfs, and 21.2 cfs. AR. 2119 (Table 3). The watermaster confirmed this quantity of water would only support certain 1883 priorities held by Barbara Farms and Taber/Ritter. ATr. 787:12-25; 788: 11-20; *see also*; ATr. 1427:25; 1428-30.

As to the April 1883 rights held by Barbara Farms, Taber, and Ritter, the Director did not consider or carefully evaluate the actual number of acres irrigated, actual crop water needs, or the availability of other water supplies (i.e. leased storage and supplemental groundwater). *See* AR. 391-93. Specific evidence was presented that Barbara Farms was only irrigating 217.5 acres in 2021, not the full 301.9 acres listed on the water right. AR. 2733. Further, Barbara Farms had rented Snake River surface water from the City of Shoshone to irrigate 66 acres. *Id.* The crop water requirement for the acres Barbara Farms actually irrigated with the Little Wood River water right was flat ignored by the Director.

Next, Don Taber confirmed that he was only irrigating 229 acres, not the full 295 acres listed on his water right on his "home place" and only 168 out of 217.5 acres on the adjacent rented Ritter farm. AR. 1610; ATr. 707:11-14. Mr. Taber also held a supplemental ground water right available for use on 248 acres. Mr. Taber admitted that he would not suffer any shortage on those acres that received groundwater in 2021. ATr. 703:18-15, 704:1-2. The Director did not account for this additional water supply in evaluating Mr. Taber's crop water needs. In fact, there was no evaluation of need, only a generalized finding that seniors could put the water to use. AR. 1909 ("curtailment will provide usable quantities of water to some senior surface water users").

Other seniors stated that they hoped to get water, but no proof was provided that they actually would. *See* ATr. 835 (watermaster made no determination that any other users would get any water from 100% curtailment). Nonetheless, the Director decided that "consumptive ground water pumping in the Bellevue Triangle should be curtailed as soon as possible in order to

protect all senior surface water rights diverting from Silver Creek and the Little Wood River," regardless of the seniors' beneficial use or other sources of water. AR. 1949.

Consequently, the Director curtailed 23,000 acres to benefit only three water rights even though the Districts proposed to mitigate these water right rights. It was undisputed the Director performed no material injury determination for those water users, including those non-party seniors the Director claimed administration would benefit. There was no substantial evidence to support such a finding even if one had been made.

2. The district court correctly held that the prior appropriation doctrine requires establishing an area of common groundwater supply for conjunctive administration.

The CM Rules require establishing an area of common groundwater supply as a prerequisite to conjunctive administration in organized water districts. AR. 2410. The Director does not dispute this, but contends that acting under section 42-237a.g frees him from having to define an area of common groundwater supply. The district court held the opposite. R. 689 ("If a surface water user cannot achieve conjunctive administration of water rights without the establishment of an area of common ground water supply under the CM Rules, may the Director do that very thing under the Ground Water Act? The Court can discern no reason why conjunctive administration under the Act should occur pursuant to some other undefined metric").

IDWR does not explain how the Director can administer by "some other undefined metric." It cannot, because establishing an area of common groundwater supply is important to establish the boundaries for due process, and the proper order of curtailment of junior rights. *Id.* (determining an area of common ground water supply "defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity

to be heard"); AR. 2411. Consequently, the district court properly held that, "the establishment of an area of common ground water supply is a necessary pre-condition to conjunctive administration of interconnected ground and surface water rights under the prior appropriation doctrine." R. 690.

i. The prior appropriation doctrine recognizes that an area of common groundwater supply is a prerequisite to conjunctive administration.

Determining an area of common groundwater supply is necessary because of the complex interconnected nature of surface and groundwater. AR. 2410. "Determining the applicable area of common groundwater supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and groundwater." *Id.* Conjunctive administration requires evaluation of two critical elements of water rights and the prior appropriation doctrine, source and priority. *A&B v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997) (conjunctive management requires a "good understanding of both the hydrological relationship and legal relationship between ground and surface water rights." These issues "generally relate to two classic elements of a water right—its source and priority." (*quoting* Interim Leg. Comm. Rep. on the Snake River Basin Adjudication, 36–37 (1994))). Determining the area of common groundwater supply provides the basis for making those evaluations and is therefore a key to determining source and priority and to ensure the prior appropriation doctrine is followed.

The Department contends that establishing an area of common groundwater is not mandatory but merely a statutory option. *App. Br.* at 21-22. Section 42-237a.g provides that, concomitant with his obligation to create water districts, the Director:

> [H]as the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to

incorporate such area in said water district.

I.C. § 42-237a.g. Thus, to incorporate groundwater rights into a district, "the Director is required to make the determination that the groundwater rights are hydraulically connected to the surface water source." AR. 2408 fn. 4 (*citing* I.C. § 42-237a.g). Determining an area of common ground water supply is a precondition to forming a water district comprised of both surface and groundwater. However, that was not done when the groundwater rights were incorporated into Water District 37 in 2013. AR. 2410.

As the district court found in the *Sun Valley* decision, that unexplained failure precluded administration under CM Rule 40 and required the Director to establish an area of common groundwater supply under CM Rule 31. AR. 2413-14. Even after being told by the court that he needed to determine an area or areas of common groundwater supply for the basin, rather than rectifying that omission, the Director decided that he did not need to make that determination at all.

This is important because an established area of common groundwater supply provides "the borders for due process" and establishes the proper order for curtailment. AR. 689. These policies align with, and serve the purposes of the core tenants of Idaho's prior appropriation doctrine—first in time is first in right (i.e., proper order for curtailment), beneficial use (i.e., ensuring all groundwater rights affecting the flow of subject surface water are parties), and source.

Conjunctive administration requires IDWR know "the 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 v. Idaho Conservation League*,

131 Idaho at 422, 958 P.2d at 579. The intricacies of conjunctive administration are "precisely the reason for the CM Rules." *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448. An area of common groundwater supply is where "the diversion and use of groundwater or changes in groundwater recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights." IDAPA 37.03.11.10.01. Significantly here, CM Rule 10.01 cites section 42-237a.g for its definition of an area of common groundwater supply. *Id.* This citation strongly demonstrates that the requirements of the CM Rules and section 42-237a.g are identical with respect to an area of common groundwater supply.

Ignoring the interrelationship between the rule and the statute, IDWR now claims that an area of common groundwater supply is irrelevant under section 42-237a.g and the prior appropriation doctrine. That simply cannot be true. Without an area of common groundwater supply, as the district court held, there is constitutional doubt about who or what is subject to curtailment. R. 689. The CM Rules make clear the process establishing an area of common groundwater supply must be followed to protect the due process rights of the groundwater users. AR. 2410 (the CM Rules "provide[] the procedures and processes necessary to safeguard juniors' due process rights").

The Department contends that Idaho case law shows an area of common groundwater supply is not a prerequisite to curtail groundwater pumping to benefit surface water users. *App. Br.* at 24-27. The cases cited by the Department however, are not instructive. In *Tappen v. Smith*, the state reclamation engineer sought an injunction prohibiting withdrawal of underground waters. 92 Idaho 451, 452, 444 P.2d 412, 413 (1968). The Court sustained the trial court's injunction, who characterized the case as "whether it (the critical groundwater area declaration)

is valid to the well in question." *Id.* at 458, 444 P.2d at 419. The Court then upheld an injunction in a critical groundwater management area that was dangerously depleted. There is no proof or determination that the Basin 37 aquifer is being depleted[24] and no critical groundwater management area has been established here.

IDWR next relies on *Baker v. Ore-Ida Foods,* but *Baker* involved very different facts. There this Court interpreted the Ground Water Act for the first time "as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate." *Baker*, 95 Idaho 575, 576, 513 P.2d 627, 628 (1973). The Court upheld an injunction against well users to prevent aquifer mining. *Id.* at 585, 513 P.2d at 637. Here, there is no evidence of aquifer mining, AR. 157-59, and in *Baker*, this Court did not address the need to establish an area of common groundwater supply.

IDWR then points to this Court's decisions in *Clear Springs* and *IGWA*. Both cases concern administration of interconnected water in the ESPA, which has an established area of common groundwater supply. Since those cases were brought under the CM Rules, IDWR argues that these decisions free IDWR from any obligation to determine an area of common groundwater supply when it does not act under the CM Rules. That is a *non sequitur*. In *IGWA*, this Court found that the Director, after having determined administration and curtailment was necessary across the ESPA's area of common groundwater supply, had the discretion to implement a trim line based on the policy of full beneficial use. *IGWA*, 160 Idaho at 129, 369 P.3d at 907. This Court's *IGWA* decision rests on a determination that it is possible to order curtailment in a subset of an area of common groundwater supply, if the facts support that outcome. It does not do away with the need to find the area of common groundwater supply in

[24] *See supra*, fns. 16, 17.

the first place. In *Clear Springs*, the Court declined to address the argument that the area of curtailment should have been broader than that ordered by the Director because it had not been raised below. 150 Idaho at 816-17, 252 P.3d at 97-98. This Court agreed that the Director had discretion to rely on a groundwater model to analyze the effects of pumping within the area of common groundwater supply, but neither the Director nor the Court attempted to use a model as a substitute for an established area of common groundwater supply.

This Court's prior holdings in *IGWA* and *Clear Springs* illustrate the vital use of an area of common groundwater supply to administer interconnected water, and that such administration may be subject to other limitations of the prior appropriation doctrine, like material injury and beneficial use, principles ignored by the Director below.

ii. An area of common groundwater supply is necessary even in an established water district.

In 2015, "[a]ll parties agree[d] that an area of common ground water supply applicable to the Big Wood and Little Wood Rivers must be determined." AR. 2410 (emphasis added). IDWR now contends that such a determination is not necessary because the parties are all within Water District 37. *See App. Br.* at 28-33. However, "the fact that juniors are in organized water districts is not necessarily relevant to the proper and orderly processing of a call involving the conjunctive management of surface and groundwater." AR 2410. Instead, the critical factor "is identifying that area of the state which has a common ground water supply relative to the senior's surface water source and the junior ground water users located therein." *Id.*

IDWR argues that the due process protections provided by an area of common groundwater supply determination are provided by Water District 37 because the water district sets the proper order of curtailment. *App. Br.* at 31. IDWR contends that it can apply a strict administration to priority approach, "[b]ecause 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." *Id.* Administration of connected waters however, requires more than knowledge of priority dates to comply with the prior appropriation doctrine. An area of common groundwater supply is necessary to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." *A&B v. Idaho Conservation League*, 131 Idaho at 422, 958 P.2d at 579.

IDWR now asserts that groundwater rights incorporated into Water District 37 share a common groundwater supply. Yet that claim was previously rejected by the district court who held that not all groundwater rights within the area of common groundwater supply are necessarily incorporated into the water district, "[a]s such, the area of common ground water supply extends beyond the boundaries of the water district." AR. 2409 at fn.5. IDWR did not appeal that determination nor make any subsequent findings.

Without the complex, hydraulic determinations of an area of common groundwater supply, the Director proceeded to curtail solely on the strict priorities of the users in Water District 37, ignoring the principles of beneficial, economic, and reasonable use. An area of common groundwater provides more than a simple "order of curtailment" based on strict priorities, it provides the tools necessary to determine "order of curtailment" based on the litany of factors required under the prior appropriation doctrine. Water district creation may recognize the interconnected nature of water, as in Water District 37, but such a grouping lacks the important technical details provided by an area of common groundwater supply that are necessary to determine the order of curtailment as required by the prior appropriation doctrine.

iii. IDWR's model is not a substitute for establishing an area of common groundwater supply.

The Department next contends that an area of common groundwater supply is "not a practical necessity" because its Model is the best available science. *App. Br.* at 33. The Director concluded that the Model is "the best available tool to evaluate the effects of groundwater pumping on flows in Silver Creek." AR. 1889. The Model boundary encompasses portions of the Wood River Valley Aquifer system, AR. 2110, but does not include the entirety of Water District 37, nor does it cover the entirety of the BWRGWMA, c*ompare* AR. 2426 *with*, AR. 2453, 2496. When establishing an area of common groundwater supply under CM Rule 31, the Director can rely on groundwater models and other technical information. However, the rules make clear that a model is not a substitute for an area of common groundwater supply, but a tool to determine that area. The Model used here is limited in its scope and does not align with the water district or the groundwater management area. It was only calibrated to conditions in 2014. ATr. 110: 9-21. The Director could have used the model as one tool to determine an area of common groundwater supply. Instead, the Director predetermined an Area of Potential Curtailment and applied the Model to those boundaries. The Area of Potential Curtailment was predetermined by IDWR staff for this proceeding only. *See* AR. 230, 244, 248; ATr. 134-36. Running a model against an *ad hoc* area of potential curtailment that is smaller than the boundaries of the water district, the Big Wood groundwater area, and the Ground Water Management Area, is a far cry from finding an area of common groundwater supply.

B. Section 42-237a.g requires that the conjunctive administration of interconnected surface water and groundwater be carried out in accordance with Idaho Code chapter 6, title 42.

The Ground Water Act obligates the Director to "control the appropriation and use of the groundwater of this state as in this act provided." I.C. § 42-231. The district court concluded that

"[o]ne tool the Director may utilize in furtherance of this duty is set forth in Idaho Code § 42-237a.g." R. 681-82. That statute, however, does not authorize the Director to unilaterally initiate administrative proceedings in all instances of material injury or where water withdrawal would exceed natural recharge. Rather, the legislature granted discretionary authority for the Director to initiate a particular administrative proceeding in a more narrow situation—i.e., outside of organized water districts.

Section 237a.g was amended by the legislature in 1994. *See* 1994 Idaho Laws Ch. 450, *Water Resources—Department Director Powers—Distribution* (H.B. 986). The legislature amended the statute to add the discretionary power to initiate administrative proceedings, "[t]o supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well. . ." *Id.* The Statement of Purpose describes the reasons for the amendments, specifically to clarify the limitations on the use of a writ of mandamus to force the curtailment of water and the Director's discretionary authority to administer water outside of organized districts:

> In 1992, the Idaho Legislature enacted changes to Idaho Code § 42-602. Those changes have been interpreted by the Idaho Supreme Court as imposing a duty upon the Director to supervise and control the distribution of water outside the boundaries of an organized water district even though the rights to that water have not been adjudicated and there are unresolved legal questions regarding the relationship of the water rights sought to be distributed. This was not the intent of the 1992 amendments . . .
>
> . . . The purpose of this Act is to restore the law relative to distribution of water back to what it was prior to the 1992 amendments to Idaho Code § 42-602 and to make clear that the Director shall not be subject to a writ of mandate when called upon to distribute water, specifically, the **Act clarifies that Chapter 6 of Title 42, Idaho Code is only applicable to distribution of water within a duly formed water district.** Water users seeking to make a call for distribution outside a water district may elect to proceed directly against the owner of the water right claimed to be causing injury or may request the director to exercise authority under other

> chapters of title 42, Idaho Code. This Act, however, makes clear that the Director's authority to distribute water outside a water district is a discretionary function. The director shall have discretion to not shut or fasten any headgate or other facility for the diversion of water pursuant to a water right outside a water district if the director determines that the legal status of the water right or the legal or hydrologic relationship of the water right to one or more other water rights, must first be adjudicated by a court . . .

See Statement of Purpose, H.B. 986, 52nd Legis., 2nd Reg. Sess. (1994) (emphasis added).[25]

This legislative history shows the purpose of the 1994 amendments was to modify and clarify "procedures for the administration of water rights outside of a water district." *Agenda for H.B. 986*, Senate Resources and Environment Committee, 52nd Legis., 2nd Reg. Sess. (April 1, 1994). The *Musser* decision required the Director to distribute water outside an organized water district under a writ of mandate, compelling the Director to act, without ability to commence a hearing. *See Minutes for H.B. 986*, Senate Resources and Environment Committee, 52nd Legis., 2nd Reg. Sess. (April 1, 1994). The 1994 amendments eliminated the Director's mandatory duty to administer outside a water district under a writ of mandamus, but provided him with the discretion to initiate administrative proceedings in the event a user outside a district makes a request and the Director determines an action is necessary. *Id.*

The Director's use of section 42-237a.g for conjunctive administration "is unprecedented in this State's history, it is a tool that the legislature has provided the Director to carry out his duties under the Ground Water Act." R. 683. However, the legislative history makes clear that the legislature created this tool to address a specific and narrow circumstance, the administration of groundwater outside of an organized district.

The district court misconstrued the Ground Water Act as providing two-prongs for administration, one with a request for administration and the other without. Actually, the

[25] A full copy of the 1994 Statement of Purpose is provided *infra* at Addendum C.

legislature did create two-prong administration—within and outside a water district. Section 42-237a.g was amended to provide the Director a specific power of administration outside water districts. In contrast, chapter 6 and the CM Rules govern conjunctive administration inside a water district. There is no conflict because the CM Rules and section 42-237a.g addressing conjunctive administration of different groups of water rights depending upon location. Here, the groundwater rights were placed within Water District 37 in 2013. AR. 2482-98. The Director's attempt to administer water within a water district, under section 42-237a.g exceeds the power granted to him by the 1994 amendments.

Contemporaneously, IDWR promulgated the CM Rules in 1994 pursuant to Idaho Code § 42-603. *See AFRD#2,* 143 Idaho at 866, 154 P.3d at 437. The rules were approved just two years after amendments were made to Idaho Code § 42-602 authorizing ground water rights to be incorporated into water districts. The CM Rules "provide a structure by which the IDWR can jointly administer rights in interconnected surface water (diverting from rivers, streams and other surface water sources) and groundwater sources." *AFRD#2*, 143 Idaho at 867, 154 P.3d at 438.[26] This Court found "[t]hat is precisely the reason for the CM Rules and the need for analysis and administration by the Director" as the "[r]ules give the Director the tools by which to determine" interconnection and potential material injury." *Id.* at 877-78, 154 P.3d at 448-49. As IDWR argued to the Supreme Court in *AFRD#2*, the "[r]ules provide the necessary administrative framework for integrating the rule that 'first in time is first in right' with the other legal tenets of the prior appropriation doctrine that seek to promote optimum utilization of the resource."

[26] In its argument to the Supreme Court in *AFRD#2*, IDWR represented that the "CM Rules are the first formal rulemaking attempt to establish a comprehensive framework for joint administration of rights in interconnected surface water and groundwater sources." *See Def.-App. Opening Br. on Appeal* at 9, *AFRD#2*, No. 33249, 33311, 33399 (Idaho Sup. Ct. Oct. 27, 2006), relevant excerpts of the Department's brief are provided *infra* at Addendum D. IDWR explained that prior "to the 1992 amendments to Idaho Code §§ 42-602 and 42-603 that provided for the inclusion of ground water rights in water districts, ground water rights and surface water rights had been administered as separate water sources in Idaho." *Id.*

Addendum D at 15 (emphasis added). Having brought the groundwater rights into the water district, the Director was bound to administer under the CM Rules, as IDWR repeatedly told the water users it would. *See supra*, Part I.B.

Instead of following the rules, the Director disregarded those processes in favor of a wholly new administrative regime untethered to any rules or procedure. In doing so, the Director misapplied the Groundwater Act, the amendments to chapter 6, and the Department's CM Rules.

Prior to July 1, 2021, any water right holder who believed a right was harmed by another's water use could initiate a process to have such an adverse claim heard by a local groundwater board. *See* I.C. §§ 42-237b-d. The groundwater board statutes were repealed by the legislature during the 2021 legislative session at IDWR's request. The Director represented to the legislature that the statutes and process were "obsolete" and "no longer necessary" because the CM Rules served as the agency's "vehicle" to handle conjunctive administration.[27] The statement of purpose for House Bill 43 expressly states that the Groundwater Act procedures are "obsolete since the adoption of the [CM Rules]."[28] In other words, the Director represented that the mechanism to accomplish conjunctive administration under the Ground Water Act is through the CM Rules, not some other undefined process.

1. Statutory interpretation and harmonization of chapters 2 and 6, title 42 require the use of the CM Rules for conjunctive administration of interconnected waters.

The Director initiated this case solely to determine potential injury to senior surface water rights. AR. 1. In using section 237a.g as a substitute for water right administration within an

[27] Video of the Director's presentation to the House Resources & Conservation committee is available at the legislature's website at https://legislature.idaho.gov/sessioninfo/2021/standingcommittees/HRES/ (Feb. 3, 2021) (minutes 2:20 – 9:00).

[28] *See Statement of Purpose*, H.B. 43, 66th Legis., 1st Reg. Sess. (2021), available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0043SOP.pdf.

established water district under chapter 6 and the CM Rules, the Director failed to properly harmonize the established processes for water right administration as required by law.

First, IDWR is expressly charged with construing and implementing the Ground Water Act "in harmony with the provisions of title 42, Idaho Code." I.C. § 42-239 (emphasis added). The Director refused to employ the "mandatory" administrative duties pursuant to statute and rule, instead setting them aside in favor of a "discretionary" process. This scheme violates well-established statutory interpretation principles. *Eller v. Idaho State Police*, 165 Idaho 147, 160, 443 P.3d 161, 174 (2019) ("A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general . . . Thus, where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute").

The present case is a perfect example of the flaws in the Director's reading of the statutes. The Director initiated a proceeding to administer only selected groundwater rights in Water District 37 that he pre-determined were injuring downstream senior surface water rights on Silver Creek and the Little Wood River. AR. 1, 2335.[29] The Director limited that area to the Bellevue Triangle and declined to initiate administration of groundwater rights anywhere else in the BWRGWMA.

When interpreting a statute, the starting point is always the language itself. If the language is clear and unambiguous, the plain meaning controls. *Nelson v. Evans*, 166 Idaho 815, 820-21, 464 P.3d 301, 306-07 (2020). A statute is ambiguous where reasonable minds might differ or be uncertain as to its meaning. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018). The "goal of statutory interpretation is to discover the

[29] This was also a major flaw in the Director's 2015 orders as found by the Court in the *Sun Valley* case. AR. 2410.

intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of the proposed constructions, the public policy behind the statute, and its legislative history." *In re Idaho Dep't of Water Res. Amended Final Ord. Creating Water Dist. No. 170* ("*Thompson Creek Mining*"), 148 Idaho 200, 210, 220 P.3d 318, 328 (2009) (internal citations omitted); *see also Nelson v. Evans, supra*. Moreover, in *Marquez v. Pierce Painting, Inc.*, the Court explained:

> A construing court's primary duty is to give effect to the legislative intent and purpose underlying a statute. Moreover, the court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature. It is incumbent upon the court to give the statute an interpretation that will not deprive it of its potency. In construing a statute, not only must we examine the literal wording of the statute, but we also must study the statute in harmony with its objective.

166 Idaho 59, 63-64, 454 P.3d 1140, 1144-45 (2018) (emphasis added).

This case presents the question of how to properly construe provisions of chapter 6 in harmony with chapter 2 regarding the legislature's intent for orderly and consistent conjunctive water right administration. Importantly, Idaho Code § 42-239 requires IDWR to read the provisions "in harmony." Within water districts, the legislature required conjunctive administration to proceed through chapter 6 and the CM Rules, not a separate, undefined process in chapter 2.[30] Consequently, the Director's proposed administration in this case runs afoul of the prescribed procedures adopted by the agency, affirmed by the legislature, and defined by this Court's precedent.

As the Court is well aware, the State spent decades and valuable resources completing the SRBA and reaching a Final Unified Decree. Conjunctive administration was a "major objective"

[30] The CM Rules acknowledge that they are implementing Idaho's Ground Water Act. *See* IDAPA 37.03.11.10.01, .10.02, .10.09, .10.10, .10.18, .10.20, .30.06, and .31. Notably, for purposes of this case, the rules provided a detailed procedure for determining material injury, reasonableness of use, and "an area of common groundwater supply." *See* I.C. § 42-237a.g; IDAPA 37.03.11.31 and .42. The Director refused to make any such findings.

of the SRBA. *See A&B v. Idaho Conservation League*, 131 Idaho at 422, 958 P.2d at 579; *see also*, *Clear Springs*, 150 Idaho at 795, 252 P.3d at 76. The adjudication provided the foundation to incorporate groundwater rights into water districts, such as Water District 37, whose "essential governmental function" is water right administration. *See* I.C. § 42-604. Importantly, IDWR specifically represented that groundwater rights would be incorporated into Water District 37 so the water rights could be administered conjunctively pursuant to the CM Rules. AR. 162-65; *see also* ATr. 1311-1313. Yet now, IDWR wrongly alleges the CM Rules do not apply.

Chapter 6 sets out the mandatory duties of the Director and the watermaster regarding water distribution. *See* I.C. §§ 42-602, 603, 604, 607. The Director is required to administer all water rights in Water District 37 in accordance with the prior appropriation doctrine and the CM Rules. But here the Director has chosen to ignore the CM Rules. *See e.g. Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 508 P.3d 293, 296 (2022) ("although an agency may have the discretion to change its rules from time to time . . . it does not have discretion to depart from its rules while they are in effect"). By failing to follow the CM Rules the Director is violating the express directives of chapter 6, title 42.

Reading chapters 2 and 6 together, including the recent repeal of the "local groundwater board" provisions, it is clear that conjunctive administration was intended to proceed through a water district and the CM Rules. The CM Rules must be "construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement." *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). The Director is required to follow the agency's own regulations, as they are integral to orderly conjunctive administration of surface and groundwater rights and were promulgated to implement the water distribution statutes. *See* Idaho Code §§ 42-602, 603, 607; *see e.g.*, *Pizzuto*,

supra, 170 Idaho 94, 508 P.3d at 296; *Eller*, *supra*; *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908-09, 104 P.3d 946, 950-51 (2004) ("IDAPA rules and regulations are traditionally afforded the same effect of law as statutes").

Accordingly, conjunctive administration of water rights under section 42-237a.g should not be viewed in isolation and must be read together with chapter 6, title 42 and its implementing regulations, the CM Rules, particularly when administering in a water district. This Court has specifically identified the purposes of chapter 6, the Ground Water Act and the CM Rules.

> Under the other provisions of Idaho Code Title 42, chapter 6, the Director is granted broad authority to direct and control water, and to administer it according to the prior appropriation doctrine. The legislature has mandated that IDWR manage water resources in Idaho, and has provided IDWR with the water district as its principal tool in carrying out this mandate.

Thompson Creek Mining, 148 Idaho at 211-12, 220 P.3d at 329-30 (emphasis added).

> The Groundwater Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources. The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Clear Springs, 150 Idaho at 808, 252 P.3d at 89 (internal citations omitted).

> Conjunctive administration requires knowledge by the IDWR of the 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. That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

AFRD#2, 143 Idaho at 877, 154 P.3d at 448 (internal citations omitted) (emphasis added).

Harmonizing chapters 2 and 6 and the CM Rules make it clear that the legislature intended that water districts, and the CM Rules, serve as the vehicle for efficient and proper conjunctive administration, not *sua sponte* discretionary proceedings by the Director. Thus, "the Director cannot distribute water however he pleases at any time in any way; he must follow the

law." *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800.

C. Senior surface water users made a delivery call.

The Director claimed "this administrative proceeding is not a response to a delivery call" and that he had "broad 'discretionary power' to initiate administrative proceedings to address the question of whether to prohibit or limit diversions under junior groundwater rights that are affecting seniors surface water rights, even in the absence of a delivery call or 'adverse claim.'" AR. 440, 1911. This position ignores the facts—the seniors made repeated demands for priority administration, both orally and in writing, and claimed injury from junior groundwater use that had been relayed to the Director for years, including as late as the spring of 2021. The Director admits that the CM Rules apply to a "delivery call." AR. 1911. Yet he ignored the fact that a "delivery call" is defined as a request for priority administration.[31] The district court did not examine whether these requests for priority administration triggered a delivery call. Instead, the court just stated that no delivery call was filed. R. 685.

1. The Director erred in finding that senior surface water users had not made a delivery call under the CM Rules.

There is no particular form as to what qualifies as a "request" for conjunctive administration within a water district. Hence, the CM Rules were triggered by the seniors' requests for water right administration. In this case, senior water right holders on the Little Wood River had made many "requests" for administration and always insisted on strict priority administration. The Association members submitted letters to the Director in February 2015. R. 2405. Next, the Association filed a petition with the Department in March 2017. *See supra*, fn. 8 (*Order Dismissing Petition for Administration*); *see also,* ATr. 559:18-21. All of these requests

[31] The CM Rules define a "delivery call" as "[a] request from the holder of a water right for administration of water rights under the prior appropriation doctrine. IDAPA 37.03.11.10.04.

sought priority administration of junior groundwater users.

Importantly, the seniors communicated their requests for administration and claims of injury to the Director at the advisory committee meetings held during the fall of 2020 through spring of 2021. *See* AR. 5956-6477, 6540-83 (seniors estimating "system injury" and "injury to individual users" for "Little Wood River decreed rights"). In October 2020, the seniors conveyed a draft agreement proposing conjunctive administration of surface and groundwater in Water District 37 which was presented at the first BWRGWMA advisory committee meeting on November 4, 2020, *see* AR. 5962, and reviewed again at the March 3, 2021 meeting, AR. 6418 (Mr. Luke reviewed "the draft proposed agreement submitted by the surface water users").

The primary stated objective of surface water users was enforcement of the prior appropriation doctrine. Requests for "priority administration" and curtailment of groundwater continued both during and outside of the advisory meetings. In the January 2021 meeting, the seniors' consultant stated that the water supply was a "zero sum game" and if water was used by pumping then it was not available for surface water users. AR. 6273. In February 2021, Tim Luke of IDWR asked for written explanations from the committee members about their goals. AR. 6279. After receiving the written responses (which IDWR did not place in the record), Mr. Luke reported to the advisory committee that the seniors demanded curtailment of groundwater as required by the priority of their water rights. AR. 6413, 6418. Mr. Luke summarized the demands of the seniors as: "The seniority of surface water rights is currently not being honored. i.e., groundwater rights that are junior to surface rights should be curtailed accordingly." AR. 6413 (emphasis added). Discussion at the meetings included "curtailment by priority, conjunctive management." AR. 6418. There is simply no other way to interpret these demands than as requests for administration under the prior appropriation doctrine. No one can credibly

assert there were no demands for priority administration in advance of the Director's Notice and hearing in this case.

Senior users confirmed they requested that the Director conjunctively administer groundwater rights in Water District 37. Carl Pendleton, member of the Big Wood River and Little Wood River Water Users Association, explained:

> A. [BY MR. PENDLETON]: . . . So if the legal term is "conjunctive management," we submitted an answer to a management plan that was presented by the groundwater pumpers and our proposal which spurred the formation of the groundwater Advisory Committee. But we are really seeking in this action priority administration.

ATr. 560:12-24 (emphasis added). Additionally, at hearing all Little Wood users explicitly, and without hesitation, testified that they were "requesting" administration of water rights "in priority." *See* ATr. 445:19-22; 455:12-13 (Brossy/Barbara Farms LLC); 499:6-10 (Hubsmith); 612:7-11 (Arkoosh); 744:2-5 (Newell).

Even though the seniors made repeated claims of injury and requests for priority administration, in his rush to use section 42-237a.g, the Director ignored these "requests" for administration to avoid the CM Rules. The Director suggested that the seniors' requests for administration arose only in response to his Notice and only because he advised the seniors they would have to demonstrate injury. AR. 1912. Somehow, the Director conflated injury with a request for priority administration. The seniors claimed injury, but they also demanded priority administration. The hearing was not the first time these "requests" for priority administration were made. Demands for priority administration were made both before and during the advisory committee meetings. IDWR does not assert otherwise. Therefore, the Director wrongly claimed his proceeding was "not a response to a delivery call," AR. 440.

2. Because a delivery call was made, the district court erred in finding the Director was authorized to initiate a proceeding under Section 42-237a.g.

"Where an adverse claim is filed, conjunctive administration implicates the CM Rules." R. 686. Here, senior surface water users repeatedly asserted claims adverse to the groundwater users and made numerous requests for conjunctive administration under the prior appropriation doctrine. These demands are requests for administration, delivery calls, or adverse claims. IDAPA 37.03.11.10.04. In *Clear Springs*, the Director treated letters asking for administration of water as delivery calls, "[t]he Director considered the letters to be delivery calls." 150 Idaho at 796, 252 P.3d at 77. As IDWR has stated, "Plainly, the [CM] Rules are entirely valid and consistent with Idaho law when the holder of a senior ground water right seeks curtailment of junior ground water rights." Addendum B at 23.

These demands triggered the CM Rules and the Director was obligated to proceed under the CM Rule procedures. The director's finding that no such request, or "adverse claim," were made is not supported by the record, and the district court therefore erred in finding that the Director could administer under section 42-237a.g instead of the CM Rules.

D. The Director's *Final Orders* violated the Districts' due process rights.

The district court concluded that the Districts' due process concerns "dovetailed" with the issues addressed with regard to the failure to designate an area of common ground water supply and perform a material injury evaluation. R. 691. The court noted that its decision to set aside the orders would address the due process concerns with the hearing process. *See id.* The court declined to address any remaining due process issues.

The Districts agree that the Director violated their right to due process by not adhering to the requirements of the prior appropriation doctrine for conjunctive administration within Water District 37. *See also* I.C. § 67-5279(3)(a). Moreover, the Director's decision to deny the

Districts' proposed mitigation plan without a hearing and immediately curtail 23,000 acres during the peak of the irrigation season was unlawful and should be addressed through this appeal. This Court should affirm the district court's implicit finding that the Districts' right to due process was violated by the agency.

Procedural due process requires that there be some process to ensure that an individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. *See Union Bank, N.A. v. JV L.L.C.*, 163 Idaho 306, 317, 413 P.3d 407, 418 (2017). Determining whether an individual's due process rights have been violated requires this Court to engage in a two-step analysis.[32] *Guzman v. Piercy*, 155 Idaho 928, 939, 318 P.3d 918, 929 (2014). Water rights are real property rights that require due process, hence the first step is met. *See* I.C. § 55-101; *In re Water District No. 170*, 148 Idaho 200, 220 P.3d 318 (2009); *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95 (water rights "must be afforded the protection of due process of law before they may be taken by the state").

The second step asks what process is due under the law.[33] By initiating conjunctive administration of hundreds of surface and groundwater rights in Water District 37 through a highly abbreviated truncated hearing process, the Director violated any notion of fundamental fairness and failed to provide the "opportunity to be heard in a meaningful time and in a

[32] The Court must first determine whether the individual is threatened with the deprivation of a liberty or property interest under the Fourteenth Amendment. *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 244, 469 P.3d 23, 31 (2020). The second step requires the Court to determine what process is due. *Id*. "A deprivation of property encompasses claims where there is a legitimate claim or entitlement to the asserted benefit under either state or federal law." *Union Bank*, 163 Idaho at 317, 413 P.3d at 418 (*quoting Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72-73, 28 P.3d 1006, 1015-16 (2001)).

[33] This Court has used the U.S. Supreme Court's balancing test in evaluating the adequacy of a particular process. *See Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 780-81, 215 P.3d 494, 500-01 (2009) (*quoting Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

meaningful manner."[34] *Ayala v. Robert J. Meyers Farms, Inc.*, 165 Idaho 335, 362, 445 P.3d 164, 171 (2019). Importantly, due process includes "the right to be fairly notified of the issues to be considered." *See Haw v. Idaho State Bd. of Medicine*, 140 Idaho 152, 159, 90 P.3d 902, 909 (2004).

Thus, to determine what process is due in light of the nature of a deprivation of liberty or property, Courts use the test enunciated in *Mathews*, which requires courts to balance: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the value of additional or substitute procedural safeguards; and, (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Mathews*, 424 U.S. at 334-35.

1. The Department's proffered process did not satisfy the requirements of due process.

In considering factors for judicial review of a water right curtailment order, Idaho courts have looked to the timing of curtailment in relation to whether or not crops have already been planted. *See e.g.*, *Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction* at Tr. 8, *IGWA v. IDWR*, No. 2007-526 (Jerome Cnty. Dist. Ct. June 12, 2007) [35] (Court explaining that IGWA being notified of curtailment *after* the planting season had commenced would bear on the argument that justice requires an exception to the exhaustion doctrine).

By the time the hearing process was initiated, the Districts were well past planting and

[34] Moreover, initiating the case after the thousands of acres were planted further violated the Idaho Supreme Court's requirement for the Director to "develop and implement a pre-season management plan" for conjunctive administration. *See A&B v. Spackman*, 155 Idaho at 653, 315 P.3d at 841.

[35] Relevant excerpts of 2007 district court order are provided *infra* at Addendum E.

already well into the irrigation season. The risk of deprivation was therefore inherently high, as District members stood to lose upwards of $12 million dollars from contracts and lost crops that had been planted in anticipation of the 2021 irrigation season. ATr. 1163:9-19. The Department owed the Districts due process protections commensurate with that potential for great harm and deprivation. The Director was aware of poor water conditions in the basin as early January, and had instructed staff to start working on technical analysis for administration in March, yet the Director nevertheless provided no notice of a section 42-237a.g curtailment proceeding until May 4, 2021. AR. 1, 105-06, 468, 2334.

Clearly, the Department's procedure did not satisfy the requirements of due process necessitated by this situation. *See City of Boise v. Industrial Com'n*, 129 Idaho 906, 910, 935 P.2d 169, 173 (1997) ("procedural protections as are warranted by the particular situation"). On May 11, 2021, the Director issued a *Request for Staff Memorandum* listing seventeen different technical subjects and subparts. AR. 98-100. Although agency staff were requested to provide the information to the Director "on or before May 17, 2021," the reports were not released until the afternoon of May 18, 2021 on IDWR's website. These "staff memoranda" consisted of four different staff reports totaling over 150 pages. AR. 2089-2402. Further, the Director withheld authorization of discovery until Saturday May 22, 2021, nearly three weeks after the Notice was issued. AR. 419-26. By this time IDWR staff had been working on their analyses for at least two months, maybe longer. It simply does not comport with due process for the agency to justify the Director's preferred outcome and then give parties mere days or weeks to respond.

Cutting discovery time in half, particularly when the case was supposed to begin and end within 4 weeks prejudiced the Districts and their consultants. AR. 106. The technical information was voluminous and required extensive expert analyses that was not possible during the

truncated discovery and hearing schedule.[36] ATr. 1288:20-24; AR. 376.

Having adequate time to evaluate and review such information was critical to protect the Districts' right to reasonably prepare and present defenses to the delivery calls and "material injury" determinations that the Director proposed to decide at the hearing. The use of experienced and highly trained experts, evaluation of complex hydrologic systems, and review of hundreds of water rights, their delivery systems and individual uses is a time-consuming and intense endeavor. *See AFRD#2*, 143 Idaho at 875, 154 P.3d at 446 ("It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts").

Upon receipt of the staff memoranda, there were numerous reports and extensive data and information to compile and review. Forcing the Districts and other parties subject to curtailment to absorb this information (without knowing how complete and comprehensive the information was) and then come prepared to a hearing to debate and review this highly technical information, in two and a half weeks, was highly prejudicial and violated due process. *See e.g., State v. Doe*, 147 Idaho 542, 546, 211 P.3d 787, 791 (2009) ("notice must be provided at a time which allows the person to reasonably be prepared to address the issue").

Since the Districts were not afforded a reasonable time to prepare for hearing through a review of the complex data and information relied upon by the Department, the risk of curtailment without a meaningful and fair process was high and in fact, did occur. A complex case with over 40 participants, including numerous water districts, irrigation companies, and several technical experts does not lend to itself to being fairly heard and resolved in only days as ordered by the Director. Consequently, the Districts urge this Court to carefully consider the

[36] Further, while Sun Valley Company filed a request for information related to the staff Memoranda, IDWR did not even produce this information until mid-week of the hearing through a series of emails. AR. 1465-72.

context and timing of this proceeding, particularly in light of reasonable schedules and fact gathering required for such a conjunctive administration case. Where a single application for permit and transfer cases can routinely take several months, a complex conjunctive administration matter involving hundreds of water rights, multiple aquifer levels and surface water sources deserves adequate time for the analysis that was required for a "fair" process.

The violation of the Districts' due process rights is amplified by the fact that this proceeding went forward without an "area of common ground water supply", perhaps the most critical factor in such a case, thereby constraining a meaningful evaluation pursuant to rules necessary to evaluate the efficient and proper administration. AR. 2411. With this short-circuited process, the hearing was woefully inadequate and violated the Districts' due process rights.[37]

Significantly, the Director curtailed all junior groundwater rights in the Bellevue Triangle based solely on a conclusion of depletion to the source as the foundation for alleged injury to senior water users who did not even participate at the hearing. AR. 1949. The Director did not evaluate "material injury" to these non-participating senior surface water rights that, but instead applied a "strict priority" and absolute "depletion" to the resource standard that is not consistent with Idaho law for conjunctive administration.[38] His use of this standard to justify denying the mitigation plan outright is contrary to law and violated the Districts' right to due process. The

[37] A "hearing at which the applicant is fully advised of the claims of the opposition and of the facts which may be weighed against him, and at which he is given full opportunity to test and refute such claims and such facts, and present his side of the issues in relation thereto, is essential to due process." *Application of Citizens Utilities Co.*, 82 Idaho 208, 215, 351 P.2d 487, 494 (1960) (emphasis added). The Districts were not "fully advised" of all the facts when the agency delayed responding to information requests and waited until a few weeks before the hearing to authorize discovery. AR. 370, 419.

[38] IDWR provides no specific evidence as to non-participating seniors' beneficial use in this case, but argues "[S]urface and ground water appropriators alike were beneficially using water under valid appropriations. . . . Surface water users on Silver Creek and the Little Wood River were thus suffering undeniable injury to their decreed water rights." *App. Br.* at 44-45. None of the "non-party" seniors showed up to put on evidence about specific water rights, crops, and their beneficial use in 2021. The Director's assumptions as to these unknown users are not supported by any substantial evidence in the record.

resulting curtailment, intended to benefit the water rights of non-parties, changed the rules the Director set at the beginning of the proceeding where he stated seniors had to participate and put on evidence of injury. AR. 1, 520-30; 1919, 1949; PATr. 41-42 (Director requiring seniors' to put on evidence of injury to their water rights).

The Districts had no opportunity to discover the facts related to these un-named seniors, their proposed water use, their efficiencies, their other water supplies, or whether they would be injured during the 2021 irrigation season. Consequently, the Districts had no basis or notice to be able to present or prove any defenses at the hearing as to these senior water rights. This type of agency ambush plainly violates due process. *See Hawkins v. Idaho Transportation Dep't*, 161 Idaho 173, 177, 384 P.3d 420, 424 (Ct. App. 2016) (In order to effectuate a meaningful defense against an administrative license suspension, a driver should have sufficient prehearing access to the very evidence deemed relevant enough to warrant the issuance of a subpoena by the very administrative hearing officer deciding the case). Consequently, the Director's orders violated the Districts' right to due process and the district court's decision can be affirmed on those grounds as well.

2. The Director wrongly denied the Districts' mitigation plan without a hearing and curtailed in favor of non-party seniors.

The Director's summary denial of the mitigation plan without a hearing also violated Idaho's APA. The Districts filed a proposed mitigation plan to address potential injury to the three affected senior water rights for the rest of the 2021 irrigation season. AR. 1649-1655. The plan proposed to deliver 500 acre-feet of storage to Barbara Farms LLC and pump and deliver groundwater to Silver Creek to increase flows for diversion by Don Taber for the 1883 water rights for his farm and the property he leased from Jim Ritter. AR. 1652-1653.

The Director summarily denied the mitigation plan without any process or pre-

deprivation hearing. AR. 1948. This precipitous action violated constitutional due process requirements. *See* I.C. § 67-5279(3). Ignoring any evidence of material injury to and reasonable beneficial use by the other seniors, the Director concluded "the Proposed Plan is not sufficient to offset depletions resulting from ground water pumping in the Bellevue Triangle." AR. 1949. The Director then applied a "strict priority" and a "depletion" to the resource standard that is not consistent with Idaho law for conjunctive administration. *See infra*, Part IV.A. The use of this "depletion" standard to justify denying the mitigation plan outright was contrary to law and violated the Districts' right to due process.

By claiming the Districts' mitigation plan failed because it did not protect all senior water rights or all depletions caused by groundwater pumping, the Director applied a standard not found anywhere in any prior water right administration case..

Next, the statute the Director used for his proceeding does not include any "mitigation plan" standard or process. *See* I.C. § 42-237a.g. At hearing, Tim Luke stated that he didn't believe the Districts had any options to mitigate under the process used by IDWR. ATr. 378:5-9. Consequently, the Districts filed their plan pursuant to CM Rule 43, the only agency rule that addresses mitigation plans in conjunctive administration. AR. 1649-1650. Under CM Rule 43, IDWR is required to publish notice and hold a hearing on any proposed mitigation plan. *See* IDAPA 37.03.11.43. The rule includes a number of factors that the Director may consider in evaluating the efficacy of the plan. *See* IDAPA 37.03.11.43.03.a-o. The Director did not publish notice of the Districts' plan and performed no analysis under the Rule 43 criteria. Instead, the Director denied the plan outright on assumptions and a list of questions. AR. 1949-1950.

The failure to provide any process on the Districts' plan led to Director's immediate curtailment of all groundwater rights effective July 1, 2021. This procedure violated the

Districts' right to due process. The Director's failure to follow CM Rule 43 is similar to the failed "replacement water plan" process the Director attempted to employ years ago in response to the Surface Water Coalition delivery call. In that case on judicial review, the district court found:

> The Court sees no distinction between the "replacement water plans" ordered in this case and a mitigation plan. . . . Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, . . .

See Order on Petition for Judicial Review at 29, *A&B v. IDWR*, No. 2008-551 (Gooding Cnty. Dist. Ct. July 28, 2009) (emphasis in original).[39] IDWR did not appeal this decision or attempt to save its alleged "replacement water plan" process that did not follow CM Rule 43. It follows then that IDWR and its Director had no authority to deny a mitigation plan in this case without applying the procedure required under its own regulations.

The Director's summary denial of the plan led to actual curtailment of the Districts' members' water rights for a critical week of the irrigation season thereby violating the Districts' constitutional right to due process. This Court can affirm the district court's decision to set aside the Directors' Orders on this basis as well.

E. The Director erred in concluding that the procedures for administration of adverse claims in section 42-237b-d did not apply.

The local groundwater board statutes provided a procedure to address adverse claims by a senior surface or groundwater user. *See* I.C. § 42-237b. Any water right holder who believed a right was harmed by another's water use could initiate a process to have such an adverse claim heard by a local groundwater board. *See* I.C. §§ 42-237b-d. These local groundwater board statutes were repealed, at the request of IDWR, during the 2021 Legislative Session pursuant to

[39] Relevant excerpts of the district court's 2009 order are provided *infra* at Addendum F.

House Bill 43 (effective July 1, 2021).

Despite the repeal, the local groundwater board statutes were still in effect when the Director sent his Notice on May 4, 2021, and all during the administrative hearing. Since senior surface water users asserted an adverse effect on their water rights, the Director was required to review whether their adverse claims complied with the statute and set the matter for hearing before a local groundwater board. *See* I.C. § 42-237b. The Director's Notice and Final Order included no discussion of this provision of the Ground Water Act or whether he was required to follow its provisions. It is not surprising that he didn't refer to section 42-237b since he claimed it was superseded by the CM Rules. But if that was the case, he should have proceeded under the CM Rules. Instead, he did neither. Since he didn't use the CM rules, the hearing process violated section 42-237b. Consequently, the district court's decision setting aside the Director's orders can be affirmed for this reason as well.

F. The Districts are entitled to an award of their reasonable attorneys' fees and costs pursuant to Idaho Code § 12-117.

Idaho Code §12-117 provides for an award of reasonable attorneys' fees and costs when the Court finds that the non-prevailing party acted without a reasonable basis in fact or law. I.C. § 12-117(1) ("in any proceeding involving as adverse parties a state agency . . . and a person . . . the court hearing the proceeding, including an appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law"). "Determining whether the non-prevailing party had a "reasonable" argument in law requires, at a minimum, examining the legal arguments made, i.e., the *substance* of the non-prevailing party's arguments." *3G AG LLC v. Idaho Dep't of Water Res.*, 170 Idaho 251, 509 P.3d 1180, 1195 (2022). "The reasonableness of a challenge to an agency's conclusions of law, when considering fees under section 12-117(1), turns on the

substance of the non-prevailing party's legal arguments – not on whether the arguments were merely repeated or repackaged from below." *Id.*

With no reasonable basis, the Department seeks to overturn well established precedent to rewrite conjunctive administration in Idaho. IDWR asks the Court to allow the Director to use "a potential area of curtailment" in lieu of finding an area of common groundwater supply, despite the district court's holding in *Sun Valley,* in which IDWR was told "that an area of common ground water supply" is a precondition to conjunctive administration in Basin 37. AR. 2410. The Department further urges the Court to approve the Director's use of an undefined "injury" standard notwithstanding this Court's holdings in *ARFD#2* and *Clear Springs* that "material injury," as defined in the CM Rules, is the appropriate standard under the prior appropriation doctrine. Finally, IDWR's position that no delivery call was made, and that the Director therefore can ignore the CM Rules, has no basis in the facts but appears to be driven by whim, with no legally recognizable standards.

IDWR's appeal has forced the Districts to expend considerable time and resources to address issues previously decided against IDWR in the *Sun Valley* case, and to defend against the Department's positions which stand in clear contravention to well established law and existing Supreme Court precedent. IDWR's actions, as well as this appeal, are not reasonably based in fact or law. As such, an award of the Districts' reasonable attorneys' fees and costs before this Court, the district court, and the administrative proceedings should be granted.

V. CONCLUSION

IDWR asks this Court to set aside years of practice and precedent to condone conjunctive administration based upon a "strict priority" outside of the traditional elements of the prior appropriation doctrine, subject only to the unfettered discretion of its Director. He claims the

right to decide when, or if, to employ the rules that have been approved by the legislature and this Court. The district court properly set aside the Director's final order curtailing junior groundwater rights in the Bellevue Triangle in 2021 that was solely based upon strict priority and depletion to the water source. The Director's failure to designate an area of common ground water supply and determine "material injury" pursuant to Idaho's prior appropriation doctrine constituted reversible error.

In issuing the final order, the Director admittedly failed to adhere to IDWR regulation, state law, and court precedence that specifically detail how conjunctive administration should proceed, even though for years, indeed decades, IDWR told the legislature and this Court how critical the conjunctive management rules are to proper administration in water districts. On top of ignoring the rules, IDWR ignored its statutory mandates for administration in water districts, ignored binding district court precedent detailing proper conjunctive administration in Water District 37, ignored its prior orders explaining to the water users how administration would occur and trampled on the groundwater users' constitutional rights.

Accordingly, the Districts request this Court affirm the district court's judgment vacating the Director's final order, and hold that the CM Rules apply to all conjunctive administration within established water districts.

//signature page to follow//

RESPECTFULLY SUBMITTED this 23rd day of September, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September 2022, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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ADDENDUM A

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**AMENDED ORDER**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of a letter ("Letter") and petition ("Petition"), both filed with the Director on January 14, 2005, from A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition" or "Coalition"). The Letter and Petition seek the administration and curtailment of ground water rights within Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer not within an organized water district or ground water management area, that are junior in priority to water rights held by or for the benefit of members of the Surface Water Coalition. The Petition also seeks designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

On February 14, 2005, the Director issued an Order in this matter, which provided an initial response to the Letter and Petition filed by the Coalition. Based upon the Director's initial and further consideration of the Letter and Petition, the Director issued an Order on April 19, 2005, superceding the interlocutory portions of the Order of February 14, 2005. Following a status conference conducted by the Director on April 27, 2005, the Director determined that Finding No. 127 should be clarified. The Director now enters the following Findings of Fact, Conclusions of Law, and Amended Order with revisions to Findings No. 124 through No. 127 and No. 129, three additional findings (Findings No. 128, No. 129, and No. 131), corrected numbering of Conclusions of Law No. 47 through No. 53, and revisions to paragraph no. 9 in the Amended Order.

example, appropriators are prohibited from committing waste or applying water in a non-beneficial manner:

> It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources. *Reynolds Irrigation District v. Sproat*, 69 Idaho 315, 206 P.2d 774; Constitution, Art. 15; §§ 42-104, 42-222 I.C. To effectuate this policy, the legislature has made it a misdemeanor to waste water from a stream, the waters of which are used for irrigation. § 18-4302 I.C. Under this section and the constitutional policy cited, it is the duty of a prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for the use thereof.

Mountain Home Irrigation Dist. v. Duffy, 79 Idaho 435, 442, 319 P.2d 965, 968 (1957). *See Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) ("It is the policy of the law to prevent wasting of water.").

43. In Idaho, ground water is treated similarly to surface water in terms of appropriation, priority, and the requirement that the water be put to a beneficial use:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

Idaho Code § 42-226.

Because Idaho Code § 42-226 seeks to promote "*optimum development* of water resources . . . [,]" it is consistent with the Idaho Constitution. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (emphasis added).

44. In *Fellhauer v. People*, the Colorado Supreme Court, in interpreting a portion of Colorado's constitution, which the drafters of the Idaho Constitution considered in crafting Article XV, § 3, reached the same conclusions regarding full or optimal economic development of underground water resources:

> It is implicit in these constitutional provisions that, along with Vested rights, there shall be Maximum utilization of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of Maximum utilization and how constitutionally that doctrine can be integrated into the law of Vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968).

45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, in conjunction with the reasoning established by the

Colorado Supreme Court in *Fellhauer*, it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use. Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. Thus, senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.

46. In its Letter, the Surface Water Coalition asserts that:

> The extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water which is the result of groundwater depletions. Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the water rights of the Surface Water Coalition.
>
> Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights.

Letter at p. 3.

47. Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. The Surface Water Coalition has no legal basis to seek the future curtailment of junior priority ground water rights based on injury alleged by the Coalition to have occurred in prior years.

48. Whether the senior priority water rights held by or for the benefit of members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by members of the Surface Water Coalition and available from both natural flow and reservoir storage combined. To administer junior priority ground water rights while treating the natural flow rights and storage rights of the members of the Surface Water Coalition separately would either: (1) lead to the curtailment of junior priority ground water rights, absent mitigation, when there is insufficient natural flow for the senior water rights held by the members of the Surface Water Coalition even though the reservoir space allocated to members of the Surface Water Coalition is full; or (2) lead to the curtailment of junior priority ground water rights, absent mitigation, anytime when the reservoir space allocated to the members of the Surface Water Coalition is not full even though the natural flow water rights held by members of the Surface Water Coalition were completely satisfied. Either outcome is wholly inconsistent with the provision for "full economic development of underground water resources" in Idaho Code § 42-226 articulated as "optim[al] development" in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513, P.2d 627, 636 (1973).

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

DATED this 2nd day of May 2005.

KARL J. DREHER
Director

ADDENDUM B

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs, and RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY, Intervenors, v. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER, its Director, Defendants, and IDAHO GROUND WATER APPROPRIATORS, INC., Intervenors.	**Case No. CV-2005-600** **DEFENDANTS' MEMORANDUM IN RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT**

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ADDENDUM C

ADDENDUM D

ADDENDUM E

ADDENDUM F