IN THE SUPREME COURT FOR THE STATE OF IDAHO

Supreme Court Docket No. 49632-2002

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

v.

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

and

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

SUN VALLEY COMPANY'S INTERVENOR-RESPONDENT 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

The Sun Valley Company ("SVC") responds in support of the district court's decision that the Director ("Director") of the Idaho Department of Water Resources ("IDWR" or "Department") violated Idaho's prior appropriation doctrine when he conjunctively administered and illegally curtailed ground water pumping in Basin 37 during the 2021 irrigation season by: (1) failing to define an area of common ground water supply ("ACGWS") as mandated by the *Rules for Conjunctive Management of Surface Water and Ground Water Resources*, IDAPA 37.01.11 *et seq*. ("CM Rules") and the district court's 2016 *Memorandum Decision and Order*, Ada County Case No. CV-WA-2015-14500 (April 22, 2016) (hereinafter *2016 Memorandum Decision*)[1] when he eschewed those requirements and instead created a "Potential Area of Curtailment" that is not recognized in Idaho law; (2) failing to make a finding of material injury in accordance with the CM Rules as required by this Court's prior decision in *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 43 Idaho 862, 154 P.3d 433 (2007) and *Clear Springs Foods, Inc. v. Idaho Dept. of Water Res.*, 150 Idaho 790, 252 P.3d 71 (2011); and (3) failing to follow Idaho's Ground Water Act, I.C. §§ 42-226 – 42-239 ("GWA"). The district court properly saw through the arguments of IDWR, which ignored the law and upended well-established precedent that water users have relied on. SVC respectfully asks that the Court affirm the district court on these points and award SVC its costs and attorney's fees on appeal.

II. FACTUAL AND PROCEDURAL HISTORY

The Director initiated this complex administrative proceeding on May 4, 2021 – which went to hearing barely four weeks later on June 7, 2021 – with a decision issued by him on June

[1] The *2016 Memorandum Decision* is located in the *Agency Record* ("A.R.") at pages 2403-19 and is also located on the SRBA's website: 0080044xx00103.pdf (state.id.us) (last visited Sept. 20, 2022). For convenience, all citations to the *2016 Memorandum Decision* will be to the specific page number in the decision and to the A.R. page number.

28, 2021. In all other conjunctive administrations matters that have come before this Court, an administrative record was developed over months and years, not days and weeks. A.R. at 205, 442.[2] IDWR's rush to hold this hearing after crops were in the ground resulted in an ill-conceived process that physically curtailed junior ground water users in Basin 37 contrary to Idaho's prior appropriation doctrine. A summary of the timeline is therefore instructive.

On May 4, 2021, the Director sent *Notice* of an administrative proceeding to water users: "[T]he Director is initiating an administrative proceeding to determine when water is available to fill the ground water rights . . . within the Wood River Valley . . . ." A.R. 1. The legal basis for the proceeding was stated as follows: "Pursuant to Idaho Code § 42-237a.g., 'water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect . . . the present or future use of any prior surface or ground water right." *Id*. (ellipses in original). Notice was mailed to some water users within Basin 37, with errors in service soon discovered. A.R. 3-42, 46-85. Notice was published in newspapers without any legal descriptions to provide water users with an understanding as to where the Director was contemplating curtailment. A.R. 44, 212-13, 317, 457-58. Importantly, the notice warned all water users: "**If you do not participate, you may still be legally bound by the results of this proceeding.**" A.R. 1 (emphasis in original).

On May 11, 2021, SVC was forced to file a notice of *Notice of Intent to Participate* to protect its water rights, A.R. 94-97, due to the fact that the Director created a "Potential Area of Curtailment" that is not recognized in Idaho law, A.R. 436, and specifically warned all water users they could be bound by the outcome of an unknown process. On May 14, 2021, SVC filed a *Motion to Dismiss* the proceeding for failure to establish an ACGWS, among other things.

[2] "A.R." refers to the *Agency Record* on appeal with citation to the specific page within the same.

A.R. 201-03. *See also* A.R. 126 ("*South Valley Ground Water District's Motion to Dismiss / Supporting Points & Authorities / Motion to Shorten Time for Response / Request for Oral Argument*"). As to the ACGWS, SVC reminded the Director that the district court's *2016 Memorandum Decision* required establishment of an ACGWS for curtailment in Basin 37, as well as reminding the Director of his statement to the 2021 Legislature that the CM Rules are Idaho's legal paradigm for curtailment of junior ground water rights. A.R. 202.

On May 11, 2021, the Director issued his *Request for Staff Memorandum* in which he asked IDWR staff to compile technical information related to water rights, delivery systems, and the Wood River Valley Groundwater Flow Model Version 1.1, among other things. A.R. 98.

On May 21, 2021, SVC, City of Bellevue, City of Hailey, and City of Ketchum[3] filed a *Request for Information Related to Staff Memoranda* with IDWR as to the *Request for Staff Memorandum*. A.R. 415-17.

On May 22, 2021, the Director issued his *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement* in which he opined, contrary to established precedent and law, that an ACGWS was not required, that he was entitled to commence the proceeding based on a selective reading of I.C. § 42-237a.g, and that the CM Rules did not apply. A.R. 436-44.

On May 24, 2021, the Director held a Prehearing Conference, which was the first time the parties to the proceeding were brought together. As to the lack of a legally significant ACGWS that would cement the boundaries of curtailment, the Director expressly recognized that the proceeding could change and be enlarged:

> [MR. BROMLEY] And the last -- my last comment, Director, is I've been involved in enough of these to have seen the scope increase from what was stated at the outset. So I -- you know, I appreciate what you're saying. But my personal

[3] Bellevue, Hailey, and Ketchum will be collectively referred to herein as "the Cities."

> experience is that scope has a tendency of enlarging. And that's the difficulty, then, that the third group is in, at least from my standpoint, for my client, is knowing that in fact that that scope will increase.

Prehearing Tr. p. 54, ln. 25; p. 55, lns. 1-7.

> [MR. SEMANKO] I still feel like what Mr. Bromley said, I don't know what's going to happen at the hearing. I don't know where it's going to go. I got to be there to protect my folks.

Id. at 67, lns. 16-19.

> [DIRECTOR SPACKMAN] And Chris is worried about creep. And I think that's a legitimate concern. And I want to -- I want to limit the focus on this hearing to the area that was identified. . . . . But the proceeding itself could go on and be much larger than this particular hearing. And there could be multiple hearings that spring out of this particular matter. That's my vision.

Id. at 69, lns. 11-14, lns. 21-24 (emphasis added).

On May 25, 2021, the Director issued his *Prehearing Order; Scheduling Order*, in which he set the hearing on exceedingly multifaceted conjunctive administration issues to commence on June 7, 2021 and described other associated deadlines, such as setting a May 26, 2021 expert witness deadline, a May 28, 2021 deadline to identify fact witnesses, and a June 2, 2021 deadline to disclose exhibits. A.R. 520-25.

The hearing in this matter commenced on Monday, June 7, 2021 and was completed on Saturday, June 12, 2021. On June 9, 2021, three days into the hearing, and a week after the exhibit deadline passed, IDWR provided SVC and the Cities with documents that were asked for in the May 21, 2021 *Request for Information Related to Staff Memoranda*. A.R. 1465-72.

On June 12, 2021, Gregory K. Sullivan,[4] the expert witness for SVC and the Cities, provided expert testimony in eight areas of inquiry:

[4] In the *Rangen, Inc*. delivery call, this Court relied on testimony from Mr. Sullivan to reduce the amount of water that Rangen was entitled to through curtailment. *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 810, 367 P.3d 193, 205 (2016) ("The Director's adoption of Sullivan's 63/37 regression analysis is supported by substantial

(1) Establishing water rights owned by SVC and the Cities are located outside of the Director's "potential area of curtailment," *Hearing Tr*. p. 1423, lns. 8-25, p. 1424, lns. 1-6.;

(2) Establishing that the "potential area of curtailment" changed throughout the hearing process, *Id*. p. 1423, lns. 8-21;

(3) Establishing the lack of evidence that water curtailed in the Bellevue Triangle will actually be received by the senior water rights that are calling for water, *Id*. p. 1424, lns. 17-25 through p. 1433, lns. 1-7;

(4) Establishing the lack of evidence of injury to senior water rights, *Id*. p. 1433, lns. 8-25 through p. 1435, lns. 1-17;

(5) Establishing the Model cannot predict the benefits of curtailment to Silver Creek and its tributaries, *Id*. p. 1435, lns. 18-25 through p. 1437, lns. 1-7;

(6) Establishing necessary improvements to the Model, *Id*. p. 1439, lns. 1-25 through p. 1441, lns. 1-19;

(7) Establishing junior ground water users in conjunctive administration in Idaho and other western states have always been given the opportunity to mitigate, despite testimony from an IDWR witness saying that could not happen in this case, *Id*. p. 1437, lns. 8-25 through p. 1438, lns. 1-25;[5] and

(8) Establishing the truncated nature of this proceeding, including not receiving requested information from IDWR until during the hearing itself, prevented Mr. Sullivan from properly analyzing the assertions made by the Department and senior water users, *Id*. p. 1441, lns. 20-25 through p. 1443, lns. 1-13.

On June 28, 2021, the Director issued his *Final Order* curtailing junior ground water rights within the Bellevue Triangle "for the 2021 irrigation season starting on July 1, 2021."

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and competent evidence."). Mr. Sullivan also serves as "the lead modeling expert for the State of New Mexico in the ongoing litigation on the Rio Grande involving Texas v. New Mexico." *Hearing Tr.* p. 1419, lns. 2-4.

[5] During the hearing, and contrary to Idaho law, an IDWR witness stated juniors would not be able to mitigate within the proceeding initiated by the Director. "Q. [BY MR. LAWRENCE] Mr. Luke, I'm going to ask you if the Director orders curtailment of junior ground water rights in this proceeding, what options would be available to junior users to prevent shutting off or to mitigate their use? A. [BY MR. LUKE] I don't know that there would be any." *Hearing Tr.* p. 378, lns. 5-9 (emphasis added). This statement is in direct contravention of this Court's prior decisions that the ability for juniors to mitigate is a bedrock principle in conjunctive administration and wholly consistent with Idaho's prior appropriation doctrine. *See e.g. Rangen, Inc. v. Idaho Dept. of Water Res.*, 160 Idaho 251, 371 P.3d 305 (2016) (approval of a mitigation plan to allow junior ground water users to continue to pump over the objection of the senior surface water user). Had IDWR followed the CM Rules, there would have been a process for filing mitigation plans.

A.R. 1882. As to the motions to dismiss filed by SVC and Galena Ground Water District/South Valley Ground Water District, the Director again held that the proceeding was not governed by the CM Rules and that he was entitled to commence the proceeding based on his selective reading of I.C. § 42-237a.g. A.R. 1911-18.

On February 10, 2022, the district court issued its *Memorandum Decision and Order*,[6] affirming the Director's use of I.C. § 42-237a.g. to initiate a contested case, but set aside and remanded in part the rest of the *Final Order* for failure to apply Idaho's prior appropriation doctrine, finding the Director erred in three specific ways.

First, the Director failed to create an ACGWS and in its place created a "potential area of curtailment" that is not found in Idaho law. *Memorandum Decision and Order* at 12; C.R. 689. As clearly stated by the district court: "Determining an area of common ground water supply is critical in a surface to ground water call." *Memorandum Decision and Order* at 11; C.R. 688 (emphasis added). Consistent with SVC's *Motion to Dismiss*, the district court held an ACGWS is critical because it "assures that those juniors who are causing the material injury are those that are curtailed." *Memorandum Decision and Order* at 12; C.R. 689. "It is undisputed that an [ACGWS] has not been established for Silver Creek and/or Little Wood River. It is further undisputed that the Director did not establish one as part of this proceeding. Rather, the Director set a 'potential area of curtailment,' to determine those junior ground water rights subject to curtailment. A.R., 1882. The procedures and criteria utilized to define the boundaries of the 'potential area of curtailment' are not clear from the record. It is unknown how the 'potential area of curtailment' was derived, and whether it is consistent with an [ACGWS] for Silver Creek

[6] The *Memorandum Decision and Order* is located at the *Clerk's Record on Appeal* ("C.R") at page 678-94. For convenience, all citations to the *Memorandum Decision and Order* will be to the page numbers in the decision and to the C.R. page numbers.

and/or the Little Wood River." *Id*. (emphasis added). Since an ACGWS was not "established in this case, the Final Order must be set aside and remanded." *Memorandum Decision and Order* at 13; C.R. 690.

Second, consistent with testimony from Mr. Sullivan, the district court held the Director failed to find injury to any senior water rights: "In this case, the Final Order contains no finding of material injury to senior surface water rights that would receive water from curtailment. . . . . Rather, it appears the Director based his curtailment on depletions to the source (i.e., Silver Creek and the Little Wood River) caused by ground water use. Since the Final Order did not make any finding of material injury to senior surface water rights, the Final Order is contrary to law and must be set aside and remanded." *Memorandum Decision and Order* at 14; C.R. 691 (emphasis added).

Third, because ground water rights are real property rights, and the Director illegally curtailed them, the district court held: "The Final Order is inconsistent with Idaho's prior appropriation doctrine for the reasons set forth herein. Therefore, the Final Order was issued to the prejudice of the substantial rights of the Petitioners. It follows that the Final Order must be set aside and remanded." *Id*. (emphasis added).

III. ADDITIONAL ISSUE PRESENTED ON APPEAL

As an issue on appeal, and pursuant to I.C. § 12-117(1), I.A.R. 35(b)(5), I.A.R. 40(a), and I.A.R. 41, SVC asks this Court for an award of its reasonable costs and attorney's fees incurred on appeal.

IV. STANDARD OF REVIEW

In an appeal from a district court acting in its appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the decision to determine whether it correctly

decided the issues. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). The Court reviews the matter "based on the record created before the agency." *Chisholm v. Idaho Dept. of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009). "The Court is bound by an agency's factual determinations even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Rangen* at 804, 367 P.3d at 199 (internal citations omitted). As to questions of law and matters of statutory interpretation, they are freely reviewed. *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 243, 443 P.3d 252, 257 (2019); *Intermountain Real Props., L.L.C. v. Draw, L.L.C.*, 155 Idaho 313, 317–18, 311 P.3d 734, 738–39 (2013). 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 decision of the Department must be "set aside if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67–5279(3). In addition, this Court will affirm an agency action unless a substantial right of the appellant has

been prejudiced. I.C. § 67–5279(4)." *Idaho Power Co. v. Idaho Dept. of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67–5279." *Id*. (internal quotation marks omitted).

V. ARGUMENT

This case is about conjunctive administration of water rights, meaning the ability for the Director to curtail junior ground water rights for the benefit of senior surface water rights. "Conjunctive administration" was "a major objective" for commencement of the Snake River Basin Adjudication, *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997) (quoting Interim Leg. Comm. Rep. of the Snake River Basin Adjudication N. 36-37 (1994)), and is governed by the CM Rules, Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, 97-101 (2016) (discussing Basin-Wide Issue No. 5 and the importance of conjunctive administration of the Snake River Basin in accordance with the CM Rules).[7] IDWR is represented on appeal by the Office of the Attorney General; therefore, it is significant that the authors of *Understanding the Snake River Basin Adjudication*, "who are current or former Idaho Deputy Attorneys General that represented the State of Idaho or the Idaho Department of Water Resources . . . [with] over 100 years of work experience on the Snake River Basin Adjudication," 52 IDAHO L. REV. at 53, told the legal community that conjunctive administration of the Snake River Basin, of which Basin 37 is a part, *Eden v. State*, 164 Idaho 241, 247, 429 P.3d 129, 135 (2018), would be governed by the CM Rules.

[7] The Court has previously relied on *Understanding the Snake River Basin Adjudication* in *Eden v. State*, 164 Idaho 241, 245, 429 P.3d 129, 133 (2018) and *United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 64, 408 P.3d 52, 62 (2017).

The CM Rules have been in place since 1994, with fifteen years' worth of precedent since this Court's 2007 decision in *American Falls* held the CM Rules were constitutional. The CM Rules and decisions from this Court concerning conjunctive administration provide water users – junior and senior alike – with an ability to understand how to advance their interests and defend their rights against others, including the Department. *Idaho Conservation League* at 422, 958 P.2d at 579 (if "[c]onjunctive administration" is not pursued "a major objective for the adjudication will not have been served . . . and another generation of ground water and surface water users will be uncertain regarding their relationship to each other.").

Given this history, why the Department has chosen to abandon the CM Rules in favor of a novel theory that advocates use of a few words and phrases in I.C. § 42-237a.g. to advance its interests in curtailment troubled the district court, as was evident in questioning of IDWR's then-deputy attorney general during oral argument on judicial review:

> [BY JUDGE WILDMAN] [Y]ou know [Mr. Costello], we've spent a lot of time since the beginning with [*American Falls*], you know, litigating the meaning, application, and constitutionality of the Conjunctive Management Rules. There has been a lot of Supreme Court decisions out on that and what's constitutionally required not only to protect seniors but also juniors and the like.

Tr. on Appeal, p. 60, lns. 18-24.

Why the Department is attempting to maneuver its way out of the CM Rules confounded the district court, is still unknown, constitutes a needless sea change that ignores due process, will continue to frustrate the relationship between junior and senior users, and waste more judicial resources in subsequent litigation. Therefore, the district court came to a reasoned decision that IDWR must be held to the CM Rules.

A. The District Court Correctly Held That An Area Of Common Ground Water Supply Is A Critical, Mandatory Requirement In Conjunctive Administration

The district court correctly held: "Determining an area of common ground water supply is critical in a surface to ground water call." *Memorandum Decision and Order* at 11; C.R. 688 (emphasis added). "The necessity of establishing an area of common ground water supply is two-fold. First, it establishes the borders for due process. . . . . Second, with respect to priority administration, its boundary establishes the proper order of curtailment of junior rights." *Memorandum Decision and Order* at 12; C.R. 689. In briefing, IDWR ignores the district court, arguing the requirement of an ACGWS is neither "mandatory . . . nor a practical necessity." *Opening Brief* at 21. Moreover, IDWR states: "Designating an area of common ground water supply in this context would be superfluous" and "the district court's analysis is incompatible with the text of § 42-237a.g. and this Court's prior appropriation caselaw." *Id*. at 22 and 29. As will be explained, the Department is incorrect as it ignores the law of the case doctrine, Idaho Code, the CM Rules, Idaho caselaw, and the Director's 2021 representation to the Legislature that he would follow the CM Rules, all of which mandate that IDWR first put water users on notice through creation of a legally-based ACGWS as to who is and is not subject to administration before water rights are curtailed.

1. The Law of the Case Doctrine Requires Establishment of an ACGWS in the Big Wood and Little Wood Rivers Before Curtailment of Ground Water Rights

The Department, the Director, and the senior water users who are part of the Big Wood & Little Wood Water Users Association – all of whom are party to this proceeding and party to the *2016 Memorandum Decision* – have been on notice since 2016 that before junior ground water rights are curtailed in the Big Wood and Little Wood rivers, an ACGWS must be established. *2016 Memorandum Decision*. A *Judgment* accompanied the *2016 Memorandum Decision*: "The

Director's *Order Denying Sun Valley Company's Motion to Dismiss* issued on July 22, 2015, is set aside and remanded for further proceedings as necessary."[8] As the prevailing party, the district court awarded SVC its costs: "Therefore, IT IS ORDERED that [SVC] is hereby awarded costs in the amount of $1,401.00."[9] The *2016 Memorandum Decision* and *Judgment* were not appealed, with the June 7, 2016 *Remittitur* instructing as follows: "The Idaho Department of Water Resources shall forthwith comply with the directives of the *Memorandum Decision and Order* and corresponding *Judgment* . . . ."[10] Emphasis added. As a final, unappealed decision that instructs the Department to establish an ACGWS as a precondition for conjunctive administration of water rights in the Big Wood and Little Wood rivers, the *2016 Memorandum Decision* is binding as "law of the case." The law of the case doctrine "is intended to avoid relitigating issues that have already been decided, and it functions much like *stare decisis*." *Regan v. Owen*, 163 Idaho 359, 362, 41 P.3d 759, 762 (2018). While the district court was not presented in this case with the law of the case doctrine, this Court may affirm the district court on this basis. *Edged in Stone* at 181, 321 P.3d at 731 (district court may be affirmed on a different legal theory). *See also Safaris Unlimited, LLC v. Jones*, 169 Idaho 644, 650-51, 501 P.3d 334, 340-41 (2021) (*sua sponte* application of "law of the case doctrine").

[8] The *Judgment* is located on the SRBA's website: 0080044xx00104.pdf (state.id.us) (last visited Sept. 20, 2022). SVC asks the Court to take judicial notice of the *Judgment*. I.C. § 9-101(3) (courts may take judicial notice of "official acts of the . . . judicial department[] of this state").

[9] The *Order Awarding Costs* is located on the SRBA's website: 0080044xx00111.pdf (state.id.us) (last visited Sept. 20, 2022). SVC asks the Court to take judicial notice of the *Order Awarding Costs*. I.C. § 9-101(3) (courts may take judicial notice of "official acts of the . . . judicial department[] of this state").

[10] The *Remittitur* is located on the SRBA's website: 0080044xx00112.pdf (state.id.us) (last visited Sept. 20, 2022). SVC asks the Court to take judicial notice of the *Remittitur*. I.C. § 9-101(3) (courts may take judicial notice of "official acts of the . . . judicial department[] of this state").

As stated by this Court, the law of the case doctrine prevents relitigation of issues that were decided by a district court acting in its appellate capacity, even when an appeal was not taken to the Supreme Court:

> The doctrine of "law of the case" is well established in Idaho and provides that "upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal...." *Suitts v. First Sec. Bank of Idaho*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc.*, 180 Mont. 434, 591 P.2d 196, 197 (1979)).
>
> . . . .
>
> Additionally, Idaho courts have applied the "law of the case" doctrine to preclude relitigation of issues in cases that did not reach the Supreme Court during the first appeal.
>
> . . . .
>
> Similarly, the Court of Appeals has held that where the district court acts in an appellate capacity, and appeal to the Supreme Court is subsequently dismissed by stipulation, the rulings of the district court "became final rulings in the case, not subject to attack in this appeal, and which stated the law of the case that the magistrate—and even this appellate court—must follow in this appeal." *Wulff v. Peralta*, 123 Idaho 567, 568, 850 P.2d 216, 217 (Ct. App. 1993).
>
> Applying the "law of the case" doctrine to cases which do not reach the Supreme Court during the first appeal would help ensure consistent results in the appellate process on all levels.

Swanson v. Swanson, 134 Idaho 512, 515-16, 5 P.3d 973, 976-77 (2000).

In the *2016 Memorandum Decision*, the district court, on judicial review, held the Department erred when it denied SVC's motion to dismiss a conjunctive administration proceeding for failure to follow the CM Rules, particularly as to the failure to establish an ACGWS in Basin 37. The parties to the *2016 Memorandum Decision* included the Director, the Department, the Big Wood & Little Wood Water Users Association, SVC, and South Valley Ground Water District, among others. *2016 Memorandum Decision* at 1-2; A.R. 2403-04 . As

concluded by the district court: "All parties agree that an area of common ground water supply applicable to the Big Wood and Little Wood River must be determined." *2016 Memorandum Decision* at 8; A.R. 2411 (emphasis added). "The area of common ground water supply in a surface to ground water call defines the world of juniors whose rights to the use of ground water may be curtailed. It is paramount that junior users who may be found within that area be given proper notice and the opportunity to be heard." *2016 Memorandum Decision* at 9; 2412 (emphasis added). In the *Remittitur* the Department was instructed to "forthwith comply" with the requirement of establishing an ACGWS as a precondition for conjunctive administration of water rights in the Big Wood and Little Wood rivers.

Here, much of the rationale and language in the *Memorandum Decision* that is at issue today was taken from the *2016 Memorandum Decision*, with direct citation thereto. *See e.g. Memorandum Decision and Order* at 11; C.R. 688 ("In [the *2016 Memorandum Decision*], the Court addressed the importance of establishing an area of common ground water supply for purposes of conjunctive administration."). When "an appellate court states a principle of law in deciding a case, that rule becomes law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same." *Swanson* at 516, 5 P.3d at 977. Here, the facts and the law are the same as in the *2016 Memorandum Decision*, with application of conjunctive administration, absent an ACGWS, involving the Director, the Department, the Big Wood & Little Wood Water Users Association, SVC, South Valley Ground Water District, and other junior users who pump ground water in the area of the Big Wood and Little Wood rivers. Therefore, in order to "ensure consistent results in the appellate process at all levels," *Swanson* at 516, 5 P.3d at 977, the law of the case doctrine should be applied in conjunctive administration in Basin 37 in order to give meaning and effect to the *2016*

Memorandum Decision wherein "All parties agree that an area of common ground water supply . . . must be determined." *2016 Memorandum Decision* at 8; A.R. 2410 (emphasis added).

2. If the Law of the Case Doctrine Does Not Apply, Idaho Code Requires the Establishment of Geographic Boundaries Before Curtailment May Occur

In the alternative, if the law of the case doctrine does not end the discussion, the district court's decision to require an ACGWS is fully supported by Idaho's prior appropriation doctrine. Dividing the state into areas for administration of water rights before curtailment is not a novel concept. This is because water rights are real property rights, I.C. § 55-101(1), and all water rights – junior and senior – are entitled to protection under the law, *Clear Springs* at 814, 252 P.3d at 95 ("the owner of a water right must be afforded due process of law"). Since the turn of the twentieth century, I.C. §§ 42-602 and 42-604 have required the Director to create water districts within which a watermaster distributes and controls water rights. *See In re Water District 170* (explaining the creation of Water District No. 170). As for ground water rights, they may be administered within specifically designated "critical ground water area[s]" and "ground water management area[s]." I.C. §§ 42-233a, 42-233b. *See Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 546 P.2d 382 (1976) (explaining administration of water rights within a critical ground water area"). A predefined area, established prior to curtailment, is clearly embodied in Idaho Code and supports the district court's decision that an ACGWS is consistent with the prior appropriation doctrine, regardless of where the Director claims his authority derives.

3. This Court, in *A&B Irr. Dist. v. Spackman*, Told the Director that he Must Follow the Procedures Embodied in the CM Rules

The Director's decision to step away from the CM Rules and substitute in an unknown "potential area of curtailment" in place of a legally significant ACGWS is eerily reminiscent of

his attempts in the early days of conjunctive administration to short-circuit established procedure to the detriment of senior surface water users through approval of what were known as "replacement water plans." *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 645, 315 P.3d 828, 833 (2013). The purpose of a replacement water plan was to allow junior ground water users to offset their ground water depletions in lieu of curtailment. *Id*. at 644, 315 P.3d at 832. While replacement water plans bore some similarity to mitigation plans allowed under CM Rule 43, IDAPA 37.01.11.043, they lacked procedural requirements for seniors to understand how to challenge them and judge their efficacy.

After the Director issued his order granting curtailment and approving replacement water plans, former Chief Justice Gerald Schroeder was appointed as a hearing officer to consider the Director's initial orders and issue a recommended order consistent with I.C. § 67-5244 and IDAPA 37.01.01.720. In his capacity as a hearing officer, former Chief Justice Schroeder "recommended that replacement water plans ordered by the Director comply with the procedural steps necessary for approval of mitigation plans, as set forth in the Conjunctive Management Rules." *Spackman* at 645, 315 P.3d at 833 (emphasis added). In reviewing the recommended order, the Director disagreed, "conclude[ing] . . . that '[a]uthorizing replacement water plans ensures that the senior water user making the delivery call is made whole during the pendency of the proceeding and the junior is not irreparably harmed prior to a hearing on the call." *Id*. at 646, 315 P.3d at 834.

On judicial review, the district court "found no distinction between replacement water plans and mitigation plans and observed that the use of replacement water plans permitted the Rules governing mitigation plans to be circumvented." *Id*. (emphasis added). On appeal, this Court affirmed the district court, "holding that the Director abused his discretion by failing to

comply with the procedural framework applicable to mitigation plans when he approved replacement water plans." *Id*. at 656, 315 P.3d at 844 (emphasis added); *see also Clear Springs* at 814, 252 P.3d at 95 ("the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and [instead] ordering replacement water").

Here, and as it held with replacement water plans that were approved to the detriment of senior surface water users, the district court opined that the Director circumvented necessary process, this time to the detriment of juniors: "It is unknown how the 'potential area of curtailment' was derived, or whether it is consistent with an area of common ground water supply . . . ." *Memorandum Decision and Order* at 12; C.R. 689 (emphasis added). Citing this sentence, and unbothered by its implications, IDWR argues: "This assertion is contrary to the record – particularly, the staff memorandum and testimony of Jennifer Sukow. In fact, at oral argument the district court asked the Department's counsel how the Director determined the Potential Area of Curtailment, and counsel, aptly, pointed to Sukow as 'the subject matter expert.'" *Opening Brief* at 35 (internal citation removed). IDWR's representation of the oral argument could not be more incorrect. As stated by the district court: "Counsel for [IDWR] was unable to explain how the boundaries of the 'potential area of curtailment' were arrived at when asked at the judicial review hearing." *Memorandum Decision and Order* at 12, fn. 14; C.R. 689, fn. 14 (emphasis added).

Despite this, IDWR tries to assure the Court that the "potential area of curtailment" suffices and that an ACGWS is not necessary because "notice was published in several newspapers and mailed to all holders of surface and ground water rights included in Water

District 37 and neighboring Water District 37B." *Opening Brief* at 11 (emphasis added). This statement is simply not accurate for five reasons.

First, by taking it upon himself to define a boundary within which curtailment could occur, the Director acted contrary to the requirements of the *2016 Memorandum Decision*. There, the court stated the Director could not undertake "the exercise of identifying those junior water right users in those areas of the state [he] believed may be affected . . . . These included junior ground water users in water district 37 and water district 37B." *2016 Memorandum Decision* at 13; A.R. 2415. "[T]he exercise undertaken by the Director leads Sun Valley and other juniors to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers . . . . The Director denies these allegations, but the Court understands the concerns of the juniors." *Id*.

Second, there were problems with what the Director now represents sufficed for notice. The problems with notice included confusion as to the scope of the curtailment area. During the Prehearing Conference, the Director candidly admitted he did not know where the northern boundary of the "potential area of curtailment" was located:

> [BY MR. SPECK] If I may revisit the question I asked at the outset, and I saw Jennifer Sukow raise her hand at one point. We really need to understand where that north line is in the area . . . . And her line, if I read [Ms. Sukow's] report correctly, is Glendale Bridge Road. And your line is significantly north of that. So we need to know what it is.
>
> [BY DIRECTOR SPACKMAN] Well, let me defer to Jennifer [Sukow]. Jennifer, are you on?
>
> [BY MS. SUKOW] Yes, I'm on. Can you hear me?
>
> [BY DIRECTOR SPACKMAN] Yes.
>
> [BY MS. SUKOW] Yeah, just to clarify that the area that you sent out that was attached to the notice is larger than the area that was analyzed in my staff memo. And Jim Speck's correct about that. It is -- it does -- it does go a bit further north,

> and then it also includes -- the area in the notice includes a few more groundwater PODs in the very southeast and southwest parts of the triangle. So I think the clarification he's asking for is which -- I guess if people are in those -- those areas that are between those two, I guess he's asking whether -- whether they would be -- whether they need to be concerned about being curtailed or not. And I don't know the answer to that. But I just wanted to point out that those -- those two areas are -- are different.
>
> [BY DIRECTOR SPACKMAN] Okay. And this is -- so thanks, Jim. So this is something unknown to me . . . .

Prehearing Tr. p. 55, lns. 19-25; p. 56, lns. 1-25; p. 57, lns. 1-8 (emphasis added).[11]

Predictably, and because the boundary was unbeknownst to the Director, the original May 4, 2021, notice of the proceeding that was mailed to water users contained errors, A.R. 3-42, requiring IDWR to re-mail notice on May 7, 2021, R. 46-85. IDWR did not and could not confirm if all the same people received new notice, or just if those who had errors did. Thus, IDWR cannot legitimately say "all" junior ground water users in Water District Nos. 37 and 37B were served.

Third, publication of the proceeding that appeared in newspapers failed to cite any legal descriptions for the boundaries within which IDWR would curtail, A.R. 44, 212-13, 317, 457-58; consequently, there was no way for ground water users who read the publication to understand whose water rights were at risk. *Compare* A.R. 44, 212-13 (notice publication) *with* CM Rule 50.01; IDAPA 37.03.11.050.01 (defining the Eastern Snake Plain Aquifer ACGWS by legal description).

Fourth, and as raised in SVC's *Motion to Dismiss*, by only serving notice on users in Water District Nos. 37 and 37B, water users in Water District Nos. 37N, 37O, and 37U, all of whom divert water in Basin 37, were never brought into this action. A.R. 197. The omission of

[11] The Director could have easily avoided this confusion by creating an ACGWS consistent with CM Rule 31. IDAPA 37.03.11.031 (describing the factors for establishment of an ACGWS).

notice to water users in Water District Nos. 37N, 37O, and 37U was previously criticized by the district court in the *2016 Memorandum Decision* and was not remedied here: "Nor was an explanation given as to why water users in other organized water districts within IDWR Basin 37 (i.e., water district 37N, 37O and 37U) were not served." *2016 Memorandum Decision* at 13; A.R. 2415.

Fifth, the "potential area of curtailment" within which IDWR claimed it would administer was not only unknown to the Director at the Prehearing Conference, but the boundary continued to shift throughout the hearing, demonstrating there was no certainty as to who was noticed and who would ultimately be curtailed. *Cities/SVC Ex. 3* located at A.R. 3140; *Hearing Tr*. p. 1423, lns. 8-21 (testimony of G. Sullivan).

All of this led the district court to properly conclude: "[T]he record fails to establish that the 'potential area of curtailment' encompassed *all* water rights which affect the flow of the subject surface water source, as required by the prior appropriation doctrine." *Memorandum Decision and Order* at 12-13; C.R. 689-90 (italics in original) (emphasis added).

If the Director followed established procedure and designated an ACGWS consistent with CM Rule 31, IDAPA 37.03.11.031, junior and senior water users would have had a legal understanding before the hearing of the scope of curtailment and would have been in a position to defend their rights and advance their interests in relation to one another. Therefore, as occurred with "replacement water plans," the district court should be affirmed for its correct understanding that the Director violated established law when he designated a "potential area of curtailment" instead of following the law for designation of an ACGWS.

4. In Repealing Certain Sections of the Ground Water Act During the 2021 Legislative Session, the Director Told the Legislature that the CM Rules are the Vehicle for Conjunctive Administration

Just as he knew from this Court and the district court that he was required to conjunctively administer water rights in accordance with the CM Rules, the Director told the 2021 legislature the same thing when he set out to repeal certain procedural sections of the GWA.

During the 2021 legislative session, House Bill 43 ("HB 43") was advanced by the Department in order to repeal I.C. §§ 42-237b, 42-237c, and 42-237d. A.R. 137, 200-01. These sections were original to the GWA and contained procedures that were required to be followed in order to realize curtailment of junior ground water rights. According to the Statement of Purpose for HB 43, the repeals were pursued in order "to eliminate inactive provisions of law. . . . . The procedures outlined in these sections are obsolete since the adoption of the Rules of Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11)."[12] A.R. 137, 201 (emphasis added).

The obsolete sections of Idaho Code that the Director sought to repeal contained mandatory procedures to seek curtailment. Idaho Code § 42-237b explained that in order to advance a claim for curtailment, the senior user was required to, among other things, identify the junior water rights causing injury along with a detailed and concise statement of the facts upon which the claim of injury was based. *American Falls* at 877, 154 P.3d at 448 (discussing I.C. § 42-237b as consistent with the CM Rules). Idaho Code § 42-237c explained that a hearing on the statement would be held before a "local ground water board." And Idaho Code § 42-237d

[12] The Statement of Purpose for HB 43 may also be found here: H0043SOP.pdf (idaho.gov) (last visited Sept. 20, 2022).

explained the composition of the local ground water board and the district court's role in naming its members.

However, with the repeal, the Department claims all that remains of the GWA when it comes to curtailment of junior ground water rights in this case is I.C. § 42-237a.g. Ignoring the binding nature of the *2016 Memorandum Decision* and its express representations to the Legislature that the Department would follow the CM Rules, IDWR now argues establishing a boundary for curtailment is wholly within the Director's discretion, meaning curtailment can occur anywhere, anytime, without any boundary whatsoever:

> Section 42-237a grants the Director the "sole discretion" to administer, enforce, and effectuate the policies of the Ground Water Act. Doubling down on this unambiguous grant of discretion, § 42-237a.g. further emphasizes the Director's "discretionary power" to "initiate administrative proceedings." And the statute recognizes the Director may, not must, establish an area of common ground water supply if it will be of assistance:
>
> > To assist the director . . . in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he *may establish* a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided.
>
> . . . .
>
> The district court's conclusion that an area of common ground water supply is mandatory voids the statute's permissive language and usurps the "sole discretion" the Legislature granted the Director.

Opening Brief at 22-23 (italics in original) (emphasis added).

In advancing this argument, IDWR cherry picks certain language from I.C. § 42-237a.g., taking it out of context, to come to the conclusion that boundaries do not matter. *St. Lukes Health Sys, Ltd. v. Bd. of Comm. of Gem County*, 168 Idaho 750, 756, 487 P.3d 342, 348 (2021) ("statute should be construed as a whole").

The permissive language cited by the Department only has to do with the Director's discretion to establish a ground water pumping level, also known as a "reasonable pumping level." There is no question that the Director did not establish a reasonable pumping level in this case, A.R. 1915, and that he may choose whether to establish a reasonable pumping level: "the Director has discretion on whether or not to set a reasonable pumping level . . . ." *A&B* at 512, 284 P.3d at 237. If, however, the Director decides to establish a reasonable pumping level, the statute only allows him to do so "in an area or areas having a common ground water supply." I.C. § 42-237a.g. (emphasis added). Use of the word "having" means the ACGWS exists before establishment of a reasonable pumping level.

That a boundary exists before water administration is consistent with the previously cited I.C. §§ 42-233a, 42-233b, 42-602, and 42-604. Moreover, the mandatory requirement for establishment of an ACGWS is also seen in the text of I.C. § 42-237a.g. in language that has striking similarity with the CM Rule 10.01, IDAPA 37.03.11.010.01, and mandates the creation of "an area having a common ground water supply" before administration:

> In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any such stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in the accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended . . . .

I.C. § 42-237 a.g. (emphasis added). *Compare* I.C. § 42-237a.g. *with* IDAPA 37.03.11.010.01 (defining ACGWS as harmonious with "Section 42-237a.g., Idaho Code").

Because of HB 43, the process and procedure outlined in I.C. §§ 42-237b, 42-237c, and 42-237d for establishing "an area having a common ground water supply" were repealed. In place of those statutes, and because the Director understood from this Court's and the district court's prior decisions that process and procedure matters when it comes to protecting junior and senior real property water rights in conjunctive administration, he told the Legislature he would follow the CM Rules. If the Director intends to repeal the CM Rules, he must do so through the procedure set forth in Idaho Code, not through a contested case. *See e.g.* I.C. § 67-5221(1) ("Prior to the . . . repeal of a rule, the agency shall publish notice of proposed rulemaking in the bulletin."). However, until he does so, the Director is "bound by [his] own rules." *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 263, 715 P.2d 927, 933 (1985) (emphasis added).

In conclusion, since 1994, the Director has followed the CM Rules in conjunctive administration of junior ground water rights, including the requirement to administer within an ACGWS. *American Falls* at 867, 154 P.3d at 438. As explained by the Director to this Court in *Musser v. Higginson*, it is because of the CM Rules – and only because of the CM Rules – that he is able to conjunctively administer the State's water resources:

> On June 16, 1993, the Mussers made a . . . demand on the director for the "full and immediate delivery of their decreed water rights from the Curran Tunnel." The director denied the demand on the grounds that "the director is not authorized to direct the watermaster to conjunctively administer ground and surface water within Water District 36A short of a formal hydrologic determination that such conjunctive management is appropriate.
>
> The Mussers sought a writ of mandate to compel the director: (1) to delivery their full decreed water rights, and (2) to control the distribution of water from the aquifer according to the priority date of the decreed water rights.
>
> The director and the department moved to dismiss the Mussers' request for a writ of mandate, arguing that the request was moot because after the Mussers initiated the action, the director issued a notice of intent to promulgate rules and a notice and order for a contested case. The proposed rules would allow the director to respond

> to the Mussers' demands by providing for the conjunctive management of the aquifer and the Snake River.

125 Idaho 392, 394, 871 P.2d 809, 811 (1994) (emphasis added).

After adoption of the CM Rules in 1994, the constitutionality, meaning, and extent of the Rules, have been reviewed on many occasions by this Court, providing juniors and seniors with an understanding of their rights and responsibilities within an ACGWS. *See e.g. Rangen*; *Spackman*; *Clear Springs*; *American Falls*. Until this proceeding, the Director has consistently applied the CM Rules in conjunctive administration. For reasons that are still unknown today, the Director has unilaterally chosen to ignore the bedrock requirement that an ACGWS must be established prior to advancing his interests for curtailment, running contrary to his representations to the district court, this Court, and the Legislature that the CM Rules govern conjunctive administration. Based on the foregoing, the Court should affirm the district court's decision that establishment of an ACGWS is a mandatory first step in conjunctive administration and is therefore consistent with the prior appropriation doctrine.

B. This Court Previously Held In *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Res.* and *Clear Springs Foods, Inc. v. Spackman* That Material Injury, As Defined In The CM Rules, Must Be Established In Order To Conjunctively Administer Junior Ground Water Rights

The Department wrongly claims the GWA "does not require the Director to find material injury before he may prohibit or limit the withdrawal of water from wells." *Opening Brief* at 36 (emphasis added). As the Department correctly acknowledges, "material injury" is a term of art contained in the CM Rules. Material injury is defined in CM Rule 10.14 as: "Hinderance 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 37.03.11.010.14. CM Rule 42 contains a list of non-exclusive factors to establish material injury, such as: (a) the

amount of water available from the source from which the water right is diverted; (b) the amount of water being diverted compared to the water rights; (c) the existence of water measuring devices and recording devices; and (d) the extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply. IDAPA 37.03.11.042.

When presented with the argument from junior ground water users that establishment of material injury absolutely applies in conjunctive administration, the district court correctly held the Supreme Court has already said it does, rendering the Department's argument on appeal baseless:

> The Petitioners argue the Director erred by failing to conjunctively administer to material injury. This issue has been addressed by the Idaho Supreme Court. Idaho Code § 42-237a.g. empowers the Director to initiate administrative proceedings to prohibit or limit the withdrawal of water from a well when "water to fill any water right in said well is not there available." I.C. § 42-237a.g. Water may be deemed available to fill a ground water right in two scenarios. The Idaho Supreme Court has explained these two scenarios as follows:
>
> > [Idaho Code § 42-237a.g] merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) *cause material injury to any prior surface or ground water right* or (b) result in withdrawals from the aquifer exceeding recharge.
>
> *Clear Springs Foods, Inc.*, 150 Idaho at 804, 252 P.3d at 85 (emphasis added). Under the first scenario, the Director's ability to curtail is contingent upon a finding that the ground water withdrawal would cause "material injury" to a senior water right. *Id*.
>
> That the Idaho Supreme Court used the term "material injury" in its interpretation of Idaho Code § 42-237a.g is significant. "Material injury" is a term of art. It is not used or defined in Idaho Code § 42-237a.g. . . . . It follows 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 that he must administer to material injury.

Memorandum Decision and Order at 13; C.R. 690 (emphasis added).

IDWR, however, futilely attempts to convince the Court that its prior holding involving interconnected ground water and surface water rights on the Eastern Snake Plain Aquifer somehow dictates a different outcome when it comes to interconnected ground water and surface water rights in Basin 37: "Compared to rights connected to the ESPA, the connection between the Wood River Valley Aquifer system and the springs feeding Silver Creek is far more immediate. . . . . The vivid distinctions between the CM Rules proceedings and the exigencies of this case, justify limiting *Clear Springs* to its facts." *Opening Brief* at 41-42.

The Department's argument is meritless. As recently acknowledged by this Court, conjunctive administration is conjunctive administration, regardless of location: "[A]ll ground water pumpers impact all hydraulically connected surface water users in the same aquifer and [] all users of hydraulically connected surface water are hydraulically impacted by all ground water users." *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 262, 509 P.3d 1180, 1191 (2022).

In conjunctive administration, the Director expressly represented to the Court in *American Falls* that he is only authorized to curtail junior ground water rights upon a finding of material injury, consistent with CM Rule 42: "Contrary to the assertion of [American Falls], 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." *American Falls* at 868, 154 P.3d at 439 (citing the Director's "Relief Order" applying the prior appropriation doctrine to the Surface Water Coalition's request for conjunctive administration) (emphasis added). Consistent with the Director's Relief Order and the CM Rules, the Court confirmed that if a junior ground water right depletes a source, the depletion may not rise to the level of material injury that should be remedied by curtailment:

> At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage right, regardless of whether there was any indication that it was necessary to fulfill current or future needs . . . . This is simply not the law in Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.

Id. at 880, 154 P.3d at 451 (emphasis added).

As the district court properly found, the Director abused his discretion and acted contrary to Idaho's prior appropriation doctrine when he did not "find[] material injury to senior surface water rights that would receive water from curtailment. . . . . Rather, it appears the Director based his curtailment on depletions to the source (i.e., Silver Creek and the Little Wood River) caused by ground water use)." *Memorandum Decision and Order* at 14; C.R. 691 (emphasis added).

In order to abandon material injury, which would allow the Director to determine injury based on "depletions to the source," the Department must overcome the principle of *stare decisis*. "In Idaho, 'the rule of *stare decisis* dictates that we 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.'" *Ware v. City of Kendrick*, 168 Idaho 795, 801, 487 P.3d 730, 736 (2021).

Requiring proof of material injury in conjunctive administration is neither a hardship, an undue burden, nor manifestly wrong; rather, it is consistent with well-established principles of the prior appropriation doctrine – which are embodied in the CM Rules – that require water is

used efficiently, without waste, and that curtailment will not be futile. IDAPA 37.03.11.010.08 (defining "futile call"); IDAPA 37.03.11.040.03 (reasonable exercise of a water right is efficient use without waste); IDAPA 37.03.11.042.01 (factors for determining material injury include reasonable use of water without waste); *3G AG* at 262, 509 P.3d at 1191 ("water right holders cannot 'waste' or 'unnecessarily hoard' water without putting it to beneficial use"); *Sylte* at 245, 443 P.3d at 259 ("The futile call doctrine in Idaho 'embodies a policy against the waste of irrigation water.' [I]f . . . water in a stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water."); *American Falls* at 877, 154 P.3d at 448 (CM Rules "can be read consistently with constitutional and statutory principles"). Because the Department cannot overcome *stare decisis*, the district court was correct in holding that material injury applies in conjunctive administration.

C. The Department Presents a "Test" for Curtailment that Cannot be Raised for the First Time on Appeal and if Addressed would Constitute a Non-Justiciable Advisory Opinion

The Department advances, for the first time on appeal, an argument about a supposed "test" for curtailment, based on a novel reading of I.C. §§ 42-226 and I.C. 237a.g.:

> This statutory test for curtailment has two elements: (1) whether well withdrawals authorized by ground water rights "would affect" the "present or future use" of any senior water rights, and if so, (2) whether that effect on a senior right is "contrary to the declared policy" of the Ground Water Act. I.C. § 42-237a.g. The first element calls for analysis of how ground water withdrawals affect the use of interconnected senior water rights. The second element depends on whether the effect on a senior right is consistent with the Ground Water Act's declared policy: "beneficial use in reasonable amounts through appropriation" and "the doctrine of 'first in time is first in right.'" I.C. § 42-226.

Opening Brief at 16-17 (emphasis added).

This "test" was never addressed during the administrative process, was not presented to the district court, and cannot be raised for the first time on appeal as an attempted backdoor around the requirement of material injury and a creation of an ACGWS: "The Court will not consider issues raised for the first time on appeal. [P]arties will be held to the theory upon which the case was presented to the lower court." *Alpha Mort. Fund Ii, an Idaho Ltd. v. Drinkard*, 169 Idaho 446, 449-50, 497 P.3d 200, 203-04 (2021) (internal citations omitted). Moreover, this argument has no bearing on whether the district court should be affirmed or reversed for its holding that the Director failed to follow the CM Rules. For this reason, any analysis of IDWR's "test" would constitute an impermissible, "non-justiciable advisory opinion." *Westover v. Idaho Counties Risk Mgmt. Program*, 164 Idaho 385, 390, 430 P.3d 1284, 1289 (2018). Therefore, the Court should not consider any argument from IDWR on this topic.

If the Court determines IDWR has not waived the issue and analysis of such would not result in an advisory opinion, SVC will briefly explain why the Department's "test" is inconsistent with the law. Idaho Code §§ 42-226 and I.C. 42-237a.g. are part of Idaho's "Ground Water Act." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582-83, 513 P.2d 627, 634-35 (1973); *see also A&B* at 506-10, 284 P.3d at 231-35 (discussing the history of the GWA). With the exception of the recently repealed I.C. §§ 42-237b, 42-237c, and 42-237d, the GWA encompasses "I.C. §§ 42-226 to 42-239 . . . ." *A&B* at 506, 284 P.3d at 231. As a series of statutes that were first passed in 1951 and then amended in 1953, all provisions of the GWA must be construed together. *Peavy v. McCombs*, 26 Idaho 143, 149, 140 P. 965, 967 (1914) ("The rule that statutes *in pari material* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature.") (emphasis added)); *see also In re Order Certifying Question to Idaho Supreme Court*, 167 Idaho 280, 283, 469 P.3d 608, 611

(2020) ("Statutes are *in pari materia* when they *relate to the same subject*. Such statutes are taken together and construed as one system.") (emphasis in original) (internal citations and quotations removed).

As to the first part of the test, and consistent with its theory, the Department relies on certain language from I.C. § 42-237a.g without giving effect to the statute "as a whole." *State v. Parsons*, 163 Idaho 643, 650, 417 P.3d 240, 247 (2018) (statutes must be construed as a whole). Through this first prong, the Director writes out of the statute whether to examine "ground water pumping level or levels in an area or areas having a common ground water supply" and whether the use of ground water will take water "at a rate beyond the reasonably anticipated average rate of future natural recharge." I.C. § 42-237a.g (emphasis added). Taking water beyond this rate is considered "mining the aquifer." *Clear Springs* at 804, 252 P.3d at 85. Mining of the aquifer is forbidden. *Briggs* at 429, 546 P.2d at 384. While there is "nothing in the statute . . . that ground water users are exempt from the doctrine of prior appropriation as long as they are not mining the aquifer," *Clear Springs* at 804, 252 P.2d at 85, the GWA and CM Rules require that the Director consider aquifer levels. IDAPA 37.03.11.020.08; IDAPA 37.03.11.031. CM Rule 20.08, with direct citation to I.C. § 42-237a.g, states: "These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge." IDAPA 37.03.11.020.08. Because ground water withdrawals cannot exceed the rate of reasonably anticipated average rate of future natural recharge, CM Rule 31 – which is the rule for determining an ACGWS – requires the Director to make a finding as to this rate: "The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply." IDAPA 37.03.11.031 (emphasis added). Contrary to law, the

Director did not examine the rate of recharge in this proceeding, saying he was not required to do so. A.R. 439-40, 1914-15.

As to the second part of the test, the Department cites to the "the declared policy" of the GWA, which is contained in I.C. § 42-226. Idaho Code § 42-226 recognizes that between ground water irrigators, they are not always protected in the maintenance of historic pumping levels, but rather protection in their reasonable pumping levels. *Clear Springs* at 803, 252 P.3d at 84; *A&B* at 508, 284 P.3d at 233 ("Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels."). As between a domestic ground water user and a ground water irrigator, the domestic well is protected in maintenance of its "historic pumping level" as against an irrigation well so long as the domestic well was drilled prior to March 29, 1978. *A&B* at 509, 284 P.3d at 234 (citing *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982)). If the Department's test is allowed, these well-established precedents will also be upended.

Lastly, the Department cites to burdens of proof, claiming that junior ground water users must prove they are not injuring senior users by "clear and convincing evidence." *Opening Brief* at 19. In support of its position, IDWR cites to decisions from this Court interpreting the CM Rules. *Id*. The Director cannot have it both ways and pick and choose when he argues for "clear and convincing evidence" based on decisions involving the CM Rules, yet claims the district court erred when it required establishment of an ACGWS and a finding of material injury consistent with the CM Rules. If this proceeding does not involve the CM Rules, then the evidentiary standard is an open question that should be litigated on the merits with a fully developed record. *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County*,

107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev'd on other grounds* 109 Idaho 299, 707 P.2d 410 (1985) (preponderance of the evidence applies in administrative hearings).

VI. SVC Should Be Entitled To An Award Of Its Reasonable Costs And Attorney's Fees

As its only issue on appeal, SVC prays for an award of its reasonable costs and attorney's fees on appeal, pursuant to I.C. § 12-117(1), I.A.R. 35(b)(5) (attorney's fees on appeal in respondent's brief) I.A.R. 40(a) (costs to prevailing party), and I.A.R. 41 (attorney's fees on appeal). Idaho Code § 12-117(1) states:

> Unless otherwise provided by statute, 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 nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

"Section 12-117(1) permits an award of fees only if the nonprevailing party 'acted without a reasonable basis in fact or law.' Determining whether the nonprevailing party had a 'reasonable' argument in law requires, at a minimum, examining the legal arguments made, i.e., the *substance* of the nonprevailing party's arguments." *3G AG* at 266, 509 P.3d at 1195. "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 nonprevailing party's legal arguments – not on whether the arguments were merely repeated or repackaged from below." *Id*.

Here, and as explained above, the Department's arguments seek to overturn well-established precedent that water users have relied on, all in an attempt to rewrite the law of conjunctive administration in Idaho; thus, there are no reasonable questions for the Court to address. First, the Department has no reasonable basis in law when it asks this Court to allow the Director's use of a "potential area of curtailment" when the district court already held in the *2016*

Memorandum Decision consistent with Idaho law and the agreement of "[a]ll parties that an area of common ground water supply" is a precondition to conjunctive administration in Basin 37. *2016 Memorandum Decision* at 8; A.R. 2411 (emphasis added). In the *Remittitur*, the Department was instructed to "forthwith comply" with establishment of an ACGWS as a precondition for conjunctive administration of water rights in the Big Wood and Little Wood rivers. As evidenced by the record, IDWR failed to establish an ACGWS, instead circumventing the decision of the district court through this appeal. Second, the Department has no reasonable basis in law when it asks the Court to approve the Director's use of an unknown injury standard in contravention of this Court's holdings in *American Falls* and *Clear Springs* that injury to senior water rights by junior ground water rights can only be proven by "material injury" as the term is defined in the CM Rules. Third, the Department has no reasonable basis in law when it asks the Court to rule on a "test" for curtailment that Director claims is embodied in certain words and phrases contained in the GWA, all in an attempt to write certain protections between water users out of the law and backdoor the requirement of material injury and establishment of an ACGWS.

By bringing this appeal, the Department has forced SVC to expend resources to relitigate the *2016 Memorandum Decision* and to defend against other unlawful actions. The steps taken by the Department in this proceeding are illegal and unreasonable; thus, warranting an award of SVC's reasonable costs and attorney's fees.

VII. CONCLUSION

Based on the foregoing, the district court should be affirmed for its clear understanding that the Director violated established Idaho law that applies in conjunctive administration. As a result, the Court should affirm the district court and award SVC its reasonable costs and attorney's fees on appeal.

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, served, and copied by iCourt on the following parties:

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