IN THE SUPREME COURT FOR THE STATE OF IDAHO

Supreme Court Docket No. 49632-2022

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT,

Petitioners-Respondents-Cross Appellants,

v.

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

Respondents-Appellants-Cross Respondents,

and

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

Intervenors-Respondents.

BWLWWUA AND BWCC INTERVENORS' BRIEF

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

Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

This case concerns the authority of the Director of the Idaho Department of Water Resources ("Department") to order in-season administration of interconnected surface and ground water rights pursuant to the provisions of the Ground Water Act. If the Director administers water rights pursuant to the Ground Water Act, is the Director required to apply the provisions of the Conjunctive Management Rules ("CM Rules") found under IDAPA 37.03.11

Anticipating unprecedented surface water shortage in the Wood River Valley in 2021, Gary Spackman, acting in his capacity as the Director of the Department, ("Director") initiated an administrative proceeding under I.C. § 42-237a.g. Consistent with the statute's plain text, the focus of the proceeding was to determine whether water was "available to fill" junior ground water rights in the aquifer beneath the area known as the "Bellevue Triangle" located in the Wood River Basin of Blaine County. Based on modeling and expert opinion, the Director designated an area of potential curtailment where ground water pumping in the Bellevue Triangle could be impacting senior surface water rights diverting from Silver Creek and the Little Wood River.

Following notice of the administrative hearing a large number of individuals, associations, and entities participated in the hearing. Impacted senior water right users, consisting of an unincorporated group of similarly situated senior surface water right holders referred to as the Big Wood Little Wood Water User's Association ("BWLWWUA"), the Big Wood Canal Company ("BWCC"), and others gave notice of their appearance and took part in the hearing (referred collectively as "seniors"). Junior ground water users also appeared in the action, including the South Valley and Galena Ground Water Districts, several local cities and entities, including the Cities of Hailey, Ketchum, Bellevue, the Sun Valley Company and Sun

Valley Water and Sewer District. (Referred collectively as "juniors"). A great number of other senior and junior water users from the area and around the state also appeared in the case.

After discovery and a six-day hearing, the Director concluded water was not available to fill the junior rights located in the Bellevue Triangle because pumping from the aquifer was reducing the supply to the seniors and causing injury, in violation of Idaho's prior appropriation doctrine. Accordingly, the Director issued a *Final Order* curtailing the junior rights in an "area of potential curtailment". The curtailment lasted eight days, ending when the Director approved a negotiated plan to mitigate the adverse effects of ground water pumping on the use of senior surface water rights. *See* AR. 2001-2027.

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

However, the district court set aside and remanded the *Final Order*, stating that the *Order* was improperly entered because the Director did not (a) formally designate an area of common ground water supply and (b) determine "material injury" to senior surface water rights according to standards to the same CM Rules. The Department appealed the decision of the district court. Cross appeals were filed by the Respondents/Cross Appellants.

A. Factual Background

Surface water rights in and below the Bellevue Triangle are senior in priority to the ground water rights in the Bellevue Triangle. In the Wood River Valley, the oldest (earliest) surface water rights were acquired in the 1870s and 1880s. AR. 1885. Silver Creek and its tributaries contain the most senior rights. AR. 2370-71. Priority dates for these rights are 1883 or before. AR. 2370-71. However, starting around 1930 and up until the early the 1990s, ground water development exponentially increased thanks to the development of contemporary drilling equipment, rural electricity, and effective pumps. AR. 1893-1893 (citing AR. 2104). Despite senior priorities, even in an ordinary water year, 1884 rights generally only ran until mid to late July. AR. 1886 (citing AR. 2373, 2376). Thus, with substantial ground water development, 1884 priority rights have been curtailed "more frequently and longer". AR. 2384. Meanwhile, even during drought years, the juniors in the Bellevue triangle continued diverting. AR. 2382-88. Additionally, there exists a uniquely strong hydrological connection where "[w]ater use within the Wood River Valley aquifer system affects Silver Creek reach gains from ground water, and thus affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek." AR. 1888 (citing AR. 2093).

Conjunctive administration of senior surface water rights and junior groundwater pumping has been years in the making within Water District 37. AR. 1886. In 1991, in response to concerns about the impacts of ground water pumping, the Big Wood River Ground Water Management Area was created (GWMA). AR. 1886. Years of discussions followed. With over 30 years of discussions, the juniors cannot claim that curtailment was just sprung on the juniors once they had crops in the ground in 2021. Furthermore, at the start of the administrative proceeding and as contained in the *Notice*, the Director advised all parties that curtailment was a

possible result of the hearing in the identified potential area of curtailment. *See Notice* AR.0001-003. Even prior to the *Notice*, at the April 7th, 2021 GWMA advisory committee meeting, (Noting the Advisory Committee was initiated in Nov. 2020) the Director stated that he was "ready to act" and warned groundwater users that they may be required "to reduce pumping much more than the amounts identified by the groundwater districts." AR. 2678. The Director further put ground water users on notice by explaining the following:

> Director Spackman weighed in during this discussion and reminded the group that he formed the committee after receiving groundwater management proposals that lacked detail and quantification. He formed the committee to present opportunities for participants to learn about surface water and ground water resource interactions and use in the Wood River basin so that they can quantify the impacts of various water management proposals. He further emphasized that approving a management plan for the Big Wood River Groundwater Management Area is not his only authority or duty; he has some responsibility during times of shortage to deliver water by priority in accordance with Idaho law. The Director suggested that due to the high probability of surface water shortages during the 2021 irrigation season, which will begin soon, ground water users need to propose specific remedial actions in the next two to three weeks.

AR. 2678. (Emphasis Added) *See also* AR. 2653-2685 for all meetings discussing the water issue from Nov. 4th 2020 through April 15th 2021.

These advisory committee hearings were held to help foster mitigation of injury to senior surface water users but were ultimately rejected by the groundwater users. Considering these advisory meetings and the discussions held, where both the ground water user's representative injured parties and their attorneys were present, juniors are not able to claim that they were surprised that the Director initiated this proceeding in the middle of the irrigation season after crops were planted. Junior-priority groundwater pumpers had ample opportunity to prepare for this curtailment, even prior to the planting for the 2021 season. Furthermore, the risk of curtailment of a junior-priority ground water right during a time of shortage is a risk that Idaho water users knowingly undertake and for which they should always plan, as the senior water users have had to do, year in and year out.

Furthermore, there have been multiple conflicts between senior surface water and junior ground water users in the recent past brought on by the consequences of ground water pumping in Water District 37. In 2015 and 2017, senior surface water users submitted delivery call requests under the CM Rules, both of which were rejected for procedural reasons. AR. 1887. However, despite discussions, conflicts, and prior attempts to the proceeding that is now under review by this Court, priority-based restrictions on ground water rights pumping from conjunctive administration in the Bellevue Triangle never occurred. ATr, vol. IV, 764:10–16.

On May 4, 2021, the Director of the Idaho Department of Water Resources issued the following Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing in Docket No. AAWRA-2021-001 ("*Notice*"). R., 1.

> A drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 ("Model") show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. 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." Based on the information from the Model, the Director of the Idaho Department of Water Resources ("Department") believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

AR. 1-43.

Given this context, the Director commenced an administrative procedure in accordance with I.C. 42-237a.g. The goal was to determine whether the senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season were impacting junior pumping in the Wood River Valley south of Bellevue. AR 0001. Ground and surface water right owners in Water Districts 37 (Big and Little Wood River basin, including Silver Creek) and Water Districts 37B (Camas Creek basin) received copies of the Notice via mail *Id.* at 45. According to the Notice, anyone seeking to take part in the proceedings was required to give notice by May 19, 2021. *Id.* at 1. The *Notice* instructed parties wishing to participate in the administrative proceeding to send written notice the Department by May 19, 2021. *Id.* The *Notice* scheduled a pre-hearing conference for May 24, 2021, and scheduled the hearing for June 7-11, 2021, at the Department's state office. *Id.* Despite arguments that the Department failed to give adequate Notice, no one with standing or who failed to subsequently participate in the administrative hearing has come forward in the appeal to the district court or in these proceedings.

On May 11, 2021, the Director issued a *Request for Staff Memorandum* ("Request"). The Request described ten subjects to be addressed in the staff memoranda, and directed that the memoranda be submitted to the Director on or before May 17, 2021. AR 0098-0100. Four staff memoranda responding to the Request were submitted to the Director on May 17, 2021, and posted on IDWR's website the next day. Also posted on the Department's website were supporting files for the staff memorandum addressing the Model's predictions of the hydrologic response in Silver Creek to curtailment of ground rights in the Bellevue Triangle.

A large number of parties filed notices of intent to participate in the administrative proceeding. The persons and entities who filed notices of participation are identified in the *Scheduling Order, Order Granting Party Status and Order Granting Party Status and Closing*

the Proceeding to Additional Parties. AR 520–530. The participants are individually identified in this brief only as needed for clarity and to avoid confusion. The Districts immediately submitted a *Petition for Judicial Review* (the "*Petition*") prior to the hearing. The *Petition* demanded, among other things, that a temporary restraining order be entered preventing the Director from starting the administrative procedure. Nevertheless, the administrative action went through as planned after the district court's denial of the request.

The Prehearing Conference was held on May 24, 2021. At the Prehearing Conference and in the subsequently issued *Scheduling Order* the Director discussed a number of issues related to party status. It was pointed out at the Prehearing Conference that the area analyzed by Jennifer Sukow in her staff memorandum was slightly smaller than the "Potential Area of Curtailment" depicted in the map attached to the Notice. 4711. The Director therefore limited the "Potential Area of Curtailment" to the area considered in Sukow's staff memorandum. *See* AR. 2114. Prior to the hearing, the parties engaged in discovery, depositions, and filing of various motions. The hearing began on Monday, June 7, 2021, and concluded on Saturday, June 12, 2021. Various lay and expert witnesses testified (including senior and junior water right holders) and several exhibits were admitted into the record.

In order to maintain senior surface water rights in the drainage from Silver Creek and the Little Wood River, the Director came to the conclusion that "consumptive ground water pumping in the Bellevue Triangle for reasons other than home and animal watering requirements ... should be reduced as soon as practicable." AR. 1884–1908. Over 300 ground water rights were restricted by the *Final Order* beginning July 1, 2021. *Id.* at 1919. The curtailed rights cumulatively provided at least some of the irrigation water to approximately 23,000 acres in Blaine County.

Furthermore, there were numerous factual findings in the *Final Order*. AR. 1884–1900. The findings discuss the "required knowledge" for managing interconnected surface and ground water rights, such as "relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where, and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958, P.2d, 568, 579 (1997). The conclusions specifically cover the hydrology of the Wood River Basin, the evolution of water use, and water rights.

As outlined in the *Final Order,* the Director held the results of the Wood River Valley Groundwater Flow Model v.1.1 ("Model"), which was used to forecast the effects of ground water pumping and curtailment, showed exceptional water supply challenges brought on by the 2021 drought. Additionally, the Model indicated there was almost certainty of injury to senior surface water rights on Silver Creek and the Little Wood River brought on by ground water pumping in the Bellevue Triangle. AR. 1884–1908. These results demonstrated that the Director implemented the prior appropriation theory correctly and arrived at the necessary conclusions regarding harm to surface water users pursuant to I.C. §42-237a.g.

On June 28, 2021, the Director issued the *Final Order*. AR. 1882–1932. The Director came to the conclusion that ground water pumping in the Bellevue Triangle violated the priority doctrine and should be stopped by applying the curtailment test in I.C. 42-237a.g. as well as long-standing prior appropriation doctrine presumptions, burdens, and evidentiary standards. AR. 1900–11. As a result, the *Final Order* curtailed certain ground water rights starting on July 1 and continuing through the rest of the irrigation season. AR. 1919.

The Respondents/Cross Appellants submitted a *First Amended Petition for Judicial Review* (the "Amended Petition") on June 30, 2021. They also submitted a second motion for a preliminary injunction and temporary restraining order at that same time. In the motions, the Respondents/Cross Appellants requested that the Director not implement the curtailment specified in his *Final Order*. The various motions were rejected by the court on July 2, 2021. Furthermore, the district court again determined that the Respondents/Cross Appellants had not satisfied the requirements for injunctive relief, pointing out that the situation includes intricate legal questions of first impression that are not without uncertainty. As a result, on July 1, 2021, affected ground water rights were restricted in accordance with the Final Order. Curtailment persisted until the Director accepted a parties' negotiated mitigation plan filed on July 8, 2021, which resulted in roughly 7 days of curtailment. On July 7, the Districts submitted a recommended mitigation strategy that had been discussed with surface water users. AR. 2001–08. On July 8, the Director approved the mitigation plan and stayed the curtailment. AR. 2029–35.

In the *Amended Petition for Judicial Review* by the Respondents/Cross, Appellants in the underlying case assert that the Director's Final Order is contrary to law and requested the district court set it aside and remand for further proceedings. The court entered an Order permitting the Intervenors to participate in the district court proceeding. The parties submitted briefing on the issues raised on judicial review and a hearing on the Amended Petition was held before the district court on January 6, 2022.

On February 10, 2022, the district court, on appeal from the Director's order, affirmed the order in part and reversed it in part. The district court held, in the absence of a delivery call, that the Director had the power to initiate the administrative proceeding under I.C. §42-

237a.g. (R. 681–84) The district court also held that the CM Rules did not supersede the Director's power to initiate administrative proceedings. *Id.* However, the Court also held that the Director's order did not comply with the prior appropriation doctrine because no Area of Common Ground Water had been determined and because the order relied on depletion to the source and made no "material injury" determination. R. 687–91. That Decision was then appealed to the Supreme Court both by the Department and cross appealed by Respondents/Cross Appellants, which is now under review.

II. ISSUES PRESENTED ON APPEAL

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

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

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

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

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

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

The Respondent filed a Cross Appeal with the additional issues as follows

A. Whether the district court erred in finding the Director was authorized to pursue conjunctive administration of water rights in Water District 37 under I.C. §42-237a.g. and outside of chapter 6 of title 42 and the CM Rules, particularly when the water rights are all in a common, established water district;

B. 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;

C. 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;

D. Whether the district court erred by holding that I.C. § 42-237b, *et seq.* did not apply when those procedures were in effect at the time of the hearing; and;

E. Whether the Districts are entitled to an award of reasonable attorneys' fees and costs pursuant to I.C. § 12-117.

The Sun Valley Company Additional Issue Presented

A. 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.

III. STANDARD OF REVIEW

The Idaho Administrative Procedure Act, under I.C. §§67-5201 through 65-5292, governs judicial review of the Director's final orders. I.C. § 42-1701A(4). The Act requires the reviewing court to affirm agency action unless the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the

statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). On appeal, this Court reviews the agency record independently to determine if the district court correctly decided the issues presented to it. *Rangen, Inc. v. IDWR*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016). "A strong presumption of validity favors an agency's actions." *Young Electric Sign Co., v. State*, 135 Idaho 804, 25 P.3d 117 (2001).

> "Where a district court acts in its appellate capacity pursuant to the Idaho Administrative Procedure Act (IAPA), this Court reviews the agency record independently of the district court's decision. I.C. § 67–5279(1). The Court will defer to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters.
>
> A strong presumption of validity favors an agency's actions. The agency's actions may be set aside, however, 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 as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced.

Cooper v. Bd. of Prof'l Discipline, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000) (citations omitted)."

The Court freely reviews questions of law. *Id.* However, the Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67–5279(1). The "agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 506, 284 P.3d 225, 231 (2012). ""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 Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500 at 199, 505-06, 284 P.3d 225, 230-31 (2012). See also *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012).

This Court exercises free review over statutory interpretation because it is a question of law. *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013).

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Id. at 361-62, 313 P.3d at 17-18 (quoting State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)).

A statute is ambiguous where the language is capable of more than one reasonable construction. P*orter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004) (citing *Jen-Rath Co., Inc. v. Kit Mfg. Co.*, 137 Idaho 330, 335, 48 P.3d 659, 664 (2002)). However, "[a]mbiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous." *Id.* (internal citation omitted). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (internal citation omitted). Accordingly, "if statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction." *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214,

219 (1999). "[T]his Court has been reluctant to second-guess the wisdom of a statute and has been unwilling to insert words into a statute that the Court believes the legislature left out, be it intentionally or inadvertently." *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty.*, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015).

Review on appeal is limited to those issues raised before the administrative tribunal with the exception of an issue the administrative tribunal lacked the authority to decide. The district court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). On an appeal from the district court, an appellate court reviews the decision of the district court to determine whether it correctly decided the issues presented to it. The appellate court will not consider issues that were not raised before the district court even if those issues had been raised in the administrative proceeding. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 793, 252 P.3d 71 (2011).

IV. ARGUMENT

In the underlying case, the district court held that the Director's *Final Order* was contrary to the prior appropriation doctrine. The seniors disagree and assert that without the Director taking action as he did, the juniors would have continued to injure seniors. The Director, by fulfilling his statutory duty of managing the State's water – never more imperative than in times of drought – determined based upon the evidence, testimony, and expert opinions and other "substantial competent evidence in the record" that seniors were being injured as a result of pumping by juniors. The juniors are asking the Director to turn a blind eye to a reality that junior pumping was injuring seniors rights.

As far back as 1951, the Legislature first enacted I.C. §42-237a.g., recognizing that the Director should have the ability to independently administer ground water that "affect, contrary

to the declared policy of this act, the present or future use of any prior surface or ground water right". I.C. §42-237a.g. The legislature has reaffirmed this principle, even as recently as this last legislative year when the legislature reworked I.C. §42-237 and left sub-article a. g. as it was. Based on this and other reasons set forth below, the Director never 'acted beyond his statutory authority.' Furthermore, the statute provides an alternative process to the CM Rules as expressly set forth.

1. The District Court erred in holding that the CM Rules were the express legal authority for any conjunctive administration of water rights rather than recognizing the CM Rules allow the Director's authority to take alternative or additional action relating to management of water resources and that the CM Rules were developed for delivery calls.

The district court's holding is simply incongruous that the CM Rule mandates such as "common ground water supply" and "material injury" must be determined under the CM Rule's while in the same decision holding the Director didn't have to follow the CM Rules under I.C. § 42-237a.g. The CM Rules state expressly that "Nothing in these rules limits the Director's authority to take alternative or additional actions relation to the management of water resources as provided by Idaho Law." IDAPA 37.03.11.003. There is no statute or rule that requires the CM Rules to be followed when proceeding under I.C. §42-237a.g. Correctly, the district court held that "the CM Rules do not limit the Director's authority under the Ground Water Act" and furthermore:

> "the promulgation of the CM Rules did not supersede the Director's authority to initiate administrative proceedings for purposes of conjunctive management under the Ground Water Act. It follows that in times of shortage, conjunctive administration can occur in one of two ways. Where no adverse claim is filed, the Director may initiate an administrative proceeding under the Ground Water Act. Where an adverse claim is filed, conjunctive administration implicates the CM Rules."

R. 685–86,

Distinctly, I.C. §42-237a.g. lays out the criteria for the Director's analysis in an unambiguous frame within the statute itself: "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, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right." *Id.* The Director's *Final Order* found from the uncontradicted and substantial evidence showed that seniors water users were, even during the hearing, being 'materially' damaged, injured, and going without water, and that the cause of their injury was due to the pumping being conducted by the junior water users. Furthermore, I.C. §42-237a.g. expressly and unambiguously states that the Director, in his discretion, "*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." *Id.* (Emphasis Added). As I.C. §42-237a.g. is unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction and as opposed to the plain meaning of I.C. §42-237a.g. *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013).

Furthermore, the simple text of the CM Rules clearly outline that they are drafted for and have been developed for a 'delivery call' scenario, such as when a senior water user makes a 'call' for their entitled water from those holding junior rights which are impacting their senior rights. As plainly referenced in the first clause of the CM Rules, and again and again throughout, the CM Rules anticipate the scenario where a delivery call has been made by a senior water user to a junior: "The [CM] rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA

37.03.11.001. In this case, there was no delivery call made to initiate the administrative proceeding.

The district court's decision that the CM Rules are binding precedent rather than persuasive was improper for several of the following reasons:

Looking closer at the district court's determination of "common ground water supply" being incorrectly required and unmet in this case, it helpful to first analyze the actual rule. The criteria as outlined in the CM Rules is the following:

> **03. Criteria for Findings.** A ground water source will be determined to be an area having a common ground water supply if: (10-7-94) **a.** The ground water source supplies water to or receives water from a surface water source; or (10-7-94) **b.** Diversion and use of water from the ground water source will cause water to move from the surface water source to the ground water source. (10-7-94) **c.** Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source.

IDAPA 37.03.11.31.03

The CM Rules were arguably created to manage a very complex problem of managing the State's water, often dealing with water from one side of the State to the other. The CM Rules were developed to create a framework by which the Department could weigh the interests from one set of water user's against those of another, often being hundreds of miles apart and spanning multiple Water Districts. Furthermore, the result of a successful call may be hard to readily ascertain without a firm recognition of the best science in which to aid in its determination. In other words, in a conjunctive management response to a delivery call one may not have the ability to turn off the water for one water user, while almost instantaneously seeing the benefits of such curtailment to another user.

With such a monumental framework, the CM Rules correctly requires a 'common ground water supply' to be determined and certain material injuries to be proven. Again, in

reading it in the whole, the CM Rules clearly and unambiguously state that the CM Rules are meant for delivery calls. ("These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right." IDAPA 37.03.11.20.04). Illustratively, CM Rule 20 outlines essentially the whole set of the CM Rules;

> Rule 30 provides procedures for responding to *delivery calls* within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to *delivery calls* within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to *delivery calls* within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state.

IDAPA 37.03.11.20.07 *Sequence of Actions for Responding to Delivery Calls* (emphasis added)

However, this is not the case from the administrative hearing now before the Court which did not involve a delivery call filed according to express requirements of IDAPA 37.03.11.20.30. According to that Rule a delivery call is made by the holder of a surface or ground water right alleging that by reason of diversion of water by one or more junior-priority ground water users it is causing material injury to the senior. Rule 30 requires the petitioner to file in writing with the Director very certain and definite information and according to Rule 230 of the Departments Procedural rules. Remarkably, these procedural requirements were the very requirements the ground water users argued must be accomplished and which resulted in the dismissal of the senior water users previous delivery calls in 2015 and 2017. *See Memorandum Decision and Order* and *Judgment* in *Sun Valley Company v. Spackman,* CV-W A-2015-14500, (2016) and *Big Wood & Little Wood Water Users Association*, Docket no. CM-DC-2017-001 (2017).

As no delivery call was determined to be made by both the Director and affirmed in the district court, the question turns to administrative authority of the Director. *See* AR. 440, 1911. R. 685. The Director has administrative authority in a water district. *See* I.C. §§42-602-619. The Director is required to administer adjudicated water rights in the water district according to the prior appropriation doctrine. I.C. §§ 42-602, 42-607. Furthermore, I.C. §42-604 lays out the creation of Water Districts in an attempt to divide the State into interrelated and non-overlapping water sources that "shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho." Idaho Code §42-604. In water districts, the legislature gives the Director authority to create, revise the boundaries, split, combine, and abolish these Districts. *Id.*

As indicated above, if the Director finds that water has an affect outside of the Water District he "*shall* divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district." *ID.* In addition to this, and the reason for creation of Water Districts, is to allow the Director to administer that water according to prior appropriation doctrine, by which he has been granted express authority for the direction and control of "all natural water sources within a water district." *See* I.C. §42-602. Therefore, Water Districts are the most complete, interrelated water systems in the State in the organization of 'common' groundwater and surface water sources.

Within Water District 37, in the worst drought in recorded history, based on the modelling, evidence, expert testimony and data going back to the 90's, it was abundantly clear that the pumping in the Bellevue Triangle was injuring the seniors. Furthermore, it was apparent and uncontested that there existed a unique and distinguishable hydrologically

connected area for the Big Wood, Little Wood and Silver Creek water sources which rose and fell based directly on the pumping in the curtailment area, with an almost immediate effect. *See* AR. 1885. "[w]ater use within the Wood River Valley aquifer system affects Silver Creek reach gains from ground water, and thus affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek." AR. 1888 (citing AR. 2093).

Because of the extreme drought, having recognized the harm currently being perpetrated on seniors, the Director had the responsibility under I.C. §42-602 to direct and control the water in the Water District and therefore acted. This was not a situation where possible other explanations could be argued as the cause of the injuries. Nor was the summer of 2021 a situation that enabled more attenuated water use from outside the area of potential curtailment which would have netted any justifiable affect to the actual delivery of the needed water to the injured seniors. *See* Jennifer Sukow Memorandum AR. 2092–2178. Areas beyond the 'area of potential curtailment simply in the end would not provide water in a manner or amount that would have been timely supplied to the seniors in 2021. AR. 2111 (Full Model curtailment benefits), 2115 (Reduced area south of Glendale Bridge curtailment benefits). *See also* AR. 1890 (citing AR. 2108) and AR. 2110. This area was the "area of potential curtailment". Notice was given and even those who did not face the threat of curtailment were allowed to participate in the hearing.

The administrative hearing was an administration of the prior appropriation doctrine during a horrible drought, in a water district that was created with an understanding of the interconnected scientific and historic impacts ground water pumping has on surface supplies. The Director's notice and area of potential curtailment provided adequate notice to juniors of the proceeding. Since the Bellevue Triangle was in the Water District and the potential area of

curtailment was further parsed down by the Jennifer Sukow's Model, the Director had the complete picture of the injuries ground water pumping were inflicting on seniors and no evidence was presented to the contrary. This is far different from delivery calls spanning hundreds of miles and multiple-water districts with the results of curtailment not apparent for weeks, months, or even years. In 2021, in Water District 37, the water was administered in priority and immediately benefited the injured seniors.

The CM Rules were and are developed for a delivery call to help administer divergent sources, water districts, and complex interrelated water systems. Interestingly, the CM Rules proscribe that in a delivery call, the Director may even decide that a water district must be changed or augmented.[1] However once a water district is formed, the Director has a duty to administer the water in that water district according to the prior appropriation doctrine. I.C. §42-602. This is precisely what the Director did in Water District 37 in 2021. The district court decision should be reversed.

2. The Director correctly utilized the prior appropriation doctrine and applied the statutory standard in I.C. §42-237a.g. in finding 'injury' was occurring to the affected seniors.

In 2021, the Wood River Valley experienced an extreme drought and water shortage. At the beginning of the irrigation season, snowfall and precipitation were extremely low and temperatures were abnormally warm. The Surface Water Supply Index for April, or SWSI3, forecasted insufficient water supply in Water District 37. AR. 1889 (citing AR 2089–91). When the Director issued the administrative proceeding *Notice* at the beginning of May, it was apparent that someone would be going without water that year and the Director, in conformance

[1] I.C. §42-237a.g. and the Ground Water Act also give the Director the ability to change or augment a Water District.

with his statutory requirements, would have to determine who. Based on the Modelling available at the beginning of the 2021 year, the Director had determined that senior water right users would likely be impacted and he therefore was required to institute I.C. §42-237a.g. in order to fulfill his duty under the Ground Water Act pursuant to Idaho Code. To do anything less would be to allow the seniors to be unequivocally injured against the precepts contained in the prior appropriation doctrine.

Based on the underlying record it is simply clear that, but for the Director's quick action in the underlying case, the senior surface water users would have been severely affected in the 2021 crop year, thereby violating the senior's property rights. I.C. §42-237a.g. give the Director the authority to administer in this circumstance:

> 42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:
>
> ...
>
> g. To 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 during any period that he determines that water to fill any water right in said well is not there available.

I.C. § 42-237a.g. goes on to state:

> ...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, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge...

I.C. § 42-237a.g. (Emphasis Added)

The district court was correct in its holding that that the Director could use I.C. §42-237a.g. in conjunctively administering water rights. Again, the statute unambiguously says that

the Director may initiate an administrative hearing when he believes that pumping would 'affect' either a surface or ground water right. *Id.* Not only is the statute unambiguous, but this concept is not something new in Idaho water use. Long held, has been the reality that every year, surface water users are required to shut off their diversions and let the water go down to someone who has a more senior right. Additionally, the Aquifer Model Version 1.1 clearly showed and expert witnesses from both the Department, as well as the participating parties in the underlying hearing, all agreed that the water system was highly hydraulically interconnected. See AR. 1885. "[w]ater use within the Wood River Valley aquifer system affects Silver Creek reach gains from ground water, and thus affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek." AR. 1888 (citing AR. 2093). This fact was not new information to any of the involved parties. This hydraulic relationship has been recognized, characterized, and, more recently, modeled using decades of research and data. AR. 2124–25. These investigations gave the Department a bedrock of knowledge which was referenced and utilized by the Director to determine whether and how the different surface and ground water sources in the region interact. See AR. 2094. Again, no expert witness contested that Aquifer Model Version 1.1 should not be used and all agreed that it was the best available tool for evaluating the interaction between groundwater and surface water in the Wood River Valley. AR. 1889 (citing testimony from the Districts' and Wood River Valley cities' expert witnesses); *see* also AR. 1904–06.

The senior water users clearly carried their burden of provable and reliable injuries to them that were, even during the time of the hearing, being caused by the pumping of junior water users. To use the parlance of I.C. §42-327a.g., the seniors were being *affected* by unreasonable pumping in the curtailment area which was directly and empirically proven by the

expert and lay witnesses from the parties and modelling during the hearing. The Director, after conducting and allowing for due process of law, realized and recognized that affect and injuries brought on directly by those pumping in the curtailment area, fulfilled his statutory requirements of managing the State's water according to the laws of the State. To do otherwise, would be to ignore the clear affect that the pumping had on the senior water rights. Recognizing this and attempting to not further violate those senior water users rights under the law, the Director utilized curtailment to remedy injury to the senior water users. The *Final Order* not only includes all the factual findings and legal conclusions necessary to satisfy the standard for curtailment in I.C. § 42-237a.g, but it also details how the curtailment fulfills the Director's duty to "distribute water in water districts in accordance with the prior appropriation doctrine." I.C. § 42-602.

However, the district court in this case (in the *Memorandum Decision and Order*) incorrectly fell back on the CM Rules to quantify the administrative hearing requirements based on two scenarios based on the *Clear Springs* case which stated;

> [I.C. § 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. v. Spackman, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011) as quoted in the *Memorandum Decision and Order* R. 681–84

The district court went on to state that with the repeal of I.C. §§ 42-237b-d the Court's two-pronged administrative approach which utilized delivery calls under the Ground Water Act, should simply have delivery call requests under the CM Rules. In analyzing the first prong, the district court confusingly held in its *Memorandum Decision and Order* that the Director clearly still had the authority to initiate an administrative proceeding but classified the proceeding as

one of conjunctive management. R. 681–84. However, the district court incorrectly relied on *dicta* from the *Clear Springs* decision for the analysis of what was required for conjunctive administration. In *Clear Springs,* in response to an administrative hearing for delivery call, this Court's mention of 'material injury' was an attempt to synthesize the language in I.C. §42-237a.g. to an understandable framework and to refute the claims of ground water pumpers in *Clear Springs* that argued they should not be curtailed because they weren't mining the aquifer. The *Clear Springs* case and reference to I.C. §42-237a.g. was not to expound on how the Director should decide an administrative hearing under I.C. §42-237a.g., rather he just had authority to hold such an administrative hearing according to his powers under I.C. §42-237a. The *Clear Spring* Court further held that ground waters are not exempt from prior appropriation doctrine and that the Director had the authority administer both ground and surface water sources. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011). The district court interpreted this to mean the that the Director's curtailment authority is "contingent upon a finding that the ground water withdrawal would cause 'material injury' to a senior water right." R. 690. Instead, the district court in this case should have evaluated the Director's actions in light of the relevant statutory text of I.C. 42-237a.g. as discussed above and hereafter.

According to I.C. §42-237a.g., withdrawals from a well may be restricted if they "would influence, contrary to the proclaimed policy of [the Ground Water Act], the existing or future use of any previous surface or ground water right." The CM Rules' definition of "material injury" does not alter or supersede the Director's statutory power and *Clear Springs* does not argue to the contrary. Nor is the term "material injury" only unique in the annuals of legal principles to water code and should therefore create obligations under the CM Rules. The term

is contained frequently in contracts, estoppel, fraud actions. *See* for example *Wright v. Spencer*, 39 Idaho 60, 61, 226 P. 173, 173 (1924) and *Sullivan v. Mabey*, 45 Idaho 595, 598, 264 P. 233, 234 (1928) *See* also 63-201 (Property Taxes) and I.C. §54-1914 (Public Works Contractors). Regardless, in light of the dearth of persuasive evidence to the contrary, the Director's thorough findings of the harm to senior water users was adequate to satisfy the Ground Water Act's curtailment requirements. Each senior water user provided testimony about how, based on the unique hydrology in the system, that pumping greatly 'affected' and 'injured' their ability to exercise their existing and very senior water rights. Furthermore, there existed ample testimony that turning off the pumps almost immediately gave the senior water users the water required to satisfy their rights.

Furthermore, according to the Model, the proposed curtailment scenario indicated that it would result in a significant increase in Silver Creek flow during the 2021 irrigation season, with average flows of 22.7 cubic feet per second (cfs), 28 cfs, and 26.5 cfs in July, August, and September. AR. 2116. Even if the Model's forecast error is taken into account, these estimates still represent double-digit flow increases in the midst of the drought-stricken irrigation season of 2021. AR. 1904. The additional flow would be available for beneficial use by surface water appropriators in priority. Numerous surface water users testified that curtailing ground water use would provide them additional water to use as personally evidenced by them when the wells were shut off in the past for various reasons. AR. 1894–1900. Fred Brossy testified that curtailing ground water pumping on July 1 would provide water in time to save his crops. AR. 1894 (citing ATr. vol. III, 467–71). Donald Taber likewise testified that he could beneficially use water generated from curtailment even if it was not available to him until August. AR. 1899 (citing ATr. vol. III, 697–98). Furthermore, the watermaster explained that it would not just

benefit the users who testified at the hearing, but rather any water user who would be in priority on Silver Creek or the Little Wood. (citing ATr. vol. IV, 898). These water users testified that they could use the water immediately for their crops, which is exactly what occurred after the Director enforced the curtailment in his *Final Order.*

To substantiate the testimony provided by the senior surface water users and one of the Model's developers, Jennifer Sukow, in her memorandum, examined the outcomes of two curtailment simulations with the Model indicating that Silver Creek will start to profit from the reduction within days. AR. 2092–2178 and AR. 2111 (Full Curtailment Scenario), AR. 2115 (South of Glendale 'area of potential curtailment' benefits). Simply put, the Model indicated that a curtailment scenario would provide relief and water that could almost immediately be put towards beneficial use by senior surface water users down the system. AR. 2113. These facts and scenarios were not challenged as the expert witnesses for both the Ground Water Districts, the Cities of the Wood River Valley, and Senior's expert all concurred at the administrative hearing that the Model was "the finest" resource available for assessing how ground water pumping affected Silver Creek flows. ATr. vol. V, 1320:2-4; vol. IV, 1452:16-20.

According to the Director's *Final Order*, "[t]he Surface Water Users, therefore, carried their burden of providing evidence to support an initial determination that during the 2021 irrigation season, the Surface Water Users have been and will continue to be harmed by a shortage of water as a result, in part, of ground water pumping in the Bellevue Triangle under junior priority water rights." AR. 1894–1900, 1903–04. The Director had virtually real-time knowledge of the Senior's ongoing injuries throughout the proceedings and the real affect the unfettered pumping was having on them. The 1885 priority rights were already terminated during the administrative hearing, and the 1884 rights were anticipated to be restricted by the end of

June. *For example*, AR. 1886 (citing AR. 2373, 2376) (*See also* Lakey memorandum AR. 2915–2924). Even the rights to 9/1/1883 priority dates had been shut off during the administrative proceeding. See *Final Order* AR. 2989–91; ATr. vol. IV, 771–72.

In addition, as highlighted by the Director in his *Final Order* and as stated in the testimony given at the hearing and shown in the Senior Surface Water Users injury table exhibits, "The surface water users also testified to the steps they have taken in 2021, and in earlier drought years, to conserve and extend their water supplies, such as securing supplemental water, planting less water intensive crops, and minimizing losses by selecting which fields and crops to continue watering and which to dry out." AR. 1900. It became evident during the proceedings that if junior rights were not restricted, senior surface water users would continue to suffer irreparable harm to their crops. To not curtail the junior water users would have been inconsistent with the prior appropriation doctrine and Supreme Court rulings that there should be "no unnecessary delays in the delivery of water." *AFRD2 v. IDWR*, 143 Idaho 862, at 874 (2007).

In the *Final Order*, the Director outlined the 'affect' of continued pumping would have on the senior surface water users. For instance, the Director listed and expounded on several senior water users' testimonies regarding the damages they had suffered and would continue to suffer. Starting with Fred Brossy, the Director's *Final Order* explained that Mr. Brossy has priorities of April 6, 1883, and April 1, 1884, yet within one or two weeks of the hearing, Mr. Brossy expected that his 1883 and 1884 rights will be curtailed. AR. 1894 (citing ATr. vol. III, 467–71). Additionally, Mr. Brossy already had to rent 100 shares of AFRD#2 storage water from the City of Shoshone as a supplemental supply and made some changes to his plantings to conserve and extend his water supply. *Id.* The Director's *Final Order* recognized that testimony

and exhibits presented at trial expected that Mr. Brossy would be affected and injured in the approximate amount of $220,000. *Id.*

Similarly, Rod Hubsmith, who held an April 1, 1884 right, who testified that he had one of the best water rights in the area, yet anticipated total injury of approximately $68,000 in crop loss as a result of water shortage in 2021. See AR. 1895. Likewise, the Director recognized that Carl Pendleton, as Chairman of the Big Wood Canal Company, testified that if the predicted June curtailment of the Canal Company's rights was realized, the organization would not be able to rent its water to users in need of a supplemental water supply. See AR. 1896. John Arkoosh and his father William's farm was relying solely on supplemental water that could not be spread far enough to irrigate entire sections of their farm and would cause them projected injuries of $55,000 in crop loss for one part of their farm and $40,000 for another farm and potentially a catastrophic loss of an entire crop due to the water situation in 2021. See AR. 1897-1898. Alton Huyser additionally projected a total injury of approximately $38,800 for 2021, as well as Don Taber who the Director found to have projected total injuries in 2021 of approximately $82,000 in crop loss for his Taber farm, $126,000 for his 7 Mile farm, and $177,600 for his Ritter farm. See AR 1899. The Director's *Final Order* also found that these water users over the years, had to conserve and extend their water supplies, secure supplemental water, forced to plant less water intensive crops, and had to let portions of their farms dry up in order to water others. See AR 1900. One point of note: These are not huge corporate farms but smaller generational family farming operations that have seen the couple hundred-acre farms they got from their fathers receive less and less water each year based on the unfettered pumping upstream. Testimony was given that Granddads had previously boasted of 1883 rights as always being available only to be sucked dry by 1989 groundwater rights, in these modern times.

The Director found conclusively that that the uncontradicted evidence presented by the seniors met their burden of showing their significant damages from the lack of water in the 2021 irrigation season. AR. 1894–1900, 1903–04. It was apparent that the seniors were being injured and harmed by the continued pumping in the Bellevue Triangle in the summer of 2021. The Director expressly held that ground water pumping in the Bellevue Triangle was adversely affecting senior surface water uses in Silver Creek and the Little Wood River. The Director, by finding the affects the pumping was having on particular senior users farming operations such as Fred Brossy, Rodney Hubsmith, Carl Pendleton, Big Wood Canal Company, John and William Arkoosh, Alton Huyser, Don Taber, Charles Newell, and Lawrence Schoen, as he did in the Director's *Final Order,* the Director was able to rely on the substantial evidence before him to determine that allowing the pumping under the Bellevue Triangle "would affect, contrary to the declared policy of [the Ground Water Act]," the present use of senior water rights diverting from Silver Creek and the Little Wood River, or their future use during the remainder of the 2021 irrigation season. I.C. § 42-237a.g. AR. 1900–11. The Director reiterated in his *Findings,* the testimony of the senior users crop decisions, irrigation efficiencies conducted this year and others and their remedial measures taken to secure additional water in the 2021 season, translated into the Director's conclusion of law that "ground water pumping in the Bellevue Triangle adversely affects senior surface water uses in Silver Creek and the Little Wood River and should be curtailed". AR. 1884–1900.

Furthermore, curtailment of the junior groundwater rights was ordered and in the end benefited the seniors. Petitioners argued in their briefing to the district court that curtailment of their rights would be 'futile'. The Director noted that in this year of drought, some senior water right holders would have been restricted regardless of ground water pumping in the Bellevue Triangle.

However, the Director determined that certain senior surface water consumers will get useable levels of water as a result of water pumping reductions. AR. 1890–91. The Director determined "central legal inquiry in this case is whether withdrawals of ground water from wells in the Bellevue Triangle 'would affect, contrary to the declared policy of [the Ground Water Act],' the present use of senior water rights diverting from Silver Creek and the Little Wood River, or their future use during the remainder of the 2021 irrigation season." AR. 1901 (quoting I.C. § 42-237a.g) (alteration in original).

The Ground Water Act's curtailment test is whether ground water rights "would affect" senior rights and if the result is inconsistent to the act's "declared policy." I.C. §42-237a.g. Just as "absolutely nothing in the legislation" supported the juniors' contention in *Clear Springs*, there is no mention of material injury in the statute. *Id.* 150 Idaho 804, 252 P.3d 85. Nevertheless, the district court believed that *Clear Springs* controlled the issue and an actual showing of 'material injury' as defined under the CM Rules was a dogmatic requirement as opposed to the unambiguous and clear language in the Groundwater Act. None of the arguments in *Clear Springs* addressed the issue at hand, which is whether "material injury" is a condition for I.C. §42-237a.g. pumping restrictions. It is simply not there. However, it was clear throughout the hearing, that the ground water pumping was 'affecting' the seniors water rights, devastatingly so, and had done so for years. Under these circumstances, the senior surface water users could claim that the Director and the Department's failure to act in accordance with the Ground Water Act would have caused their water users immediate and irreparable damage and would not have been in the "interest of justice." The Director identified that expediency was required to determine these issues as soon as possible and without further delay. Anything short of what the Director did would be a substantial denial of the rights of

senior surface water users under any semblance of law and a clear breach of their right to their own due process.

3. For the first time, in the summer of 2021 the ground water rights in Water District 37 were administered according to law.

When a senior appropriator saw "a well 'across the road' with a 'water right 94 years junior' to his, continue to pump water when his rights are curtailed" it simply becomes nonsensical with the notion of 'first in time, first in right' of the prior appropriation doctrine in the state of Idaho. AR. 1900 (quoting ATr. vol. II, 395:7–9). However, that is exactly the situation faced by the senior surface water users as the direct result of the pumping in the Bellevue Triangle. Correspondingly, the "presumption under Idaho law is that the senior is entitled to his decreed water right . . . ." *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. Consequently, according to the prior appropriation doctrine in I.C. §42-237a.g., clear damage and affect to a senior water right holder is sufficient for purposes of remedy under the Ground Water Act and the theory of prior appropriation. As outlined in I.C. § 42-226, requiring water to be "devoted to beneficial use in reasonable amounts through appropriation" in this case, the senior water users showed injury and that any water they would receive would be put to beneficial use while the juniors failed to meet their burden of showing clear and convincing evidence that their pumping was not impacting the water supply of the seniors, that the Model was faulty, or that restriction of their water rights would be futile. AR. 1903–11.

It was determined that both junior and senior water right users were beneficially putting their available allocations of water to beneficial use. AR. 1902. However, under the requirements as contained in I.C. § 42-237a.g., this was simply a situation of "[w]ater in a well shall not be deemed available to fill a right therein . . . ." Nevertheless, the district court's

decision determined that CM Rules should be used for both a delivery call situation as well as under the administrative procedure of I.C. § 42-237a.g. which would result in continuing injury to the senior.

In the *Final Order's* conclusion of law, the Director correctly outlined and discussed the *Clear Springs* decision which modified the 'first in time, first in right' of not blocking the full economic development of underground resources subsequently codified in I.C. § 42-226. The Director went on to quote the *Clear Springs* Court which held that the *Clear Springs* modification did not mean an appropriator "who is producing the greater economic benefit or would suffer greater economic loss" has the better right to the use of the water. Id. at 801-02, 252 P.3d at 82-83. In the *Final Order,* the Director also explained that *Clear Springs* distinguished the *Noh v. Stoner, 53 Idaho 641 at 804, 26 P.2d 1112(1933)* case by recognizing that full economic development and I.C. §42-226 only applied to appropriators of ground water and was different from this case as the senior water rights affected where surface water rights and not ground water rights. AR 1901.

Also, in conformance with the Prior Appropriation doctrine, the Director outlined that "Once an initial determination is made that the senior appropriator is or will be injured by diversions under a junior priority water right, the junior appropriator bears the burden of proving that curtailment would be futile, or otherwise challenging the injury determination. *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. Further, junior appropriators who claim their diversions do not injure a senior appropriator are required to establish that claim by "clear and convincing evidence." *A&B Irr. Dist., et al., v. IDWR*, 153 Idaho 500, 516-20, 284 P.3d 225, 241-45 (2012). The Director held "all of the water rights to divert from Silver Creek and the Little Wood River are 'first in time" and therefore "first in right". AR. 1902. The *Final Order* further held that

based on the modelling, ground water pumping in the Bellevue Triangle has a significant impact on stream flows in Silver Creek. AR. 1902–07. Furthermore, "this analysis predicted that the curtailment would increase flows in Silver Creek by approximately 23-27 cfs during the months of July, August, and September." AR. 1890 (citing AR. 2113–14). These conclusions are supported by the testimony of the watermaster and the surface water users on Silver Creek and the Little Wood River. They testified that, based on their observations, flows in Silver Creek and the Little Wood River respond to changes in ground water pumping in the Bellevue Triangle within a few days, or a week at most." *Id.* After finding that the senior's had met their burden, the Director correctly determined that junior appropriators then have the burden of disproving injury or proving some other defense to curtailment. *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. AR. 1904.

With these findings the Director therefore held "the effects of ground water withdrawals in the Bellevue Triangle on senior water rights diverting from Silver Creek and the Little Wood River during the 2021 irrigation season are contrary to "the doctrine of 'first in time is first in right.'" AR. 1903–07. The Director also differentiated this situation from the Eastern Snake Plain Aquifer, in that curtailment within the Bellevue Triangle was something that could more readily be understood and that prompt action would give immediate affect to those affected senior surface water rights and not be 'futile'. AR. 1910. Limiting curtailment to the Bellevue Triangle therefore gives effect to the beneficial use principles underlying the futile call doctrine even though this was not under a delivery call. AR. 1907–10, *See* also *IGWA v. IDWR*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016)

Regardless of this reasoned and fully examined decision in the Director's *Final Order,* the district court held that the Director's *Final Order* did not comply with Idaho's prior

appropriation doctrine. R. 688–90. The district courts analysis recognized that while the Director was not required to apply the CM Rules under the Ground Water Act, the district court "is informed by the rules, definitions, procedures, and criteria set forth in the CM Rules" citing their constitutional reliabilities as held in the *AFRD 2* Case. *American Falls Reservoir Dist. No. 2*, 143 Idaho 862, 872-880 154 P.3d 433, 443-451 (2007). Again, this simply can't be the case where the Court on one hand determines the Director does not have to follow the CM Rules under I.C. §42-237a.g. which outlines the clear authority of the Director to conjunctively administer surface and ground water rights but does have to follow the CM Rules in conjunctive management. This reasoning does not align with the legislature's clear intent and wording in the I.C. §42-237a.g. and the Ground Water Act.

I.C. §42-237a.g. language is clear that "Water in a well shall not be deemed available... if withdrawal...would affect...*any* prior surface or ground water right." (emphasis added). The legislature specifically allowed the Director, under the Ground Water Act, to manage both the surface and ground waters of the state. As noted above and the district courts own decision recognized that the Director "may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available" is clear in subparagraph I.C. §42-237g. and not just in a delivery call. R. 685–86. The rest of the language in I.C. §42-237g. outlines that the Director "*may* establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him..." (emphasis added). Though I.C. §42-237g. allows the Director to establish a common ground water supply as a tool in his determination if water is available for a ground water right, the real requirement the district court should have used in its ruling is outlined clearly in the same statute by the next sentence. "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, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge." I.C. §42-237g.

Therefore, the test under the Ground Water Act is if the Director determines that the present use of any surface water right in priority is 'affected' against the policy of the Act, by ground water being withdrawn faster than future natural recharge. The policy of the Act is of course found in I.C. §42-226 which outlines the policies of 'first in time is first in right' and the requirement of the water to be beneficially used with the understanding of full economic development of the ground water resource. Nowhere in the Ground Water Act does it outline exactly how the Director is to make his determination but rather do "all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources..." I.C. §42-226. The fact of the matter is that the Department had determined back in 1991, with former Director Keith Higginson's moratorium on new ground water rights, that "surface and ground waters of the Big Wood River drainage are interconnected" and the "[d]iversion of ground water from wells can deplete surface water flow in streams and rivers." AR. 1886. Even back in 1991, the Department recognized that the policy of Ground Water Act was in jeopardy in the Bellevue Triangle. With the hearing in 2021 and the extreme drought, it became readily apparent that pumping was depleting the surface flows in the interconnected system and that full curtailment was reasonably necessary to effectuate the mandates of the Act. The determination was obvious based on the wealth of evidence, modelling, expert and lay witnesses, which all were used by the Director in his determination and *Final Order*. The district

court correctly held that CM Rule 1 limits the CM Rules to setting forth the procedures for responding to a delivery call (R. 686) but incorrectly held that the CM Rules should dictate the procedures of whether there was water available as determined by the administrative scheme under the Ground Water Act. R. 690-691.

Based on the substantial evidence presented at the hearing, the Director could not have come to a different conclusion than that set forth in his *Final Order* and protected the rights of the seniors. Simply put, the juniors were irrigating when the seniors were facing shortfalls. The Director saw what was happening and responded with the authority granted in I.C. §42-237a.g. Contrary to the district court's ruling, the Ground Water Act does not require a formal determination of an area of common groundwater supply as set forth in CM Rule 31, a determination of material injury as set forth in CM Rule 42, and an evaluation of a proposed mitigation plans as set forth in CM Rule 43.

4. Good, statewide, conjunctive management policy favors the ability of the Director to utilize his authority to administer the prior appropriation doctrine quickly

Although Petitioners argue that the Director must proceed under the CM Rules, the district court has previously addressed this contention. In a recent 2020 decision in the *Basin 33 Water Users v. Surface Water Coalition*, the district court ruled that the Director does not need to use the CM Rules when exercising his authority under the Ground Water Act. *Basin 33 Water Users v. Idaho Dep't of Water Res.*, No. CV01-20-8069, (Idaho Dist. Ct., Nov. 6, 2020) (available at https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV01-20-08069/CV01-20-08069-20201106-Memorandum-Decision-and-Order.pdf) In that case the district court held that the CM Rules are only implicated upon the filing of a delivery call under those Rules. *Id.* The district court recognized that the Director correctly concluded in the *Basin 33* case that the CM Rules "do not subsume the separate need to manage ground water resources under the Ground

Water Act, despite the completion of the SRBA and creation of water districts." *Id.* The district court rejected the Petitioner's reasoning in the *Basin 33* case and found;

> "Absent the Ground Water Act, the Director's only option for addressing continuing ground water declines is to wait for the next delivery call...In theory, the pattern could continue until the ground water reaches critical levels or worse.
>
> These examples demonstrate in practical terms the fallacy of the assumption and the shortcoming of relying exclusively on the CM Rules for ground water management. They further demonstrate that the Director's duty to manage ground water under the Act does not cease when an adjudication is completed or when a delivery call is resolved. They show that when a call is addressed through mitigation or some other monetary agreement, as opposed to curtailment, the continued depletion of the underlying water source is not addressed....leaving the Director's express duty under the Act...unfulfilled".

Basin 33 Water Users v. Idaho Dep't of Water Res., No. CV01-20-8069, slip op. at 12 (Idaho Dist. Ct., Nov. 6, 2020) (available at https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV01-20-08069/CV01-20-08069-20201106-Memorandum-Decision-and-Order.pdf). (Emphasis added)

The same logic applied in Water District 37 in the early summer of 2021. Without the statutory authority granted by the legislature in the Ground Water Act, the Director would be required to wait for a delivery call. Delivery calls can have the unjust 'David versus Goliath' result. Seniors with significantly older rights are faced with the expensive and discouraging reality of protecting their water rights against the legions of pumpers who may have determined that encumbering the issues in administrative proceedings and court would be cheaper and more effective than addressing the reality of the priority doctrine. The legislature saw the wisdom of granting the Director more than one way to administer water rights. By granting the Director the express ability to utilize the Ground Water Act to "do all things reasonable and necessary"[2] the Director is able to protect groundwater depletion by administering to the area pursuant to I.C. § 42-237a.g.

[2] Idaho Code § 42-231

The Director's decision here, based on the underlying record, was clearly within his statutory discretion. Pumping in the area of potential curtailment diminished seniors' water supplies as established by the evidence at the hearing. See AR. 1885. Furthermore, based on the model and substantial evidence presented at hearing, curtailment provided irrigation water to the seniors in their time of need. Finally, curtailing pumping in the curtailment area resulted in almost immediate benefit to surface water sources and to the seniors' water supplies. It is the purpose of the Water District to organize hydrologically connected water. "The Court has previously held that hydrologically connected surface and ground waters must be managed conjunctively." *See* I.C. §§42-602-619. AR. 1888 (citing AR. 2093) (for how interconnected the Bellevue Triangle is). See also *Rangen, Inc. v. IDWR*, 160 Idaho 119, 130, 369 P.3d 897, 908 (2016) quoting *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

Evidence of injury to the seniors was ample, the seniors were being injured directly by the pumping. AR. 1894–1900 (summarizing testimony). Further evidence indicated that the seniors had for years made irrigation efficiency improvements to try to try to stretch the water as far as reasonably possible. *Id.* The *Final Order* walked through each and every argument that was presented during the hearing and again, the Director found that the junior ground water users had not met their burden by clear and convincing evidence that "curtailment of ground water pumping in the Bellevue Triangle will not result in a 'sufficient quantity' of water for senior surface water user on Silver Creek and the Little Wood River to apply to beneficial use." AR. 1904–06 quoting *Sylte*, 165 Idaho at 245, 443 P.3d at 259.

The juniors' argument that the CM Rules should apply would result in continuing injury to the seniors while the juniors pump out of priority. This would fly in the very face of the prior appropriation doctrine of 'first in time first in right' and leave the Director's charter under

the Ground Water Act.... "unfulfilled". *Basin 33 Water Users v. Surface Water Coalition* Memorandum Decision and Order, CV01-2020-8069 pg. 12, Nov. 6th 2020. In I.C. §42-237a.g. the Legislature has left the Director with the discretion and obligation to make a determination whether a ground water right should be left on when it is affecting senior surface water rights.

The end result of the Director's action was the prior appropriation was administered as it was intended...users with senior rights were furnished water in their time of need and juniors were curtailed. Any claim of harm made by the juniors must be weighed against the known harm that was occurring to the seniors. Most significantly, even though the depletions caused by ground water pumping have been known for thirty years, it was the first time in Basin 37 that ground water rights, at least in the Bellevue Triangle, were administered in priority. AR. 1904.

The Director needs to be able to administer water rights efficiently and quickly in order to avoid injury to senior water right holders. Recognizing the Director's lawful administration under I.C. § 42-237a.g. will result in the Director administering water rights in compliance with priority. Especially in years of drought. If the Director had proceeded under the CM Rules, the seniors' injury would have been allowed to continue throughout the 2021 irrigation season in Basin 37 and perhaps longer As this Court stated in the *Basin 33* case, absent the Ground Water Act, "the Director's only option for addressing continuing ground water declines is to wait for the next delivery call...In theory, the pattern could continue until the ground water reaches critical levels or worse", as was the very situation in the underlying case.[3] This case, as much as any

[3] *Basin 33 Water Users v. Surface Water Coalition* Memorandum Decision and Order, CV01-2020-8069 pg. 12, Nov. 6th 2020.

other, demonstrates the shortcomings of relying exclusively on the CM Rules for ground water management.

Furthermore, the Director's action allowed for a just and timely result which still was made within the bounds of law, based on substantial evidence, and due process. With the timeliness of the Director's action being a chief component of the just result which occurred in 2021. As the Court in *AFRD2* explained that "Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water" *AFRD2,* 154 P.3d at 446. Waiting for the next delivery call is simply not in line with the bed rock principle of prior appropriation or the ground water act. "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. *AFRD*, 154 P.3d at 446.

V. CONCLUSION

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

surface water rights, satisfying the statutory curtailment test and justifying the decision to curtail junior rights. This Court should uphold the district court's holding that I.C. §42-237a.g. grants the Director the right to conduct an administrative proceeding independent of the CM Rules but otherwise reverse the district court and affirm the *Final Order*.

DATED this 27th day of October 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October 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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