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

Supreme Court Docket No. 49632-2022

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT,

Petitioners-Respondents-Cross Appellants,

v.

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

Respondents-Appellants-Cross Respondents,

and

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

Intervenors-Respondents.

SOUTH VALLEY GROUND WATER DISTRICT'S AND GALENA GROUND WATER DISTRICT'S CROSS-APPEAL REPLY 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. INTRODUCTION

In this appeal the Idaho Department of Water Resources ("IDWR" or the "Department") asks this Court to approve a whole new scheme for conjunctive administration of surface and ground water rights, not only within Water District 37, but throughout the entire state. In support, IDWR points to a single sentence in a 1953 statute and its 1994 amendment, which admittedly has never been used in the manner that IDWR now advocates. In 2013, when IDWR incorporated ground water rights into Water District 37, the agency specifically represented that conjunctive administration would be handled under the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"), IDAPA 37.03.11, *et seq*. AR. 2484, 2491. Later, when the Director convened the water users in Basin 37 in 2020, IDWR pointed the water users to the CM Rules and to the ground water management area statute, but not to Idaho Code § 42-237a.g ("Section 42-237a.g"). AR. 5963-6007. IDWR does not dispute either these facts or the historical background regarding conjunctive administration in Water District 37.

Judge Wildman, who presides over Idaho's general stream adjudications and all administrative appeals from IDWR decisions, saw through this effort and rightly found that "[w]hether the Director conjunctively administers water rights under the Ground Water Act or under the CM Rules, that administration must comply with the principles of the prior appropriation doctrine as set forth in this state's Constitution, statutes, and case law."[1] R. 687. This conclusion provides certainty to both surface and ground water users throughout the state.

[1] The district court's decision follows the agency's prior representations that the CM Rules implement the prior appropriation doctrine and Ground Water Act. *See Districts' Op. Br.*, Addenda B, D. The Districts' addenda are reproduced in *Respondents and Cross Appellants' Motion to Augment the Record*, filed concomitantly. Citations to those documents will be referenced herein as Aug. p.

IDWR would have it otherwise and asks this Court to give its Director free reign to choose when to apply the CM Rules and when to ignore them.

South Valley Ground Water District and Galena Ground Water District (the "Districts") have raised the following additional issues on cross-appeal: 1) whether the Director could use Section 42-237a.g for conjunctive administration within an established water district; 2) whether the senior water users actually made a delivery call; 3) whether the court erred in failing to address the Districts' due process arguments; 4) whether Idaho Code § 42-237b, in effect at the time of the hearing, applied; and, 5) whether the Districts should be entitled to reasonable attorneys' fees and costs.

While the district court correctly determined that the Director failed to make basic decisions necessary for conjunctive administration in this case—i.e. "material injury" and "an area of common ground water supply"—the court mis-stepped in concluding that the Director could administer ground water rights within an organized water district pursuant to Section 42-237a.g and not pursuant to the Department's CM Rules. The district court did not reach the issue of how to properly reconcile and harmonize chapter 2 and 6, title 42, and further erred in concluding the seniors had not made a delivery call. Similarly, the district court did not reach the issue of the Director violating the Districts' due process rights. The district court also concluded that the Director was not bound to follow the adverse claim procedures in Idaho Code § 42-237b, a statute in effect at the time the Director initiated and held his contested case.

Since the Court can affirm based on the district court's rationale and reasoning, it is not necessary to reach all of the cross-appeal issues presented by the Districts. However, these errors provide additional grounds to set aside the Director's *Final Order* and *Order Denying Mitigation Plan* and provide guidance to the Department on remand. Therefore, the Districts respectfully

request the Court to affirm the district court's decision to set aside the Department's orders, including for the reasons set forth in the Districts' issues on cross-appeal.

II. ARGUMENT

If the Court affirms the district court, it will not need to address the issues on cross-appeal. *See Dredge Mining Control-Yes!, Inc. v. Cenarrusa*, 92 Idaho 480, 484, 445 P.2d 655, 659 (1968) (resolution of issue not essential to the case will not be determined). However, "[w]hen a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds." *Berglund v. Dix*, 170 Idaho 378, 511 P.3d 260, 266 (2022) (citing *Martel v. Bulotti*, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003)). If this Court affirms the district court's ordered remand, it may give guidance on other issues raised in the appeal. *See Hood v Poorman*, No. 48636, 2022 WL 15043784 (Idaho October 27, 2022).

Other than the request for attorneys' fees, the Districts' issues on cross-appeal address additional reasons to set aside the Director's orders in this case. Here, the district court concluded the Director did not properly follow the prior appropriation doctrine by failing to make a finding of material injury and an area of common ground water supply; if that decision is upheld, as it should be, the Court will not need to address the Districts' cross-appeal issues. Because IDWR challenges the district court's conclusion, the Districts will address the alternative grounds to affirm the district court.

A. The district court erred by holding that Section 42-237a.g authorized the Director to initiate the underlying administrative proceeding within Water District 37.

The Court should carefully examine the purpose of IDWR's appeal. The Department is not satisfied with the district court's judgment ordering compliance with Idaho's prior

appropriation doctrine for purposes of conjunctive administration. Instead, the Department asks this Court to grant the Director the ability to administer outside of what IDWR previously contended was necessary for lawful conjunctive administration, i.e., the CM Rules. The CM Rules have been in place for nearly two decades but now, IDWR wants to turn back the clock and administer under an undefined paradigm with no procedures. The argument is troubling to water users, and it should trouble the Court.

IDWR's claim that the Director has the right to unilaterally administer under Section 42-237a.g without regard to the CM Rules is particularly suspect in this case, where conjunctive administration has been at issue for many years. The spring of 2021 was not the first time that IDWR and the water users confronted the prospect of conjunctive administration in Water District 37. Seniors had tried for years to initiate administration of ground water rights, and the Director was aware of their repeated requests for administration and claims of material injury.

The water users and judiciary have expended considerable time and effort to address what is needed for lawful conjunctive administration both in this basin and throughout the state. Although the Director and senior water users previously failed to comply with the CM Rules, resulting in the dismissal of initial delivery calls and contested cases, the rules did not change, and the district court previously ruled and made clear what was necessary. Moreover, other drought years have come and gone within that timeframe, yet not once did the Director attempt to unilaterally administer ground water rights pursuant to Section 42-237a.g.[2]

[2] IDWR Ex. 5, AR. 2190, is a list of years with the corresponding Surface Water Supply Index (SWSI), including those with below 0.0 indexes. Several years between 2015 and 2021 had low streamflow forecasts and total annual volume. In other words, 2021 was not the first drought condition that the agency had witnessed in the area.

Dissatisfied with the Department's own rules, the Director chose to take on the seniors' case himself with an unprecedented approach to conjunctive administration.[3] The Director had no procedures, no path for mitigation, and changed the ground rules as the case proceeded, culminating with a curtailment order in the middle of the summer. This was despite the fact the district court previously ordered the Director to take certain "critical" actions. The Director ignored the court's order and final judgment, and instead embarked on a new regime that left juniors guessing as to how administration would occur. In the end, the Director even curtailed for the benefit of non-party senior users that had not put on any evidence of actual beneficial use of their water rights. AR. 1949 (the Director states that ground water pumping was curtailed "in order to protect all senior surface water rights diverting from Silver Creek and the Little Wood River") (emphasis added).

Hence, even if this Court finds the Director had discretion to administer under Section 42-237a.g, that discretion was abused under the unique facts in this case. Although the district court concluded that the Director could unilaterally administer under the statute, this Court should reverse.

1. The Director's application of Section 42-237a.g fails to harmonize chapters 2 and 6, title 42, Idaho Code.

IDWR argues that chapter 6, title 42, does not prohibit the Director from initiating proceedings under Section 42-237a.g, nor does it mandate the use of the CM Rules. *IDWR Resp. Br.* at 15. The Department fails to properly reconcile the applicable statutes together and further

[3] *See IDWR Appellants' Reply and Cross-Response Brief* ("*IDWR Resp. Br.*") at 12 ("Section 42-237a.g thus serves as a critical administrative backstop when water is scarce but individual water users cannot or do not file delivery calls under the CM Rules"). The Director went so far as to administer for the benefit of non-party seniors despite setting a deadline for parties to participate, and not having any evidence of those non-parties' actual beneficial use of water in 2021. Here there is no evidence that these Basin 37 water users "cannot" file a delivery call and, as set forth in Section II.B.2, *infra*, they actually did so.

ignores the history of relevant amendments made in response to early conjunctive administration issues. Moreover, IDWR ignores the very order it issued when combining ground water rights into Water District 37 in 2013. AR. 2491 (order finding that conjunctive administration would be guided by the CM Rules).

IDWR's primary contention on appeal is that its Director is free to isolate one sentence from one statute and disregard other laws, rules, and case law that govern conjunctive administration under Idaho water law. Even though Section 42-237a.g has never been used in such a manner before, the Department claims *carte blanche* authority to initiate proceedings and curtail ground water rights under the guise of the Director's "sole" discretion. In doing so, IDWR ignores the Legislature's express directive in Idaho Code § 42-239, well-established canons of statutory construction, and the history of conjunctive administration in this state.

The district court and IDWR believe there are "two paths, or prongs" for conjunctive administration within Water District 37. *See IDWR Resp. Br.* at 12; R. 684-86. The district court found that the CM Rules apply when a delivery call is made, but IDWR argued that the Director can use Section 42-237a.g regardless of the filing of a delivery call. *See* R. 560-62; *see also*, PATr. 62:15-25, PATr. 63:1-6. Amazingly, the Department contends that the Director is not bound to follow the Department's own rules.

IDWR told the district court that even if a senior files a delivery call under the CM Rules, the Director still has discretion and authority to administer under Section 42-237a.g without adherence to the rules. Tr. 75:7-17 ("I think that the authority is distinct. I think the director does have the authority under 237a.g. to administer. A delivery call would be a call between water users. So I suppose there could be a circumstance where it could happen in parallel"); *see also*, Tr. 75:24-76:5. Such a result does not properly harmonize chapters 2 and 6, Idaho Code, and

would create a conflicting, multiple track process for conjunctive administration. The uncertainty of competing processes for conjunctive administration is not what the Legislature intended.

Instead, the Legislature expressly required IDWR and its Director to "construe the provisions of this act [Ground Water Act], wherever possible in harmony with the provisions of title 42, Idaho Code, as amended . . ." I.C. § 42-239.[4] Therefore, the Department has an obligation to "reconcile" the various statutes, not isolate and ignore relevant laws. *See e.g. Sampson v. Layton*, 86 Idaho 453, 457, 387 P.2d 883, 885 (1963); *Herman ex rel. Herman v. Herman*, 136 Idaho 781, 787, 41 P.3d 209, 215 (2002) ("Statutes must be construed as a whole without separating one provision from another").

The Legislature did not want, as IDWR now argues, to untether the Ground Water Act from chapter 6. IDWR and the district court failed to harmonize chapters 2 and 6, but instead separated the statutes with a reading that leaves water users guessing as to how conjunctive administration will be handled.

The Department ignores the directive in Idaho Code § 42-239, claiming that harmony means reading a portion of Section 42-237a.g in isolation and contends that chapter 6 does not require the use of the CM Rules. IDWR only points to Idaho Code § 42-602 as requiring adherence to the prior appropriation doctrine, disregarding the rest of chapter 6. However, the very rules the Department promulgated cite and rely upon Idaho Code § 42-603 as the statutory basis for conjunctive administration of ground and surface water rights. IDAPA 37.03.11.00 (legal authority). Because the CM Rules have been found to be constitutional and consistent with the prior appropriation doctrine, it follows that harmonizing chapters 2 and 6 is necessary for the

[4] The statute is an authority separate and apart from this Court's canons of statutory construction. Hence, IDWR and the district court should have construed the laws together as required by law.

Director's lawful implementation of conjunctive administration. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* ("*AFRD#2 v. IDWR*"), 143 Idaho 862, 154 P.3d 433 (2007).

Moreover, IDWR does not square its "discretion" to administer theory under chapter 2 with the mandatory water right administration duties outlined in chapter 6. For instance, Idaho Code § 42-602 states that the Director "shall distribute water in water districts in accordance with the prior appropriation doctrine." Idaho Code § 42-607 similarly provides that it "shall be the duty of said watermaster to distribute waters . . . when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others." IDWR recognizes these mandatory duties. *See IDWR Resp.* at 15. How is it then can the Director "pick and choose" when and where to implement "discretionary" conjunctive administration under Section 42-237a.g? The answer—there cannot be both a mandatory and a discretionary path at the same time.

Consequently, the Court should reconcile and harmonize the two chapters in order to ascertain the proper procedure for conjunctive administration. That process is clearly defined in the CM Rules.

2. By the 1994 amendments to Section 42-237a.g, the Legislature only granted the Director discretionary authority to administer rights outside of water districts.

IDWR does not dispute its prior representation to this Court where it stated that prior "to the 1992 amendments to Idaho Code §§ 42-602 and 42-603 that provided for the inclusion of ground water rights in water districts, ground water rights and surface water rights had been administered as separate water sources in Idaho." *See Def.-App. Opening Br. on Appeal* at 9,

AFRD#2, No. 33249, 33311, 33399 (Idaho Sup. Ct. Oct. 27, 2006).[5] Although Section 42-237a.g. was enacted in 1953, it was not until 2021 that IDWR attempted to use that statute to conjunctively administer water rights.

When certain amendments to Idaho Code § 42-602 were made in 1992, the Idaho Supreme Court interpreted those changes as requiring the Director to immediately administer ground water rights located outside organized water districts. *See Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). The Legislature responded to the *Musser* decision within a matter of weeks and amended Section 42-237a.g to clarify that the Director's responsibility to administer ground water rights outside of organized water districts was discretionary, not subject to a writ of mandate or the requirements of chapter 6, title 42. *See Statement of Purpose*, H.B. 986, 52nd Legis., 2nd Reg. Sess. (1994).[6] Significantly, the Legislature did not make the same changes for ground water rights located within a water district.

The 1994 amendments added the discretionary language the Director relies on to initiate the administrative proceedings below, ". . . in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well. . ." I.C. § 42-237a.g. The Department forgoes responding to the Districts' discussion of Section 42-237a.g's legislative history because it cannot dispute those facts. Instead, the Department simply argues the statute "unambiguously applies to any well regardless of location." *IDWR Resp. Br.* at 14. A proper reading of all pertinent statutes regarding conjunctive administration leads to the conclusion that the Legislature intended that ground water rights within an organized water district would be administered pursuant to the water distribution statutes and the rules that were

[5] Attached to *South Valley Ground Water District and Galena Ground Water District Respondents' and Cross Appellants' Combined Brief* ("*Districts' Op. Br.*") as Addendum D. *See also*, Aug. pp. 185-233.

[6] Attached to *Districts' Op. Br.* as Addendum C. *See also*, Aug pp. 136-84.

promulgated to assist with that administration. *See Hood v. Poorman*, 2022 WL 15043784; at *16. ("[w]here two statutes apply to the same subject matter they are to be construed consistent with one another where possible, otherwise the more specific statute will govern"). This has been IDWR's position for years, and the Department should be held to that requirement now.

Ignoring the history and purpose of the 1994 amendments, IDWR alleges the Director has the authority under Section 42-237a.g to regulate "any well" regardless of the well's location within or outside a water district. *IDWR Resp. Br.* at 13-14. But the statute contemplates varying administrative processes that are dependent upon the status of a water district. One must read the entire statute to understand the context of the first sentence in Section 42-237a.g. "In determining the ordinary meaning of the statute, effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *In Re Decision on Joint Motion to Certify Question of Law to Idaho Supreme Ct. (Dkt. 31, 32, 45)*, 165 Idaho 298, 302, 444 P.3d 870, 874 (2018). That is, a statute is to be construed as a whole without separating one provision from another. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990).

Notably, in the second half of the statute, the Director is authorized to determine an "area of common ground water supply" and if that ground water "affects the flow of water in any stream or streams in an organized water district, to incorporate that area in said water district." I.C. § 42-237a.g. If the ground water does not affect the flow of any stream, the Director can incorporate that area into a separate water district as provided for in Idaho Code § 42-604. *See id.*

A critical element of Section 42-237a.g has been wholly ignored by the IDWR in this appeal:

> administration of water rights within a water district created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code . . . except that in the administration of ground water rights either the director . . . or the watermaster in a water district or the director . . . outside of a water district, shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided. . .

I.C. § 42-237a.g (emphasis added). IDWR's reading would render the 1994 amendment superfluous or meaningless, contrary to this Court's rules of statutory interpretation, as the Department now contends that the Director always had this unlimited authority regardless of a well's location, i.e. inside or outside an organized water district. *See IDWR Resp.* at 12; *see Chester v. Wild Idaho Adventures RV Park, LLC*, No. 48363, 2022 WL 16548955 at *6 (Idaho October 31, 2022).

IDWR incorporated ground water rights into Water District 37, or "enlarged the district," in 2013 and specifically cited provisions of the Ground Water Act as authority for doing so.[7] AR. 2489. The end of Section 42-237a.g makes clear that only the "director" would make such administration decisions "outside of a water district." This signals that Section 42-237a.g does not apply as a "stand alone" water right administrative scheme within a water district where a watermaster has primary duties to administer the water rights. *See* I.C. § 42-607.

Instead, Section 42-237a.g plainly states that administration "shall be carried out in accordance with the provisions of title 42, Idaho Code."(emphasis added). The relevant title 42 water right administration provisions for rights located within a water district are found explicitly

[7] However, contrary to the statute's directive, the Director failed to determine "an area of common water supply" despite incorporating ground water rights in Water District 37 in 2013. This failure was highlighted and explained by Judge Wildman in his *Sun Valley Order*, AR. 2403-2418.

in chapter 6. That chapter in turn points to rules promulgated to assist in that administration. *See* I.C. § 42-603 (authorizing the Director to "adopt rules and regulations for the distribution of water .. . as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof"). IDWR adopted the CM Rules in 1994 as "necessary to carry out the laws" for conjunctive administration. In other words, IDWR promulgated specific rules to govern conjunctive administration throughout the state "for the distribution of water" within water districts.

The Department alleges that its CM Rules are shelved and not triggered unless there is a "delivery call." However, at the same time, IDWR argues that chapter 6 "broadly empowers the Director and watermasters to distribute water . . according to the prior appropriation doctrine," and that surface water rights are administered by priority, "not by merely waiting for delivery calls." *IDWR Resp. Br.* at 17. Which is it then? Can watermasters administer ground water rights without "delivery calls" pursuant to chapter 6, like surface water rights? Or, is that reserved for the Director only? IDWR fails to explain this conundrum in its reasoning. History tells us that IDWR has never contended that conjunctive administration would occur, as they argue now to this Court, under a "strict priority" surface water to surface water like regime.

Moreover, IDWR represented that ground water rights were being brought into Water District 37 to "provide for proper conjunctive administration of surface and ground water rights." AR. 2484 (emphasis added). IDWR explained to all the water users in the Water District 37 that "conjunctive administration is guided by separate processes outlined in the [CM Rules]." AR. 2491. Not once did IDWR allege that "proper" conjunctive administration would take place through the Director's unilateral decision to initiate proceedings under Section 42-237a.g and not follow the rules and process expressly provided for by chapter 6, i.e., the CM Rules.

From *Musser*, through recent cases like *AFRD#2* and *Rangen*, IDWR has repeatedly advised water users and advocated to Idaho's judiciary about the importance and necessity of its CM Rules for purposes of conjunctive administration. IDWR consistently represented that prior to 1992 ground water and surface water had been administered as separate sources, thus the reason for promulgating the CM Rules in the first place. Ironically, the Department does not look to the rules in this case and instead shies away from them, apparently solely as a litigation position to support the Director's unprecedented decision.[8]

Only by ignoring the contemplated process for administration in chapter 6 and the CM Rules can IDWR find any support for its argument. Yet, that is exactly contrary to what the Legislature and well-established canons of statutory construction require. *See* I.C. § 42-239; *See also, Hood v. Poorman*, 2022 WL 15043784; at *16. Chapter 6 and the CM Rules govern conjunctive administration within organized water districts, whereas the Legislature granted the Director discretion to use Section 42-237a.g for ground water rights located outside of water districts.

B. The district court erred by not finding the seniors had made a delivery call.

The Districts' cross appeal also asks this Court "[w]hether 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." *Districts' Op. Br.* at 11. Here, the seniors made numerous demands directly to the Department, both written and oral, for priority administration. Those requests constitute "delivery calls" as defined by the CM Rules. *See* IDAPA 37.03.11.10.04.

[8] The Court should scrutinize and question IDWR's motives where it strays from a policy and position it has held for decades. *See e.g. CSL Plasma Inc. v. U.S. Customs and Border Protection*, No. 21-CV-2360 (TSC), 2022 WL 4289580 at *9-10 (D.D.C. Sept. 16, 2022) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious").

However, rather than act on these demands pursuant to the CM Rules, the Director claimed he could create a new proceeding.

The Department admits that the CM Rules define a delivery call as "request from the holder of a water right for administration of water rights under the prior appropriation doctrine," but contends that because the Director did not initiate the administrative proceeding in response to a request for priority administration, there was no delivery call. *IDWR Resp. Br.* at 6. The Director cannot shut his eyes and ears to the seniors' explicit requests for priority administration and then claim he is acting entirely on his own initiative, unencumbered by the rules. The record is abundantly clear that requests were made, *see* Section II.B.2, *infra*, and the Director erred in ignoring those requests and refusing to proceed under the CM Rules.

IDWR gets both the record and the Districts' argument egregiously wrong when it contends that the only record of a demand for administration comes from two prior delivery calls that had been dismissed. *See IDWR Resp. Br.* at 6-8. Similarly, the district court erred in accepting the Department's conclusory argument that the Director "was not responding to a delivery call." R. 685.[9]

1. A delivery call requires a request for administration of water rights under the prior appropriation doctrine.

The Department concedes that the CM Rules apply to delivery calls against junior ground water rights. *IDWR Resp. Br*. at 4. In that, the parties agree. IDWR also admits that the CM Rules define a "delivery call" as "[a] request from the holder of a water right for administration of water rights under the prior appropriation doctrine." IDAPA 37.03.11.10.04; *IDWR Resp. Br*.

[9] The district court did recognize that "[i]t is disputed whether the Director was responding to a delivery call in this case." R. 685. However, the district court considered only the two prior delivery calls made in Basin 37 without analyzing the Districts' claim that new delivery calls were made throughout the BWRGWMA advisory committee meetings immediately preceding the initiation of the administrative proceedings.

at 6. Moreover, CM Rule 20 provides in unambiguous language: "These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights." IDAPA 37.03.11.20.01. But IDWR claims this rule is irrelevant.[10] *IDWR Resp Br* at 6. Apparently, to IDWR the words "all situations" was amended by Rule 1 to actually mean "some situations" or whenever the Director deems it expedient. *Id*. But that is not what the plain language of CM Rule 20.01 says. It says "all."

The Department then argues that in addition to a "request" for administration, the CM Rules "have detailed requirements for a written delivery call petition." *IDWR Resp. Br*. at 6. IDWR's current position seems to be that, unless and until the detailed requirements for a petition are met, no delivery call has been made—which ignores the definition of a delivery call in CM Rule 10.04.

To support this contention, IDWR cites the district court's decision in *Sun Valley v. Spackman*, R. 2403-18 ("*Sun Valley*"), and argues that the 2015 delivery call was "dismissed on remand from the district court because it did not meet the filing and service requirements of CM Rule 30." *IDWR Resp. Br*. at 7. The Department mistakenly conflates the definition of a delivery call in Rule 10.04 with the notice and service requirements for a petition under CM Rule 30.

Unfortunately, in making this new claim, IDWR misstates the court's decision in the *Sun Valley* case. There, the seniors sent letters to the Director seeking priority administration, which

[10] IDWR has previously maintained that a delivery call is necessary for <u>all</u> conjunctive administration. "The Rules require that the senior make a delivery call, a nominal requirement that even the SRBA District Court contemplated would be <u>a necessary component of conjunctive administration</u> . . . Such a requirement is also a common sense <u>necessity</u> for efficient administration as it notifies the Director that the senior water right holder is not receiving sufficient water under his right to achieve the beneficial use for which the right was established." *Defendants' Memo in Response to Motion for Summ. Judg.* at 30, *AFRD#2*, No. CV-2005-600 (Gooding Cnty. Dist. Ct. Dec. 6, 2005) (emphasis added); Addendum B to *Districts' Op. Br.*; *see also*, Aug. pp. 67-135.

the Director characterized as a "delivery call." AR 2405. The court held that the Director erred, not because there had been no delivery call, but rather because "the seniors failed to satisfy both the filing and service requirements of Rule 30." AR. 2416. Nothing in *Sun Valley* stands for the proposition that a request for priority administration only qualifies as a delivery call under the rules if it meets all the filing requirements. There is no such condition in the court's decision or in the rules. Instead, *Sun Valley* merely concludes that failure to comply with the filing and service requirements is grounds to dismiss the delivery call not that the CM Rules do not apply. AR. 2416.

Sun Valley clearly illustrates that a delivery call and the subsequent service and filing requirements under Rule 30 are distinct. In *Sun Valley*, the district court held that the delivery call violated the CM Rules, AR. 2416, not that the CM Rules did not apply. As the Department admits, a delivery call is merely "when one water user makes an adverse claim against another (i.e., makes a delivery call)." *IDWR Resp. Br*. at 4. There is no particular form as to what qualifies as a "request" for conjunctive administration within a water district.[11] Hence, a request for priority administration is a delivery call that triggers the CM Rules. The Department recognizes this, and on appeal, IDWR admits that the prior delivery calls were in fact "delivery calls," even though those calls were later dismissed for failing to meet the requirements of Rule 30. *IDWR Resp. Br*. at 6 (referring to "the senior water users' previous delivery calls") *see also id.* at 7 (describing the 2015 and 2017 proceedings as "delivery calls"). Hence, based on IDWR's past practices and interpretations, a "delivery call" does not have to meet all of the requirements of Rule 30 to be considered a "delivery call."

[11] For example, seniors in other conjunctive administration matters have submitted letters that the Director determined qualified as "delivery calls" under the CM Rules. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011) ("Blue Lakes delivered a letter. . . Clear Springs delivered letters to the Director").

IDWR contends that the Districts have admitted that the seniors' did not file a delivery call. *IDWR Resp. Br*. at 6 (citing AR. 133). This claim is disingenuous. The position before the Director in the Districts' motion to dismiss is the same as it is now. "Thereafter, the Association members did not file a delivery call that satisfied the requirements of CM Rule 30." AR 133 (emphasis added). The Districts agree that seniors must supply the CM Rule 30 information to satisfy due process and comply with the rule. *Sun Valley, supra.* AR. 2411-12 (Rule 30 process necessary to satisfy due process requirements). Just as in *Sun Valley*, the seniors' delivery call demands here should have been dismissed for failure to satisfy Rule 30. Importantly IDWR did not appeal this *Sun Valley* decision and is bound by the principles of res judicata.[12] *See Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007) ("The doctrine of res judicata covers both claim preclusion (true res judicata) and issue preclusion (collateral estoppel). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action which might have been made. Issue preclusion protects litigants from litigating an identical issue with the same party or its privy") (cleaned up).

IDWR then misstates the Districts' position about the history of the seniors' demands for priority administration at "various times in the past." *IDWR Resp. Br*. at 4. IDWR suggests that the Districts are relying entirely on the fact that there had been unsuccessful delivery calls attempts in 2015 and 2017 as the sole basis for finding a delivery call had not been made leading up to this unilateral proceeding. *Id*. Not true. Certainly, the Director was aware of the prior delivery calls. Those facts should have placed the Director on heightened alert when the demands for priority administration came streaming in during 2020 and 2021 from the seniors,

[12] *See Final Order Dismissing Delivery Calls*, Nos. CM-DC-2015-001 and CM-DC-2015-002 (IDWR June 22, 2016), publicly available at https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2015-001/CM-DC-2015-001-20160623-Final-Order-Dismissing-Delivery-Calls.pdf.

and it undoubtably did. These innumerable and more recent demands for priority administration are described in more detail in the following subsection.

2. The seniors made many verbal and written requests for priority administration of water rights under the prior appropriation doctrine that qualify as a delivery call under the CM Rules.

The seniors communicated their requests for administration and claims of injury to the Director at the ground water management area advisory committee meetings held during the fall of 2020 through spring of 2021. *See* AR. 5956-6477, 6540-83 (seniors estimating "system injury" and "injury to individual users" for "Little Wood River decreed rights"). In October 2020, the seniors submitted a draft agreement proposing conjunctive administration of surface and ground water in Water District 37 which was presented at the first meeting on November 4, 2020, *see* AR. 5962, and reviewed again at the March 3, 2021 meeting, AR. 6418 (Mr. Luke reviewed "the draft proposed agreement submitted by the surface water users").[13]

In February 2021, Tim Luke of IDWR asked for written explanations from the committee members about their goals. AR. 6279. After receiving the written responses (which IDWR failed to release or place in the record), Mr. Luke reported to the advisory committee in writing that the seniors demanded curtailment of ground water as required by the priority of their water rights. AR. 6413, 6418. Mr. Luke summarized the written demands of the seniors as: "The seniority of surface water rights is currently not being honored. i.e., ground water rights that are junior to surface rights should be curtailed accordingly." AR. 6413 (emphasis added). There is simply no other way to interpret the seniors' written statements from October 2020 and February 2021 than as requests for priority administration under the prior appropriation doctrine, i.e., delivery calls.

[13] The Districts moves the Court to take judicial notice of this memorandum pursuant to Idaho R. Evid. 201(d). A copy of the October 2020 draft agreement for conjunctive administration ("2020 Agreement") is attached to Districts' *Motion to Augment the Record* at Aug. pp. 276-80.

IDAPA 37.03.11.10.04. Neither IDWR nor the seniors dispute that these demands were made.

IDWR then argues that the seniors' testimony at the hearing, demanding prior appropriation, was not a delivery call under the CM Rules. *IDWR Resp. Br*. at 7. That testimony however, was not cited as evidence that a delivery call was made during the hearing, but to show that the demands of the seniors made during the prior advisory committee meetings was for administration of water rights in priority under the prior appropriation doctrine, and was understood as such by those seniors. *See* ATr. 560:12-24 (Pendleton); ATr. 445:19-22; 455:12-13 (Brossy/Barbara Farms LLC); 499:6-10 (Hubsmith); 612:7-11 (Arkoosh); 744:2-5 (Newell).

The information provided by the seniors to the Department throughout the advisory committee process, specifically the written submissions in October 2020 and February 2021, were delivery calls. IDWR asserts that these written demands are not sufficient to meet the requirements of CM Rule 30. *IDWR Resp Br* at 6-7. The Districts agree. But the fact that the demands for priority administration were not accompanied by CM Rule 30 information does not mean there has been no "request for administration of water rights under the prior appropriation doctrine." IDAPA 37.03.11.10.04; *see also*, *Clear Springs*, 150 Idaho at 796, 252 P.3d at 77 (the Director treated letters asking for administration of water as delivery calls); *see also* AR. 2405 (the Director treated two letters demanding priority administration of their surface water rights and ground water rights within water district 37 as delivery calls).

The seniors presented unequivocal demands to the Director for priority administration of their water rights in accord with the prior appropriation doctrine—this was a delivery call. The district court erred in not finding the seniors had made a delivery call that triggered application of the CM Rules.

C. The Director violated the Districts' right to due process.

The district court concluded that it was unnecessary to analyze the Districts' due process claims because to comply with Idaho's prior appropriation doctrine the Director was required to designate an "area of common ground water supply" and make a finding of "material injury." R. 687-691. Since the Director's administrative proceeding and final order did neither, the order was set aside and remanded. R. 692. However, the court noted that its resolution of these issues "dovetail" with the "issues of due process concerns with respect to the hearing process" raised by the Districts. R. 691. Consequently, the court did not specifically analyze the Districts' issues:

> 3. Whether the Director's administrative process and Final Order violated the Districts' rights to due process.
>
> 4. Whether the Director's reliance upon the staff memoranda, including a pre-determination of "the area of common ground water supply" violated the Districts' right to due process.
>
> 5. Whether the Director erred in denying the Districts' proposed mitigation plan ordering curtailment without an opportunity for hearing.

R. 336.

Resolution of the issues of a properly defined "area of common ground water supply" and "material injury" support the Districts' due process issues on cross appeal. Since the Director failed to perform the proper evaluations consistent with well-established concepts in Idaho water law, including as defined in the CM Rules, the resulting administration was unconstitutional. Stated another way, the Director had a defined path that this Court held is consistent with the constitution for proper conjunctive administration, yet the Director refused to follow that path. *See AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433. Therefore, this Court can affirm the district court's order and judgment on the additional grounds that the Director's actions violated the Districts' due process rights.

1. An area of common ground water supply is a component of the prior appropriation doctrine.

The district court held that determining an area of common ground water supply is required for conjunctive administration under the CM Rules and the Ground Water Act. R. 689 (there is "no reason why conjunctive administration under the Act should occur pursuant to some other undefined metric"). Establishing an area of common ground water supply is necessary because: (1) it establishes the borders for due process; and, (2) it establishes the proper order of curtailment of junior rights. *Id.*

An area of common ground water supply is a necessary component of conjunctive administration under the prior appropriation doctrine. R. 689. The Department disagrees. It argues that because the requirement to designate an area of common ground water supply is "rooted in the CM Rules and judicial statements about delivery calls under the CM Rules," that determining an area of common ground water supply is unnecessary here. *IDWR Resp. Br.* at 23. However, the district court's holding is not just limited to the CM Rules. The district court simply applied basic principles of the prior appropriation doctrine that are also set forth and incorporated in the CM Rules.

The Department steps around the need to identify the area of common ground water supply and instead argues that the Director evaluated the core principles of the prior appropriation doctrine, priority and beneficial use. *See IDWR Resp. Br.* at 21-22. Apparently, IDWR believes that properly identifying the common source of water supply for the various rights is not necessary. While priority and beneficial use are critical elements, the prior appropriation doctrine is comprised of a multitude of rights and obligations related to priority and beneficial use, including: water appropriation procedures; priority date; point and means of diversion; period of use; place of use; conveyance loss; duty to not waste water; economical and

reasonable use; the sale, transfer, or rental of water rights; and, the administration and distribution of water rights, *see* Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 37-57, 90 (1968).

The Districts explained that "[c]onjunctive administration requires evaluation of two critical elements of water rights and the prior appropriation doctrine, source and priority," and "determining the area of common ground water supply provides the basis for making those evaluations and is therefore a key to determining source and priority and to ensure the prior appropriation doctrine is followed." *Districts' Op. Br.* at 26; *see also* AR. 2410; *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). The Department provides no response. Even today, the Department has never explained why an area of common ground water supply and the boundaries of the Water District 37, including the ground water rights, are not co-extensive. AR. 2408. But it is undisputed that no such determination has been made. *Id*.

IDWR argues on appeal that Water District 37 incorporates all the ground water rights affecting the flow in the Little Wood and the Big Wood Rivers. *IDWR Resp. Br* at 24. This claim is directly contrary to IDWR's prior admissions and the district court's determination in *Sun Valley*. AR 2408. There, the court noted that "no party argues that the boundary of water district 37 is one and the same with that area of the state having a common ground water supply relative to those rivers." AR 2410. After that determination and final judgment, the Director did nothing to ensure that Water District 37 encompassed the area of common ground water supply and gave no notice to anyone who might be affected that he was making such a determination. AR. 2411.

The Department now asserts, without any process whatsoever, that the ground water rights which affect the flow in the rivers in this case have been determined. An area having a

common ground water supply is defined in pertinent part as "[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source." IDAPA 37.03.11.10.01. Thus, the Department is trying to convince this Court that it really did make this essential determination even though there is no record of a proceeding to establish the area of common ground water supply. R. 689 ("It is unknown how the 'potential area of curtailment' was derived or whether it is consistent with an area of common ground water supply for Silver Creek and/or the Little Wood River"). Then in the next breath, the Department contends that it does not have to determine an area of common ground water supply when it chooses not to administer under the CM Rules.

The Department argues that the requirement to establish an area of common ground water supply is limited to proceedings under the CM Rules. Of course, the CM Rules are consistent with the prior appropriation doctrine. *See AFRD#2 v. IDWR*, 143 Idaho at 878, 154 P.3d at 449. But the Department does not explain why it included the area of common ground water supply in the rules if it is irrelevant to the prior appropriation doctrine. *See e.g.* IDAPA 37.03.11.31; IDAPA 37.03.11.50.01. The Ground Water Act also recognizes the concept of an area of common ground water supply. *IDWR Resp. Br.* at 24.

Section 42-237a.g provides 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 as hereinafter provided." IDWR cites this passage as giving the Director the discretion to establish an area of common ground water supply, but this passage provides the Director discretion to establish ground water pumping levels after making an area of common ground water supply determination. Additionally, the Director "shall also have the power to determine what areas of the state have a common ground water supply." I.C. 42-237a.g. While this provision does not

mandate the Director establish areas of common ground water supply, it does not extinguish the requirement that an area of common ground water supply be established prior to taking certain actions.[14]

IDWR suggests that the 1994 amendments to Section 42-237a.g give the Director broad, unlimited discretion in administering ground water rights. *IDWR Resp. Br.* at 25. But the discretionary language added in 1994 was in response to the *Musser* decision and was intended to "make[] clear that the Director's authority to distribute water outside a water district is a discretionary function." *See Statement of Purpose*, H.B. 986, 52nd Legis., 2nd Reg. Sess. (1994). The 1994 amendments did not concern areas of common ground water supply in any way. IDWR complains that the district court's order leaves the Director no choice but to establish an area of common ground water supply. *IDWR Resp. Br.* at 25. But IDWR does not explain why the Director should not have to identify "[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source." IDAPA 37.03.11.10.01. IDWR further fails to explain why it should not have to follow the district court's 2015 *Sun Valley* judgment requiring the same.

The Department disputes the district court's determination that an area of common ground water supply is necessary because it establishes the borders for due process and because it establishes the proper order of curtailment of junior rights. "Determining the area of common ground water supply is necessary to bring in all ground water rights which affect the flow of the subject surface water source. That is required to assure that proper priority administration is

[14] Like, incorporating ground water rights into a district. AR. 2408 fn. 4 ("To incorporate ground water rights into the district, the Director is required to make the determination that the ground water rights are hydraulically connected to the surface water source.") (*citing* I.C. § 42-237a.g). Or, to conjunctively administer water rights under the prior appropriation doctrine. R. 690.

accomplished consistent with the prior appropriation doctrine." R. 689.

IDWR suggests that a ground water model is a substitute for an area of common ground water supply.[15] *IDWR Resp. Br.* at 24-27, 31-34. The district court found:

> The procedures and criteria utilized to define the boundaries of the "potential area of curtailment" are not clear from the record.[16] It is unknown how the "potential area of curtailment" was derived, or whether it is consistent with an area of common ground water supply for Silver Creek and/or the Little Wood River. Therefore, the record fails to establish that the "potential area of curtailment" encompassed all ground water rights which affect the flow of the subject surface water source, as required by the prior appropriation doctrine.

R. 690 (footnote in the original).

Having failed to demonstrate that the area of potential curtailment encompasses all the ground water rights which affect the flow in the rivers, IDWR cannot credibly argue that it met the requirements of the prior appropriation doctrine or the due process rights of the parties curtailed. IDWR further urges the Court to uphold the Director's failure to designate an area of common ground water supply on a misreading of this Court's prior cases. *See IDWR Resp.* at 27-30. IDWR mischaracterizes those cases as standing for something none of them state, that an "area of common ground water supply" is not necessary for conjunctive administration.

IDWR first alleges that *Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968), supports the concept that the "Ground Water Act authorized an injunction against ground water pumping" and that is analogous to the Director's actions in this case. *IDWR Op. Br.* at 24; *IDWR Resp. Br.* at 28, 30. The facts in *Tappan* involved compliance with the Director's "critical" ground water area order. *Tappan*, 92 Idaho at 452-54, 444 P.2d at 413-15. The Director filed a direct action in

[15] Notably in 2014, the Idaho Legislature rejected IDWR's effort to repeal CM Rule 50, where the agency claimed that it could instead use the ESPAM model as a substitute for the rule's defined area of common ground water supply. *See* Idaho H.C.R. 10, 63rd Legis., Reg. Sess. (2015); S.L. 2015, Vol. 2 at 1340-1341.

[16] "Counsel for the Respondents was unable to explain how the boundaries of the "potential area of curtailment" were arrived at when asked at the judicial review hearing." R. 690 at fn. 14.

district court seeking to enjoin a couple from pumping water from a new well and from changing their point of diversion and place of use for two other wells. *See id.* The trial court upheld the critical ground water designation, confirming the "dangerous depletion" of the aquifer, and the Director's decision to prohibit the new appropriation and transfer. The trial court relied upon IDWR's testimony that showed the existing rights for irrigation, together with permits issued prior to the critical ground water area designation, "constituted a serious drain in the water supply of the valley, and that the withdrawal of underground water was approaching the estimated amount of water available." *Id.* at 454, 444 P.2d at 415 (emphasis added).

The Supreme Court upheld the trial court's injunction because it prevented aquifer mining, not on the basis of material injury to senior water rights. In short, *Tappan* did not address conjunctive administration in an established water district and does not stand for the proposition that an "area of common ground water supply" is unnecessary under those facts.

IDWR next argues that *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) supports the Director's curtailment here as well. Specifically, IDWR claims no "area of common ground water supply" was necessary to enjoin the junior pumping in *Baker*. *IDWR Resp.* at 29. Again, IDWR misreads the case. The court concluded that during the period 1961 through 1968 the parties had withdrawn water from the aquifer far in excess of the annual recharge rate causing a 20 ft. per year drop in the aquifer's water level. In other words, the parties were unlawfully "mining" the aquifer, i.e., perennially withdrawing ground water at rates beyond the recharge rate.[17] *Baker*, 95 Idaho at 577, 513 P.2d at 629. Again, *Baker* did not address

[17] *Briggs v. Golden Valley Land & Cattle Co.* was a follow up proceeding for the same water rights at issue in *Baker*. *See* 97 Idaho 427, 546 P.2d 382 (1976). There the Court confirmed that the district court in *Baker* prohibited withdrawals beyond the quantity of water that was recharged annually: "In order to prohibit 'mining' of the aquifer, the court enjoined further pumping from the aquifer by those water users whose ground water rights were not among those which the court had determined to be the senior 5500 acre feet of annual ground water rights licensed to extract water from the water." *Id* at 429, 546 P.2d at 384.

curtailment in response to material injury to senior surface water rights, rather it was implemented to prevent continued aquifer mining.

IDWR next argues that, since the Director reduced the area subject to curtailment within the ESPA in response to delivery calls in the *Clear Springs* and *Rangen* cases that somehow excuses the Director's failure to designate an "area of common ground water supply" in this case. Both of those cases involved a defined area of common ground water supply set by CM Rule 50. Therefore, the cases provide no authority for limiting the curtailment to a subset of rights when there is no area of common ground water supply in the first place. Here, no area of common ground water supply exists despite the district court ordering the Director to determine one seven years ago. Moreover, the "trim line" in *Clear Springs* and *Rangen* concerned a prior model's perceived uncertainty and the Director's decision to exclude certain rights from curtailment based upon timing and quantity of water returned that would be available for the seniors' use. Neither case addressed the foundational issue of establishing an area of common ground water supply at the outset. Accordingly, IDWR's effort to stretch the results of those cases to excuse the Director's actions here should be rejected.

Finally, none of the above four cases support IDWR's claim that "an area of common ground water supply is not a 'vital' element of the prior appropriation doctrine." *IDWR Resp. Br.* at 30. Neither *Tappan* nor *Baker* addressed when an area of common ground water supply needed be determined for conjunctive administration, and both involved unlawful aquifer mining conditions. Significantly, there is no aquifer mining here, AR. 157-59, and the Department does not contend there is. *Clear Springs* and *Rangen* concerned the ESPA, which has an area of common ground water supply defined by agency rule. IDAPA 37.03.11.50.01. Those cases

cannot be read to excuse making a determination of an area of common ground water supply in the first place.

As a result of these failures to properly identify and establish "[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source" the Department deprived the Districts of a critical element of the prior appropriation doctrine and accordingly deprived them of due process. *See* IDAPA 37.03.11.10.01. The Districts' members' water rights are property rights subject to the protections of the prior appropriation doctrine and due process. *U.S. v Pioneer Irr. Dist*., 144 Idaho 106, 111-13, 157 P.2d 600, 605-07 (2007). Consequently, the Director's failure to make that foundational decision violated the Districts' due process rights.

2. The district court properly held that the Director must make a finding of material injury and that the Director did not make that finding here.

In addition to failing to satisfy the Districts' due process with a properly defined "area of common ground water supply," the Director erred in failing to make a finding of "material injury" and instead basing curtailment "on depletions to the source . . caused by ground water use." R. 691. On appeal, IDWR and the senior water users argue that the Director can use a lesser "injury" standard. *IDWR Resp. Br.* at 36 ("The Ground Water Act does not require the Director to find material injury . . ."); *BWCC and BWLWWUA Intervenor's Brief* at 21-31.

Importantly, at the outset of this proceeding the Director advised the parties that he did not know the difference between "injury" and "material injury." PATr. 49:10-17. Now on appeal, the Director reverses course and argues that the standard for conjunctive administration under the Ground Water Act is an "injury" that is somehow different from "material injury." *IDWR Resp. Br.* at 35. IDWR has to make this argument to pursue its appeal because admittedly the Director did not properly evaluate all the elements of "material injury" in the administrative

proceeding. But this Court should not allow the Director to take one position at the outset of the hearing and another afterwards on appeal. As the United States Supreme Court has cogently stated, "a court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.'" *Kisor v Wilkie,* 139 S.Ct. 2400, 2421 (2019).

The Department also attempts to save the Director's flawed injury analysis by alleging it was close enough and complies with "the beneficial use principles underlying the concept of 'material injury' in three ways."[18] *IDWR Resp. Br.* at 35. While IDWR's effort to show that the Director got close to "material injury" is unavailing, IDWR makes this effort because it has conceded in prior proceedings that Section 42-237a.g's term "affect" is consistent with "material injury" under the CM Rules.[19] *See Defendants' Memo in Response to Motion for Summ. Judg.* at 53, ("As an initial matter, the fact that the Rules require a material injury, rather than simply an

[18] IDWR claims the Director: 1) addressed "surface and ground water users' efficiencies, finding they all put water to beneficial use in reasonable amounts through valid appropriations . . ."; 2) "properly evaluated the Districts' defenses . . ."; and 3) "exercised his discretion to limit curtailment to the Bellevue Triangle . . ." *IDWR Resp. Br.* at 35-36 (emphasis added). This, IDWR claims, satisfied "not only the statutory test for curtailment, but also the prior appropriation doctrine." *Id.* at 36. The problem is, the Director's *Final Order* did no such thing. The Director did not properly evaluate the seniors' actual beneficial use, or reasonable in-season demand. The Director made no attempt to analyze how much water was needed by the seniors based upon what crops they were growing in 2021 and the actual number of acres that were being irrigated compared to the water rights. *See Districts' Op. Br.* at 24. Significantly, the Director did not and could not make any findings of beneficial use as to non-participating seniors since there was no evidence of their water use at all. IDWR's claim that "they all put water to beneficial use," *IDWR Resp. Br.* at 35, is flat wrong and misrepresents the administrative record. Further, the Director ignored supplemental surface and ground water supplies that certain seniors had acquired to satisfy their crop water needs. *See Districts' Op. Br.* at 24. Without specific crop water need and demand analysis, the Director's findings did not equate to a "material injury" finding required under Idaho's prior appropriation doctrine.

[19] IDWR also glosses over the fact that the claimed increase in flow resulting from curtailment would benefit seniors who did not make a delivery call, and the watermaster confirmed that after losses in the channel, only three 1883 water rights would be able to put resulting water to beneficial use. AR. 2119 (showing water estimated available from curtailment after applying losses on the order of 20% and 33%); ATr 787:12-25; 788:11-20 (watermaster testifying that the September 1883 right would have received some water but no their full right, and the June 1883 right would receive water). The watermaster testified at hearing that neither Purdy (Sept 1883) nor Blackburn Farms (June 1883) had made an injury claim, or was seeking conjunctive administration. ATr. 834:6-15. Greg Sullivan provided additional testimony about the limited rights that would receive water. ATr. 1427:25; 1428-30.

injury, is consistent with the established rule that an existing junior ground water right may not be curtailed unless the senior has suffered an injury that is material and actual, and not fanciful, theoretical or merely possible."); *see also id* at 5-6, 22.

Notably, IDWR does not dispute the substance of the Rule 42 guidelines or factors for determining "material injury" in conjunctive administration.[20] *See IDWR Resp. Br.* at 43. However, IDWR mistakenly contends that those material injury factors are relevant only to the "Districts' unproven defenses." *Id.* IDWR admits, as it must, that under the prior appropriation doctrine, "[s]uch injury must be material and actual, and not fanciful, theoretical, or merely possible." (emphasis added). *See IDWR Resp. Br.* at 37. Over a century ago, this Court made it very clear that the senior must prove material injury. *Bower v. Moorman*, 27 Idaho 162, 182, 147 P. 496, 503 (1915). Yet here, the Director's injury analysis began and ended with the seniors' priority date and whether ground water use would have an impact on the surface water source, not specific water rights and their beneficial use. AR. 1948-50.

CM Rule 42 requires the Director to evaluate "the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency . . . the amount of water being diverted and used compared to the water rights." IDAPA 37.03.11.42.01(d and e). Such information is necessary to determine a senior's actual crop water need and reasonable in-season demand. The Director made no such findings for any of the seniors, whether they appeared in this proceeding or not. Instead, he applied a

[20] The Director admitted the CM Rule 42 factors were a "guide" for his injury determination in this case. PATr. 50:17-20. On appeal, IDWR attempts to re-cast the Director's statement as only applying to the "burden of proof" not evaluation of the senior's "material injury." *See IDWR Resp. Br.* at 20, n. 9. This cannot be true because the CM Rules do not include a burden of proof as explained by this Court in *AFRD#2 v. IDWR*. 143 Idaho at 874, 154 P.3d at 445 ("Requirements pertaining to the standard of proof and who bears it have been developed of the years and are to be read into the CM Rules . . . However, as noted with respect to the burdens of proof and evidentiary standards, it is not necessary that every procedural requirement be recited in the CM Rules"). IDWR's attempt to rewrite the Director's representations that were made to the water users on this issue fails.

"strict priority" regime that was only concerned with depletions to the surface water source. IDWR provides no valid justification for this failure on appeal. Instead, IDWR contends that curtailment of surface water rights is a substitute for a detailed material injury analysis based on ground water withdrawals. *See IDWR Resp. Br.* at 37. The district court saw through the shortcomings and properly set aside the Director's error.

Even after admitting that the prior appropriation doctrine requires proof of material injury, IDWR continues to argue that this Court did not mean what it said about material injury in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). IDWR argues that this Court's analysis in *Clear Springs* was "barely relevant to the case at bar" and that its Director was free to ignore the decision because it was only "dicta." *IDWR Resp. Br.* at 38. This is a misreading of the law. The Director has no authority to reject a clear and unambiguous statement from this Court and IDWR cites no authority giving him that right. Even if the statement were dicta, and it is not, the Director is still bound. *See Aceves v Allstate Ins. Co.*, 68 F.3d 1160, 1164 (9th Cir. 1995) ("The district court, like us, is bound to follow the considered dicta as well as the holdings of the California Supreme Court when applying California law"). The district court rightly disagreed with IDWR on this point.

IDWR claims this Court only evaluated Section 42-237a.g "in passing" and that the holdings would not change if the Court had omitted the words "material injury." *Id.* at 39. IDWR cannot rewrite *Clear Springs*. Words matter in this Court's opinions, they cannot be brushed aside because the Department disagrees with them. In *Clear Springs*, junior ground water users argued a defense to the senior spring users' call based upon the Ground Water Act, citing Section 42-237a.g. 150 Idaho at 803-04, 252 P.3d at 84-85. This Court analyzed the claimed defense and interpreted the statute as follows:

> The statute merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface or ground water right or (b) result in withdrawals from the aquifer exceeding recharge. . . . The district court did not err in holding that the curtailment orders do not violate Idaho Code §§ 42-226 and 42-237.a.

Id. at 804, 252 P.3d at 85 (emphasis in original). This Court's holding is not merely "dicta" as it disposed of a claimed defense offered by the junior ground water users in the case. Clearly, the Court's analysis of Section 42-237a.g "played a role" in its decision in the case. *See State v. Hawkins*, 155 Idaho 69, 74, 305 P.3d 513, 518 (2013).

Having admittedly failed to undertake a material injury analysis and having utterly failed to do anything other than determine priority and "depletion to the source," the Director violated the substantial due process rights of the Districts and their members.

3. The Director's hearing process violated the Districts' right to due process.

This Court can also address the other due process issues not reached by the district court as additional grounds to affirm the district court's final judgment. Notably, the Director's hearing process and denial of the Districts' mitigation plan without a hearing provide further evidence of the Director's violation of their constitutional rights.

Constitutional issues are questions of law subject to the Court's free review on appeal. *See Regan v. Owen*, 163 Idaho 359, 361, 413 P.3d 759, 761 (2018). The Director violated the Districts' due process rights in two principal ways. First, the short-circuited hearing process that was the first of its kind and purported to address complex conjunctive administration of hundreds of surface and ground water rights did not provide the Districts with the "opportunity to be heard in a meaningful time and in a meaningful manner." *See Ayala v. Robert J. Meyers Farms, Inc.*, 165 Idaho 335, 363, 445 P.3d 164, 171 (2019). Second, the Director denied the Districts' proposed mitigation plan without any hearing whatsoever. AR. 1948.

IDWR wrongly alleges that the "district court did not find a due process violation, and on appeal no party argues they lacked notice or an opportunity to be heard *before* curtailment." *IDWR Resp. Br.* at 47. The Department misrepresents the court's decision as well as the Districts' issue on cross-appeal. First, the district court held the following:

> The Court's analysis of the issues addressed in Section III.C address many of the due process concerns raised by the Petitioners related to the hearing process. With respect to any remaining due process issues, the Court holds it need not reach those at this time, as the Director's *Final Order* is already set aside and remanded for the reasons set forth herein.

R. 691. In other words, since the district court set aside and remanded the final order to IDWR to properly designate an area of common ground water supply and make a material injury determination, the court noted it was unnecessary to analyze the remaining due process arguments. Failing to administer consistent with Idaho's prior appropriation doctrine in this regard is unconstitutional. Just because the district court did not specifically analyze the due process elements does not mean there was no violation, as IDWR's reply brief implies.

Since the district court remanded the matter to IDWR, it is appropriate for this Court to address the Districts' due process arguments and provide guidance on how the Department should satisfy those rights in this case. *See Regan*, 163 Idaho at 363, 413 P.3d at 763 (listing cases where Court addresses arguments for purpose of providing guidance on remand).

Rather than using the CM Rules, with its defined procedures and process, the Director initiated this complex conjunctive administration case pursuant to Section 42-237a.g, a statute with no procedural safeguards. Although procedural due process is a "flexible concept" dependent upon the particular case at hand, the fact this was the first time the Director used the statute warrants this Court's careful evaluation to identify what procedures were due to satisfy the constitutional protections owed to the Districts.

In support of its claim that adequate process was provided, the Department provides a general laundry list reciting the pre-hearing conference, standards to intervene, motion practice, discovery, a six-day hearing, and documentary evidence and briefing *IDWR Resp. Br*. at 47. The Department however, ignores the context under which this all happened. Notably, the Director initiated the case on May 4, 2021, identifying and essentially prejudging an area of potential curtailment well after planting and irrigation had started. AR. 1-2. The Director did not disclose the staff memoranda and technical data upon which this decision was made until May 18-21, AR. 380, including the modeling that the Department now argues is a substitute for an "area of common ground water supply," *IDWR Resp. Br.* at 31-34. Moreover, the Department was still disclosing background information supporting its reports during the hearing.[21] AR. 1404-74.

Conjunctive administration is no "garden variety" water law dispute. As this Court is well aware, proper and adequate consideration of hydraulic connection, aquifer characteristics, modeling, evaluation of a senior's material injury, a junior's defenses, and mitigation, requires sufficient time and effort in order to be heard "at a meaningful time and in a meaningful manner." *See Ayala*, 165 Idaho at 362, 445 P.3d at 171. While time is certainly of the essence in water right administration, this Court has advised that "[g]iven the complexity of the factual determinations that must be made . . . . 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#2*, 143 Idaho at 785, 154 P.3d at 446 (emphasis added).

In this case the Director held his technical information until the eleventh hour and only gave the Districts a little more than two weeks to digest and address it at the hearing. This was despite the fact that IDWR's own experts had been working on their evaluations for months and

[21] Furthermore, the Director did not even authorize discovery to commence until Saturday May 22, 2021. R. 419.

the Director's modeler admitted that running alternative scenarios to evaluate uncertainty with the ground water model that contains over 55,000 individual cells would take several months. *See* ATr. 169:8-170:19 ("A: I think we'd be looking at something on the order of months to look at that"). Cases with highly technical questions like conjunctive administration cannot be fairly evaluated in just a few days. As such, the process was prejudicial to the Districts, whose members faced curtailment, since it was not fair under the circumstances. *See e.g.*, *State v. Doe*, 147 Idaho 542, 546, 211 P.3d 787, 791 (2009) ("notice must be provided at a time which allows the person to reasonably be prepared to address the issue").

IDWR cannot credibly defend this process, yet it claims the Director "opted for an efficient yet thorough pre-curtailment process." *IDWR Resp. Br.* at 51. It is questionable why an agency that describes the 2021 water year as a "deep and worsening drought" would wait until May 4th to initiate an unprecedented complex conjunctive administration case. *Id.* at 47. Certainly, with IDWR's technical expertise and forecasting, it was aware of the pending conditions as early as January of that year. *See* R. 411-32 (water supply forecasts). The water conditions were such that the Director could have followed this Court's guidance and developed a "pre-season management plan" that could have been vetted prior to the irrigation season. *See e.g., A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013). Waiting until after crops were planted and receiving irrigation water for several weeks is a clear abuse of discretion in this case and ultimately denied the Districts' constitutional due process.

The Department's "strict priority" regime is further advanced in its response to the due process issue on appeal. *See IDWR Resp. Br.* at 54-56. Ironically, given the Department's steadfast reliance on chapter 2 for its curtailment authority, IDWR now turns to chapter 6, title 42 to justify the Director's actions. *See id.* (citing I.C. §§ 42-602, 604). The Department implies

that a surface to surface water right regime applies to conjunctive management decisions and that the "irrigation is too short" to provide constitutional due process. *Id.* at 55. Yet in upholding the CM Rules, this Court explained that surface to surface water administration issues "are simply not the same" as conjunctive administration. *See AFRD#2*, 143 Idaho at 877, 154 P.3d at 448.

While it is true that a watermaster and the Director have a "clear and executive duty" to distribute water in a water district, the Department promulgated specific rules to assist in implementing conjunctive administration. *See* I.C. § 42-603; IDAPA 37.03.11, *et seq*. The Department brushes over this law and claims that his "powers and duties will be impaired" if he follows constitutional due process and provides for a meaningful pre-curtailment hearing. The Department's failure to provide adequate due process is not excused by a surface to surface administration example. The Court should reject IDWR's argument accordingly.

4. The Director's denial of the Districts' mitigation plan without a hearing was unconstitutional.

Rather than address the merits of the Director's unconstitutional action in denying the Districts' mitigation plan without a hearing, the Department argues the mitigation plan is not part of this appeal. The Court should reject this argument because the Director's order illuminates the fact that he acted without a hearing, and confirms the erroneous injury standard the Director used to order curtailment in the first place. *See* Part II.F, *infra* (discussing the propriety of judicial review over the Director's mitigation denial).

There is no dispute that the Director denied the Districts' plan without the opportunity for a hearing. If material injury to a water right can be properly mitigated, there is no basis for the Director to curtail the junior right. *See Bower*, 27 Idaho at 182, 147 P. at 503 ("if there was a loss of water in the Bower wells that could be returned without material damage to respondents' well, and at the same time the Moorman well be supplied with water, the court would not be justified

in preventing the completion of the Moorman well"). Due process required a hearing on the Districts' proposed mitigation plan. *See Districts Op. Br.* at 52. Since Section 42-237a.g contains no provisions regarding mitigation, the Districts turned to the Department's own rules for "mitigation plans" under the CM Rules. *See* IDAPA 37.03.11.43. The CM Rules provide due process on mitigation plans and have been upheld as facially constitutional by this Court. *See AFRD#2*, *supra*. Without any other guidelines, Director cast aside tested procedures for conjunctive administration and consideration of proposed mitigation.

The Department fails to address the Districts' substantive arguments that the Director violated their due process by denying the mitigation plan without a hearing, and fails to explain why the Director did not grant a hearing. "Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222." *Order on Petition for Judicial Review* at 29, *A&B v. IDWR*, No. 2008-551 (Gooding Cnty. Dist. Ct. July 28, 2009) (emphasis added).[22] The failure to provide any process on the Districts' plan led to Director's immediate curtailment of all ground water rights effective July 1, 2021. This procedure, or lack thereof, violated the Districts' right to due process.

5. Balancing the *Mathews* factors.

IDWR asserts that the due process claims should be addressed under balancing factors set out by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Department argues that the balance of interests between the Department's function and the Districts' interests supports the Director's *ad hoc* proceedings. *See IDWR Resp. Br.* at 48. To the contrary, under the unique facts in this case, the weight of interests confirms the Director did not

[22] Attached to *Districts' Op. Br.* as Addendum F. *See also*, Aug. pp. 142-75.

provide adequate due process to the Districts. Three factors guide the balance of private and governmental interests:

> (1) the importance of the private interest at stake; (2) the risk of an erroneous deprivation of rights given the processes at hand and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

LU Ranching Co. v. U.S., 138 Idaho 606, 608, 67 P.3d 85, 87 (2003) (cleaned up) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The Department contends the first *Mathews* factor is "a wash because private interests were at stake for every water user effected by the proceeding." *IDWR Resp. Br.* at 49. But *LU Ranching* held that the private interest in the right to use water is "great." 138 Idaho at 608, 67 P.3d at 87. This private interest is to be weighed against the government's interest. *See Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 263-64 (1987) (comparing conflicting private interests and the interests of the government). In *LU Ranching,* this Court did not weigh the interests that other water users had in the SRBA procedures at issue—it weighed LU Ranching's interests against the government's interest. Yet, IDWR tries to pit the interests of the water users in the procedures provided by the CM Rules against seniors' interests in a secure water supply, "a junior's interest in fairer curtailment procedures could, by delay alone, devour a senior's right to use water first." *IDWR Resp. Br.* at 49. The Department however, does not support this conclusion, or provide case law that a potential injury to one private individual outweighs another's right to adequate due process where their injury is guaranteed.

Moreover, the Director's persistent avoidance of the CM Rules left many questions related to the private interests involved here unanswered. An area of common ground water supply would have provided clarity as to which juniors and seniors were actually impacted by

potential curtailment. Similarly, had the Director analyzed material injury, the actual injury to seniors would be known. The Director's failure to utilize these due process and prior appropriation concepts illustrates his failure to provide the Districts adequate due process, as well as shows why the first *Mathews* factor is not a wash. The private interests of the juniors are manifest. The Director ordered complete curtailment of approximately 23,000 irrigated acres in the Bellevue Triangle. Conversely, the material injury to seniors was not defined as the Director performed no specific analysis on their actual water needs. The first *Mathews* factor therefore, weighs in favor of the Districts' private interest.

The second *Mathews* factor is the risk of erroneous deprivation of rights and the ability of the government to provide additional safeguards. *LU Ranching*, 138 Idaho at 608, 67 P.3d at 87. This case presented an enormous risk erroneous deprivation. The curtailment order was unlawful and there was no alternative safeguard provided when the Director refused to grant a hearing on a mitigation plan and demanded that the Districts mitigate all depletions to the source. AR. 1948-50. IDWR contends that the "deep drought" of 2021 necessitated an abbreviated hearing process, that "the situation arguably warranted a curtail-now-hearing-later approach," and that additional procedural safeguards were therefore unnecessary. *IDWR Resp. Br.* at 51. IDWR fails to tell this Court why nowhere else in the State, during this all pervasive "deep drought" of 2021, did the Director feel the need to engage in this type of abbreviated and truncated process.[23] The Director acted only in Basin 37. The abbreviated hearing process, initiated after plantings had begun, created a risk of erroneous deprivation that additional procedural safeguards, like those embodied in the CM Rules, would have protected against.

[23] Drought declarations were issued in twenty Idaho counties in 2021. Copies of these drought declarations issued by the Director and Governor are available at https://idwr.idaho.gov/water-data/drought-declarations/.

IDWR argues that the third *Mathews* factor—the Department's interests—"tips the balance against the Districts decisively" because "distributing water among appropriators in a water district is an "essential governmental function." *IDWR Resp. Br.* at 54-55. While it is true that a watermaster and the Director have a "clear and executive duty" to distribute water in a water district, the Department promulgated specific rules to assist in implementing conjunctive administration. *See* I.C. § 42-603; IDAPA 37.03.11, *et seq*.; *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) ("The Director also 'shall distribute water in water districts in accordance with the prior appropriation doctrine.' This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law"). In short, the Director has no legitimate interest in not following the law, the prior appropriation doctrine, or IDWR's own regulations.

Conjunctive administration is complex and the associated due process mechanisms promulgated for those situations is similarly complex. IDWR's position appears to be that its interest in distributing water will <u>always</u> trump the juniors' due process interests. IDWR asks the Court to allow "in-season administration of interconnected surface and ground water rights" without making material injury findings, establishing areas of common ground water supply, or even complying with the Department's own procedural rules of conjunctive administration. *IDWR Resp. Br.* at 55. That providing such established due process protections may limit the Director's power to act immediately and unilaterally is not enough to ignore the procedures the Department and this Court have already established as necessary to provide due process. *See AFRD#2*, *supra*.

The balance of the interests require the Director to provide due process that would ensure the water users had the ability to adequately respond to the Department's months-long internal

analysis rather than giving them less than a few weeks, to ensure that material injury and an area of common ground water supply was properly considered, as well as afford them the opportunity for a hearing on a mitigation plan prior to curtailment. None of that was given in the Director's abbreviated curtailment hearing and no mitigation plan hearing was held. The Department has promulgated rules precisely designed to provide the requisite due process for curtailment of interconnected waters. The Director side-stepped the very rules that would have provided due process.

D. The district court erred by ignoring the applicability of Idaho Code § 42-237b.

The local ground water board statutes provided a procedure to address "adverse claims" by a senior surface or ground water user. *See* I.C. § 42-237b.[24] Any water right holder who believed a right was harmed by another's water use could initiate a process to have such an adverse claim heard by a local ground water board. *See* I.C. §§ 42-237b-d. These local ground water board statutes were repealed, at the request of IDWR, during the 2021 Legislative Session pursuant to House Bill 43, but the repeal was not effective until July 1, 2021, long after the administrative hearing. The district court skipped over Idaho Code § 42-237b because "the legislature altered that scheme in 2021." R. 684. Idaho Code § 42-237b's repeal however, was not in effect when the Director's administrative proceedings began in May 2021.

It is axiomatic that a legislative repeal of statute is not effective until its effective date. *See Landgraf v. USI Film Products*, 511 U.S. 244, 257 (1994) ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date"); *Hunt v. Sun Valley Co.*, 561 F.2d 744 (9th Cir. 1977)

[24] If the CM Rules do not govern the proceedings, as the Department told the Legislature they would when proposing the repeal of Idaho Code § 42-237b, then section 42-237b, effective at the time of the proceedings, would govern.

(finding that Idaho's comparative negligence statute did not apply to an accident that occurred prior to enactment of that statute because the statute had yet to go into effect); *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (1977) (state tax commission did not have authority to act on new statute until after its effective date); *see also* I.C. § 48-518 (provisions of the previous trademark act are applicable to proceedings initiated before the effective date of the repeal); I.C. § 73-118 (providing that crimes may be prosecuted when committed prior to the effective date repealing that crime).

Idaho Code § 42-237b therefore, remained the law until July 1, 2021. *See* I.C. § 67-510. IDWR does not even pretend that the repeal was effective in May when the Director called for his abbreviated hearing, or in June when he held it. Thus, the Director had no valid reason to disregard the statute prior to its effective date. Because the administrative process began in May 2021, and the adverse claims made by Water District 37 senior users were made beginning in late 2020 and early 2021, the district court should have considered and applied those adverse claim procedures set out in Idaho Code § 42-237b. The district court therefore erred by not requiring the Department to have followed the procedures of the Ground Water Act contained in Idaho Code § 42-237b.

E. Order denying mitigation plan is properly before the court on appeal.

The Department argues that the Director's June 29, 2021 Order denying the Districts' mitigation plan, AR. 1948-50 ("Mitigation Denial Order"), is outside this Court's jurisdiction because the Districts did not challenge the June 29 Order in their June 30, 2021 P*etition for Judicial Review*. *IDWR Resp Br.* at 57.

The Mitigation Denial Order reiterates the Director's unfounded position that the administrative proceedings "do[] not address or involve delivery calls," and that mitigation, as an

alternative to curtailment, is discretionary. AR. 1949. The Director claimed to have considered the Districts' mitigation plan. *Id.* However, the Director's Mitigation Denial Order outright rejects the Districts' plans and concludes that they do not contain sufficient detail or assurances to provide mitigation. Importantly, the reason the Director rejected the plan was that the plan did not mitigate all depletions to the source or protect unknown seniors who did not participate in the proceeding. AR. 1949-50. These are critical due process violations.

The Department now argues, for the first time on appeal to this Court, that the Districts' challenge to the Director's failure to provide a hearing on his Mitigation Denial Order is jurisdictionally barred because it was not the subject of the Districts' first amended petition for judicial review. *IDWR Resp. Br.* at 57-58. The Districts did properly raise the Mitigation Denial Order before the district court and this Court. The Mitigation Denial Order was included in the supporting materials filed with the district court on June 30, 2021. The Districts first amended petition specifically objects to the Director's disregard for the CM Rules, of which the mitigation plan and its hearing process are a part. R. 146 at ¶ 64. The first amended petition also seeks judicial review of the Director's failure to provide adequate due process procedures. R. 146-50 at ¶ 70-82. The petition claims Idaho law clearly prescribes the proper process for administration and curtailment of water that the Director failed to follow, R. 149 at ¶¶ 72-74, and specifically notes the Director's inaction on the Districts' mitigation plan, *id.* at ¶¶ 80-82.

The Districts' challenge to the Director's failure to hold a hearing on the mitigation plan, and its relation to the Director's due process shortfalls, was clearly presented to the district court as part of its judicial review petition, R. 146-50, and its accompanying filings:

> The Director did not follow the required procedures for a mitigation plan set forth in Rule 43 of the Department's Conjunctive Management Rules, *see* IDAPA 37.03.11.43, in his consideration and denial of the Petitioners' Proposed Mitigation Plan. . . The Director denied the Petitioners' Proposed Mitigation Plan without first holding a hearing on the plan.

See Second Declaration of Michael A. Short at ¶¶ 7-8 (emphasis added).[25] Simply put, the Districts raised the issue of the Director's Mitigation Denial and failure to hold a hearing in their first amended petition, filed on June 30, 2021 and within the statutory 28-day period for judicial review.

Further, there is no dispute that the Mitigation Denial Order is included in the administrative record. AR. 1948-50. IDWR did not object to its inclusion or ask the district court to exclude it. By incorporating the Mitigation Denial Order into the administrative record, IDWR has admitted that the order is subject to judicial review. Idaho Code § 67-5249 provides that the agency must compile the administrative record, which includes "any …final order." I.C. § 67-5249(2)(g) (emphasis added). Judicial review of the agency action is based on this administrative record complied by the agency. I.C. § 67-5249(3). As this Court has observed: "Judicial review of a final decision of IDWR is governed by IDAPA, Title 67, chapter 52 of the Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 205, 220 P.3d 318, 323 (2009). Because the Mitigation Denial Order is a "final order" included in the administrative record, it is therefore subject to judicial review.

[25] A copy is publicly available at https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CV07-21-00243/Second-Declaration-of-Michael-A-Short..pdf. While this document was listed in the district court record's table of contents, and is cited by IDWR, R. 193 at fn. 7, the document itself does not appear to have been included in the record. To the extent necessary for judicial notice of this declaration, the Districts move the court to augment the record. *See also* Aug. pp. 281-85.

Additionally, IDWR makes their present argument for the first time in its reply brief. The Department did not raise this complaint in the district court proceedings even though the issue was clearly presented to the court in the Districts' petition, supporting declaration, and subsequent briefing. *Compare* R. 387-90 (Districts' arguments on failure to hold hearing on mitigation plan) *with*, R. 591-93 (IDWR's response arguing mitigation plans are not a junior's right). The Department's failure to raise its current argument—that the failure to hold a hearing on the proposed mitigation plan was not properly challenged—at the district court, or in its previous briefings here, fails to preserve that issue for appeal. *See e.g.*, *State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 595, 601 (1993) (raising an issue for the first time in a reply brief "does not allow for full consideration of the issue, and we will not address it"); *Henman v. State*, 132 Idaho 49, 51, 966 P.2d 49, 51 (Ct. App. 1998) ("Issues raised for the first time in a reply brief will not be addressed on appeal").

The Districts timely challenged the Director's failure to hold a hearing on its proposed mitigation plan. The Department's new argument to the contrary, submitted in its reply brief, should be ignored. IDWR presents no explanation for the Director's wrongful denial of the mitigation plan without a hearing. Based on the undisputed administrative record, the Director's summary denial of the mitigation plan led to actual curtailment of the Districts' members' water rights for a critical week of the irrigation season thereby violating the Districts' constitutional right to due process. This Court can affirm the district court's decision to set aside the Directors' orders on this basis as well.[26]

[26] The district court concluded that it did not need to reach the issue since the Director's curtailment order was set aside and remanded. If the curtailment order is set aside the substance of the Director's order denying the Districts' mitigation plan in moot. However, the Director's action in issuing an order without a hearing is what is relevant and a violation of due process. The Court should advise IDWR on remand what procedure it must follow if the Districts file a mitigation plan, assuming the Director issues a proper order that finds curtailment.

F. This Court should consider the Districts' addenda to their opening brief.

IDWR asks the Court to disregard six addenda attached to the Districts' opening brief, characterizing those documents as an impermissible attempt to augment the record. *IDWR Resp. Br.* at 56. To the contrary, the Districts are not seeking to have these documents added to the administrative record, rather they are publicly available records that the Court can and should take judicial notice of which support the Districts' legal positions on appeal. The documents consist of prior orders from IDWR and the district court, IDWR's prior legal representations to the district court and this Court, and a statement of purpose for the 1994 amendment that are all relevant regarding IDWR's position on conjunctive administration. IDWR has consistently argued that conjunctive administration is more than "strict priority" administration, but for the first time in this appeal IDWR argues a complete opposite approach. Nonetheless, concomitant with this brief, the Districts are filing a *Motion to Augment the Record* which provides full copies of the addenda, description and purpose of those documents, and the reason the Court should augment the record to include them in its consideration of IDWR's new-found legal position.

G. Attorneys' fees and costs should be awarded to the Districts.

While the Department does not dispute that Idaho Code § 12-117 provides this Court with authority to award fees and costs, it alleges that such an award cannot be granted to the Districts because it has presented "novel" questions thereby establishing a reasonable basis in fact or law for bringing its appeal. Such assertion, however, is simply not true as there is well-settled law addressing the issues it has raised. Indeed, as set forth above, the mandate of an area of common ground water supply and the application of the material injury definition in the CM Rules were previously and clearly established in *Sun Valley*, *ARFD #2*, and *Clear Springs*. Likewise, the Department's attempt to create confusion regarding the application of the CM

Rules fell short because the facts establish that a delivery call was actually made, thereby requiring the Director to proceed under those Rules rather than Section 42-237a.g.

This Court must see the Department's appeal for what it is: a thinly veiled attempt to enable it to avoid the CM Rules and administer water rights in whatever manner it desires regardless of what the law requires. But, since there is well-settled precedent resolving these so-called "novel" questions, the Department's appeal had no reasonable basis in fact or law and should not have been pursued. Despite this, the Department proceeded with its appeal which required the Districts to incur substantial fees and costs to respond to its meritless arguments. Given the Department's frivolous acts, it is appropriate for this Court, pursuant to Idaho Code § 12-117, to award the Districts their fees and costs.

III. CONCLUSION

This appeal involves critically important legal questions for water users, not only in the Big Wood and Little Wood basins, but throughout the state. Over the past twenty years, IDWR and its many Directors have insisted that they needed conjunctive management rules to properly balance the competing interests and needs of surface and ground water users where there is some hydrologic connection between the two sources of water supply. IDWR drafted, and the Legislature approved, those rules. The CM Rules have been in place and have been implemented in many circumstances around the State. This Court has seen many of those cases on appeal.

Now, without warning and without making any changes to the rules, the Director decides that the rules do not apply here. But it is not just in Basin 37 where the Director says the rules do not apply. The Director argues he can dispense with the CM Rules whenever he chooses, just by pointing to Section 42-237a.g. So, the questions for this Court are, with this background, must the Director follow the rules and procedures established for conjunctive administration of surface

and ground water over the past decades? Or, is he free to discard the conjunctive management rules, and the concepts of material injury and area of common ground water supply under the prior appropriation doctrine, when he deems it expedient? Is the Director free to require ground water users to ensure there is no depletion to a surface water source? Or, must water users still prove material injury? Is there a limit to the Director's power? Or not? Is he free to initiate an abbreviated hearing process to curtail ground water users in the middle of a long hot irrigation season? And then, deny them the opportunity to present a mitigation plan?

This Court's considered evaluation of these issues will lead inexorably to the conclusion that the district court should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of November, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November 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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