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**In the Supreme Court of the State of Idaho**

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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.

Supreme Court Docket No. 49632-2022

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**MUNICIPAL PROVIDERS' AMICUS BRIEF  
IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS  
AND INTERVENORS/RESPONDENTS  
AND PARTIAL AFFIRMANCE OF THE DISTRICT COURT**

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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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## IDAHO APPELLATE RULE 8(C) STATEMENT

Veolia Water Idaho, Inc. (“Veolia”) and the City of Coeur d’Alene (“Coeur d’Alene”) submit this proposed amicus brief and accompanying motion pursuant to Rule 8 of the Idaho Appellate Rules. Veolia and Coeur d’Alene are together referred to in this brief as the “Municipal Providers.”

Veolia (formerly SUEZ Water Idaho Inc.) is the provider of municipal water supply to the City of Boise and some of its surrounding areas. Roughly two-thirds of Veolia’s water supply is diverted from groundwater, and the other one-third from surface water (*i.e.*, the Boise River). The Boise River is considered fully appropriated during much of the year in the vicinity of Veolia’s wells, with many water rights senior to Veolia’s groundwater rights. Groundwater rights in the Boise River valley have not yet been administered conjunctively with surface water rights, although some have predicted such administration will occur in the near future.

Coeur d’Alene is the provider of municipal water supply to the City of Coeur d’Alene and some surrounding areas. It relies on groundwater from the Rathdrum Prairie Aquifer and pumps water from ten wells to over 19,000 water accounts and nearly 53,000 customers. The City of Coeur d’Alene is the largest city in North Idaho and the biggest single user of the Rathdrum Prairie Aquifer. In order to plan properly for its citizens and their future needs, coherent and predictable processes must be followed by the agencies that manage and regulate the City’s water withdrawal and use.

The Municipal Providers are interested in this appeal because it will determine whether the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) must

determine an “area of common ground water supply” and “material injury”<sup>1</sup> before curtailing groundwater rights for the benefit of surface water users. The Municipal Providers support the district court’s determination that, in the administrative proceeding below, the Department violated Idaho’s prior appropriation doctrine by failing to define an area of common ground water supply or make a finding of material injury to senior surface water rights.

The outcome of this appeal on these points will have statewide implications. The Municipal Providers (and many others) divert groundwater from aquifers in areas of the state that have not yet been subject to conjunctive administration.<sup>2</sup> All Idaho groundwater users, regardless of location, are entitled to the protections afforded by the foundational principles of Idaho’s prior appropriation doctrine underpinning the requirement that IDWR determine an area of common ground water supply and material injury before curtailing junior groundwater rights in conjunctive administration with surface water rights.

Counsel for the Municipal Providers authored this brief in whole, and the Municipal Providers paid all fees incurred in preparing this brief. No person or entity besides the Municipal Providers contributed money that was intended to fund the preparation or submission of this brief.

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<sup>1</sup> For ease of reading, in this brief the term “material injury” includes the concept of whether a senior water right holder is using water efficiently and without waste.

<sup>2</sup> A comment on terminology: “Administration” refers to the Department’s statutory responsibility to enforce priority, including the curtailment of junior water rights when required to meet senior needs. The term “conjunctive administration” refers to the administration of ground and surface water rights together. The term “conjunctive management” is broader. It refers to the full panoply of mostly voluntary governmental and private efforts to reduce conflict between ground and surface water users and promote more effective utilization of all water resources. Thus, while conjunctive administration deals with the “policing” of priorities, conjunctive management includes such things as research, education, voluntary conservation measures and other demand reduction, recharge projects, provision of substitute water supplies, and other efforts to stabilize or improve water availability. This distinction in terminology, however, is fairly recent. At the time that the Conjunctive Management Rules were adopted in 1994, the term conjunctive administration was not yet in vogue. Using current terminology, those rules would more appropriately be named the Conjunctive Administration Rules.

## ARGUMENT

The arguments in this amicus brief focus solely on the foundational prior appropriation principles that IDWR must apply before curtailing groundwater rights when administering them conjunctively with surface water rights. To be clear, the Municipal Providers take no position in this appeal on the separate question before the Court as to whether IDWR is limited exclusively to the Conjunctive Management Rules, IDAPA 37.03.11, when conjunctively administering ground and surface water rights or whether IDWR may initiate a proceeding under Idaho Code § 42-237a.g as it did in this case. The Municipal Providers contend that the same prior appropriation principles apply either way—that is, they apply in any conjunctive administration irrespective of which procedure is employed to initiate the administration.

IDWR contends that by proceeding under section 42-237a.g it may curtail junior ground water rights without first (1) defining an area of common ground water supply and (2) making a fact-based finding of material injury to senior surface water rights. The district court determined that this was contrary to Idaho’s prior appropriation doctrine. The Municipal Providers agree, and respectfully request that this Court affirm the district court on these points.

In short, defining an area of common ground water supply is necessary in order to inform water users and the Department—at the outset of the proceeding—which water rights are at risk of curtailment. Otherwise, as was the case here, water users and the Department are left to guess who should participate in the proceeding and who might be curtailed.

Likewise, a finding of material injury is a foundational prerequisite for curtailment under the prior appropriation doctrine. Otherwise, as was the case here, IDWR may cut off water users based on its general impression that tightening the screws on juniors might benefit seniors—without specific evidence or findings with respect to futile call, actual losses suffered by seniors (as opposed to not receiving the entire quantity authorized under their decrees), reasonableness

of the senior water right diversion and use, using water efficiently and without waste, full economic development of the groundwater resource, and the absence of forfeiture or partial forfeiture by the seniors. This “strict” or “per se” injury approach fails to incorporate all necessary prior appropriation principles.

The district court’s decision, as well as the briefs of Respondents/Cross-Appellants and Intervenor/Respondents,<sup>3</sup> offer detailed explanations of why Idaho’s prior appropriation doctrine requires defining an area of common ground water supply and determining material injury before junior groundwater rights can be curtailed in their conjunctive administration with surface water rights. To summarize the main points:

1. “the prior appropriation doctrine provides the parameters through which conjunctive administration must occur.” R. 687<sup>4</sup> (the district court’s *Memorandum Decision and Order*, citing Idaho Const., Art XV, § 3; I.C. § 42-106).
2. Determining an area of common ground water supply is critical in a surface to ground water administration because its boundary defines the world of water users whose rights may be affected. R. at 689 (the district court’s *Memorandum Decision and Order*).
3. The area of common ground water supply establishes the borders for due process and its boundary establishes the proper order of curtailment of junior rights in inverse priority to satisfy materially injured senior rights. R. at 689 (the district court’s *Memorandum Decision and Order*).
4. Injury must be to another water right. *In re Johnson*, 50 Idaho 573, 300 P. 492, 494 (1931) (“The term ‘injured’ . . . applies to injury to the water right of another”). *See GWD Brief* at 16.

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<sup>3</sup> *See South Valley Groundwater District and Galena Groundwater District Respondents’ and Cross Appellants’ Combined Brief* (filed Sep. 23, 2022) (“GWD Brief”), *Sun Valley Company’s Intervenor-Respondent Brief* (filed Sep. 23, 2022) (“SVC Brief”), and *City of Hailey’s Intervenor-Respondent Brief* (filed Sep. 23, 2022) (“Hailey Brief”).

<sup>4</sup> “R.” refers to the District Court Clerk’s Record on Appeal with citation to the specific page within the record.

5. Injury to other water rights must be substantial, “not merely a fanciful injury but a real and actual injury.” *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7, 154 P.2d 507, 513 (1944). *See GWD Brief* at 16.
6. Idaho Code Section 42-237a.g “merely provides that well water cannot be used to fill a groundwater right if doing so would . . . cause material injury to any prior surface or groundwater right.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011). *See GWD Brief* at 18.
7. IDWR has previously declared that “depletion does not equate to material injury” and that “[m]aterial injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 868, 154 P.3d 433, 439 (2007). *See SVC Brief* at 27.
8. “Material injury” has been defined as “[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law . . . .” IDAPA 37.03.11.010.14. *See Hailey Brief* at 7.
9. The parameters of “material injury” to be “determined in accordance with Idaho law” are “set forth in Rule 42” of the Conjunctive Management Rules, which lists a number of factors to be considered “in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste.” IDAPA 37.03.11.042. *See Hailey Brief* at 7.
10. “While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. . . . [T]he Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). *See SVC Brief* at 28.
11. Curtailing groundwater rights without finding that their diversion and use causes material injury to senior surface water rights deprives the groundwater users of their real property rights which are entitled to protection under the law. I.C. § 55-101; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011) (“Under Idaho law, a water right is real property, and the owner of a water right must be afforded due process of law before the right can be taken by the State.” (internal citations omitted)). *See SVC Brief* at 15.
12. “[W]hile the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources . . . .” I.C. § 42-226; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 801, 252 P.3d 71, 82 (2011). *See GWD Brief* at 20.

Regardless of whether IDWR conjunctively administers ground and surface water rights in a delivery call under the Conjunctive Management Rules or (if this Court allows it) by

initiating a proceeding under Idaho Code Section 42-237a.g, the same prior appropriation principles apply. IDWR cannot avoid these principles or pick-and-choose which ones apply depending on how and where a conjunctive administration proceeding is initiated (*i.e.*, by a delivery call or otherwise). For example, junior groundwater users in this proceeding were curtailed without a finding of material injury to senior surface water users, whereas even the Department appears to acknowledge such a finding would have been required if a delivery call had been initiated by seniors. *IDWR Appellants' Brief* at 40 (noting that the Conjunctive Management Rules “expressly require” a finding of material injury). Also, junior groundwater users in this proceeding were curtailed without a finding of material injury while junior groundwater users in other parts of the state (*i.e.*, in the Eastern Snake Plain Aquifer) have faced curtailment only on the basis of findings of material injury. All of Idaho’s water users are entitled to the same treatment under the law.

The area of common ground water supply and material injury principles at issue in this appeal are not merely constructs of the Conjunctive Management Rules, but rather are necessary components for *any* conjunctive administration of ground and surface water rights to be consistent with Idaho’s prior appropriation doctrine. “[T]he Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine . . . .” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). The Conjunctive Management Rules are shaped by these principles. The requirements for (1) a defined area of common ground water supply and (2) findings of material injury are not derived from or limited to a particular set of administrative rules. These are foundational principles that must apply in all contexts of conjunctive administration.

In the Ground Water Act, Idaho Code §§ 42-226 to 42-239, the Idaho Legislature brought ground water rights into the priority system on the express condition that “full economic development of underground water resources” would be a factor for consideration, along with other established prior appropriation doctrine principles. The Ground Water Act further expresses the Legislature’s recognition that the constitutional directives concerning “those using the water” for “beneficial uses,” Idaho Const. Art. XV § 3, mean that the State has the power and the clear duty, before simply shutting off a citizen’s water supply, to ensure the senior is making actual beneficial use. This requires IDWR to determine what actually is going on in these complex systems where aquifers are alleged to affect streams and groundwater pumping is alleged to actually interfere with the exercise of senior surface water rights.

The Ground Water Act does not provide that junior ground water rights simply would be shut off whenever senior surface water users are not receiving their full decreed quantities and point at aquifer pumping as the culprit. The area of common ground water supply and material injury requirements were embodied in the Conjunctive Management Rules to direct IDWR’s evaluation of the factors necessary to conjunctively administer ground and surface water rights in a delivery call in compliance with Idaho’s prior appropriation doctrine. But those same factors are necessary to comply with prior appropriation doctrine regardless of whether conjunctive administration occurs due to a delivery call.

*IDWR’s Appellants’ Brief* suggests that IDWR believes it has unfettered discretion to concoct different standards depending on different “settings” and “exigencies.” *IDWR’s Appellants’ Brief* at 41-42. The Municipal Providers respectfully request that the Court reject this notion. Granted, this Court has held that “[s]omewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this

valuable commodity, lies an area for the exercise of discretion by the Director.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). However, “[t]his is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight.” *Id.* Groundwater users around the state are entitled to a consistent and even-handed application of the law of prior appropriation. Idaho’s prior appropriation doctrine should not change depending on the location of a water user or how a conjunctive administration proceeding is initiated.

At this time, it is unknown whether or where conjunctive administration might next occur in the state. However, if and when it does occur, it is imperative that IDWR be required to follow the time-tested prior appropriation principles set forth in Idaho’s constitution, statutes, and case law. In particular, and at issue in this case, IDWR must determine an area of common groundwater supply so all of the groundwater users whose diversions affect the flow of water in a surface source—and *only* those groundwater users—are implicated, provided notice, and given an opportunity to defend their use and/or mitigate for it. Moreover, before curtailing groundwater rights, IDWR must find that the groundwater use materially injures senior water rights that are being used efficiently and without waste and not merely that additional water resulting from curtailed groundwater pumping might accrue to surface sources for no particular benefit to any specific senior user. This is necessary to ensure that the interests of groundwater users around the state are “equally guard[ed],” I.C. § 42-101, and that strict priority administration does not “block full economic development of underground resources” anywhere in the state. I.C. § 42-226.

## CONCLUSION

The Municipal Providers respectfully request that the Court affirm the district court’s determination that, before curtailing groundwater rights in conjunctive administration with

surface water rights, the Department must determine an area of common ground water supply and find that groundwater use causes material injury to senior surface water rights. Doing so will ensure that groundwater users around the state receive all the protections afforded under Idaho's prior appropriation doctrine.

DATED this 30th day of September, 2022.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned does hereby certify that on the 30th day of September, 2022, this electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, was served on each party at the following email addresses via ECF/iCourt electronic filing:

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I HEREBY CERTIFY that on this 30th day of September, 2022, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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