

Before the Idaho Department of Water Resources
In the Matter of Basin 37 Administrative Proceeding

Docket #AA-WRA-2021-001

Post-Hearing Brief

Submitted by Lawrence Schoen, Claimant as Participant in the Proceeding

Holder of water rights 37-351b & 37-352b

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I. Basis of Participant Claimant Lawrence Schoen's claim in the Procedure:

That he is being, in the water year 2021, as he has been in all previous years he has owned these irrigation water rights, denied just and full use of these rights and therefore is and has been injured as to his legal and economic interests. In 2021, as in all previous years, Participant's water rights have been curtailed, while junior water rights holders have been allowed to continue pumping groundwater entirely unregulated.

This denial of rights and injury are due substantially to maladministration of water rights in Basin 37 and Water District 37. The Idaho Department of Water Resources (IDWR) has allowed these junior rights holders to violate Idaho's priority doctrine, in 2021 and all previous years; has allowed unregulated groundwater pumping to deplete severely the aquifer which is the source of groundwater supplying the Silver Creek spring creek system, which is the source of Participant's water rights; has allowed this depletion to occur in 2021 and cumulatively over a very long period of time, such that today the aquifer and flows in Silver Creek and tributaries may be said to be in crisis; has failed to establish an area of common groundwater supply recognizing the common nature of groundwater and surface flows in Basin 37 and in the Silver Creek and Little Wood River drainage in particular, despite the evidence justifying such a determination found in countless scientific studies performed over the past 50 years.

II. The following are the basic constitutional principles and laws (with highlights) which Participant finds to be relevant and determinative in this dispute over the use of water resources and which frame the authority of the Director of IDWR to act to resolve it:

United States Constitution, XIV Amendment:

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Idaho Constitution, Article XV, Water Rights:

Section 1. Use of waters a public use. The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally

appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

Section 5. Priorities and limitations on use. Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of [this article](#) provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Idaho Code Section 42-106. Priority.

As between appropriators, the first in time is first in right.

Idaho Code Section 42-602. Director of the department of water resources to supervise water distribution within water districts.

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section [42-604](#), Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of [chapter 6, title 42](#), Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code Section 42-603. Supervision of water distribution — Rules and regulations.

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of [chapter 52, title 67](#), Idaho Code.

Idaho Code Section 42-607. Distribution of water.

It shall be the duty of said watermaster to distribute the waters of the public stream, streams, or water supply comprising a water district among the water users taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates or controlling works for the diversion of water from such stream, streams, or water supply, during times of water scarcity, in order to supply the prior rights of others from such stream or water supply; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or

having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during times of water scarcity, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right from such stream or water supply, and the watermaster shall close all headgates or controlling works of diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. As long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.

Idaho Code Section 42-237a. Powers of the director of the department of water resources.

Paragraph g.: To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.
2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section [42-604](#) of [title 42](#), Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of [title 42](#), Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources 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, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

III. While this Administrative Proceeding pertains to actions the director may take to curtail groundwater diversion in the proscribed area only during the current water year, Participant maintains that injury to his water rights is the result of long-term cumulative, excessive, unregulated groundwater diversion that has so depleted the aquifer as to have both immediate and long-term negative impacts on surface flows in Silver Creek and tributaries, whose direct source is this groundwater. Simultaneously, Participant has been curtailed prematurely relative to junior rights holders in this and prior years and thus injured in all these years. In this context, the full extent of his beneficial use in all prior years can never be known. In other words, it is impossible for him and other senior surface water users so affected to project realistically the extent of injury in the current water year, because such an estimation is hopelessly skewed by unaccounted-for injuries in prior years.

IV. Model analysis presented in the Sukow Response to Request for Staff Memo (May 17) details additional surface flows likely to result from proposed groundwater diversion curtailment on each of several calendar dates. The analysis suggests that the benefits to senior users of volume increases to surface flows would be limited. The junior rights holders maintain that since benefit is limited, those like Participant with the more junior of the senior surface rights no longer have standing in the Proceeding, and/or that curtailment should be limited, or perhaps no curtailment should occur this water year. Each of these arguments must be rejected on the grounds, as stated in testimony, that the effects of years of unregulated groundwater pumping are cumulative; the accumulation of effects must end because they threaten senior surface rights in this and future years; allowing juniors to pump from the source of surface flows while seniors are curtailed is, has been and would be a clear and obvious violation of priority doctrine. That such a clear violation has been allowed to persist for so many years is not a reason to allow it to continue. That 2021 is a year of almost unprecedented water scarcity is even more reason to put an end to any business-as-usual approach and to begin to follow the laws in place.

V. Both testimony of groundwater appropriators and questioning by attorneys on their behalf tried to keep the focus of the Proceeding on practices, potential inefficient use, waste, or other available water sources by or for the seniors. Groundwater users also maintained they would be harmed economically if their water supplies were to be curtailed. The first set of issues is relevant with respect to a determination of what may be reasonable in any outcome of this dispute for both claimants and respondents. They do not address, however, the central issue of the Proceeding, which is the unregulated diversion of groundwater by junior rights holders, which directly causes injury to senior water rights holders.

These responses together represent quintessential adding insult to injury. They ignore entirely the primacy of priority doctrine. They ignore the economic harm already being suffered by those with rights senior to theirs, who already have been curtailed in 2021

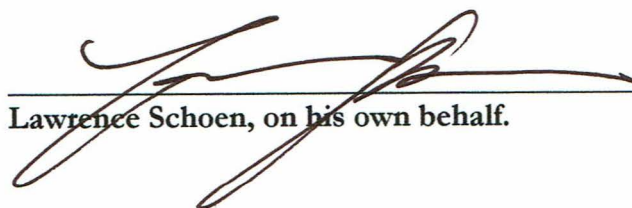
due to the extreme drought conditions in Basin 37. They ignore their own longstanding practices of wasting water and depleting the aquifer by, for example, irrigating fall stubble prior to tillage, as opposed to irrigating for productive purposes. They ignore their own longstanding abusive practices, for example using supplemental water rights as primary water supply. They ignore the fact that surface users in the past met with groundwater users to try to create an equitable solution and agreement, only to find these attempts rejected repeatedly, thus indicating that groundwater users were willing to yield little or nothing towards resolution. So here we are.

VI. Participant stipulates his support for the Hayspur Fish Hatchery situated in the basin to be allowed to continue its uses of water to maintain its brood stock for public benefit, pending whatever additional investigation and determination, if any, the Director may require of the hatchery's function and need with respect to consumptive vs non-consumptive uses of its water supply.

VII. In conclusion, the Director has little choice in this matter but to curtail consumptive water use in the proscribed area of impact for the remainder of water year 2021, such that no user is allowed to divert water for consumptive use whose water right is junior to any other right which has been curtailed. Priority doctrine should be upheld. Furthermore, should curtailment result in enhancement of surface flows in Silver Creek, its tributaries and/or the Little Wood River, already curtailed surface rights should be restored to the extent feasible, in terms of volumes and durations.

The Director should find and make a determination, as he is authorized by statute to do, that the Silver Creek basin and downstream is an Area of Common Groundwater Supply. The Director is here called upon to promote further study of the correlation between groundwater elevation and surface flows; more robust monitoring of groundwater usage; and, renewed efforts towards cooperative, inclusive, negotiated solutions to the inherent conflict between surface and groundwater consumption in order to minimize harm to water users and to support efficient, lawful use of this increasingly scarce and precious resource.

Submitted by:



Lawrence Schoen, on his own behalf.

Date:

06/18/2021