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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

) Docket No. AA-WRA-2021-001  
)  
) **BWLWWUA AND BWCC POST HEARING**  
) **BRIEF**  
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## **STATEMENT OF THE CASE**

### **Nature of Case**

This is an administrative proceeding initiated by the Director of the Idaho Department of Water Resources (IDWR) pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104 to determine whether water is available to fill the ground water rights within the Wood River Valley south of Bellevue as defined by IDWR and commonly referred to as the “Bellevue Triangle”.

### **Course of Proceedings**

Following several meetings of the Big Wood Ground Water Management Area Advisory Committee, and unsuccessful negotiations between senior surface water users and junior ground water users, the Director issued a *Notice of Administrative Proceeding, Prehearing Conference and Hearing* dated May 4, 2021, An *Amended Notice of Hearing* was issued on May 27, 2021. A *Prehearing Order; Scheduling Order* was issued May 25, 2021. An administrative hearing was held on June 7 through June 12, 2021. At the conclusion of the administrative hearing the Director requested that parties file briefs by June 18, 2021.

### **Statement of Facts**

#### **Brief History of Ground Water Management in the Big Wood Basin**

There have been concerns about the impact of ground water on surface water supplies in the Big Wood Basin for many years. The Big Wood and Silver Creek drainages were designated as a critical ground water area on June 21, 1961. The designation was rescinded on January 26, 1966, apparently at the request of local water users.

On June 28, 1991, IDWR issued an *Order* "In the Matter of Designating the Big Wood River Groundwater Management Area". See SVGWD Exhibit 3. As part of the findings of fact contained in the Order, it states:

2. The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water users can also deplete available supplies for other users and affect basin under flow which presently accumulates in the Magic Reservoir.

4. Injury could occur to prior surface and ground water rights including the storage rights in Magic Reservoir if the flows of streams, rivers, and ground water underflow in the Big Wood River Basin are intercepted by junior priority ground water diversions.

In the "General" section of the Management Policy attached to the Order, it states:

The surface and ground water system in the Big Wood River Basin is interconnected. Diversion and use of water from a tributary stream or well will impact the total water supply available in the system.

Except during periods of high run off when Magic Reservoir fills and spills, the available water supply, both surface and ground water, upstream from Magic Reservoir is fully appropriated. Silver Creek is fed by numerous springs where flows depend partly on percolating seepage resulting from Big Wood River irrigation diversion and use upstream in the Bellevue area. Ground water inflow contributes to the surface flow of Silver Creek and its tributaries from the headwaters to a point approximately two (2) miles upstream of Picabo, where Silver Creek ceases to be a gaining stream.

Diversions of ground water in the Bellevue Triangle, and generally in locations hydrologically upstream from Picabo, will deplete the surface flow of Silver Creek. Prior water right holders who divert from the Little Wood River also depend on surface water flow from Silver Creek. Depletion of Silver Creek flow will injury these earlier-in-time right holders. Many of the Little Wood River right holders also receive storage water from Magic Reservoir.

In 1980, the Director of the Department of Water Resources issued a Policy Memorandum by which he declared that the surface water of the Big Wood River upstream from Magic Reservoir was fully appropriated. Since that date, no new permits for consumptive purposes have been issued for the use of the river or any of its tributaries. The Department has continued, however, to issue permits for the use of ground water within the water shed. It now appears that the policy must be changed with respect to new consumptive uses of ground water.

The Management Policy attached to the Order states under “Statutory Requirements and Authorities”:

c. Section 42-237a.g., Idaho Code, empowers the Director to prohibit or limit the withdrawal of water from any well during the period that he determines that water to fill any water right is not available.

In the “Management Policy” section of the Management Policy attached to the Order, it states:

After the water rights of the Basin are determined in the Snake River Basin Adjudication, and a method for the co-regulation of surface and ground water rights has been determined, the Director may require record keeping and reporting and may also issue orders if needed to reduce or stop ground water diversions.

The Management Policy went on to restrict applications for future consumptive ground water rights. Although the ground water management designation restricted applications for new consumptive rights, no evidence was presented at the June 7<sup>th</sup> through June 12<sup>th</sup>, 2021 hearing that any ground water right has been curtailed since the June 28<sup>th</sup>, 1991 Order was issued.

The decline in surface water supplies was confirmed by the testimony of the senior water right holders. In addition, Idaho Fish and Game witness testified that a spring right that was established over fifty (50) years ago at 15 cfs has declined in production to 5 cfs. The junior ground water pumpers’ evidence also supported the fact that surface water supplies have been

declining. SVGWD Exhibit 23, page 15, indicates that between 1970 and 2016, Big Wood River supplies declined twenty-six percent (26%), District 45 canal diversions declined fifty-four percent (54%), and base line canal divisions declined forty-seven percent (47%). The same exhibit, on page 4, states:

The Big Wood River and Silver Creek are a complex, interconnected hydrologic system. The relationship between the surface and ground water systems is such that any stress on one system will result in an effect on the other.

In 2015 and in 2017, formal calls were made by senior surface water users pursuant to the Conjunctive Management Rules adopted by IDWR. Both call proceedings were ultimately dismissed due to procedural deficiencies.

Following the dismissal of the 2017 call proceeding, surface water users and ground water users have been in discussions concerning the management of ground water withdrawals. Eventually the discussions were formalized and IDWR developed and facilitated in meetings with the Big Wood Groundwater Management Area Advisory Committee that included representatives of surface water users and ground water users. Information was exchanged but the parties were unable to agree on a ground water area management plan and could not reach resolution on how to manage water supplies during 2021. The Director then issued the *Notice of Administrative Proceeding* described above, initiating this contested case.

#### **IDWR Action and Staff Memos**

In the *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing ("Notice")* the Director stated that he "believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries

during the 2021 irrigation season." *Notice* at 1. The *Notice* was accompanied by cover letter stating the following:

A drought is predicted for the 2021 irrigation season and the water supply in the Little Wood River-Silver Creek drainage may be inadequate to meet the needs of surface water users in that area. Therefore, the Director of the Department has initiated an administrative proceeding to determine if the surface water rights in the Little Wood-Silver Creek drainage will be injured in the 2021 irrigation season by pumping from junior-priority ground water rights in the Wood River Valley south of Bellevue. The administrative proceeding could result in curtailment of junior-priority ground water rights south of Bellevue this irrigation season.

Director May 4, 2021 Letter to "Water Right Holder" (emphasis added).

On May 11, 2021, the Director issued the *Request for Staff Memorandum in the Matter of Basin 37 Administrative Hearing* (Request) requesting staff to provide memorandum on ten designated topics

### **Staff Memos**

In response to the *Request* staff members provided the following memoranda.

a. Philip Blankenau – Evapotranspiration Analyst - *Metric evapotranspiration as a means to identify possible injury, Basin 37 Administrative Proceeding, AA-WRA-2021-001*, IDWR Exhibit 3, May 17<sup>th</sup>, 2021.

Mr. Blankenau's staff memorandum detailed a METRIC (Mapping Evapotranspiration at High Resolution with Internalized Calibration) model that tries to anticipate estimated actual evapotranspiration (ET<sub>a</sub>) to determine if crops (alfalfa) would be injured because a lack of water in 2021. Blankenau's report selected irrigated fields within an area west of the Milner-Gooding Canal supplied by the American Falls Reservoir District Number 2 ("AFRD2") that did not overlap the North Side Canal Company service area or other surface or groundwater POU's ("AFRD2" area) See the selected study area located in Figure 1 in *Blankenau Staff Memo* pg. 4 (2021). The report explained "This area was selected because it has a full supply of water nearly

every year from the Snake River.” *Blankenau* Staff Memo pg. 2 (2021).

However based on testimony provided by surface water users and general misunderstanding about the AFRD 2 supplied 161 Conditioned Exchange Supplemental Rights – this area does not best predict the METRIC modeling injuries. Evidence was presented that the 161 Exchange Conditioned supplemental Rights from AFRD 2 are not always available for surface water right users, contrary to the Department’s assumption that these supplemental rights could be used throughout the season in quantities that could be used to cover user’s complete acreages. In contrast, surface water users who have these rights and the watermaster testified these supplemental rights are only good when their other 1884 rights are cut off. Furthermore, senior surface water users testified the amount of AFRD2 water is not enough to supplant the water rights that were cut and were not available throughout the season. See *Tim Luke Cross* Testimony pg 288-293 and *Kevin Lakey* Testimony pg. 778 ln. 11-22.

Not understanding this, Tim Luke, in his memo incorrectly characterized those with 161 Exchange Condition on their water rights as having sufficient irrigation water available all season long and therefore their water shortages were excluded from consideration in this proceeding. At the hearing, Tim Luke testified that he was indeed wrong about the 161 Exchange Condition rights and the extent of the water available to those with that condition on their water rights. *Tim Luke Cross* Testimony pg 288-293, and *Tim Luke* Staff Report pg. 17-18. Based on this incorrect assumption Blankenau’s report was misguided.

Furthermore, the conclusion of Blankenau’s Staff report that crops were damaged due to the water shortages that were experienced in 2013 in the Richfield area and North Shoshone but not in the AFRD2 area during the same time period was equally inconclusive. Based on

testimony and evidence presented by Blankenau, the seniors, the watermaster and others, the METRIC (ET<sub>a</sub>) model makes no distinction between sources of water and does not address that many of the 2013 crops in the AFRD2 area had adequate water supplies because the senior surface waters users rented water to replace their senior priority rights that were no longer being delivered. *See generally Senior Surface Water Users Testimony and Kevin Lakey Testimony pg. 904-906 regarding rental water that year. See also Phil Blankeneu Testimony pg. 250-260.*

b. Sean Vincent – Hydrology Section Manager – *Surface Water Supply Forecasts for the wood River Basins* May 17<sup>th</sup>, (2021).

The IDWR staff memorandum from Sean Vincent ("Vincent Memo"), describes the Surface Water Supply Index ("SWSI") as a predictive indicator of surface water availability in a basin compared to historic supply. The NRCS publishes a table with 10-, 30-, 50-, 70-, and 90-percent exceedance forecasts for the coming season along with measured total annual water supply volumes for the previous 30 years which are ranked from highest to lowest. Vincent concluded his testimony by stating that based upon the June SWSI forecast, the 2021 water supply forecast is the worst in the last thirty years. *See IDWR Exhibit 5.*

c. Tim Luke – Water Compliance Bureau Chief - *Responses to Request for Staff Memorandum - Basin 37 Administrative Hearing* May 17<sup>th</sup>, 2021. CORRECTED June 8<sup>th</sup> 2021.

Mr. Luke's Staff Memo was comprised of a broad overview and description of surface water deliveries in the Wood River Basin, the 161 Water Right Exchange Condition on some senior surface water rights, and identification and analysis of possible of irrigated lands potentially injured by groundwater pumping.

The Luke Memo, relied on Sean Vincent's Staff Memo detailing an expanded SWSI analysis by NRCS at the Big Wood River above Hailey gauge for the 104-year historical period

of record, 1917 through 2020. The updated 2021 April SWSI at the Big Wood River above Hailey gauge with an 50% chance exceedance value for the historical period of record was -3.1 and among the lowest ranked SWSI values for the 104-year period. Other years with the same -3.1 April SWSI value include 1988 and 1961, ranked respectively at 91 and 92 of 104 years of record. The next two closest years are 1939 (-3.0 SWSI) and 1937 (-3.2 SWSI), ranked respectively at 90 and 93. Both 1939 and 1937 are in the pre-groundwater development period for which water right priority delivery records are available. *Luke Memo* pg. 21, (2021).

When asked if Mr. Luke agreed with Jennifer Sukow's opinion that curtailment of the wells in the Bellevue Triangle would result in substantial increase in flows at the sportsman's access area, his response was that he agreed with her opinion. *Tim Luke Testimony* pg. 381-382 lns 19-25, 1-4.

d. Jennifer Sukow, P.E., P.G., *Predicted hydrologic response in Silver Creek and the Little Wood River to curtailment of groundwater use in 2021, Basin 37 Administrative Proceeding, AA-WRA-2021-001* May 17, 2021. CORRECTED June 8<sup>th</sup>, 2021.

Ms. Sukow's staff memo provided technical information relevant to prediction of the hydrologic response in Silver Creek and the Little Wood River to the potential curtailment of groundwater use during the 2021 irrigation season. Throughout her staff memorandum, Ms. Sukow referred to memorandums from previous 2015 and 2017 proceedings. (hereinafter, "*Sukow, 2015 and 2017*"). Ms. Sukow described Wood River Valley aquifer system and Silver Creek and its tributaries above the Sportsman Access gage as hydraulically connected. "Water use within the Wood River Valley aquifer system affects Silver Creek reach gain from groundwater, and thus affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek." *Sukow Staff Memo*, pg. 2 (2021). Ms. Sukow referred to a *Wylie*

2019 update study on groundwater conditions in the Big Wood River Ground Water Management Area that “concluded there has been a long-term groundwater level decline in the Wood River Valley aquifer system since 1968, but that water level trends appear to have stabilized since the formation of the BWRGWMA in 1991.” *Sukow Staff Memo*, pg 2 (2021). Using the same four wells that formalized this position, Ms. Sukow stated that “Recent water level measurements indicate that water levels in both the unconfined and confined aquifer have declined since 2019, in response to a low water supply year in 2020.” *Sukow Staff Memo*, pg 3 (2021).

Sukow further explained that discharges from the Wood River Valley aquifer system is the primary source of water for Silver and Willow Creek (*Sukow* 2015) and that there were sufficient records of measurement between 1995 and 2014 at two locations within the reach gain from groundwater to show strong correlation at Silver Creek. Sukow also assumed this strong correlation would exist for the Willow Creek reach gain as well but explained there wasn’t enough measurement data to confirm. *Sukow Staff Memo*, pg 4 (2021).

In discussing groundwater development in the Triangle, Ms. Sukow explained that “[b]etween 1995 and 2014, an average of approximately 42,000 acres of land in the Wood River Valley were irrigated for agriculture or partially irrigated for residential or urban uses. Groundwater was the sole source of supply for approximately 9,000 acres and a second source of supply for approximately 27,000 acres.” *Sukow Staff Memo*, pg 4 (2021) referring to (*Sukow*, 2017).

Ms. Sukow’s staff memo also discussed the WRV Aquifer Model Version 1.1 as the best available tool for evaluating the interaction between groundwater and surface water in the Wood River Valley. Sukow further explained that “every groundwater model is a simplification of

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complex hydrologic system, there is uncertainty in all groundwater model predictions” in explaining a +/- 15-20% predictive uncertainty for three analyses where water was injected south of Bellevue. *Sukow Staff Memo*, pg 15 (2021). Using the Model to simulate curtailment on May 1, June 1, July 1, and August 1, over a period of 12 years, Ms. Sukow explained that “While a significant portion (66%) of the curtailed water use remains in aquifer storage on October 1, the predicted July through September increases in streamflow are also significant (Table 1). Predicted increases to the average monthly streamflow during the 2021 irrigation season range from 23 to 28 cfs in Silver Creek, 10 to 16 cfs in the Big Wood River above the Dry Bed, and 2 to 7 cfs in the Big Wood River below the Dry Bed. Increases in streamflow in Silver Creek would be available for diversion in priority to water users on Silver Creek and the Little Wood River.” *Sukow Staff Memo*, pg 17 (2021).

Analyzing the second area for simulated curtailment south of Glendale Bridge the “WRV1.1 model simulations show groundwater withdrawals from the confined aquifer have significant in-season impacts to streamflow in Silver Creek, even in the area underlying Willow Creek...[and] 99% of the predicted in-season benefit to Silver Creek streamflow can be achieved by curtailing 70% of the consumptive groundwater use within the model domain by reducing the area of curtailment to the area south of Glendale Bridge” *Sukow Staff Memo*, pg 22-23 (2021).

Ms. Sukow concluded that “Additional streamflow in Silver Creek may benefit water users at different locations within the Silver Creek and Little Wood River system.” *Sukow Staff Memo*, pg 26 (2021). Sukow also explained that Silver Creek is expected to be the only source of water for the Little Wood River at Station 10 during the 2021 irrigation season. *Sukow Staff Memo*, pg 26 (2021). There is further explanation of “Estimated seepage losses range from 16

cfs to 46 cfs and from 20% to 37% of the inflow to the reach” between WD 37 Little Wood Station 10 and USGS Sportsmans Access gages. Ms. Sukow’s conclusions, as supported by her testimony at the proceeding, are of utmost importance. In Sukow’s staff memo she concludes that the Wood River Valley aquifer system is hydraulically connected to Silver Creek and its tributaries and “consumptive groundwater within the Wood River Valley aquifer system has significant impact on Silver Creek streamflow.” *Sukow Staff Memo Conclusions*, pg 29 (2021). Furthermore, Sukow concludes that curtailing groundwater beginning July 1 according to the WRV1.1. model would “result in increases in Silver Creek reach gain of approximately 23 cfs, 28 cfs, and 27 cfs during the months of July, August, and September.” *Sukow Staff Memo Conclusions*, pg 29 (2021). Similar increases would occur for the area south of Glendale Road “yielding approximately 99% of the benefit to Silver Creek reach gain while curtailing approximately 70% of the consumptive use within the WRV1.1 model boundary.” *Sukow Staff Memo Conclusions*, pg 29 (2021). Taking into consideration any seepage loss through the waters course of travel, water would be delivered to the senior users on Silver Creek and the Little Wood River. *Sukow Staff Memo Conclusions*, pg 30 (2021).

### **Senior Surface Water Users**

Big Wood & Little Wood Water Users Association (hereinafter “BWLWWUA”) is an unincorporated association which was organized by senior surface water right holders who divert from the Big Wood & Little Wood Rivers in order to act as a single voice in protecting the water rights of the individuals who have become its members. Although its members include several water right holders who divert on the Big Wood River, because the Director has limited this proceeding to only those who divert from the Silver Creek and Little Wood River drainage, only some members of the BWLWWUA that believed they met the Director’s qualification filed for

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Party status in this proceeding. Other members who divert water rights from the Big Wood River nevertheless have as their source of water originating with the Bellevue Triangle and claim injury from ground water pumping recognized the Director's spatial limitations on participation for the 2021 hearing and elected not to testify.

Pursuant to the Director's *Prehearing Order; Scheduling Order*, dated May 25, 2021, those senior water right parties who participated directly in the proceeding and were classified as the first group by the Director, including their most relevant individual water rights, are as follows:

1. Barbara Farms, LLC, represented by Fred Brossy, with the following water rights: 37-344A, priority date 4/06/1883 and rate of 4 cfs (Barbara Exhibit 4); 37-973, and priority date 4/01/1884 and rate of 2 cfs. (Barbara Exhibit 6).
2. Donald Taber, with the following water rights: 37-423, priority date 4/01/1883 and rate of .3 cfs (Taber Exhibit 4); 37-424, priority date 4/01/1884 and rate of 2.2 cfs (Taber Exhibit 6); and 37-425, priority date 4/01/1887 and rate of 2.2 cfs (Taber Exhibit 8).
3. 7 Mile Ranch LLC, represented by its tenant, Donald Taber, with the following water right: 37-321, priority date 4/30/1884 and rate of 3 cfs (7 Mile Exhibit 4).
4. James Ritter, represented by his tenant, Donald Taber, with the following water right: 37-49, priority date 4/01/1883 and rate of 4.2 cfs (Ritter Exhibit 2).
5. Rodney Hubsmith; with the following water right: 37-472, priority date 4/01/1884 and rate of 1.2 cfs. (Hubsmith Exhibit 2).
6. William Arkoosh, represented by his partner, John Arkoosh, with the following water rights: 37-327, priority date 5/15/1884 and rate of 2.2 cfs (W. Arkoosh Exhibit 6); 37-329, priority date 5/15/1886 and rate of 2 cfs (W. Arkoosh Exhibit 8).
7. John Arkoosh, with the following water rights: 37-326, priority date 11/01/1882 and rate of .4 cfs (J Arkoosh Exhibit 2); 37-328, priority date 4/01/1885 and rate of .6 cfs (J Arkoosh Exhibit 4); 37-460, priority date 6/03/1884 and rate of 4 cfs (J Arkoosh Exhibit 6); and 37-461, priority date 7/17/1884 and rate of 1.4 cfs (J Arkoosh Exhibit 8).
8. Alton & Paula Huyser Trust dba Big Wood Farms, represented by Alton Huyser, with the following water rights: 37-10561A, priority date 5/05/1884 and rate of 4 cfs (Big Wood Farms Exhibit 6); and 37-10561B, priority date 5/05/1884 and rate of 2.2 cfs (Big Wood Farms Exhibit 8).
9. Carl Legg, with the following water rights: 37-1126, priority date 4/08/1908 and rate of .8 cfs (Legg Exhibit 2); and stockwater 37-10640, priority date 12/31/1889 and rate of .02 cfs (Legg Exhibit 4).

10. Charles Newell, with the following water right: 37-432, priority date 4/15/1885 and rate of 2.6 cfs (Newell Exhibit 4).

In addition to the above, the following three individual parties, although diverting from the Wood River, have claimed that the source of their rights are directly impacted by the pumping within the Bellevue Triangle yet were classified as within the third Group by the Director due to his order limiting the diversions to only the Silver Creek and Little Wood River: Sabala Farms, Inc., represented by Martin Sabala; Nicholas Westendorf and David Hults.

The parties within the first group, named the “Surface Water Users witnesses” by the Director, each testified. The first witness, Fred Brossy, testified as to the BWLWWUA’s purpose in protecting the individual surface water users’ water rights. He then verified his water rights described above as owned by entities with which he is a principal member, namely Barbara Farms. Mr. Brossy testified that over the years during which more wells were being drilled and pumped within the Bellevue Triangle, he personally witnessed the levels of the Little Wood River diminish even greater than could be attributed to any dry weather patterns. He testified that as a result of lower flows, he was forced to reduce growing higher consumptive crops on many of his acres even though the replacement crops were of less value. Even though the Barbara Farm’s water rights are some of the most senior on the Little Wood, Mr. Brossy testified these rights would NOT be sufficient to grow his current crops to maturity. In fact, knowing that his water rights would not be filled, Mr. Brossy leased 66 inches of AFRD2 water from the City of Shoshone and was attempting to find additional water to rent from AFRD2. Because he is attempting to save his organic potatoes and organic garden seed beans, he testified that he would need to use any rented water on these valuable crops at the expense of his other crops. *Fred Brossy Testimony pg. 430-478*

Finally, Mr. Brossy introduced into evidence Barbara Exhibit 1, which sets forth the shortfall and yield loss together with projected revenue loss his entities would suffer in this 2021 year, together with the inability to water alfalfa seeded this year in order to have it start to take root in this current season for production in the years after 2021. He testified as to the source of his numbers from his 37 years of experience in the business and his knowledge of current crop values and costs. His gross numbers exceeded a quarter of a million dollars in injury as a result of not having enough water to fully grow his crops, which numbers would have been higher had he grown the crops he would normally have grown had more of his water rights been filled.

*Fred Brossy Testimony pg. 430-478*

Although not in order of testimony given, another witness and party, Donald Taber, testified as to three farms which he either owned or rented and where his diversions are the exclusive diversion to approximately 7 miles of the Little Wood River. These farms consist of his “Taber farm”, the “7 Mile Ranch, LLC” and the “James Ritter farm.” Similarly to Fred Brossy’s testimony, Mr. Taber has owned and rented the Taber Farm for many years and has personal knowledge of the lowering levels in the Little Wood River since the large number of wells have been drilled and pumped in the Bellevue Triangle. He testified that he has also seen the river rise significantly when the Triangle wells are turned off. He also testified as to the changes in crop choices due to not having his water rights filled as they have historically been filled. Mr. Taber also testified as to the amount of alfalfa and silage corn he would lose as a result of his inability to supply sufficient water to them this year. Like Mr. Brossy, Mr. Taber too created an exhibit to evidence his injury this year to his crops for the “Taber” farm (*See Taber Exhibit 1*). He acknowledged, as evidenced in his injury exhibit that he also has a ground water

right (37-8401 for 3 cfs) which he would be able to use to reduce his losses and at least grow some alfalfa, silage corn and spring wheat to its full term. Nevertheless, according to Mr. Taber's historical and actual knowledge of prices and historical yields realized on his lands, he determined that he is also injured to approximately a quarter of a million dollars on his "Taber" farm. *Don Taber Testimony pg. 673-713.*

Mr. Taber also testified to the same lack of water and related issues as to the 7 Mile Ranch which he has rented for many years. He also created an exhibit supporting his claim of injury to those 2021 crops as well, which exceeded \$125,000 (*See 7 Mile Exhibit 1*). Finally, Mr. Taber testified to the same lack of water and issues related to the Ritter farm, which he has rented for many years also. The salient point of his testimony for the Ritter farm was that it is among the most senior and best water rights on the river and at 4.2 cfs, it had historically ALWAYS had sufficient water to water its crops. Yet this year, as has been the case in recent years, he will be injured over \$177,000 to his silage corn and alfalfa, including a complete loss to his sugar beets (*See Ritter Exhibit 1*) due to the projected lack of river-supplied irrigation water. *Don Taber Testimony pg. 673-713*

Mr. John Arkoosh testified as to the lack of water and related issues for both his father's farm (William Arkoosh) as well as his own farm. Because they have been partners for many years, as with the others who testified, he was very aware of the diminishing flows in the Little Wood over the years since the wells were drilled and pumped in the Triangle. He also testified as to significant rise in the river when the Triangle wells are turned off. Knowing this Arkoosh testified that they were not growing more consumptive, high-value crops this year. Because of the cattle operation conducted by both of the Arkooshes, and the need to grow feed for their cattle, John & William have been required to rent water from AFRD2 in order to grow silage

corn for feed. He acknowledged that William owns a supplemental ground water right (27-7570 for 4.29 cfs) and therefore should be able to grow certain acres of alfalfa to its full term and cuttings. Nevertheless, John testified that there would be losses to other alfalfa crop in that they would not get their historical cuttings, all of which amounted to approximately \$55,000 *Arkoosh* Testimony pg. 571-642. (*see also* W. Arkoosh Exhibit 1).

John Arkoosh then presented an exhibit evidencing his own crops' injury and damages as a result of not having his water rights filled as they have historically been. (*See* J. Arkoosh Exhibit 1). Although one of his water rights is an 1882 right, which is very early right he testified that he presumes it will meet the needs of the alfalfa to which it is applied. However it is only .4 cfs and doesn't come near to covering the other alfalfa crops described in J. (*See* Arkoosh Exhibit 1). In fact, J. Arkoosh too has rented AFRD2 water in order to mitigate his injury and damages. John Arkoosh testified as to a portion of the organic potatoes acreage currently growing on his farm, that he presumes will be covered due to a water right all witnesses called the Carey Act Water, which apparently does not get turned off by the water master. Nevertheless, John has other acres of organic potatoes and organic new seeding for alfalfa that will be lost, making the total injury and damages reaching over \$650,000. *Arkoosh* Testimony pg. 571-642

Mr. Rodney Hubsmith testified similarly to the others as to the lowering of the Little Wood River in the past several years and has a farm directly below the Station 10 stream flow measuring and diversion devices. He stated with conviction that he is confident that the wells are a significant reason for the lowering of the river and can view the measuring structure and the increased flows within a few days following the pumps in the wells in the Triangle being turned off. He also testified as to his lack of historically sufficient water under his senior surface rights

and his inability to rent any water to mitigate his damages due to his geographic location. He testified that because he is a rancher, due to the lack of water to grow feed for his herd, he has been required to sell approximately one/half of his breeding cows. In order to grow the least consumptive crops possible, he has planted Timothy grass in his pastures and to be used for a hay crop. Nevertheless, he too testified to creating an exhibit which evidenced approximately \$68,000 in injury and damages to his 2021 crop year *Hubsmith* Testimony pg. 480-515. (See *Hubsmith* Exhibit 1).

Mr. Charles Newell's testimony confirmed the steady decrease in flows in the Little Wood River and his inability to supplement his needs. Like Mr. Hubsmith, Mr. Newell testified as to his requirement to sell off some of his cattle herd due to lack of water for which to grow feed for them and his inability to mitigate for that loss. This includes his loss of replacement calves to maintain his herd in the following year. As with the others, he introduced an exhibit evidencing his loss and damages for 2021. *Newell* Testimony pg. 732-748. (See also *Newell* Exhibit 1).

Similarly, Mr. Alton Huyser testified regarding the noticeable impacts of the pumping of the wells and to his wheat crop being injured and damaged due to lack of his historical water supply in the amount of over \$38,820 (See *Big Wood Farms* Exhibit 1). *Huyser* Testimony pg. 644-670. Finally, although for 2021, Mr. Carl Legg's 1908 water rights are considered junior to most of the other senior's rights, he nevertheless testified to the lack of water to his water rights causing him to not be able to seed his pasture with a special seed mix used in a bison pasture which he intends to establish, costing him \$3,000 *Legg* Testimony pg. 715-731. (See also *Legg* Exhibit 1).

Carl Pendleton, Chairman of the Board of Directors of the Big Wood Canal Company (“BWCC”), testified on behalf of BWCC. He described his background and experience with managing one of the largest water suppliers within Water District 37 and with his own farming operation, which relies solely on BWCC-provided water. The BWCC water rights with a Little Wood River source were admitted into evidence. (See Fletcher Exhibit 1). Carl testified that all of the irrigation rights of BWCC authorize irrigation of 39,683 acres and that generally BWCC delivers irrigation water to approximately 36,000 acres. *Pendleton on Behalf of BWCC*, Testimony pg. 517-568.

Carl explained that some of the BWCC Little Wood rights are considered junior surface water rights and are not typically in priority later in the irrigation season. However, he testified that the junior rights that are available in the spring are beneficial to deliver water to the Dietrich area of the BWCC, which typically requires irrigation water earlier in the season due to its soil types and lower elevation. Importantly, this diversion from the Little Wood River allows BWCC to delay deliveries of storage water out of Magic Reservoir to that area. Carl also testified that the situation pertaining to the BWCC water supplies is so dire this year that BWCC will halt delivery the week of June 7<sup>th</sup>. He also testified that even if BWCC halts deliveries within its system, if its more senior Little Wood rights came back into priority, BWCC could then lease those rights to other surface water users as a revenue source. Finally, Carl testified that curtailment in 2021 would assist BWCC with its water supplies for the 2022 irrigation season. WD37 Watermaster Kevin Lakey, in his testimony as well, stated that curtailment during the 2021 season would also benefit BWCC’s post irrigation season delivery of its stock water right.

*Pendleton* on Behalf of BWCC, Testimony pg. 517-568 *see also Kevin Lakey* Testimony pg. 792 ln. 6-10.

Although there was testimony that water rights with priorities later than 1883 might not be filled during the 2021 season should curtailment of pumps in the Triangle be required, Mr. Taber and others testified that those later water rights have historically come back into priority again later in the season, even in drier years, and water provided under those rights can, at any time, be beneficially applied to help many crops. *Brossy*, Testimony, pg. 469-470 ln. 22-25, 1-7. *Legg*, Testimony pg. 721 ln 1-8. *Huyser* Testimony pg. 666-667, ln 25, 1-11. *See generally* Senior Surface Water User Testimony. It should also be noted that virtually all of the BWLWWUA witnesses testified as to their diligence in upgrading the efficiency of their irrigation systems to ensure that water was not wasted or lost through incidental seepage. Most now pipe from River to sprinkler. This is especially true of the most senior of those surface water users and who stand the most to gain should curtailment of the Bellevue pumps occur.

*Pendleton* on Behalf of BWCC, Testimony pg. 517-568

The Triangle water users' experts argued and rely upon the significant drought being experienced by the basin in 2021 as the cause of the senior surface water users' lack of source for their water rights. However, it is the position of the seniors that during times of shortage, regardless of cause, priority should be administered. When the water source is diminished due to drought, seniors are entitled to their supply of water before the juniors receive theirs. The evidence shows that by curtailing the Triangle ground water rights the priorities of seniors' surface rights would be restored and could be put to beneficial use. Ms. Sukow testified that a curtailment of the junior Triangle ground water users would result in "substantial increase in flows" at the Sportsman Access gauge in this year. *Sukow* Direct pg. 86-87, lns 21-25, 1-18.

The seniors called the Basin 37 Watermaster, Kevin Lakey. Lakey has served as Watermaster since November 2003. He described his duties, which include measuring and regulating surface water diversions and measuring ground water diversions. He explained how priority cuts were determined. He stated that 2021 is the worst water supply year since he's been Watermaster. He explained that without additional water in the surface system, all priorities junior to March 1883 will be cut before the end of June.

Lakey discussed the Exchange Condition 161 and discussed how it had been administered in the past and how it will be administered in the future. He stated that seniors whose rights contain the condition do not receive any additional irrigation water as a result of the exchange and that the water resulting from the exchange normally would be diverted by BWCC. *Lakey, Direct pg. 7, ln. 9-12.*

He also explained that the supplemental water rights are separate and apart from the exchange condition, although those who have the exchange condition on a water right generally have the right to supplemental water from AFRD2. He explained that supplemental water does not guaranty a full water supply and that each senior having supplement rights has a specific amount of water that is delivered pursuant to the supplemental right. The right varies from farm to farm. *Lakey, Direct pg. 777-778.*

He also testified that based upon his experience with measurements, slightly over 40,000 AF of deliveries to headgates was required to furnish a full surface water supply for Silver Creek and the Little Wood River. As stated elsewhere in this brief, he has personally observed a five-day response to surface flows when ground water diversions are halted. *Lakey, Direct pg. 785, ln. 19-25.*

Based upon his measurement records and the information supplied by IDWR of the results of curtailment, Lakey estimated that surface rights with a priority of April 1, 1883 and April 6, 1883 would be restored if curtailment occurred. He also stated there could be some benefit to other 1883 rights and to the post irrigation stock water right held by BWCC. *Lakey*, Direct pg. 788, ln. 13-25. *See also Lakey*, Direct pg. 790-791.

The seniors also called Eric Miller as an expert witness. Miller supported the findings of Jennifer Sukow and testified about the cumulative impact of ground water diversions on surface water supplies. As stated in his report, Miller Exhibit 1, Miller concluded that if there is no curtailment in 2021, the hydrologic impacts to surface water rights in the Little Wood-Silver Creek drainage during the 2021 irrigation season are approximately 8,182 AF based upon anticipated withdrawals during the 2021 season and residual effect of previous groundwater withdrawals. *Miller*, Direct pg. 928, ln. 1-25. He also concluded that modeling runs completed for the 2021 irrigation season by Jennifer Sukow show that curtailment of groundwater pumping in the 2021 irrigation season would result in increased streamflow in Silver Creek during the 2021 irrigation season and that the majority of that water would reach senior surface water rights in the Little Wood River. *Miller*, Direct pg. 928-929.

### **Junior Ground Water Users**

Mark Johnson:

Mark Johnson, dba Silver Creek Seed, is a seed potato grower. He owns but mostly rents ground within and without the Bellevue Triangle. He testified that he farms approximately 600 acres within the Triangle. He testified that he contracts most of his seed pre-season to farmers who grow potatoes for processing as well as for sale in grocery stores and restaurants. Most of

his contracts are multiyear that roll-over each year. Although he has some surface water, virtually all of his potato acres come with a supplemental ground water right that is leased to him along with the lands he leases from the Landlords. *Mark Johnson*, pg. 1006-1062.

Mr. Johnson did not understand the water rights upon which he relies and testified that he has never been without water to fully grow his potato crops which need at least 90 to 100-120 days to grow. Furthermore, he testified that he uses his wells to wet the soil just prior to digging the potatoes as it helps break up the dirt clods. He acknowledged in his testimony that the senior surface water users have for many years claimed they were being injured or impaired by the pumping within the Triangle, asking to have the pumpers curtailed, yet he continued to grow potatoes and enter into long term contracts in late September 2020, all the while pumping as he had always pumped. He confirmed that he doesn't expect to have losses unless the water rights that he relies on are curtailed. If the rights are curtailed, he testified he would incur significant losses. *Mark Johnson*, pg. 1006-1062.

Mr. Johnson's testimony concerning damages resulting from curtailment was contradicted to some degree by the testimony of Pat Purdy. Mr. Purdy, as an operator of Picabo Livestock, testified that Picabo Livestock leases Mr. Johnson approximately 230 acres of the ground used to grow potatoes, that the ground leased by Picabo Livestock has senior surface rights appurtenant, and that curtailment of ground water rights would not affect the water supply to the ground leased to Mr. Johnson. *Mark Johnson*, pg. 1006-1062.

Stuart Taylor:

Mr. Taylor has been the General Manager of Wood River Ranch for approximately 9 years. It is a cattle operation and its acreage sit on the western boundary of the Bellevue Triangle

about a quarter of the way up from the bottom. It grows mostly pasture and a small amount of grass alfalfa. Although there are certain surface water rights diverted from the Big Wood River, it holds ground water rights in four different wells on the west side of Big Wood River. As to the Triangle on the east side of the river, the Ranch owns ground water rights which cover all of what is called the home place which includes approximately 550 acres watered under pressurized wells. *Stuart Taylor*, pg. 1064-1093.

Mr. Taylor testified that when he first came to the ranch, it was grossly overwatered and he has worked to conserve water by installing pivots and better sprinkler systems. He agreed that if curtailed he would feed his herd with bailed alfalfa but claims that it would reduce his herd's calving percentages and cause him to sell off a herd that he has been working to improve for many years. He agreed that the seniors have priority but that there shouldn't be a strict priority system in place maintaining that there needs to be some type of syncing take place to allow all to continue to have water. However, he didn't have a solution to allow this goal to occur. He recognized that while the senior surface water users have been curtailed, his pumps have not been impacted and he continues to pump to fulfill his crop needs. *Stuart Taylor*, pg. 1064-1093.

Gary Beck:

Mr. Beck testified that he came to the Hillside Farm ranch west of Picabo, several years ago from his home near Burley. He is the manager of the ranch. He testified that when he first arrived and for several years thereafter, the pumps were on 24/7 with no regard for any conservation. There are surface water rights associated with the Ranch but most of the acreage has ground water rights as supplemental rights. He went into great detail as to how he went about reducing the pumping volume on the lands of the ranch which, by his admission, actually

increased the productivity of the mostly alfalfa and pasture crops. He also testified about the substantial cost that is incurred to upgrade irrigation equipment. He acknowledged that while the senior surface water rights have been curtailed, his pumps continue to pump ground water which has kept his crops healthy and grown to full maturity. He said if ground water rights were curtailed, Hillsdale Ranch Farms would survive but would incur substantial crop loss and potential loss of future contracts. *Gary Beck*, pg. 1105-1143.

Mr. Beck also testified that he personally observed increases in flows in Silver Creek within 10-14 days of reducing ground water diversions on the Hillsdale farm. *Gary Beck*, pg. 1138-1139, ln. 21-25, lns 1-18.

Pat Purdy:

Mr. Purdy, manager of Picabo Livestock Co., testified about and introduced pictures of two different beaver dams located within Silver Creek and the Little Wood River that he observed on June 9, 2021. He and his employees tore out portions of both dams and restored flows. The water level behind the dams fell quickly and water which was backed up outside of the creek channel flowed back into the Creek. He admitted that beaver dams are always a problem, that just as soon as you open one up, the beavers will rebuild it and that the beavers that built the dams would need to be trapped. *Pat Purdy*, pg. 1389-1413.

The ground water users called Zach Hill as an expert witness. Mr. Hill testified that he has studied ground water levels for SWGWD since 2017, and shared some of his finding with IDWR, but hasn't done so in recent years. He testified that the Big Wood River water supplies have diminished over time. *See also* SVGWD Exhibit 23 pg. 4 (showing reduced flows in their surface water systems are not simply them being more efficient by their own choice.) He also

testified that he has monitored the diversion of water by Silver Spring Ranch and testified that reducing irrigation diversions have improved Silver Creek flows. *Zach Hill Cross* pg. 1223, ln 1-15. Overall, his conclusions were that surface water supplies are diminishing which he attributed to climatic changes and that reduced irrigation diversions increases surface supplies. *See Zach Hill* pg. 1178-1235.

The ground water users also called Erick Powell as an expert. Eric testified that he has studied five or six irrigation delivery systems/methods and calculated efficiencies of those systems based upon acreage and amount of water delivered. He admitted that he did no analysis of the types of delivery systems, nor did he attempt to determine how each type of system reflected the numbers of acres being irrigated by a type of system. His conclusion was that Mr. Miller's use of an 85% efficiency for Bellevue Triangle irrigation was too high but admitted that Jennifer Sukow also used an 85% efficiency rating in her model runs.

Powell also testified that based upon a report by Wylie that the Big Wood aquifer stabilized in 1991. He admitted that stabilization does not mean that ground water diversions are not affecting surface water supplies and admitted that the ground water development moratorium that occurred in 1991 was a factor in the stabilization of the aquifer. *Erick Powell Cross Testimony* pg. 1298 ln. 1-25.

Powell also testified that he replicated Jennifer Sukow's model runs and testified they were performed accurately. *Erick Powell Cross Testimony* pg. 1267-1269. He then testified concerning the uncertainty of the model and attempted to state that the use of four months in the model run increased uncertainty but admitted that he had not performed any analysis to support that conclusion. He went on to discuss data gaps in the model and testified that he found 200 cells out of 55,000 contained in the model that lacked connectivity and attempted to assert that

also increases uncertainty. Powell admitted that even with its flaws, that no model is perfect, that all models could be improved and that the model used in this matter was the best tool available. *Erick Powell Cross Testimony* pg. 1267-1269.

The Cities and SVC call Greg Sullivan as an expert. Sullivan also admitted that the model used by Jennifer Sukow was the best tool available. *Greg Sullivan Testimony* 1446-1447. He stated that based upon Kevin Lakey's testimony, if curtailment occurred, more water would result from curtailment than was needed to supply the seniors that Lakey testified would receive water from curtailment. He admitted that other seniors could divert the additional water and admitted that he had done no analysis of how other seniors could benefit. *Greg Sullivan Testimony* 1432-1433. He admitted that there was no evidence of the seniors wasting water. He admitted that to his knowledge, Idaho does not have a defined efficiency standard for irrigation. He suggested various improvements to the model and discussed mitigation plans.

In an attempt to contradict the testimony of the BWLWWUA witnesses that surface water flows spiked shortly following the Triangle wells being turned off, the groundwater users were asked questions inferring that if the wells were turned off, most likely the spike was also from the simultaneous lack of surface water diversions within the Triangle. However, from the testimony the ground water right holders, most, if not all of their wells were diverting from supplemental ground water rights. Supplemental wells would not be diverted until such time as the primary surface water right is curtailed. Therefore, if supplemental wells were being pumped and then turned off, the effects to stream flows would logically be due to the cessation of pumping since primary surface water rights would have already been curtailed in priority.

Kevin Lakey testified that in August, 2020, flows in the Little Wood increased approximately 10 cfs following some of the Triangle wells being turned off. *See Kevin Lakey Testimony* pg 831 ln 1-25. Counsel for the ground water users attempted to have Mr. Lakey justify the spike seen by Mr. Lakey as resulting from the pumping of ground water by Picabo Livestock which diverted approximately 10 cfs of groundwater into Silver Creek. However, when cross examined, Mr. Purdy acknowledged that although it is true that his ranch owns a well that pumps directly into Silver Creek, except for only one occasion he can remember in recent years, the same cfs pumped into the creek was rediverted by him onto his farm with a 1883 priority surface water right. Therefore, the spike in flows determined by the watermaster is logically the result of the pumps being turned off in the Triangle. *Pat Purdy Cross Testimony* pg. 1412-1413.

Because of some of the Triangle water right holders' testimony as to their recent years' modification to their irrigation facilities and practices in order to water their lands more efficiently, it is presumed that they argue that they have in some manner mitigated their use of water as junior water right holders. Although their change in irrigation practices is notable, it is what is required of all water users in the first place. Mr. Beck acknowledged that before he made his modifications, there was absolutely no conservation to the water diversions as they ran 24/7. He then testified that he took an afternoon trip down the Little Wood and saw what he supposed was a pivot wasting water due to its use of an end gun. However, he clearly is not privy to the needs of the senior surface water users in their watering practices and whether watering with an end gun is or is not a sufficient use of water on another's lands.

Furthermore, the testimony of almost every single senior surface water user was how they have spent substantial amounts of money upgrading their systems, as they had the financial

means to do so, in order to avoid as little incidental loss as possible. The testimony of these seniors verified that they had each done what was reasonably and economically possible to conserve their use of water to ensure that they were applying their water as beneficially as possible.

### **ISSUES PRESENTED**

1. Is the Director required to administer senior surface water rights and junior ground water rights in priority?
2. Does the Director have authority to administer ground water rights pursuant to Idaho Code § 42-237a.g. and other applicable law?
3. Are senior surface water right users being injured by junior ground water pumping?
4. Did junior ground water pumpers present any viable defenses at the time of the hearing?

### **ARGUMENT**

#### **The Director is Required to Administer Senior Surface Water Rights and Junior Ground Water Rights in Priority**

IDWR is mandated with a clear legal duty to administer the State's water resources, including ground water, pursuant to the Idaho Constitution, Idaho statutes, governing case law, and the Director's prior orders which all plainly provide:

"Priority of appropriations shall give the better right as between those using the water;" Idaho Constitution, Art. XV, § 3.

"As between appropriators, the first in time is first in right." Idaho Code § 42-106.

"It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . according to the prior rights of each respectively, and to shut and fasten . . . facilities for diversion of water from such

stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . .” Idaho Code § 42-607.

“[T]he law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld . . . If persons can go upon tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the sources of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. To allow this to be done would disturb substantial vested rights, and the law will not permit it.” *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 414-15 (1888).

“While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, “First in time, first in right,” should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity.” *Drake v. Earhart*, 2 Idaho 750, 753 (1890).

“After the water rights of the basin are determined in the Snake River Basin Adjudication, and a method for the co-regulation of surface and ground water rights has been determined, the Director may require record keeping and reporting and may also issue orders if needed to reduce or stop ground water diversions.”

*Order* “In the Matter of Designating the Big Wood River Ground Water Management Area”, Management Policy at 3 (June 28<sup>th</sup>, 1991).

The bedrock principle of water right administration, “first in time, first in right” has not wavered. For example, the Idaho Supreme Court has consistently reaffirmed this guiding principle in the State’s water law. *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931)(“a valid appropriation first made under either method will have priority over a subsequent valid appropriation”); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9, (1944)(“It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water.”); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977)(“it is obvious

that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right."); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.")

In its most basic terms the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights. With respect to the distribution of water within an organized water district, Idaho law expressly requires the Department to follow the rule of priority:

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 rights to the users thereof.

Idaho Code § 42-603.

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . according to the prior rights of each respectively, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . .

Idaho Code § 42-607.

The Idaho Supreme Court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, as is expected in 2021, water must be distributed according to the priority dates of the respective water rights, as set forth by decree or license. *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935).

According to the Idaho Constitution, relevant state statutes, and the Director's *Order* creating the Big Wood River Ground Water Management Area, the Director has a clear legal duty to curtail junior water rights to satisfy senior rights in times of shortage.

In a series of decisions resulting from surface water/ground water administration since 2005, the Idaho Supreme Court has consistently upheld the priority doctrine and its application to surface water/ground water administration. For example, in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), a case involving the administration of ground water and surface water and the curtailment of ground water, the Idaho Supreme Court reiterated the priority doctrine principles:

It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water. As between appropriators, the first in time is the first in right.

*Clear Springs Foods, Inc.*, 150 Idaho at 815, 252 P.3d at 96.

Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder. (Citations omitted).

*Clear Springs Foods, Inc.*, 150 Idaho at 815, 252 P.3d at 96.

The State has the duty to supervise the appropriation and allotment of both surface and ground waters to those diverting such waters for any beneficial purpose. (Citations omitted).

*Clear Springs Foods, Inc.*, 150 Idaho at 815, 252 P.3d at 96.

In times of shortage, water rights must be administered in priority.

**The Director has Authority to Administer Ground Water Rights Pursuant to Idaho Code § 42-237a.g.**

The Director initiated this administrative proceeding pursuant to the provisions of Idaho Code § 42-237a.g. which provides, among other things:

In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water

resources, *the director of the department of water resources in his sole discretion, is empowered:*

g. To supervise and control the exercise and administration of all rights to the use of ground waters and *in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available.* 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.* (Emphasis added)

Based upon the plain wording of the statute, the Director has the discretion and the authority to initiate an administrative proceeding to prohibit or limit the withdrawal of water from any well during any period that the Director determines that water to fill any water right in said well is not available.

The junior ground water right holders have argued that the Director must proceed under the Conjunctive Management Rules. This argument is contrary to the wording of the statute and is contrary to the holding in the case of *Basin 33 Water Users v. Surface Water Coalition*, Ada County Case No. CV01-20-8069 (November 6, 2020). In that appeal from the Director's action creating a ground water management area on the Eastern Snake River Plain Aquifer, the *Memorandum, Decision and Order* issued by the Court addresses the ground water users' argument and cites Idaho Code § 42-237a.g.:

In 1951, the legislature enacted the Idaho Ground Water Act. The Act tasks the Director with the management of ground water within the State. Idaho Code §§ 42-231 and 42-237a.g. It directs him “to do all things reasonably necessary or appropriate to protect the people of the State from depletion of ground water resources contrary to the public policy express in this Act.” I.C. §42-237.

The public policies expressed by the Act include the “traditional policy... requiring the water resources of this State to be devoted to beneficial use in reasonable amounts through appropriation,” as well as this State’s policies to “conserve its ground water resources” and “promote and encourage the optimum development and augmentation of the water resources of this State.” I.C. §§ 42-234 and 42-237a.

Later in the decision, the Court states that the Conjunctive Management Rules are not implicated unless a delivery call is made by a senior surface water right holder:

Under its terms, the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls made by the holder of a senior surface or ground water right against the holder of a junior ground water right in an area having a common ground water supply. IDAPA 37.03.11.001. No such delivery call has been made in this case. Therefore, the Court finds the Director’s designation of the ESPAGWMA does not implicate the CM Rules.

If the legislature intended that the Conjunctive Management Rules had to be used in all cases pertaining to administration of ground water/surface water rights, the legislature has had multiple opportunities to amend the Ground Water Act to address that issue. It has not done so. This fact was noted in the *Order* of the Court:

In addition, the Ground Water Act is silent on any legislative intent to limit its application or to modify the Director’s express duty post-adjudication. Since adoption of the CM Rules in 1994, the Ground Water Act has been amended various times. Therefore, the legislature has had multiple opportunities to limit its application to areas of the State that have not been adjudicated were that indeed its intent. That has not been done. Similarly, no

where in the CM Rules is it expressly provided that their application is intended to supersede or limit application of the Ground Water Act. *Accordingly, despite whatever assumptions may have previously been made concerning the CM Rules, such assumptions are not grounded in law.* (Emphasis added).

Further, the Director's interpretation of the statute complies with the interpretation standard set forth in the case of *Duncan v. State Bd. Of Accountancy*, 149 Idaho 1, 232 P.3d 322 (2010). In *Duncan*, the Idaho Supreme Court stated:

When an agency interprets a statute or rule, this Court applies a four-prong test to determine the appropriate level of deference to the agency of interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. (Citation omitted).

The Director's action in this case survives the four-prong *Duncan* test: (1) IDWR is the agency responsible for administration of its Procedural Rules, the CM Rules, and Ground Water Management Areas; (2) the Director's construction is reasonable; (3) neither the CM Rules, Procedural Rules, or Ground Water Area Management statutes expressly address the matter; and (4) the decision of the Director meets the "rationales" requirements, which are:

There are five (5) rationales underlying the rule of deference: (1) That a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise and interpretation of the rule; (4) the rational of repose; and (5) the requirement of contemporaneous agency interpretation. *Duncan*, 149 Idaho at 3, 232 P.3d 324.

The Director's decision must meet any of the above "rationales." The Director, in his decision to proceed pursuant to Idaho Code § 42-237a.g. determined that the Conjunctive

Management Rules do not apply to this proceeding. It is reasonable to rely upon the Director's expertise in interpreting the rules and statutes pertaining to ground water area management. The Director's decision to proceed pursuant to I.C. § 42-237a.g. satisfies the requirements of the *Duncan* test and should be given deference.

**Are senior surface water right users being injured by junior ground water pumping?**

The evidence is uncontroverted that ground water pumping in the Bellevue Triangle affects the surface water supplies of Silver Creek, its tributaries and the Little Wood River. The seniors in this case all testified to the damage to their crops and livestock resulting from the lack of surface water supplies. All seniors testified that if more water was received, it could be put to a beneficial use.

The Supreme Court has held that to "diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982). "Priority of appropriations shall give the better right as between those using the water" of the state. Art. XV, § 3, Idaho Const. "As between appropriators, the first in time is first in right." Idaho Code § 42-106. Idaho law requires the Director and Watermaster to protect the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42- 237a(g), and 42-607. The juniors carry the burden of proof to demonstrate that water they are taking out-of-priority would not be put to beneficial use under a senior's decreed natural flow or storage right. *AFRD #2 v. IDWR*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007).

"The Wood River Valley aquifer system is hydraulically connected to Silver Creek and its tributaries above the Sportsman Access gauge, and consumptive use of groundwater within

the Wood River Valley aquifer system has a significant impact on Silver Creek streamflow.” *Sukow Staff Memo Conclusions*, pg 29, (2021). Ground water pumping under hydraulically connected junior priority rights in the Bellevue Triangle has impacted the senior surface water users' senior natural flow to the Little Wood River “water use within the Wood River Valley aquifer system affects Silver Creek reach gain from groundwater, and thus affects streamflow in Silver Creek and in the Little Wood River downstream of Silver Creek” leaving less water available to flow for the senior surface water users' water rights. *Sukow Staff Memo* pg. 2 (2021).

Junior priority ground water pumping reduces the water available, particularly in the critical months of July to September, that could be diverted and used under senior surface water rights. In Tim Luke’s staff memorandum, senior surface water users have had their senior rights cut during the irrigation season, such as in 2011, 2013, 2016, due to the lack of an adequate water supply, including reduced natural flow availability and decreased storage fill. *Luke Staff Memorandum*, Figure 3, 4, 5 pg. 14-17 (2021).

As a consequence of reduced water supplies, including natural flow during the critical high demand months of the irrigation season, senior surface water users have had to rent additional shares, re-nozzle sprinkler systems, modify irrigation practices, dry up acres, and change cropping decisions, including planting less water consumptive and less lucrative crops such as grains instead of higher value crops. *See generally Surface Water Users Testimony*. Furthermore, reduced water supplies in 2021 have forced senior surface water users to seek out and try to rent additional storage water from wherever they can find it to make their crops. *See generally Surface Water Users Testimony*. Additionally, Big Wood Canal Company has also been forced in 2021 to reduce deliveries and curtail water to its own shareholders and has had to

shut-off for a period of time during the irrigation season because of short water supplies. *Carl Pendleton, Direct* (2021). With a less reliable natural flow supply, senior surface water users are forced to use more reservoir storage earlier in the season leaving less storage available later in the year and less carryover storage for future dry years.

Senior surface water users and the watermaster testified to rights in 1880s that had already been cut at the time of the hearing, while testimony from junior ground water testimony explained that they have never been cut and could pump 24/7. *See generally Surface Water Users Testimony, see also Beck Testimony.* Injury to a water right is not conditioned upon water "shortage" to a particular field. In other words, a senior water right holder does not have to wait and watch his field burn up before he can make a call or before an injury to his water right occurs. Such an "after-the fact" determination runs counter to Idaho's prior appropriation doctrine and would usurp the purpose of timely administration. Diverting water out-of-priority, to the detriment of a senior right that could have otherwise diverted and used that water, is the "injury" that the Director and watermasters are obligated to prevent under the law. Since the ground water pumping reduces reach gains in the Silver Creek, its tributaries, and the Little Wood River, the water supply is injured for the senior surface users' natural flow rights. *See generally Surface Water Users Testimony. See also Sukow Staff Memo* (2021). This reduction in water supply reduces the amount of water that could otherwise be diverted and beneficially used, hence it "diminishes" the priority, or injures the senior's surface water rights. But for these reduced reach gains, such as in 2021, the senior surface users could have diverted and used that water under their senior surface water rights. *See generally Surface Water Users Testimony.*

The unfettered groundwater pumping has injured the 2021 senior surface water users' senior water rights unlawfully and has forced the senior surface water users to bear the risk of

uncertainty for this year's water supply. Therefore, the senior surface water users this year have had to acquire additional supplies and cut back on their consumption to operate conservatively in the face of this routinely occurring injury. *See generally* Surface Water Users Testimony. Accordingly, the senior surface water users have suffered and will continue to suffer injury to their senior surface water rights by reason of junior priority ground water pumping.

### **The Junior Groundwater Pumpers Did Not Present any viable Defenses**

During the course of the hearing, the ground water users alluded to several possible defenses that they are raising in this action. The defenses are similar to those raised in the *Rangen* call and the *Surface Water Coalition* call. The defenses can be summarized as follows:

1. The surface water shortages are not caused by ground water diversions but are a result of climatic conditions.
2. Compared to the ground water pumpers, the seniors are less efficient in their irrigation methods.
3. If curtailment occurs, the ground water users incur more damage than the seniors.
4. The ground water model's uncertainties make it unreliable.
5. If curtailment occurs, the seniors will not receive water in a timely fashion.

In times of water shortage, senior rights should be given priority. The cause of the shortage of irrigation water does not affect the application of the priority doctrine. A water right gives the appropriator the right to the use of the water from that source, which right is superior to that of later appropriators when there is a shortage of water. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007). Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water

rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid. *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 219, 113 P. 741, 743 (1911).

There is no evidence that the senior surface water users are "wasting" water, that they are misapplying water, that their irrigation practices are unreasonable, or that their irrigation systems are inefficient. To the contrary, the record plainly demonstrates that each senior user operates and maintains his delivery system at a high level, constantly improving his delivery system. *See generally* Senior Surface Water Users Testimony. Based on the evidence, it is obvious the senior surface water users' diversions and water use under their water rights conforms to the standard practice and legal requirements in Idaho.

It would be improper for the Director to weigh the relative damage to seniors resulting from a shortage in surface water supplies when compared to the damage to juniors if curtailment occurs. In *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), the Idaho Supreme Court held that curtailment orders do not violate the full economic development provisions of the Ground Water Act and that the question is whether the senior can put the water resulting from curtailment to a beneficial use. Seniors don't even have to show that the use of the water would generate a profit. "If business profitability was the basis for appropriation, decreed water rights would become meaningless. The issue would be which appropriator at the time could make the greater profit by using the water." *Clear Springs Foods*, 150 Idaho at 812, 252 P3d at 93.

The uncertainty of a model and the use of a model was also addressed in *Clear Spring Foods*. All experts and Department employees addressing the issue in this 2021 administrative proceeding stated that the model was the best available tool for the analysis that was performed.

Pursuant to the *Clear Springs Foods* decision, the Director would have to find that a bias exists in the model results for the use of the model to be improper.

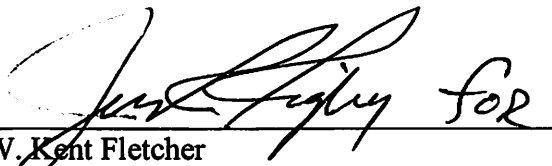
There is no evidence in the record to support that the model has a bias. There was testimony that the model had uncertainty, but all experts addressing the issue admitted that the uncertainty runs both ways – it may over predict or under predict a result. There was no assertion of bias presented at the time of the hearing. So long as the Director finds that the model is the best available tool to account for the impact of ground water pumping and predict the results of curtailment, he will meet the standard set forth in *Clear Lakes Foods*.

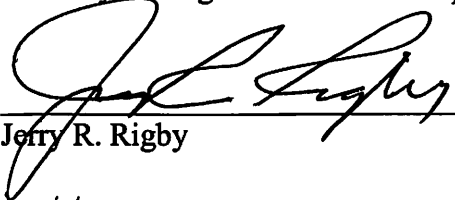
The ground water users argued that the model does not show response times resulting from curtailment, and therefore it is unlikely that if curtailment occurs, water will be received by the seniors in a timely fashion. Contrary to these claims, the evidence demonstrated that the benefits of curtailment on river reach gains would be realized relatively quickly - for example curtailment of ground water pumping would result in an improvement of flows in Silver Creek Tributaries of the amount of depletion caused by ground water pumping *Erick Powell* Direct pgs. 34, Direct ln. 6-12. Rod Hubsmith testified that he has observed that flows increase within a few days of the cessation of ground water diversions. Kevin Lakey testified that he has observed the quick response time to the cessation of ground water diversion. Gary Beck, a ground water witness, testified that he has observed a response in Silver Creek within 10-14 days of the cessation of ground water diversions. All of the evidence supports a finding that the response time from curtailment is timely enough to benefit the seniors.


## CONCLUSION

The senior surface water users are seeking lawful and proper administration of junior priority ground water rights that are materially injuring their senior surface water rights. Even though the ground water users have been on notice since the entry of the ground water management order in 1991 that their right to divert could be curtailed pursuant to the provisions of I.C. 42-237a.g., they seek to avoid administration and force senior priority rights to self-mitigate while they pump unfettered. The evidence and the testimony provided by the senior surface water users during this proceeding support the administration initiated by the Director. As required by the Idaho Constitution, statutes and case law, the Director should curtail the junior water rights that are injuring the senior water right holders as required by the priority doctrine.

Dated this 21<sup>st</sup> day of June, 2021.

  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of June, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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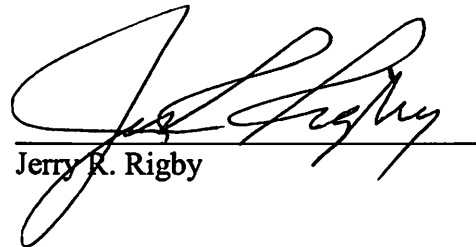
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