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DEPARTMENT OF
WATER RESOURCES

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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

**SOUTH VALLEY
GROUNDWATER DISTRICT AND
GALENA GROUND WATER
DISTRICT'S POST HEARING
MEMORANDUM**

I. INTRODUCTION

South Valley Ground Water District and Galena Ground Water District (collectively the "Districts") hereby submit this post-hearing memorandum in compliance with the Director's

request made on the record on June 12, 2021. Tr. Vol. VI, 1477:20-22.¹ The Districts do not waive any rights regarding the legality of this proceeding by submitting this brief, and hereby expressly reserve all rights and defenses concerning this proceeding, the hearing held June 7-12, 2021, and any resulting orders.

II. FACTUAL AND PROCEDURAL BACKGROUND

This proceeding involves two separate but interrelated water systems: 1) the Big Wood River above Stanton Crossing, groundwater in the Bellevue Triangle and the upper reaches of Silver Creek on one hand; and 2) the Little Wood River on the other.² The primary water supply for the groundwater in the Bellevue Triangle and the headwaters of Silver Creek is the Big Wood River. Over the past thirty (30) years, flows in the Big Wood River at Hailey have declined as much as twenty-six percent (26%). SVGWD & GGWD Ex. 23 at 15. IDWR's analysis shows, and the Districts' analysis agrees, there is a strong correlation between flows in the Big Wood River at Hailey and flows in Silver Creek at the Sportsman's Access gage. IDWR Ex. 6; Tr. Vol. V, 1344:9-11 ("We know that Silver Creek responds to the Big Wood and the discharge at the Hailey gage. There's a strong relationship there"). 2021 has turned into a miserable year for water supply in the Big Wood River Basin, with predicted streamflow and water availability declining virtually every month from January through June. *See generally*, IDWR Exs. 1, 6.

Apart from the water supply difficulties in the Big Wood River in 2021, the water supply in the Big Wood River below Stanton Crossing and in the Little Wood River has historically been notoriously unreliable. By 1927, the water users and the United States government recognized

¹ References to exhibits are listed by entity and party (e.g., "IDWR Ex. __"), and references to the hearing transcript are listed by volume (e.g., "Tr. Vol. __, [page]:[line]"). All combined exhibits from the SVGWD and GGD are hereinafter referenced as "SVGWD & GGWD Ex. __").

² Based on the Director's May 4, 2021 *Notice*, water rights to the Big Wood River below Stanton Crossing are not included in this proceeding.

there was only a partial supply of water available for users in the Big Wood below Stanton Crossing and in Little Wood River. SVGWD & GGWD Ex. 6. Water shortage was so pronounced that a 1927 contract issued by the United States to the water users in the Big Wood River and Little Wood River basins recounted that these lands were “reclaimed and improved and are occupied by settlers who have suffered crop losses on account of such water shortages and on account of such water shortages are struggling under great difficulties to continue the occupation and cultivation on the lands of the project.” SVGWD & GGWD Ex. 6 at 4, ¶ 5. These chronic shortages led the United States to construct the American Falls Reservoir and a canal to supply water to these lands through what is now known the Milner-Gooding canal. *Id.* Under this contract, the settlers were required to enter into a contract with the Big Wood Canal Company and American Falls Reservoir District #2 (“AFRD2”) to forego delivery of Wood River water in exchange for Snake River water furnished to the river rights. SVGWD & GGWD Ex. 6 at 8, ¶ 18.

Even with this additional supply of water, the Big Wood and Little Wood Rivers have remained chronically short in drought years, from the 1930s through the present day. Without the addition of Snake River storage, the water supply can be meager at best. The 1930s suffered numerous drought years. Specifically, 1931, 1937, and 1939 were years with very low natural flows leading to the regular priority cuts to surface rights in the Big Wood Basin and Little Wood Basin. *See* IDWR Ex. 4 at 27; SVGWD & GGWD Ex. 39. Rights junior to 1883 were routinely curtailed in those low water years. As Tim Luke’s Staff Memo explains, water shortages in the 1930s occurred before most of the groundwater development had begun in the Bellevue Triangle and in the area above Bellevue in the Big Wood River. *See* IDWR Ex. 4.

Bellevue Triangle groundwater development began to increase in the early 1950s, continued into the 1960s and 1970s, and leveled off in the 1980s. SVGWD & GGWD Ex. 24 at

33; IDWR Ex. 4. In 1991, IDWR Director Keith Higginson issued an order designating the Big Wood River Groundwater Management Area (BWRGWMA). SVGWD & GGWD Ex. 3. The order recognized that Silver Creek is fed by springs whose flows depend, in part, on seepage from Big Wood irrigation diversions and water use in the Bellevue Triangle. *Id.* at 3 (Management Policy, § I.A). The Order recognized that the Director has the duty to protect prior rights and to allow full economic development of the resource. *Id.* at 1 (Findings of Fact, No. 1). The Order also established a Management Policy providing that new consumptive use applications will be denied unless the applicant could show that there would be no injury or proof of adequate mitigation. *Id.* at 5 (Management Policy § III). The Director allowed non-consumptive, municipal, stock water, and domestic uses to continue to withdraw water from the aquifer under new applications. *Id.* at 4 (Management Policy § III). The Order designating the BWRGWMA also stated that one of the goals of the Groundwater Management Act was to ensure that “early appropriations of groundwater are protected in the maintenance of reasonable ground water pumping levels.” *Id.* at 1.

After the designation of the BWRGWMA and the moratorium on new consumptive uses, groundwater use leveled off. Investigations and analysis by IDWR staff, including Allan Wylie, have determined that since 1991, groundwater levels are stable and have been increasing slightly during certain times of the year, particularly in April, prior to the onset of the irrigation season. SVGWD & GGWD Ex. 15 at 15.

Since the designation of the Groundwater Management Area in 1991 no action has been taken to establish reasonable groundwater pumping levels in the Bellevue Triangle and no action has been taken to determine an Area of Common Groundwater Supply in the Big Wood Groundwater Management Area. Tr. Vol. II, p. 317:25-318:7. No witness offered testimony on

reasonable pumping levels or designation of an area of common ground water supply, and the Director did not request the information to be addressed in any staff memo. *See Request for Staff Memorandum* (May 11, 2021).³ Nor did the Director request any information about whether the groundwater withdrawals exceeded the reasonably anticipated average rate of future natural recharge under Idaho Code § 42-237a.g

In 2011, the Department issued a preliminary order creating a water measurement district for groundwater rights in the upper Big Wood and Little Wood River Basins. SVGWD & GGWD Ex. 4. In 2013, the Department issued an order combining certain water districts and bringing groundwater rights into Water District 37. SVGWD & GGWD Ex. 5. The Department made a presentation to the water users at that time explaining that bringing the water rights and groundwater and surface water rights into a single Water District would provide for proper conjunctive administration of surface and groundwater. *Id.*; Tr. Vol. II, 311:1-12. Water users complained about the impact of having groundwater and surface water rights in a single water district, particularly as it related to conjunctive administration or conjunctive management. The Department responded and advised the water users that “conjunctive administration is guided by separate processes outlined in the conjunctive management rules (CMR’s) IDAPA 37.03.11.” SVGWD & GGWD Ex. 5 at 10 (Conclusions of Law ¶ 16). The Department also pointed to successful implementation of the conjunctive management rules within Water District 130 located just to the south within the Eastern Snake Plain Aquifer (ESPA).

In 2015, after the water districts were combined, and after the Department advised the water users in Basin 37 that groundwater and surface water would be managed by the conjunctive

³ The senior water users’ consultant Eric Miller did not offer opinions on these items either. Tr. Vol. IV, 987:3-14.

management process, a number of individuals under the Big Wood Little Wood Water Users Association (“Association”) attempted to file a delivery call against groundwater users in the Big Wood Groundwater Management Area. Sun Valley Company moved to dismiss the proceeding on the grounds that the Department could not manage the delivery call under Rule 40 of the conjunctive management rules because no “Area of Common Ground Water Supply” had been established. The Director denied that motion, but was reversed on appeal by the District Court, which agreed that there could not be a delivery call under Rule 40 without an “Area of Common Ground Water Supply” and further held that Rule 30 authorized the Department to determine such an area under a Rule 30 conjunctive management proceeding. SVGWD & GGWD Ex. 1; Tr. Vol. II, 316:7-318:9.

Following the dismissal of the 2015 delivery call, the Department did not establish an “Area of Common Ground Water Supply” within the Big Wood Groundwater Management Area. Tr. Vol. II, 317:25-318:7. In 2017, a second effort to initiate delivery call was made by the Association. That delivery call was dismissed by the Director because the Association had no standing to bring a delivery call under the Conjunctive Management Rules on behalf of its members and that the members would have to assert individual delivery calls to initiate a conjunctive management proceeding. SVGWD & GGWD Ex. 2. The Director’s decision was not appealed.

Meanwhile, the South Valley Groundwater District and the Galena Groundwater District began an effort to draft a groundwater management plan for the BWRGWMA, as no plan had been put in place at the time of the 1991 designation order or since. In 2019, a draft of a groundwater management plan was provided to the Director, but he sent the groundwater districts back to the drawing board. Also, during this time, hydrologists for the surface water users and the groundwater

users met regularly to discuss the hydrology of the system. *See e.g., SVGWD & GGWD Ex. 23; Tr. Vol. V, 1185:11-24.* After consulting with the surface water users, in the fall of 2020, the Districts submitted another version of their proposed plan to the Director, and the surface water users responded with a document of their own. *Tr. Vol. V, 1185:25-1186:23.*

In response to those submittals, the Director established a Ground Water Management Area Advisory Committee which met from November 2020 to April 2021. *Tr. Vol. II, 297:11-20; SVGWD & GGWD Ex. 19.* During the second meeting of the Advisory Committee, the Department's attorney gave a presentation concerning options and comparing and contrasting delivery calls under the Conjunctive Management Rules and Management Plans under the Groundwater Management Area statute, Idaho Code § 42-233b. *See SVGWD & GGWD Ex. 19 at 6-7.* No mention was made any other means of administration as between surface and groundwater, because the Department had not thought of such alternatives at that time. *Tr. Vol. II, 343:12-19.*

By the March 3, 2021 meeting, surface water users had begun seeking curtailment by priority and conjunctive management. *SVGWD & GGWD Ex. 19 at 24.* During the March 24, 2021 meeting surface water committee members continued to raise the issue of conjunctive management. The Director stated to the committee that he had some responsibility to administer by priority and admonished the groundwater users to provide proposed remedial actions within the next two to three weeks. At the same time, internally the Department was evaluating conjunctive administration within Basin 37. Jennifer Sukow, the Department modeler, began discussing generating response functions or depletion functions using the Big Wood groundwater model with the Director, explaining that it would take two weeks to set up and run the model because the model was complex and indeed far more complex than the ESPA model. *Tr. Vol. I, 173-74; SVGWD & GGWD Ex. 36.* This information about obtaining new model runs was apparently not

shared with the advisory committee. SVGWD & GGWD Ex. 19; *See also* SVGWD & GGWD Ex. 36.

At the April 7th meeting of the Advisory Committee, the groundwater users proposed a reduction in use and the surface water users proposed other measures, including establishing minimum stream flows and financial penalties. The Director admonished the groundwater users that their proposal was inadequate and admonished the surface water users that their proposal was unreasonable. He stated that he was considering all options but did not specifically reference Idaho Code § 42-237a.g. SVGWD & GGWD Ex. 19 at 29; Tr. Vol. II, 345:7-22. At the April 15th advisory committee meeting the groundwater users brought back an increase in proposed reductions in use. The Big Wood Canal Company (“BWCC”) stated that it could agree but the Association stated that it needed additional time. SVGWD & GGWD Ex. 19 at 28-29. The next day, the Association rejected the groundwater users’ proposal.

Three weeks later, on May 4th, the Director issued the Notice initiating this proceeding (“*Notice*”). The *Notice* was limited to “Silver Creek and its tributaries” and stated that the scope of the proceeding was whether “curtailment of ground water rights during the 2021 irrigation season would result in increased flows for the holders of senior surface water rights during the 2021 irrigation season.” The *Notice* also provided that, based on a reference to “information from the Model,” the Director believed that withdrawal of water from ground water wells in the Bellevue Triangle would affect senior surface water rights in Silver Creek and its tributaries during the 2021 irrigation season. On May 27, 2021, the Director issued an *Order Granting Party Status and Closing the Proceeding to Additional Parties*, reiterating “the Director has repeatedly emphasized that this proceeding is meant to address the 2021 irrigation season.” *Order* at 2.

The *Notice* did not inform water users that the scope of the proceeding would extend to alleged injuries occurring beyond the 2021 irrigation season. Nor was any information from the Model that led to the Director's belief disclosed at the time of the *Notice*. On May 11, 2021, the Director issued a *Request for Staff Memoranda*, requesting that Staff reports be submitted to the Director by May 17, 2021. By the time of May 17th staff memoranda, IDWR and its groundwater modelers had been working with the Model for nearly two months to assist with the Department's evaluations. SVGWD & GGWD Ex. 36. Even so, the May 4th *Notice* set a contested case hearing date starting June 7, 2021, only three weeks after the Staff Reports were submitted to the Director, disclosing some of the Model results and other requested information.⁴

The *Request for Staff Memoranda* included a request for staff to explain methods of analysis of possible injury. The Request listed three possible methods. The Request did not include all the elements for consideration of injury under Rule 42 of the Conjunctive Management Rules. Staff did not extend the potential methodology for determining injury beyond the three possible methods of evaluating injury described by the Director, when responding to the Request for Staff Memorandum, or cover all the elements of Rule 42, confining their responses to the specific questions raised by the Director. Tr. Vol. II, 377:7-378:4; IDWR Ex. 4.

⁴ The record is undisputed that these Staff Reports were not available to the groundwater users until the reports were posted on the Department's website sometime on the afternoon of May 18th, and that some of the model files posted were corrupted and not accessible until May 20th. Tr. Vol. VI, 1470-72. In other words, the Districts only had the staff reports in their hands less than three weeks before the start of the hearing. Moreover, IDWR did not respond to Sun Valley Company's May 21, 2021 request for related information until mid-way through the hearing on June 9th. Tr. Vol. VI, 1469-1472. The Districts had requested information from IDWR on May 13, 2021, but did not receive any response from IDWR until they filed a formal public records request on May 20, 2021. Only then did IDWR respond with some information by email at the close of business on May 24, 2021. *See id.* It does not appear that everything requested was provided, and the Department did not provide a log of what documents it withheld. The Districts reserve all rights concerning the delay in providing information during this shortened hearing schedule and how it impacted their ability to have a meaningful opportunity to be heard.

A prehearing conference was held before the Director on May 24, 2021. The Director made it clear that the contested case was limited to the geographic area defined in the *Notice*. See Pre-Hearing Tr., 52:1-10 (“the focus of this hearing is really on Silver Creek, on Little Wood, depletions to those sources of water, and diversions of groundwater within the area in the Bellevue Triangle identified by Jennifer Sukow”). The Director stated that any senior water right holder would be expected to bring evidence of injury and that merely pleading that they have water rights and are entitled to water is not enough. *Id.*, 46:3-5. Nor is it sufficient to show that the model shows depletions. There must be proof of causation. The Director disclaimed knowing whether there was any difference between “injury” as it was being used in this proceeding and “material injury” as used in the *AFRD2* decision cited by the Director at the pre-hearing conference. *Id.*, 49:10-20. He further stated that the Conjunctive Management Rule 42 factors would be a “very important” guide in putting on proof in this proceeding. *Id.*, 50:6-20.

The *Notice* of potential curtailment did not encompass the entire BWRGWMA or even the ground water in the area of the Big Wood River in Basin 37. The *Notice* excluded the Camas ground water portion of the Ground Water Management Area and excluded the area above a line drawn below the City of Bellevue. *Notice*, Attachment A. This northern boundary line in the *Notice* was not located in the same place as the northern boundary line in Jennifer Sukow’s Staff report. IDWR Ex. 2; Pre-Hearing Tr. 55:19-57:5. No one was able to explain why the northern boundary line was located where it was in the *Notice*. See Tr. Vol. I 137:25-139:2. The *Request for Staff Memorandum* requested identification of areas which had “minimal” contribution to Silver Creek Streamflow. *Request for Staff Memorandum* at 2, #6. “Minimal” was not defined for the modeler. Tr. Vol. I 134:8-24.

IDWR's modeler selected a line at the Glendale Bride as the boundary, but did not test the boundary by simulating model runs with different boundaries to the north or south, to evaluate a "minimal" contribution. Tr. Vol. I 135:3-137:7. The modeler looked at some wells' response functions in drawing the model boundary but did not rely on response functions (i.e., depletion) to establish the northern boundary. *Id.* The line that was drawn includes two wells across the street from one another; one curtailed and one not. Tr. Vol. I, 137:8-139:2. The Director then issued a scheduling Order on May 25, 2021 and stated that the area of potential curtailment would be the area in Jennifer Sukow's Staff Memo (IDWR Ex. 2), without explanation other than that Ms. Sukow's Staff Memo encompassed a smaller area.

III. LEGAL ISSUES

A. Senior Surface Water Rights and Beneficial Uses in 2021 / Extent of Potential Injury.

The conjunctive administration of senior surface water rights and junior ground water rights in Water District 37 requires consideration of certain "post-adjudication" factors, including those identified in CM Rule 42. *See* Pre-Hearing Tr., 50:17-20 (Rule 42 factors are "an important guide"). As noted above, the Director observed no difference between "injury" and "material injury." *See Id.*, 49:10-20. Accordingly, the CM Rules' definition of "material injury" provides: "Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." IDAPA 37.03.11.10.15 ("CM Rule" 10.15).

A senior is not entitled to his or her decreed quantity if that water will not be put to beneficial use. *See AFRD#2 v. IDWR*, 143 Idaho 862, 878 (2007) ("there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed"). Moreover, depletion to a water source does not automatically constitute material injury

to a water right. With respect to irrigation water rights in conjunctive administration, the Idaho Supreme Court has observed the following:

On April 7, 2010, the Director issued his Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover. This order set forth a refined methodology for determining material injury, starting from a predictive baseline of the senior water right holders' actual needs.

* * *

1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which methodology must comport in all respects with the requirements of Idaho's prior appropriation doctrine, be made available in advance of the applicable irrigation season, and be promptly updated to take into account changing conditions.
2. A senior right holder may initiate a delivery call based on allegations that specified provisions of the management plan will cause it material injury. The baseline serves as the focal point of such delivery call. The party making the call shall specify the respects in which the management plan results in injury to the party. While factual evidence supporting the plan may be considered along with other evidence in making a determination with regard to the call, the plan by itself shall have no determinative role.
3. Junior right holders affected by the delivery call may respond thereto, and shall bear the burden of proving by clear and convincing evidence that the call would be futile or is otherwise unfounded. A determination of the call shall be made by the Director in a timely and expeditious manner, based on the evidence in the record and the applicable presumptions and burdens of proof.

A&B Irr. Dist. v. Spackman, 315 P.3d 828, 835, 841 (emphasis added).

The Director did not follow the administrative procedure set forth by the Idaho Supreme Court. Instead, the Director initiated this proceeding well after the irrigation season had started and developed a new and unprecedented procedure for hearing evidence related to water use and actual need for the 2021 irrigation season, long after the season was underway and crops were in

the ground. The Director required the seniors to put on evidence of actual injury to a water right. *See Pre-Hearing Tr.*, 50:1-3.

Certain senior water users that filed notices of participation did not attend or present any evidence at the hearing. *See Notices of Participation* (Joe Matheny May 17, 2021; Sabala Farms, Inc. May 17, 2021; Nick Westendorf May 17, 2021; and David Hults May 17, 2021; City of Gooding May 17, 2021). Consequently, these water users and their water rights are not part of any injury analysis for purposes of this proceeding in 2021 and should be excluded from any resulting order.⁵ *See generally Pre-Hearing Order*.

With respect to those seniors potentially impacted by groundwater pumping for the remainder of the 2021 irrigation season, the following evidence is relevant and was addressed at the hearing. First, Barbara Farms LLC (“Barbara”) owns water right 37-344A, priority date 4/6/1883, diversion rate 4 cfs (200 miner’s inches), place of use 301.9 acres. Barbara Ex. 4. Mr. Fred Brossy testified at hearing as to the following crop mix⁶ and acres irrigated for 2021:

<u>Crop Type</u>	<u>Acres</u>	<u>Last Day Irrigation</u>
Organic garden seed beans	21	Aug 30
Organic edible pinto beans	20	Aug 25
Organic purple barley	11	July 15
Organic malt barley/new seeding alfalfa	49.5	July 15
Organic winter wheat/new seeding alfalfa	12	July 15

⁵ Certain water users on this list only have water rights to the Big Wood River. *See Sabala Farms, Inc.*, Westendorf, and Hults. As stipulated to by counsel at the hearing, this proceeding does not address any alleged injury to water rights to the Big Wood River. This stipulation further covers any Big Wood River water rights held by those seniors that did participate at the hearing, as that evidence only was presented to show available total water supplies for 2021. *Tr. Vol. I*, 14:22-25; 15:1-11; *Vol. IV*, 436:1-23; 438:3-12 (“For this hearing today, we’re not purporting, show what the Director indicated, the total water supply”).

⁶ Barbara is also growing organic processing potatoes (21 acres) and organic garden seed beans (45 acres). However, these acres are being supplied by water from American Falls Reservoir District #2 through a rental with the City of Shoshone. *See Barbara Ex. 1*. The 2021 crop water requirement on these acres is being met by an alternate water supply previously obtained by Barbara and AFRD#2’s water rights are not supplied by the Little Wood River. *See CM Rule 42.01.g; see also, Water Right Nos. 01-6; 01-2064*. As such, these acres are removed from any injury analysis to water right 37-344A since they are not being irrigated with that water right in 2021.

Organic no-till edible pinto beans	16	Aug 25
Organic alfalfa green chop	71	Aug 30
Organic rye green chop/new seeding alfalfa	17	Sep 15
Total	217.5 acres	

Accordingly, Barbara's 4 cfs is only being used to irrigate 217.5 acres in 2021, not the full 301.9 acres identified on the water right. The Director must take into account the actual number of acres being irrigated in 2021 for purposes of his material injury analysis. *See* CM Rule 42.01.d. Barbara irrigates with wheel line and pivot sprinklers, and gated pipe, and has unmeasured losses, including from pivot pump ponds back to the Little Wood River. Tr. Vol. III, 443:22-25; 444:1-6; 458:1-23.

Next, Don Taber irrigates his "Home Farm" with water right 37-423, priority date 4/1/1883, diversion rate 0.3 cfs, place of use 295 acres.⁷ Taber Ex. 4. Mr. Taber testified at hearing as to the following crop mix⁸ and acres irrigated for 2021:

<u>Crop Type</u>	<u>Acres</u>	<u>Last Day Irrigation</u>
Alfalfa	61	Sep 30
Silage Corn	106	Sep 10
Malt Barley	62	July 10
Total	229 acres	

Accordingly, Mr. Taber's 0.3 cfs is only being used to irrigate 229 acres at most in 2021, not the full 295 acres identified on the water right. Moreover, the quantity is insufficient to irrigate all of those acres (30 inches on 229 acres = 0.13 inch/acre). The Director must take into account the actual number of acres being irrigated in 2021 as well as the availability of his supplemental

⁷ Mr. Taber identified 202 acres (96 alfalfa and 106 silage corn) irrigated with water right nos. 37-424 (4/1/1884) and 37-425 (4/1/1887). Curtailment of junior groundwater to fill these surface water rights would be futile in 2021. *See infra*.

⁸ Mr. Taber also irrigates alfalfa (60 acres), silage corn (112 acres), and spring wheat (43 acres) (total=215 acres) with a supplemental ground water right 37-8401. *See* Taber Ex. 18. However, his ground water right authorizes a diversion of 3 cfs for use on 248 irrigated acres. Accordingly, we have applied the balance of the supplemental ground water use (35 acres) to reduce the alfalfa acreage from 96 acres to 61 acres for purposes of this analysis.

ground water right 37-8401 for use on 248 acres. *See* CM Rule 42.01.d.; 42.01.g. Mr. Taber irrigates with hand and wheel lines, pivot sprinklers, and has piped his entire system from the point of diversion to the point of application. Tr. Vol. III, 680:21-22

Don Taber also leases and irrigates the adjacent “Ritter Farm” with water right 37-49, priority date 4/1/1883, diversion rate 4.2 cfs, place of use 215.7 acres. Ritter Ex. 2. Mr. Taber testified at hearing as to the following crop mix and acres irrigated for 2021:

<u>Crop Type</u>	<u>Acres</u>	<u>Last Day Irrigation</u>
Alfalfa	73	Sep 20
Silage Corn	75	Sep 10
Sugar Beets	20	Sep 20
Total	168 acres	

Accordingly, Mr. Taber’s 4.2 cfs is being used to irrigate 168 acres in 2021, not the full 217.5 acres identified on the water right. Tr. Vol. III, 707:11-14. The Director must take into account the actual number of acres being irrigated in 2021. *See* CM Rule 42.01.d. Mr. Taber irrigates with wheel line and pivot sprinklers, and has piped his entire system from the point of diversion to the point of application. Tr. Vol. III, p. 689:13-17.

Mr. Taber testified that he operates his “Home Farm,” the “Ritter Farm”, and the “7 Mile Ranch” as “one operation.” Tr. Vol. III, 703:5-11. Accordingly, the Director should take into account whether water rights are temporarily moved between properties and whether that supply is available for use at times when other rights may be curtailed. *Id.* 703:10-11 (“Q. Able to move water back and forth if needed? A. Yes.”).

Neither Barbara through Mr. Brossy, nor Mr. Taber identified an actual “crop water demand” for their respective properties in 2021. Both witnesses did not identify the application

rate per acre or the total volume needed for the year. Tr. Vol. III, 458:24-25; 459:1-4; 679:21-25; 680:1-9.

The Water District 37 Watermaster, Kevin Lakey, submitted an analysis proposing 3.1 acre-feet/acre, but that was rejected by the seniors. *See* SVGWD & GGWD Ex. 20; Tr. Vol. IV, 864-866. Neither witness testified as to what reasonable in season amount of water is required to fully irrigate the respective crops nor how much water had been diverted to date through the administrative hearing. IDWR should evaluate and identify a crop water need for each crop and field identified above, as well as the total volume diverted through June 21, 2021, for purposes of calculating any demand shortfall for the rest of 2021. Although actual diversions vary year to year, Phil Blankenau concluded that his analysis “did not clearly identify water shortage in the Little Wood and Silver Creek area during the 2013 drought.” IDWR Ex. 3 at 10. This area includes all of the places of use irrigated by Barbara and Mr. Taber identified above. As such, IDWR should take into account water diverted and used in 2013 rather than what was claimed to be an “adequate water year” by the Water District 37 Watermaster.⁹

As to any water rights held by the above seniors with priority dates April 1, 1884 and junior, and all other seniors that testified at the hearing, the request for conjunctive administration should be denied as futile for the rest of the 2021 irrigation season.¹⁰ As set forth below, even

⁹ The so-called “adequate” water year chosen by Eric Miller, based on discussions with Kevin Lakey, cannot not be relied upon by the Department in this proceeding because in that water year, deemed “adequate,” surface water users had six and even eight acre-feet per acre delivered to their headgates, well beyond any recognized duty of water. *See* Bellevue Ex. 1, at 8; Tr. Vol. IV, 884; IDAPA 37.03.02.35.01.j (Beneficial Use Examination Rules); *Id.*, at Appendix A (establishing 3.5 AFA standard for this area of the state). Based on the water-master’s experience, 3.5 acre-feet is high for this area. Tr. Vol. IV, 864:7-11.

¹⁰ The water rights that the defense of futile call apply to are as follows: April 1, 1884 (37-472, Rod Hubsmith), (37-424, Don Taber), (37-973, Barbara Farms LLC); April 30, 1884 (37-321, 7 Mile Ranch LLC); May 5, 1884 (37-10561A, 37-10561B, Big Wood Farms LLC); May 15, 1884 (37-327, Bill Arkoosh); June 3, 1884 (37-460, John Arkoosh); July 17, 1884 (37-461, John Arkoosh); April 1, 1885 (37-328, John Arkoosh); April 15, 1885 (37-432, Charles Newell); May 15, 1885 (37-21401, BWCC); April 1, 1886 (37-272, BWCC); May 15, 1886 (37-329, Bill Arkoosh); June 1, 1886 (37-351B, Lawrence Schoen); April 1, 1887 (37-425, Don Taber), (37-21403, BWCC); June 15, 1887 (37-352B, Lawrence Schoen); April 1, 1890 (37-176, Bill Arkoosh); April 1, 1905 (37-1127, John

assuming for argument's sake that the Model is correct in predicting an increase in flows in Silver Creek on a monthly basis, full curtailment of 23,000¹¹ acres in the Bellevue Triangle would only produce the following quantities (by the end of each month):

<u>Month</u>	<u>Curtailed CU AF</u>	<u>Silver Creek CFS</u>	<u>AF</u>
July	7,214	22.7	1,398
August	6,737	28.0	1,720
September	3,502	26.5	1,578

IDWR Ex. 2 at 25 (Table 2).

Applying the measured and calculated losses between the Sportsman's Access Gage and Station 10 taken by IDWR in 2020, the table would be further revised as follows:

<u>Month</u>	<u>Curtailed CU AF</u>	<u>Silver Creek CFS</u>	<u>AF</u>
July	7,214	15.7	937 (33% loss)
August	6,737	22.4	1,376 (20% loss)
September	3,502	21.2	1,262 (20% loss)

IDWR Ex. 2 at 28 (Table 3); Ex. 2 at 25 (Table 2) (emphasis added).¹²

Arkoosh); November 6, 1905 (37-13114, BWCC); August 1, 1906 (37-1131, Bill Arkoosh); November 13, 1907 (37-13043, BWCC); April 8, 1908 (37-1126, Carl Legg). *See* Miller Ex. 1, Appendix. B.

¹¹ Jennifer Sukow testified that her simulated curtailment "would affect water supply for 23,000 acres in the Bellevue Triangle, Tr. Vol. I., 139:12-16, and Justin Stevenson testified that total irrigated acreage in the South Valley Ground Water District is 22,000 to 23,000 acres, Tr. Vol. V, 1158:24-1159:4. The March 10, 2015 *Report of the Idaho Department of Water Resources*, approving the SVGWD, estimates total irrigated acreage at 25,000. For purposes of this memorandum, SVGWD and GGWD utilize Ms. Sukow's 23,000 acres of affected water supply as total irrigated land in the Bellevue Triangle at risk of curtailment.

¹² IDWR's losses were calculated and measured between the 20th of each month. The August estimated value (20%) was applied to September.

Kevin Lakey, the Watermaster, testified at the hearing regarding projected curtailment dates of water rights to the Little Wood River:

Q. [MR. FLETCHER]. Have you analyzed which senior priorities in Little Wood and Silver Creek will benefit if junior groundwater rights are curtailed in 2021?

A. [MR. LAKEY]. Yes.

Q. Can you explain how you did that analysis?

A. I used numbers from Jennifer Sukow's work that gave me an idea of how much water would return to Silver Creek or show up in Silver Creek over certain days. So using her numbers, I went back to my estimated priority cut dates and said if there were certain priority cuts that we're estimating, and what Jennifer was estimating would be in Silver Creek more than what we had, and so I made the comparison of the two, and started saying, well, which priority dates might be left on.

* * *

Q. And what was your conclusion in that analysis? What priority dates would be restored if curtailment took place on July 1?

A. There were varying effects on priority rates – or priority dates and the rates we would be able to deliver. The September of '83 would have gotten some, but not their full right. The June of '83 would have gotten, I believe, all of their water. The April 6th and April 1st priorities would receive water with the July 1 curtailment.

Tr. Vol. IV, 787:12-25; 788:11-20.

As set forth above, Mr. Lakey testified that of the water curtailed, as predicted by the Model, only the April 1, 1883, the April 6, 1883, and a portion of the September 9, 1883¹³ water rights would receive water as a result of that curtailment. *See id.* Greg Sullivan, the expert for Sun Valley Company and the Cities, confirmed this testimony reviewing the list of water rights and the fact that other water users (not calling seniors in this case) would receive water as well. Tr. Vol.

¹³ The September 1883 rights are held by Picabo Livestock which is not making a demand for administration. Tr. Vol. VI, 1391:10-11; Tr. Vol. VI, 1405:6-25.

VI, 1427:25; 1428-1430. Curtailing all 23,000 acres of junior groundwater use to supply any water rights beyond the three 1883 rights held by Barbara (4 cfs) and Taber/Ritter (4.5 cfs), would therefore be futile and should be denied accordingly.

Another reason the Director should consider certain surface water users' demands for administration futile, or unsupported by the evidence, is based on the Exchange Condition, also known as Condition 161 on the water rights. Some of the individuals asserting injury have water rights with this Exchange Condition. Tim Luke issued instructions to the watermaster explaining how this condition would be administered. IDWR Ex. 4, at Attachment A. He did not include water users with that condition on their right as being potentially injured by shortages because they had an alternative water supply. Tr. Vol. II, 295:4-6; *see generally* Tr. Vol. II, 288-295; *see* CM Rule 42.01.h. Tim Luke pleaded with those surface right holders to come forward with additional information; no one did. *See* Tr. Vol. II, 297:16-20. Counsel suggested that the amount of water might vary, but no actual evidence was offered to overcome Mr. Luke's analysis, or to show injury to water rights with this condition. *See* Tr. Vol. II, 289:6-290:4.

In general, the "underlying idea behind the Futile Call Doctrine is that the primary purpose of water appropriation is to put water to beneficial use. . . . If a junior is required to respond to a call for water and the outcome will result in no beneficial use by the senior but only in the waste of water, then the junior is excused from responding to the call, and the waste, which is factually and legally undesirable, will be avoided." Law of Water Rights and Resources § 5:35 (2020) (citing *Kelly v. Teton Prairie LLC*, 376 P.3d 143 (Mont. 2016)).

The Idaho Supreme Court recently addressed "futile call" in *Sylte v. IDWR*, 165 Idaho 238 (2019).¹⁴ In *Sylte* the Court noted:

¹⁴ The CM Rules define "futile call" as "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call

The futile call doctrine in Idaho “embodies a policy against the waste of irrigation water.” *Gilbert v. Smith*, 97, Idaho 735, 739, 552 P.2d 1220, 1224 (1976); *see also, Hill v. Green*, 47 Idaho 157, 274 P. 100, 110-11 (1928). Generally, this provides

if . . . seepage, evaporation, channel absorption of other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

165 Idaho at 245 (citing *Gilbert*, 97 Idaho at 739).

Applying the facts of this case to the Supreme Court’s “futile call” standard it is clear that water in a “sufficient quantity” will not reach the senior water rights in this matter with priorities of April 1, 1884 and junior in order to apply it to beneficial use during the 2021 irrigation season. *See infra*, fn.10. Furthermore, the various seniors testified at the hearing that their rights have been or will be curtailed, which even if curtailed groundwater would supply a right junior to September 9, 1883, it would be too late anyway. *See* Tr. Vol. III, 506-07 (Mr. Hubsmith explaining that his right is projected to go off June 15th and that he will not “make another cutting”); Hubsmith Ex. 1 (timothy grass hay and pasture, last irrigation 9/30); Tr. Vol. III, 630:15-19 (Mr. Arkoosh testifying that his water will be off shortly after his first cutting and he’ll be lucky to get it watered again to get a second cutting); Bill Arkoosh Ex. 1 (Alfalfa, last irrigation 9/1); John Arkoosh Ex. 1 (potatoes and new seeding oats/alfalfa, last irrigation 9/15); Tr. Vol. III, 697:24-25 (“It probably would not benefit the corn because it would be dead.”); Tr. Vol. III, 710:20-25; 711:1-5 (Mr. Taber explaining that there would be no benefit for wheat or sugar beets); Taber Ex. 1, 7 Mile Ranch Ex. 1; Tr. Vol. III, 724:23-24 (Mr. Legg testifying he is “not currently irrigating” his pasture); Legg Ex. 1 (new seeding pasture, last irrigation 9/30, but not planted); Tr. Vol. III, 736:13-18 (Mr. Newell testifying

by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.” CM Rule 10.08.

that his 4/15/1885 right was going off “tomorrow or the next day”); Newell Ex. 1 (alfalfa hay, grass hay and pasture, oat hay, last irrigation 9/30); Tr. Vol. III, 653:5-6, 662:3-11 (Mr. Huyser explaining his 1884 right was cut on June 2nd, and explaining what happens to his wheat crops for remainder of irrigation season); Big Wood Farms Ex. 1 (winter wheat, last irrigation 7/15; spring wheat, last irrigation 7/25).

Moreover, the evidence shows that in prior drought years, rights junior to 1883 have been curtailed during the irrigation season regardless of groundwater pumping. Tr. Vol. III, 504:15-21; 626:3-4; 700:3-16; 702:10-12. The fact such administration would be “futile” is further proven by the Model curtailment scenarios which predict that 67% of the curtailed groundwater would remain in the aquifer for July, August, and September 2021. *See* IDWR Ex. 2 at 25, Table 2 (predicting 67% increase in aquifer storage). The seniors’ own expert, Mr. Eric Miller, confirmed that such curtailment was not an “optimum utilization of the water resource” for the balance of the 2021 irrigation season. Tr. Vol. IV, 986:5-25; 987:1-2.

As set forth above, the evidence in the record shows that only the water rights of April 1, 1883 and April 6, 1883 would suffer possible injury due to groundwater pumping in the Bellevue Triangle in 2021. Even if all 23,000 acres are curtailed, only water rights 37-49 (Ritter), 37-423 (Taber), and 37-344A (Barbara Farms LLC), are projected to receive any water resulting from curtailment during the 2021 irrigation season.

Similar to the surface rights with priorities April 1, 1884 and junior, the Director should deny conjunctive administration of any ground water rights in order to satisfy BWCC’s water right 37-444 (April 6, 1883) during the 2021 irrigation season. At hearing, BWCC’s President Carl Pendleton testified that the company does not deliver water right 37-444 once it closes the Dietrich Canal. Tr. Vol. III, 541:1; 542:1-17. (“Q. . . would Big Wood Canal Company be able to take

delivery of any of its Little Wood rights this year? A. We would not.”). Instead, the water dedicated to that right remains in the Little Wood River, available to fill other senior water rights or those just junior (i.e., June 14, 1883 or September 1, 1883). Since BWCC discontinued deliveries on June 10th, it would not be able to put water right 37-444 to beneficial use for the rest of the 2021 irrigation season.¹⁵ Tr. Vol. III, 548:24-25; 549:1-10. As such, any curtailment of junior ground water rights in the Bellevue Triangle for water right 37-444 would be futile.

Consequently, the Director should apply and confirm that “futile call” prevents curtailment of junior groundwater rights in the Bellevue Triangle to satisfy surface water rights with priorities April 1, 1884 and junior.

B. SVGWD Groundwater Users’ Water Rights and Water Use and the Impact of Proposed Curtailment.

The boundary line drawn by the *Notice* and Jennifer Sukow’s Staff Memo encompasses the ground water users within most of the South Valley Groundwater District and a small number of users in the Galena Ground Water District. The Bellevue Triangle area of potential curtailment relies on surface water deliveries to the major canals in the Bellevue Triangle, the Baseline and the D45 canals which are positively correlated with flows in the Big Wood at Hailey. IDWR Ex. 4 at 4; Tr. Vol. I, 160:12-21.

The canal systems are a major source of water for the ground water in the Bellevue Triangle. SVGWD & GGWD Exs. 3, 24. The canals experience significant conveyance losses, adding to the groundwater supplies and the flows in Silver Creek. Tr. Vol. V, 1153-54; SVGWD

¹⁵ Mr. Pendleton testified that BWCC had rented the water right in the past, but that it did not have a rental in place for 2021. Tr. Vol. III, 567:5-16. Moreover, IDWR has previously refused to conjunctively administer junior ground water rights in order to supply water to a senior for rental purposes. *See e.g., Second Amended Order Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* at 27, ¶ 80 (SWC Call Case, June 23, 2010). Applying that policy here the Director should not obligate junior groundwater users to curtail or mitigate for a water right that is not put to beneficial use or rented.

& GGWD Ex. 32. Jennifer Sukow agreed in her testimony that Attachment G to the USGS Report utilized a 60% conveyance loss in the D45 and Baseline Canals as an input to the Model. IDWR Ex. 2; Tr. Vol. I, 150:1-25; 151:1-2 . There is a positive correlation between diversions into the D45 and flows at the Sportsman's Access gauge on Silver Creek. SVGWD & GGWD Ex. 24 at 23. Both the Hailey gauge flows and D45 canal diversions, correlations to Silver Creek flows are statistically stronger by R2 values than the correlation between groundwater levels in the Bellevue Triangle and the flows at Sportsman's Access. *Compare* IDWR Ex. 6 with IDWR Ex. 1, Figure 9.

The South Valley Groundwater District encompasses approximately 22,000 - 23,000 acres of irrigated crop land served by ground water. Tr. Vol. V, 1158:22-1159:4. The primary crops grown in the Bellevue Triangle are barley/grains, alfalfa, pasture and cattle, with some potatoes, and other miscellaneous crops. Tr. Vol. V, 1159:13-25. Most of the land in the South Valley District has both surface and ground water, with some lands on the Bellevue Triangle exclusively supplied by surface water and some exclusively by ground water. In 2021 the Big Wood surface water supplies are expected to be completely out of water by early July. *See e.g.*, Tr. Vol. IV, 1076:12-14.

By the time the *Notice* was issued in May 2021, the crops were in the ground and contracts were executed. Water was being delivered at the time of discussions of the advisory committee in March, and early April water supplies were predicted to be available well into July when the barley crops would no longer need to pump groundwater. Given what was known at the time, planting crops in April was a reasonable decision.

The *Notice* and Staff Memo of Jennifer Sukow both propose curtailing all ground water use in the Bellevue Triangle as of July 1, 2021. IDWR Ex. 2 at 29. The Staff Memo does not conclude, or even suggest, that there is insufficient water in the aquifer to satisfy the needs of the

ground water users. Instead, it focuses on the consequence of a complete, 100%percent curtailment on flows in Silver Creek and Little Wood. The Staff Memo does not examine the benefits of a partial curtailment, either on a time priority basis, or by location, or by influence of a particular well or wells on Silver Creek. Slashing all groundwater use with a single stroke of the pen is not consistent with the 1991 Big Wood Ground Water Management Area Order which established a goal to assure that early appropriations of ground water are protected with a reasonable pumping level. SVGWD & GGWD Ex. 3 at 1. Nor would a 100% curtailment be consistent with Idaho Code § 42-226 (The 1951 Ground Water Act). There, the legislature directed that, while first in time is first in right is recognized, a reasonable exercise of the right “shall not” block full economic development of the State’s ground water resources.

Indeed, doing as some of the seniors and their counsel demand and curtailing solely based on the relative priorities of surface water users vis-à-vis ground water priority dates would violate Idaho Code § 42-226 and Idaho’s long-held policy of securing the maximum use and benefit and least wasteful use of Idaho water’s resources, and even the very concept of conjunctive management. *IGWA v. IDWR*, 160 Idaho 119, 131, 369 P.3d 897, 909 (2016); CM Rule 10.03. As the Supreme Court held there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to a caller. *Id.* at 120, 369 P.3d at 910.

With that legal backdrop it is important to consider the impact of a 100% curtailment, as modeled by Jennifer Sukow, against the benefits. Starkly, over two-thirds of the curtailed water would remain in the aquifer, unavailable for any use, and the vast majority of that water would leave the aquifer during the coming, non-irrigation season. IDWR EX. 2, at 24-25. Sadly, this curtailment would waste more water than it would yield. The Idaho Constitution and statutes do

not allow hoarding of water, nor permit wasting water. *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). Yet that would be the result of a curtailment. Surface water users would command large volumes of water even though they would actually use only a small quantity.

Mark Johnson is a potato farmer operating as Silver Creek Seeds. He grows seed potatoes for a variety of commercial growers on 750 acres in the Bellevue Triangle. He entered into contracts with his customers, and with landowners to rent the fields last fall. The fields were all planted before this proceeding began. Potatoes must have water until the first of September to survive, then a little water at harvest time at the end of September. The July 1 curtailment order would kill his crops. He would go out of business. Thirty-five years in the potato business would be over. His customers would leave him, looking for a more reliable supplier. Tr. Vol. V, 1055-56.

Stuart Taylor has been the ranch manager at Wood River Ranch since 2012, he testified about the impact of curtailment on the pasture land used to raise cattle on the Wood River Ranch. Tr. Vol. V, 1077-80. If ground water is not available, the pastures will not be able to support the cattle on the ranch for the remainder of the season through the time when he moves the cattle herd to winter pasture in October/November. Rather than sell the cattle and lose the valuable genetic makeup of the herd, he would choose to buy hay which would cost \$250,000-\$300,000 just in 2021. Tr. Vol. V, 1079:15-17 If he did feed hay, he would lose calves to disease and would lose 40% of the reproduction from the cows, over the next season.

Mr. Taylor also explained the many water management improvements he has implemented on the ranch since he arrived in 2012. Tr. Vol. V, 1070-75. He has reduced the water application dramatically. He introduced alternative forage crops to create a wider biodiversity to replace the

pre-existing mono culture. This biologically diverse pasture needs less water and, importantly, consumes less water. Since these measures have been implemented over time, none of this information about water use, crop requirements or other changes has been, or could have been, incorporated into the Model, which was based on data up to 2014 and with only limited actual pumping data from the Bellevue Triangle. The ranch has also placed some of its water in the water bank and dried up acres in an effort to be a good neighbor and a good steward of water resources in the basin. Tr. Vol. V, p. 1067:1-3; 1081:11-20.

Also significant to the proceeding is the location of Wood River Ranch at the far western boundary of the Model, straddling the Big Wood River. Mr. Taylor has never observed impact to flows on Silver Creek from operations on the ranch. Tr. Vol. IV, 1086:21-25.

Gary Beck has been the Ranch Manager for Hillside Ranch for twenty-two years. Mr. Beck explained that the barley crop on the ranch is contracted to Coors and Anheuser-Busch under long-term agreements. Tr. Vol. V, 1128-1129. The ranch produces both organic and conventional barley crops for these customers. In 2009 Gary and the ranch began experimenting with water savings projects. Tr. Vol. V, 1113. Hearing of the ranch's interest in water conservation, Coors, teaming with The Nature Conservancy, identified Hillside Ranch as the Coors Model Barley Ranch. Working with Coors and TNC, the ranch over the years found ways to reduce its water use by 40%, including by eliminating end guns, lowering sprinklers, drying up corners, eliminating wheel lines, improving sprinkler packages, using variable speed pivots to direct water to where it is needed the most, relying on soil moisture monitors to measure water needs, reducing the number of days the pivots run to 4 or 5 days per week, and enrolling in the Peak savings program to turn off the pumps during evening high load hours for twelve hours each week. Tr. Vol. V, 1113-1125.

None of this updated usage or pumping information has been incorporated into the Model. Moreover, in 2021 Mr. Beck plowed up 2500 acres of alfalfa and planted barley because barley uses less water. Tr. Vol. V, 1106:24, 1115:17-1116:5. Significantly, Mr. Beck, who is from Burley and who has relatives in the Richfield – Gooding area, recently toured the Richfield – Gooding area looking at the irrigation practices. He did not see similar types of water conservation measures in use there as had been implemented on Hillside Ranch. Tr. Vol. V, 1130:20-25; 1131:1-16.

Mr. Beck explained the consequences of a July 1 curtailment on the barley crop. Tr. Vol. V, 1128:12-13 (“So if we’re shut off on July 1st, the crop will not make grade at all”). The last two weeks of water are critical to allow the kernels to plump up to meet Coors and Anheuser-Busch standards. Tr. Vol. V, 1128:12-25; 1129:1-23. The brewers’ field men have advised that a water curtailment will mean that the crop will not be acceptable under the contracts and will be rejected. *See Id.* Mr. Beck’s experience with the barley crop bears out that assessment. If the crop is rejected, the cost of harvesting for feed barley would not justify the revenue and the entire crop would be lost at a revenue loss of \$2 Million. *See Id.* Guest workers on the ranch from Mexico would have to be laid off and required to return home. Tr. Vol. V, 1131:22-25; 1132:1-5. Long term consequences would be severe. Long term contracts would likely not be renewed in previous quantities, or at all, if the customer cannot depend on Hillside Ranch to reliably produce a crop on a regular basis.

Zach Hill has been responsible for water management improvements at the Silver Springs Ranch on the headwaters of Silver Creek. He explained the water conservation measures that the ranch has undertaken to benefit Silver Creek. He also explained the recharge and wildlife water rights on the ranch that collect waste water and drain water, directs that water toward Silver Creek and hence, have resulted in an increasing trend in the flows from the springs and creeks on the

ranch that are main headwaters of Silver Creek. Tr. Vol. V 1199:18-1202:2; SVGWD & GGWD Ex. 40. Since 2015 to the present – Grove Creek, Mud Creek, Wilson Creek, Cain Creek, Patton Creek, and Chaney Creek are all trending upward. None of this information about increasing trends in the springs and creeks tributary to Silver Creek is incorporated in the model.

Throughout the Bellevue Triangle there have been vast improvements in water conservation measures and water use. Moreover, various fields throughout the Bellevue Triangle are not being irrigated in 2021. Yet, none of this information is calibrated in the Model since it only includes data through 2014, nearly a decade old now. The Model is a generation behind regarding water conservation, use, and up-to-date measured data, as well as 2021 consumptive use.

The injury to the crops described by Mr. Johnson (potatoes), Mr. Taylor (pasture and cattle) and Mr. Beck (barley) apply across the entire Bellevue Triangle and 22,000 – 23,000 acres of land irrigated from wells. South Valley members anticipate losses from a July 1 curtailment, occurring in the middle of the irrigation season, well in excess of \$12 Million. Tr. Vol. V, 1129:2-9, 1163:9-10. These losses are unacceptable give the Director's duties under Idaho law and the projected benefits resulting from curtailment compared to the impacts on junior groundwater users.

C. There Are Multiple Issues with The Model Which Make It an Insufficient Tool for The Department to Rely Upon for a Curtailment in This Proceeding.

Although the Model may be the “best” scientific tool currently available, there are significant questions regarding whether it is the right tool for curtailing the ground water users in the proposed curtailment area.¹⁶ Indeed, there are multiple uncertainties with the Model as well as aquifer parameters questions, such as hydraulic conductivity, that make the Model an insufficient tool to use for the purpose intended by the Director in this case, which is a partial season

¹⁶ In contrast, the ESPA model went through multiple iterations before it was used for administration. *See infra*.

curtailment to benefit downstream senior surface water users for irrigation purposes from July 2021 through September 2021. In this matter it is undisputed that IDWR model runs and supporting information were not supplied until May 18th and May 21st respectively. The Districts were prevented from conducting any meaningful analysis or recalibration to evaluate water data and information gathered since 2014 (the last year used to calibrate the Model). Tr. Vol. V, 1288. Moreover, the modeled boundary of curtailment is arbitrary and capricious as it is not based upon actual groundwater hydrology in the basin.

For instance, the Model's uncertainty, as calculated by Allan Wylie a former Department staff member, is at least twenty-two (22%) percent over a ten (10) month span. SVGWD & GGWD Ex. 15. Notably, Mr. Wylie's analysis only included two (2) cells within the Bellevue Triangle. *Id.* Given the limited review of cells within the proposed curtailment area, it is possible that the Model's uncertainty in that area may be even greater than twenty-two (22%) percent. And, as Dr. Powell, an engineer at Brockway Engineering testified, the more the response time-period is reduced, the more the Model's uncertainty will increase. Tr. Vol. V, 1267:9-1268:4. Thus, Ms. Sukow's analysis for the Department, which was based upon a three (3) month time-period, likely has an uncertainty of greater than twenty-two (22%) percent – a fact which Ms. Sukow admitted in her Memorandum to the Department as well as during the Hearing in this matter. IDWR, Ex. 2 at 29; Tr. Vol. I, 220:7-18. Notably, no one, including the Department's staff, has had enough time to determine what the actual uncertainty of Ms. Sukow's analysis is.

There is additional uncertainty regarding the Model's results based on a lack of data. In fact, the Model Final Report which was authored by Mr. Wylie and Ms. Sukow among others, recognizes that there are significant gaps in data and in the Department's understanding of the aquifer that are "apparent" – which Ms. Sukow corroborated during her testimony at the Hearing.

SVGWD & GGWD Ex. 14 at 26; Tr. Vol. I, 152:23-156:22. Specifically, Mr. Sullivan, a senior water resources engineer with Spronk Water Engineering, testified that the Model is based on assumed values for pumping prior to 2014, especially in the proposed curtailment area, even though additional data has been collected since that time which includes pumping data, ET, stream measurements, aquifer levels and efficiency. Tr. Vol. VI, 1439:5-1440:7. That additional data, however, has not been included in the calibrated Model. Tr. Vol. V, 1270:2:7. The Model does not account for lands being left fallow throughout the Bellevue Triangle in 2021 as well. Certainly, this additional data is useful and should be used to re-calibrate the Model to allow for more accurate evaluations, which is extremely important in this case since the Department is currently relying on data that is more than seven (7) years old to make a decision regarding curtailment. Although the Model's lack of data was originally pointed out in the Model Final Report, the Model has not been recalibrated to incorporate this additional data so the data gaps still exist today. Tr. Vol. V, 1268:16-1270:12.

Given the Department's short notice of this proceeding, the junior groundwater users were hamstrung by not being able to perform a different analysis with seven (7) years of additional data that may have disclosed a different result. Tr. Vol. V, 1288:11-24. As such, there has been no meaningful opportunity to conduct this work and provide it in the context of this case.

The junior ground water users are further prejudiced by the fact that they did not receive the Department's staff memoranda, including Ms. Sukow's, until May 18, 2021¹⁷ with supporting information provided later, which was less than three (3) weeks prior to the start of the Hearing. This prevented any possibility of the junior ground water users from having a chance to recalibrate

¹⁷ Notably, Ms. Sukow began her modeling activities in March 2021, which was two (2) months prior to the time that her calculations were provided to the junior ground water users. Tr. Vol I., 187:1-7. Although the Department had the benefit of such time to conduct the analyses, the Districts were given less than three weeks.

the Model with updated information to show more accurate results. Completing work with a complex groundwater model is not something that can be accomplished in mere days. Instead, a thorough evaluation can take weeks or months.

Notably, Ms. Sukow's Memorandum does not address response functions even though she reviewed them during her Modeling activities. Tr. Vol I., 187:1-7; Tr. Vol. V, 1273:14-1274:3; *See also* IDWR Ex. 2. This is an important point to recognize because it means that, despite having information relating to the impact of each well within the proposed curtailment area, the Department did not rely upon the response functions to determine where the proposed curtailment area should be located. In addition to the Department's failure to take into account response functions, it is unable to predict whether water will actually make it downstream to senior surface water users if a curtailment occurs. This is because Model version 1.1 does not have the ability to predict this important information nor does it have the ability to account for conveyance losses in any way. Tr. Vol. VI, 1435:18-1436:13. Although this technology exists, it is not incorporated into Model version 1.1. Tr. Vol. VI, 1436:17-1437:7. If such technology was incorporated into the Model and properly calibrated, Mr. Sullivan opined that there would be greater confidence in the Model's results because the Department would be able to "simulate the seepage losses of the additional flow and getting it down to the Sportsman Access gage, and potentially also a diversion of that water, if there are diversions." Tr. Vol. VI, 1436:25-1437:7.

Mr. Powell also testified that he has low confidence in the model calibration constraints, especially the hydraulic conductivity values. Specifically, he testified that of the Model's three layers, layer one had a hydraulic conductivity value of over 500,000 feet per day and layer two had a hydraulic conductivity value of more than 950,000 feet per day. Tr. Vol. V, 1270:20-12721:11. Mr. Powell explained that these are extremely high values which he has never seen

before and he did not believe they were based on realistic values, especially when compared to Model version 1.0's values which are more reasonable. *Id.* To rectify these errors, Mr. Powell opined that the Model should be re-calibrated with more constraints on values. *Id.* It is important to recognize that this testimony is unrebutted even though the Department offered other rebuttal testimony.

Given the unrealistic aquifer parameters, it is unknown whether the Model version 1.1 is actually an improvement over Model version 1.0. And, accepting and using a model without qualification, when that estimate has a calculated error rate of over twenty-two (22%) percent raises serious questions when curtailing established property rights. Stated another way, the Director should have reasonable certainty of the results when he is proposing to curtail 23,000 acres and cause initial estimates of economic damage near \$12 million dollars in order to supply surface water to only 615 acres. This Model has not reached that point of certainty based upon unrealistic parameters, high calculated uncertainty, and the lack of required data.

With respect to an early version of the Eastern Snake Plain Aquifer Model (ESPAM), IDWR implemented a careful approach concerning the use of a groundwater model for curtailment. With respect to an error factor for ESPAM 1.0, Justice Schroeder, the Hearing Officer in the Spring Users' proceeding explained:

The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low. The Director concluded that the model could be no better than the measuring gauges and used the 10% margin absent a better figure developed through further testing of the model.

* * *

The evidence is clear that the model is not perfect and should have an error factor developed to utilize. It may be simple but true – a 10% factor is closer to accurate

than no error factor, once the scientists agree, as they do, that an error factor is desirable.

* * *

The Director's use of the "trim line" to limit curtailment was proper.

Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation at 14, 22 (Spring Users' Call, Jan. 11, 2008).

The Idaho Supreme Court addressed the issue on appeal in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011). In that case the Court found:

Former-Director Dreher relied upon the Department's ground water model in issuing the curtailment orders. However, he found that the model had an uncertainty of up to ten percent due to the margin of error in stream gauges used in developing the model. Based upon that level of possible uncertainty, he limited the junior water rights curtailed. . . . The Director also found that "the degree of uncertainty associated with application of the [Aquifer] ground water model is 10 percent."

* * *

The court stated, "The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality. . . . Given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error." The court concluded, "Accordingly, the Director did not abuse discretion by applying the 10% margin of error 'trim line.'" The issue is whether the district court erred in upholding the Director on the ground that he did not abuse his discretion in not curtailing ground water appropriators who are within the model's margin of error.

* * *

The Director concluded that there was up to a 10% margin of error in the groundwater model due to the margin of error in the stream gauges, and he decided not to curtail appropriators who were within that margin of error when deciding whether they were causing material injury to the Spring Users' water rights. . . . The district court did not err in upholding the Director's decision in this regard.

150 Idaho at 812, 816-17.

Whereas the Department previously excluded junior ground water rights within the identified margin of error, or model uncertainty of ten (10%) percent, the same protocol is even more warranted in this case where the Model's calculated error is over twice that number, *i.e.*, over

twenty-two (22%) percent. The predictions are even more uncertain in the Bellevue Triangle as the Model is non-linear and there are two aquifer sources, an unconfined and confined aquifer. Therefore, if the Director makes a decision on curtailment based on Model version 1.1, he would be making his decision with a very high error rate. Based on the above, the Districts submit that the Model is not sufficiently developed for purposes of conjunctive administration and cannot be reliably used to curtail junior groundwater rights in 2021.

D. Water Users Anecdotal Claims of Immediate Response from Turning Off Pumps Is Unscientific; Unreliable and Not Supported by Any Scientific or Technical Measurement Data.

The surface water users repeatedly made claims that when pumps in the Bellevue Triangle were turned off there is an immediate response in flows at Station 10. *See* Tr. Vol. III, 473:10-18; 493:15-24; 659-660; 740:15-18. The water users never identified which pump or the amount of pumping reductions, and never identified specific measurements showing any actual response, timing of response or volume of water.

Primarily, they relied on an incident in August 2020 when the watermaster requested that pumps be turned off to enhance flows at Station 10. Tr. Vol. IV, 785:10-786:8. The watermaster testified that he did make a request for pumping reduction in August 2020 to see if there would be a response at Station 10. *Id.* Following that request, the watermaster testified that he noticed that Station 10 flows experienced a noticeable uptick in flows. *Id.* However, a number of compounding factors make this observation unreliable as a basis for establishing cause and effect to any purported injury, particularly as to timing and volume of the responses.

First, at that same time of the request, surface water in Silver Creek went out of priority, including the Picabo Livestock's September 1883 right of 20 cfs. Tr. Vol. IV, 829:9-11. This means that 20 cfs was not being diverted above Picabo. Second, the watermaster did not know if

or how many pumps turned off or what volume was no longer being pumped. Tr. Vol. IV, 786:19-787:1. The watermaster said that he accounted for the surface water rights going out of priority and still had about 10 cfs of unaccounted-for increase in flows, which he attributed to pumping reduction. *Id.* However, his calculation of unaccounted-for flows failed to take into account a significant fact. He admitted that Nick Purdy (Picabo Livestock) had turned on a pump and pumped 8 cfs directly into Silver Creek at this same time. Tr. Vol. IV, 855:5-12. He also admitted that he did not account for this direct pumping into the creek when expressing his opinion that there was 10 cfs of unaccounted-for increase in flow, and admitted that this direct pumping represented the vast majority of the unaccounted-for increase in flows. Tr. Vol. IV, 786:19-787:1.

The claims of immediate response from turning off pumps do not represent the best available science. They are not supported by any real data. Instead, such assertions are pure speculation. Speculation is the “art of theorizing about a matter as to which evidence is not sufficient for certain knowledge.” *Karlson v. Harris*, 140 Idaho 561, 432, 97 P.3d. 428, 565 (2004) (citing Black’s Law Dictionary 1255 (5th ed.1979)). Whether Mr. Lakey is an expert or a lay witness does not matter, his testimony cannot be based on inadmissible speculation. *Tech Landing LLC v. J LH Ventures, LLC*, 162 482, 490, 483 P.3d. 1025, 1033 (2021). Moreover, any claims of the individual water users purporting to tie the timing of unknown wells being turned off with increased flows in the Little Wood River are not admissible testimony because they have no first-hand knowledge of the facts they purported to relay. Idaho Rule of Evidence 602; Comment to IRE 602 (“Rule 602 is intended to continue the common law requirement that a lay witness must have “first hand” knowledge of the facts to which he testifies.”). Several senior witnesses admitted they did not know which pumps had a direct impact on Silver Creek flows or were causing injury

to senior surface water rights. Tr. Vol. III, 456:15-18; 500:15-18; 612:19-25; 613:1-10; 663:22-25; 664:1-6; 706:20-25; 707:1-2; 723:11-19.

E. Comparison Of Priority Cut Dates in the 1930s With Current Projected Priority Cut Dates Does Not Establish Material Injury.

The Director's Request for Staff Memoranda asked staff as part of an evaluation of potential methods of determining injury to compare deliverable priorities as between analogous water years prior to pumping and deliverable dates that might be expected in 2021. Tim Luke's Staff Memo, §10 responded by observing that water years 1937 and 1939 had similar values for the Hailey gauge records, based on NRCS SWSI report when compared to the April 1 NRCS forecast for 2021. IDWR Ex. 4. He concluded correctly that the 1930s for the most part, proceeded groundwater development in the Bellevue Triangle. IDWR Ex. 4 at 21. Mr. Luke then identified water master delivery records for more recent analog years to 2021. He compared curtailment volumes between 1937/1939 and 2004/2020, which he selected as analog years to 2021. On the first day of the hearing, Sean Vincent provided a stream flow forecast updated to June 1, 2021, which showed that the forecast had deteriorated significantly since the April 1 forecast. By June 1, the NRCS forecast placed the stream flow at Hailey as one of the worst years, in the past 30 years, Tr. Vol. I, 48:2-15, with a SWSI forecast number of -4.0. IDWR Ex. 5; Tr. Vol. II, 340:9-10. The result of this forecast change is that the 1937 and 1939 water year no longer match the current forecast run off for 2021, since the 1937 and 1939 SWSI numbers were -3.2 and -3.0. Tr. Vol. II, 339:24-340:5. Not -4.0, which is the June 1, 2021 forecast. IDWR Ex. 5.

The change in forecast would result in different analog years in the pre-pumping period. Tr. Vol. I, 51:8-15. In fact, now 1931 is a more comparable year for pre-groundwater development based on the June 1, 2021 NRCS forecast. Tr. Vol. II, 299:5-11. IDWR does have curtailment

records from the Black Book for 1931. *Id.*; SVGWD & GGWD Ex. 39 at 11. But IDWR did not run the numbers for the 1931 water against a comparable water year to the 2021 SWSI forecast.¹⁸

The net effect is that 1937 and 1939 are no longer the right pre-ground water development years to compare to the current water year. The year 1931 would be similar, but that comparison was not done by IDWR. Thus, the comparisons in Mr. Luke's Staff report are no longer appropriate. Moreover, the comparisons do not prove injury, as Mr. Luke agreed. Tr. Vol. II, 341:6-11.

Another significant problem with comparing water years from the 1930s to current years is that since the 1930s Silver Creek and the Little Wood have deteriorated significantly in their ability to transmit water downstream to Station 10 on the Little Wood without excessive seepage losses. In the 1930s and 1940s, the Water District¹⁹ was engaged in a program to maintain the banks of the creek to prevent channel losses. For example, the 1931 Black Book reports work performed to prevent loss of water to sink holes in Silver Creek. SVGWD & GGWD Ex. 39 at 7; Tr. Vol. IV, 858:7-859:2. Seepage losses in the creek and river were estimated at 15% for the 1930s. SVGWD & GGWD Ex. 39. In the 1940s, the water district entered into an easement agreement with landowners on Silver Creek to build up, repair and maintain the banks of Silver Creek specifically to prevent the loss of irrigation water. SVGWD & GGWD Ex. 12 at 1; Tr. Vol. IV, 858:7-859:2.

¹⁸ SVGWD witness Dave Shaw offered testimony comparing the 1931 water year with current water years in modern times with the earliest curtailment dates in the Little Wood River, but the Director did not admit the testimony on the ground that it was "not SWSI." Tr. Vol. V 1357:18-1359:7; *See also* SVGWD & GGWD Ex. 42. Yet, as Mr. Vincent testified, the NRCS SWSI report values that are taken from the USGS Hailey Gauge records. If anyone looked at the USGS records they would be looking at the same data that is reported by the NRCS SWSI report. Tr. Vol. VI 1466:25-1467:13. Mr. Shaw, rather than relying on the NRCS report, went directly to the same data that is the basis for the NRCS reports. So, while his opinion is "not SWSI," it relies upon the same data

¹⁹ WD 11AB, now WD 37.

Since the current water master has been in office for the past 20 years, the water district has not maintained the banks of the Creek as set out in the easement and has not sought permits for any such work. Lakey Testimony. Not surprisingly, then, the seepage losses between Sportsman's Access and Station 10 have approximately doubled to a range of 20-37%. IDWR Ex. 2 at 26; Tr. Vol. I, 140:21-141:12. The water master measured approximately 20 cfs was being lost at a single stretch on Silver Creek in March 2021. Tr. Vol. IV, 852:8-10 Moreover, reliable evaluation of seepage losses is frustrated by measurement uncertainty. Tr. Vol. I, 131:21-25. IDWR views the Station 10 measurements as "poor." Tr. Vol. I, 232:3-9.

As testimony on the last day of the hearing showed, even today, during an inadequate water supply where users are demanding water, there are significant obstructions in the creek and river. Mr. Purdy found two beaver dams, one on Silver Creek and one on the Little Wood, that were backing water up and on to adjacent land. When he partially breached the beaver dams, increased flows showed up at Station 10 right away. Tr. Vol VI, 1396:13-18; SVGWD & GGWD Exs. 43-46. Beavers will return and repair the dams if the beaver are not trapped. Tr. Vol. VI, 1407:18-22, 1408:6-14. The Supreme Court has long held that the law of Idaho is that a junior water right holder has a "vested right to insist on the continuance of the condition that existed at the time he made his appropriation." *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912).

These current obstructions are further reason that comparing flows and curtailment dates in the 1930s with the current flows and potential curtailment dates is fraught with uncertainty and not a reliable way to establish injury.

F. The Notice Limited the Scope of The Hearing to the Irrigation Season.

Big Wood Canal Company ("BWCC") attempted to assert injury to its stock water right after the irrigation season. Tr. Vol. III, 544:8-16, 545:11-17. BWCC offered no evidence to

quantify such injury. The model results do not predict any amount of flow that might be available for this right after the irrigation season. IDWR Ex. 2, at 25. BWCC did not testify how it would put that water to beneficial use. Consequently, BWCC failed to comply with the directive from the pre-hearing conference to do more than show a water right that might suffer a shortage. Moreover, any claim to injury to a water right beyond the 2021 irrigation season is beyond the scope of this proceeding and should not be considered.

G. The Impact of Galena Ground Water Users to Silver Creek Is Nominal and Does Not Justify the Department's Proposed Curtailment.

Only twenty-one (21) out of over four (400) hundred of Galena GWD's members' water rights are located within the proposed curtailment area. SVGWD & GGWD Ex. 41. The total decreed flow rate for those twenty-one (21) water rights is only 4.04 CFS. *Id.*; Tr. Vol. V, 1273:5-13. But, based on Mr. Powell's calculations, the flow rate that would be curtailed under a curtailment order would only be 3.8 CFS, which he opined would have a nominal impact on Silver Creek. Tr. Vol. V, 1275:10-13; 1301:11-14.

Such conclusion is based on Mr. Powell's review of the response functions of the Model's cells located within the Galena GWD area, which were provided by Ms. Sukow in her shape files. Tr. Vol. V, 1274:4-8. The response functions in those shape files were based on a five (5) month percentage of what water would show up in Silver Creek if a curtailment occurred. Tr. Vol. I, 197:13-198:12. It is unclear whether that five (5) month period was for 2002 or 2007, which is important because the percentages would change since the Model is not linear. Nevertheless, based on the information that Ms. Sukow provided in her shape files, Mr. Powell calculated the response functions of the cells within the Galena GWD area to be between a 4.6%-20% response. *Id.* at 1274:4-12. Mr. Powell also ran the Model to obtain the actual model response for the cells encompassing the twenty-one (21) Galena ground water users' water rights during the curtailment

period, which quantified that amount at less than 0.5 CFS. *Id.* at 1276:16-1277:1; 1302:2-9. Certainly, this nominal amount of water does not justify a curtailment of Galena GWD's members.

H. Curtailment Would Violate Idaho's Law on Optimum Development and the Principle of Conjunctive Management of Surface and Ground Water.

The Director must evaluate the proposed 2021 conjunctive administration in the context of the Ground Water Act and other Idaho law. In general, the Director is proposing to curtail approximately 23,000 acres in the Bellevue Triangle in order to support the temporary irrigation of 615 acres located downstream (i.e., Barbara Farms LLC = 217.5; Taber = 229; Ritter = 168). As a comparison, the administrative action would be the equivalent of curtailing ninety-eight (98) acres in order to supply water to two (2) acres ($23,000/615 = 0.02$). Idaho law provides the following policy considerations when evaluating conjunctive administration in this context.

First, Idaho Code § 42-101 charges the Director with the following concerning irrigation rights:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, providing for its use, shall equally guard all the various interests involved.

I.C. § 42-101 (emphasis added).

While the prior appropriation doctrine controls distribution of water to the various rights, this provision has important consideration in the context of this proceeding where the Director did not initiate the matter until May 4, 2021, well after the irrigation season began. Faced with a decision as to how to administer for the balance of the irrigation season, the Director must "equally guard all the various interests" of the seniors and juniors and make a decision in the best interest of the State at this late date. Curtailing 98% of the acres involved in order to supply water to a

mere 2% is not “economical” and does not lend itself to the continued industrial prosperity of the state for the rest of the 2021 irrigation season.²⁰

Next, the Ground Water Act specifically requires consideration of the following:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

I.C. § 42-226.

The Idaho Supreme Court addressed the Ground Water Act’s concepts of “reasonable use,” “beneficial use, and “full economic development” or “optimum development of water resources” in *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016) (hereinafter “*Rangen*” case). In *Rangen*, the Court held the following:

The Court has previously held that hydrologically connected surface and ground waters must be managed conjunctively. . . . “While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception . . . the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.” . . . As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho. . . . This policy limits the prior appropriation doctrine by excluding from its purview water that is not being put to beneficial use. . . . Necessarily, not all of the water collected due to the curtailment will accrue to the senior water right holder; some will remain in the aquifer and some will flow to other tributary springs. This complexity can make it very difficult to balance a senior right holder’s interest in receiving additional water against the State’s interest in securing the maximum use and benefit, and least wasteful use, of its water resources. In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in an delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller. As discussed, Idaho law contemplates a balance between the “bedrock principles” of priority of right and

²⁰ There are approximately 23,615 acres at issue (23,000 in the Bellevue Triangle, 615 in the Little Wood), of which the potential injury to rights in the Little Wood only comprises about 2.6%.

beneficial use. . . . The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.

369 P.3d at 908-910.

The Director's discretion and "balancing requirement" in conjunctive administration in this proceeding is further tempered by the timing. This is a case where crops have already been planted and are currently receiving irrigation water. The optimum use of water resources in 2021 must take into consideration the best use of available water in the public interest. Curtailing 23,000 acres to supply a limited quantity of water to 615 acres is not "securing the maximum use and benefit, and least wasteful use" of water supplies in the Bellevue Triangle and Silver Creek/Little Wood area for the balance of the 2021 irrigation season. Whereas, IDWR's own staff report shows that 67% of the curtailed water would remain in the aquifer and not be put to beneficial use by anyone, senior or junior, that waste of resources tips the scale in the favor of the juniors at this point in time. Stated another way, this state policy does not condone curtailing 23,000 acres in order to save 650 for the balance of this season.²¹

The timing of the proposed curtailment further warrants against its order this summer. Junior ground water users have entered into contracts, planted crops, and initiated two months of irrigation. The Director and IDWR never indicated that a new proceeding under Idaho Code § 42-237a.g would be initiated during the irrigation season for purposes of water right administration. Instead, IDWR and the Director have always contemplated using the CM Rules for conjunctive administration of surface and groundwater resources in Water District 37. Those representations

²¹ Moreover, any of the drought induced losses suffered by Mr. Taber are covered by a multi-peril drought insurance policy. Tr. Vol. III, 706:1-5; 708:7-9; 712:2-7. Given that remedy, the disparity is even greater as the Director would be curtailing 23,000 acres to supply limited water to Barbara Farms' 217.5 acres, less than 1% of the acres curtailed ($23,000/217.5 = 0.09$). The effect of curtailment is even further unwarranted if Barbara can be supplied water for the rest of 2021 through the Milner-Gooding Canal.

were made when ground water rights were brought under the administrative regime of Water District 37 back in 2014. *See* SVGWD & GGWD Ex. 4.

At no time did anyone at the State indicate a different process would be employed for administration. Tim Luke admitted the same at hearing. Tr. Vol. II, 312-13. This “unfair surprise” tempers the Director’s discretion in this proceeding and the maximum use of available water for the balance of the 2021 irrigation season. On the flip side seniors have made decisions anticipating a lower water supply due to a lower snowpack and lack of precipitation. Tr. Vol. III, 457:8-15 (“we chose not to grow corn or as many acres as of beans based on potentially shorter water season . . . Q. That decision was made last winter? A. It was made during the course of the winter, yes”); 485:23-25; 486:1-7; 506:24-25 (“I planted [Timothy hay] 2 years ago to survive shortfalls of water”); 680:7-9. Seniors testified they planted grain and rented additional water for purposes of their crop decisions this year. *See generally* Brossy Testimony; Huyser Testimony, Taber Testimony, Arkoosh Testimony. Those decisions were made well in advance of any proposed conjunctive administration that was initiated on May 4, 2021. Whereas decisions have been made, the table is set, the Director must exercise his discretion accordingly.

Curtailing groundwater acres at this point in the irrigation season would basically preclude the beneficial use of 67% of the available groundwater and curtail 98 acres of groundwater irrigated land in order to supply water for 2 acres of surface irrigated land. The Director should deny curtailment accordingly.

I. No Legal Authority for This Administrative Proceeding Taking Place in Mid-Season Outside the Conjunctive Management Rules.

SVGWD filed a motion to dismiss this proceeding on various legal grounds, including the requirement that the Director was required to proceed under IDWR’s CM Rules. *See generally*,

SVGWD Motion to Dismiss (5/13/21). The Director denied the motion and asserted that the CM Rules were not implicated because no delivery calls had been filed. *See Order Denying Motion to Dismiss* at 5-6 (“*Denial Order*”). SVGWD adopts and incorporates its prior motion to dismiss and supporting materials, and reasserts that legal position for purposes of this post-hearing brief.

While the Director did not have the benefit of sworn testimony at the time of ruling on the motion to dismiss, there is no question now that the seniors are requesting administration of junior ground water rights and claiming adverse effects to their senior surface water rights under oath. *See e.g., AFRD#2 v. IDWR*, 143 Idaho 862, 877 (2007) (noting requirement for CM Rules and section 42-237b to file a written statement “under oath”); *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* at 25 (SWC Call, Apr. 29, 2008) (“The senior water right holder must allege material injury under oath setting forth the basis of that belief”). Consequently, such statements qualify as a “delivery call” under the CM Rules and/or an adverse claim that triggers a local ground water board process.²² For the foregoing reasons the Director should dismiss this proceeding and apply the applicable statute and rules for purposes of conjunctive administration in 2021.

First, the Director cannot read section 42-237a.g in isolation from the rest of the Ground Water Act. Both section 42-237a.g and 42-237b were codified as part of the 1953 amendments to the Ground Water Act. *See Idaho Sess. Laws*, Chp. 182. As such, the Director must read the statutory provisions in context of the entire act, not in isolation from one another. *See Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310 (2009). The Idaho Supreme Court provided the following guide for statutory construction:

²² Idaho Code § 42-237b was effective law at the time of hearing and is still effective today. Furthermore, since the Legislature had not adjourned there remains a question as to whether or not statutes passed during the session are legally effective July 1, 2021. *See Alex J. Adams (DFM) May 20, 2021 Memo to Department Heads*.

In construing legislative acts it is not the business of the court to deal in any subtle refinements of the legislation, but our duty is to ascertain, if possible, from a reading of the whole act, and amendments thereto, the purpose and intent of the legislature and give force and effect thereto. *State v. Groseclose*, 67 Idaho 71, 171 P.2d 863 (1946). Statutes must also be construed as a whole without separating one provision from another. *Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982); *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 639 P.2d 442 (1981). The primary function of the court in construing a statute is to determine legislative intent and give effect thereto. *Carpenter v. Twin Falls County*, 107 Idaho 575, 691 P.2d 1190 (1984); *Umphrey v. Sprinkel*, 106 Idaho 700, 682 P.2d 1247 (1983).

See George W. Watkins Fam. v. Messenger, 118 Idaho 537, 539–40, 797 P.2d 1385, 1387–88 (1990), abrogated by *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011).

In denying the motion to dismiss, the Director reasoned that conjunctive administration can apparently occur in one of three forums as of the spring of 2021: 1) an IDWR section 42-237a.g proceeding initiated by the Director; 2) the CM Rules; or 3) a local ground water board under section 42-237b. The Director's interpretation misses the intent of the Legislature and how water rights are to be administered within a water district. If a water user believes another right is causing an adverse effect, the local ground water board process provides a forum. *See* I.C. § 42-237b. The Director believes section 42-237a.g usurps the procedure if he makes the decision to administer. If that is a correct interpretation, then the power to administer, or not administer, is left solely in the agency's hands, and apparently to the Director's lone discretion.

If the Director could use 42-237a.g for conjunctive administration then why bother with the CM Rules in 1994, the SRBA, and the combination of ground and surface rights into Water District 37? The Director's "fielder's choice" interpretation fails, especially when the agency has represented to water users for over 20 years that the CM Rules would be the vehicle to implement conjunctive administration in Basin 37. Instead of following a court tested procedure that provides certainty to all water users involved, the Director chose a new path, not supported by Idaho's

canons of statutory construction. If section 42-237a.g provided the agency with sua sponte authority to administer, then why did IDWR ignore past droughts in Basin 37, and why did IDWR not use its authorities in other basins around the state for the same purpose? Even if the Director had no such authority, singling out ground water users in the Bellevue Triangle for 2021 is an arbitrary exercise of that authority considering the various drought declarations across the State and shortages to senior water users in other Basins.

Reading the entire Ground Water Act in context, if the Director wishes to address adverse claims in conjunctive administration, then section 42-237b provides a detailed procedure before a local ground water board. The Director cannot “pick and choose” which parts of the Act to implement. *See e.g., In re Salgado-Nava*, 473 B.R. 911, 919 (9th Cir. BAP 2012) (“it is not our role to pick and choose between statutory provisions and only give effect to some of them”). In denying the motion to dismiss, the Director points to the repeal of section 42-237b, but not 42-237a.g to justify his position. *Order Denying Motion to Dismiss* at 4. However, section 42-237b was effective at the time of the issuance of the *Notice* on May 4, 2021, and remains effective today. The Director has no legal authority to ignore an effective law. Moreover, IDWR was the agency that proposed the legislation in the first place, not on the basis that section 42-237a.g. would be used for conjunctive administration, but rather on the representation that the CM Rules would be the procedural vehicle for such administration. *See Statement of Purpose* House Bill 43, 2021 Idaho State Legislative Session.

In arguing against the application of the CM Rules, the Director’s *Denial Order* focused on the absence of a delivery call by senior rights holders. *See Denial Order* at 5-7, 11. Since those arguments have been made however, numerous senior rights holders have testified, both during depositions, and during the hearings for this matter, that they are requesting administration, or

calling on, junior ground water rights in the Bellevue Triangle.²³ In light of these calls for administration, it is appropriate for this matter to be dismissed and for the Director to initiate proceedings pursuant to the CM Rules.

“The [CM Rules] prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” CM Rule 01. The CM Rules define a delivery call as, “A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.” CM Rule 10.04 (emphasis added).

The *Denial Order* argues that the Director is empowered to proceed under Idaho Code §42-237a.g in order to protect senior right holders, and that “adopting the protracted and time-consuming schedule contemplated by Bellevue and South Valley would effectively preclude any possibility of protecting senior surface water rights.” *Denial Order* at 11. However, the senior right holders *have* made calls for conjunctive administration in this matter and the CM Rules provide a full, and detailed procedure for the protection of those senior water rights. There is no basis for the Director to cast aside the rules and take the unprecedented step of administering rights under Idaho Code §42-237a.g. As evidenced at the hearing, the CM Rules are now clearly implicated by reason of the seniors’ call for administration.

The Director recognizes that “the CM Rules provide procedures for responding to delivery calls.” *Id.* at 5 (emphasis in original). As numerous, unequivocal calls for conjunctive water

²³ See Tr. Vol. II, I, 455:12-14 (Mr. Brossy “requesting administration of water within Basin 37 in priority”); 499:7-8, 10 (Mr. Hubsmith “requesting from the Director to administer water rights by senior priority doctrine. . . Both surface and groundwater”); 632:1-3 (Mr. Arkoosh stating “I would like the Department to administer the water in Water District 37, groundwater water and surface water, by priority date”); 663:18-21 (Mr. Huyser claiming material injury to surface rights caused by upstream groundwater pumping); 708:10-13 (Mr. Taber claiming injury to surface rights based upon junior pumping upstream); 722:18-22, 723:5-8 (Mr. Legg requesting conjunctive administration, claiming injury by junior groundwater rights); 744:2-5 (Mr. Newell seeking to have surface and groundwater rights administered pursuant to their priorities).

administration have occurred for Basin 37, the Director should follow the dictates of the CM Rules and initiate proceedings under that procedure. The present proceedings, being no longer necessary to protect the senior's water rights in the presence of clear calls for conjunctive administration of water right, should be dismissed and the Director should initiate proceedings consistent with the CM Rules.

IV. CONCLUSION

Curtailment of 23,000 acres of productive crop land in the Bellevue Triangle in the middle of the irrigation season would devastate the planted crops. Potatoes would die. Barley would not make grade. Pastures would have to be replaced with purchased hay resulting in loss of calves and significant loss of reproduction. All of this, for three farms that might benefit if the predictions of the model are correct—predictions admittedly made with a high predictive error rate of greater than 22%. That error rate does not even include the undisputed deficiencies in the model's hydrologic transmissivity rates, and the fact that significant changes in water use have been implemented in the Bellevue Triangle since 2014 data was last added to the model calibration.

Curtailment under this scenario would violate the Idaho law of optimum development of the water resources, Idaho Code § 42-226, the Conjunctive Management Rules, and the duty of the Director to balance uses to avoid waste. For all these reasons, South Valley Ground Water District and Galena Ground Water District request the Director take no further action under these proceedings and dismiss this contest case.

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Dated this 21st day of June, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 2021, the foregoing was filed, served, and copied as shown below.

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