Albert P. Barker, ISB #2867
Travis L. Thompson, #6168
Michael A. Short, #10554
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034
Email: apb@idahowaters.com
tlt@idahowaters.com
mas@idahowaters.com

Attorneys for Petitioner South Valley Ground Water District

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SOUTH VALLEY GROUND WATER DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources, Respondents.	CV07-21-00243 CASE NO. CV07-2021-_____ **MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW, COMPLAINT FOR DECLARATORY RELIEF, TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, OR ALTERNATIVELY, WRIT OF PROHIBITION**

COMES NOW, the Petitioner, SOUTH VALLEY GROUND WATER DISTRICT, on behalf of its members (collectively "Petitioner"), by and through counsel of record, BARKER ROSHOLT & SIMPSON LLP, and hereby submits this *Memorandum in Support of Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary*

Injunction, or Alternatively, Writ of Prohibition ("Petition"). This memorandum sets forth the points and authorities supporting each count included within the Petition and is supported by the Petition, the *Declaration of Travis L. Thompson*, the *Declaration of David B. Shaw*, the *Declaration of G. Erick Powell*, the *Declaration of SVGWD Chairman Kristy Molyneux*, and all attachments and exhibits thereto, all of which all been filed concomitantly with this memorandum.

INTRODUCTION

The Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11 et seq.) ("CM Rules") implement Idaho law with respect to administration of surface and ground water rights. Idaho Department of Water Resources (IDWR), district court, and Idaho Supreme Court precedent identify a detailed process and sequence of events for the agency to follow.

In this case, the Director has cast aside this well-established precedent, including a prior district court final judgment, and has instead decided to play an alleged 60-year-old "hole card" for conjunctive administration. *See* Ex. P to *Thompson Dec.* (a true and correct copy of the May 21, 2021 *Order Denying Motion to Appoint Independent Hearing Officer*) at 2 ("This is the first time the Director has sought to invoke Idaho Code § 42-237a.g. for water right administration") (emphasis added).

Despite this claimed statutory authority existing since 1953, and a ground water management area designation in place since 1991, the Director consciously chose to wait until May 4th of this year, after SVGWD members had planted and started irrigating 25,000 acres of valuable crops and forage, before starting an administrative case that is slated to begin and end within a few weeks. In an unprecedented move for the agency, the Director has shelved the CM Rules and has forced junior ground water users to suffer a brand new fast-tracked administrative

process where extensive hydrologic and modeling information is supposed to be analyzed and defenses prepared and presented at an administrative hearing set to begin in less than two weeks.

The Director has disregarded agency and judicial precedent, and has refused to follow CM Rule 30 procedures for administration of ground water rights in Basin 37, a region where ground water rights are included within a water district but where no "area of common ground water supply" has been designated. Instead, the Director has taken on burdens and process required of senior surface water right holders, and has done so through defective notice and an arbitrary and clandestine roll out of technical information. Although the Petitioner filed a *Request for Information* with the Department on May 13, 2021, the agency has yet to produce any documents as of the date of the filing of this case.[1] *See Thompson Decl,.* ¶ 17.

In addition, over two weeks after the May 4th *Notice*, IDWR released over 150 pages of staff reports in the late afternoon of May 18th, including extensive and new groundwater modeling. Instead of providing a reasonable time to evaluate this information and conduct meaningful discovery, the Director is unlawfully requiring the Petitioner to evaluate this material and prepare for a hearing set to begin in less than two weeks. Prejudicing SVGWD and its consultants, the Director's novel process does not provide "a meaningful opportunity to be heard in a meaningful manner." The consequences will be the unlawful and arbitrary curtailment of over 25,000 acres in Blaine County that rely upon groundwater in some manner for an irrigation water supply.

The Director's truncated administrative proceeding is an unlawful substitute for what is required under Idaho law. Simply put, the proper procedure to be used in this situation is the CM Rules promulgated and adopted pursuant to chapter 6, title 42. Whereas Water District 37 includes

[1] Since IDWR has refused to respond to Petitioner's request for information the Petitioner was forced to file a public records request with the agency pursuant to Idaho Code § 74-102 on May 21, 2021. *Thompson Decl.*, ¶ 26.

surface and ground water rights, and the CM Rules implement Idaho Code §§ 42-603 and 607; Idaho Code § 42-237a.g is not a lawful substitute for conjunctive administration in this case. Continuing with the present administrative proceeding and threatened curtailment of thousands of SVGWD's members' irrigated lands stands to cause over $12 million dollars in immediate and irreparable economic harm. The Director's surprise move has no basis in Idaho law and completely belies agency representations to the SRBA Court, the Basin 37 surface and ground water users, and most recently the Idaho Legislature.

Only this Court has the legal and equitable authority to stop this arbitrary agency action and prevent irreparable harm. For the reasons set forth below the Court should issue a preliminary injunction and preserve the status quo while this action is adjudicated.

FACTUAL BACKGROUND

A. *Ground Water Rights in Basin 37*.

IDWR designated the Big Wood River Ground Water Management Area (BWRGWMA) on June 28, 1991. Although the order included a "management policy," it did not establish either a reasonable groundwater pumping level or a "reasonably anticipated rate of future natural recharge." Moreover, the designation did not determine an "area of common ground water supply." Since that time, aquifer levels in the Big Wood River Basin have remained fairly stable and based upon an IDWR presentation, there is no evidence of aquifer mining. *See* Ex. A to *Declaration of Travis L. Thompson* ("*Thompson Decl.*"). Two years later, IDWR issued an *Amended Moratorium Order* affecting all applications for permit proposing a consumptive use of water within the trust water area.

Historically, ground water rights in Basin 37 were not included within established water districts. That changed with the culmination of the Snake River Basin Adjudication (SRBA) and

the court's order authorizing the Director to distribute water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and partial decrees that superseded the reports for those surface and ground water rights located in Basin 37, part 2 (Camas and Clover Creek drainage areas) and part 3 (Upper Big and Little Wood River drainage areas). At the time, in its September 17, 2013 *Preliminary Order* from In the Matter of the Proposed Combination of Water District Nos. 37 et al., the Department explained:

> The proposed combination of water districts and inclusion of surface water and ground water rights in one district will provide for proper conjunctive administration of surface and ground water rights and the protection of senior priority water rights.

See Ex. B to *Thompson Decl.* ("*WD37 Order*") at 3 (emphasis added).

In the conclusions of law regarding the combination of the water districts and inclusion of surface and ground water rights, the Department found:

> 4. Idaho Code § 42-604 mandates the Director form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. . . Efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users. *Id.* The combination and revision of water districts within Basin 37, parts 2 and 3 is necessary for the reasons set forth in Finding of Fact 13 and for the efficient administration of water rights in general.
>
> * * *
>
> 16. …Adversarial tensions between ground water and surface water users resulting from potential conjunctive administration of water rights should not negatively affect water district operations given the limited regulatory scope of the water district and the fact that conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR's) (IDAPA 37.03.11). . . . Moreover, the CMRs have been implemented and mitigation has been successfully implemented within WD130 without disruption to the operations of the water district despite the fact both surface water and ground water rights are included in the district.

> 17. …The Department is statutorily obligated to create or modify water districts largely to provide a regulatory structure to address water distribution problems and minimize potential conflicts. Water districts are not authorized to address potential mitigation requirements of junior ground water right holders but they are authorized to enforce mitigation requirements that may be required pursuant to orders of the Director under the CMRs.
>
> * * *
>
> 24. …Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should take the following actions:
>
> i. Combine WD37 and WD37M into one water district to be designated as WD37;
>
> ii. Combine ground water rights in the Upper Wood River Valley and Silver Creek/Bellevue triangle area with surface water rights in a combined WD37 to regulate water rights, and protect senior priority water rights in Basin 37;

WD37 Order at 8, 10, 12 (emphasis added). Thus, when groundwater rights were brought into WD37, that decision was based on the Department's representation that conjunctive administration would be managed under the CM Rules.

B. *Conjunctive Administration of Water Rights in Basin 37*.

Shortly after IDWR combined the various water districts and included ground water rights in WD37, the Department addressed conjunctive administration and the formation of ground water districts at a public meeting in Hailey, Idaho on March 7, 2014. Questions surrounding including ground water rights in the water district were understandable given historic administration. The Department's presentation identified the following with respect to conjunctive administration in the basin:

Does ground water pumping cause injury to water rights diverted from the stream?

Idaho has a process to address this question.

Ex. C of *Thompson Decl.* at 8.

Conjunctive Management of Surface and Ground Water Resources

- Conjunctive Management Rules
  - IDAPA 37.03.11
  - Authorized by I.C. § 42-603
- IDWR Adopted 1994
  - (approved by Legislature 1995)

Id. at 9.

Specifically, as to procedure and how the agency intended to distribute water to the various rights within the water district, IDWR represented the following:

Delivery Calls and Mitigation in a Water District (process/timeframe)

- Senior must submit petition alleging injury by junior users and identify senior rights being injured
- Initial investigation by Water District watermaster and IDWR
  - Director may request additional information from Senior (senior does not bear burden to determine/prove injury)
- IDWR Director considers factors to determine material injury
  - Matter generally handled as contested case as per IDAPA Rules
  - Pre-hearing schedule
    - information gathered/provided by both senior and junior right holders; expert reports/analyses; motions; depositions etc.
  - Hearing scheduled and held
- Time from Delivery Call Petition to Hearing
  - May take up to one year or more:
    - May depend on complexity of case and parties
    - May depend on availability of ground water model

Id. at 15-17 (emphasis added).

As set forth in the Department's representations to the water users within WD37, conjunctive administration was to follow the CM Rules, with a senior filing a petition, the Director determining "material injury," and a contested case that would be expected to last a year or more.

Having addressed calls throughout the ESPA, IDWR understood the complexity and time needed to address conjunctive administration in an orderly and fair process.

On February 23, 2015, less than a year after IDWR's presentation, members of the Big Wood and Little Wood River Water Users Association ("Association") submitted letters to the Director requesting priority administration. *See* Ex. D of *Thompson Decl.* at 3 (a true and correct copy of the *Memorandum Decision and Order* issued on April 22, 2016 in *Sun Valley Co. v. Spackman*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV-WA-2015-14500 ("*Memorandum Decision and Order*")). The Director created contested cases and proceeded to consider the Association's delivery calls under CM Rule 40. The Director held a status conference on May 4, 2015, and then a pre-hearing conference on June 3, 2015. The Director also requested detailed information and data from staff in the form of a memorandum that was due by August 21, 2015.

Sun Valley Company (SVC) moved to dismiss the calls for the Association's failure to comply with the procedure of CM Rule 30. The Director denied the motion to dismiss but then designated that decision as a final order for purposes of judicial review. On appeal, the District Court set aside the Director's decision and remanded the case for proceedings consistent with its *Memorandum Decision and Order*. *See* Ex. D to *Thompson Decl.* The Court found the Director's decision violated the CM Rules and the substantial rights of the junior ground water right holders. The Court noted since there was no defined "area of common ground water supply," IDWR was required to process the delivery call under CM Rule 30. The Court further found that the determination of an "area of common ground water supply" had to be made pursuant to CM Rules 30 and 31 with proper notice and service to all potential junior priority ground water right holders that might be affected. IDWR did not appeal the district court's final judgment.

On March 6, 2017, the Association filed a *Petition for Administration* with IDWR. The Director authorized discovery and then held a pre-hearing conference on May 11, 2017. SVGWD filed a motion to dismiss that was joined by other parties. After further briefing by the parties, the Director entered an order dismissing the petition on standing grounds on June 7, 2017. The Director concluded that CM Rules 30 and 42 require submittal of specific information unique to each senior surface water user, including water right numbers, delivery systems, beneficial use, and alternate water supplies. The Association did not appeal or seek further review of the Director's order.

C. *Proposed 2021 Ground Water Curtailment in Basin 37*.

In the fall of 2020 IDWR appointed an advisory committee for the Big Wood River Basin Groundwater Management Area. The committee met over several months addressing a variety of topics and issues. In the spring of 2021 senior surface water users on the committee identified alleged injuries and so-called "quasi-injuries" for the upcoming irrigation season. At the April 7, 2021 meeting, a representative for the senior surface water users requested the following:

> The lower valley surface water users made a counter proposal that included limiting groundwater within the Galena Groundwater District to 12,000 acre feet, limiting groundwater pumping within the South Valley Groundwater District to 25,000 acre feet, an August 15th end date for groundwater irrigation pumping, a minimum flow target of 50 cfs on the Little Wood River at Station 10.

Ex. F of *Thompson Decl.*

At the April 15, 2021 meeting, the representative for the senior surface water users made the following statements regarding alleged material injury:

> Cooper Brossy then provided an update on the lower valley surface water users' projected 2021 shortfalls. He indicated that they estimate a system injury of 38,850 acre-feet, with injury to individual users totaling 18,210 acre-feet (11,460 acre-feet for Big Wood Canal Company/Magic Reservoir and 6,750 acre-feet for decree users, including 3,000 acre-feet for Big Wood

> River decreed rights, and 3,771 acre-feet for Little Wood River decreed rights).

Ex. G of *Thompson Decl.*

At that same meeting, the Director stated that he was "ready to act" and warned groundwater users that they may be required "to reduce pumping much more than the amounts identified by the groundwater districts." *Id.* After the Director's pronouncement, the Association rejected the proposal from the ground water users. Thereafter, the Association members did not file a delivery call meeting the requirements of CM Rule 30. *Thompson Decl.* ¶ 22.

On May 4, 2021 the Director issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing*. *See* Ex. I of *Thompson Decl.* ("*Notice*"). The Director stated that he "believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season." *Notice* at 1. The *Notice* was accompanied by cover letter stating the following:

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

Ex. J of *Thompson Decl.* (emphasis added).[2]

The *Notice* does not identify which surface or groundwater water rights are affected or by how much. The Director stated at the April 15th meeting that "the impact of groundwater pumping

[2] The original letter and *Notice* included an address list with errors. Consequently, IDWR revised its address list and resent the letter and *Notice* on May 7, 2021. *See* Ex. K of *Thompson Decl.*

on surface water flows varies by location, with some pumpers impacting surface flows more than others." *See* Ex. G of *Thompson Decl*. However, the *Notice* does not identify the surface water rights that are or may be injured. Further, the *Notice* provides no indication of any injury standard, including "material injury" under the CM Rules. The *Notice* references groundwater model "curtailment runs" but does not identify those runs or the results. Significantly, the *Notice* only references potential impacts on "senior surface rights on Silver Creek and its tributaries during the 2021 irrigation season." *Notice* at 1. The *Notice* makes no reference whatsoever to senior surface water rights on the Little Wood or Big Wood Rivers.

On May 11, 2021 the Director requested staff to produce memorandums on sixteen different technical subjects and subparts. *See* Ex. N of *Thompson Decl*. The Director requested staff to file the memos "on or before May 17, 2021." *Id.* On May 18, 2021, a day after the Director's deadline, four reports totaling over 150 pages were posted to the Department's website. *See Thompson Decl.*, ¶ 23. The Department did not serve the reports on any parties, including SVGWD. *Id*.; and *Declaration of G. Erick Powell Decl.* ("*Powell Decl*."), ¶ 6. Counsel for SVGWD were only made aware of the reports late in the day on May 18, 2021. *Powell Decl.*, ¶ 6. Background information supporting certain portions of the technical reports were not made available until May 21, 2021, after IDWR was made aware that the information that was posted to its website included corrupt files. *Id*.

On May 13, 2021, SVGWD filed its: (1) *Motion Dismiss / Supporting Points & Authorities / Motion to Shorten Time for Response / Request for Oral Argument* ("*Motion to Dismiss*"); (2) *Motion to Appoint Independent Hearing Officer*; (3) *Motion for Continuance of Hearing*; and, (4) *Motion for Order Authorizing Discovery*. *Thompson Decl.*, ¶ 17. Petitioner also filed a *Request for Information* with IDWR on May 13, 2021. *Id*. IDWR has still failed to produce any documents in

response to Petitioner's *Request for Information* as of the date of the filing of this action. *Thompson Decl.*, ¶ 26.

On May 21, 2021, the Director issued an order denying Petitioner's *Motion to Appoint Independent Hearing Officer*, and an order authorizing discovery. Ex. P and Ex. Q of *Thompson Decl*. The order authorizing discovery was served on the parties by email on Saturday May 22, 2021, or 9 days after Petitioner requested such authorization. *See* Ex. Q to *Thompson Decl.* That same weekend the Director issued an order denying the *Motion to Dismiss* by email on Saturday May 22, 2021 ("*Dismiss Denial Order*"). *See Thompson Decl.*, ¶ 18.

On May 22, 2021, SVGWD moved the Director to designate the *Dismiss Denial Order* as final under the Idaho Administrative Procedures Act. *See Thompson Decl.*, ¶ 24. The Director denied that motion by order on May 24, 2021. *See* Ex. T to *Thompson Decl.*

POINTS AND AUTHORITIES

Legal points and authorities supporting each count included within the Petition are as follows in order congruent with the Petition.

COUNT I
PETITION FOR JUDICIAL REVIEW

PETITIONER HAS EXHAUSTED ITS ADMINISTRATIVE REMEDIES, OR ALTERNATIVELY, THE PETITION QUALIFIES FOR AN EXCEPTION.

The Idaho Administrative Procedures Act (APA) provides for judicial review of agency actions. I.C. § 67-5270. Idaho law requires a person to "exhaust administrative remedies" before seeking judicial review. I.C. § 67-5271. However, exhaustion is not required as "a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." I.C. § 67-5271(2).

"Under unusual circumstances a court may circumvent [the exhaustion of remedies] rule, but only where the interests of justice so require. *Grever v. Idaho Telephone Co*., 94 Idaho 900, 903 (1972). Idaho Courts have described circumstances which require an exception to the exhaustion doctrine, such as (1) where the agency acts outside its authority; (2) where resort to administrative procedures would be futile; (3) where the aggrieved party is challenging the constitutionality of the agency's actions; or, (4) where requiring the exhaustion of administrative remedies would occasion delay which would cause irreparable injury regardless of the outcome of the proceedings. See *Id*.; *Peterson v. City of Pocatello*, 117 Idaho 234, 236 (Ct. App. 1990); *Williams v. State*, 95 Idaho 5, 8 (1972). The Idaho Supreme Court has recognized two exceptions to the exhaustion rule: 1) when the "interests of justice so require; and 2) "when the agency acted outside its authority." *Lochsa Falls, LLC v. State*, 147 Idaho 232, 237 (2009).

Petitioner has exhausted its administrative remedies with respect to the Director's proposed hearing set to begin in less than two weeks. The Director set the hearing by *Notice* on May 4, 2021. Over 40 separate individuals and entities have filed notices to participate. However, extensive technical information through the form of four separate staff memos over 150 pages long was not released until late on May 18, 2021. The Director did not even authorize discovery until May 21, 2021. To this date the Department has failed to respond to Petitioner's *Request for Information.*

This two-and three-week delay by the Department prejudices Petitioner and violates its right to due process as its consultants do not have a reasonable time to evaluate this information and prepare for the hearing. *See* generally *Powell Decl.* and *Declaration of David B. Shaw* ("*Shaw Decl*.").

Petitioner requested a continuance to address these issues which was denied. Petitioner moved to dismiss the case and that motion was denied. Petitioner further requested the Director to

designate that order as final which was also denied. Petitioner has no administrative remedy to prevent the irreparable harm of being forced to endure an unprecedented proceeding that does not provide "a meaningful opportunity to be heard in a meaningful manner." *See Shaw Decl*. This is particularly true when compared to all other conjunctive administration proceedings that have been held before the agency. *See Thompson Decl.* ¶ 27.

Given the complexity of conjunctive administration and the Supreme Court's admonition for the agency to have the correct information to make such decisions, the Director's "rush to judgment" violates Idaho law as it leaves parties without the time and ability to carefully analyze and present the issues, most notably the 150 pages of the staff memorandums just produced last week. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 875 (2007) ("*AFDR#2*") ("it is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the facts"). Whereas every other contested case on conjunctive administration has spanned months or even years, including in representations to water users in Basin 37, the Director's decision to begin and conclude this case in a matter of days violates Idaho law. Where the Petitioner and other parties were only given nine (9) business days to initiate and complete discovery, it is unreasonable to address a case of this magnitude and complexity within that timeframe.

The result is an arbitrary process that threatens the curtailment of 12,000 acres that are planted and receiving irrigation water within Petitioner's boundaries. *See Declaration of SVGWD Chairman Kristi Molyneux* ("*SVGWD Decl*."), ¶ 6. Even if the Petitioner has not exhausted its administrative remedies, the "interests of justice" clearly require an exception to prevent imminent and irreparable harm.

COUNT II
REQUEST FOR DECLARATORY RELIEF:

IDWR IS WITHOUT AUTHORITY TO EMPLOY THE ADMINISTRATIVE PROCEEDING AND PROCESS PROPOSED IN THE NOTICE

Idaho's water distribution statutes require administration of water rights in accordance with the prior appropriation doctrine. *See* I.C. §§ 42-602 and 42-607. The Legislature authorized the Director to "adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of rights of the users thereof." I.C. § 42-603 (emphasis added). Pursuant to that legislative authorization, IDWR promulgated the CM Rules, which were approved by the Legislature and became effective on October 7, 1994. *See In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 650 (2013) (quoting I.C. § 42-603 and describing the rules as part of "developing a water allocation plan for an up-coming irrigation season").

The Idaho Supreme Court has explained that the CM Rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *See AFRD#2*, 143 Idaho at 878 (quoting *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422 (1997)). The Court has also noted that the CM Rules integrate "all elements of the prior appropriation doctrine as established by Idaho law" and that hydrologically connected surface and ground waters must be managed conjunctively. *See IGWA v. IDWR*, 160 Idaho 119, 130 (2016).

In general, the CM Rules should be "construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement."

Mason v. Donnelly Club, 135 Idaho 581, 586 (2001). The CM Rules, administrative rules of IDWR, have "the force and effect of law" and are integral to orderly conjunctive administration of surface and ground water rights as they were promulgated pursuant to and complement the water distribution statutes. *See* I.C. §§ 42-602, 42-603, and 42-607; *See e.g. Eller v. Idaho State Police*, 165 Idaho 147, 160 (2019); *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908-909 (2004) ("IDAPA rules and regulations are traditionally afforded the same effect of law as statutes").

In addition to the water distribution statutes, the Legislature codified the Ground Water Act. At the time of the original act and amendments in the early 1950s, ground water rights were not managed conjunctively within surface water districts. Accordingly, the act contains various statutes regarding well drilling, recharge, designation of special management areas, general authorities, and determination of adverse claims. *See* I.C. § 42-226 *et seq*. With respect to administration, the local ground water board statutes provided a procedure to address claims by a senior surface or ground water user. *See* I.C. § 42-237b. However, the local ground water board statutes were recently repealed during the 2021 Legislative Session pursuant to House Bill 43 (effective July 1, 2021). The Director personally appeared before the House Resources & Conservation Committee on February 3, 2021 and specifically represented the statutes were unnecessary given administration was covered by the CM Rules.[3]

The CM Rules reference and implement various provisions of Idaho's Ground Water Act. *See* IDAPA 37.03.11.10.01, 02, 09, 10, 18, and 20; IDAPA 37.03.11.30.06; IDAPA 37.03.11.31. Notably, in this case the rules provide a detailed procedure for implementing the statute and determining "an area of common ground water supply." *See* I.C. § 42-237a.g; IDAPA 37.03.11.31.

[3] A video recording of the committee meeting is available at https://legislature.idaho.gov/sessioninfo/2021/standingcommittees/HRES/

The Director cannot conjunctively administer surface and ground water rights without first determining such an area. *See Memorandum Decision and Order* at 9 ("a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood River and Little Wood Rivers and the junior ground water users located therein"); *See also*, IDAPA 37.03.11.30.07 ("Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: . . . c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district"); *See also*, IDAPA 37.03.11.31.01 ("The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply").

These statutes and rules must be read together to ascertain what is required for lawful administration. *See State v. Garner*, 161 Idaho 708, 711 (2017) ("Statutes and rules that can be read together without conflicts must be read in that way."). Idaho's water distribution statutes, Ground Water Act, and CM Rules "should not be read in isolation, but must be interpreted in the context of the entire document." *Idaho Power Co. v. Tidwell*, 164 Idaho 571, 574 (2018). Reading the relevant statutes and rules together leads to one conclusion, conjunctive administration of junior groundwater and senior surface water rights must proceed under the Department's CM Rules.

A. *Section 42-237a.g Does Not Give the Director Authority to Initiate a Contested Case for Conjunctive Administration Outside the CM Rules in Basin 37*.

Despite the CM Rules, the Director has attempted to initiate administration of ground water rights in an isolated region of Basin 37 (Bellevue Triangle) on the theory that he can *sua sponte* initiate a contested case and regulate solely under I.C. § 42-237a.g. That authority however, with

respect to "administration" of water rights, is further informed by the CM Rules and specific processes already approved by the agency, Legislature, and importantly the Idaho Supreme Court.

In *Clear Springs Foods, Inc. v. Spackman*, junior priority ground water users objected to the Director's orders in response to the spring users' delivery calls and claimed curtailment was precluded as long as they were not "mining" an aquifer. 150 Idaho 790 (2010). The Court analyzed their argument in the context of I.C. § 42-237a.g and noted:

> The statute merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface or ground water right or (b) result in withdrawals from the aquifer exceeding recharge.

Id. at 804.

The Court recognized the Director could prohibit ground water diversions under the statute in only two scenarios: 1) where pumping is found to cause material injury; or, 2) to prevent aquifer mining. *Id.* The "material injury" inquiry leads to administration and the procedure provided for under the CM Rules.

In this matter the Director is not seeking to regulate or enforce the use of water "at a rate beyond the reasonably anticipated rate of future natural recharge." I.C. § 42-237a.g. The Department has not made a determination of what the average annual recharge rate is. The *Notice* doesn't mention average annual recharge. Instead, according to the *Notice*, the Director has initiated this proceeding to determine the second element referenced by the statute, whether junior ground water use is causing "material injury" to senior surface water rights. *See Notice* at 1.

The Director's inquiry into "material injury" depends upon a number of factors specifically set out in the Department's CM Rules. *See* IDAPA 37.03.11.42. Moreover, given no "area of common ground water supply" has been determined, that material injury inquiry must follow the requirements of CM Rule 30. The Idaho Supreme Court has instructed IDWR how to implement

lawful conjunctive administration pursuant to the CM Rules. In *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, the Court set out a three-part process for IDWR to follow in irrigation administration cases:

> 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.

155 Idaho at 653 (emphasis added).

The Director's *Notice* wholly ignores steps 1 and 2 of the Supreme Court's procedure and instead leap-frogs straight to step 3. Setting aside the failure to follow CM Rule 30 and 31, the Director has not provided a proposed management plan "**in advance of the irrigation season**" required by the Supreme Court. *See id.* Waiting until after the irrigation season is well underway, when crops are in the ground, violates the Supreme Court's procedure.

Moreover, only weeks ago the Department represented to the Legislature that conjunctive administration of ground water rights is covered by the CM Rules, not the Ground Water Act. Notably, the Statement of Purpose for House Bill 43 provides that the statutes for administration

under local ground water boards are "obsolete since the adoption of" the CM Rules. *See* Ex. L of *Thompson Decl*. The Director presented the bill to the House Resources & Conservation Committee on February 3, 2021 and specifically explained the statutes could be repealed since conjunctive administration is handled under the CM Rules. It follows that the Director has no authority to disregard the agency's own rules that cover the exact matter at issue. *See Mason*, 135 Idaho at 585 ("The Commission, therefore, does not have discretion to disregard the rule based on its own policy considerations").

Pursuant to well-established canons of statutory construction, IDWR must read the relevant statutes and rules together to arrive at a lawful outcome for conjunctive administration. *See Rangen, Inc. v. IDWR*, 160 Idaho 252, 256 (2016) ("Administrative rules are interpreted the same way as statutes"). As the CM Rules implement the water distribution statutes and relevant portions of the Ground Water Act, the Department is bound to follow the procedures it has promulgated. *See Garner*, 161 Idaho at 711 ("Statutes and rules that can be read together without conflicts must be read that way"); *Tidwell*, 164 Idaho at 574 (2018) (statute and rules "should not be read in isolation, but must be interpreted in the context of the entire document"); *See also*, *Farber v. Idaho State Ins. Fund*, 147 Idaho 307 (2009) ("Courts must give effect to all the words and provisions of [the rules] so that none will be void, superfluous or redundant").

The Director has never previously proposed to conjunctively administer surface and ground water rights through a short-cut process relying solely on I.C. § 42-237a.g. By ignoring the relevant water distribution statutes and CM Rules, which define a clear process for conjunctive administration of water rights in Basin 37, the Director's *Notice* is legally flawed and should be enjoined accordingly.

B. The Director's Administrative Proceeding is a Collateral Attack on the District Court's Order for Conjunctive Administration in Basin 37.

The proper process for conjunctive administration in Basin 37 was already decided by the SRBA District Court in 2016 (sitting in capacity to review IDWR action). *See* Ex. E of *Thompson Decl.* ("*Sun Valley Judgment*"). IDWR and its Director were party respondents to that case. Pursuant to Idaho's *res judicata* doctrine, the Director cannot collaterally attack that final judgment and evade what the court has required for conjunctive administration. Accordingly, the Director's *Notice* violates Idaho law on res judicata grounds and should be enjoined accordingly.

1. Claim Preclusion

The doctrine of res judicata covers both claim preclusion and issue preclusion. *See Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC*, 164 Idaho 555, 560 (2019). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. *See id.* A claim is precluded where: 1) the original action ended in a final adjudication on the merits, 2) the present claim involves the same parties as the original action, and 3) the present claim arises out of the same transaction or series of transactions as the original action. *See id.* at 560-61. When the three elements are established, claim preclusion bars "every matter offered and received to sustain or defeat the claim *but also as to every matter which might and should have been litigated* in the first suit." *Id.* at 561 (italics in original) (quoting *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437 (1993)).

The first question is whether the original action ended in a final judgment on the merits. It did. *See Sun Valley Judgment*. Judge Wildman entered a final judgment on April 22, 2016. The Court set aside the Director's decision denying Sun Valley's motion to dismiss and remanded the matter to the agency for further proceedings as necessary. *Id.*

The next inquiry is whether the present claim involves the same parties. Here, the agency has sent the *Notice* to 1,100 ground water right holders in Basin 37. SVGWD has appeared on behalf of its members and was a party to the *Sun Valley* proceeding on judicial review. IDWR and the Director were a party to the proceeding.

Finally, the present claim arises out of the same transaction or series of transactions as the original case. The first action concerned the Director's effort to conjunctively administer surface and ground water rights in the Basin 37. The Director attempted to address the senior's request for administration through CM Rule 40. The Director erred as a matter of law. In commenting on what is required for lawful conjunctive administration, the District Court held:

> As will be shown below, the fact that juniors are in organized water districts is not necessarily relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water. Much more relevant, in fact critical, to processing such a call is identifying that area of the state which has a common ground water supply relative to the senior's surface water source and the junior ground water users located therein. Since it is Rule 30 that provides the procedures and criteria for making this determination, the Court, for the reasons set forth herein, holds that the Director's determination that Rule 40 governs the calls must be reversed and remanded.
>
> * * *
>
> Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.
>
> * * *
>
> Therefore, to process the Association's calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.

> * * *
>
> Therefore, the Court finds that Rule 30 provides the procedures and processes necessary to safeguard juniors' due process rights. It follows that when a call is made by a senior surface water user against junior water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.
>
> * * *
>
> Therefore, the Court finds that it is Rule 30 that provides the Director the authority to determine an area of common ground water supply. It follows the procedures set forth in Rule 30 must be applied to govern the calls. . . . Since the procedures and criteria for making this determination are associated with Rule 30, **it is Rule 30 that must govern a call where a senior surface water user seeks to curtail junior ground water users in an area of the state that has not been designated as an area having a common ground water supply.**
>
> * * *
>
> The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudge any issues relevant to the contested case proceeding. . . Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association.

Memorandum Decision and Order at 8-11, 14 (emphasis added).

This proceeding also involves the proper procedure for conjunctive administration in Basin 37. Here, the Director issued the *Notice* in direct response to claims of material injury made by senior surface water users in the Advisory Committee meetings in mid-April. If there is any question that a "delivery call" has been filed, at least one senior surface water user has claimed "injury" and is requesting administration pursuant to a declaration filed with IDWR on Sunday May 23, 2021. *See* Ex. V to *Thompson Delc.* In that declaration, Mr. Brossy identifies claimed shortages to senior surface water rights and alleges that benefits would accrue to his water rights

if junior ground water rights were curtailed. *See id.* Such a declaration qualifies as a "delivery call" under the Department's CM Rules. *See* CM Rule 10.04 ("**Delivery Call**. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.") (emphasis added). As such, the Director is bound to follow the CM Rules and employ the proper procedure under CM Rule 30.

The Director stated he "was ready to act." Ex. G of *Thompson Decl*. How the Director is required to act to conjunctively administer surface and ground water rights in Basin 37 is plainly governed by the District Court's decision and final judgment. Although the Court advised that proper and orderly conjunctive administration requires a determination of "an area of common ground water supply" the Director has failed to make that determination for five years. Whereas the agency used rulemaking to define the Eastern Snake Plain Aquifer area of common ground water supply (CM Rule 50.01), the agency has failed to employ that process as well for Basin 37.

The present *Notice* purports to determine if water is available to fill certain ground water rights on the basis of whether those junior rights "would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season." *Notice* at 1. The issue is plainly conjunctive administration of surface and ground water rights. Again, the Director has not initiated a proceeding to identify a "reasonable ground water pumping level" or the "reasonably anticipated rate of future natural recharge," but he has initiated this matter solely on the basis of administration of water rights. *See* I.C. § 42-237a.g. Since the District Court has already ruled that he is bound to follow CM Rule 30 and make a determination of "an area of common ground water supply," the Director is bound by the court's final judgment.

2. Issue Preclusion

Issue preclusion, or collateral estoppel, bars re-litigation of an issue previously determined when:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Stoddard v. Hagadone Corp., 147 Idaho 186, 190–91 (2009).

The issue at concern in the Petition is the proper procedure IDWR must follow for the administration of ground water rights in areas of hydrologically connected surface and ground water in Basin 37. More specifically, the operative issue is whether the IDWR is required to follow CM Rule 30 for the administration or curtailment of ground water rights in Basin 37. The 2016 decision in *Sun Valley Co. v. Spackman* meets all the elements for issue preclusion. *See Memorandum Decision and Order*.

Satisfying the first and fifth element, IDWR and SVGWD were parties to the *Sun Valley* proceeding on judicial review, which was a full and fair opportunity to litigate the application of CM Rule procedures in Basin 37. As to the second element, the issue decided in *Sun Valley* is identical to present issue, i.e. "whether the delivery calls at issue should be governed by the procedures set forth in Rule 30 or Rule 40." *Memorandum Decision and Order* at 16. Third, the issue was actually decided in the prior litigation, "the procedures set forth in Rule 30 must be applied to govern the calls," and, "it is Rule 30 that must govern a call where a senior surface water user seeks to curtail junior ground water users in an area of the state that has not been designated as an area having a common ground water supply," like Basin 37. *Id.* at 11. Finally, the fourth

element is satisfied because a final judgment on the merits was issued in *Sun Valley*. *See Sun Valley Judgment.*

The decision in *Sun Valley* clearly holds that the IDWR is required to follow CM Rule 30 for the administration of ground water rights in Basin 37. IDWR is therefore precluded from arguing that another process, such as it has attempted under I.C. §42-237a.g, is authorized. Res judicata bars the present agency proceeding and this Court should enjoin it accordingly.

COUNT III
REQUEST FOR DECLARATORY RELIEF:

IDWR'S PROPOSED ADMINISTRATIVE PROCEDURE VIOLATES PETITIONER'S RIGHT TO DUE PROCESS

The Director's proposed administrative hearing violates the Petitioner's right to due process protected by the constitution under the Fourteenth Amendment of the U.S. and Idaho Constitutions.[4] Water rights are real property rights that come with entitlements to due process before they are administered, curtailed, or taken. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water District No. 170*, 148 Idaho 200, 213 (2009); *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977); *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 160 (1921). By proposing to adjudicate conjunctive administration of hundreds of surface and groundwater rights within complex hydrology in Basin 37 in a matter of mere weeks, the Director has plainly violated any notion of fundamental fairness and has utterly failed to provide for the "opportunity to be heard in a meaningful time and in a meaningful manner." *Ayala v. Robert J. Meyers Farms, Inc.*, 165 Idaho 355, 362 (2019).

[4] The Idaho Supreme Court has held that the Idaho Constitution "guarantees substantially the same protections for due process of law" as the United States Constitution. *See Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 505 (2014). The Court in *Williams* further found that state agencies are subject to these due process requirements. *See id.*

The Director's decision to wait and issue his *Notice* well after the beginning of the irrigation season creates additional due process hurdles, as it threatens to curtail thousands of acres that have planted crops proceeding to maturity and harvest. The timing of the Director's proposed administration threatens nearly $12 million dollars in economic damage to Petitioner's water users, as well as critical forage for livestock and animals. *See SVGWD Decl*. This "after-the-fact" proposal is clearly not what the Idaho Supreme Court required when it referenced the Director having the authority to "develop and implement a pre-season management plan" for conjunctive administration. *See In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho at 653 (2013) (emphasis added). Although the Director claims authority under the 1953 amendments to the Ground Water Act to proceed in this manner, the timing of his new administrative paradigm, sprung on water users years after applying the CM Rules to every other delivery call in the state, and well after SVGWD's members have planted and started irrigating their fields, is legally suspect.

Indeed, the constitution and state law demand more. Consequently, the Court should carefully scrutinize the agency's process and the clear prejudice resulting to junior priority ground water right holders in this case. This is particularly troubling where the agency has failed to respond to the Petitioner's *Request for Information* filed on May 13, 2021, and where discovery was only authorized on May 22, 2021, allowing for mere days to discover relevant facts and prepare for the fast-tracked hearing. A complex case with over 40 participants and several technical experts does lend to itself to being fairly heard and resolved in only days or a few weeks as ordered by the Director. Consequently, Petitioner urges this Court to carefully consider the context and timing of what is being proposed, particularly in light of reasonable schedules and fact gathering required for such a conjunctive administration case.

A. *The Notice, Contested Case, and Hearing Schedule Violates SVGWD's Due Process Rights*.

Procedural due process requires IDWR provide a process to ensure that an individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. *See Newton v. MJK/BJK, LLC*, 167 Idaho 236, 244 (2020). The Idaho Supreme Court has explained that "[p]rocedural due process is an essential requirement of the administrative process, and notice is a critical aspect of that due process." *City of Boise v. Industrial Com'n*, 129 Idaho 906, 910 (1997). The Court further observed that a "hearing is not a mere formality – it is an integral component of due process because it provides a claimant with an opportunity to be heard in a meaningful time and in a meaningful manner." *Ayala*, 165 Idaho at 362 (emphasis added). Further, a "hearing at which the applicant is fully advised of the claims of the opposition and of the facts which may be weighed against him, and at which he is given full opportunity to test and refute such claims and such facts, and present his side of the issues in relation thereto, is essential to due process." *Application of Citizens Utilities Co.*, 82 Idaho 208, 215 (1960) (emphasis added). Petitioner cannot be "fully advised" of all the facts when the agency fails to respond to information requests and delays the authorization of discovery.

As explained below, the Director's *Notice* and truncated hearing violate the Petitioner's right to due process. Addressing complex and unique conjunctive administration issues is not a garden variety matter that can be completed within days. *See Shaw Decl.* Such a rushed hearing does not provide Petitioner with a full and fair opportunity to become advised of all necessary facts and fully test and refute adverse claims. *Id.* Whereas determining issues of hydrologic interaction, "material injury," "crop water need," as well as defenses to a delivery call can involve numerous witnesses, expert opinions, and mountains of water data and analyses, a "meaningful hearing"

clearly requires adequate time and discovery to provide parties due process and ensure the agency is presented with the best available evidence to make an informed and reasoned decision.

Determining whether an individual's Fourteenth Amendment due process rights have been violated requires a two-step analysis under Idaho law: 1) determining whether the individual is threatened with deprivation of a liberty or property interest; and 2) determining what process is due. *See Newton*, 167 Idaho at 244.

A court must first determine whether the individual is "threatened" with the deprivation of a liberty or property interest. Water rights are real property right interests in Idaho. *See* I.C. § 55-101. The Idaho Supreme Court has expressly held that water rights "must be afforded the protection of due process of law before they may be taken by the state." *Clear Springs Foods, Inc.*, 150 Idaho at 814; *Nettleton*, 98 Idaho at 90 (1997); *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651 (1915). The Supreme Court has noted that issuing curtailment orders without prior notice and an opportunity for hearing can constitute an abuse of discretion and violation of the right to process. *See Clear Springs Foods, Inc.*, 150 Idaho at 815 ("Under these circumstances, the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for hearing"). Here the Director has threatened curtailment of ground water rights during the 2021 irrigation season. *See Notice* at 1 ("If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season") (emphasis added). SVGWD's members, holders of real property interests in their water rights, meet the first step of the due process analysis.

The second step asks what process is therefore due under the law. Due process requires that parties "be provided with an opportunity to be heard at a meaningful time and in a meaningful

manner." *City of Boise*, 129 Idaho at 910. Due process includes "the right to be **fairly** notified of the issues to be considered." *See Haw v. Idaho State Bd. of Medicine*, 140 Idaho 152, 159 (2004) (emphasis added).

The concept is flexible, "calling for such procedural protections as are warranted by the particular situation." *City of Boise*, 129 Idaho at 910. The Idaho Supreme Court has used the U.S. Supreme Court's balancing test in evaluating the adequacy a particular process:

> Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . Due process is flexible and calls for such procedural protections as the particular situation demands . . . Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Ayala, 165 Idaho at 362.

Applying the Court's balancing test to this case exposes the flaws in the Director's proceeding and the violation of procedural safeguards required for lawful conjunctive administration. First, the private interests affected by this case are the individual ground water rights of the members of SVGWD and the thousands of acres of planted crops and forage. *See SVGWD Decl*. The Supreme Court has previously found that such a private interest at stake is "great" as "[t]he right to water is a permanent concern to farmers, ranchers, and other water users." *See LU Ranching Co. v. United States*, 138 Idaho 606, 608 (2003). The Director is threatening to curtail those water rights during the middle of the 2021 irrigation season, despite crops having already been planted, which would cause over $12 million dollars in damage. *See SVGWD Decl.*

Next, the risk of an erroneous deprivation of the water right interest is extremely high given the procedures proposed to be used. As noted above, the Director has noticed up a contested case to begin and end within a few weeks.[5] On May 11, 2021 the Director issued a *Request for Staff Memorandum* listing seventeen different technical subjects and subparts. Although agency staff were requested to provide the information to the Director "on or before May 17, 2021," the reports were not released until the afternoon of May 18, 2021 on IDWR's website.[6] The information consisted of four different staff reports totaling over 150 pages (collectively, "Staff Memorandums"). *Thompson Decl.* ¶ 23. Petitioner further filed a *Request for Information* with IDWR on May 13, 2021. *Thompson Decl.* ¶ 17. The Department has yet to produce any documents in response to this request as of the filing of the present case. *Thompson Decl.* ¶ 26. Further, the Petitioner was only notified that discovery was authorized on Saturday May 22, 2021, or over two weeks after the *Notice* was filed. Cutting discovery time in half, particularly when the case was supposed to begin and end within 4 weeks clearly prejudices Petitioner and its consultants.

The technical information is voluminous and requires extensive expert analyses. *See* generally *Shaw Decl.* and *Powell Decl*. Having adequate time to evaluate and review such information is critical to protect Petitioner's right to reasonably prepare and present defenses to the delivery calls and "material injury" determinations that the Director proposes to decide at the hearing.

Whereas every other conjunctive administration contested case before IDWR has taken months or years, not weeks, the Director's truncated and arbitrary schedule does not satisfy

[5] The May 4, 2021 *Notice* service list contained multiple errors causing the agency to re-mail it on May 7, 2021. Most affected junior ground water right holders only received an actual copy of the *Notice* by mail during the week of May 10th.

[6] To the knowledge of Petitioner's counsel, no party was provided notice of this internet posting or actual copies of the staff reports.

Petitioner's right to due process.[7] For example, the following outlines the various delivery call cases and their timeframes to complete discovery, motion practice, and hold an administrative hearing on the issues raised by seniors and juniors:

Spring Users (Blue Lakes / Clear Springs)	May 2005 to November 2007
Surface Water Coalition	January 2005 to February 2008
A&B Irrigation District	January 2008 to June 2009
Rangen, Inc.	Sept. 2011 to March 2014
Big Wood and Little Wood Users (Basin 37)	Feb. 2015 to Jan. 2016[8]

Thompson Decl. ¶ 27.

The use of experienced and highly trained experts, evaluation of complex hydrologic systems, and review of hundreds of water rights, their delivery systems and individual uses is a time-consuming and intense endeavor. *See Shaw Decl.; Powell Decl.* But, the CM Rules make it clear that those evaluations are necessary under the prior appropriation doctrine to determine when there has been a material injury. *See AFRD#2*, 143 Idaho at 875 ("It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts").

As illustrated in the recently released *Staff Memorandums*, there are numerous reports and extensive data and information to compile and review. Forcing the Petitioner and other parties

[7] Moreover, the shortcomings of the current hearing schedule are further exposed when compared to a typical application for permit or transfer contested case. Even in the example where a proceeding only evaluates one or a few water rights, the Department routinely provides at least three months from the pre-hearing conference to the hearing date. While there is no defined timetable that applies to every case, counsel for the Petitioner is aware of no proceeding where the Department has forced litigants to go to hearing in less than one month.

[8] The hearing was not held, but at the June 5, 2015 pre-hearing conference, the Director requested the parties to hold Jan. 11-22, 2016 for a hearing in the matter, approximately seven months later. The Department previously represented that a contested case for conjunctive administration in Basin 37 could take a "year or more." *See Thompson Decl.* ¶ 5.

subject to threatened curtailment to absorb this information (without knowing how complete and comprehensive the information will be) and then come prepared to a hearing to debate and review this highly technical information, in two and a half weeks, is highly prejudicial. *See e.g. State v. Doe*, 147 Idaho 542, 546 (2009) ("In addition, notice must be provided at a time which allows the person to reasonably be prepared to address the issue") (emphasis added).

Since the Petitioner will not have a reasonable time to prepare for hearing, the risk of curtailment without a meaningful and fair process is high. By contrast, as explained below, the additional and substitute procedures provided by the CM Rules provide the required due process in such a situation, and have already been tested through Idaho's judicial system.

Third, there is little fiscal or financial burden on the Department to provide for the proper procedure and hearing as required by the CM Rules. Indeed, as this Court previously noted, the burden of filing and service is on the senior users, not IDWR, under a CM Rule 30 proceeding. Whereas the agency has once again erroneously taken up this effort on its own to provide notice to some subset of juniors, that can be corrected through the procedures already set out in CM Rule 30. Any proper hearing process will inevitably involve the same issues, parties, and facts. *See Citizens Allied for Integrity and Accountability, Inc. v. Schultz*, 335 F.Supp.3d 1216, 1228 (D. Idaho 2018). Ensuring the hearing complies with the CM Rules and due process will "set an example for future hearings and thereby reduce the probability of further litigation." *Id.*

The violation of Petitioner's due process rights is amplified by the fact the issue of what process is required has previously been decided. The very parties before this Court were debating the very issue, proper procedure for conjunctive administration in Basin 37, nearly six years ago. The CM Rules contain important due process safeguards for purposes of conjunctive administration where "an area of common ground water supply" has not been designated. The

Director's newly created statutory process disregards those procedures, and prejudices the rights of Petitioner's members.

The Department is not without guidance on what procedures are due. In *Sun Valley*, the Court previously explained how procedural due process safeguards are protected by the procedures of CM Rule 30:

> More troubling, however, is the fact that the letters were not served by the seniors on the juniors they seek to curtail. This lack of service violates Rule 30, which expressly requires that "[t]he Plaintiff shall serve the petition upon all known respondents as required by IDAPA 37.01.01, 'Rules of Procedures of the Department of Water Resources.'" IDAPA 37.03.11.030.02. It also raises issues regarding due process of law. The Director engaged in correspondence with counsel for the seniors regarding the calls, including a request for further information and clarification, before junior users had notice the calls had been filed. . . .
>
> The Director attempted to address the notice and service concerns by taking it upon himself to provide notice of the calls to the juniors. . . . To do this, the Department undertook the exercise of identifying those junior water right users in those areas of the state it believed may be affected by one or both of the calls. *Id.* These included junior ground water users in water district 37 and water district 37B. *Id.*
>
> At the time, no explanation was given as to how the Director determined whom to serve, or as to what areas of the State may be affected by the calls. Nor was an explanation given as to why junior users in other organized water districts within Basin 37 (i.e., water district 37N, 37O and 37U) were not served. However, the exercise undertaken by the Director leads Sun Valley and other juniors to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers to be the boundaries of water district 37 and 37B. They assert this determination was made without notice to them and without an opportunity for them to present evidence and be heard on the issue. The Director denies these allegations, but the Court understands the concerns of the juniors. . . . The Director, as the decision maker, should not have been placed in the position of appearing to have made these kinds of determinations prior to the juniors having been given notice of the calls. The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudge any issues relevant to the contested case proceeding.

> Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association. These include the right to have the seniors comply with the mandatory filing and service requirements of Rule 30. *See e.g. Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (holding that due process rights are substantial rights). Since the seniors' requests for administration fail to meet these mandatory requirements of Rule 30, the Director's decision to deny Sun Valley's motion to dismiss is in violation of the CM Rules and violates the substantial rights of the juniors.

Memorandum Decision and Order at 13-14.

The above decision left no doubt that CM Rule 30 is the proper due process to apply for conjunctive administration in Basin 37. Such a process follows the Supreme Court's admonition for proper water right administration:

> In fact, efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users.

In re: IDWR Amended Final Order Creating Water District No. 170, 148 Idaho 200 at 211 (emphasis added).

The Director's proposed process, initiated after the irrigation season has begun, is not "evenhanded" and threatens any notion of "consistent planning" by Petitioner's members. Moreover, the Director blatantly disregarded the Court's ruling and judgment by initiating a case with the same errors that were present in that proceeding. Notably, the Director has not required the seniors to follow the filing and service requirements of CM Rule 30. This is an about-face from his position in the spring of 2017, where he dismissed the senior surface water users' petition for failing to comply with CM Rule 30. *See* Ex. M of *Thompson Decl.*

Instead, IDWR has once again taken it upon itself to serve various junior water right holders of its own choosing in Basin 37. There is no notice to the water users of the boundaries of an "area of common groundwater supply." Furthermore, it appears that the Director has implicitly pre-judged an area of common ground water supply by identifying a limited area of potential curtailment (Bellevue Triangle) without following the requirements of the CM Rules in making that determination. *See Notice*, Attachment A (identifying "potential area of curtailment").

In addition to failing the due process notice requirements set forth by the District Court's prior decision and judgment, the Director's *Notice* clearly fails the balancing test identified by the Supreme Court in *Ayala*. At its heart, a "procedural due process inquiry is focused on determining whether procedure employed is fair." *State v. Roth*, 166 Idaho 281 (2020). What the Director has done fails that standard.

The Director has short-circuited the established process, ignored his recent representations to the Legislature, and set a contested case hearing to begin and end within a matter of weeks. With extensive technical information made available for the first time on May 18th, affected junior ground water users and their technical experts were given only 19 days (inclusive of weekends and a holiday) to review and analyze this material and prepare any opinions and defenses. The time for discovery is even less as the Director waited to authorize discovery until May 22, 2021. Further, IDWR has still not responded to Petitioner's *Request for Information* filed over ten days ago.

Evaluated in context of what is necessary for a unique and complex conjunctive administration hearing, the process provided for by the *Notice* does not satisfy constitutional due process rights and provide for a "meaningful opportunity to be heard." It is just this type of action "that undermines public confidence in a fair and impartial tribunal" and should be dismissed. *See e.g. Ayala*, 165 Idaho at 363. Moreover, "the right to due process is the right to be free from

arbitrary actions of government officials." *Browning v. Vernon*, 874 F.Supp. 1112, 1121 (D. Idaho 1994). An agency's action cannot be upheld when a party is deprived of due process rights. *See e.g., Newton*, 167 Idaho at 244 ("This Court will not affirm the validity of an encroachment permit where an opposing party was deprived of their due process rights").

In summary, in light of the unique circumstances and complexity of such highly technical administrative cases, the Director's action violates Petitioner's constitutional right to due process and the Court should enjoin the administrative proceeding as a matter of law.

B. *The Notice is Defective and Warrants Dismissal of this Case*.

On May 4, 2021 the Director sent the *Notice* to over a thousand water users and published a notice in local papers. On May 7, 2021 the Director sent new a *Notice* to over a thousand water users because the first *Notice* had multiple errors in addresses. In the *Notice*, the Director set a deadline of May 19, 2021 to file notices to participate and set May 24, 2021 as a pre-hearing conference. It won't be until this date that the parties will even know who to serve its pleadings on in accordance with IDAPA 37.01.01.203 and 303.

And, although some entities or persons may file notices of intent to participate, they may not actually appear at the pre-hearing conference, thus, the first time that parties will know who is actually going to participate is March 24, 2021 only 8 total business days to conduct and conclude discovery and prepare for the hearing. This rushed scheduled certainly seems to simply give lip service to a full and fair opportunity for parties to defend their water rights and use. Given the process that is occurring, IDWR risks reversal of any decision as arbitrary capricious and a violation of due process under the existing schedule.

Because the Request broadens the scope of the administrative hearing that was set forth in the Notice, the Notice fails to provide accurate Notice of what may occur in the administrative

hearing and does not properly identify what is to be remedy or what the government's interest in curtailing junior groundwater use actually is. Thus, the Notice fails to meet due process requirements. The Notice must accurately provide the affected parties, in this case, real property right holders, with what is at stake, what the process and procedures will be and whether or not their interests are at risk. If people relied strictly on the Notice, water users outside the curtailment area could have reasonably concluded that they were not at risk, yet, the Request makes it clear that the Director thinks the entire basin is at issue, including all groundwater pumping and all streams. At the very least, before being deprived of their property, the water users are entitled to a Notice that specifically apprises them of the reasons and in this case, the location, of what is at risk in order to have meaningful review of any action or proposed action by the Director. See *True v. Idaho Dep't of Health and Welfare*, 103 Idaho 151, 165 (1982) ("Without being apprised of the reasons behind his recommitment, the patient can hardly be assured of the meaningful review to which he is constitutionally entitled.")

COUNT IV
PRELIMINARY INJUNCTION

A. *Legal Standard for Injunctive Relief.*

"Water rights are real property ... and as such may be protected by injunction ... when threatened by irreparable injury." *Olson v. Bedke*, 97 Idaho 825, 830 (1976). Idaho Rules of Civil Procedure define specific circumstances warranting the issuance of a preliminary injunction, including:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

Idaho R. Civ. P. 65(e). To obtain an injunction *pendente lite*, as in this case, "it is not necessary that such a showing be made as would entitle [Plaintiffs] to relief on a final hearing." *White v. Coeur d'Alene Big Creek Mining*, 56 Idaho 282 (1936). Rather, "it is sufficient to show a state of facts ... justifying protection of property during pendency of the action." *Id*. "The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted." *Miller v. Ririe Joint Sch. Dist. No. 252*, 132 Idaho 385, 388 (1999) (citing *Cazier v. Economy Cash Stores, Inc.*, 71 Idaho 178, 187 (1951). The Idaho Supreme Court has specifically upheld an injunction issued *pendente lite* in a water dispute case in order to protect growing crops, despite the resulting infliction of great damage upon the enjoined party. *Wilson v. Eagleson*, 9 Idaho 17, 28 (1903).

B. *Irreparable Harm Will Result if the Director is Not Enjoined*.

The Director's proposed hearing is set to begin in less than two weeks. The technical information supporting his proposed administration was just released last week. The Petitioner's consultants have had only days to begin to analyze the 150 pages of technical reports and voluminous background information and data addressing complex hydrology in Basin 37. Moreover, Petitioner's members have approximately 25,000 acres of crops and forage that have been planted and are currently being irrigated for the 2021 irrigation season. Holding an unlawful hearing and threatening curtailment without the opportunity to be heard at a "meaningful time and in a meaningful manner" violates Petitioner's right to due process. Denying irrigation water to planted crops poses an immediate and irreparable injury to SVGWD's members and is estimated to cause damages over $12 million dollars. *SVGWD Decl*., ¶ 8. Including the loss of 12,000 acres

of crops already planted, and other irreparable damage to 5,500 acres used for livestock and pastureland. *Id*., ¶¶ 6-7.

The points and authorities above, the facts alleged in Petitioner's Petition, and the declarations filed in support of Petitioner's Petition, provide ample evidence that the IWR's *Notice*, procedure, and proposed actions exceed its authority, violates Petitioner's legal rights, contravenes Idaho law, and will cause extreme irreparable injury to Petitioner's growing crops and agricultural activities, as well as to the economy of the State of Idaho. An injunction is clearly necessary and proper during the pendency of this action to protect Petitioner's water rights and prevent the extreme irreparable injury which would result from the curtailment thereof.

COUNT V
WRIT OF PROHIBITION

In the alternative to the arguments and counts discussed *supra*, Petitioner requests this Court issue a writ of prohibition that restrains IDWR from further proceedings pursuant to its *Notice* until further order from the Court. "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Idaho Code § 7-401 Writs of prohibition are extraordinary and are issued with caution. *Gibbons v. Cenarrusa*, 140 Idaho 316, 318 (2002). Before the Court will issue such writ, two contingencies must be shown: "the tribunal, corporation, board, or person is proceeding without or in excess of the jurisdiction of such tribunal, corporation, board, or person, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law." *Henry v. Ysursa*, 148 Idaho 913, 915 (2008) (citing *Olden v. Paxton*, 27 Idaho 597, 600 (1915)). Thus, there are two elements that must be met for this Court to issue a writ of prohibition in the present matter: (1) the Director's

actions pursuant to the *Notice* are in excess of IDWR's jurisdiction; and, (2) there is no other plain, speedy, or adequate remedy in the ordinary course of law.

A. *The Director's Actions Exceed IDWR's Jurisdiction*.

The word "jurisdiction" when used in reference to a writ of prohibition includes the power or authority conferred by law. *Crooks v. Maynard*, 112 Idaho 312, 319 (1987). The Director has cited I.C. § 42-237a.g as his authority to call the administrative proceedings at issue here. As was argued under Count II above, I.C. § 42-237a.g does not provide the Director unilateral authority to initiate a de facto delivery call for the purposes of curtailing ground water rights.

Additionally, when reading the applicable statutes and regulations together, Idaho law is clear that CM Rules contain the appropriate process for the administration and curtailment of ground water rights. *See Garner*, 161 Idaho at 711(Statutes and rules that can be read together without conflicts must be read in that way); *AFRD#2*, 143 Idaho at 878 (the CM Rules are the tools by which to determine how, when, where and to what extent the diversion and use of water from one source impacts). By failing to employ the procedural dictates of the CM Rules, the Director has exceeded his administrative authority.

B. *Petitioner will be Left Without Other Plain, Speedy, or Adequate Remedies*.

SVGWD's petition for writ of prohibition is made in the event that the Court denies its other petitions and complaints. *See Butters v. Hauser*, 131 Idaho 498, 501 (1998) (The existence of an adequate remedy in the course of legal procedure, either legal or equitable in nature, prevent the issuance of a writ). First, as has been argued *ad nauseum* in this memorandum, the procedures employed by the Director for the deprivation of Petitioner's water rights is made without the proper authority to do so, and will violate Petitioner's substantive and procedural due process rights. Petitioner has requested numerous avenues to remedy the Director's unauthorized actions and to

protect its due process rights. If those remedies are denied, Petitioner will be left with no plain, speedy, or adequate remedies at law. Additionally, if this Court allows the Director to proceed as proposed, the absence of procedural protections ensure that whatever remedy Petitioner may find will not be adequate or timely. As such, if the Petition's previous counts are denied by this Court, Petitioner requests the issuance of a writ of prohibition that restrains IDWR from further proceedings pursuant to its *Notice* until further order from the Court.

CONCLUSION

The Director is unlawfully proceeding with a de facto delivery call, with the aim of erroneously depriving Petitioner's members of water in violation of their legal rights, the CM Rules, and in excess of statutory authority. The Director seeks to act without providing adequate due process, and any resulting curtailment will cause immediate and irreparable harm to Petitioner and its members.

The amount of injury will be widespread and cannot be justly mitigated for via the imposition of damage after the fact. The economic impact of curtailment of ground water in Basin 37 is estimated at nearly $12 million in damages to Petitioner's members that have responded to such inquiry, resulting in further economic loss to the surrounding communities and the State of Idaho for which there is no adequate remedy at law.

Based on the forgoing, Petitioner and its members are entitled to the relief requested in its Petition.

//

//

//

// Signature page to follow//

DATED this 24th day of May, 2021.

BARKER ROSHOLT & SIMPSON LLP

/S/ ALBERT P. BARKER
Albert P. Barker

Attorneys for South Valley Ground Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2021, the foregoing was filed, served, and copied as shown below.

IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 Hand delivery or overnight mail: 322 East Front Street Boise, ID 83702 Fax: (208) 287-6700	☐ ☐ ☐ ☒ ☒	U. S. Mail Hand Delivered Overnight Mail iCourt Fax
Gary L. Spackman Director IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 gary.spackman@idwr.idaho.gov Fax: (208) 287-6700 Hand delivery or overnight mail: 322 E Front St Boise, ID 83702	☐ ☐ ☐ ☒ ☒	U. S. Mail Hand Delivered Overnight Mail iCourt E-mail

/s/ Albert P. Barker
Albert P. Barker