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

Respondents.)
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COME NOW, the Petitioners, SOUTH VALLEY GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, BARKER ROSHOLT & SIMPSON LLP and GALENA GROUND WATER DISTRICT, on behalf of its members, by and through counsel of record, LAWSON LASKI CLARK, PLLC (collectively "Petitioners" or "Districts"), and hereby submits this *Memorandum in Support of Motion to Amend Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*. This memorandum is supported by the Petitioners' *Amended Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*, the *Declaration of Michael A. Short*, the *Declaration of Mark Johnson*, and those declarations filed by Petitioners previously on previously filed on May 24, 2021, and all exhibits and attachments thereto.

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I. INTRODUCTION

This case concerns the arbitrary and unprecedented action of an agency to curtail groundwater rights according to an alleged "discretionary" use of a portion of Idaho's Ground Water Act, Idaho Code § 42-237.a.g. While Idaho law requires water to be distributed by priority, the Director cast aside the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11 et seq.) ("CM Rules").

Instead, the Director initiated this internal process back in March when he instructed his groundwater modeler to begin curtailment evaluations. This information was kept secret until late May, until the agency was forced to divulge it through a Public Records request. The Director told the Advisory Committee for the Big Wood GWMA that he had information to determine injury in mid-April, yet nothing was disclosed. The Director then initiated the contested case with a notice on May 4, 2021, weeks after crops were already planted, and told all water users that a hearing would be held the first week of June. The staff memos that he relied upon for his decision were not disclosed until May 18, 2021. Junior surface right holders had less than a couple weeks to conduct discovery and prepare defenses. Information related to the staff memos was still being produced by the agency during the week of the hearing. The Director alleges the Wood River Groundwater model is the "best science," yet there is no dispute that expert witnesses had time to properly evaluate the model runs and present any alternative analyses. The cake was baked back in March, but the Director did not reveal it until the eleventh hour before the hearing. This is not due process and it is not how water rights are to be fairly administered under Idaho law.

Contrary to what the Director did here, the 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 approximately 23,000 acres of valuable crops and forage, before starting an administrative case that began and ended within a few weeks. In an unprecedented move for the agency, the Director 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 was supposed to be analyzed, and defenses prepared and presented at an administrative hearing in only a three-week period.

The Director disregarded agency and judicial precedent, and 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 the burdens and the 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 Petitioners filed a *Request for*

Information with the Department on May 13, 2021, the agency did not produce any documents until the close of business on May 24, 2021.[1]

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 required the Petitioner evaluate this material and prepare for a hearing in less than two weeks. Prejudicing SVGWD and its consultants, the Director's novel process did not provide "a meaningful opportunity to be heard in a meaningful manner." The consequences have been the *Curtailment Order* issued by the Director on June 28, 2021, which orders the unlawful and arbitrary curtailment of nearly 23,000 acres in Blaine County which rely upon groundwater in some manner for an irrigation water supply.

The Director's truncated administrative proceeding was 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 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. If the Director can administer according to his "discretionary" use of section 42-237a.g. in select river basins, then why both with water districts, and why did the agency promulgate the CM Rules in the first place? If that authority is upheld, there is no question it was an arbitrary and capricious action to wait until the middle of a drought to exercise it, after crops were planted.

[1] Since IDWR 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.

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 actions have 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 enjoin the *Curtailment Order* 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.

II. 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. 2021 Curtailment in Basin 37 and run-up to the Notice

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 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

[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.*

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.*

D. Hearing and the Curtailment Order

The Director conducted an administrative hearing at IDWR's state office in Boise, Idaho from June 7 through June 12, 2021. Numerous parties filed post-hearing memorandums. The Districts filed a *Proposed Mitigation Plan* on June 23, 2021, proposing to fully mitigate any injury to the three senior water rights that may be injured this irrigation season. The Director issued a final order ("*Curtailment Order*") curtailing all junior groundwater rights listed on Exhibit A to the order for the rest of the 2021 irrigation season. *See Declaration of Michael A. Short* ("*Short Decl.*"), ⁋ 15. The curtailment **is ordered to begin on 12:01 a.m. on Thursday July 1, 2021**. *See* Ex. S of *Short Decl.* The Districts further filed a petition to stay curtailment, request for expedited decision and a request for hearing on the mitigation plan on June 28, 2021. *See Short Decl.*, ⁋18.

III. POINTS AND AUTHORITY

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

The Idaho Administrative Procedures Act (APA) provides for judicial review of agency actions. I.C. § 67-5270. On July 1, 2021, the Director issued the *Curtailment Order*, a final order in the matter with an effective date of July 1, 2021 at 12:01 a.m. Petitioners are entitled to judicial review of the *Curtailment Order* as a matter of law and right.

COUNT II
REQUEST FOR DECLARATORY RELIEF:

IDWR WAS 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. 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

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

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 initiated and administered 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. Although the Director references Idaho Code § 42-602, he wholly ignored section 42-603 and the implementing CM Rules in his order of curtailment. *See Curtailment Order* at 19. The Director cannot simply "pick and choose" which statutes to follow and read together for purposes of lawful conjunctive administration. Yet, that is what he has done with the *Curtailment Order*.

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* and resulting *Curtailment Order* 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 Department's proceedings and resulting *Curtailment Order* have wholly ignored 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.* (emphasis added). Waiting until after the irrigation season is well underway, when crops are in the ground, violates the Supreme Court's procedure and is plainly arbitrary and capricious.

Moreover, only months 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. Even assuming the Director has this authority, the timing of his exercise has prejudiced junior ground water users by allowing them to plant and begin irrigating crops for the 2021 irrigation season. If this authority has existed since 1953, springing it on water users in May of 2021 is completely arbitrary. Moreover, 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 Department's proceedings have been legally flawed and the *Curtailment Order* pursuant to those proceedings should be enjoined accordingly.

B. Idaho Courts Have Ruled That CM Rules Are Required for The Administration of Surface and Ground Waters.

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.

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.
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> * * *
>
> 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, all seniors testified at the hearing that they are requesting administration of all water rights, surface and groundwater, within Water District 37. Such requests qualify 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 in original). 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 proceedings purported 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 did not initiate a proceeding to identify a "reasonable ground water pumping level" or the "reasonably anticipated rate of future natural recharge," instead he 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.

Additionally, 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, *inter alia*, the proper procedure IDWR should have followed 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, invalidates the conclusions and orders made pursuant to those proceeding, and this Court should enjoin the *Curtailment Order* accordingly.

COUNT III
REQUEST FOR DECLARATORY RELIEF:

IDWR'S ADMINISTRATIVE PROCEDURE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

The Director's administrative hearing violated 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 adjudicating 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).

The Director's decision to initiate proceedings and administration of water well after the beginning of the irrigation season creates additional due process hurdles, as it has resulted in an order to curtail thousands of acres that have planted crops proceeding to maturity and harvest. The timing of the Director's 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

[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.*

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 flawed and at a minimum arbitrary and capricious under the circumstances.

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 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 a fast-tracked hearing that took six days to complete. IDWR was still only disclosing information during the course of the 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.

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 – <u>it is an integral component of due process</u> 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. In this case the Director has proposed to curtail junior groundwater rights for alleged injury to senior water users that did not even participate at the hearing. *See Curtailment Order* at 28. The Petitioners had no opportunity to discover these un-named seniors, their proposed water use, or whether they would be injured this irrigation season. Consequently, the Petitioners had no basis or notice to be able to present or prove any defenses. This type of agency action violates due process and is plainly arbitrary and capricious.

As explained below, the Director's *Notice* and truncated hearing violated 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 ordered curtailment of ground water rights during the 2021 irrigation season. *See Curtailment Order*. SVGWD's members, as 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 has ordered curtailment of 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. 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.[5] 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 waited to produce any documents in response to this request until the close of business on May 24, 2021. *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 prejudiced Petitioner and its consultants. While Sun Valley Company filed a request for information related to the Staff Memorandums, IDWR did not even produce the information until mid-week of the hearing in a series of emails.

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 Petitioner's right to due process.[6] For example, the following outlines the various delivery call

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

[6] 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.

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[7]

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

[7] 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.

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 did not have a reasonable time to prepare for hearing, the risk of curtailment without a meaningful and fair process was high and in fact, did occur. 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 complied 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 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 proceedings clearly fail 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 held contested case hearing 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 was even less as the Director waited to authorize discovery until May 22, 2021. Moreover, certain information was not even disclosed by the agency until the middle of the hearing.

Evaluated in context of what is necessary for a unique and complex conjunctive administration hearing, the Department's proceedings do 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." *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").

The fact the Petitioners' members' rights to due process were violated in the *Curtailment Order* is further amplified by the fact the Director is proposing to curtail ground water rights to supply to senior users who did not even participate in the hearing. Despite sending out notice to hundreds of water users in Basin 37, and setting a deadline for a notice to participate, only a handful of senior water users actually participated and testified at the hearing. The Director performed no "Crop Water Need" analysis as to these seniors but instead made vague findings of "shortage of water" that "impacted" their farming activities. Based on the modeled evidence in the record, curtailing all 23,000 acres would only supply enough water to fill three senior 1883 water rights that irrigate 615 acres. *See* Ex. AA to *Short Dec.* (Petitioners' Post Hearing Memorandum at 13-18). However, based on the *Curtailment Order*, the Director has now decided to administer groundwater rights under this proceeding to satisfy seniors that were not a part of this case and who chose not to participate in this proceeding.

In this respect the Director made the following finding in response to the Petitioners' "futile call" defense:

> Further, South Valley's and Galena's argument that curtailment would be futile incorrectly assumes that the Director may only consider the benefits of curtailment to the senior water rights held by the water users who appeared in this proceeding. This case is not a response to a delivery call by individual senior water right holders, however, and Idaho Code § 42-237a.g., does not limit the Director to considering the benefits of curtailment to senior water users who have appeared in an administrative proceeding. In addition, the senior water right holders who appeared in this proceeding are not necessarily the only water users on Silver Creek and the Little Wood River who would benefit from curtailment. Almost all water rights on Silver Creek and the Little Wood River are senior to ground water rights in the Bellevue Triangle. Any of these surface water rights would be allowed to divert flows resulting from curtailment, within the limits of their priorities. Tr. p. 898.

Curtailment Order, at 28.

The Director set the rules for the administrative case when he issued the *Notice* and *Pre-Hearing Order*. He then unilaterally changed those rules with the *Curtailment Order*. The Petitioners had no way of knowing that these unnamed seniors' rights would be at issue or subject to this case. In fact, the Director made it clear in the Pre-Hearing Conference that proof of injury by individual water users was essential beyond simply proof of depletion in the streams. Ex. W of *Short Decl.*, at 46:3-5. He also was aware of no difference between material injury as that term is used in the case law and the CM rules and injury for purposes of this administrative proceeding. *Id.*, at 49:10-20 The Petitioners were not allowed to conduct any discovery into any injury claims of water users who chose not absent themselves from participation in the administrative proceeding. In essence, the Director is proposing to curtail junior rights in favor of senior rights despite no allegation of injury and certainly without any evidence of injury to any of those non-participating seniors. The Director wrongly assumes, without any supporting evidence, that seniors who chose not to participate would beneficially use any water resulting from his curtailment order. Stated another way, the Petitioners were precluded from conducting discovery and putting on a defense as to water rights and users of senior water right holders who made no appearance and no showing of any kind at the hearing. This course of action and finding violates the Petitioners' right to due process as they were deprived of a "meaningful opportunity" to have a meaningful hearing as to any alleged injury to these unnamed seniors and their unnamed water rights

In summary, in light of the unique circumstances and complexity of such highly technical administrative cases, the Director's proceedings violated Petitioner's constitutional right to due process and the Court should enjoin the enforcement of the *Curtailment Order* as a matter of law.

COUNT IV
REQUEST FOR DECLARATORY RELIEF:

THE DIRECTOR'S FINAL ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, AND IS ARBITRARY AND CAPRICIOUS

A. The Model Relied Upon by Department Staff and the Direct is Inadequate.

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.[8] 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 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). *See* Ex. E of *Short Decl.*, at 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. *See* Ex. I of *Short Decl*. 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 uncertainly in that area may be even greater than twenty-two (22%) percent. And, as Dr.

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

Powell, an engineer at Brockway Engineering testified, the more the response time-period is reduced, the more the Model's uncertainty will increase. Ex. E of *Short Decl.*, at 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. Ex. P of *Short Decl.*, at 29; Ex. A of *Short Decl.*, at 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. Ex. H of *Short Decl.*, at 26; Ex. A of *Short Decl.*, at 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. Ex. D of *Short Decl.*, at 1439:5-1440:7. That additional data, however, has not been included in the calibrated Model. Ex. V of *Short Decl.*, at 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. Ex. E of *Short Decl.*, at 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. Ex. E of *Short Decl.*, at 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, 2021[9] 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 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. Ex. A of *Short Decl.*, at 187:1-7; Ex. E of *Short Decl.*, at 1273:14-1274:3; *See also* Ex. P of *Short Decl.* 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

[9] 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. Ex. A of *Short Decl.*, at 187:1-7. Although the Department had the benefit of such time to conduct the analyses, the Districts were given less than three weeks.

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. Ex. D of *Short Decl.*, at 1435:18-1436:13. Although this technology exists, it is not incorporated into Model version 1.1. *Id.*, at 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." *Id.*, at 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. Ex. E of *Short Decl.*, at 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.
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> * * *
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> 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.
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> * * *
>
> The Director's use of the "trim line" to limit curtailment was proper.

See Ex. X of *Short Decl.* (*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.

B. Material Injury to Senior Surface Water Holders has not been established.

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. Ex. C of *Short Decl.*, at 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. Ex. D of *Short Decl.*, at 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. Ex. D of *Short Decl.*, at 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. Ex. D of *Short Decl.*, at 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. Ex. D of *Short Decl.*, at 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. Ex. D of *Short Decl.*, at 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. JLH 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. Ex. C of *Short Decl.*, at 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.

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. *See* Ex. Q of *Short Decl*. He concluded correctly that the 1930s for the most part, proceeded groundwater development in the Bellevue Triangle. *Id.*, 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, Ex. A of *Short Decl.*, at 48:2-15, with a SWSI forecast number of -4.0. Ex. R of *Short Decl.*; Ex. B of *Short Decl.*, at 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. Ex. BD of *Short Decl.*, at 339:24-340:5. Not -4.0, which is the June 1, 2021 forecast. Ex. R of *Short Decl*.

The change in forecast would result in different analog years in the pre-pumping period. Ex. A of *Short Decl.*, at 51:8-15. In fact, now 1931 is a more comparable year for pre-groundwater development based on the June 1, 2021 NRCS forecast. Ex. B of *Short Decl.*, at 299:5-11. IDWR does have curtailment records from the Black Book for 1931. *Id*.; Ex. J or *Short Decl*., at 11. But IDWR did not run the numbers for the 1931 water against a comparable water year to the 2021 SWSI forecast.[10]

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

[10] 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." Ex. E of *Short Decl.*, at 1357:18-1359:7; *See also* Ex. K of *Short Decl*. 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. Ex. F of *Short Decl.*, at 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

appropriate. Moreover, the comparisons do not prove injury, as Mr. Luke agreed. Ex. B of *Short Decl.*, at 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 District[11] 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. Ex. J of *Short Decl.*, at 7; Ex. D of *Short Decl.*, at 858:7-859:2. Seepage losses in the creek and river were estimated at 15% for the 1930s. Ex. J of *Short Decl*. 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. Ex. G of *Short Decl*., at 1; Ex. D of *Short Decl.*, at 858:7-859:2.

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%. Ex. P of *Short Decl*., at 26; Ex. A of *Short Decl.*, at 140:21-141:12. The water master measured approximately 20 cfs was being lost at a single stretch on Silver Creek in March 2021. Ex. D of *Short Decl.*, at 852:8-10 Moreover, reliable evaluation of seepage losses is frustrated by measurement uncertainty. Ex. A of *Short Decl.*, at 131:21-25. IDWR views the Station 10 measurements as "poor." *Id*, at 232:3-9.

[11] WD 11AB, now WD 37.

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. Ex. D of *Short Decl.*, at 1396:13-18; *see* Ex. K-O of *Short Decl*. Beavers will return and repair the dams if the beaver are not trapped. Ex. D of *Short Decl.*, at 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.

C. The Curtailment Order Ignores Idaho Law and Policy for the Optimum Development and Use of Water.

To support the argument that the *Curtailment Order* ignores Idaho law and Policy for the optimum development and use of Idaho's waters, see the discussion in Count V, *infra*.

D. The Curtailment Order Ignores Establish Principles for the Conjunctive Management of Surface and Ground Water.

To support the argument that the *Curtailment Order* ignores established principles for the conjunctive management and administration of surface and ground water in Idaho, see the discussions in Count II and III, *supra*.

A. *No Legal Authority Exists to Initiate Proceedings in Mid-Season Outside of 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*, Ex. Y of *Short Decl.* The Director denied the motion and asserted that the CM Rules were not implicated because no delivery calls had been filed ("*Denial Order*"). *See* Ex. Z of *Short Decl*., at 5-6.

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"); Ex. X of *Short Decl*., at 25 ("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.[12] 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.*

[12] 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*.

Idaho State Ins. Fund, 147 Idaho 307, 310 (2009). The Idaho Supreme Court provided the following guide for statutory construction:

> 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 and a clear abuse of discretion 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. Ex. Z of *Short Decl*., 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* Ex. Z of *Short Decl.,* 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.[13] 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." Ex. Z of *Short Decl*., 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.

[13] *See* Ex. B of *Short Decl.*, at 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).

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 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.

COUNT V
REQUEST FOR DECLARATORY RELIEF:

THE *CURTAILMENT ORDER* IS IN VIOLATION OF PUBLIC POLICY

The Director initiated this proceeding in the middle of the irrigation season, well after the water users facing curtailment had already planted their crops. 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 (97.4) acres in order to supply water to two (2.6) acres.[14] *See* Ex. AA to *Short Dec.* (Petitioners' Post-Hearing Memo at 13-18). 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

[14] 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%.

> 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 97.4% of the acres involved in order to supply water to a mere 2.6% is not "economical" and does not lend itself to the continued industrial prosperity of the state for the rest of the 2021 irrigation season.

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 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. CITE? Stated another way, this state policy does not condone curtailing 23,000 acres in order to save 615 for the balance of this season.[15]

[15] Moreover, any of the drought induced losses suffered by Mr. Taber are covered by a multi-peril drought insurance policy. Ex. C of *Short Decl.*, at 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.

Curtailing groundwater acres at this point in the irrigation season would basically preclude the beneficial use of 67% of the available groundwater and curtail 23,000 acres of groundwater irrigated land in order to supply water a mere 615 acres of surface irrigated land. Staying the *Curtailment Order* will support the public interest in optimum use of water in that it will prevent the disproportionate loss of water, and it will allow the Director time to review and approve the proposed mitigation plan, which is expected to offset the potential benefits to senior right holders from curtailment.

COUNT VI
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).

B. Irreparable Harm Will Result if the Curtailment Order is Not Enjoined.

The Director's *Curtailment Order* **is effective as of 12:01 a.m. on July 1, 2021**. Petitioner's members have approximately 23,000 acres of crops and forage that have been planted and are currently being irrigated for the 2021 irrigation season. Holding an unlawful hearing and ordering 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 South Valley Groundwater District encompasses approximately 22,000 - 23,000 acres of irrigated crop land served by ground water. Ex. E of *Short Decl.*, at 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. *Id.*, at 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.,* Ex. D of *Short Decl.*, at 1076:12-14. By the time the present matter commenced 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.

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 *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. Ex. E of *Short Decl.*, at 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. Ex. E of *Short Decl.*, at 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. *Id.*, at 1079:15-17 If he used feed hay, he would lose calves to disease and would lose 40% of the reproduction from the cows, over the next season.

Gary Beck has been the Ranch Manager for Hillside Ranch for twenty-two years. Mr. Beck explained the consequences of a July 1 curtailment on the barley crop. *Id.*, at 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 kennels to plump up to meet Coors and Anheuser-Busch standards. *Id.*, at 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. *Id.*, at 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.

The injuries described by Mr. Johnson (potatoes), Mr. Taylor (pasture and cattle), and Mr. Beck (barley) apply across the entire Bellevue Triangle and the 22,000 – 23,000 acres of land irrigated from wells, and are injuries representative of the losses the Petitioners' will incur as a result of the *Curtailment Order*. South Valley members alone anticipate losses from the *Curtailment Order*, occurring in the middle of the irrigation season, well in excess of $12 Million. *Id.*, at 1129:2-9, 1163:9-10.

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 VII
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 enforcement of the *Curtailment Order* 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.

DATED this 29th day of June, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2021, the foregoing was filed, served, and copied as shown below.

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