Jerry R. Rigby (ISBN 2470)
Chase T Hendricks (ISBN 8604)
Of RIGBY, ANDRUS
& RIGBY LAW, PLLC
Attorneys at Law
25 North Second East
Rexburg, ID 83440
Telephone: (208) 356-3633
Facsimile: (208) 356-0768
jrigby@rex-law.com
chendricks@rex-law.com

Joseph F. James
James Law Office, PLLC
125 5th Ave. West
Gooding, ID 83330
Telephone: (208) 934-4429
joe@jamesmvlaw.com

W. Kent Fletcher (ISBN 2248)
Fletcher Law Office
PO Box 248
Burley, ID 83318
wkf@pmt.org

Attorneys for Big Wood & Little Wood Water Users Association and Big Wood Canal Company

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 0F WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,

Case No. CV07-21-243

BWLWWUA AND BWCC'S REPLY BRIEF TO PETITIONERS' OPENING BRIEF

Respondents.

and

SUN VALLEY COMPANY, CITY 0F BELLEVUE, BIG WOOD CANAL COMPANY, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, and CITY OF POCATELLO,

Intervenors.

COMES NOW, the BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, as the representative of its individual parties to the above-entitled matter, and the BIG WOOD CANAL COMPANY ("BWLWWU" and "BWCC", also referred as the "Senior Surface Water Users), collectively, by and through its attorneys of record, RIGBY, ANDRUS & RIGBY LAW, PLLC, JAMES LAW OFFICE, PLLC, and FLETCHER LAW OFFICE, hereby respond to the *PETITIONERS' OPENING BRIEF,* filed by the South Valley Ground Water District and Galena Ground Water District, as the Petitioner's, (collectively "Ground Water Districts").

STATEMENT OF THE CASE

On May 4, 2021, the Director issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* ("Notice"). The Notice stated that a drought is predicted for 2021 irrigation season, and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. *Id.* at 1. The *Notice* also stated that curtailment model runs of the Wood River Valley Groundwater Flow Model v .1.1 ("WRV 1.1 Model" or "Model") showed that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021

irrigation season. *Id.*

The *Notice* cited Idaho Code § 42-237a.g.'s provision that 'water in a well shall not be deemed available to fill a water right therein if withdrawal of the amount called for by the right would affect ... the present or future use of any prior surface or ground water right" and stated that, based on the information from the Model, the Director 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." *Id.* The *Notice* stated the Director was initiating an administrative proceeding, pursuant to Idaho Code§ 42-237a.g. and IDAPA 37.01.01.104, to determine whether water is available to fill the ground water rights within the Wood River Valley south of Bellevue, as depicted in the map attached to the *Notice*. *Id.* The map defined this as the "Potential Area of Curtailment." The Notice stated "[i]f the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation seasons." *Id*

The *Notice* instructed parties wishing to participate in the administrative proceeding to send written notice the Department by May 19, 2021. Id. The *Notice* scheduled a pre-hearing conference for May 24, 2021, and scheduled the hearing for June 7-11, 2021, at the Department's state office. *Id*

On May 11, 2021, the Director issued a *Request for Staff Memorandum* ("Request"). The Request described ten subjects to be addressed in the staff memoranda, and directed that the memoranda be submitted to the Director on or before May 17, 2021. *Id.* at 1-3.
Four staff memoranda responding to the Request were submitted to the Director on May 17, 2021, and posted on IDWR's website the next day. Also posted on the Department's

website were supporting files for the staff memorandum addressing the Model's predictions of the hydrologic response in Silver Creek to curtailment of ground rights in the Bellevue Triangle.

A large number of parties filed notices of intent to participate in the administrative proceeding. The persons and entities who filed notices of participation are identified in the *Scheduling Order, Order Granting Party Status and Order Granting Party Status and Closing the Proceeding to Additional Parties*. The participants are individually identified in this order only as needed for clarity and to avoid confusion.

The Prehearing Conference was held on May 24, 2021. At the Prehearing Conference and in the subsequently issued *Scheduling Order* the Director discussed a number of issues related to party status. It was pointed out at the Prehearing Conference that the area analyzed by Jennifer Sukow in her staff memorandum was slightly smaller than the "Potential Area of Curtailment" depicted in the map attached to the Notice. Scheduling Order at 3. The Director therefore limited the "Potential Area of Curtailment" to the area considered in Sukow's staff memorandum. *Id.* The boundary for the updated "Potential Area of Curtailment" is reflected in Figure 17 of Sukow's *staff memorandum*. IDWR Ex. 2, Figure 17.

Prior to the hearing, the parties engaged in discovery, depositions, and filed various motions. The hearing began on Monday, June 7, 2021, and concluded on Saturday, June 12, 2021. Various lay and expert witnesses testified (including senior and junior water right holders) and exhibits were admitted into the record.

The Groundwater Districts filed a *Petition for Judicial Review* of the Director of the Idaho Department of Water Resources' ("Director," "Department," or "IDWR") *Final Order* dated June 28, 2021 and the *Final Order* Denying Mitigation Plan dated June 29, 2021. Administrative Record ("R."); R. 1882, 1948. These orders were based exclusively on Idaho

Code § 42-237a.g. The Director curtailed over 300 ground water rights that were providing irrigation water to approximately 23,000 acres in Blaine County. The Groundwater District argue now that the curtailment was based solely upon "strict priority" and without regard to material injury in the middle of an irrigation season was unprecedented and contrary to law. Petitioners, South Valley Ground Water District and Galena Ground Water District (collectively "Petitioners", "GWD", or "Districts"), submit that the Director erred and request this Court reverse and set aside the above referenced decisions.

ISSUES PRESENTED BY GROUNDWATER DISTRICTS

The Districts present the following issues for Judicial Review:

I. Whether the Director erred in pursuing conjunctive administration of water rights in Water District 37 under section 42-237a.g and not chapter 6, title 42 and the Department's CM Rules.

II. Whether the Director's *Final Order* is arbitrary and capricious and not supported by substantial evidence in ordering curtailment based upon "strict priority" and not material injury or the seniors' "reasonable in-season demand" and "crop water need" for the 2021 irrigation season.

III. Whether the Director's administrative process and *Final Order* violated the Districts' rights to due process.

IV. Whether the Director's reliance upon the staff memoranda, including a predetermination of the "area of common ground water supply" violated the Districts' rights to due process.

V. Whether the Director erred in denying the Districts' proposed mitigation plan and ordering curtailment without an opportunity for a hearing.

VI. Whether the Director erred in failing to find that curtailment, at least for certain senior rights, was barred by the futile call doctrine?

VII. Whether the Director's *Final Order* violates the state's policy of "optimum development and use" of groundwater.

VIII. Whether the Districts are entitled to attorneys' fees on judicial review pursuant to Idaho Code § 12-117.

ADDITIONAL ISSUE PRESENTED

The Senior Surface Water Users have one additional issue on appeal: [see IAR 35b4]

I. Whether the Senior Surface Water Users are entitled to attorneys' fees on judicial review pursuant to Idaho Code § 12-117.

STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by IDAPA, Title 67, chapter 52 of the Idaho Code. I.C. § 42–1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67–5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). As to the weight of the evidence on questions of fact, this Court does not substitute its judgment for that of the agency. *Spencer*, 145 Idaho at 452, 180 P.3d at 491. The Court shall affirm an agency decision unless the Court finds the agency's findings, inferences, conclusions, or decisions were: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." I.C. § 67–5279(3); see *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67–5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67–5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222.

Any party "aggrieved by a *Final Order* in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). Generally, a Court is charged with deferring to an agency's decision. See *Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 229, 192 P.3d 1050, 1053 (2008) (Court should not substitute its judgment for that of the agency as to questions of fact so long as the decision is "supported by substantial and competent evidence"); *St. Joseph Reg. Med. Ctr. v. Nez Perce Cty.*, 134 Idaho 486, 488, 5 P.3d 466, 468 (2000). The Court, however, is "free to correct errors of law." *Mercy Medical Center*, supra.

The "substantial evidence" test is synonymous with the "clearly erroneous" test. "To hold that a finding is not clearly erroneous, there must be substantial evidence in the record to support the finding." *Pace v. Hymas*, 111 Idaho 581, 588, 726 P.2d 693 700 (1986). "The court shall not substitute its judgment for that of the agency as to the evidence on questions of fact." Idaho Code § 67-5279(1). "Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla." *Spencer v. Kootenai Cty.*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008). "It is not the role of the reviewing court to weigh the evidence." *Davisco Foods Intern. v. Gooding County*, 118 P.3d 116 (2005). In determining whether an agency abused its discretion, the Idaho Supreme Court has held that a court "must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790,813,252 P.3d 71,94 (2011).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id*

ARGUMENT

I. The Director properly applied the Proper Statutory and Regulatory Process for of Water Rights in Basin 37.

Petitioners argue in their *Petitioners' Opening Brief* that the Director improperly elected to not follow the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11 et seq.) ("CM Rules") and for the first time in 60 years decided to invoke Idaho Code § 42-237a.g. for water right administration in Basin 37. Most of the issues in the *Petition for Judicial Review* revolve around the Director not applying the CM Rules.

The Director used Idaho Code §42-237a.g. to curtail Ground Water rights in the worst drought year on record when time was of the essence, elsewise, the Senior Surface Water Users would have been determinedly injured. The Petitioner previously argued that the "Director determining 'material injury,' in a contested case that would be expected to last a year or more."[1] However based on the Modelling available at the beginning of the 2021 year, the Director had determined that Senior Water Right Users would likely be impacted and he therefore was

[1] Petitioner's *Memorandum in Support of Motion for Preliminary Injunction* pg 7. Case No CV07-2021-00243.

required to institute I.C. §42-237a.g. in order to fulfill his duty under the Ground Water Act pursuant to Idaho Code. *See Notice.*

It is simply clear based on the underlying record, that but for the Director's quick action in this pending case, the Senior Surface Water Users would have been materially injured in the 2021 case, thereby violating the Senior's own Due Process rights and the Director shirking his duty under the Idaho Water codes in Title 42. The question of whether the Director has authority to act under I.C. §42-237a.g. is dispositive of the entire case.

At the beginning of the underlying case, the Sun Valley Company ("SVC") and SVGWD both filed *Motions to Dismiss.*[2] SVC's Motion was almost entirely predicated on the theory that a "call" by a senior water right holder is required to initiate an administrative hearing and is based upon a misinterpretation of the statute being utilized by the Director in this case. SVGWD argued that this administrative action must comply with the Conjunctive Management Rules (CM Rules) and misinterprets the express wording of the statute authorizing the alternative procedure utilized by the Director in this action.

SVC's argument was based upon the wording contained in Idaho Code § 42-237a.g. which states "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would effect... the present or future use of any prior surface or ground water right." The Petitioner argues to interpret this sentence to require a "call" by a senior water right holder. However, the wording of the statute is referencing the "amount called for by such right" which is the junior ground water right, not the senior water right. There is nothing in §42-237a.g. requiring the prior surface or ground water rights to make a water call. In

[2] See SVGWD's Motion to Dismiss filed in the Docket No. AA-WRA-2021-001, May 13, 2021.

other words, if a junior is "calling" for its water by diverting water and it affects the present or future use of any prior surface or ground water right, the Director is statutorily authorized to administrator the rights. Anytime a junior user is diverting water, the junior user is calling on that junior's right.

The Petitioner argues in the *Opening Brief* that a "call" was made by Senior Surface Water Users in both the pre-hearing Advisory Meetings and during depositions for this pending case. The statements made during both the advisory meetings and depositions were made by lay people who do not have the full understanding of the complex water laws, statutes and verbiage. This is particularly interesting considering that Basin 37 junior ground water users requested and obtained dismissal of prior water calls by senior surface water users on the grounds that the calls were not properly filed. *See Order Dismissing Petition for Administration* dated June 7, 2017, CM-DC-2017-001 and *Final Order Dismissing Delivery Calls* dated June 22, 2016, CM-DC-2015-001.

The parts of the statute that are not quoted are those portions that expressly give the Director the authority to administer in this circumstance:

> 42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:
>
> g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. (Emphasis added)

Idaho Code § 42-237a.g. goes on to state:

> Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

There is nothing set forth in Idaho Code § 42-237(a) that requires the Director to proceed under the conjunctive management rules in order to initiate the administrative proceeding referenced in Idaho Code § 42-237a.g., contrary to the arguments of SVC and Petitioner.

Petitioners assert that this is the first time the Director has utilized Idaho Code §42-237a.g. for water right administration in the 60 years since the Groundwater Act was passed.[3] However, the issue of whether the Director must proceed under Idaho's *Rules for Conjunctive Management of Surface Water Resources* ("CM Rules") when administering ground water has already been addressed by Judge Wildman. In a *Memorandum Decision and Order* dated November 6, 2020, *Basin 33 Water Users v. Surface Water Coalition*, Ada County Case No. CV01-20-8069, this Court has ruled that the Director does not need to use the CM Rules when exercising his authority under the Ground Water Act. This Court further went on to state that the CM Rules are only implicated upon the filing of a delivery call under those Rules.

As in this case, the groundwater coalitions of Basin 33 and Upper Valley Water Users challenged the Director initiating administrative proceeding under Idaho Code § 42-237a.b. and not following the CM Rules. In the *Basin 33* case, the groundwater users argued that CM Rules supersede and limit the Director's authority according to the *Final Unified Decree* in the Snake River Basin Adjudication ("SRBA"). However, the Court expressly disagreed with the Petitioner's assertion that the CM Rules somehow limit and supersede the Director's authority to act under the Ground Water Act.

The Court recognized that the Director correctly concluded in the *Basin 33* case that the CM Rules "do not subsume the separate need to manage ground water resources under the Ground

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[3] Clause 39. Filed in Petition for Judicial Review, et al filed in CV07-2021-0243

Water Act, despite the completion of the SRBA and creation of water districts."[4] The Court rejected the Petitioner's reasoning and found;

> "Absent the Ground Water Act, the Director's only option for addressing continuing ground water declines is to wait for the next delivery call...In theory, the pattern could continue until the ground water reaches critical levels or worse.
>
> These examples demonstrate in practical terms the fallacy of the assumption and the shortcoming of relying exclusively on the CM Rules for ground water management. They further demonstrate that the Director's duty to manage ground water under the Act does not cease when an adjudication is completed or when a delivery call is resolved. They show that when a call is addressed through mitigation or some other monetary agreement, as opposed to curtailment, the continued depletion of the underlying water source is not addressed....leaving the Director's express duty under the Act...unfulfilled".

Basin 33 Water Users v. Surface Water Coalition Memorandum Decision and Order, CV01-2020-8069 pg. 12, Nov. 6th 2020.

As this Court concluded in the *Basin 33* case above, the Director has the ability to utilize the Ground Water Act "do all things reasonable and necessary"[5] to protect groundwater depletion by administering to the area pursuant to Idaho Code § 42-237a.g. The Court also expressly affirmed and recognized CM Rule 3, which provides;

> 003. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 3).
> Nothing in these rules limits the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho Law.[6]

This Court further held that "Rule 3 makes clear the CM Rules do not limit the Director's ability to exercise the authority granted to him under the Ground Water Act."[7] Exactly as in the *Basis 33* case, senior surface water users in the Big Wood River Valley cannot afford to wait until

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[4] *Designation Order* R., 19 & fn. 18.

[5] Idaho Code § 42-231

[6] IDAPA 37.03.11.003

[7] *Basin 33 Water Users v. Surface Water Coalition* Memorandum Decision and Order, CV01-2020-8069 pg. 10, Nov. 6th 2020.

ground water levels reach critical levels to initiate a delivery call. The Courts have ruled that the Director has the ability to initiate administrative proceedings under the Ground Water Act outside of the CM Rules and specifically in Idaho Code § 42-237a.g. when he determines it necessary, as the Director has done here. Any failure to respond to the information from the Model that withdrawal of water from ground water wells in the Wood River Valley south of Bellevue would impact the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season would leave the Director's duty under the Act, likewise, unfulfilled.

The Idaho Supreme Court addressed an agency's, such as IDWR's, ability to interpret areas of Code in its charge in the seminal Idaho case *Chevron* in *J.R. Simplot Company, Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). In its ruling, the Idaho Supreme Court articulated a four-step analysis;

> After reviewing our extensive case history, as well as the holdings of the U.S. Supreme Court and various other state courts, we hold that the rule of deference to agency statutory constructions retains continuing validity. We hold that a standard of "free review" is not applicable to agency determinations. Accordingly, we hereby clarify and limit *Idaho Fair Share* [*v. Public Utility Comm'n, 113 Idaho 959, 751 P.2d 107 (1988)*] to the extent that case implied that the standard of free review was appropriate for reviewing an agency's statutory interpretations.
>
> In determining the appropriate level of deference to be given to an agency construction of a statute, we are of the opinion that a court must follow a four-prong test. The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law. *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979).
>
> The second prong of the test is that the agency's statutory construction must be reasonable. This requirement was recognized at the beginning of our case law when in *State v. Omaechevviaria*, 27 Idaho 797, 152 P. 280 (1915), we indicated that deference would not be appropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no

> weight or consideration." 27 Idaho at 803, 152 P. at 281; *see also Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).
>
> The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue. An agency construction will not be followed if it contradicts the clear expressions of the legislature because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-3, 104 S. Ct. at 2781 (footnotes omitted).
>
> If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present. If the underlying rationales are absent then their absence may present "cogent reasons" justifying the court in adopting a statutory construction which differs from that of the agency.

J.R. Simplot Company, Inc. v. Idaho State Tax Comm'n, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991) (emphasis supplied).

> When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is "incumbent upon a court to give a statute an interpretation which will not render it a nullity." *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct. App. 1991).

State v. Reyes, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003).

However the issue with I.C. §42-237a.g. is not one of ambiguity. The statute clearly states the intention of the Legislature. The Senior Surface Water Users do not believe that the statute leads to an absurd result, but even if it did, the Idaho Supreme Court held it will not overturn an unambiguous statute:

> We have recited the language from the *Willys Jeep* case or similar language numerous times, usually without even addressing whether we considered the unambiguous statute absurd as written. [String citation omitted.]

> In several cases, we have responded to arguments that the wording of an unambiguous statute would produce an absurd result, but we have never agreed with such arguments. [String citation omitted.]
> Thus, we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Indeed, the contention that we could revise an unambiguous statute because we believed it was absurd or would produce absurd results is itself illogical. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Porter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous. *In re Application for Permit No. 36–7200*, 121 Idaho 819, 823–24, 828 P.2d 848, 852–53 (1992). If the only reasonable interpretation were determined to have an absurd result, what other interpretation would be adopted? It would have to be an unreasonable one. We therefore disavow the wording in the *Willys Jeep* case and similar wording in other cases and decline to address Plaintiffs' argument that Idaho Code section 39–1392b is patently absurd when construed as written.

Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011) (Eismann, J.) (citing *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979)).

Furthermore, IDWR's own rules and Procedures as outlined in IDAPA give the Director and the Department very little leeway in not following what is clearly and unambiguously written in Idaho Code. "A hearing officer in a contested case has no authority to declare a statute unconstitutional." IDAPA 37.01.01.415.

Based on the case law noted above and the prior decision in the *Basin 33* case it is clear that the Director has the responsibility and ability to initiate administrative proceedings when he finds a need. Considering the particular drought-stricken prospects that presented themselves in the spring of the 2021 in Basin 37 the Director made a determination to act and that determination was lawfully appropriate. Though the Director did not reference this statute, it

could also be argued that the Director by issuing the initial *Notice* in this case complied with Idaho Code §67-5247 as all the criteria in that code was present and was met by the Department.[8]

II. The Director's Injury Determination Properly Analyzed Idaho Law and Properly Analyzed the Senior's Actual Beneficial Use as the Director determined that anything short of full curtailment would result in irreparable harm to Senior Surface Water Users.

The Ground Water Districts again rely on the CM Rules and argue that the Director did not properly analyzed the Senior's beneficial use in finding 'material injury' to the Senior's surface water rights for the 2021 irrigation season. For the reasons noted above, this is a misinterpretation of the abilities and authority the Director has under I.C. §42-237a.g. As outlined in the Director's *Final Order*, the Director held that "The surface water users, therefore, carried their burden of providing evidence to support an initial determination that during the 2021 irrigation season, the surface water users have been and will continue to be injured by a shortage of water resulting, in part, from ground water pumping in the Bellevue Triangle under junior priority water rights. *Final Order,* pg. 23. Through the proceeding, the Director had information about the Senior's continued injuries almost in real-time. Through the course of the proceeding, the 1885 priority rights were already shut off and the 1884's were expected to be

[8] *See* 67-5247. EMERGENCY PROCEEDINGS. (1) An agency may act through an emergency proceeding in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action. The agency shall take only such actions as are necessary to prevent or avoid the immediate danger that justifies the use of emergency contested cases. (2) The agency shall issue an order, including a brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action. When appropriate, the order shall include findings of fact and conclusions of law. (3) The agency shall give such notice as is reasonable to persons who are required to comply with the order. The order is effective when issued. (4) After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be re- quired if the matter did not involve an immediate danger. (5) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency con- tested cases or for judicial review thereof.

curtailed sometime before the end of June. *See, e.g.,* Tr. pp. Tr. pp. 771-72 788-89 (Lakey test.); *Rigby Ex. 2* (Lakey memorandum). Through the pendency of the case even the 9/1/1883 priority rights had been cut. *Final Order* pg. 8 and 29

Furthermore, as testified in the hearing and as contained in the Senior Surface Water Users injury table exhibits and noted by the Director in his *Final Order* "The surface water users also testified to the steps they have taken in 2021, and in earlier drought years, to conserve and extend their water supplies, such as securing supplemental water, planting less water intensive crops, and minimizing losses by selecting which fields and crops to continue watering and which to dry out." *Final Order* pg. 19. By not curtailing junior rights it became clear through the proceedings that it would continue to irreparably harm senior surface water users to the benefit of any junior ground water users and is not in line with prior appropriation doctrine and the Supreme Courts holdings that there be "no unnecessary delays in the delivery of water." *AFRD2 v. IDWR*, 143 Idaho 862, at 874, 153 P.3d 433, at 445 (2007).

The Director found conclusively that that the uncontradicted evidence presented by the seniors met their burden of showing their significant damages from the lack of water in the 2021 irrigation season. The Director, in his *Final Order* went through several particular senior users farming operations such as Fred Brossy, Rodney Hubsmith, Carl Pendleton, John and William Arkoosh, Alton Huyser, Don Taber, Charles Newell, and Lawrence Schoen. The Director reiterated in his *Findings,* with explanations of the senior users crop decisions, irrigation efficiencies these individuals had conducted this year and others, remedial measures taken to secure additional water in the 2021 season, and ultimately finding that "ground water pumping in the Bellevue Triangle adversely affects senior surface water uses in Silver Creek and the Little Wood River and should be curtailed. *Final Order* pg. 19, *See* also pg. 13-19.

If the Director had proceeded under the CM Rules this seniors' injury would have been allowed to continue in the 2021 irrigation season in Basin 37. As this Court stated in the *Basin 33* case, absent the Ground Water Act, "the Director's only option for addressing continuing ground water declines is to wait for the next delivery call...In theory, the pattern could continue until the ground water reaches critical levels or worse", as was the situation in the underlying case.[9] This case, as much as any other, demonstrates the shortcomings of relying exclusively on the CM Rules for ground water management. Failure to act during the 2021 crop season would have resulted in continued depletion of the water source and continuing injury to senior users' rights.

III. The Director's Proceeding and Hearing Process Did Not Violate the Districts' Constitutional Due Process Rights.

The Petitioners also argue that the proceeding violated their right to due process. In *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18, 32-33 (1976), the Supreme Court of the United States announced a general formula which has been accepted by the Idaho Supreme Court for the determination of what process is due:

> "(O)ur prior decisions indicate that 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 requirement would entail."
> In summary, the approach is utilitarian, requiring a preliminary showing that the asserted interest is a cognizable interest under the Fourteenth Amendment, and then requiring a balancing of the relative interests of the individual and the state. The foregoing approach has been adhered to by this court in numerous cases. See, e.g., Bowler v. Board of Trustees of School Dist. No. 392, 101 Idaho 537, 617 P.2d 841 (1980); Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

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[9] *Basin 33 Water Users v. Surface Water Coalition* Memorandum Decision and Order, CV01-2020-8069 pg. 12, Nov. 6th 2020.

Application of True, 103 Idaho 151, 155, 645 P.2d 891, 895 (1982)

The Idaho Supreme Court has described the flexible nature of the due process analysis this way:

> Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation. The U.S. Supreme Court has stated that 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, third, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirements would entail.[10]
>
> ...
>
> Procedural due process requires some process to ensure that the individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. *Cowan v. Board of Commissioners,* 143 Idaho 501 at 512, 148 P.3d 1247 at 1258 (2006). This requirement is met when the defendant is provided with notice and an opportunity to be heard. *Id.* The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. *Id.*

Neighbors for a Healthy Gold Fork v. Valley Cty., 145 Idaho 121, 127, 176 P.3d 126, 132 (2007)

The Supreme Court of Idaho examined what process would be due for curtailment of a unadjudicated 'constitutional' water right even without a prehearing in *Nettleton v. Higginson* (1977). The Court in that case explained the basic tenants of what due process is required in curtailing a water right, even un unadjudicated one:

> "Justice Powell, in a concurring opinion in *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 91 S.Ct. 1895, 40 L.Ed.2d 406 (1974), notes that the determination of what due process is required in a given context requires a balancing of both the nature of the governmental function involved and the private interests affected. 416 U.S. at 624-25, 94 S.Ct. 1895. It is well-settled that the water itself is the property of the state, which has the duty to supervise the allotment of those waters with minimal waste to the private appropriators. I.C. s 42-101; *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960);

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[10] *Neighbors for a Healthy Gold Fork v. Valley Cty.*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007) (citations *omitted).*

Walbridge v. Robinson, 22 Idaho 236, 125 P. 812 (1912). In addition, the state's authority to regulate the distribution of the water is constitutionally based:

> 'The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.'

Idaho Const. Art. 15, s 1.

The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. As to the private interests affected, it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation, i.e. first in time is first in right. However, as stated earlier, it is the state's duty to supervise the distribution of the waters through the Water Resource Board and its watermasters. In *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973), the dissent aptly considered the practical difficulties facing the watermaster:

'It is to be kept in mind that the authority of the watermaster in his district is to control the delivery to the water from the source of supply * * * into the respective ditches or canals leading from the main stream. The watermaster is confronted by two significant problems when delivering water within his water district: first, he must maintain the constitutional requirement of priority of water rights among the various users; second, he is confronted with the practical problem of delivering water to the correct point of diversion. When one considers the magnitude of the watermaster's problem of water delivery in his water district, it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion.

...

'First the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.' *Fuentes v. Shevin*, 407 U.S. 67, 91, 92 S. Ct. 1983, 2000, 32 L. Ed. 2d 556 (1972)

We find the above three requirements to be met in the present case and find no procedural due process violation in the actions of the watermaster pursuant to I.C. § 42-607.

Nettleton v. Higginson, 98 Idaho 87, 90–91, 558 P.2d 1048, 1051–52 (1977)

The Idaho Supreme Court has also discussed the due process required for curtailment of water rights in *Clear Springs Foods, Inc. v. Spackman* 150 Idaho 790, 814, 252 P.3d 71, 95 (2011). In *Clear Springs* the Court stated that in cases involving administration of water rights in time of shortage, due process must be balanced with the need for prompt action:

> The first requirement is that "the seizure has been directly necessary to secure an important governmental or general public interest." A water right "does not constitute ownership of the water," *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). All waters within the state when flowing in their natural channels and all ground waters are property of the State. Idaho Code §§ 42–101 & 42–226. The state has the duty to supervise their appropriation and allotment to those diverting such waters for any beneficial purpose. *Id.* "It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water. As between appropriators, the first in time is the first in right." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944). "The doctrine of prior appropriation grew out of the sense of justice of the miners who came to the west in search of gold and other precious metals." *Joyce Livestock*, 144 Idaho at 11, 156 P.3d at 512. "Eventually, the state, territorial, and federal governments recognized that the only way the arid lands of the west could be settled and turned to agricultural use was to officially recognize the law of appropriation as the law of the land." *Pocatello v. State*, 145 Idaho 497, 502, 180 P.3d 1048, 1053 (2008). Just apportionment to, and economical use by, those who have appropriated water for a beneficial use furthers the important governmental interest of securing the maximum use and benefit of Idaho's scarce water resources. *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("[T]he entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.").
>
> The second requirement is that there has been a special need for very prompt action. In times of water shortage, someone is not going to receive water. When a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action. "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). Deprivation of water for the time it would take for a hearing may cause serious economic or other harm to the senior appropriator. In addition, very prompt action may be necessary to prevent attempts at self-help and possibly even violence.
>
> The third requirement is that the person initiating the seizure is a government official responsible for determining that seizure without a prior hearing was necessary and justified in the particular instance. That determination must be made under narrowly drawn standards. The State has the duty to supervise the appropriation and allotment of both surface and ground waters to those diverting such waters for any beneficial purpose.

> Idaho Code §§ 42–101 & 42–226. The State uses the Department and watermasters to allot the water among appropriators and to curtail junior appropriators who are interfering with the water rights of senior appropriators. They do so according to narrowly drawn standards.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011)

Here, it is uncontested that the Director has the duty to supervise the appropriation and allotment to those diverting such waters for any beneficial purpose, thus meeting the first *Clear Springs* requirement. The second *Clear Springs* requirement was also clearly met in this case – it is uncontroverted that there would be a shortage of water supplies during 2021. Finally, the third Clear Springs requirement was clearly met as the Petitioners received adequate due process: (1) they had actual notice of the pending curtailment order and the hearing date; and (2) they had a meaningful opportunity to be heard by presenting evidence at the hearing.

The United States Supreme Court in the *Mathews* case addresses procedural due process requirements without a hearing. In the case at hand, the parties engaged in discovery including the taking of depositions, a lengthy week-long hearing was held and the Petitioners were given opportunity to present evidence, the Petitioners cross-examined Department expert witnesses and other witnesses, called their own witnesses, and were represented by counsel. Furthermore, the Director was an impartial decision maker who relied only on what was presented on the record. The Director's *Final Order* contained statements of the reasons for the final determination.

The underlying hearing complied with the other seminal United State Supreme Court case of *Goldberg v. Kelly*, 397 U.S. 254, 255, 90 S. Ct. 1011, 1014, 25 L. Ed. 2d 287 (1970). It should be noted that "No one has a vested right in any given mode of procedure (*Railroad Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231; *Gwin v. United States*, 184 U. S. 669, 674, 22 Sup. Ct. 526, 46 L. Ed. 741), and so long as a substantial and efficient remedy remains or is provided due

process of law is not denied by a legislative change (*Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 439, 23 Sup. Ct. 234, 47 L. Ed. 249). *Crane v. Hahlo*, 258 U.S. 142, 147, 42 S. Ct. 214, 216, 66 L. Ed. 514 (1922).

As the Order Denying South Valley Ground Water District's Motion to Designate Order Denying Motion to Dismiss as *Final Order* filed in the Matter of Basin 37 Administrative Proceeding Docket No. AA-WRA-2021-001 indicates "As discussed in the Order, this case involves a question of administration during the current 2021 irrigation season, and time is of the essence. Drought conditions are predicted, and the information available to the Director suggests that ground water pumping in the Bellevue Triangle during the 2021 irrigation season will have an immediate, measurable impact on surface flows in Silver Creek and its tributaries, and may injure senior surface water rights diverting from those sources. *Order Denying Motion to Dismiss* at 8.

Under these circumstances, such as was present here, the senior surface water users would argue that the Director and the Department failing to act when they did pursuant to the Ground Water Act would have caused imminent and irreparable harm to their water users and would not be in the "interest of justice". Expediency was required to determine these issues as soon as possible and not postpone. Anything short of doing exactly what the Director did would be a substantive denial of senior surface water users' rights under the code and a violation of their own due process.

<u>High Risk of Erroneous Deprivation, Notice, Discovery and Preparation was Inadequate.</u>

The Groundwater Districts argue that initiation of the curtailment proceedings after crops had been planted created a high risk of erroneous deprivation, that the Director's Notice was

inadequate, and the Director's Discovery and Preparation Process was inadequate. The Groundwater Districts cannot claim surprise that a curtailment order was issued as part of the *Final Order*. At the start of the administrative proceeding and as contained in the *Notice*, the Director advised all parties that curtailment was a possible result of the hearing. *See Notice.* Additionally, at the April 7, 2021 advisory committee meeting, (noting the Advisory Committee was initiated in Nov. 2020) 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." *SVGWD and GGWD's Exhibit 19* April 7th Advisory Meeting Minutes. The Director further put ground water users on notice by explaining the following:

> Director Spackman weighed in during this discussion and reminded the group that he formed the committee after receiving groundwater management proposals that lacked detail and quantification. He formed the committee to present opportunities for participants to learn about surface water and ground water resource interactions and use in the Wood River basin so that they can quantify the impacts of various water management proposals. He further emphasized that approving a management plan for the Big Wood River Groundwater Management Area is not his only authority or duty; he has some responsibility during times of shortage to deliver water by priority in accordance with Idaho law. The Director suggested that due to the high probability of surface water shortages during the 2021 irrigation season, which will begin soon, ground water users need to propose specific remedial actions in the next two to three weeks.

SVGWD and GGWD's Exhibit 19, March 24th Advisory Meeting Minutes.

These advisory committee hearings were held to help foster mitigation of injury to senior surface water users but were ultimately rejected by the groundwater users. Considering the participation of all parties at these advisory it is disingenuous to claim that parties were surprised that they could be curtailed in the middle of the irrigation season after crops were planted. Given the nature of the discussions and the Director's statements, junior-priority groundwater pumpers had ample opportunity to prepare for curtailment. Furthermore, the risk of curtailment of a

junior-priority ground water right during a time of shortage is a risk that Idaho water users knowingly undertake and for which they should always plan. The impact of curtailment of 23,000 acres and the considerations of the public interest concerning junior priority water rights, as described in Petitioner's *Opening Brief* and elsewhere, is not a basis to avoid enforcement of the Director's Order finding material injury and his responsibility to fulfill the tenants of Idaho Priority laws. The junior users are arguing that they should not be affected by water rights administration while senior users are being injured. The hearing, discovery and the participation by the affected parties was sufficient based on the situation and should be upheld.

IV. The Director's Reliance Upon Staff Memorandums, Including the Effective Pre-Determination of an ACGWS, Did Not Violate the Districts' Due Process Rights.

The Petitioner next asserts that 'way' the Director relied on Expert Staff Reports was inappropriate and violated the Petitioner's Due Process Rights, again citing the CM Rules as solely authoritative. It should be noted that the Petitioners enumerate no claims of violations of IDAPA Department Rules and Procedures in the underlying case except that the Department's Experts gathered and presented information in the underlying case and allege that was somehow inappropriate.

IDAPA rules are clear that "Subject to Rules 558, 560, and 600, all parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments." IDAPA 37.01.01.157. Furthermore the rules clearly state that "In all proceedings in which the agency staff will participate, or any report or recommendation of the agency staff (other than a recommended order or preliminary order prepared by a hearing officer) will be considered or

used in reaching a decision, at the timely request of any party the agency staff must appear at any hearing and be made available for cross-examination and otherwise participate in the hearing, at the discretion of the presiding officer, in the same manner as a party." IDAPA 37.01.01.201

At no point in the underlying case did the Petitioners object to this Agency Expert testimony coming into the record at the time of the hearing. "Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development..... The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence." IDAPA 37.01.01.600

The fact that the Department had begun reviewing the "Bellevue Triangle" area prior to the hearing without informing the Petitioners and 'behind closed doors' is disingenuous. The junior users are arguing that the Department should not do its statutory duty of administering water rights. The fact that the Department routinely and independently conducts its own research is in furtherance its statutory duties and an absolute necessity to administer water rights in the State of Idaho.

Regardless, the Petitioner as well as the Senior Surface water users presented their own Expert testimony thoroughly throughout the underlying hearing and were each allowed to present conflicting expert opinion about the interactions between the surface water and groundwater in the curtailment area. Based on the language in *Final Order* the Petitioner's own "Expert witnesses Erick Powell and Greg Sullivan, acknowledged that, despite the need for improvement to the WRV 1.1 Model, the model is the best available tool to evaluate the effects of ground water pumping on flows of Silver Creek" (Tr. at 1320; 1452). *Final Order* pg. 8.

Although the Groundwater Districts disagree with the Director's final determination the Court must recognize the Director's discretion and statutory duty to administer water rights.

V. The Director did not err in Denying Mitigation Plan and Ordering Curtailment.

The Groundwater Users present argument that the Director denied a proposed mitigation plan without any process or hearing. Unlike the detailed methodology of mitigation allowed in the conjunctive management rules, I.C. Sec. 42-237a.g. does not specifically provide for mitigation and hearing. The senior surface users had no objection to the hearing of the *Proposed Mitigation Plan* but a stay during that time as requested by Petitioners would only exasperate the injuries senior surface water users were suffering while allowing ground water users to continue to divert out-of-priority. However just as Petitioner's complain that the Director curtailed their water at a critical time in the season, the Senior Surface water's were likewise suffering recognized 'material injury'. As outlined in the *Final Order* the Director found that

> The assertions that this case is analogous to a delivery call in the ESPA are contrary to the record. This proceeding involves an aquifer that is far smaller than the ESPA in geographical extent and volume. The record shows that change in ground water pumping from the Bellevue Triangle are quite rapidly reflected changes in the flow of Silver Creek and the Little Wood River, and that the amount of change is substantial. Moreover, there is a need for prompt action to protect senior surface water rights on Silver Creek and the Little Wood River. Many of these rights have been curtailed due water shortages and more likely will be soon; yet out-of-priority ground water pumping in the Bellevue Triangle continues. Under these circumstances requiring many months" of prehearing preparation would be far in excess of what is warranted by the particular situation." *Neighbors*, 159 Idaho at 190 358 P.3d at 75. It also would effectively preclude in-season protection of senior surface water rights while allowing junior ground water right to continue pumping. See *Second Rangen* Dec. at 8 (rejecting the rationale that "the senior user's water use and operations should be disrupted so as to not unduly disrupt the juniors"). In the circumstances of this case, the extended prehearing schedule that the Cities, Sun Valley, and IGWA seek "unreasonably shifts the risk of shortage to the senior surface water right holder." *First Rangen* Dec. at 13-14. Id.

Final Order pg. 37.

Furthermore, the senior surface water users have previously responded that the *Proposed Mitigation Plan* by the ground water users as insufficient. The Ground Water Districts' attempt

to mitigate to a specific subset of priority dates fails to fully mitigate the impacts that will be realized by the BWLWWU & BWCC's rights should full curtailment of the ground water rights within the Bellevue Triangle be ordered for as contained in the previously filed *Response to Proposed Mitigation Plan* filed in this proceeding. *See BWLWUA and BWCC Response to Mitigation Plan*

Additionally, as the Director explained in the *Final Order,*

> The argument that curtailment cannot be ordered until the junior ground water users secure mitigation is also contrary to the holdings of the District Court for in the second *Rangen* decision. *Memorandum Decision and Order* (5th Jud. Dist. Case o. CV 2014-4970) (June 3, 2015) (*"Second Rangen Dec."*). In *Second Rangen Dec.*, the Director delayed curtailment to allow junior ground water users "sufficient time ... to prepare for curtailment." *Second Rangen* Dec., at 4. The District Court rejected the Director's approach because it resulted in Rangen's senior rights being "prejudiced and subjected to unmitigated material injury while junior users were permitted to continue out-of-priority diversions." Id. at 7-8. The District Court held that "under the Director's rationale, the senior user's water use and operations should be disrupted so as to not unduly disrupt the juniors," which was contrary to Idaho's prior appropriation doctrine. *Id.* at 8. The argument that curtailment cannot be ordered in this case until junior ground water users secure mitigation is contrary to Idaho's prior appropriation doctrine for the same reasons.

Final Order, pg. 35.

Shifting the risk of shortage to the senior surface water right holder during the pendency of these post hearing proceedings would be unlawful and inequitable. The Director held an extensive hearing in this matter and made a determination that BWLWWU & BWCC's users are being materially injured by junior ground water pumping. SVGWD AND GGWD'S have not provided any authority suggesting that there is a due process right to a further hearing on mitigation before the order finding material injury may be enforced.

The term "agency action" is defined in Idaho Code § 67-5201. It expressly includes both actions and the failure to act. Had the Director not utilized 42-237a.g. the Senior Surface water users own Due Process Right's would have been jeopardized as the Ground Water District's now

complain. Again, the Petitioner erroneously tries to draw conclusions based solely on the CM Rules.

F. The Director did not Err in Denying the Districts' Futile Call Defense.

Again, the Petitioner asserts the CM Rules as controlling for the administrative hearing in the underlying case. The Idaho Supreme Court recently addressed "futile call" in *Sylte v. IDWR*, 165 Idaho 238 (2019). In *Sylte* the Court noted:

> The futile call doctrine in Idaho "embodies a policy against the waste of irrigation water." *Gilbert v. Smith*, 97, Idaho 735, 739, 552 P.2d 1220, 1224 (1976); see also, *Hill v. Green*, 47 Idaho 157, 274 P. 100, 110-11 (1928). Generally, this provides if . . . seepage, evaporation, channel absorption of other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

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

It is uncontested that water in a "sufficient quantity" would not reach the senior water rights in this matter with priorities of April 1, 1884 and junior in order to apply it to beneficial use during the 2021irrigation season. See infra, fn.9. However, the Director, in his discretion, noted in his *Final Order* that there were rights senior to April 1, 1884 that would benefit from curtailment, and therefore not render the curtailment "futile." The Director explained that "It simply means that, in this year of drought, some senior water right holders would have been curtailed regardless of ground water pumping in the Bellevue Triangle. That does not change the fact that curtailment will provide usable quantities of water to some senior surface water users." *Final Order* pg 27-28. The Director recognized that Idaho case law supports extensive curtailment as found in the *IGWA* and *Rangen* decisions. The Director further explained that

there would be benefit to additional senior users not participating in the underlying hearing. "The Director also disagrees with South Valley's and Galena's argument that curtailment would be futile because most of the curtailed water would remain in the aquifer during the 2021 irrigation season. The futile call doctrine does not require all or even most of the curtailed water to reach senior water users' points of diversion." *Final Order* pg. 29.

The Director having firmly analyzed the "futile defense" argument of the Petitioner's found in his *Final Order* that it was without merit and based on his discretion as the trier of fact this Court should not second guess his assertion. "It is not the role of the reviewing court to weigh the evidence." *Davisco Foods Intern. v. Gooding County*, 118 P.3d 116 (2005).

G. The Director's Order Does Not Violate Optimum Utilization of the State's Water Resources.

The Groundwater Districts assert that the Director's decision failed to take into account the "optimum use" doctrine as outlined in Idaho Const., Art XV, § 7 and subsequent case law. The Director responded to this line of argument in the *Final Order* stating "Moreover, "full economic development of underground water resources," does not mean that "the ground water appropriator who is producing the greater economic benefit or would suffer the greater economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators." *Clear Springs*, l 50 Idaho at 802, 252 P.3d at 83. As the Idaho Supreme Court has recognized, the prior appropriation doctrine as established by Idaho law can be "harsh," especially in "times of drought." *AFRD2*, 143 Idaho at 869, 154 P.3d at 440. "First in time is first in right" among those beneficially using the water, Id. Const. XV § 3; Idaho Code § 42-106, and "it is obvious that in times of water shortage someone is not going to receive water." *Nettleton v. Higginson*, 98 Idaho 87, 91,558 P.2d 1048, 1052 (1977).

The Petitioner mischaracterizes the Director's "optimum use" requirement to what they refer to as "the best use" of available water in the public interest. Here, based on the unprecedented level of drought the senior surface water users were shouldering the entire breadth of loss to their crops, finances, and livelihoods; meanwhile, until the curtailment date of July 1, the junior groundwater pumpers were enjoying their water unfettered. This was patently not in alignment with the prior appropriation doctrine that the Director is statutorily required to administer. As outlined in prior case law the prior appropriate doctrine is the law of the land and the results are not for this Court to question in their fulfillment. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953).

H. The Senior Surface Water Users are Entitled to Attorneys' Fees on Judicial Review Pursuant to Idaho Code §§ 12-121, 12-117 and the Petitioner is not.

Idaho Code §12-121, "allows the award of attorney fees in a civil action if the appeal merely invites the Court to second guess the findings of the lower court." *Bach v. Bagley*, 148 Idaho 784, 797, 229 P.3d 1146, 1159 (2010). Under Idaho Code § 12-121, "the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." See also I.R.C.P. 54(e)(2). The Idaho Supreme Court has ruled that Idaho Code § 12-121 may also serve as a basis to award attorney fees on appeal. *Fuquay v. Low*, 162 Idaho 373, 397 P.3d 1132, 1138 (2017); *Minich*, 99 Idaho at 918, 591 P.2d at 1085; *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 87, 278 P.3d 943, 957 (2012)(following *Minich*).

With regard to awards of attorney fees under the Private Attorney General Doctrine, even though the authorizing statute is Idaho Code § 12-121, a prevailing party can claim attorney fees under this doctrine without establishing the usual requirement under the statute that the party against whom attorney fees is sought brought, pursued, or defended the case frivolously, unreasonably, or without foundation. Instead, to obtain attorney fees under the Private Attorney General Doctrine, the claimant must demonstrate: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *State v. Dist. Ct. of the Fourth Jud. Dist.*, 143 Idaho 695, 702, 152 P.3d 566, 573 (2007) (citing *Miller v. EchoHawk*, 126 Idaho 47, 49, 878 P.2d 746, 748 (1994)); *Red Steer*, 101 Idaho at 100, 609 P.2d at 167.

Additionally, "Section 12–117 authorizes fees to the prevailing party on appeal. The Court employs a two-part test for I.C. § 12–117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012) (citation omitted) (quoted in *Hobson Fabricating Corp. v. SE/Z Const., LLC*, 154 Idaho 45, 53, 294 P.3d 171, 179 (2012). Idaho courts have interpreted this to allow awards not only in the context of judicial appeals of administrative decisions, but by the administrative body in the administrative hearing itself. *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989), see, *Ockerman v. Ada Cty. Bd. of Comm'rs,* 130 Idaho 265, 267, 939 P.2d 584, 586 (Idaho Ct. App. 1997).

Attorney fees are appropriate under section 12-117(1) "in any proceeding involving as adverse parties a state agency . . . and a person . . . if [the court] finds that the nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117(1). We have awarded fees under section 12-117(1) where the nonprevailing party

> continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision. Although the [nonprevailing parties] may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, [they] were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. Nevertheless, [they] chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and [the prevailing party] is awarded its reasonable attorney fees

Rangen, Inc., 159 Idaho at 812, 367 P.3d at 207 (alterations in original) (quoting *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

Here, the Groundwater users have asserted the same arguments as it did before the Director. They have continually asserted that the CM Rules are the only mechanism by which the Director can perform his duties, despite clear evidence to the contrary, noted above. Thus, because the Groundwater users have failed to add any significant new analysis or authority to its arguments the Senior Surface Water Users should be awarded fees under section 12-117(1). *See City of Blackfoot v. Spackman*, 162 Idaho 302, 311, 396 P.3d 1184, 1193 (2017).

Furthermore, in *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 644 P.2d 1333 (1982) (McFadden, J.), the Court awarded attorney fees on appeal noting that an appellant will be subject to an attorney fee award if he or she appeals without a reasonable expectation of obtaining reversal:

> In the instant case a dispassionate view of the record discloses there was no valid reason to anticipate reversal of the judgment below on the factual grounds urged. The record contains abundant evidence supporting the determination of the judge and jury. Similarly, the arguments and authorities advanced in support of the two legal issues presented on appeal failed to establish how the discretionary decisions of the district court not to bifurcate the issues involved in the trial or to act upon the motion for a view arose to the level of error.

Rueth II, 103 Idaho at 81, 644 P.2d at 1340.

If an agency's actions are based upon a "reasonable, but erroneous interpretation of an ambiguous statute," then attorney fees should not be awarded. *Idaho Potato Comm'n v. Russet Valley Produce, Inc.*, 127 Idaho 654, 661, 904 P.2d 566, 573 (1995) *citing Cox v. Dep't of Ins., State of Idaho,* 121 Idaho 143, 148, 823 P.2d 177, 182 (Ct. App. 1991)). See *Jayo Dev., Inc. v. Ada Cnty. Bd. of Equalization*, 158 Idaho 148, 153, 345 P.3d 207, 212 (2015) (holding party on appeal acts without a reasonable basis in law when it advances arguments based on a disregard for the plain language of a statute; awarding prevailing county agency attorney fees incurred on appeal pursuant to Section 12-117); *Arnold v. City of Stanley*, 158 Idaho 218, 224, 345 P.3d 1008, 1014 (2015) (same result).

Here, the Petitioner's and the Respondent stipulated in the *Stipulation and Joint Motion Regarding Motion to Amend* filed in the present case that Counts II through V of the Petitioner's *First Amended Petition & Complaint* which contained requests for declaratory relief, preliminary injunction, and writ of prohibition; should be combined in this Petition for Judicial Review "under Count I, including within the Petitioners' opening brief to be filed in this matter, as arguments in support of the relief available under Idaho Code § 67-5279(3) rather than as separate causes of action for declaratory relief under Idaho Code §§ 10-1201—10-1217. *See Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 *(2008).*

CONCLUSION

Based upon the above, BWCC & BWLWWU oppose and ask the Court to not to grant the Petitioners' *Petition for Judicial Review*.

Dated this 19th day of November, 2021.

JERRY R. RIGBY

CHASE T. HENDRICKS

/s/
JOSEPH F. JAMES

Attorneys for Big Wood & Little Wood Water Users Association

/s/
W. KENT FLETCHER

Attorney for Big Wood Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2021, the above and foregoing was served on the following by the method(s) indicated below:

IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 Megan.Jenkins@idwr.idaho.gov Garrick.Baxter@idwr.idaho.gov Michael.Orr@idwr.idaho.gov	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Gary L. Spackman, Director IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 gary.spackman@idwr.idaho.gov	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
James R. Laski Heather E. 0' Leary. Lawson Laski Clark, PLLC P.O. Box 3310 Ketchum, ID 83340 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Jerry R. Rigby Chase T Hendricks Rigby, Andrus & Rigby, PLLC 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com chendricks@rex-law.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Joseph F. James James Law Office, PLLC 125 5th Ave. West Gooding, ID 83330 joe@jamesmvlaw.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail

W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83316 wkf@pmt.org	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Candice McHugh Chris M. Bromley McHugh Bromley, PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Sarah A. Klahn Somach Simmons & Dunn 2033 11th St., Ste. 5 Boulder, CO 80302 sklahn@somachlaw.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Albert P. Barker Travis L. Thompson Michael A. Short John K. Simpson BARKER ROSHOLT & SIMPSON LLP PO Box 2139 Boise, ID 83701-2139 apb@idahowaters.com tlt@idahowaters.com mas@idahowaters.com jks@idahowaters.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Michael Lawrence GIVENS PURSLEY P.O. Box 2720 Boise, ID 83701-2720 mpl@givenspursley.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail
Brian O'Bannon Matthew Johnson WHITE PETERSON 5700 E Franklin Rd. Ste. 200 Nampa, ID 83687 icourt@whitepeterson.com	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail

Jerry R. Rigby