

**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,

Respondents,

and

SUN VALLEY COMPANY, CITY OF  
BELLEVUE, BIG WOOD CANAL  
COMPANY, BIG WOOD & LITTLE  
WOOD WATER USERS ASSOCIATION,  
CITY OF POCA TELLO, CITY OF  
KETCHUM, and CITY OF HAILEY,

Intervenors.

Case No. CV07-21-00243

**RESPONDENTS' BRIEF**

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Judicial Review from the Idaho Department of Water Resources  
Honorable Eric J. Wildman, District Judge, Presiding

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## I. STATEMENT OF THE CASE

### A. Nature of the Case.

This is a judicial review proceeding pursuant to the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 et seq. South Valley Ground Water District (“South Valley”) and Galena Ground Water District (“Galena”) (collectively “Petitioners”) appeal the Director (“Director”) of the Idaho Department of Water Resources’ (“Department” or “IDWR”) *Final Order*. The issues raised in this appeal stem from an unprecedented drought in Administrative Basin 37 (“Basin 37”) during the 2021 irrigation season.

As a result of water supply scarcity, the Director commenced an administrative proceeding pursuant to his authority under Idaho Code § 42-237a.g. to determine whether ground water withdrawals in the Wood River Valley south of Bellevue (hereinafter “Bellevue Triangle”) were adversely affecting senior surface water rights diverting from Silver Creek and the Little Wood River during the 2021 irrigation season contrary to the prior appropriation doctrine. Ultimately, the Director curtailed Petitioners, who hold junior ground water rights in the Bellevue Triangle, for approximately one week in the beginning of July of 2021. Petitioners’ junior ground water rights had never been curtailed before, despite commonplace curtailment of Basin 37 senior surface water rights in previous years.

In this appeal, Petitioners allege the Director lacked the authority to initiate the administrative proceeding pursuant to Idaho Code § 42-237a.g. However, the plain language of the statute unambiguously authorizes the Director to curtail ground water rights that are adversely affecting senior water rights pursuant to the prior appropriation doctrine.

The Director reasonably concluded Petitioners' junior ground water rights were adversely affecting senior water right holders on Silver Creek and the Little Wood River and properly ordered curtailment to protect senior water users due to the exigency of an extremely scarce water supply year in 2021. Before doing so, the Director ensured the fairness of the administrative proceeding related to the curtailment determination. Petitioners were in no way unreasonably or arbitrarily deprived of the use of their water rights between July 1 and 8, 2021.

**B. Statement of Facts and Procedural Background.**

This appeal presents issues related to the distribution and administration of water in a year of drought and unprecedented water supply scarcity. The ultimate issue in the underlying administrative proceeding, conducted pursuant to the Director's authority in Idaho Code § 42-237a.g., is whether junior ground water rights diverting in the Wood River Valley south of the City of Bellevue (hereinafter the "Bellevue Triangle") should have been curtailed in 2021 in favor of the hydraulically interconnected senior water rights diverting from Silver Creek and the Little Wood River. R. 1883, 1900.

*i. Water Development and Regulatory Activities in Basin 37.*

Early development of surface water irrigation in the Wood River Basin began in the 1870's and 1880's. In a normal or average water year, water rights bearing a priority date of 1883 and earlier are deliverable for the entire irrigation season. R. 2373, 2376. In a normal or average water year, water rights bearing a priority date of 1884 are deliverable until mid-to-late July. *Id.* For decades, surface water rights on Silver Creek and the Little Wood River have been curtailed in priority based on surface water supplies. In 2021, by the time of the administrative

hearing in early June, many of the senior surface water rights diverting from Silver Creek and the Little Wood River were already curtailed, or would have been soon. *See, e.g.*, IV Hr’g Tr. 771–72, 788–89; R. 2989–93; R. 2379, 2389–91 (list of potentially injured water rights). On the other hand, by the time of the hearing, junior ground water rights in the Bellevue Triangle had not been curtailed, and apparently had never been curtailed. IV Hr’g Tr. 764:10–16.

“[Ground water] development for irrigation in the Bellevue Triangle began around 1930. Significant development of the confined aquifer for irrigation began in the late 1940s.” R. 2103. With modern drilling, rural electrification, and efficient pumping systems, ground water diversion increased until the early 1990’s when regulatory actions by the Department restricted further ground water development. *See* R. 2104.

In 1991 the Department designated the Big Wood River Ground Water Management Area (“Management Area Order”). R. 1886. Three findings inform this case:

2. The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water uses can also deplete available supplies for other users and affect basin underflow which presently accumulates in the Magic Reservoir.
3. There are a number of Applications for Permit to Appropriate Water pending before the department which propose additional consumptive uses of ground water within the Big Wood River drainage.
4. Injury could occur to prior surface and ground water rights including the storage right in Magic Reservoir if the flows of streams, rivers and ground water underflow in the Big Wood River Basin are intercepted by junior priority ground water diversions.

R. 1886–87. The Management Area Order stated the Department would not approve a new application for consumptive use unless there was a showing of no injury to existing rights. R. 1887. As a result, approvals of new water rights largely ended in the area. *Id.*

Since issuance of the Management Area Order the Department, in coordination with the water users in the Wood River Basin, has taken the following actions:

- 2010 – In cooperation with the U.S. Geological Survey, began a program to expand the existing hydrologic monitoring network in the Wood River Valley with the installation of four stream gages in the Wood River Valley[;]
- September 21, 2011 – Issued order: (a) creating the Upper Wood Rivers Water Measurement District; and (b) requiring all ground water users to install measuring devices prior to the 2014 irrigation season[;]
- 2012 – In cooperation with the U.S. Geological Survey, began work on development and calibration of a numerical groundwater-flow model for the Wood River Valley, including Silver Creek and ground water underlying the Bellevue Triangle[;]
- September 17, 2013 – Issued order: (a) combining water districts for the Big Wood River, the Little Wood River, and Silver Creek; and (b) adding ground water rights from the Upper Big Wood River valley above Magic Reservoir and the Silver Creek drainage to the water district (Water District 37); and (c) abolishing the Upper Wood Rivers Water Measurement District[;]
- February 2015 to June 2016 – First conjunctive management delivery call by surface water users against ground water users dismissed on procedural grounds[;]
- 2016 – Published final report documenting version 1.0 of the Wood River Valley Groundwater-Flow Model (IDWR Ex. 2 at 14)[;]
- March 2017 to June 2017 – Second delivery call dismissed on procedural grounds[;]
- 2018 through 2020 – Proposals for Ground Water Management Plans submitted by ground water users to Director of IDWR[;]
- 2019 – Published final report documenting recalibrated version 1.1 of the Wood River Groundwater-Flow Model [(“WRV1.1 Model”)] (IDWR Ex. 2 at 14)[;]

- 2019 – Published a summary of groundwater conditions in the Big Wood Ground Water Management Area and a summary of Silver Creek Flow Measurements by IDWR staff between 2014 and 2018[;]
- 2020 – Published a summary of seepage surveys by IDWR staff between 2017 and 2019 on Trail Creek near Ketchum[; and]
- Fall 2020 through spring 2021 – Approximately biweekly meetings of Big Wood River Ground Water Management Area Advisory Committee; at these committee meetings, analyses of the hydrology and hydrogeology of the Wood River Basin were presented by experts and by those who had personally observed facts related to water availability and use.

R. 1887–88.

*ii. The Wood River Valley Ground Water Flow Model.*

“The Wood River Valley aquifer system is hydraulically connected to Silver Creek and its tributaries above the Sportsman Access gage. Water use within the Wood River Valley aquifer system affects . . . streamflow in Silver Creek and the Little Wood River downstream of Silver Creek.”

R. 2093. Discharge from the Wood River Valley aquifer system is the primary source of water for Silver Creek . . . .” R. 2095 (citation omitted).

The WRV1.1 Model was developed to serve as a tool for water rights administration and water resource management and planning. *See* R. 2106. Twenty-two Modeling Technical Advisory Committee (“MTAC”) meetings were held between March 2013 and January 2019 to “facilitate a transparent and open process of data collection, model construction, and model calibration.” R. 2105. The final report documenting the current version of the model was published in 2019, with input from MTAC. *See Id.*

In 2019, when the recalibrated WRV1.1 Model was published, Allan Wylie, one of the model developers stated:

Although every groundwater model is a simplification of a complex hydrologic system, WRV Aquifer Model Version 1.1 is the best available tool for evaluating the interaction between groundwater and surface water in the Wood River Valley. The science underlying the production and calibration of the WRV Aquifer Model Version 1.1 reflects the best knowledge of the aquifer system available at this time. The WRV Aquifer Model Version 1.1 was calibrated to 1,314 aquifer water-level measurements and 1,026 river gain-and loss calculations. Calibration statistics indicate a good fit to the observed data, providing confidence that the updated model provides an acceptable representation of the hydrologic system in the Wood River Valley.

R. 2106 (*italics omitted*).

At the administrative hearing, discussed in more detail below, expert witnesses Erick Powell and Greg Sullivan acknowledged that, despite the need for improvement to the WRV1.1 Model, it is still the best available tool to evaluate the effects of ground water pumping on flows of Silver Creek (V Hr'g Tr. 1320:2–4; VI Hr'g Tr. 1452:16–20).

*iii. The 2021 Drought.*

2021 was an unprecedented year of drought and water supply scarcity in Basin 37. Water District 37 watermaster Kevin Lakey testified during the hearing that 2021 flows at the Sportsman's Access gage and Station 10 were lower than flows on comparable dates in *any* analogous water supply year. IV Hr'g Tr. 766:7–10. He testified that water supply conditions in Basin 37 were the worst he has seen since becoming watermaster in 2003. *Id.* at 766:11–13.

In April of 2021, the United States Department of Agriculture, Natural Resources Conservation Service (“NRCS”) April Surface Water Supply Index<sup>1</sup> (“SWSI”) predicted almost

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<sup>1</sup> "SWSI is a predictive indicator of surface water availability in a basin compared to historic supply." R. 2089 (*parenthesis omitted*).

unprecedented drought conditions in Basin 37. By June, the NRCS SWSI prediction was worse than the June through September SWSI for any of the previous 30 years. *See* I Hr’g Tr. 50:10–20.

As a result of the predicted unprecedented water supply scarcity, the watermaster predicted unusually early curtailment of surface water rights from Silver Creek and the Little Wood River (1884 priorities on the Little Wood River cut during June 2021, and April 1, 1883, priorities cut by June 30.) *See* IV Hr’g Tr. 771–72.

The Director was aware of the unprecedented nature of these forecasts and warned water users in Basin 37. At the March MTAC meeting the Director stated that he has some responsibility to act during times of shortage to deliver water in priority, and, therefore, asked for specific remedial actions from the groundwater users. R. 2678. During the April 7, 2021, MTAC meeting, the Director reminded the committee that the groundwater management proposals thus far had lacked detail and quantification and a plan was needed quickly to deal with scarcity. R. 2681. By the April 15, 2021, MTAC meeting, the Director stated plainly to Basin 37 ground water pumpers that they may be required “to reduce their pumping *much more than the amounts that have been proposed by the groundwater districts.*” R. 2684 (italics added).

*iv. Initiation of the Basin 37 Administrative Proceeding.*

The Director issued a *Notice of Administrative Proceeding, Pre-Hearing Conference and Hearing* on May 4, 2021, under the caption “*In the Matter of Basin 37 Administration*”, and Department Docket No. AA-WRA-2021-001 (“Notice”). R. 1–43. The Notice stated that a



drought was predicted for the 2021 irrigation season, and the water supply in the Little Wood River, its tributary Silver Creek, and the tributaries to Silver Creek, may be inadequate to meet the needs of surface water users. R. 1. The Notice stated curtailment runs of the WRV1.1 Model showed curtailment of ground water rights in the Bellevue Triangle 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 Director initiated an administrative proceeding as authorized by the plain and unambiguous language in Idaho's Ground Water Act, specifically Idaho Code § 42-237a.g. and IDAPA 37.01.01.104. The Director initiated the "administrative proceeding to determine whether water is available to fill the ground water rights . . . within the Wood River Valley south of Bellevue. . . ." R. 1. 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 season" and provided a mapped "Potential Area of Curtailment." *Id.*

The Director mailed a copy of the Notice to both ground and surface water right holders within Water District 37 and Water District 37B. Order Den. Appl. for TRO at 2; *see* R. 3–42. Those desiring to participate in the administrative proceeding were to send written notice to the Department by May 19. R. at 1. The Notice scheduled a prehearing conference for May 24, and a hearing for June 7-11. R. 1–2.

On May 11, the Director issued a *Request for Staff Memorandum* to address ten subjects related to facts and technical information potentially relevant to the administrative proceeding, to be provided to the Director by May 17, 2021. R. 98–100.

The responsive staff memoranda were submitted to the Director on May 17 and posted on the Department’s website on May 18, 2021. R. 1883. The supporting data files for one memorandum was posted on May 19 and reposted on May 21 after it was discovered that one of the files would not open. R. 1883; *see* R. 380. Minor typographical errors in two of the memoranda were addressed in the *Prehearing Order; Scheduling Order* issued on May 25. R. 524.

v. *The Director’s Request for Modelling and Analysis of Injury.*

Department subject matter expert Jennifer Sukow was tasked with running the WRV1.1 Model analysis and preparing a staff memorandum for the Director. *See* R. 1903.

Sukow's modelling analyses, as explained in her staff memorandum and testimony, show that the Wood River Valley aquifer system is hydraulically connected to Silver Creek and its tributaries above the Sportsman's Access gage, and that ground water pumping in the Bellevue Triangle has a significant impact on stream flows in Silver Creek.

*Id.* Sukow used the Model to “simulate the impact of curtailing consumptive use of groundwater for agricultural, municipal, residential, commercial, and irrigation uses during the 2021 irrigation season.” *Id.* The Model indicated that 99% of the predicted in-season benefit to Silver Creek streamflow could be achieved by curtailing groundwater use within the Bellevue Triangle. *See* R. 1890.

“Sukow used the WRV1.1 Model to simulate the effects of curtailment of ground water rights diverting within the Bellevue Triangle on July 1 of this year. This analysis predicted that the curtailment would increase flows in Silver Creek by approximately 23-27 cfs during the months of July, August, and September.” R. 1903.

Department subject matter expert Tim Luke was asked to identify lands irrigated by water from Silver Creek and the Little Wood River “that could be injured by depletions caused by ground water pumping.” *See* R. 99. The Director further sought an explanation of “methods of analysis for identifying possible injury” to senior water rights arising from depletions caused by ground water pumping. R. 100.

The staff memorandum prepared by Tim Luke undertook an analysis of potentially affected water rights, and identified lands potentially injured by ground water pumping using IDWR’s water rights spatial data, including GIS feature layers, that identified places of use for water rights diverting from Silver Creek and the Little Wood River. R. 2379. The list was limited to exclude: (1) water rights with POUs also irrigated by ground water; (2) drain or wastewater sources; (3) rights owned by BWCC or AFRD2 that may receive water from another source; (4) all “Exchange Condition” water rights. *Id.* The potentially affected rights were compiled as “Attachment A” to the Luke Memorandum. *Id.*; *see* R. 2389–91.

*vi. Prehearing Motions, the Hearing, and Subsequent Actions in District Court.*

Many parties throughout the State filed notices of intent to participate in the administrative proceeding. *Id.*; *see* R. 520–22. Prehearing motions were filed, including two motions to dismiss the proceeding, an alternative motion for a continuance, and a motion to postpone the hearing. *See* R. 436, 1883. The Director denied these motions (except for the motion to authorize discovery, which was granted) on May 21 and May 22. *See* R. 400–01, 409, 429, 446.

On May 22, 2021, the Director issued an *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement*. R. 446. The Director also issued an *Order Denying Motion to Appoint Independent Hearing Officer*. R. 407–14. On the same day, South Valley filed a motion requesting the Director designate the order denying South Valley’s motion to dismiss as final, and, therefore subject to judicial review with this Court. R. 453. The Director denied the motion on May 24. R. 500.

The prehearing conference occurred on May 24, 2021. R. 520, 1883. Participants discussed the topics identified in the Notice, as well as all pending motions. *See Pre-Hr’g Tr.* The Director limited the “Potential Area of Curtailment” to the area considered in the staff memorandum. R. 523, 1883. At the prehearing conference, the Director also informed the parties he was denying South Valley’s motion to designate the order denying South Valley’s motion to dismiss as a final order and would follow up in writing. *Pre-Hr’g Tr. of R. 40:22–41:1*. After the prehearing conference, South Valley filed the *Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition* (“Petition for Judicial Review”), and other related filings with this Court.

On May 24, 2021, the Director issued an order denying South Valley’s motion to designate as a final order, and issued the prehearing and scheduling order on May 25, 2021. R. 500, 520–30. “Prior to the hearing, the parties engaged in discovery, depositions, and filed various motions.” R. 1883.

The hearing was held over six days, June 7–12, 2021. *Id.* A variety of lay and expert witnesses testified, and exhibits were admitted into the record. *Id.* Department subject matter experts who prepared the Staff Memorandum were made available for cross-examination. *See* I Hr’g Tr. 6; II Hr’g Tr. 270. The parties filed post-hearing briefs a week after hearing. *See* R. 1487–1539, 1806–1826, 1833–1881. Petitioners also filed a proposed mitigation plan, “contingent on a determination that a curtailment order is necessary to prevent material injury,” on June 24, 2021. R. 1649, 1651.

This appeal was first initiated by Petitioners on May 24, 2021, when Petitioners filed the *Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Injunction, or Alternatively, Writ of Prohibition*. On May 27, 2021, this Court denied the request for temporary restraining order. Order Den. Appl. for TRO at 2.

The Director issued the *Final Order* on June 28, 2021. *See* R. 1919. The *Final Order* concluded junior ground water rights in the Bellevue Triangle were adversely affecting senior surface water rights on Silver Creek and the Little Wood River, contrary to the Ground Water Act (Idaho Code § 42-237a.g.) and ordered ground water rights to be curtailed on July 1, 2021, for the remainder of the 2021 irrigation season. R. 1907, 1919.

Petitioners filed a petition to stay implementation of the *Final Order* on the day it issued, pending a decision on the proposed mitigation plan. R. 1943. On June 29, 2021, the Director issued final orders denying the mitigation plan and the petition for stay. R. 1950, 1958.

On June 30, 2021, Petitioners filed several documents with this Court, including a motion to amend the petition for judicial review already on file. A hearing was held on July 1, 2021.

Order Den. Second Mot. for Prelim. Inj. at 3. The Court’s *Order Denying Second Motion for*

*Preliminary Injunction* held:

The evidence shows this is an exceptionally dry year in the Wood River Basin. The evidence also shows there is going to be water supply shortfall in that Basin for the 2021 irrigation season. Simply stated, there is not enough water to satisfy all existing water rights. As result, this is not typical preliminary injunction case where the Court can enter an order enjoining an action that is going to cause injury, maintain the status quo, and then wait for the issue to work its way through the process without harm to the parties. Without curtailment, senior surface water rights will suffer material injury this irrigation season. With curtailment, certain junior ground water rights will be required to turn off in whole or in part this irrigation season. Maintaining the status quo via the entry of preliminary injunction in this case cannot create more water supply so as to satisfy all water rights. There are going to be water rights that are unsatisfied during the 2021 irrigation season one way or another and entering preliminary injunction to maintain the status quo cannot avoid that result.

Order Den. Second Mot. for Prelim. Inj. at 4. As a result, the Court concluded Petitioners had not “carried their burden of establishing that their members have a clear right to divert ground water this irrigation season to the detriment of senior surface water rights.” *Id.*

The Court drew an analogy between this case and its recent *Memorandum Decision and Order in Basin 33 Water Users v. Surface Water Coalition*, Case No. CV01-20-8069 (Ada Cnty. Dist. Ct. Idaho Nov. 6, 2020) . Order Den. Second Mot. for Prelim. Inj. at 5. The Court concluded “[m]any of the principles and rationales set forth by the Court in its decision in that case are applicable here,” concluding:

The legislature has directed that the Director administer the waters of the state consistent with the prior appropriation doctrine. *See e.g.*, I.C. § 42-602. The Idaho Constitution requires priority administration. Idaho Const., Art. XV, § 3. Therefore, even if a question exists regarding which set of rules the Director should be operating under, there is no question that the Constitution requires that water be administered in priority and that the Director has an obligation to carry out that

function. The Idaho Supreme Court made that clear in *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) , when it provided that the Director’s duty to deliver water under Idaho Code § 42-602 “is clear and executive.” While the Director has a clear and executive duty, the details of how the Director chooses to distribute water are largely left to his discretion. *Musser*, 125 Idaho at 395, 871 P.2d at 812.

*Id.* Petitioners failed to establish a clear right to injunctive relief and the Court denied the *Second Application for Temporary Restraining Order* and *Second Motion for Preliminary Injunction* on July 2, 2021. *Id.* at 4, 7.

In denying Petitioners’ claims related to due process, the Court concluded:

[D]ue to the nature of water right administration and the exigencies of the situation time is of the essence. The Idaho Supreme Court and this Court have recognized that due process needs to balance the opportunity to be heard against the exigencies of the situation. *See e.g., American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (“Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water”). The parties were given notice, a hearing was conducted before the Director, and the parties were afforded the opportunity to be heard. The Court understands the frustration caused by the shorter timeframes associated with the administrative proceeding, but that is the nature of the situation.

Order Den. Second Mot. for Prelim. Inj. at 6.

On July 8, 2021, after one week of curtailment, and in response to a negotiated amended mitigation plan between Petitioners and senior surface water users, the Director approved a mitigation plan, and stayed further curtailment. R. 2009-27; Pet’rs’ Opening Br. at 2.

Petitioners and the Department thereafter filed a *Stipulation and Joint Motion Regarding Motion to Amend* the petition for judicial review on July 23, 2021. After addressing an objection by Petitioners, the Department settled the agency record and transcripts with the Court on September 17, 2021. Pet’rs’ Opening Br. at 3. Petitioners gained consent from the parties to file

an overlength brief on October 22, 2021. *See* Pet’rs’ Unopp’d Mot. & Supp’g Points for Leave to File Overlength Br. at 2. The 128-page *Petitioners’ Opening Brief* followed later that evening. *See* Pet’rs’ Opening Br. at i.

## II. ISSUES PRESENTED ON APPEAL

Respondents’ formulation of the issues presented is as follows:

1. Whether the Director has the authority to initiate an administrative proceeding that may lead to curtailment for ground water rights adversely affecting senior water rights pursuant to the plain language of Idaho Code § 42-237a.g.
2. Whether the Director’s authority under Idaho Code § 42-237a.g. of the Idaho Ground Water Act is constrained by IDAPA 37.03.11 et seq.—Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”)—despite the lack of delivery call.
3. Whether the Director properly administered water, during an unprecedented drought in Basin 37, pursuant to priority administration.
4. Whether the administrative proceeding—including the six-day hearing—unreasonably or arbitrarily deprived Petitioners of water and, therefore, due process.
5. Whether the Director may utilize Department subject matter experts to provide advice and analysis related to his duty to distribute and administer the State of Idaho’s water resources pursuant to Idaho law and the prior appropriation doctrine.
6. Whether the Director properly denied Petitioners’ first mitigation plan.
7. Whether the Director’s findings and conclusions related to the futile call doctrine are supported by the record.
8. Whether Petitioners are entitled to attorneys’ fees.

## III. STANDARD OF REVIEW

Judicial review of a final decision by the Department is governed by the Idaho Administrative Procedure Act (“IDAPA”) Idaho Code §§ 67-5201 et seq. IDAPA requires courts to undertake judicial review of agency decision making based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529



(1992). The court must affirm the agency decision unless the court finds the agency’s findings, inferences, conclusions, or decisions are: (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. Idaho Code § 67-5279(3); *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 the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222 (2001). “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998).

An agency action is “capricious” if it “was done without a rational basis.” *Am. Lung Ass’n of Idaho/Nev. v. USDA*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). An agency action is “arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *Id.* The Court exercises free review over questions of law. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). If the agency action is not affirmed, it must be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep’t of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

## IV. ARGUMENT

### A. Pursuant to Idaho Code § 42-237a.g., the Director Had the Plain, Unambiguous Authority to Administer Water Rights in Basin 37 During 2021’s Unprecedented Drought.

In Idaho, 2021 was an unprecedented time of water scarcity, with drought conditions especially severe in Basin 37. In early June 2021, the United States Department of Agriculture, Natural Resources Conservation Service (“NRCS”) issued the June SWSI, indicating exceedance forecast<sup>2</sup> volumes worse than any of the previous 30 years. R. 1889. Flows at the Sportsman’s Access gage and at Station 10 were lower than the flows on comparable dates *in any recorded analogous water supply year*. *Id.* Supply conditions were the worst the watermaster had seen since he became watermaster in 2003. *Id.* (citing IV Hr’g Tr. 766:11–13).

Against this backdrop, the Director concluded: “[a]s a result of the predicted dismal surface water supply, surface water rights from Silver Creek and the Little Wood River[,] senior in priority to ground water rights in the Bellevue Triangle[,] will be curtailed unusually early during the 2021 irrigation season.” R. 1889–90. The Director concluded 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 water rights diverting from those sources.” R. 499. Due to the immediate, measurable impact on surface flows, and to prevent ongoing adverse impact to senior water rights, the Director acted pursuant to his authority in Idaho’s Ground Water Act.

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<sup>2</sup> An exceedance forecast represents the probability actual streamflow values will exceed forecasted values.

*i. The Director's Broad Discretionary Authority to Distribute and Administer Water.*

The Idaho Constitution states, “[t]he use of all water now appropriated, or that may hereafter be appropriated for sale, rental or distribution . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.” IDAHO CONST., Art. XV, § 1. Section 5 continues: “[W]henever the supply of such water *shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use . . .*” IDAHO CONST., Art. XV, § 5 (italics added). Idaho Code § 42-106 states, at its most basic level, the prior appropriation doctrine: “As between appropriators, the first in time is first in right.” The State of Idaho, acting through the Director must regulate and control the use of its water resources by priority of right, and in times of scarcity, must implement reasonable limits on quantity and time of use.

The Director owns the difficult responsibility of such regulation and control of use. Idaho Code § 42-602 requires the Director to “distribute water in water districts in accordance with the prior appropriation doctrine.” The Idaho Supreme Court has held that this “gives the Director a ‘clear legal duty’ to distribute water,” with “the details of the performance of the duty [. . .] left to the director’s discretion.” *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) (citations omitted). In other words, “[s]omewhere between the absolute right to use a decreed water right [by a water user] and an obligation not to waste it and to protect the public’s interest in this valuable commodity, *lies an area for the exercise of discretion by the Director.*” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433,

451 (2007) (*italics added*). The Director has discretionary authority in a water management case that is not available to him in a water rights case. *A&B Irrigation Dist. v. Spackman*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013).

*ii. Idaho’s Ground Water Act Explicitly Authorized the Director to Initiate an Administrative Proceeding, Determine Injury, and Curtail Ground Water Rights on the Bellevue Triangle in 2021.*

The Ground Water Act authorizes and requires the Director to manage ground water resources within the state. Idaho Code §§ 42-231, 237a.g. The Director must “do all things necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to public policy expressed in the [Ground Water Act].” Idaho Code § 42-231. The public policies expressed in the Act include the “traditional policy . . . requiring the water resources of the state to be devoted to beneficial use in reasonable amounts through appropriation.” Idaho Code § 42-234. As this Court has already concluded in this case, “[t]he Idaho Constitution requires priority administration.” Order Den. Second Mot. for Prelim. Inj. at 5. And “there is no question that the Constitution requires that water be administered in priority and that the Director has an obligation to carry out that function.” Order Den. Second Mot. for Prelim. Inj. at 5. “The Idaho Supreme Court has made it clear in *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812, (1994), when it provided that the Director’s duty to deliver water under Idaho Code § 42-602 ‘is clear and executive.’ While the Director has a clear and executive duty, the details of how the Director chooses to distribute water are largely left to his discretion.” *Id.*

In this case, the Director acted within his discretionary authority to administer Idaho’s water rights in Basin 37, pursuant to the plain, unambiguous language of Idaho’s Ground Water Act—specifically Idaho Code § 42-237a.g.—when he initiated the administrative proceeding to determine whether junior ground water users in the Bellevue Triangle were adversely affecting senior surface water users. Based on the record established in the administrative proceeding below, the Director’s Final Order, which concluded junior ground water users were having an immediate, measurable effect on senior surface water users, and curtailed junior ground water pumping in the Bellevue Triangle, accordingly, should be affirmed.

(a.) Idaho Code § 42-237a.g. is a Plain, Unambiguous Statement of the Director’s Discretionary Authority to Administer Ground Water in Times of Scarcity.

The Director and Department have broad powers and special expertise in ground water appropriation and distribution. *See e.g., Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (“Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated [IDWR] the function of ascertaining reasonable pumping levels”). The Ground Water Act states:

It shall likewise be the duty of the [Director] to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

Idaho Code § 42-231.

The Ground Water Act explicitly grants the Director broad “discretionary power” to “supervise and control the exercise and administration of all rights to the use of ground water . . . .” Idaho Code § 42-237a.g. The plain and unambiguous language of the statute gives the

Director the discretionary power to: (a) supervise and control the exercise and administration of all rights to the use of ground water in Idaho; and (b) prohibit or limit ground water withdrawals that adversely affect the use of senior surface water rights. *Id.* “[I]n the exercise of this discretionary power,” the Director “may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well” during any period the Director determines “that water to fill any water right in said well is not there available.” *Id.* “Water in a well shall not be deemed available to fill a water right therein,” in turn, “if withdrawal of the amount called for by such right” would affect, contrary to the policy of the Ground Water Act, “the present or future use of any prior surface or ground water right . . . .” *Id.* Therefore, Idaho Code § 42-237a.g. gives the Director the explicit authority to prohibit or limit ground water withdrawals adversely affecting the use of senior surface water rights. *Stevenson v. Steele*, 93 Idaho 4, 11–12, 453 P.2d 819, 826-27 (1969).

As a part of the administrative proceeding under Idaho Code § 42-237a.g., the Director must determine whether withdrawal of the ground water rights at issue would be contrary “to the policy of the Ground Water Act.” *Id.* Idaho Code § 42-226 affirms Idaho’s “traditional policy” of “requiring the water resources of this state to be devoted to the beneficial use in reasonable amounts through appropriation” and its recognition of the prior appropriative doctrine that “first in time is first in right.”

Thus, the Ground Water Act incorporates Idaho’s prior appropriation doctrine. The doctrine that “first in time is first in right” is one of the “bedrock” principles of Idaho’s prior appropriation doctrine. *A&B Irrigation Dist*, 155 Idaho at 650, 315 P.3d at 838 . “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." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797-798, 252 P.3d 71, 78-79 (2011). Prior appropriation presumes the senior is entitled to his decreed water right, although there may be relevant post-adjudication factors related to the amount of water needed. *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449.

Because the Director's authority to initiate administrative proceedings pursuant to Idaho Code § 42-237a.g. is based on plain and unambiguous statutory language, no further statutory interpretation is necessary. See *Payette River Prop. Owners Ass'n v. Board of Com'rs of Valley Cnty*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999) ("When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the court need not consider rules of statutory construction."); *Kootenai Elec. Coop., Inc. v. Wash. Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995) (where statutory language is clear and unambiguous, statutory construction is unnecessary and courts need only apply the statute). This authority is "primary and exclusive in the absence of a clearly manifested expression to the contrary." *Roberts v. Idaho Transp. Dep't*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Idaho Ct. App. 1991). There is *no* expression to the contrary in the Ground Water Act and the Director's authority to initiate the relevant administrative proceeding must be given effect by the Court.

The legislative history of Idaho Code § 42-237a.g. offers additional insight into the Director's discretion. In 1994 the Idaho Legislature amended Idaho Code § 42-237a.g. to add "in his sole discretion" to the introductory paragraph, and the terms "discretionary" and "initiate

administrative proceedings” to paragraph g. *See* Ground Water Act, ch. 450, § 3, 1994 Idaho Sess. Laws, 1436, 1437 (codified at Idaho Code § 42-237a.g. (1994)). The Ground Water Act was last amended by the Idaho Legislature in 2021. *See* R. 439. The 2021 Idaho Legislature amended certain portions of the Ground Water Act to remove the local ground water board adverse claim procedure, but the Legislature *did not* alter or amend the Director’s authority in Idaho Code § 42-237.a.g. *Id.* The Director’s explicit discretionary power remains intact. This outcome makes practical sense, as the Director’s authority to act in times of scarcity and drought should not be limited to circumstances, for example, of calls between water users, as will be discussed in more detail below.

(b.) The Director Acted Consistently with the Plain, Unambiguous Language of Idaho Code § 42-237a.g.

Within the confines of the policy expressed by the Ground Water Act, the Director properly determined how ground water use in the Bellevue Triangle was affecting senior water rights on Silver Creek and the Little Wood River pursuant to Idaho Code § 42-237a.g.

Upon lawful initiation of the administrative proceeding pursuant to the plain language of the Ground Water Act, the Director’s authority became determinative:

The statute authorizes the Director to prohibit or limit ground water withdrawals in two different sets of circumstances: (1) when such withdrawals “would *affect*, contrary to the declared policy of [the Ground Water Act], the present or future use of any prior surface or ground water right”; or (2) when such withdrawals would exceed “the reasonably anticipated average rate of future natural recharge.” Idaho Code § 42-237a.g.

R. 1915 (alterations in original). The relevant focus in this matter relates only to the first set of circumstances. *Id.* The determinative issue for decision at the administrative proceeding was



“whether ground water rights diverting in the Bellevue Triangle should be curtailed this year in favor of senior water rights diverting from Silver Creek and the Little Wood River.” R. 1900.

The Director concluded that “[t]he junior priority ground water rights in the Bellevue Triangle have not been curtailed this year [(2021)], and apparently have never been curtailed in the past.” R. 1904. The Director concluded, under this set of facts, allowing Bellevue Triangle ground water users to continue to pump would adversely affect surface water rights because:

[A]most all of the water rights to divert from Silver Creek and the Little Wood River are “first in time” and, therefore, “first in right.” The vast majority of the surface water rights for lands irrigated by Silver Creek and the Little Wood River bear priority dates pre-dating 1900. IDWR Ex. 3 at 18 & Attachment A. The vast majority of the ground water rights in the Bellevue Triangle bear priority dates later than 1940. *See, e.g.*, IDWR Ex. 2 at 12–13. Only one of the surface water rights for lands irrigated by Silver Creek and the Little Wood River in Attachment A to the Luke Memorandum has a priority date later than 1940. IDWR Ex. 3 at 18 & Attachment A.

R. 1903.

The Director concluded: (1) IDWR modelling and testimony at hearing showed the hydraulic connection between the Wood River Valley aquifer system and Silver Creek and its tributaries above the Sportsman’s Access gage; (2) “ground water pumping in the Bellevue Triangle has a significant impact on stream flows in Silver Creek”; (3) the WRV1.1 Model reasonably simulated the effects of curtailment of ground water diverting within the Bellevue Triangle on July 1 of this year; (4) curtailment of Bellevue ground water pumping “would increase flows in Silver Creek by approximately 23-27 cfs during the months of July, August, and September”; and (5) “flows in Silver Creek and the Little Wood River respond to changes in ground water pumping in the Bellevue Triangle within a few days, or a week at most.” *Id.*

The Director concluded curtailing ground water pumping, specifically in the Bellevue Triangle “will provide senior surface water users with 99% of the predicted benefit of curtailing all ground uses within the domain of the WRV1.1 Model.” R. 28. Therefore, “[l]imiting curtailment to the Bellevue Triangle . . . gives effect to the beneficial use principles underlying the futile call doctrine.” *Id.*; see also *Idaho Ground Water Ass’n v. Idaho Dep’t Water Res.*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016).

The Director further concluded senior surface water users did not simply rest on the presumption<sup>3</sup> they were entitled to their decreed water amounts. R. 1904. Senior surface water users submitted “considerable testimony and exhibits showing that curtailment of their senior water rights will result in substantial crop and revenue losses during the 2021 irrigation season.” *Id.* Therefore, the Director concluded the surface water users carried their burden of providing evidence to support an initial determination that during the 2021 irrigation season the surface water users had been and would 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. *Id.* On the other hand, the Director concluded the junior ground water users “did not carry their burden of showing by clear and convincing evidence that ground water pumping in the Bellevue Triangle does not injure senior appropriators diverting from Silver Creek and the Little Wood River.” *Id.*; see *A & B Irr. Dist. v. IDWR*, 153 Idaho 500, 524, 284 P.3d 225, 249 (2012) (“[i]t is

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<sup>3</sup> “The presumption under Idaho law is that the senior is entitled to his decreed water right . . . .” *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449.

Idaho’s longstanding rule that proof of ‘no injury’ by a junior appropriator in a water delivery call must be by clear and convincing evidence”).

Thus, the Director concluded “the effects of ground water withdrawals in the Bellevue Triangle on senior water rights diverting from Silver Creek and the Little Wood River during the 2021 irrigation season [were] contrary to ‘the doctrine of “first in time is first in right.”’” R. 1907 (quoting Idaho Code § 42-226). As such, the Director concluded curtailment was authorized within the plain and unambiguous authority of the Ground Water Act. *Id.*

*iii. The Director’s Actions Were Consistent with the Ground Water Act, Idaho Water Law, and the Prior Appropriation Doctrine.*

Petitioners concede Idaho Code § 42-237a.g. “allows the Director to initiate proceedings to prohibit or limit the withdrawal of groundwater if he determines water is not available.” Pet’rs’ Opening Br. at 26. Petitioners, however, look beyond this plain, unambiguous statement and attempt to “harmonize” the plain language with a variety of other Idaho statutes, legislative history, rules, and regulatory regimes. *Id.* While Petitioners’ reading of Idaho water law does not actually conflict with what the Director did here, much of what Petitioners cite to is either irrelevant to an Idaho Code § 42-237a.g. administrative proceeding or inapplicable to the specific circumstances.

The Director’s actions are consistent with the rest of the Ground Water Act, and with Idaho Water law generally, pursuant to the prior appropriation doctrine. The Director’s Final Order, therefore, must be affirmed. Petitioners’ remaining arguments to the contrary are without a basis in law and contrary to the plain language of the statute.

(a.) The CM Rules are Inapplicable to the Director’s Unambiguous Authority in Idaho Code § 42-237a.g.

Notwithstanding the plain language of the Ground Water Act, Petitioners continually, and incorrectly, make conclusory statements that the CM Rules preclude the Director from exercising his authority under the Ground Water Act, Idaho Code § 42-237a.g. Pet’rs’ Opening Br. at 17, 19, 21, 24–28, 31–35, 37, 38, 40, 41, 43, 44, 47, 49, 56, 63, 66, 72, 85, 87. To the contrary, the CM Rules are inapplicable to the Director’s actions in this case. The CM Rules do not supersede or supplant the Director’s plain authority in the Ground Water Act, and the Director’s broad inherent authority to regulate, administer, and distribute the State’s water resources, especially in unprecedented times of scarcity and drought. Nothing in Idaho Code § 42-237a.g. or the CM Rules requires the Director to apply the CM Rules in conducting an administrative proceeding under Idaho Code § 42-237a.g. *See Basin 33 Water*, at 12–13 (the CM Rules do not bar application of the Ground Water Act).

The CM Rules expressly affirm and recognize the Director’s authority to act under the Ground Water Act, through CM Rule 2: “002. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 2). Nothing in these rules limits the Director’s authority to take alternative or additional actions related to the management of water resources as provided by Idaho law.” IDAPA 37.03.11.002. CM Rule 2 states in clear and unambiguous terms that nothing in the CM Rules limits the Director’s authority to take alternative or additional action relating to the management of water resources as provided by Idaho law. *See Kootenai Elec. Coop, Inc. v. Wash. Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995) (where

statutory language is clear and unambiguous, statutory construction is unnecessary and courts need only apply the statute); *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011) (“Administrative rules are interpreted the same way as statutes”). CM Rule 2 demonstrates a specific legislative intent to not have the CM Rules limit the Director’s options relating to the management of Idaho’s ground water resources, as provided for by Idaho law. As this Court has previously concluded, “Rule [2]<sup>4</sup> makes clear the CM Rules do not limit the Director’s ability to exercise the authority granted to him under the Ground Water Act.” *Basin 33 Water Users*, at 10 . Notwithstanding the fact that the CM Rules were not applicable to the administrative proceeding below, the Director will respond to the Petitioners’ various arguments related to the CM Rules.

First, “CM Rule 1 plainly states that 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 . . . .’ IDAPA 37.03.11.001.” R. 1911; *see Basin 33 Water Users*, at 8. A “delivery call” is a request made by the *holder of a senior priority water right* for administration of junior priority water rights. IDAPA 37.03.11.010.04. Petitioner’s stance that a delivery call was either (a) required, or (b) made, in this instance, is contrary to Idaho water law because nothing in Idaho Code § 42-237a.g. requires the filing of a delivery call, and, regardless, no delivery call was actually filed here. R. 438; R. 1909.

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<sup>4</sup> IDAPA 37.03.11 was amended July 1, 2021. IDAPA 37.03.11.002 (“CM Rule 2”) was IDAPA 37.03.11.003 (“CM Rule 3”) at the time of this decision; IDAPA 37.03.11.003 is currently reserved.

Next, the Director’s authority pursuant to the Ground Water Act is obviously distinct from the ability of a *water user* to request a delivery call pursuant to the CM Rules. Again, a delivery call is “a request from the holder of a water right for administration.” IDAPA 37.03.11.001. The Director is not a *holder* of a water right. The Director represents the regulatory body with the authority to administer and distribute water, including the conjunctive administration related to delivery calls as between users. This distinction highlights the difference between a senior water right holder calling as against a junior water holder, and the Director’s independent, generalized, authority to administer Idaho water in priority. If this were not the case, the Director’s authority would be arbitrarily constrained within the confines of water users making delivery calls amongst themselves. The Director has the plain and singular authority to *initiate* administrative proceedings to limit ground water withdrawal pursuant to Idaho Code § 42–237a.g.

This in contrast to the Director’s inherent authority—within the bounds of the Idaho water law and the prior appropriation doctrine—to take immediate action to remedy the injurious effects of drought and scarcity, in priority, on senior water users. This Court has already addressed a similar argument, concluding it is a fallacy to assume the exclusive use of the CM Rules for ground water management in Idaho. *Basin 33 Water Users*, at 12. From a practical perspective, the Director must be able to act outside of the CM Rules in certain circumstances, here pursuant to Idaho Code § 42-237a.g., to fulfill the duties and authorities provided him pursuant to the Ground Water Act. In this case the Director acted on his own volition, under power of his own statutory authority, distinct from a water user’s ability to make a delivery call.

The senior Basin 37 water users' actions do not amount to delivery calls. The Final Order states:

Prior to the hearing, the Director had informed the parties the surface water users would be required to provide some evidence of water shortage or injury traceable to junior ground water pumping. This was the purpose for which the surface water users provided testimony and exhibits, and the Director had 'broad power' to impose this requirement upon the surface water users.

R. 1912 (citation omitted). "Fulfilling this requirement, and in so doing[,] clarifying their positions in this proceeding (some surface water users did not take a position on whether the Director should take any action) did not amount to filing 'delivery calls.'" R. 1913. The senior's complaints over the years were not specific to a water user, rather they were specific to a use. For years senior surface water users in Basin 37 have been curtailed within the irrigation season based on priority of *surface water supply*. Ground water pumping has always, until this season, continued unabated in the Bellevue Triangle despite senior surface water curtailment. No delivery call is necessary for the Director to attempt to address this inequitable, out-of-priority, reality.

Petitioners argue the term "affect" in Idaho Code § 42-237a.g. means "material injury" under the CM Rules. Pet'rs' Opening Br. at 32–33. Petitioners argue that because the Idaho Supreme Court in the *Clear Springs Foods, Inc.* case framed "affect" as "material injury," and because material injury is defined in CM Rule 10, the CM Rules should govern how "affect" was determined in the administrative proceeding. *Id.* For the reasons already stated above, the CM Rules are inapplicable to the Director's authority to initiate an administrative proceeding pursuant to Idaho Code § 42-237a.g. Likewise, the Director properly analyzed and determined

injury in this matter under the guiding presumptions, burdens, and evidentiary standards of the prior appropriation doctrine.

Finally, Petitioners argue the Director was required to develop an “area of common ground water supply” pursuant to the CM Rules “procedures and criteria” prior to administration in this case. Pet’rs’ Opening Br. at 37. Consequently, Petitioners argue the Idaho Supreme Court three-step process for conjunctive administration pursuant to the CM Rules should have been used here. Pet’rs’ Opening Br. at 36(citing *A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841). This argument also fails for the same reasons. The CM Rules, including the CM Rule provisions related to the determination of areas having a common ground water supply, are inapplicable to an administrative proceeding initiated by the Director pursuant to Idaho Code § 42-237a.g.

(b.) The Director was not required to determine a “reasonable pumping level,” or a “reasonably anticipated rate of future natural recharge” before initiating the administrative proceeding.

Petitioners argue the Director was also required to determine a “reasonable pumping level,” or a “reasonably anticipated rate of future natural recharge” before he initiated the administrative proceeding. Pet’rs’ Opening Br. at 5, 27–28. Petitioners are, again, incorrect.

Pursuant to the plain language of Idaho Code § 42-237a.g. the Director is *allowed* to make determinations related to “an area of common ground water supply,” a “reasonable pumping level,” or a “reasonably anticipated rate of future natural recharge.” *See* Idaho Code § 42-237a.g. (“in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply



as determined by him . . . .”); *see also A&B Irr. Dist.*, 153 Idaho at 511, 284 P.3d at 236 (“he is not obligated to establish a reasonable ground water pumping level”). The Director is also authorized to allow ground water withdrawals “at a rate exceeding the reasonably anticipated rate of future natural recharge . . . .” Idaho Code § 42-237a.g. However, he is not mandated to undertake any of this analysis, nor is the analysis preconditional to the authority to initiate an administrative proceeding. This again makes practical sense, in preserving the Director’s authority to act quickly, in-season, in times of scarcity or drought.

(c.) The Director Properly Limited Petitioners’ Use of Water by Curtailment.

The Director concluded curtailment was proper here because junior ground water pumping both: (a) had an immediate, measurable effect on up-basin senior surface water use based on an established hydrologic connection; and (b) was blatantly out of priority. In such cases the Director has the authority and duty to regulate and control the use of the State’s water resources by priority of right, and in times of scarcity to implement reasonable limits on use.

The Idaho Supreme Court has stated that the drafters of the Idaho Constitution “intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right.” *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 874, 153 P.3d at 445. “Clearly, it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water.” *Id.* at 875, 153 P.3d at 446. This Court has also emphasized the importance of prompt administrative action to address water supply deficiency, “in the year in which it occurs.” Mem. Decision and Order on Pet. for Jud. Review, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV 2014-2446, at 10 (Twin Falls Cnty. Dist. Ct. Idaho Dec. 3, 2014). Curtailment of ground water rights the

following irrigation season is too late, as the injury to the senior appropriator, and correspondent out-of-priority use, has already occurred. *Id.*

In this case, the Director had the responsibility to protect senior surface water users' *in-season* use. The Director's ability to limit use in-season to protect against injury to senior appropriators is paramount to his responsibility to administer Idaho's water resources in priority. The Idaho Supreme Court has recognized "the prior appropriation doctrine as established by Idaho law can be 'harsh,' especially in times of drought." *Am. Falls Res. Dist. No. 2*, 143 Idaho at 869, 154 P.3d at 400. "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). Protecting senior water rights from injurious ground water pumping can also require the curtailment of extensive acreages. *See, e.g., Idaho Ground Water Ass'n*, 160 Idaho at 132, 369 P.3d at 910 (may be a large disparity between the number of acres curtailed and the benefit to senior surface rights.)

The Idaho Supreme Court has concluded:

It shall be the duty of the [Director] to have *immediate direction and control of the distribution of water* from all of the streams, lakes, ground water and other natural water sources in this state to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water shall be accomplished either (1) *by watermasters* appointed as provided in this chapter and supervised by the director; or (2) *directly by employees of the department* of water resources under authority of the Director in those areas of the state not constituted into water districts as provided in this chapter. *The director must execute the laws relative to the distribution of water in accordance with rights of prior appropriation as provided in section 42-106, Idaho Code.*

The director of the department of water resources shall, in the distribution of water from the stream, rivers, lakes, ground water and other natural water sources, be governed by this title.

*Musser*, 125 Idaho at 395, 871 P.2d at 812 (quoting Idaho Code § 42-602). Thus, the Director must have immediate and direct control of the distribution of water in Idaho, both to implement the prior appropriation doctrine, prevent waste, and to prevent the adverse effects of out-of-priority use.

(d.) The Director Properly Addressed Petitioners' Curtailment Concerns.

Petitioners argue the Director's curtailment determination was improper because he did not: (a) take into account actual water need or sufficiently analyze beneficial use; (b) establish a baseline methodology; (c) establish "reasonable in-season demand," "crop water need," or "demand shortfall"; (d) analyze "reasonableness and optimum development of water resources in the public interest"; (e) provide more than a statement of "senior's perceived water supply shortfalls and alleged impacts on crop production"; (f) analyze unauthorized acres, rental supply information, or supplemental ground water rights; or (g) analyze the extent water requirements could be met with existing facilities and water supplies. Pet'rs' Opening Br. at 44–50. In other words, Petitioners complain the Director did not sufficiently analyze the way in which senior decreed water rights were being utilized. *Id.* at 23. Petitioners' arguments incorrectly characterize the Director's actions.

As an initial matter, Petitioners' arguments related to the seniors' water use and need are based on a mistaken conclusion the CM Rules control the Director's actions here, and that "material injury," and the injury determination represented in the CM Rules controls the

Director's ability to limit water use pursuant to the Ground Water Act. The Petitioners are mistaken. As already discussed, the CM Rules are inapplicable to the administrative proceeding below and are irrelevant to this Court's analysis on appeal. The Director will nevertheless respond to Petitioners' arguments.

First, the Director sufficiently analyzed actual water need and beneficial use of senior water rights. Department staff aided the Director in understanding water need as a part of the injury calculus:

The Luke Memorandum identifies lands potentially injured by ground water pumping using IDWR's water rights spatial data, including GIS feature layers, that identify the places of use ("POU") for water rights diverting from Silver Creek and the Little Wood River. [IDWR Ex. 4 at 18]. The resulting list of water rights was modified to exclude: 1) all water rights with POUs that are also irrigated by ground water, 2) water rights having a "drain" or "wastewater" source, 3) water rights owned by BWCC or AFRD2 that may receive water from another source, and 4) all water rights having the "Exchange Condition" that authorizes the exchange of water from the Big Wood and Little Wood Rivers for Snake River water injected into the Wood River system via the Milner-Gooding Canal. [IDWR Ex. 4 at 7, 18].

R. 1891. Next, the Director heard from a variety of senior water right holders related to water need for the 2021 irrigation season, concluding:

Most or all of these surface water right holders also testified as to the measures they have taken, and investments they have made, to increase the efficiencies of their irrigation systems and conserve water, such as converting to pivot irrigation systems, and piping their water from the point of diversion to the place of use. 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.

R. 1900. Finally, the watermaster testified at hearing "that curtailment of ground water pumping in the Bellevue Triangle would increase the amount of water available for diversion by at least

some of the senior surface water users on Silver Creek and the Little Wood River.” R. 1907.

The Director concluded that the ground water users did not rebut or undermine this testimony.”

*Id.* The purpose of curtailment under these circumstances was to provide at least some water to senior surface water rights holders. It is illogical to conclude that because senior water right holders may not be able to *maximize* in-season beneficial use during an unprecedented drought, junior ground water rights should be allowed to keep pumping the scarce supply. Petitioners failed at hearing to show by clear and convincing evidence that curtailment would not result in “a sufficient quantity” of water for senior surface water users on Silver Creek and the Little Wood River to apply that water to beneficial use. *Sylte v. Idaho Dep’t of Water Res.*, 165 Idaho 238, 245, 443 P.3d 252, 259 (2019). Any risk of uncertainty in supply properly falls to the junior ground water users.

Second, Petitioners argue the Director had to undertake a series of analytical exercises prior to curtailment, including, among others, establishing “reasonable in-season demand,” “crop water need,” and a “demand shortfall.” Pet’rs’ Opening Br. at 48. However, rather than being mandatory, the various analytical tools Petitioners recite are discretionary, and their use depends on the underlying circumstances. Petitioners’ arguments here stem from *A&B Irrigation District*. *A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838. However, *A&B Irrigation District* does not require the Director to undertake the analysis deemed required by Petitioners prior to curtailment. *A&B Irrigation District* instead holds the Director properly administered a specific, multi-season delivery call pursuant to the CM Rules. The administrative proceeding and curtailment in this case was not governed by the CM Rules. The plain language of Idaho Code §

42-237a.g. does not require the analysis desired by Petitioners, especially where the curtailment analysis is occurring real-time in an unprecedented period of in-season water supply scarcity.

Similarly, this set of facts is inapposite to the development of the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”). The Fourth Methodology Order stems from the Surface Water Coalition delivery calls pursuant to the CM Rules on the Eastern Snake Plain Aquifer (“ESPA”). Fourth Methodology Order, *In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist.*, No. CM-DC-2010-001, at 3, 30 (Idaho Dep’t of Water Res. Apr. 19, 2016). First, again, the CM Rules are inapplicable here. Further, establishment of curtailment in Basin 37 is markedly distinct from a curtailment analysis on the Eastern Snake Plain Aquifer:

This case involves pumping from the Wood River Valley aquifer within the Bellevue Triangle, not from the ESPA. The ESPA delivery calls involved many more ground water diversions and a far larger area than this case. The vast majority of the ESPA diversions were much farther away from the Snake River than ground water diversions in the Bellevue Triangle are from Silver Creek and its tributaries. The impacts of the ESPA diversions on surface flows of the Snake River are far more diffuse, delayed, and attenuated than the impacts of ground water diversions in the Bellevue Triangle are on the surface flows of Silver Creek and its tributaries. Further, the record shows that ground water pumping in the Bellevue Triangle has significant impacts on flows in Silver Creek and the Little River within a few days of when pumping begins or ends.

R. 1908.

Petitioners next argue the Director failed to consider “reasonableness and optimum development of water resources in the public interest.” Pet’rs’ Opening Br. at 49. In the *Rangen, Inc.* (2014) case the Idaho Supreme Court held:

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 a 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.

*Idaho Ground Water Ass'n*, 160 Idaho at 132, 369 P.3d at 910. The Director properly balanced priority of right and beneficial use in this case, concluding:

The simulation of curtailment indicates that 99% of the predicted in-season benefit to Silver Creek streamflow can be achieved by curtailing 70% of the consumptive groundwater use within the model domain by reducing the area of curtailment to the area south of Glendale Bridge. IDWR Ex. 2 at 22-23. This area coincides with the Bellevue Triangle area identified as the 2021 potential curtailment area. The remaining 30% of the consumptive groundwater use has minimal impact on Silver Creek.

R. 1890. The Director effectively applied elements of optimum use to specifically limit curtailment to water use causing the vast majority of adverse effects to senior use.

Finally, Petitioners fail to consider the exigency of the circumstances. As this Court has already concluded:

The evidence shows this is an exceptionally dry year in the Wood River Basin. The evidence also shows there is going to be a water supply shortfall in that Basin for the 2021 irrigation season. Simply stated, there is not enough water to satisfy all existing water rights. . . . Without curtailment, senior surface water rights will suffer material injury this irrigation season. . . . There are going to be water rights that are unsatisfied during the 2021 irrigation season one way or another. . . .

Order Den. Second Mot. for Prelim. Inj. at 4. Despite this fact, Petitioners argue the Director should have first, for example, analyzed unauthorized acres, rental supply information, supplemental ground water rights, and effect of use of existing facilities and water supplies. As described above, the Director did undertake much of this analysis when he determined which senior water rights could be injured by ongoing ground water pumping. The risk of uncertainty of supply created by scarcity here should not be borne by those water users senior in priority. Mem. Decision and Order on Pet. for Jud. Review, *Rangen, Inc.* at 13 (2014).

Here, where injury must be addressed in-season; where timing was of the upmost importance; based on the best basin-specific scientifically derived hydrological data; the Director acted pursuant to his unambiguous authority in Idaho Code § 42-247a.g. Infused into much of Petitioners' argument here is that it was somehow unfair to limit their use when the Director did not unquestionably understand how all senior priority use was occurring. *See e.g.*, Pet'rs' Opening Br. at 62. The risk of uncertainty—from modelling to hydraulic response—must be allocated to the junior ground water users. “Equality in sharing the risk does not adequately protect the senior priority surface water right holder from injury.” Mem. Decision and Order on Pet. for Jud. Review, *Rangen, Inc.* at 13 (2014); R. 1904.

Petitioners failed to carry their burden of showing, by clear and convincing evidence, during the administrative proceeding, that evidence related to modelling and hydraulic connectivity could not be relied on to show that the ground water pumping in the Bellevue Triangle reduces flows in Silver Creek and the Little Wood River. This failure, and the nature of



the prior appropriation regime, means the sometimes-harsh risk of deprivation must arc toward them.

In summary, the Director concluded:

The record . . . supports a conclusion that the effects of ground water withdrawals in the Bellevue Triangle on senior water rights diverting from Silver Creek and the Little Wood River during the 2021 irrigation season are contrary to ‘the doctrine of “first in time is first in right.”’ Idaho Code § 42-226. The Director, therefore, is authorized to prohibit or limit ground water withdrawals in the Bellevue Triangle on this basis. Idaho Code § 42-237a.g.

R. 1907.

The Director concluded senior surface water rights out of Silver Creek and the Little Wood River were first in time and right, and additional flows to them from the curtailment of junior ground water pumping in the Bellevue Triangle could bring quantifiable, immediate relief. The Director concluded ground water use from the Bellevue Triangle should be limited because curtailment of such ground water pumping would positively affect the present and future use of senior surface water rights on Silver Creek and the Little Wood River. The Director’s conclusions are supported by substantial evidence in the record, pursuant to Idaho Code § 42-237a.g., and, therefore, the Final Order must be upheld.

(e.) The Director’s Interpretation of Idaho Code § 42-237a.g. is Entitled Deference.

Petitioners argue the Director’s interpretation of Idaho Code § 42-237a.g. deserves no deference. Pet’rs’ Opening Br. at 41. Petitioners argue the way in which they “harmonize” various Idaho water law statutes is “simpler and more straightforward than the Department’s interpretation that allows the Director unfettered authority to initiate a case. . . .” *Id.* at 43. To be

clear, it is the Respondents' position that the statutory language is clear and needs no "interpretation" or "harmonizing." But if the Court does not conclude the Director's authority in Idaho Code § 42-237a.g. is plain and unambiguous, the agency's interpretation deserves deference.

The Idaho Supreme Court applies a four-prong test in determining whether to defer to an executive agency's statutory interpretation:

First, the court must determine if the agency has been entrusted with the responsibility to administer the statute at issue. Second, the agency's statutory construction must be reasonable. Third, the court must determine that the statutory language at issue does not expressly treat the precise question at issue. Finally, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present.

*Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998).<sup>5</sup> "If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation." Pet'rs' Opening Br. at 42–44. Rationales include: (1) the rationale of repose; (2) the rationale requiring that a practical interpretation of the statute exists; (3) the rationale requiring the presumption of legislative acquiescence; (4) the rationale requiring contemporaneous agency interpretation; and (5) the rationale requiring agency expertise. *J.R. Simplot Co., Inc. v. Idaho State Tax Com'n*, 120 Idaho 849, 857-860, 820 P.2d 1206, 1215-1217 (1991).

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<sup>5</sup> Petitioners do not actually address the first three prongs of the deference test. Instead, they go directly to a discussion of why the rationales underlying the rule of deference are not present. Pet'rs' Opening Brief at 42–44. For the reasons stated above, Petitioner's arguments related to agency deference are misguided. The Director's interpretation of Idaho Code § 42-237a.g. is reasonable and deserves deference.

Under this test, the Director's interpretation of Idaho Code § 42-237a.g. deserves deference. First, the Director and IDWR have been entrusted with the responsibility to administer the Ground Water Act, and specifically Idaho Code § 42-237a.g. Second, the Director's statutory interpretation of the Ground Water Act, specifically his authority pursuant to Idaho Code § 42-237a.g., through the lens of the Idaho Constitution and prior appropriation regime, *is reasonable*, for the reasons already explained above. Third, while Respondents believe that Idaho Code § 42-237a.g. *does* unambiguously address the precise question at issue on appeal, this does not mean that the Director's interpretation is not also entitled to deference.

Finally, rationales underlying the rules of deference are present here, including legislative acquiescence and agency expertise. The most recent changes to the Ground Water Act occurred during the 2021 legislative session. While the Legislature concluded the local ground water board process for dealing with adverse claims amongst ground water users was obsolete, considering the CM Rules procedures related to delivery calls, it made no change to the Director's discretionary authority in Idaho Code § 42-237a.g. The rationale of agency expertise is also present, as the Director and Department are the State's experts in terms of water supply, administration, and shortage, thus the grant of authority to the Director to determine whether water in a well is unavailable because of an adverse effect on senior surface or ground water rights.

#### **B. Petitioners' Procedural Due Process Was Not Violated.**

Petitioners argue the administrative proceeding conducted by the Director, and the resulting Final Order, violate due process. Pet'rs' Opening Br. at 50–71. Petitioners were in no

way denied due process. The administrative proceeding initiated by the Director provided all process due Petitioners in relation to the in-season administration and exigency of an unprecedentedly scarce water supply year.

*i. Procedural Due Process.*

Procedural due process requirements are met when notice and an opportunity to be heard are provided. *Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cnty. Comm'rs of Payette Cnty.*, 159 Idaho 182, 190, 358 P.3d 67, 75 (2015) (citation omitted). The “opportunity to be heard must occur at a meaningful time and in a meaningful manner.” *Id.* Procedural due process includes “the right to be fairly notified of the issues to be considered.” *Haw v. Idaho State Bd. of Medicine*, 140 Idaho 152, 159 (2004). “Due process is not a concept to be rigidly applied, but is a flexible concept called for such procedural protections as are warranted by the particular situation.” *Id.* Receiving procedural due process means “that a person is not *arbitrarily* deprived of his or her rights.” *Telford v. Nye*, 154 Idaho 606, 611, 301 P.3d 264, 269 (2013) (italics added). “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978). At base, “[a] procedural due process inquiry is focused on determining whether procedure employed is fair.” *State v. Roth*, 166 Idaho 281, 285, 458 P.3d 150, 154 (2020) (quoting *Bradbury v. Idaho Judicial Counsel*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001)). Therefore, protection of procedural due process means: (1) fair notice of the issues to be considered; (2) fair opportunity to be meaningfully heard on the issues; and (3) no unfair or arbitrary deprivation of a right by the procedure.

To successfully show violation of procedural due process,<sup>6</sup> Petitioners must be able to show a property interest is at issue and the Director's actions arbitrarily deprived them of that interest. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009). A water right "is a property interest for purpose of the Fourteenth Amendment and, therefore, due process of law must be provided before the state deprives a citizen of a water right." *Id.* Petitioners hold ground water rights and, therefore, had a property interest at issue in the administrative proceeding, but the Director in no way unreasonably or arbitrarily deprived them of their rights.

*ii. Petitioners' Water Rights Were Curtailed for One Week, Not Unjustifiably Deprived.*

The Director has an affirmative duty to distribute water in accordance with the prior appropriation doctrine. *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Curtailment is a natural function of administration by prior appropriation and being subject to curtailment is *not* being deprived of a water right. *See In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213–24, 220 P.3d 318, 331–32 (2009) (being subject to water district regulation and distribution along with payment of proportional fees did not deprive water user of property interest). "A water user has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine." *Id.*

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<sup>6</sup> Petitioners make no substantive due process claim.

Administration and curtailment of water rights is a foreseeable, reasonable outcome under the prior appropriation doctrine, within the confines of water scarcity and availability. In times of scarcity—including the unprecedented drought conditions experienced in the Big Wood River Basin in 2021—curtailment of use cannot be characterized as an unreasonable deprivation of water rights where due process was protected. It is reasonable and foreseeable that in times of scarcity, following along from his duty to administer and regulate the State’s water resources, the Director may administer water rights by curtailment. This is an obvious and extremely common occurrence throughout the State each irrigation season. *All* water users are eventually curtailed in priority as water supply dwindles throughout each season.

Here, the Director had a duty to administer water rights in priority in the face of unprecedented scarcity. As the Court has already stated in this case:

In regards to the short time frames, the Court notes that due to the nature of water right administration and the exigencies of the situation time is of the essence. The Idaho Supreme Court and this Court have recognized that due process needs to balance the opportunity to be heard against the exigencies of the situation. *See e.g., American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (“Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water”). The parties were given notice, a hearing was conducted before the Director, and the parties were afforded the opportunity to be heard. The Court understands the frustration caused by the shorter timeframes associated with the administrative proceeding, but that is the nature of the situation.

Order Den. Second Mot. for Prelim. Inj. at 6–7. This was the nature of the situation in 2021.

While it may be perceived as unfair by Petitioners, it is the sometimes-harsh reality of the use of the State’s water resources under priority administration. There was not enough water to fill all

water rights in Basin 37 in 2021. The Director has a duty to distribute water in priority as best as he can, in order to prevent or stop ongoing injury and adverse effects on use.

Time was of the essence and in-season administration was required. Ground water pumping in the Bellevue Triangle<sup>7</sup> was shown to have an immediate, measurable impact on surface flows in Silver Creek and its tributaries and carried the potential to adversely affect senior surface water rights diverting from those sources. Senior surface water rights diverting from Silver Creek and its tributaries *also* represent real property rights coequal to those of Petitioners. By early June the senior surface water rights on Silver Creek and the Little Wood River were being curtailed by priority based on *surface* water supply only. Hydraulically connected ground water users continued to pump despite this fact. In times of water shortage, these senior surface water rights have priority of use over the water rights of junior ground water users. IDAHO CONST. Art. XV; Idaho Code §§ 42-106, 226, 237a.g., 602, and 607. Curtailment of Petitioners' ground water rights represented reasonable curtailment in priority and not an arbitrary deprivation of water rights.

*iii. Regardless, Petitioners Received Process Due Under the Exigencies of Unprecedented Drought in the Big Wood River Basin.*

Although there was no arbitrary deprivation here, the Director will respond to Petitioners' specific due process arguments.

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<sup>7</sup> Petitioners attempt to argue that because Idaho's 2021 drought was not limited to the Basin 37, the Director should have conducted similar administrative proceedings in other parts of the State, specifically the Rexburg Bench. Pet'rs' Opening Br. at 29–30. The 2021 irrigation season has concluded, and other areas of the state are not at issue in this appeal. Petitioners' right to due process is tied to their property interest in their own water rights, not any other water users' rights.

Petitioners do not deny the contested case was initiated by the Notice and a hearing took place on June 7-12, 2021. Petitioners cannot argue they did not receive notice and an opportunity to be heard. Instead, Petitioners perceive the administrative proceeding as being unfair to *them*. Petitioners never dispute that this was an unprecedented year of water shortage and scarcity in the Wood River Basin. They do not refute that this scarcity led to the curtailment of many *senior* surface water rights on Silver Creek and the Little Wood River. There is no dispute these seniors *also* planted crops and executed contracts for the season and suffered economic loss due to curtailment. Petitioners cannot dispute that these seniors have been curtailed in prior seasons, or that they have *never* before been curtailed.

Petitioners instead attempt to persuade the Court curtailment of their junior water rights is unlawful because it would result in economic injury to them. This stance is fundamentally at odds with the prior appropriation regime and ignores basic tenets of Idaho water law. The Director cannot focus solely on impacts of administration to the junior Petitioners. Timely and effective priority administration of water rights is integral to due process, and necessary, if the Director is to “equally guard all the various interests involved.” Idaho Code § 42-101. The Director has a responsibility to protect *all* water users’ interests, not just ground water pumpers in the Bellevue Triangle.

The rule that “first in time is first in right” is one of the “bedrock” principles of Idaho’s prior appropriation doctrine. *A&B Irr. Dist.*, 155 Idaho at 650, 315 P.3d at 838. “Priority in times is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.” *Clear Springs Food, Inc.*, 150 Idaho at 797–98,



252 P.3d at 78–79. As the Idaho Supreme Court has recognized, the prior appropriation doctrine as established by Idaho law can be “harsh,” especially in “times of drought.” *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 869, 154 P.3d at 400. “It is obvious that in times of water shortage someone is not going to receive water.” *Nettleton*, 98 Idaho at 91, 558 P.2d at 1052.

Additionally, the question of which appropriator—senior or junior—produces the greater economic benefit or would suffer the greater economic injury is legally irrelevant to priority administration. *See, e.g., Clear Springs Foods Inc.*, 150 Idaho at 802, 252 P.3d at 83 (holding that “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.”). Again, this Court has emphasized the need for prompt administrative action to address a water supply deficiency in the year it occurs as curtailment the next season is too late. *Mem. Decision and Order on Pet. for Jud. Review., Rangen, Inc.* at 13 (2014).

Next, Petitioners make a variety of intertwining due process claims, including: (1) the Notice was insufficient based on the CM Rules; (2) the Director risked arbitrary deprivation when he initiated the hearing process after crops were planted and the irrigation season was underway; (3) the discovery process was inadequate due to the abbreviated hearing schedule; (4) more time was needed to prepare for hearing due to the complexity of the underlying substance; (5) insufficient time was allowed to refute the WRV1.1 Model; (6) issues at hearing were complicated and Petitioners generally needed more time to prepare; (7) the Director curtailed in

favor of senior water rights that were not party to the administrative proceeding; (8) the Director's request for, and reliance on, IDWR Staff Memoranda violated due process; and (9) the denial of the Mitigation Plan alongside actual curtailment violated due process. Pet'rs' Opening Br. at 51–64. The Director disagrees on all fronts.

(a.) Petitioners Received Sufficient Notice.

Petitioners received proper and sufficient notice. The Notice was issued on May 4, 2021, and stated that the director was initiating an administrative proceeding under Idaho Code § 42-237a.g. “to determine whether water was available to fill the ground water rights” within the Bellevue Triangle, which was depicted on a map attached to the Notice. R. 2, 1, 43. The Notice stated that “[i]f the Director concludes that water is not available to fill the ground water right, the Director may order the ground water rights curtailed for the 2021 irrigation season.” R. 1. The Notice invited all interested parties to file notices of participation and scheduled a prehearing conference to discuss the hearing procedure, remote participation at hearing, discovery, witnesses, and burdens. R. 1–2. The Notice scheduled the hearing for June 7–11, 2021 (extended during hearing to June 12). R. 2. Notice was proper in this case.

Due to unprecedented drought and substantial evidence of adverse effects on senior surface water users, the Director had to act quickly. The abbreviated timeline in this case was proper due to scarcity of the resource and the need for in-season administration. As the Idaho Supreme Court has held, “[c]learly, it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water.” *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 875, 153 P.3d at 446. This Court has also emphasized the importance of prompt

administrative action to address water supply deficiency in-season. Mem. Decision and Order on Pet. for Jud. Review, *Rangen, Inc.* at 10 (2014). Curtailment of ground water rights the following irrigation season is too late, as the injury to the senior appropriator, and correspondent out-of-priority use, has already occurred. *Id.*

Finally, as to Petitioners' arguments that the CM Rules should govern the content and delivery of the Notice, the CM Rules are inapplicable to the provision of notice of an administrative proceeding pursuant to Idaho Code § 42-237a.g., as already discussed above.

(b.) The Director Conducted the Hearing Process in a Timely Fashion Under Exigent Circumstances.

The administrative proceeding was conducted fairly—Petitioners received all process due—under the exigent circumstances of an unprecedentedly scarce water supply and real, adverse effects to senior water users in Basin 37. Petitioners admit “[p]erhaps the Department’s abbreviated hearing process would have satisfied the dictates of due process were they conducted and concluded prior to the planting season.” Pet’rs’ Opening Br. at 55. In doing so Petitioners appear to argue that administration by priority should stop once crops are planted because of the potential of economic harm to water users. Again, however, this outcome would be antithetical to the prior appropriation doctrine. As discussed above, senior priority water users suffered economic harm in this case and the Director had a duty to administer water rights in priority. *See Musser*, 125 Idaho at 395, 871 P.2d at 812 (“We conclude that the director’s duty to distribute water pursuant to [Idaho Code § 42-602] is a clear legal duty”).

Based on the exigencies of the situation, hearing procedures—including discovery and preparation time—were more than sufficient for purposes of Petitioners’ due process. Pursuant to the Notice and based on discussion at the prehearing conference, the parties were able to conduct discovery, depose witnesses, and file a series of prehearing motions. At hearing multiple witnesses testified, including IDWR staff (who prepared agency memoranda for the Director and Parties), expert witnesses, and exhibits were submitted and exchanged. Witnesses and Department staff were cross-examined. Post-hearing briefs were filed, including a 48-page brief by Petitioners. *See e.g.* I–VI Hr’g Tr.; R. 126–76, 1597–648, 2191–309, 2997–3000, 3008–21, 3145–48, 3149. The Notice, as well as the subsequent proceedings and hearing, provided Petitioners a “full and fair” opportunity to be heard before any curtailment order was issued. *See Coeur d’Alene Tribe v. Johnson*, 162 Idaho 754, 762, 405 P.3d 13, 21 (2017).

(c.) The WRV1.1 Model is the Best Tool Available for Conjunctive Administration in Basin 37.

The WRV1.1 Model was developed to serve as a tool for water rights administration and water resource management and planning in Basin 37. R. 1888. It was developed over the past decade, including through twenty-two MTAC meetings between 2013 and 2019. *Id.* With input from MTAC, the current iteration was published in 2019. *Id.*

The Model was critical to the Director’s curtailment determination in the administrative proceeding below:

Sukow's modelling analyses . . . show that the Wood River Valley aquifer system is hydraulically connected to Silver Creek and its tributaries above the Sportsman's Access gage, and that ground water pumping in the Bellevue Triangle has a significant impact on stream flows in Silver Creek. Sukow used the WRV1.1 Model

to simulate the effects of curtailment of ground water rights diverting within the Bellevue Triangle on July 1 of this year. This analysis predicted that the curtailment would increase flows in Silver Creek by approximately 23-27 cfs during the months of July, August, and September. These conclusions are supported by the testimony of the watermaster and the surface water users on Silver Creek and the Little Wood River. They testified that, based on their observations, flows in Silver Creek and the Little Wood River respond to changes in ground water pumping in the Bellevue Triangle within a few days, or a week at most.

R. 1903.

Petitioners' expert testified that while the Model may not be perfect—that every model has its problems—the Model, as it was calibrated, remains “the best tool” currently available, “warts and all.” V Hr'g Tr. 1300–01, 1320:2–4; R. 1905. Two other expert witnesses also acknowledged that while the Model needs improvement it “is the best available tool to evaluate the effects of ground water pumping on flows of Silver Creek ([V Hr'g] Tr. at 1320; [VI Hr'g Tr.] 1452).” R. 1889.

Petitioners argue on appeal they did not have time to refute information in the record developed through the Model. Pet'rs' Opening Br. at 58. Petitioners do not make allegations to specific issues with the Model on appeal but did so during the pendency of the administrative proceeding, negating their argument that there was insufficient time to refute Model inputs and results. Petitioners' expert also introduced evidence and testimony attempting to refute the Model within the timeframe developed for the administrative proceeding.

As to Petitioners' specific arguments regarding the Model made below, the Director has already concluded:

The ground water users' evidence regarding the WRV1.1 Model raises questions about the Model's calibration and predictions of the hydraulic response in Silver

Creek and the Little Wood River to curtailment of ground water pumping in the Bellevue Triangle. The ground water users have not shown however, that it is highly probable or reasonably certain that the Model is so flawed that it cannot be relied upon for purposes of this proceeding. To the contrary, it is essentially undisputed that the Model is the best scientifically-based based tool currently available for predicting the hydraulic response in Silver Creek and the Little Wood River to curtailment of ground water pumping in the Bellevue Triangle. Certainly the Model can be and should be improved and refined, and would benefit from having more data, but this is true of all models. . . . The ground water users have not carried their burden of showing by clear and convincing evidence that the WRV 1.1 Model cannot be relied upon to show that ground water pumping in the Bellevue Triangle reduces flows in Silver Creek and the Little Wood River.

R. 1906 (citation omitted).

It was reasonable for the Director to rely on the Model, particularly where he had to determine the level of adverse effect to senior water users, in-season, under severe drought conditions. The Model is the best currently available tool for understanding the effect of groundwater pumping in the Bellevue Triangle on surface water supplies in Silver Creek and the Little Wood River. In this case, any risk of modelling uncertainty alleged by Petitioners must be borne by them because “[e]quality in sharing the risk does not adequately protect the senior priority surface water right holder from injury.” Mem. Decision and Order on Pet. for Jud. Review, *Rangen, Inc.* at 13 (2014).

(d.) The Director Properly Included All Senior Water Rights in the Curtailment Process, Not Just Those Participating in the Administrative Proceeding.

Petitioners argue they should not have been curtailed in favor of “non-party” seniors. Pet’rs’ Opening Br. at 62–63. Whether or not a senior is a party to an Idaho Code § 42-237a.g. administrative hearing does not determine whether they are entitled to the protection afforded

them by their seniority. “The presumption under Idaho law is that the senior is entitled to his decreed water right. . . .” *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449.

The Director concluded that:

Once an initial determination is made that the senior appropriator is or will be injured by diversions under a junior priority water right, the junior appropriator bears the burden of proving that curtailment would be futile, or otherwise challenging the injury determination. *AFRD2*, 143 Idaho at 878, 154 P.3d at 449. Further, junior appropriators who claim their diversion do not injure a senior appropriator are required to establish that claim by ‘clear and convincing evidence.’” *A&B Irr. Dist., et al., v. IDWR*, 153 Idaho 500, 516-20, 284 P.3d 225, 241-45 (2012). This requirement ‘gives the proper “presumptive weight to a decree.”’ *Id.* at 517, 284 P.3d at 242.

R. 1903. The Director made the initial determination that senior appropriators were being adversely affected by junior ground pumping. Many adversely affected surface water users actively participated at hearing and introduced exhibits and testimony to show continued curtailment of surface water rights would result in substantial crop and revenue losses during the 2021 irrigation season. Simply because not all senior surface water rights participated in the administrative proceeding does not mean that the Director is required to ignore non-participating senior priority water rights.

Petitioners’ argument is based on the erroneous assumption that curtailment may only be offset against senior water right holders that were party to the administrative proceeding.

The record shows that the ground water rights in the Bellevue Triangle are junior in priority to virtually all of the surface water rights for Silver Creek and the Little Wood River. The Final Order did not determine that the only surface water rights on Silver Creek and the Little Wood River that must be protected are those bearing priority dates equal to or earlier than 1883. The Final Order determined that consumptive ground water pumping in the Bellevue Triangle should be curtailed as

soon as possible in order to protect *all* senior surface water rights diverting from Silver Creek and the Little Wood River.

R. 1949 (*Italics added*). Petitioner's desired outcome would be antithetical to the prior appropriation doctrine. If Petitioners' stance became the rule, the Director and those acting in distribution (watermasters, Department staff) would only be able to curtail water rights in priority after the water right holder becomes party to a contested case. This outcome does not, and cannot, represent the reality of priority administration. During the irrigation season, on a sometimes-day-by-day basis, users are curtailed in priority based on supply.

Petitioners' logical fallacy also pervades the way in which they determine how curtailment affected their members on appeal. *See e.g.*, Pet'rs' Opening Br. at 76 (calculation of acres benefitting from junior ground water curtailment based *only* on senior water rights acres of seniors that were party to the proceeding). As a result, Petitioners' calculations related to the effect ground water curtailment had on senior water rights are incorrect and skew the actual effect curtailment had on senior water rights. The Director properly analyzed the effect of curtailment on *all* senior water rights in priority, and the Department's analyses related to curtailment are proper. *See* R. 2379, 2389–91 (list of potentially injured water rights).

The Director's duty and authority to administer water rights in priority, to prevent injury, and protect all water users' right of use, means that in times of scarcity all senior water rights must be analyzed when determining curtailment. The circumstances that presented in 2021 meant that there had to be immediacy to the Director's response to protect senior water rights in priority and the Director properly considered all senior water rights in priority.



(e.) The Director Properly Relied on IDWR Staff Memoranda.

Petitioners argue the Director's reliance on IDWR staff memoranda, included Sukow's determination of the potential area of curtailment, violated due process. Pet'rs' Opening Br. at 65. To the contrary, the Director's enlistment of Department subject matter experts to understand how a severe drought might affect water administration in Basin 37 is *exactly* the purpose of the administrative agency tasked with administration and distribution of the State's water resources in priority. Petitioners attempt to argue Department staff "are not allowed to engage in gathering, assembling, and organization of information on behalf of parties." Pet'rs' Opening Br. at 68. Petitioners' argument here misunderstands the Department's role in water administration in Idaho, and administrative agencies generally. Department staff were not acting on behalf of senior appropriators or any party to the administrative proceeding. IDWR staff were acting at the behest of the Director pursuant to their specialized knowledge.

Rule 157 of the Idaho Department of Water Resources Rules of Procedure<sup>8</sup> ("IDWR Procedural Rules") states "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. Agency staff are not, however, parties to the proceeding. Department staff serve as subject matter experts to inform, report, and make recommendations to the Director and hearing officers on matters related to the Department's specialized knowledge. This is bolstered by the fact that in any contested case proceeding the

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<sup>8</sup> The Director's Notice initiated a contested case, and, therefore, the rules governing contested cases before the Department are applicable here. IDAPA 37.01.01 et seq.

Director may take official notice of “scientific facts within the agency’s specialized knowledge.” IDAPA 37.01.01.602; see also Idaho Code § 67–5251 (official notice may be taken of “generally recognized technical or scientific facts within the agency’s specialized knowledge”). The Director also used his authority to take official notice in this proceeding, an action not appealed by Petitioners.

Next, Rule 201 states:

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. Due process, as it relates to staff participating in contested cases, is, therefore, met where staff are made available at hearing for cross-examination. This undisputedly occurred during the hearing. Further,

The Request for Staff Memorandum was issued, and the staff memoranda were submitted, before the May 19, 2021, deadline for filings notices of participation. On the day after the deadline for filing notices of participation, the Department sent emails to the parties who had filed notices, informing them that the Request and the staff memoranda were available on the Department’s website.

R. 1883 n. 2. Petitioners’ stance would lead to the absurd result that Department staff would not be able to analyze “lands irrigated by water from Silver Creek and the Little Wood River ‘that could be injured by depletions caused by ground water pumping.’ . . . [and] ‘methods of analysis for identifying possible injury’ to senior water rights arising from depletions caused by ground water pumping.” R. 1891 (internal citations omitted).

The hydraulic connectivity between ground water pumping on the Bellevue Triangle and Silver Creek and the Little Wood River is well understood, at least partially due to Department staff's efforts. The WRV1.1 Model represents the best tool for understanding this interaction. The Director has the authority to utilize Department staff, who built the Model, and administer curtailment and other administrative actions, to analyze these issues utilizing their specialized knowledge.

(f.) The Director Did Not Violate Petitioners' Due Process by Denying the Mitigation Plan.

On June 24, 2021, Petitioners submitted *South Valley Ground Water District and Galena Ground Water District's Proposed Mitigation Plan* ("Proposed Mitigation Plan"). See R. 1649–799. The Proposed Mitigation Plan was submitted pursuant to CM Rule 43, "in response to the delivery call and demands for conjunctive administration of surface and ground water use . . . asserted by certain surface water users." R. 1649–50. Petitioners submitted the Proposed Plan in anticipation of a curtailment order. R. 1948. Petitioners argue the Director denied the mitigation plan without process or "pre-deprivation" hearing. Pet'rs' Opening Br. at 68.

As discussed supra, the administrative proceeding below did not address or involve delivery calls and was not governed by the CM Rules. Therefore, the procedure outlined in the CM Rules related to proposed mitigation plans is inapplicable here. Regardless, while Idaho Code § 42-237a.g. does not explicitly authorize mitigation in lieu of curtailment, the Director's authority to prohibit or limit ground water withdrawal and use under Idaho Code § 42-237a.g. is

“discretionary” and “broad.” *Stevenson*, 93 Idaho at 11–12, 453 P.2d at 826–27. The Director, therefore, decided to allow mitigation as an alternative to curtailment. R. 1949.

However, the Director concluded Petitioners’ Proposed Mitigation Plan should be rejected because the Proposed Mitigation Plan assumed that:

[T]he mitigation obligation of the junior water right holders is limited to protecting three senior surface water rights bearing 1883 priority dates. . . . [However] [t]he record shows that the ground water rights in the Bellevue Triangle are junior in priority to virtually all of the surface water rights for Silver Creek and the Little Wood River. The *Final Order* did not determine that the only surface water rights on Silver Creek and the Little Wood River that must be protected are those bearing priority dates equal to or earlier than 1883. The Final Order determined that consumptive ground water pumping in the Bellevue Triangle should be curtailed as soon as possible in order to protect all senior surface water rights diverting from Silver Creek and the Little Wood River.

*Id.* The same underlying faulty premise as to who Petitioners *assumed* should be curtailed caused the Proposed Mitigation Plan to incorrectly determine what they considered to be the curtailment obligation. The Director denied the Proposed Mitigation Plan for a variety of other valid reasons, but no additional process or hearing was due to Petitioners in relation to their initial proposed mitigation plan.

Further, mitigation is not a right that a junior ground water user can be deprived of by the Director. Mitigation is a tool used to offset water owed by curtailment to senior priority water rights. It is the right of use held by senior water right holders that is impacted by junior ground water right use out of priority. Petitioners have no right to continue to adversely impact senior water rights. If this approach were allowed, it would result in senior water rights being “prejudiced and subjected to unmitigated material injury while junior users were permitted to

continue out-of-priority diversions.” Mem. Dec. and Order, *Rangen, Inc. v. Idaho Dep’t of Water Res.*, No. CV 2014-4970, at 8 (Twin Falls Cnty. Dist. Ct. Idaho June 3, 2015). The risk inherent in attempting to mitigate under the prior appropriation doctrine falls to the junior ground water right holders to avoid “unreasonably shift[ing] the risk of shortage to the senior surface water right holder.” Mem. Decision and Order on Pet. for Jud. Review, *Rangen, Inc.* at 13–14 (2014).

### **C. The Director Properly Denied Petitioners’ Futile Call Defense.**

The Director concluded Petitioners’ futile call defense “incorrectly assumes that the Director may only consider the benefits of curtailment to the senior water rights held by water users who appeared in this proceeding.” R. 1909. Again, the Director reiterated the senior water users who are party to the proceeding are not the only water users on Silver Creek and the Little Wood River that would benefit from curtailment as almost *all* water rights on Silver Creek and the Little Wood River are senior to the Bellevue Triangle ground water rights. *Id.* Petitioners’ futile call defense, therefore, improperly limited the futility analysis to those senior water right holders party to the proceeding. As a result, the Director properly rejected the defense as it did not consider the full spectrum of potentially affected senior water rights. Nevertheless, and even if the administrative proceeding had served to address a delivery call, curtailment of ground water pumping in the Bellevue Triangle was consistent with the futile call doctrine. *Id.*

First, ground water pumping from the Wood River Valley aquifer is not limited to the Bellevue Triangle:

Approximately one-third of the consumptive ground water use within the model domain comes from the aquifer area located outside the Bellevue Triangle. IDWR Ex. 2 at 22-23; Tr. pp, 86-87. By limiting curtailment to the Bellevue Triangle, senior surface water users were provided 99% of the Model-predicted curtailment benefit.

*Id.* The Director’s discretion to limit or prevent ground water withdrawals pursuant to Idaho Code § 42-237a.g., faced with unprecedented drought in Basin 37, does not require all, or even most, of the curtailed water to reach senior water users’ points of diversion. All that is required is a “sufficient quantity for [the senior water user] to apply it to beneficial use.” *Sylte*, 165 Idaho at 245, 443 P.3d at 259.<sup>9</sup>

Therefore, the Director properly concluded:

[T]he record establishes that curtailment of junior ground water pumping in the Bellevue Triangle will provide water in usable quantities for at least some of the senior surface water users, a fact that South Valley and Galena concede. The fact that curtailment will not provide usable quantities to all senior surface water right holders who have insufficient supply, therefore, does not render the curtailment “futile.” 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.

R. 1908.

Petitioners’ arguments would flip the futile call doctrine on its head. Petitioners would have the Director provide *no* water to senior surface water rights without a full analysis of all potential parameters of current use. However, “[t]he record . . . establishes that many of the surface water rights on Silver Creek and the Little Wood River have been, and will be, curtailed

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<sup>9</sup> For the same reason, Petitioners’ argument that some water will be lost by conveyance or will remain in the aquifer also fail. The critical outcome is that a sufficient quantity is available for beneficial use.

due to a water shortage that is due, in part, to ground water pumping in the Bellevue Triangle.”

R. 1910. “The record also establishes . . . that surface water uses on Silver Creek and the Little Wood River have substantial economic benefits . . .” and it would not be futile to provide some amount of water to the senior water rights in priority. *Id.*

Petitioners next argue “the evidence showed that in prior drought years, rights junior to 1883 have been regularly curtailed during the irrigation season regardless of groundwater pumping.” Pet’rs’ Opening Br. at 78. Petitioners’ observation highlights the exact purpose of the administrative proceeding. Junior ground water rights in the Bellevue Triangle have never previously been curtailed to provide water to senior surface water rights in Basin 37. This does not prove that curtailment would be futile: It proves that junior ground water right holders should be held to the same standard of priority administration pursuant to the prior appropriation doctrine as are Basin 37 senior surface water right holders. Simply because ground water pumping has never been curtailed does not mean ground water pumping is not adversely affecting senior surface water rights.

Petitioners’ argument that protecting senior surface water right holders may require curtailment of extensive acreage also fails. “As Idaho courts have recognized, protecting senior surface water rights from junior ground water pumping can require curtailment of extensive acreage.” *See, e.g., IGWA*, 160 Idaho at 132, 369 P.3d at 910 (large disparity between number of acres curtailed and benefit to a senior surface right may occur.). R. 1909.

Curtailment in this case was not futile and the Director properly developed a list of water rights that would potentially be injured by ground water use in the Bellevue Triangle. *See* R. 2379, 2389–91.

#### V. ATTORNEY FEES ON APPEAL

Petitioners seek attorney’s fees pursuant to Idaho Code § 12-117. Pet’rs’ Opening Br. at 86. The Court must award attorney’s fees and expenses in any proceeding involving a state agency and a person if the Court finds the “nonprevailing party acted without a reasonable basis in fact or law.” Idaho Code § 12-117(1); *see also Hoffman v. Bd. Of the Local Improvement Dist. No. 1101*, 163 Idaho 464, 473, 415 P.3d 332, 341 (2017) (County boards awarded attorney’s fees where landowners pursued appeal without a reasonable basis in law).

As established above, the Director’s Final Order curtailing junior ground water rights in priority is consistent with Idaho Code § 42-237a.g. and the prior appropriation doctrine. The administrative proceeding below was also conducted in a manner to protect Petitioners’ junior ground water rights from unreasonable deprivation. The exigency of unprecedented drought conditions in Basin 37 in the 2021 irrigation season necessitated the Director take timely, immediate action pursuant to his “broad powers to direct and control distribution of water from all natural water sources within water districts.” *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800; *and see* Idaho Code § 42-602. Thus, the Director did not act in an arbitrary or capricious manner and the Final Order does not prejudice the Petitioners’ substantial rights. The Director acted with a reasonable basis in fact and law. Petitioners are not entitled to attorney fees on appeal.




## VI. CONCLUSION

The Director's Final Order was consistent with Idaho law and supported by substantial evidence. The Director initiated the administrative proceeding and curtailed ground water rights in priority pursuant to his plain, unambiguous authority in Idaho Code § 42-237a.g. Petitioners have failed to prove curtailment arbitrarily deprived them of the use of their water rights or the administrative proceeding was otherwise procedural deficient. Therefore, Petitioners have not met their burden to show that IDWR erred in one of the ways specified in Idaho Code § 67-5279(3) and those alleged errors prejudiced their substantial rights. IDWR respectfully requests the Court affirm the Director's Final Order and affirm the Director's actions related to priority-based administration of a scarce water supply during unprecedented drought.

DATED this 19th day of November 2021.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

A handwritten signature in blue ink, appearing to read "Sean Costello", is written over a horizontal line.

SEAN COSTELLO  
Deputy Attorney General  
Idaho Department of Water Resources

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November 2021, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

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