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 POCATELLO, CITY OF KETCHUM, and CITY OF HAILEY

Intervenors.

Case No. CV07-2021-00243

IDWR Docket No. AA-WRA-2021-001

INTERVENOR SUN VALLEY COMPANY'S RESPONSE BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director

Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Sun Valley Company ("SVC") provides this *Response Brief* in support of *Petitioner's Opening Brief* ("Opening Brief"), filed by South Valley Ground Water District ("SVGWD") and Galena Ground Water District ("GGWD") in the above-captioned matter. SVGWD and GGWD will be referred to collectively herein as "the Districts." SVC agrees with the Districts that the *Final Order* should be reversed due to the Director of the Idaho Department of Water Resources' ("IDWR," "Department," or "Director") failure to follow the law.

SVC owns junior ground water rights and senior surface water rights in Basin 37. R. 3144 (summary of SVC water rights). In order to protect its water rights, and as the Court is aware, SVC actively participated in a previous Basin 37 conjunctive administration matter, filed in 2015 by the same or similar group of surface water users who are before the Court in this proceeding. There, the Court dismissed the delivery call due to the Department's failure to correctly follow the law, specifically the *Rules for Conjunctive Management of Surface Water and Ground Water Resources*, IDAPA 37.01.11 *et seq*. ("CM Rules"). *Opening Brief* at 9-10; *Memorandum Decision and Order*, Case No. CV-WA-2015-14500 (Fifth Jud. Dist. Apr. 22, 2016) ("2015 Memorandum Decision"). In 2017, SVC was again actively engaged in defending against a CM Rules delivery call, brought by the same or similar group of surface water users who filed the 2015 delivery call. *Opening Brief* at 9-10. There, the Department dismissed the delivery call due to the seniors' failure to follow the law, with the matter not being taken up on judicial review. *Id*.

Like the Districts, and in order to protect its water rights, SVC filed a *Motion to Dismiss* with the Director before the underlying hearing, arguing the Director failed to follow the CM Rules and the mandatory procedures outlined in Idaho's Ground Water Act, I.C. §§ 42-226 – 42-

239 ("GWA"). R. 192-209 (SVC's Motion to Dismiss); R. 126-176 (Districts' Motion to Dismiss). In denying the motions to dismiss, the Director confirmed he was not following the CM Rules, but instead was following a few select words in I.C. § 42-237a.g., rather than the entirety of the GWA, to initiate and prosecute this proceeding against junior ground water users. R. 436. In this action, the Director forced junior ground water users to defend their water rights at an unlawful hearing, resulting in physical curtailment of wells in the Bellevue Triangle.

SVC reserves the right to address any issue raised by the IDWR or Big Wood and Little Wood Water Users Association (the "Association") at oral argument.

II. FACTUAL AND PROCEDURAL HISTORY

The Director initiated this matter when he sent *Notice* of an administrative proceeding to water users: "[T]he Director is initiating an administrative proceeding to determine when water is available to fill the ground water rights . . . within the Wood River Valley south of Bellevue . . ." R. 1. The legal basis for the proceeding was stated as follows: "Pursuant to Idaho Code § 42-237a.g., 'water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect . . . the present or future use of any prior surface or ground water right." *Id*. (ellipses in original).[1]

Notice of the proceeding was mailed to water users in "Water District 37" and "Water District 37B." R. 45. No explanation was given as to why water users in Water District Nos. 37N, 37 O, and 37U were not served. The lack of explanation for not serving water users in all

[1] The Director was contemplating this proceeding at least as early as March 24, 2021. In an email to IDWR staff, the Director stated: "I have been thinking about the possibility of initiating conjunctive water administration in the Wood River basin during the irrigation season of 2021. Meg[h]an Carter [deputy attorney general] confirms I have the authority to initiate administration under Idaho code section 42-237a.g." SVGWD/GGWD Ex. 36; R. 2335 (emphasis added).

of the Basin 37 water districts was previously addressed and criticized by the Court in the 2015 delivery call matter:

> Nor was an explanation given as to why junior water users in other organized water districts within IDWR Basin 37 (i.e. water district 37N, 37O, and 37U) were not served. However, the exercise undertaken by the Director leads Sun Valley and other juniors to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers to be the boundaries of water district 37 and 37B. . . . . [T]he Court understands the concerns of the juniors. To them, the Director appears as having determined issues relevant to the contested case proceedings . . . .

2015 Memorandum Decision at 13-14 (internal footnote omitted).

On May 11, 2021, SVC filed a *Notice of Intent to Participate*, R. 94-97, and on May 14, 2021, filed its *Motion to Dismiss*, R. 192-209.

On May 11, 2021, the Director issued his *Request for Staff Memorandum* in which he asked IDWR staff to compile information related to ten categories: (1) hydrology; (2) surface water supply predictions; (3) surface water deliveries; (4) development and beneficial use of ground water; (5) development and operation of the Wood River Valley Groundwater Flow Model Version 1.1 ("Model"); (6) Model curtailment runs; (7) benefits of modeled curtailment to surface water sources, as opposed to senior water rights; (8) understanding of Snake River Basin Adjudication ("SRBA") partial decrees relating to exchanges of Snake River water and Big Wood/Little Wood water; (9) which lands could be injured by ground water pumping; and (10) methods for analyzing injury.

On May 21, 2021, SVC, City of Bellevue ("Bellevue"), City of Hailey ("Hailey"), and City of Ketchum ("Ketchum")[2] filed a *Request for Information Related to Staff Memoranda* with IDWR in which information related to the Staff Memoranda was requested. R. 415-17.

[2] Bellevue, Hailey, and Ketchum will be collectively referred to herein as "the Cities."

On May 21, 2021 – a mere 17 days before the June 7, 2021 hearing – the Director issued his *Order Authorizing Discovery*. R. 400.

On May 22, 2021, the Director issued his *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement* in which he opined the CM Rules did not apply, that he was entitled to commence the proceeding based on a select reading of I.C. § 42-237a.g, and that due process was satisfied. R. 436-44.

On May 25, 2021, the Director issued his *Prehearing Order; Scheduling Order*, in which he set the hearing on exceedingly complex conjunctive administration issues to commence on June 7, 2021 and described other associated deadlines, such as setting a May 26, 2021 expert witness deadline, a May 28, 2021 deadline to identify fact witnesses, and a June 2, 2021 deadline to disclose exhibits. R. 520-25.

The hearing in this matter commenced on Monday, June 7, 2021 and was completed on Saturday, June 12, 2021. On June 9, 2021, three days into the hearing, and a week after the exhibit deadline passed, IDWR provided SVC and the Cities with documents that were asked for in the May 21, 2021 *Request for Information Related to Staff Memoranda*. R. 1465-72.

During the hearing, SVC and the Cities requested "all written information, emails or memos, regarding Meg[h]an's 'confirmation to [the Director] that he has the 'authority to initiate the administration under Idaho code section 42-237a.g.' as stated in his March 24, 2021 email to Sean, Jennifer, Tim, Shelley and Mat which is SVGWD Ex. 36." R. 1327. The request was denied in an email by counsel for IDWR during the hearing. R. 1473.

On June 12, 2021, Gregory K. Sullivan,[3] the expert witness for SVC and the Cities, provided expert testimony in seven areas of inquiry:

[3] Mr. Sullivan also serves as "the lead modeling expert for the State of New Mexico in the ongoing litigation on the Rio Grande involving Texas v. New Mexico." Tr. p. 1419, lns. 2-4.

(1) Establishing water rights owned by SVC, Bellevue, Hailey, and Ketchum are located outside of the Director's potential area of curtailment, Tr. p. 1423, lns. 8-25, p. 1424, lns. 1-6.;

(2) The lack of evidence establishing that water curtailed in the Bellevue Triangle will be passed down to the senior water rights that are calling for water, Tr. p. 1424, lns. 17-25 through p. 1433, lns. 1-7;

(3) The lack of evidence to establish injury to senior water rights, Tr. p. 1433, lns. 8-25 through p. 1435, lns. 1-17;

(4) The Model cannot predict the benefits of curtailment to Silver Creek and its tributaries, Tr. p. 1435, lns. 18-25 through p. 1437, lns. 1-7;

(5) Necessary improvements to the Model, Tr. p. 1439, lns. 1-25 through p. 1441, lns. 1-19;

(6) Junior ground water users in conjunctive administration in Idaho and other western states have always been given the opportunity to mitigate, despite testimony from an IDWR witness saying that could not happen in this case, *infra* footnote 4, Tr. p. 1437, lns. 8-25 through p. 1438, lns. 1-25; and

(7) The truncated nature of this proceeding, including not receiving requested information from IDWR until during the hearing itself, has prevented Mr. Sullivan from properly analyzing the assertions made by the Department and senior water users, Tr. p. 1441, lns. 20-25 through p. 1443, lns. 1-13.

On June 28, 2021, after considering the evidence and testimony, the Director issued his *Final Order* curtailing junior ground water rights within the Bellevue Triangle "for the 2021 irrigation season starting on July 1, 2021." R. 1882. As to the motions to dismiss filed by the

Districts and SVC, the Director again held that the proceeding was not governed by the CM Rules, that he was entitled to commence the proceeding based on a select reading of I.C. § 42-237a.g., and that due process was satisfied. R. 1911-18.

III. ISSUES PRESENTED ON REVIEW

SVC joins in and concurs with the issues raised by the Districts.

As an additional issue on review, SVC moves this Court for an award of its reasonable costs and attorneys' fees incurred in this matter, pursuant to I.C. § 12-117.

IV. STANDARD OF REVIEW

When a district court acts in an appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the decision to determine whether it correctly decided the issues. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). The Court reviews the matter "based on the record created before the agency." *Chisholm v. Idaho Dept. of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005).

The decision of the Department must be "set aside if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67–5279(3). In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced. I.C. § 67–5279(4)." *Idaho Power Co. v. Idaho Dept. of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67–5279." *Id.* (internal quotation marks omitted).

As to questions of law and matters of statutory interpretation, they are freely reviewed. *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 243, 443 P.3d 252, 257 (2019); *Intermountain Real Props., L.L.C. v. Draw, L.L.C.*, 155 Idaho 313, 317–18, 311 P.3d 734, 738–39 (2013).

V. ARGUMENT

A. SVC Agrees With The Districts That The Director Failed To Apply The Proper Statutory And Regulatory Process For Administration Of Water Rights In Basin 37

The Districts argue the Director failed to follow both the CM Rules and the entirety of the GWA when he initiated this matter, resulting in physical curtailment of junior ground water wells in the Bellevue Triangle; thus, moving the Court to set aside the *Final Order*. *Opening Brief* at 20-44. In support of their arguments, the Districts walk the Court through an analysis of Chapter 2, Title 42 (with particular attention to the GWA), Chapter 6, Title 42, the CM Rules, and caselaw to explain the errors committed by the Department. SVC agrees with the Districts and offers the following for the Court's consideration as to why the *Final Order* should be reversed.

1. The CM Rules Are The Legal Vehicle By Which Junior Ground Water Rights Are Administered In Favor of Senior Water Rights

Since 1994, conjunctive administration of junior ground water rights for the benefit of senior water rights has been governed by the CM Rules. *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 866, 154 P.3d 433, 437 (2007). As explained by the Director to the Supreme Court in *Musser*, it is because of the CM Rules, and only because of the CM Rules, that he can conjunctively manage the State's water resources:

> On June 16, 1993, the Mussers made a . . . demand on the director for the "full and immediate delivery of their decreed water rights from the Curran Tunnel." The director denied the demand on the grounds that "the director is not authorized to direct the watermaster to conjunctively administer ground and surface water within Water District 36A short of a formal hydrologic determination that such conjunctive management is appropriate.

> The Mussers sought a writ of mandate to compel the director: (1) to delivery their full decreed water rights, and (2) to control the distribution of water from the aquifer according to the priority date of the decreed water rights.
>
> The director and the department moved to dismiss the Mussers' request for a writ of mandate, arguing that the request was moot because after the Mussers initiated the action, the director issued a notice of intent to promulgate rules and a notice and order for a contested case. The proposed rules would allow the director to respond to the Mussers' demands by providing for the conjunctive management of the aquifer and the Snake River.

Musser v. Higginson, 125 Idaho 392, 394, 871 P.2d 809, 811 (1994) (emphasis added).

Here, as in *Musser*, the seniors demanded "priority administration" pursuant to the "priority doctrine." *Opening Brief* at 40. Through this demand, the seniors implicated *Musser* and the Director, as in *Musser*, was required to follow the CM Rules, the very Rules he promulgated in 1994 to address conjunctive administration.

Since adoption of the CM Rules in 1994, the constitutionality, meaning, and extent of the Rules, including the ability for junior ground water users to mitigate,[4] has been reviewed on many occasions by IDWR, this Court, and the Idaho Supreme Court, providing juniors and seniors with an understanding of their rights and responsibilities. *See e.g. Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 367 P.3d 193 (2016); *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 155 Idaho 640, 315 P.3d 828 (2013); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). For reasons unknown, the Director has unilaterally chosen to ignore the CM Rules and the years of law behind them.

[4] During the hearing, and contrary to CM Rule 43 ("Mitigation Plans"), IDWR stated juniors would not be able to mitigate within the proceeding initiated by the Director. "Q. [BY MR. LAWRENCE] Mr. Luke, I'm going to ask you if the Director orders curtailment of junior ground water rights in this proceeding, what options would be available to junior users to prevent shutting off or to mitigate their use? A. [BY MR. LUKE] I don't know that there would be any." Tr. p. 378, lns. 5-9.

To show it was not only the Director who believed that the CM Rules were the only legal vehicle for administration of hydraulically connected water rights, the State of Idaho represented the same thing to the SRBA district court during the adjudication of Basin 37: "[F]acilitating the implementation of conjunctive administration is a major purpose of the SRBA . . . ." *Brief in Support of Motion for Order of Interim Administration for Water Rights in Basin 37, Parts 2 and 3*, Subcase No. 00-92021-37, p. 3 (Jan. 29, 2013) (hereinafter "Interim Administration Brief"). Interim administration was sought "so that the[] rights may be administered conjunctively." *Id*. (emphasis added) (capitalization removed). With reference to the 1994 Interim Legislative Committee Report on the SRBA, the State declared: "Resolving the legal relationship between ground and surface waters was one of the main reasons for commencement of the SRBA . . . ." *Id*. (emphasis added). On February 20, 2013, the Court granted the State's motion. *Order Granting State of Idaho's Amended Motion for Order of Interim Administration of Surface and Ground Water Rights in Basin 37, Parts 2 and 3*, Subcase No. 00-92021-37 (Feb. 20, 2013).

That "conjunctive administration" was referring to administration of water rights pursuant to the CM Rules goes without saying:

> Conjunctive administration requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources. That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

American Falls at 877, 154 P.3d at 448 (emphasis added). *See also* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 97-101 (2016) (discussing Basin-Wide Issue No. 5 and the importance of the conjunctive administration general

provision to allow for conjunctive management pursuant to the CM Rules).[5] *See also A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1998) ("Historically, conjunctive management has not occurred in Idaho . . . . If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another general of ground and surface water users will be uncertain regarding their relationships to each other.") (emphasis added).

With the legal paradigm of conjunctive administration applying to the basins within the SRBA through interim administration and application of the CM Rules, the Department expressly represented to water users in Basin 37 that the CM Rules are the legal vehicle for administration of hydraulically connected ground water and surface water rights. *See Opening Brief* at 7-8; R. 161-165 (2014 IDWR PowerPoint to Basin 37 water users regarding conjunctive administration). That conjunctive administration is the method for determining material injury to senior water rights in Basin 37 is further consistent with this Court's *2015 Memorandum Decision*, which is binding on the parties today.

According to the *2015 Memorandum Decision*, if a delivery call proceeds in Basin 37, and because no area of common ground water supply ("ACGWS") has been established, it must move forward under the CM Rules, specifically CM Rules 30 and 31. A review of that decision, which was initiated by SVC, is dispositive in this matter.

There, two letters were filed with the Director by a group of downstream senior surface water users alleging water shortages. "The Director informed the seniors he would treat the requests for administration as delivery calls under the CM Rules and proceeded to initiate two

[5] "The authors are current or former Idaho Deputy Attorneys General that represented the State of Idaho or the Idaho Department of Water Resources during the course of the SRBA. The article is based upon their first-hand knowledge of the events discussed. Collectively, the authors have over 100 years of work experience on the Snake River Basin Adjudication." 52 Idaho L. Rev. at 53.

contested case proceedings." *2015 Memorandum Decision* at 3. As explained by the Court:

> On June 25, 2015, Sun Valley moved the Director to dismiss the calls for their failure to comply with the applicable filing requirements. *Id*. at 382-402. Among other things, it argued that Rule 30 of the CM Rules governs the calls and that the seniors did not satisfy the filing requirements of that Rule. *Id*. In his *Final Order*, the Director denied Sun Valley's *Motion*. *Id*. at 888-898. He held the calls are governed by Rule 40 of the CM Rules and that the seniors' letters meet the filing requirements of that Rule. *Id*. Sun Valley subsequently filed a *Motion* asking the Director to review and revise his *Final Order*. *Id*. at 963-977. The Director denied the *Motion* on October 16, 2015. Supp. R., pp. 84-88.

Id. at 4 (emphasis added).

On review, the Court reversed the Director's denial of SVC's *Motion to Dismiss*. First, the Court stated the calls could not proceed under CM Rule 40 because no "area of common ground water supply" had been designated to provide juniors an "opportunity to be heard and present evidence in opposition to the petitioner's allegations." *Id*. at 10.

Second, without a designated ACGWS, the Court explained its rationale as to why the calls must proceed under CM Rules 30 and 31:

> All parties agree that an area of common ground water supply applicable to the Big Wood and Little Wood Rivers must be determined.
>
> . . . .
>
> Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.
>
> . . . .
>
> Therefore, to process the Association's calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.

. . . .

> These safeguards provide juniors proper notice of the alleged area of common ground water supply as well as the opportunity to be heard and present evidence in opposition to the petitioner's allegations.
>
> . . . .
>
> Therefore, the Court finds that it is Rule 30 that provides the Director the authority to determine an area of common ground water supply. It follows the procedures set forth in Rule 30 must be applied to govern the calls.

Id. at 8-11 (emphasis added).

Due to the foregoing, and because no ACGWS has been established, administration of hydraulically connected ground water and surface water rights in Basin 37 must be advanced in accordance with CM Rules 30 and 31. The Director's failure to follow the CM Rules – the very rules he stated in *Musser* were required for him to administer hydraulically connected water rights – is an abuse of discretion and should be reversed by the Court.

2. In Ignoring The CM Rules, Which Was A Violation Of Law In And Of Itself, The Director Then Failed To Follow The Requirements Of The GWA

Because the Director did not follow the CM Rules, he instead relied on select language in one sentence in I.C. § 42-237a.g. to initiate this proceeding for the benefit of senior surface water rights: "Pursuant to Idaho Code § 42-237a.g., 'water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect . . . the present or future use of any prior surface or ground water right.'" R. 1 (ellipses in original). In the *Final Order*, and despite all of the substantive and procedural requirements in the GWA, the Director reiterated that his authority in this matter begins and ends with his truncated reading of I.C. § 42-237a.g: "Nothing in Idaho Code § 42-237a.g. makes initiation of such an administrative proceeding contingent upon the filing of a delivery call or request for

administration of ground water rights." R. 1912. The Director then cited *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969) for the proposition that he has "'broad powers' to prohibit or limit ground water withdrawals that adversely affect the use of senior surface water rights." R. 1901 (emphasis added); *see also* R. 1912 ("Idaho Code § 42-237a.g. grants 'broad powers' to the Director in cases such as this one. *Stevenson*, 93 Idaho at 11-12, 453 P.2d at 826-27."). The *Final Order* completely ignores, however, that the Supreme Court's affirmance of the actions taken in *Stevenson* relied on much more than a limited reading of I.C. § 42-237a.g.; instead, relying on procedural components of the GWA that were wholly ignored here.

In *Stevenson*, a senior surface water user who appropriated water from Warm Springs Creek near Oakley, Idaho, argued that pumping from a well that was located "approximately 550 feet from Warm Springs and has the same source of water as Warm Springs . . . reduces the flow of water from Warm Springs until it ceases entirely." *Stevenson* at 5, 453 P.2d at 820. With reference to I.C. §§ 42-237c and 42-237d, the matter was brought to the "local ground water board [who] concluded that appellants' well rights were junior and subsequent to respondents' rights to the use of waters from Warm Springs. . . . . [And] that the continuation of appellants' present pumping program would result in the withdrawal of the ground water supply in that area at a rate beyond the reasonable anticipated average rate of future natural recharge" *Id*. at 5-6, 453 P.3d at 820-21 (emphasis added). On appeal, the Court affirmed the curtailment of the junior ground water well, opining as follows:

> Both the first order of the ground water board and the second order of the state reclamation engineer expressly recognized that "due recognition be given to the provisions of Idaho ground water statutes . . ." In trying the latter order de novo, the court was empowered to enjoin all pumping of appellants' well **because it found** that such pumping "would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge." As the state reclamation engineer or

> ground water board could have "prohibited" appellants' withdrawal of water from the well under the statutes, so also it was proper for the court to enjoin the operation of the well in order to prevent the desiccation of Warm Springs and the consequent infringement of respondents' senior rights.
>
> . . . .
>
> In particular, appellants attack the court's acceptance of the opinion of Mr. Anderson upon the ground water supply. However, Mr. Anderson's qualifications as a geologist and ground water engineer were unchallenged, and appellants had full opportunity to cross-examine him as to the basis of his opinion that the use of appellants' well was actually removing ground water beyond the rate of recharge. The facts upon which Mr. Anderson based his opinion were for the most part uncontradicted.

Id. at 12, 453 P.2d at 827 (emphasis added).

Here, and despite citing *Stevenson* to support his "broad powers," the *Final Order* wholly ignores the GWA, which forms the basis of the Court's decision. Idaho Code § 42-237a.g. is part and parcel of Idaho's "Ground Water Act." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582-83, 513 P.2d 627, 634-35 (1973); *see also A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 506-10, 284 P.3d 225, 231-35 (2012) (discussing the history of the GWA). As a series of statutes that were first passed in 1951 and then amended in 1953, all provisions of the GWA must be construed together. *Peavy v. McCombs*, 26 Idaho 143, 149, 140 P. 965, 967 (1914) ("The rule that statutes *in pari material* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature.") (emphasis added)); *see also In re Order Certifying Question to Idaho Supreme Court*, 167 Idaho 280, 283, 469 P.3d 608, 611 (2020) ("Statutes are *in pari materia* when they *relate to the same subject*. Such statutes are taken together and construed as one system.") (emphasis in original) (internal citations and quotations removed). Thus, consistent with *Stevenson*, I.C. § 42-237a.g. cannot be read in isolation and must instead be read with the GWA as a whole, *in pari materia*.

First, and despite the Director's statement to the contrary, R. 1912 ("[n]othing . . . makes initiation of such an administrative proceeding contingent upon the filing of a delivery call or request for administration of ground water rights"), the GWA requires an "adverse claim[]" to initiate the proceeding. I.C. § 42-237b. That an adverse claim must be filed by the holder of a senior water right is not discretionary, but rather is mandatory process, just like the filing of a petition to initiate a CM Rules delivery call:

> The [CM] Rules require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury. That is consistent with the [GWA] statutory provision which requires a surface priority water right holder claiming injury by junior water right holders pumping from an aquifer to file a 'written statement under oath' setting forth 'the facts upon which [he] founds his belief that the use of his right is being adversely affected' by the pumping. I.C. § 42-237b.

American Falls at 877, 154 P.3d at 448 (emphasis added).

In initiating this proceeding, the Director ignored the plain language of I.C. § 42-237b and the requirements for the need of an adverse claim as expressed in *Stevens* and *American Falls*.

Second, the adverse claim "shall include" four requirements:

> 1. The name and post-office address of the claimant.
>
> 2. A description of the water right claimed by the claimant, with amount of water, date of priority, mode of acquisition, and place of use of said right.
>
> 3. A similar description of respondent's water rights so far as is known to the claimant.
>
> 4. A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.

I.C. § 42-237b (emphasis added).

Despite the mandatory requirement, no "adverse claim" is present in the record before this Court. *Goodrick v. Field*, 167 Idaho 280, 283, 469 P.3d 608, 611 (2020) (use of the word "shall" in statutes makes the requirement "mandatory").

Third, and as seen in *Stevenson*, the hearing on the adverse claim "shall be conducted before . . . such local ground water board under reasonable rules and regulations of procedure prescribed by the director of the department of water resources." I.C. § 42-237c (emphasis added). Moreover, "the board shall have the authority to determine the existence and nature of the respective water rights . . . and whether the use of the junior right affects, contrary to the policy of this act, the use of the senior right." *Id*. (emphasis added).

In this case, and despite the mandatory requirements of the statute, the hearing did not occur before the local ground water board, but rather, the Director.

Fourth:

> [When a] written statement of claim . . . is filed . . . [and] is deemed sufficient . . . the said director of the department of water resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim. The said local ground water board shall consist of the director . . . and a person who is a qualified engineer or geologist, appointed by the district judge of the judicial district which includes the county in which the well of the respondent . . . is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of respondent . . . is located."

I.C. § 42-237d (emphasis added).

Again, despite the mandatory requirements, the Director failed to form a local ground water board or notify the Blaine County district court for appointment of an engineer or geologist.

Finally, and as seen in *Stevenson*, "due recognition was given to the provisions of Idaho ground water statutes" with citation to I.C. § 42-237a.g. and a finding that pumping "would affect, contrary to the declared policy of this act, the present or future use of any prior surface or

ground water right or result in the withdrawing of ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge." *Stevenson* at 12, 453 P.2d at 827 (emphasis added); *see also* I.C. § 42-237c ("whether the use of the junior right affects, contrary to the policy of this act, the use of the senior right.").

Here, the Director gave no recognition to the GWA when he completely ignored the "declared policy"[6] of the Act in the context of this proceeding, R. 1901, and determined he did not need to make a finding as to the "future rate of natural recharge," R. 1915. As to the rate of future natural recharge, no evidence was presented to show "mining" of the aquifer beneath the Bellevue Triangle, *Baker* at 577, 513 P.2d at 629, which would be indicated if water was being withdrawn at a "rate beyond the reasonably anticipated average rate of future natural recharge." I.C. § 42-237a.g. Moreover, no evidence was presented for purposes of establishing a "reasonable ground water pumping level." I.C. § 42-237a.g. In fact, evidence presented at the hearing through an IDWR report indicated that ground water levels in the Bellevue Triangle had

[6] The "declared policy" of the GWA is established in I.C. § 42-226, which states:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.

While the Director cites the Supreme Court's decision in *Clear Springs* to support his rationale for ignoring the declared policy of the GWA, he cannot have it both ways. The decision in *Clear Springs* reviewed a delivery call brought under the CM Rules, not application of I.C. § 42-237a.g. Because the Director says this is not a CM Rules delivery call, R. 1912 ("this proceeding was initiated by the Director, *sua sponte*, pursuant to Idaho Code § 42-237a.g."), *Clear Springs* does not apply, and the Court should apply the precedent in *Stevenson*. *Gomez v. Crookham Co.*, 166 Idaho 249, 259, 457 P.3d 901, 911 (2020) ("rule of stare decisis dictates that we follow controlling precedent") (internal brackets omitted). Similarly, the Director's citation to *A&B* at 516-20, 284 P.3d at 241-45 to support his decision to apply a "clear and convincing" standard of evidence in this case, R. 1903, has no basis in law, as *A&B* and its progeny are decisions involving the CM Rules, not initiation of a proceeding under the GWA. *Stevenson* makes no reference to an evidentiary standard of review; thus, the preponderance of the evidence standard applies. *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev'd on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

stabilized or increased since 1991. SVGWD/GGWD Ex. 15 at 12; R. 2242 (IDWR Open-File Report written by Allan Wylie titled "Summary of Ground Water Conditions in the Big Wood River Ground Water Management Area: 2019 Update"). Stabilizing or increasing ground water levels cannot lead to a factual conclusion that an aquifer is being mined or approaching being mined.

As to the setting of a reasonable pumping level, it is meant to assist the Director; thus, the lack of any evidence discussing such a level or acknowledging that aquifer levels have stabilized or increased since 1991, combined with *Stevenson* stating, "due recognition" must be given to the "declared policy of" the GWA and the "reasonably anticipated average rate of future natural recharge," demonstrates the Director's failure to consider the facts and law. Consequently, and without evidence of mining or approaching mining conditions, or the need for a reasonable pumping level, curtailment of ground water within the Bellevue Triangle was an abuse of discretion and should be reversed.

3. Despite The Director's Argument To the Contrary, The Local Ground Water Board Requirements In I.C. §§ 42-237b, 42-237c, and 42-237d Have Not Been Repealed

All of the requirements of the GWA were brought to the Director's attention by the Districts and SVC prior to the hearing, R. 11 and R. 198-201, and were summarily ignored, due to the Director's opinion that the local ground water board statutes were "repeal[ed]." R. 439 ("The Legislature repealed Idaho Code § 42-237b"). The Director is quite simply wrong.

During the 2021 legislative session, House Bill 43 ("HB 43") was presented to the Legislature in an attempt to repeal I.C. §§ 42-237b, 42-237c, and 42-237d. According to the Statement of Purpose for HB 43, the repeals were pursued in order "<u>to eliminate inactive provisions of law</u>. The legislation eliminates outdated and obsolete sections of Idaho Code

related to water right delivery calls. The procedures outlined in these sections are obsolete since the adoption of the Rules of Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11)."[7] Emphasis added. Because the Director did not apply the CM Rules and instead relied on the GWA, he was required to follow all of its requirements, including the appointment of a local ground water board. "[T]he Director cannot distribute water however he pleases at any time in any way, he must follow the law." *A&B Irr. Dist. v. State*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) (emphasis added).

As seen in the legislative history associated with HB 43, no emergency clause was included; thus, the "repeals" of I.C. §§ 42-237b, 42-237c, and 42-237d were ineffective until, at best, July 1, 2021.[8] "In the absence of a declared emergency, I.C. § 67-510 provides that, 'no legislation shall take effect until July 1 of the year of the enactment or sixty (60) days from the end of the legislative session in which the legislation has been passed, whichever date occurs last.'" *Fox v. Board of County Com'rs, Boundary County*, 121 Idaho 686, 690, 827 P.2d 699, 703 (Ct. App. 1991) (emphasis added); *see also Gibbons v. Cenarusa*, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002) ("The authority to determine the effective date of legislation is contained in Article III, § 22 of the Idaho Constitution, which states . . . 'No act shall take effect until sixty days from the end of the session . . . except in the case of emergency which emergency shall be declared in the preamble or in the body of the law.'"). Because the hearing in this matter commenced on June 7, 2021 and was completed on June 12, 2021, the entire proceeding was illegal, as the earliest the repeals could have been effective was July 1, 2021. Thus, the Director's statement that "[t]he Legislature repealed Idaho Code § 42-237b" is fundamentally

[7] H0043SOP.pdf (idaho.gov) (last visited November 18, 2021).

[8] HOUSE BILL 43 – Idaho State Legislature (last visited November 18, 2021).

wrong. R. 439. The Director's legal conclusion is subject to this Court's "free review," *Intermountain* at 317, 311 P.3d at 738, and should be reversed.

Moreover, and as addressed below with the Director, R. 1533-34, the repeals are still ineffective as of the signing of this brief. As the Court may be aware, the ineffectiveness of the repeals is due to the House of Representatives failing to adjourn *sine die*: "The Idaho Senate adjourned its 2021 legislative session in May; however, the Idaho House of Representatives refused to do so, opting instead to recess to a date no later than December 31, 2021. Thus, the 60-day window for gathering the required signatures for the referendum has not yet commenced." *Reclaim Idaho v. Denney*, Docket Nos. 48784, 48760, Slip Op. at 9, fn. 5 (Idaho Sup. Ct., Aug. 23, 2021) (emphasis added).[9] "Because it is unknown when the Idaho House of Representatives will adjourn *sine die*, there is great uncertainty as to when that 60-day period will begin." *Reclaim Idaho* at 22-23 (emphasis added).[10]

That the repeals will remain ineffective until "sixty (60) days" after the House of Representatives finally adjourns *sine die*, I.C. § 67-510, is significant and important for the Court to consider. Not only does the failure to adjourn *sine die* render all matters that occurred in this proceeding illegal, but it also renders future proceedings unlawful as well, at least until the repeals are effective. As to future proceedings, the Director unequivocally stated to the Governor, the Speaker of the House, and Basin 37 water users that he intends to continue this same proceeding this winter to further curtail junior ground water rights:

[9] The Court's slip decision in *Reclaim Idaho* may be found on the Idaho Supreme Court's website: 48784xx.pdf (idaho.gov) (last visited 11/18/2021).

[10] This great uncertainty is readily acknowledged by IDWR: "Because the House recessed the session, and has not yet adjourned *sine die*, there is uncertainty as to when the IWRB's currently temporary fee rules will take effect." R. 1533.

> If, by December 1, 2021, a proposed ground water management plan, mutually acceptable to the ground water and surface water users in the Wood River Basin, is not submitted to the Director, of if the submitted plan is unacceptable to the Director, the Director will immediately schedule a hearing for the Basin 37 Proceeding that is currently pending before the Director. The hearing will be scheduled to determine the actions the Director should take to ensure that ground water diversions in the Wood River Basin do not negatively affect the present or future use of any prior surface or ground water right.

R. 2000 (emphasis added).

On November 17, 2021, the House of Representatives adjourned *sine die*.[11] Since the session has now concluded with both chambers adjourning *sine die*, the repeals of I.C. §§ 42-237b, 42-237c, and 42-237d will become effective on January 16, 2022, which is "sixty (60) days" from November 17, 2021, I.C. § 67-510. Until the repeals are effective, the Director cannot continue the "[p]roceeding that is currently pending before" him; rather, he must follow the law, necessitating an adverse claim, filed by a senior water user, and heard by a local ground water board.

B. Pursuant To I.C. § 12-117, SVC Is Entitled To An Award Of Its Reasonable Costs And Attorneys' Fees

As its only issue on appeal, SVC prays for an award of its reasonable costs and attorneys' fees, pursuant to I.C. § 12-117(1):

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency . . . and a person . . . the court hearing the proceeding, including an appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

The decision to grant or deny a request for attorneys' fees under I.C. § 12-117(1) is left to the sound discretion of the Court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353,

[11] 2021 Legislative Session comes to an end (kivitv.com) (last visited 11/18/2021).

355 (2012). The Court will not award a grant of reasonable costs and attorneys' fees if a party presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012).

Here, and as explained above, there are no legitimate questions for the Court to address. The Director ignored the CM Rules and the entirety of the GWA when he initiated this proceeding, forcing SVC to expend resources in defending against this unlawful action. The steps taken by the Director in this proceeding were illegal; thus, warranting an award of reasonable costs and attorneys' fees.

VI. CONCLUSION

Based on the foregoing, the entirety of the Director's legal conclusions are incorrect due to his failure to follow the CM Rules and the GWA. Consequently, the Court should reverse the *Final Order* and award SVC its reasonable costs and attorneys' fees.

Respectfully submitted this 19th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2021, the foregoing was filed, served, and copied by iCourt on the following parties:

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