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. CV07-21-00243

PETITIONERS' REPLY BRIEF

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

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INTRODUCTION

South Valley Ground Water District and Galena Ground Water District ("Petitioners" or "Districts") hereby submit this reply to response briefs filed by the Respondent Idaho Department of Water Resources / Director Gary Spackman ("*IDWR Br.*") and Intervenors BWLWWUA / BWCC ("*Seniors Br.*") and Sun Valley Co. ("*SVC Br.*").[1]

In response to Petitioners' *Opening Brief* ("*Op. Br.*") the Department tries to suggest that the 2021 administrative proceeding was a routine matter of priority administration. It was not. There is no dispute that the Director's procedure here has never, ever been utilized before in the history of the Department.

The Director curtailed all ground water use in only a discrete portion of the Big Wood Groundwater Management Area, in mid-season, without determining an Area of Common Groundwater Supply. This curtailment order affected 23,000 acres. The model relied on by the Director showed curtailment would benefit only three surface water users from the Little Wood River. Yet, the Director insisted, contrary to the model results, that all water users in the Little Wood would benefit, even those who did not participate or provide any evidence of injury or beneficial use of water. The Director justifies this proceeding by claiming it was not conjunctive administration and therefore he is not required to determine material injury, an area of common ground water supply, nor follow any part of the agency's conjunctive management rules, but that he can curtail based solely on priority and depletions.

For the reasons explained herein, the Director is wrong.

[1] Intervenors City of Hailey and City of Bellevue also filed joinders in certain arguments made by Petitioners and Sun Valley Co.

I. Conjunctive Administration Defined Pursuant to Idaho Law.

In 1994, IDWR crafted extensive regulations for conjunctive management/administration of surface and ground water rights throughout the state. *See* IDAPA 37.03.11.01 *et seq*. ("CM Rules"). There is a common understanding, and no party disputes, that these rules were written in response to the Idaho Supreme Court's decision in *Musser v. Higginson*. 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Court affirmed the trial court's writ of mandate requiring administration of ground water rights that may have affected certain surface water rights. *Id.* At that time there was no administrative guidance on conjunctive water right administration. The agency's CM Rules filled that gap.[2]

The Idaho Supreme Court described it as follows:

> Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management in this system 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.

A&B Irr. Dist. v. Idaho Conservation League, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

The Court further observed that the CM Rules give the Director the "tools" to address "proper management" of surface and ground water. *AFRD#2 v. IDWR*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007) ("That is precisely the reason for the CM Rules, and the need for analysis and administration by the Director") (emphasis added).

[2] The Department defines "conjunctive management" as "[l]egal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply." CM Rule 10.03. *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 82 (2011). The term "conjunctive administration" is often used interchangeably with conjunctive management. There is no separate definition of conjunctive administration. However, the Supreme Court has stated that conjunctive management relates to "administration" of surface and ground water subject to the policy of reasonable use. *Id.* at 805, 252 P.3d at 86, *citing* CM Rule 20.03.

Conjunctive administration implements the Constitution and the Ground Water Act. As the Court explained, "[t]he policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively." *Clear Springs Foods*, 150 Idaho at 808, 252 P.3d at 89 (emphasis added); *IGWA v. IDWR*, 160 Idaho 119, 367 P.3d 897 (2016); *see also*, CM Rule 20.02.

Stated another way, it is mandatory, not discretionary, for the Director to conjunctively administer surface and ground water rights. During and following the Snake River Basin Adjudication (SRBA), IDWR expended considerable time and resources creating water districts to accomplish conjunctive administration.[3] With respect to Water District 37, the Department repeatedly represented that water distribution would be implemented through the agency's CM Rules, not some other "priority only" regime. R. 162-65; R. 2491 ("conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR's)(IDAPA 37.03.11)").

As this Court is aware, conjunctive administration of groundwater and surface water rights to Silver Creek and the Little Wood River has started and stopped on two prior occasions (2015 and 2017). Despite prior short water years (2013, 2014, 2015, 2019), not once did the Director attempt to implement an alternative conjunctive administration regime under section 42-237a.g. Not once did IDWR or its Director allege that administration would be based solely upon groundwater "depletions" to Silver Creek instead of "material injury" to individual senior surface water rights.

[3] IDWR staff testified it was the Department's position that it could not perform conjunctive management until the groundwater rights were decreed. Tr. 307:14-25; 308:1.

On May 4, 2021, the Director initiated a contested case "to determine if the surface water rights in the Little Wood River-Silver Creek drainage will be injured in the 2021 irrigation season . . ." R. 1. On its face the case squarely implicated conjunctive administration, which the Department concedes. *IDWR Br.* at 1. Nothing in the notice indicates the case was initiated to determine "an area of common ground water supply," define a "reasonable ground water pumping level," or determine whether pumping exceeded the "reasonably anticipated average rate of future natural recharge." *See* Idaho Code § 42-237a.g. Therefore, the question is whether IDWR was required to use the very rules it promulgated for this situation or whether an alternative, "priority only" type of administration was authorized by Idaho law.

The Department and the Seniors avoid calling this proceeding what it really is—conjunctive administration of surface and ground water rights within Water District 37. Despite their unwillingness to use the term "conjunctive administration" or "conjunctive management," the Department admits that this appeal "presents issues related to distribution or administration of water in a year of drought…" *IDWR Br.* At 2 (emphasis added). The Director agrees that "This case, like *Clear Springs* involves the question of whether junior ground water rights should be curtailed in favor of senior surface water rights." R. 1914. *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) of cousrse involved conjunctive administration under the CM Rules. And the Director admits that this case is "like *Clear Springs."*

IDWR admits that the "ultimate issue" in this proceeding was whether junior ground water rights should have been curtailed in favor of senior surface water rights to Silver Creek and the Little Wood. *IDWR Br.* at 2. That ultimate issue is the essence of conjunctive administration. Neither the Department nor the Seniors deny this simple truth. All they say is that the CM Rules did not apply to this proceeding.

First, they claim no delivery call was "filed" as required under the CM Rules. But, one doesn't "file" a delivery call. Under the CM Rules, a petition is what is "filed." CM Rule 30.01. A delivery call is "a request" by a senior water user for "administration of water rights under the prior appropriation doctrine." CM Rule 10.04. That request was made here.

Second, the Director believes that he has "inherent" authority to conjunctively administer as between surface and ground water rights, whenever the Director chooses to do so, regardless of whether a water district is organized or not. *IDWR Br.* at 23, 29. The Department contends that the Director is free to disregard the CM Rules—rules that are designed to deal with this precise situation, administration of surface and ground water rights together.[4]

To support this theory, IDWR relies on CM Rule 1 and ignores the remaining rules. However, the rules explicitly provide:

> These rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights…

CM Rule 20.01 (emphasis added).[5]

The Department's rules do not say that they apply only in some situations or only when the Director chooses to apply them. Rather, the rules apply in all situations in the State where there is a claim of material injury resulting from junior priority ground water use.

The Department admits that Basin 37 was the only basin in the State where the Director chose to institute his one-of-a-kind administration of surface and ground water rights outside of

[4] At the hearing on the Districts' second motion for preliminary injunction, the Director's counsel provided no explanation of why the critical elements of the rules do not or should not apply. Instead, counsel only asserted that the Director does not have to follow any rules if the Director chooses to initiate a proceeding on his own initiative. Second Injunction Hearing Tr. 53:11-20 (July 1, 2021).

[5] This rule has existed since 1994. It was approved by the Legislature as required by Idaho Code § 67-5291. *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650-51, 315 P.3d 828, 838-39 (2013). For over twenty-five years the Legislature has made no revisions to or disapproval of these rules.

the CM Rules. IDWR makes no attempt to justify why only this group of surface and ground water users were selected and no other. The Director's actions to cast aside the CM Rules despite the mandatory provisions of Rule 20 resulted in an arbitrary and capricious decision. The Districts respectfully request this Court to set aside the final orders accordingly.

II. The Court's Orders Denying Petitioners' Motions for Preliminary Injunction did not Pre-Judge this Appeal.

On May 27, 2021, this Court denied the Districts' first application seeking a temporary order restraining the pending administrative proceeding. The Court denied that petition based upon the conclusion that there was no irreparable and immediate injury because the Director had not made any curtailment decisions at that time, as he had merely called for a hearing. *See First Order* at 3-4. Following the administrative hearing, the Districts once again came before the Court seeking an order, this time enjoining the curtailment order issued by the Director on June 28, 2021. In its July 2, 2021 Order, the Court noted that an injunction is only granted in "extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Second Order* at 4. The Court denied the motion for preliminary injunction after finding that "this case involves complex issues of law that are not free from doubt." *Id*. The Court also stated that "[t]hese are complex legal issues of first impression . . . and complex issues of fact that are not free from doubt" *Id*. at 5-6. Accordingly, the Court concluded, "this is a complex legal issue of first impression and as such there can be no clear right to injunctive relief." *Id.* at 7.

IDWR's response to the current appeal seems to suggest that this Court has already decided the issues on appeal, despite the Court's repeated observations that there were complex legal and factual issues that are "not free from doubt." The Department asserts that the Court has already concluded the Idaho Constitution requires priority administration and the Director has

the duty to carry out that function. *IDWR Br.* at 19. That is no doubt correct. However, there is equally no doubt that the Idaho Constitution requires review of the second bedrock of the priority doctrine, and that is the doctrine of reasonable "beneficial use." *A&B Irr. Dist. v. Spackman*, 155 Idaho at 650, 315 P.3d at 838. If this was simply a matter of priority administration and nothing else, the Court likely could not have concluded that the relief sought involves complex issues of law.

Moreover, this Court did not rule on the question of whether or not the truncated procedure adopted by the Department here comported with due process. Nor did the Court conclude that first in time is the only matter at issue. Rather, the Court concluded that the Districts had not established a clear right to restrain the Director from acting under the exigencies of delivery during the 2021 water year. Moreover, the Court did not comment on the undisputed fact that the Director gave his own staff more than two months to prepare their analysis and gave the Districts two weeks to evaluate what the Department staff had done. Accordingly, the Court has not determined that the Department's actions were appropriate and comported with the requirements of due process and Idaho's APA.

ARGUMENT

I. The Department Fails to Properly Interpret Section 42-237a.g in Context With Other Applicable Statutes and Rules.

A. Legislative History of Section 42-237a.g.

Key to discerning the Legislature's intent with respect to section 42-237a.g is understanding the legislative history and why amendments were made to the statute in 1994. Section 42-237a.g was amended in direct response to the Supreme Court's *Musser* decision issued on February 28, 1994. *See* 1994 Sess. Laws, Chp. 450 § 3, pp. 1436-37. The Statement of Purpose for House Bill 986 provides:

> In 1992, the Idaho Legislature enacted changes to Idaho Code § 42-602. Those changes have been interpreted by the Idaho Supreme Court as imposing a duty upon the Director to supervise and control the distribution of water outside the boundaries of an organized water district even though the rights to that water have not been adjudicated and there are unresolved legal questions regarding the relationship of the water rights sought to be distributed. This was not the intent of the 1992 Amendments.
>
> Prior to the Court's decision, the burden was on the water user making a call for distribution outside a water district to identify the person causing the injury and to make a *prima facie* showing of injury. The effect of the Court's decision is to shift a private water user's legal burden and expenses to the state. Unlike the distribution of water within a water district, there is no mechanism for the state to fully recover its costs for distributing water outside a water district.
>
> The purpose of this Act is to restore the law relative to distribution of water back to what it was prior to the 1992 amendments to Idaho Code § 42-602 and to make clear that the Director shall not be subject to a writ of mandate when called upon to distribute water. Specifically, the Act clarifies that Chapter 6 of Title 42, Idaho Code is only applicable to distribution of water within a duly formed water district. Water users seeking to make a call for distribution outside a water district may elect to proceed directly against the owner of the water right claimed to be causing injury or may request the director to exercise authority under other chapters of title 42, Idaho Code. This Act, however, makes clear that the Director's authority to distribute water **outside a water district** is a discretionary function.

HB 986 Statement of Purpose (emphasis added); *Addendum A.*

Accordingly, the Legislature added the words "in his sole discretion" in the preamble of section 42-237a, and the term "discretionary" to subpart (g). *See* 1994 Sess. Laws Chp. 450 § 3, pp. 1436-37. The amendment was approved on April 11, 1994, and included an emergency provision to apply "to all calls for distribution of water pending at the time of passage and approval."[6] *Id.*

The legislative history clarifies that the Legislature wanted to ensure a *Musser* like decision would not occur again, and that water right administration outside of an organized water district would be discretionary, not mandatory. *See Saint Alphonsus Reg. Med. Ctr. v. Gooding*

[6] The same bill amended section 42-602 clarifying the Director's mandatory water distribution duties within water districts. 1994 Sess. Laws Chp. 450 § 1.

County, 159 Idaho 84, 87, 356 P.3d 377, 380 (2015) (". . . the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed"). Stated another way, the Legislature wanted to give the Director the ability to "not" administer water rights in certain cases, namely, when the rights had not been adjudicated.

IDWR misstates the purpose of the 1994 amendment and wrongly asserts these changes were made to give the Director "explicit discretionary power" to act in any situation, regardless of whether or not water rights are located within an organized water district, rather than the discretionary power to not act in certain situations. *IDWR Br.* at 22-23. First, IDWR did not make this claim to the Legislature in 1994, and it is contrary to the explicit Statement of Purpose. Second, IDWR's reading fails to properly harmonize all of the applicable statutes and rules. IDWR then, wrongly contends that by not changing this wording when the 2021 Legislature repealed the "local ground water board" process, the Legislature implicitly expanded the Director's authority. *Id.* Not true. Just the opposite, as that repeal is further evidence that the Legislature intended conjunctive administration to use the CM Rules. *See* HB 43 Statement of Purpose (2021 Legislative Session); *Op. Br.* at 34. A proper reading of all applicable statutes together leads to only one result for conjunctive administration within Water District 37, that the Department is to follow the requirements of chapter 6 and the agency's CM Rules.

B. The Director Failed to Harmonize Chapters 2 and 6, Title 42, Idaho Code for Purposes of Conjunctive Administration in Water District 37.

The Director admits that sections "42-602 and 42-237a.g of the Idaho Code guide the Director's analysis in this case." R. 1900; *IDWR Br.* at 18. The Director cites the requirement in section 42-602 to distribute water "in accordance with the prior appropriation doctrine," and ends his analysis there. That directive brings all of chapter 6 into this case, including the CM Rules promulgated under section 42-603. *Compare* Idaho Code §§ 42-602, 603, 604, 607 and CM

Rules *with* § 42-237a.g. The Director's reference to a single line in one statute in chapter 6 misses the rest of the applicable provisions throughout the chapter. *See State, Dept. of Health & Welfare v. Housel*, 140 Idaho 96, 104, 90 P.3d 321, 329 (2004) ("Statutes must also be construed as a whole without separating one provision from another"); *Nelson v. Evans*, 166 Idaho 815, 821, 464 P.3d 301, 307 (2020) ("sometimes '[a] reading of the provision in the context of the entire chapter is [ ] enlightening.").

Consequently, the Director erroneously discarded the CM Rules, and the Department offers no principled basis for when the Director can ignore the rules. *See e.g. Baker v. U.S. Dept. of Agriculture*, 928 F. Supp. 1513, 1524 (D. Idaho 1996) ("It is a well-established rule that the agency is bound to follow the regulations it issues. . . Those under the agency's jurisdiction have a right to insist that the agency adhere to its own rules").

IDWR claims the proceeding was commenced as "a result of water supply scarcity." Yet it does not dispute that the entire state suffered from a drought in 2021. *IDWR Br.* at 1. Despite widespread drought and shortages, the Director chose not to implement this alternative administration anywhere else in the state. The Department's claim that that the Director has "unfettered discretion" to administer in priority in drought without following conjunctive administration pursuant to chapter 6, title 42 and the CM Rule is not supported by the facts or law.

If there are competing conjunctive water right administration regimes within the law, as IDWR contends, then the Director had an express duty to harmonize the two together to implement the Legislature's true intent. The Ground Water Act requires the following:

> The executive and judicial departments of the state shall construe the provisions of this act, wherever possible in harmony with the provisions of title 42, Idaho Code, as amended; and nothing herein shall be construed contrary to or in conflict with the provisions of article XV of the Constitution; and except where otherwise

> provided in this act, the provisions of title 42, Idaho Code, as amended, shall continue to govern ground water rights in this state.

Idaho Code § 42-239 (emphasis added).

The Idaho Supreme Court requires the same for statutory interpretation. *See Gatsby v. Gatsby*, 169 Idaho 308, 495 P.3d 996, 1005 (2021) ("all statutes relating to the same subject are to be compared, and . . . brought into harmony by interpretation") (emphasis added); *State, Dept. of Health & Welfare*, 140 Idaho at 105, 90 P.3d at 329 ("[i]t is the duty of courts, in construing statutes, to harmonize and reconcile laws whenever possible and to adopt the construction of statutory provisions which harmonize and reconciles them with other statutory provisions").

IDWR has no response to the express requirement of section 42-239. The Director concedes that he did not attempt to harmonize chapter 6 and the CM Rules with his novel interpretation of section 42-237a.g. Yet, the SRBA statutes, amendments to section 42-603, the Department's promulgation of the CM Rules, and legislative approval of the same, are all "provisions of title 42" implemented after 1953, and they all point to a defined process for conjunctive administration that is implemented under to the CM Rules.[7]

That process, which began with the commencement of the SRBA over 30 years ago, included decreeing the various ground water rights and ultimately incorporating those rights into Water District 37. This was all done to accomplish conjunctive administration as required by law. The Director ignored this process and IDWR does the same in its response.

Instead, IDWR isolates a phase from section 42-237a.g to support its reading of the Director's statutory authority. The Department alleges section 42-237a.g is unambiguous, stands apart from the rest of the code, and that a plain reading of the statute authorized the Director's

[7] Section 42-603 was amended in 1992 to authorize the adoption of rules for the distribution and administration of ground water in addition to surface water. *See* 1992 Sess. Laws, Chp. 339 § 4.

actions. *IDWR Br.* at 20-22. The Department's interpretation fails as it produces an untenable reading of the statute in isolation, and subjugates mandatory conjunctive administration within a water district to wholly discretionary authority in section 42-237a.g, unbound by any rules or defined procedures.

The objective of statutory interpretation is to give effect to legislative intent. *Saint Alphonsus Reg. Med. Ctr. v. Ada County*, 168 Idaho 741, 747, 487 P.3d, 333, 339 (2021). Interpretation begins with an examination of the literal words of the statute. *Id.* When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and a court need not consider rules of statutory construction. *Id.* However, statutes that are *in pari materia* are construed together to effect legislative intent. *Id.*

Statutes are *in pari materia* when they relate to the same subject. *See In re: Order Certifying Question to the Idaho Supreme Court*, 167 Idaho 280, 283, 469 P.32d, 608, 611 (2020). As for interpreting multiple statutes on the same subject, the Supreme Court has instructed:

> Such statutes are taken together and construed as one system. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Language in a particular statutory section need not be viewed in a vacuum; *all sections* of applicable statutes must be construed together to determine legislative intent.

Id. (emphasis in original) (internal citations omitted).

Based upon the above canons of construction, it is clear that the Legislature did not intend for conjunctive administration to be "choose your own adventure." Just the opposite; everything the Legislature has enacted on the subject, including the recent repeal of the "local ground water board" procedure, points to chapter 6 and the well-defined process under the CM Rules to implement conjunctive administration. *See* HB 43 Statement of Purpose ("The

procedures outlined in these sections are obsolete since the adoption of the [CM Rules]"); *Op. Br.* at 34.

Isolating a single phrase in section 42-237a.g does not free the Director to implement his new conjunctive administrative regime whenever and wherever he pleases. *IDWR Br.* at 20-22. He must follow all of the law. *See In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) ("the Director cannot distribute water however he pleases in any time in any way; he must follow the law").

IDWR suggests that the Director undertook this unprecedented action because of the 2021 water supply conditions. *IDWR Br.* at 8, 17, 45. However, IDWR cites nothing in section 42-237a.g indicating that the statute only applies in times of drought.[8] The general authorities identified for the administration and enforcement of the Ground Water Act exist without regard to particular water supply conditions. This Court should take judicial notice that there was a drought throughout the entire State in 2021. Moreover, drought declarations have been common in recent years in Basin 37, including in 2020, 2015, 2014, and 2013.[9] Nothing in section 42-602 or section 42-237a.g authorizes the Director to avoid the CM Rules when there is a drought. That is when the CM Rules are needed.

[8] IDWR implies that the extreme water supply conditions in 2021 justified the Director's novel actions. Water shortages in Basin 37, and throughout Idaho, are not uncommon. *See e.g. Eden v. State of Idaho*, 164 Idaho 241, 253, 429 P.3d 129, 141 (2018) ("IDWR issued a moratorium against the approval of certain new applications in the Snake River Basin 37, Part 1 in 1993. That moratorium is still in place today because of a long-standing water shortage in Basin 37"). Despite such prior shortages, the Director has never asserted such authority to curtail junior groundwater rights based upon "priority" alone.

[9] Contrary to IDWR's insinuation for justifying the Director's novel actions here, drought is not a new or sudden phenomena. For example, Governor Little and Director Spackman previously issued drought declarations in the spring of 2020 for both Blaine and Lincoln counties. These counties also received drought declarations in April 2007, 2013, 2014, and 2015. Copies of drought declarations issued back to 1994 are publicly available on IDWR's website at: https://idwr.idaho.gov/water-data/drought-declarations/.

Section 42-237a.g authorizes the Director to prohibit or limit ground water withdrawals to protect a reasonable pumping level or prevent mining. That is not what he did here. Instead, the Director embarked on a new protocol to administer surface and ground water, solely relying on priority and depletion to the source, contrary to the CM Rules.

The Supreme Court's interpretation of section 42-237a.g leaves no doubt that the Director must analyze "material injury" in the conjunctive administration context. In *Clear Springs v. Spackman*, the Court held that the term "affect" in section 42-237a.g means "cause material injury to any prior surface or ground water right." 150 Idaho 790, 804, 252 P.3d 71, 85 (2011) (emphasis added). IDWR agrees that the Court stated that "affect" means "material injury," but asks this Court to ignore that directive based solely on IDWR's claim that this case has nothing to do with the CM Rules, where "material injury" is actually defined. *IDWR Br.* at 30. But, IDWR offers no other definition of "material injury" and does not explain why the "material injury" standard does not apply to section 42-237a.g, as the Court held. *Id*. Although IDWR and the Director prefer to ignore the Court's decision and interpretation, lower courts are obligated to abide by the decisions of the Idaho Supreme Court. *Gonzalez v. Thacker*, 148 Idaho 879, 883, 231 P.3d 524, 528 (2009). Thus, the Director erred by failing to apply the material injury standard under section 42-237a.g.

Since "material injury" is not defined in the statutes, the Department must turn to its own rules for purposes of making that determination. Indeed, material injury is exactly what all parties agree was at issue in this proceeding. The Seniors maintain that the Director made a finding of "material injury." *Seniors Br.* at 25. The Director advised the senior water users that they would have to prove "injury" and stated that he did not know any difference between the

standards for "injury" and "material injury." Pre-Hearing Tr. 46:3-5; 49:10-20. He also stated that the CM Rules were a "very important" guide to this proceeding. *Id.* 50:6-20.

Despite these acknowledgements at the outset of the case, the Director's *Final Order* makes no finding of material injury. R. 1882 *et seq*. Instead, the order mentions "material injury" only once, when discussing this Court's *Rangen* decision where Rangen's senior rights were subjected to material injury from junior users' out-of-priority use.[10] R. 1916. The Director's *Final Order Denying Mitigation Plan* also doesn't reference "material injury," but instead refers to "adverse effects" and also required proof that the mitigation plan would "offset depletions," a standard never previously identified by the Director or mentioned in the rules. R. 1949. The CM Rules not only define "material injury," they include a lengthy list of factors the Director is authorized to consider when making that decision. *See* CM Rule 42. The Director ignored these criteria and proceeded to curtail junior ground water rights solely upon priority and depletion effects. The Director offers no principled basis for when he chooses to administer ground water and surface water under section 42-237a.g, other than that he gets to choose. He does not say when he can dispense with "material injury."

In sum, the Director wrongly isolated and relied upon section 42-237a.g without regard to the statutes and rules for conjunctive administration set forth in chapter 6 and the CM Rules. The Department's narrow reading misrepresents what the Legislature intended for conjunctive

[10] The Director's reliance upon the district court's decision in *Rangen*, both in the underlying *Final Order*, and in the response brief on appeal is misplaced. *IDWR Br.* at 60-61. First, *Rangen* concerned the CM Rules, which the agency claims do not apply in this case. *Id.* at 27. IDWR cannot have it both ways. Second, the court rejected the Director's actions in that case because juniors had been given multiple opportunities to mitigate the five-year phased in curtailment. *See Second Rangen Dec.* at 2-4. The Court found the Director erred by not curtailing when the juniors' mitigation failed. *Id.* at 7-9. Moreover, the *Rangen* call proceeding took place over several years wherein junior groundwater users were afforded due process through the filing and processing of various CM Rule 43 mitigation plans. No such due process was provided in this case as the Director denied the Districts' mitigation plan and ordered immediate curtailment without a hearing.

administration within organized water districts, and its interpretation should be rejected on appeal.

C. The Court Should Not Afford Any Deference to IDWR's New Interpretation.

IDWR claims its new-found interpretation of section 42-237a.g is entitled to judicial deference. This claim is wrong for a host of reasons. First, it is contrary to section 42-602, which requires administration of rights in a water district to follow the provisions of chapter 6, including the CM Rules. Next, IDWR placed adjudicated ground water rights into Water District 37 with the express purpose that administration would be accomplished under the conjunctive management rules. Importantly, IDWR's new interpretation is directly at odds with the legislative history of the 1994 amendments to sections 42-602 and 42-237a.g, where the Director was only given discretion to not administer outside organized water districts. *See Addendum A*; s*ee also City of Arlington v. FCC*, 569 U.S. 290, 324 (2013) (no deference to agency interpretation contrary to the "language, structure, policy and legislative history" of the act).

Even if IDWR could overcome these barriers, no deference is owed the Director's new found interpretation of the statute. The Idaho Supreme Court has established a four-prong test to determine the appropriate level of deference the Court should give an agency's construction of a statute. *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991); *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998).

As to the first prong certainly IDWR is required to administer all statutes at issue here. However, the remaining factors do not apply. The Department's construction of section 42-237a.g is not reasonable, because it reads the statute in isolation without harmonizing chapter 6 or the CM Rules. *IDWR Br.* at 41. Hence, it is unreasonable to interpret section 42-237a.g to disregard chapter 6 and the CM Rules. It is also unreasonable to interpret section 42-237a.g to

give the Director unfettered discretion to pick and choose which statutes and regulations he applies, particularly in the light of the legislature's purpose that adding the "discretionary" language to allow the Director the authority to not administer outside a water district. *See* HB 986 Statement of Purpose, *Addendum A*.

The third prong is absent because section 42-602 requires the Director to administer water rights in a water district under chapter 6. The Department's interpretation of section 42-237a.g also fails the fourth prong, which looks at the underlying rationales for the rule of deference. The fourth prong has five elements to consider: (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. *Simplot*, 120 Idaho at 857-60, 820 P.2d at 1215-17. None of the rationales support a finding for agency deference.

IDWR admits that the first rationale, that of repose, does not exist here because the Department's interpretation of section 42-237a.g is both novel and new. When the rationale of repose is absent, even a reasonable agency interpretation would not be given deference. *See id.* at 863, 820 P.2d at 1220.

The second rationale is not present here either because the Districts' interpretation of the statute, i.e., that administration of water in this case should be conducted pursuant to the CM Rules, is simpler and more straightforward than the Department's interpretation that allows the Director unconstrained authority to initiate a case with no defined procedures. *Id.*, 120 Idaho at 863-64, 820 P.2d at 1220-21(second rationale was absent because Simplot provided a simpler statutory interpretation than the Tax Commission).

The third rationale, the presumption of legislative acquiescence, is also absent. The Legislature is charged with knowledge of how its statutes are interpreted, and by not altering the statutory text the Legislature is presumed to have sanctioned the agency interpretation. *Ada County v. Bottolfsen*, 61 Idaho 363, 102 P.2d 287 (1940). Here, the Department's interpretation is brand new. The Legislature has not had the chance to acquiesce or agree with IDWR. At the hearing, IDWR staff testified that they did not advise the Advisory Committee of this interpretation, were not even aware of the statute in the fall of 2020, nor were they contemplating using the statute. *See* Tr. 345:11-16. This interpretation only first arose in internal correspondence between the Director and certain staff in March of 2021. R. 2333-36. The interpretation was only made public on May 4, 2021. R. 1.

The Department's argument that the Legislature acquiesced to the Director's broad interpretation of section 42-237a.g by making changes to the Ground Water Act in 2021 also fails for several reasons. House Bill 43, eliminating the local ground water boards, was signed into law on March 16, 2021, and the first notice of the Director's new interpretation of section 42-237a.g occurred nearly two months later. R. 1. Second, Legislative acquiescence will "require 'something' more to determine *actual* legislative intent than merely reenacting the statute after it has received an agency construction." *Simplot*, 120 Idaho at 864, 820 P.2d at 1221 (emphasis in original). Here, House Bill 43 did not amend section 42-237a.g. Finally, the Director's request to repeal sections 42-237b *et seq.* was predicated on his representation that conjunctive administration would be handled through the CM Rules, rather than through a unilateral process under section 42-237a.g. In other words, the 2021 Legislature was not presented with the Director's current interpretation of the statute, hence there is no acquiescence.

IDWR agrees that the fourth rationale requiring agency interpretation contemporaneous with the passage of the statute is also absent. Section 42-237a.g was passed and amended several decades before the Department's novel interpretation and application of the statute in May 2021, the first-time section 42-237a.g had been applied in this manner. *See* Tr. 343:16-19; 345:7-13.

The fifth rationale, requiring agency expertise, is also missing in this case. The Department has expertise regarding the distribution of water in the State of Idaho under the conjunctive management rules, but no experience or expertise in administering water under section 42-237a.g. Here, the Director has simply offered a reading of a statute related to his own legal authority and discretion. In matters like this, agencies are not impartial, the Department has an interest in interpreting section 42-237a.g in a way that expands its powers. "A court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalization advanced' to 'defend past agency action against attack.'" *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019).

Since none of the rationales supporting deference are present this Court should not defer to the Department's new-found interpretation. Because the Department has promulgated, and the Legislature has approved, the CM Rules for the conjunctive administration of surface and ground water rights, the Department's interpretation eschewing those rules should be overturned.

D. Under the Unique Circumstances Related to Administration in Water District 37, the Director Abused his Discretion by Not Following the CM Rules.

Alternatively, if the Court does find that the Director has "discretion" to conjunctively administer water rights pursuant to section 42-237a.g, then, given the unique circumstances of this case, he abused that discretion by failing to use the CM Rules as guidance for this proceeding and by failing to determine an area of common ground water supply as the Court

instructed the Director to establish over 5 years ago. R. 2410-13; *see* Idaho Code § 67-5279(3)(e).

For years IDWR proceeded down the traditional path to implement conjunctive administration in Water District 37. *See Op. Br.* at 3-10. IDWR promulgated rules, the SRBA Court decreed the water rights, and IDWR incorporated ground water rights into Water District 37. At every junction the Department repeatedly represented that conjunctive administration in Basin 37 would be addressed through the CM Rules. The Director's abandonment of those promises without acknowledging them is arbitrary and capricious.

In addressing the Seniors' 2015 requests for administration this Court made clear that certain procedural protections were necessary to protect junior water users' due process rights.

> Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. **In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.**
>
> * * *
>
> Therefore, to process the Association's calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.
>
> * * *
>
> **Therefore, the Court finds that Rule 30 provides the procedures and processes necessary to safeguard juniors' due process rights.** It follows that when a call is made by a senior surface water user against junior water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.

R. 2411-2412 (emphasis added).

The Court found that the Director must determine an "area of common ground water supply" as a pre-condition to conjunctively administering water rights in Water District 37.

Despite this holding and final judgment entered over five (5) years ago, the Director has not determined an area of common ground water supply and did not do so during the 2021 proceeding. It was an abuse of discretion to refuse to implement the direction from this Court to determine an area of common ground water supply before administering ground water and then to pre-select portions of the Big Wood Ground Water Management Area for administration and leave out other portions before the hearing even began.

The Director further abused his discretion by advising the parties to this proceeding that the seniors would be required to establish injury, and equate injury to "material injury," and then abandon any pretense of requiring proof of material injury, asserting that the CM Rules do not apply. All of this agency flip-flopping is inconsistent with a reasoned agency decision-making process. Under the Administrative Procedure Act, "[w]hen an administrative agency sets policy, it must provide a reasoned explanation for its action." *Judulang v. Holder*, 132 S.Ct. 476, 479 (2011). "When an agency changes its policy, it must at least display awareness that it is changing position' and 'show that there are good reasons for the new policy. The requirement of a reasoned explanation "is not a high bar, but it is an unwavering one." *Ass'n of Irritated Residents v. U.S. Env't Prot. Agency*, 10 F.4th 937, 945 (9th Cir. 2021) (internal citations omitted).

IDWR offers no rational or reasoned explanation for its switch in policy. Under the unique circumstances of conjunctive administration in Water District 37, and based upon express representations to the water users, at a minimum the Director abused his discretion by turning to an unprecedented water right administration protocol.

II. The Department's CM Rules Applied to the Seniors' "Requests" for Water Right Administration.

A. The Seniors' "Requests" Triggered the CM Rules Procedures.

"In 1994, the Department adopted rules concerning conjunctive management of ground water and surface water **for the entire state**." *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 795-96, 252 P.3d 71, 76-77 (2011)(emphasis added). IDWR asks the Court to free it from the CM Rules by claiming: 1) nothing in section 42-237a.g requires the filing of a delivery call; and 2) "no delivery call was actually filed here." *IDWR Br.* at 28. The Seniors do not make this argument but instead contend that the "statements made during both the advisory meetings and depositions were made by lay people who do not have the full understanding of the complex water laws, statutes and verbiage." *Seniors Br.* at 10.

IDWR's first argument lacks any merit. Section 42-237a.g contains no reference to a procedure to respond to a request for administration because that procedure was explicitly set out in section 42-237b. Idaho Code § 42-237b (administrative determination of adverse claims); *see also*, *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969) (local ground water board convened to address adverse claims by senior surface water right holders and ground water users). Section 42-237b was in effect at the time the Director initiated this administrative hearing and remained in effect throughout the proceeding, but the Director ignored those procedures as well. It was repealed by the Legislature during the 2021 session on IDWR's, and its Director's representations that section 42-237b was "obsolete" and no longer needed because conjunctive administration was covered by the CM Rules.[11]

[11] Nonetheless, the local ground water board process was in place during this proceeding. Section VI *infra*; *see also SVC Response* at 18-21.

The second argument that "no delivery call" was made here is without merit based upon the language in the CM Rules and the undisputed facts. IDWR first claims that the "senior's complaints over the years were not specific to a water user, rather they were specific to a use." *IDWR Br.* at 30. That is simply not true. The Seniors' 2015 delivery call letters, while deficient in other ways, stated: "The past and present failure of the Idaho Department of Water Resources to administer the subject surface and hydrologically connected ground water rights under the prior appropriation doctrine has resulted in material injury to the Petitioners." The individual Petitioners (water users) and their water rights were all named in the petition. R. 2403-19. In addition, the Department attempted to pre-determine potential injury to specific water rights on its own accord both in 2015; *see* R. 5956 (IDWR map of water right PODs in "Water Delivery Call"), and in 2021, *see* R. 2362-2402.

More significantly, the CM Rules define a "delivery call" as a "request from the holder of a water right for administration of water rights under the prior appropriation doctrine." CM Rule 10.04 (emphasis added). Webster's defines a "request" as: "1: the act or an instance of asking for something; 2: something asked for; 3: the condition or fact of being requested . . ." Webster's 9th New Collegiate Dictionary (1987). There is no question that the Seniors made repeated "requests" for conjunctive administration. The Director was aware of these "requests" dating back to at least 2015. The Seniors admit they made "requests" for administration in the context of this case, but argue they didn't understand what they were doing. *Seniors Br.* at 10.

The requests for priority administration fall into three categories: (1) formal petitions in 2015 and 2017 by these same Seniors; (2) demands for priority administration leading up to and including the 2020-2021 Advisory Committee meetings and related discussions; and, (3) demands for priority administration in depositions and during the administrative hearing subject

to this appeal. These "requests" for administration all triggered application of the CM Rules, but the Director chose to respond to the Seniors' demands by ignoring the rules and curtailing using section 42-237a.g instead.

Given the history of repeated demands for conjunctive administration in Water District 37, there is no credible argument that no "request for administration" had been made. *See IDWR Br.* at 28. IDWR asserts that no delivery call was "filed." *Id.* Whether something is filed properly determines whether the proceeding should proceed, as this Court and Director have both previously concluded. R. 2403; 5976-79. Whether a paper is filed or not does not mean there is no "delivery call" or "request" triggering the rules' application. CM Rule 10.04.

The Director's response focuses on what was said at the hearing, but he fails to even address the fact that repeated demands for delivery of water in priority in Basin 37 were made long before the Director instituted this administrative proceeding. The Director claims that the unmistakable requests for priority administration during the proceeding, *Op. Br*. at 40, were merely statements offered as proof of injury, *IDWR Br.* at 30; *Seniors Br.* at 10. The Director ought to know the difference between injury and a request for priority administration. Material injury is a hindrance to the exercise of a water right. CM Rule 10.14. A request for priority administration constitutes a delivery call. CM Rule 10.04. The statements by the Seniors were all unambiguous requests for priority administration.

There is no dispute that petitions for a delivery call were filed in 2015 and again in 2017. *See* R. 5972-84 (IDWR presentation to Advisory Committee on "Delivery Calls."). There is no dispute that demands for administration and even "curtailment in priority" were made throughout the advisory committee meetings. *See Op. Br.* at 39; R. 6273, 6279, 6413, 6418. Prior to the kick off of the Advisory Committee process, the surface water users submitted what they called a

Proposed Agreement (October 20, 2020).[12] *See* https://idwr.idaho.gov/water-rights/groundwater-management-areas/big-wood-ground-advisory-committee/.[13] The Seniors made repeated references to "time priority basis management." They also demanded "conjunctive management." The Seniors stated: "We are of the opinion that management of the system on a 'time priority basis' should be the core focus of the ground water management plan." *Id.* The Director's response ignores these written demands for priority administration.

It is astonishing the lengths to which the Department and the Director have gone to avoid the conjunctive management rules. If the conjunctive management rules are so abhorrent, burdensome, or difficult to follow, the rules should be changed, not ignored. After all, the Department drafted the rules.

The Director attempts to justify the proceeding by asserting that some of the water users did not ask for priority administration. *IDWR Br.* at 28, 30; R. 1913. Even if one party didn't demand administration, that does not matter because there is no doubt that demands for priority administration were made. The bigger problem is that this claim is not true. The Seniors plainly testified that they wanted priority administration.[14]

Ultimately, the Department asserts that the Director has an "independent, generalized, authority to administer Idaho water in priority." *IDWR Br.* at 29. Whatever his general authority, it doesn't change the fact that requests for priority administration were made by the Seniors in this case. While the Director does have a duty to administer, he must still "follow the

[12] These were signed by Carl Pendleton for Big Wood Canal Company and John Arkoosh, a Little Wood surface water user on behalf of his Association.

[13] The Director took judicial notice of the proceedings of Advisory Committee proceedings. This Proposed Agreement apparently was not placed in the administrative record but it is publicly available on the IDWR Advisory Committee page and is therefore subject to judicial notice by this Court. The Districts request that the Court take judicial notice of this public document. Idaho Rule of Evidence 201.

[14] *See* Tr. 445:19-22; 455:12-13; 499:6-10; 612:78-11; 744:2-5.

law." *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). In this proceeding he has not done so.

B. The Basin 33 Water Users Case involves a GWMA Designation, not Conjunctive Administration.

IDWR and the Seniors rely upon the decision in *Basin 33 Water Users v. Surface Water Coalition*, (Case No. CV01-20-8069, Ada County Dist. Ct, 4th Jud. Dist., Nov. 6, 2020) ("*Basin 33*"), for the position that the CM Rules do not apply to this case. *IDWR Br.* at 27-28; *Seniors Br.* at 11-13, 15. But, in doing so, they skip past the fact that the Basin 33 case had to do with the powers of the Director to designate a ground water management area under Idaho Code section 42-233b, and did not involve conjunctive water right administration.

The facts underlying *Basin 33* are strikingly different. Previously there was no GWMA for the ESPA despite historic declines in aquifer storage volume and spring discharges. Here, by contrast, ground water levels in the Wood River Valley Basin aquifer have remained stable for the past 30 years. R. 2231-2309. IDWR concluded that "since the formation of the GWMA in 1991 the water-table appears to be either reasonably stable or recovering at a rate of about 0.18 ft/yr." R. 2246.

Procedurally, the petitioners in *Basin 33* challenged the Director's GWMA designation order for: 1) failing to follow the CM Rules; 2) not conducting rulemaking; 3) not holding a contested case hearing before issuing the order; and, 4) not designating the GWMA because ground water districts had previously been formed. *See Basin 33* at 2-3. The Court reviewed section 42-233b, and found this statute authorizes designation of a groundwater management area when the conditions suggest that there may not be "sufficient ground water to provide a reasonably safe supply for irrigation or other uses." *Id.* at 5. This Court also concluded that rulemaking and a contested case proceeding were not required to designate a GWMA. *Id.* at 6.

The Court reached this conclusion based on the express language of section 42-233b and section 42-237e, neither of which are at issue here. *Id.* at 7.

The Court also observed that "the Petitioners argued the CM Rules limit and supersede the Director's authority under the Ground Water Act in this case." *Id.* at 8 (emphasis added). The Court then concluded that the CM Rules only concern designation of GWMAs in "an area of the State where water rights have not been adjudicated." *Id.* at 9-10. Designating a GWMA is an option under the CM rules for an area without an organized water district. In contrast, the Big Wood GWMA was designated in 1991, and the water rights have since been adjudicated and incorporated into Water District 37. R. 2420.

This case does not concern the Director's designation of a GWMA. This appeal concerns conjunctive administration of ground and surface water rights within a water district. Designation of a GWMA is only implicated by a single statute in title 42, i.e., section 42-233b. However, ground water right administration is covered by multiple statutes, all of which must be construed together in harmony. *See* Idaho Code §§ 42-237a.g, 237b, 602, 603, 607. This is not a case where a single statute, like section 42-233b, is dispositive of the issue before the Court.

Here the Director's conjunctive administration of water rights in Water District No. 37 is squarely covered by the water distribution statutes and CM Rules. The Director is charged to implement conjunctive administration in light of all applicable statutory and regulatory requirements, specifically Chapter 6. Idaho Code § 42-602. Unlike the petitioners in *Basin 33*, the Districts are not claiming that the CM Rules supersede the applicable statutes. Just the opposite, the CM Rules implement the administration statutes and were promulgated for the express purpose of processing requests for water right administration. *See AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 ("The Rules do give the Director the tools by which to determine 'how

the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]'"). Indeed, the Director specifically represented to the Legislature last spring that the "local ground water board" provisions were obsolete since conjunctive administration was to proceed under the CM Rules. *See* HB 43 Statement of Purpose. In stark contrast, the Director made no statement to the Legislature that formation of a GWMA was "obsolete" because of the CM Rules.

As such, the Basin 33 case is distinguishable and is not dispositive of the issues on appeal here. The Court should disregard the arguments made by IDWR and the Seniors accordingly.

III. The Director's Curtailment Order Violated Idaho Water Law.

It is important to recognize that the Director curtailed 23,000 acres of land when the model he relied upon showed that no more than three participating seniors would benefit from the curtailment. R. 2116, 2119; Tr. 787:12-25; 788:11-20; 1427:25; 1428-1430. The model also showed that two-thirds of the water from curtailment remains in the aquifer and would not arrive at the seniors' headgates for beneficial use during the 2021 irrigation season. R. 2116. He then compounded this egregious error by refusing to allow the juniors to mitigate for the shortage that would accrue to the senior users who would be shorted without curtailment. R. 1949.

IDWR contends that this sweeping curtailment was proper because the juniors had a "measurable effect" on senior surface water use and their pumping was "blatantly out of priority." *IDWR Br.* at 32. IDWR claims the Director had a responsibility to protect "senior surface water users' *in-season* use" and that curtailment is "paramount to his responsibility to administer Idaho's water resources in priority." *Id.* at 33 (emphasis in original). On appeal, for the first time ever, the Department advocates a "strict priority" only regime for conjunctive administration. IDWR ignores the Idaho Supreme Court's holdings regarding conjunctive

administration and Idaho's constitutional requirements to implement the prior appropriation doctrine. *See e.g. AFRD#2*, 143 Idaho at 876, 154 P.3d at 447 ("constitutional requirement that priority over water be extended only to those using the water").

Further, administration requires an understanding of the interconnectedness of the sources and how the flows in one source affect the other source. *Id*. 143 Idaho at 877, 154 P.3d at 448. Those factors were discarded in favor of the simple "blatantly out of priority" approach.

In *A&B Irr. Dist. v. Spackman*, the Court confirmed: "[t]he prior appropriation doctrine is comprised of two bedrock principles – that the first appropriator in time is first in right and that water must be placed to a beneficial use." 155 Idaho 640, 650, 315 P.3d 828, 838 (emphasis added). The prior appropriation doctrine has two components, priority and beneficial use. Beneficial use "acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law." *Id.* As noted by former Chief Justice Gerald F. Schroeder, "[a]pplication of water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management of the water right." *See Addendum B;* (IDWR at 27; quoted in fn. 25) (Appeal Docket Nos. 38912 *et al*.).

IDWR ignores the crucial second principle in its response brief. Instead, IDWR advocates in support of the Director's "priority only" administration theme. In the past, IDWR has repeatedly argued against priority-only conjunctive administration before the Idaho Supreme Court. *See Addendum B* (IDWR at 24, 27) ("Rote, priority administration to decreed diversion rates is not the law in Idaho . . . The Director's decision to employ a baseline that focuses on beneficial use, as opposed to blind priority administration, is reasonable and consistent with Idaho law. . . a finding of material injury requires more than shortfalls to the decree or licensed

quantity of the senior right") (emphasis added). The agency has taken the exact opposite approach in this case by relying solely upon "priority" to justify the Director's actions.[15]

Here, the Director did not analyze the Seniors' actual "beneficial use" with any specificity in this case. IDWR admits that the Director performed no detailed analysis of the Seniors' actual "reasonable in-season demand," "crop water need," or what their projected "demand shortfall" would be. The Director failed to recognize the undisputed fact that certain Seniors were irrigating acres and areas not within their decreed limits, or that they had available supplemental water supplies. *See Op. Br.* at 48-49. Instead, the Director made only vague and generalized statements regarding water use in 2021. *IDWR Br.* at 35. Evidence was provided that the Seniors had farming operations and were using water to grow crops. However, to determine "actual need" and potential "material injury," the concept of "beneficial use" required more. The Director has the tools and capability of performing such an analysis, as evidenced in other irrigation conjunctive administration cases, but he arbitrarily chose not to undertake that analysis here. R. 1900-07, 1949-50; *see generally A&B Irr. Dist.*, 155 Idaho 650, 315 P.3d 828; *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012).

Moreover, the Director wrongly decided that any Seniors with "exchange conditions" on their water rights might be injured as well, despite this supplemental water supply. The Director initially requested staff to identify only those water users "that do not have AFRD#2 storage." R. 2335. In his staff memo, Tim Luke stated that "IDWR assumes that the Exchange Condition rights are not injured from depletion of river flows causing by groundwater

[15] The Court should deny IDWR's "priority only" conjunctive administration argument pursuant to the doctrine of judicial estoppel. *See McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013). The doctrine precludes parties "from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Id.*, 154 Idaho at 894, 303 P.3d at 581. IDWR has repeatedly argued before district courts and the Idaho Supreme Court that conjunctive administration is not based upon "priority only." *See generally*, *Addendum B.*

pumping." R. 1340 (emphasis added). In his *Final Order*, the Director reversed course and observed "[n]ot all Exchange Condition water rights have a 'supplemental' supply of water . . ." R. 1891. Without identifying specific water rights of the Seniors or non-participating seniors, he concluded that "even Little Wood River water rights with the Exchange Condition can be injured by ground water pumping in the Bellevue Triangle. *Id.* (emphasis added). This conclusory and vague finding lacks specificity required for proper conjunctive administration. Like his failure to determine actual water need, the lack of evidence about which water rights the Director is speaking to regarding the exchange condition renders such a finding unlawful under the Idaho APA. *See* Idaho Code § 67-5279(3)(d) (not supported by substantial evidence in the record).

Consequently, IDWR cannot and does not dispute the facts in the record showing what water was actually needed by the three seniors that stood to be injured during the 2021 irrigation season. *See Op. Br.* at 72-74. This information was crucial for analyzing the seniors' actual beneficial use, yet the Director chose to disregard it. By disregarding critical facts and circumstances related to the Seniors' alleged "material injury," the Director's decision was arbitrary and capricious. *See* Idaho Code § 67-5279(3)(e); *Rouwenhorst v. Gem County*, 168 Idaho 657, 485 P.3d 153, 158 (2021) (agency "actions are considered arbitrary [or] capricious if made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principle"); *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007).

IV. The Director Received No Evidence Regarding Non-Participating Seniors' Beneficial Use and Wrongly Denied the Districts' Futile Call Defense.

IDWR does not dispute that the Director curtailed juniors in favor of "non-participating" seniors and denied the futile call defense as to anyone who did not participate. IDWR claims

that the Director made a finding of "adverse" effects to the non-participating seniors. *IDWR Br.* at 54. Of course, "affect" on prior water rights under section 42-237a.g requires a showing of "material injury." *Clear Springs*, 150 Idaho at 804, 252 P.3d at 85. No one contends there is any proof of any material injury or any actual injury to any non-participating senior. The Director curtailed in favor of non-participants despite having no evidence in the record that these non-participating seniors were putting their water to beneficial use during the 2021 irrigation season. Idaho law forbids an agency from making such decisions based upon the APA and constitutional due process. Idaho Code § 67-5279(3) (a), (d), and (e).

The Director has no supporting evidence in the record for this decision, therefore it must be set aside. *See Mills v. Holliday*, 94 Idaho 17, 19, 480 P.2d 611, 613 (1971) ("an agency order not supported by findings of fact where such findings are required will be set aside"); *Cooper v. Board of Prof'l Discipline of Idaho State Board of Medicine*, 134 Idaho 449, 456, 4 P.3d 561, 568 (2000) (setting aside agency decision not supported by substantial evidence in the record); *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 761, 302 P.3d 718, 729 (2013) ("for an agency to rely on facts withheld from the record is a denial of due process").

The scope of the case was limited to the 2021 irrigation season. R. 1, 608 ("The Director has repeatedly emphasized that this proceeding is meant to address the 2021 irrigation season…"). Accordingly, any water use outside of the 2021 irrigation season was excluded from the scope of the proceeding. The Director also set a deadline for any interested water user to file a notice of participation "by May 19, 2021." R. 1. The Director expressly "closed" the proceeding to additional parties on May 27, 2021. R. 607-08 ("no additional parties will be allowed in this proceeding").

The Director set the table. He identified the scope of the proceeding (2021 irrigation season) and the parties that could participate. R. 520-22. There was no inkling that the water rights or water use of "non-participants" were at issue. Not surprisingly, the Director received no evidence about any non-participating senior surface water use. Accordingly, the water rights of those participating seniors that could potentially use water resulting from curtailment between July 1st and the end of the irrigation season was limited.[16] The Watermaster testified that only water rights with priorities of September 9, 1883 and senior would receive water resulting from a July 1st curtailment. Tr. 787:12-25; 788:11-20.

Despite this evidence, the Director denied the Districts' futile call defense as to that list of senior water rights identified at footnote 10, R. 1612, because curtailment was predicted to "provide water in useable quantities for at least some of the senior surface water users" and "senior water right holders who appeared in this proceeding are not necessarily the only water users on Silver Creek and the Little Wood River who would benefit from curtailment," R. 1908-09. In other words, although the Director "closed the proceeding" on May 27th and received no evidence as to these un-named seniors' actual beneficial use in 2021, he used those same non-participants as a reason to curtail and deny the Districts' futile call defense.

IDWR justifies the Director's denial of the Petitioners' futile call defense on the basis of "the full spectrum of potentially affected senior water rights" held by seniors that did not participate in the contested case. *IDWR Br.* at 60. The Seniors joined in this argument by noting "there would be benefit to additional senior users not participating in the underlying hearing." *Seniors' Br.* at 30. Yet, the Seniors concede that it was "uncontested that water in a 'sufficient quantity' would not reach the senior water rights in this matter with priorities of April 1, 1884

[16] The Districts summarized this evidence and the scope of potential injury in their post-hearing memorandum. R. 1609-15.

and junior in order to apply it to beneficial use during the 2021 irrigation season." *Id.* at 29 (emphasis added). IDWR does not disagree, but asserts that the Director can revert to strict priority to protect all senior water rights, anywhere in the system. *IDWR Br*. at 59.

In determining whether or not the participating Seniors would be "materially injured," the Director was obligated to analyze the Districts' futile call defense as to each individual water right and actual beneficial use in 2021. Evidence was presented as to each participating Senior's water use in this case. R. 1609-15. Moreover, the Director received evidence of substantial stream losses in Silver Creek and the Little Wood River and the presence of multiple beaver dams at the time of hearing. R. 2119-21, 1576, 3145-48. The Director erroneously ignored all of this evidence in his wholesale denial of the futile call defense.

Futile call "embodies a policy against the waste of irrigation water." *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). If water in a stream will not reach a senior in a sufficient quantity to apply it to beneficial use, an upstream junior is allowed to divert. *Sylte v. IDWR*, 165 Idaho 238, 245, 443 P.3d 552, 559 (2019). For example, IDWR allowed junior users on a creek in neighboring Basin 34 to continue to divert 12 cfs this irrigation season when their curtailment would deliver less than 0.35 cfs to a downstream senior (a ratio of 2%) (0.35 / 12). *See Addendum C*. The Department characterized such curtailment as "both futile and wasteful." *Id.*; *see also* CM Rule 10.08 ("A delivery call . . . that would result in waste of the water resource").

Here, IDWR's model showed that water rights held by many of the participating Seniors would not receive <u>any water</u> from curtailment. *See* R. 1609-15; R. 1910. At a minimum, futile call applied to these water rights. Moreover, as to the three 1883 water rights that did stand to benefit, the Director did not analyze whether it was wasteful to curtail 23,000 acres to supply

water to 650 acres (a ratio of 2%) (650 / 23,000). *Op. Br.* at 72-74. Although the Director could have found that futile call applied, he also could have authorized mitigation for those three affected water rights. By failing to perform such an individual analysis, the Director wrongly denied the Districts' mitigation plan outright and ordered unlawful curtailment. Furthermore, where 67% of the curtailed water was predicted to remain in the aquifer, the balance of the irrigation season, the Director determined it was not "futile" to supply limited water to three senior water rights and forego watering 23,000 acres. The Director's decision did not comply with the law. Moreover, IDWR's decision is not in line with other decisions on the futile call defense that it made this year. *See Addendum C.*

V. The Director Violated the Districts' Due Process Rights.

At a minimum, the Director violated the Districts' right to due process in three basic ways. First, the Director initiated and concluded a complex conjunctive administration case within a matter of weeks. The Districts did not have a meaningful opportunity to present defenses, prepare their own technical analysis, or contest technical work that IDWR had been preparing for months. Second, the Director provided defective notice in not advising the Districts that they could be curtailed in favor of non-participating seniors. The Director closed the proceeding to additional parties on May 27th, received no evidence regarding the non-seniors' beneficial use, yet proceeded to curtail the Districts' members by priority to satisfy these non-participants' water rights. Finally, the Director provided no procedure to allow the Districts to mitigate, and instead denied their mitigation plan outright without a hearing. The denial of due process had serious consequences as it resulted in the curtailment of 23,000 acres during the heat of the summer, a time when water was needed the most.

A. The Director's Notice and Hearing Process was Unreasonable and Unforeseeable, and was a Violation of the Districts' Due Process Rights.

At its core, due process required IDWR to provide the Districts "with an opportunity to be heard in a meaningful time and in a meaningful manner." *Ayala v. Robert J. Meyers Farms, Inc.*, 164 Idaho 355, 362, 445 P.3d 163, 171 (2019). The Idaho Supreme Court has found that a "hearing is not a mere formality—it is an integral component of due process." *Id*. Of course, the type of process due in a water right administration matter is not "one-size fits all." The Supreme Court has recognized that "due process" is flexible depending upon the particular situation. *City of Boise v. Industrial Com'n*, 129 Idaho 905, 910, 935 P.2d 169, 173 (1997). However, in the case of a complex conjunctive administration matter, what is "meaningful" or "fair" has to be evaluated in proper context. This case concerned an aquifer with multiple layers, hundreds of water rights, multiple surface water sources, and a model with over 59,000 individual cells. The analysis and technical review required for such an undertaking is not something that happens in mere days. Tr. 1287-88 (Erick Powell testifying that he "absolutely" did not have time to perform his own model runs and test various simulations). In fact, IDWR's modeler was given two months to conduct her analysis.

The Director's misinterpretation of applicable statutes and rules arbitrarily deprived the Districts of its property interest by commencing and implementing a hearing process which had a high risk of erroneous deprivation and which also led to the deprivation of the Districts' members' property interests, i.e., use of their vested groundwater rights.[17]

While curtailment is one result of water right administration, the unprecedented hearing process employed by the Director to justify curtailment in Water District 37 in 2021 was neither

[17] IDWR admits the Districts' members have ground water rights, which are protectable property right interests. *See IDWR Br.* at 44.

reasonable nor foreseeable. First, the Director has never before unilaterally acted under the guise of section 43-237a.g to curtail ground water rights within an organized water district in the middle of an irrigation season. IDWR's Tim Luke admitted the Department hadn't even thought of the notion as late as the fall of 2020. Tr. 343:16-345:16. Whereas the Department had repeatedly represented that conjunctive administration would follow the CM Rules, employing a wholly new process without guidance or a defined process was patently unforeseeable, particularly when 23,000 acres had already been planted and the irrigation season commenced.

Compressing a conjunctive administration case into a few weeks was not foreseeable, let alone fair. Although IDWR staff had begun analysis in late March, the Director did not authorize discovery in the case until May 22, 2021 (a Saturday), barely two weeks before the hearing was set to begin. No other conjunctive administration case has ever been placed on such a fast track, or rush to judgment. "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959), *quoted with approval in Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (emphasis added).

Second, the Director completely ignored other relevant and applicable statutes and rules when implementing this new proceeding. *See* Part I, *infra*. Whereas the agency had promulgated rules with detailed procedures for conjunctive administration, the wholesale discarding of such rules was not fair, and left the parties guessing as to what would be addressed. Moreover, this Court has previously found that the CM Rules procedure provides juniors with due process, as they preclude the Director from pre-judging the outcome. R. 2412. After all, the right to due

process "is the right to be free from arbitrary actions of government officials." *Browning v. Vernon*, 874 F.Supp. 1112, 1121 (D. Idaho 1994).

In this case, the agency's staff began gathering information and conducting analyses months before the hearing. R. 2335. The Department did not disclose this information to anyone. IDWR staff did not produce the results of this work until May 18, 2021, just weeks before the hearing. Further, the Director waited until Saturday May 22, 2021 to authorize the Districts to engage in discovery, about two weeks before the hearing. R. 419-26.

Conjunctive administration is not a garden variety water law case. As noted by leading authority professor Doug Grant, "the management of hydrologically connected surface water and groundwater under the appropriation doctrine is widely acknowledged to be complicated."[18] With respect to the conjunctive administration on the Eastern Snake Plain Aquifer (ESPA), the agency conducted various contested cases that lasted several months, even over a year.

By contrast here, the Department relied upon a non-linear model far more complex than ESPAM, as acknowledged by the agency's modeler and the Districts' expert. R. 2334; *see also*, Tr. 1244:2 ("It is a very complex system"). The Wood River Model has over 59,000 individual cells compared to about 11,000 cells for ESPAM. R. 2334. There are multiple aquifer layers and numerous surface water sources to evaluate. IDWR's modeler that authored its report acknowledged that "several significant gaps in data or in the understanding of the underlying hydrologic system have become apparent during this project." R. 2216. Despite over six years of additional data (2014-2020), the model had yet to be updated to include such changes. Further, the model's calculated uncertainty of at least 22% was over double the estimated uncertainty of prior versions of ESPAM. The minimum uncertainty of 22% was greater since the

[18] *See The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 Land and Water L. Rev. 1 (1987).

agency used a three-month stress period, well short of the ten-month stress period that was used for its calibration. Tr. 1267-68. Given the extreme values of certain response functions, the Districts' consultant had serious questions about the model's reliability. Tr. 1286-87.

However, in order to properly evaluate response functions of pumping in these individual cells, and perform his own model runs and calibrations, the Districts' consultants explained that it would take at least several months. R. 113 ("three weeks is inadequate time for the parties to properly analyze and/or prepare rebuttal testimony"); *see also*, Tr. 1288:3-24. Despite the complexity, the Director brushed aside the Districts' concerns for adequate time to prepare and evaluate the technical information that was produced. R. 104-07, 111-15.

Clearly, based upon the unique facts of this situation, the Director failed to provide the Districts with a "fair" procedure. *See State v. Roth*, 166 Idaho 281, 285, 458 P.3d 150, 154 (2020). Instead, the Director rushed the case under the guise of drought conditions, which he knew had been developing for several months prior. *See Addendum A*.

In sum, while the Director provided an opportunity to be heard, the meaningfulness of that opportunity was neutered by: 1) the novelty of the process (it followed neither the ground water rules nor the CM Rules); 2) the lack of procedural safeguards endemic of an *ad hoc* hearing; and, 3) the relatively short period of time to prepare for the hearing given the complexity of issues and the amount of time generally afforded conjunctive administration cases. Without a meaningful opportunity to be heard, the Director violated the Districts' constitutional right to due process. The final order should be set aside accordingly.

B. No Notice of Administration for Non-Participating Seniors' Water Rights.

In addition to an unfair hearing process the Director also failed to give proper "notice" that non-participating seniors' water rights would be at issue and subject to the contested case

and conjunctive administration. Notice, including the right to be "fairly notified of the issues to be considered, is a critical aspect of due process in any administrative process." *Rincover v. State, Dept. of Finance, Securities Bureau*, 124 Idaho 920, 921, 866 P.2d 177, 178 (1993). With respect to notice the Idaho Supreme Court has affirmed the federal standard:

> The United States Supreme Court has indicated that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950). . . .
>
> In *Mullane*, the court further held that "notice must be of such nature as reasonably to convey the required information . . ., and it must afford a reasonable time for those interested to make their appearance." *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873. In other words, meaningful notice consists of both substantive and temporal components. That is, the content of the notice must be such as to fairly advise the person of its subject matter and the issues to be addressed. Notice must be clear, definite, explicit and unambiguous. A notice is not clear unless its meaning can be apprehended without explanation or argument.

State v. Doe, 147 Idaho 542, 545-46, 211 P.3d 787, 790-91 (2009).

In other words, the Director was required to put the Districts on notice that "non-participating" seniors' water rights would be at issue in the case. No such notice was provided. Further, the Districts believe the case concerned "material injury" to the Seniors' water rights, instead the Director curtailed according to non-participating seniors' water rights and depletions to the stream. R. 1949. Although the Director identified a deadline for affected water users to participate and then closed the case on May 27th, not once did he indicate that water rights of non-participants would be at issue. It was only weeks after the hearing, when he issued the *Final Order* and *Final Order Denying Mitigation Plan*, that he apprised the parties he was curtailing groundwater rights for the benefit of these non-participating seniors.

IDWR has no valid justification for this action in its response. Instead, the Department claims that priority alone required such administration. *IDWR Br.* at 54-55 ("Petitioners' desired

outcome would be antithetical to the prior appropriation doctrine"). Yet, the Director had no evidence as to whether these non-participating seniors were putting their water to beneficial use. No one knows if those seniors had fallowed lands, were participating in a crop set aside program, had rented water to someone else, or were wasting water. The Districts had no opportunity to discover these facts and put on a defense. As such, they were wrongly curtailed without due process as to these unknown, non-participating seniors and their alleged beneficial use in 2021. The Director's failure to provide proper notice as to this issue is fatal, and should be reversed and set aside accordingly.

C. The Director's Failure to Address the Districts' Mitigation Plan Prior to Curtailment Violated Due Process.

The Director also wrongly denied the Districts' mitigation plan without a hearing prior to curtailment. The Director justified this unlawful action asserting that the Districts did not offer to mitigate non-participating seniors' water rights. R. 1949 ("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 . . ."). As explained above, this issue was not properly noticed and cannot serve as a lawful basis to deny the Districts' mitigation plan. The Director's failure to provide a hearing on the Districts' mitigation plan is fatal as well.

IDWR admits that section 42-237a.g does not contain any procedures regarding a mitigation plan. *IDWR Br.* at 58. Therefore, the Districts turned to the only guidance on the issue, the CM Rules. On June 24, 2021, the Districts submitted a proposed mitigation plan pursuant to CM Rule 43. *See* R. 1649-1799. Under CM Rule 43, IDWR is required to publish notice and hold a hearing on any proposed mitigation plan. The rule includes a number of factors that the Director may consider in evaluating the efficacy of the plan. *See* CM Rule 43.03.a-o. The CM Rules' mitigation procedures provide the juniors' due process.

The Director did not publish notice of the Districts' proposed mitigation plan, did not perform analysis under the Rule 43 criteria, and did not hold a hearing on the proposed mitigation plan. The Director instead denied the plan outright based on assumptions and a list of questions he had about the plan. R. 1949-50.

IDWR's only justification for the Director's action is that CM Rule 43 is "inapplicable." *IDWR Br.* at 58. Directly contrary to its own rules, IDWR argues that "mitigation is not a right that a junior ground water user can be deprived of by the Director." *Id.* at 59. Under the CM Rules, a mitigation plan is meant to identify "actions and measures to prevent, or compensate holders of senior-priority water rights for material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply." CM Rule 10.15. The mitigation plan represents an important safeguard mechanism for junior ground water rights in the conjunctive administration of water that allows them to use their property rights and still provide water to seniors who have suffered material injury. The Director's denial of the Districts' plan without any review or hearing violates both the CM Rules and the due process safeguard mitigation is meant to provide to the deprivation of junior ground water rights.

Notably, the district court in the Surface Water Coalition litigation previously held that a pre-curtailment hearing on the mitigation plan is necessary since, "[c]urtailing junior water users pending the outcome of such a hearing circumvents the purpose of issuing mitigation plans in the first place." *Id.* at 11. "*Once a mitigation plan has been proposed*, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in Idaho Code § 42-222." *See Order on Petition for Judicial Review* at 29 (*A&B Irr. Dist. v. IDWR*, Fifth Jud. Dist., Gooding County Dist. Ct., Case No. CV-2008-551, July 24, 2009) (emphasis in

original). Therefore, the Director wrongly denied the Districts' right to a mitigation plan hearing before implementing curtailment in this matter.

The proper mechanism for conjunctive administration of surface and ground water is the CM Rules. The Director's failure to provide notice, hearing, or analysis to the Districts' Mitigation Plan is a clear violation of the Districts' due process rights under the CM Rules. A mitigation plan hearing should occur within a reasonable time after submission of the plan to IDWR.[19] *See Order on Petitions for Rehearing* at 11 (*A&B Irr. Dist. v. IDWR*, Fifth Jud. Dist., Gooding County Dist. Ct., Case No. CV-2008-551, August 23, 2010).

The Director's failure to follow the hearing and procedure requirements once a mitigation plan had been proposed violates the Districts' due process rights. Even if the CM Rules are not applicable, CM Rule 43 articulates a vital due process safeguard outlining an important opportunity for junior water users to mitigate possible deprivations of their property rights. CM Rule 43's notice, hearing, and promptness requirements are a significant framework of due process protections which should have been followed by the Director. *See Wood v. City of Lewiston*, 138 Idaho 218, 222, 61 P. 3d 575, 599 (2002) (government action to assess is in deprivation of private property rights, therefore courts require "strict compliance" with mandatory statutory procedures).

VI. IDWR Waived Petitioners' Argument that the Local Ground Water Board Statutes were Effective at the Time of the Director's Administrative Proceeding.

There is no doubt that the "local ground water board" statutes (section 42-237b *et seq*.) were in effect when the Director noticed up and held the hearing under the auspices of section

[19] The Director granted the Districts' request for a hearing after curtailment, asserting that such a hearing was not required pursuant to the CM Rules and citing the only basis for the hearing as Idaho Code § 42-1701A(3). Although the Director approved a stipulated Mitigation Plan on July 8, 2021, the damage had been done as 23,000 acres had been curtailed for a week during the first week of July, a time of extreme heat and no precipitation.

42-237a.g. On appeal, IDWR has waived any argument as to whether the applicable statutes were effective when these proceedings commenced, because IDWR failed to present either argument or authority on the issue in its response brief. "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Safaris Unlimited, LLC v. Von Jones*, 163 Idaho 874, 881, 421 P.3d 205, 212 (2018) (*quoting State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)).

In its opening brief, Petitioners demonstrated that the local ground water board statutes were effective during the filing of the Director's Notice and the administrative hearing in this case. *See Op. Br.* at 34, fn. 21. Since the Seniors were claiming an "adverse effect" on their water rights, the Director was required to review whether that claim complied with the statute and set the matter for hearing before a local ground water board. *See* Idaho Code § 42-237b. The Director's *Notice* and *Final Order* included no discussion of this provision of the Ground Water Act, nor whether he was required to follow its provisions. When it was brought to his attention during the proceeding, the Director summarily dismissed the argument. R. 439. As such, the entire process violated section 42-237b.

The Department does not respond to this argument except to state that the local ground water board statutes had been repealed in the 2021 legislative session. *See IDWR. Br.* at 23. But IDWR does not state that the repeal was effective either at the time of the administrative hearing or when the Director issued his *Final Order*. The Department therefore, does not present any argument, nor any authority, to refute the Districts' position that the local ground water board requirements were in effect when this case was pending before the agency.

The 2021 repeal of Idaho Code §§ 42-237b, 42-237c, and 42-237d is not effective until January 16, 2022, as the House of Representatives did not adjourn the 2021 session until

November 17, 2021. *See* Idaho Code § 67-510. Because the local ground water board requirements were in effect during the pendency of this matter, because the Department has waived any arguments to the contrary, and because the Department failed to follow the provisions of the local ground water board statutes, the Notice and administrative hearing in this case violate section 42-237b, and should be set aside for that reason as well.

VII. The Court Should Deny the Seniors' Request for Attorneys' Fees.

The Seniors request attorneys' fees under Idaho Code §§ 12-117 and 12-121. *Seniors' Br.* at 31-34. Since the Seniors have no grounds for their request against the Districts the Court should deny the request.

First, Idaho Code section 12-121 does not apply, as the Districts have a reasonable foundation to pursue this appeal. *See* Idaho Code § 12-121. The Court recognized in the *Second Order*, this case is a matter of first impression with "complex issues of law and fact." The Director pursued conjunctive administration based upon an unprecedented interpretation of Idaho law resulting in the curtailment of 23,000 acres in July. The Districts have a right to judicial review of that final agency action. *See* Idaho Code § 67-5279(3). Pursuing an appeal regarding an interpretation of the law, including important constitutional issues, is not unreasonable or without foundation.

Next, the Seniors claim fees should be awarded based upon Idaho Code section 12-117 and the assertion that the Districts are asserting "the same arguments." Again, the Districts have a reasonable basis in fact and law to advance this petition for judicial review. The Director's interpretation of the various statutes and rules is subject to judicial review by law. The Court, not the agency, is the final arbiter of what the law means. If a party cannot advance arguments to a court that it made to the agency that would undercut the very purpose of judicial review in

Idaho's APA. As such the Seniors claim for fees under Idaho Code section 12-117 should be denied as well.

CONCLUSION

Everyone agrees that this case involved conjunctive administration, "like *Clear Springs*," in Water District 37 in 2021. Everyone agrees that the Director did not use IDWR's CM Rules. Everyone agrees that no Director has ever used or interpreted Idaho Code 42-237a.g in the manner this Director did for the first time in 2021. Ignoring chapter 6, title 42, and the CM Rules entirely, the Director conjunctively administered based solely upon "priority" and depletions to the source, without regard to "material injury" or the Seniors' actual beneficial use. This unprecedented move was contrary to every representation IDWR has previously made to the water users, the Court, and the Legislature.

The Director further rushed to judgment in violation of the Districts' due process rights. The Director ordered internal technical research in March, shielded this information from public view until late May, and then forced the Districts to try to discover and defend against the Director's selected analysis within a few weeks. The Director compounded this error by curtailing in favor of non-participating seniors without receiving any evidence as to their beneficial use. Critically, the Director wrongly denied the Districts' mitigation plan without a hearing. Such actions plainly violate the Idaho Constitution and APA.

The Districts respectfully request the Court set aside the Final Order and Final Order Denying Mitigation Plan.

//Signature page to follow//

DATED this 17th day of December, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December 2021, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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ADDENDUM
A

STATEMENT OF PURPOSE 1994

RS04039C3

In 1992, the Idaho Legislature enacted changes to Idaho Code § 42-602. Those changes have been interpreted by the Idaho Supreme Court as imposing a duty upon the Director to supervise and control the distribution of water outside the boundaries of an organized water district even though the rights to that water have not been adjudicated and there are unresolved legal questions regarding the relationship of the water rights sought to be distributed. This was not the intent of the 1992 Amendments.

Prior to the Court's decision, the burden was on the water user making a call for distribution outside a water district to identify the person causing the injury and to make a prima facie showing of injury. The effect of the Court's decision is to shift a private water user's legal burden and expenses to the state. Unlike the distribution of water within a water district, there is no mechanism for the state to fully recover its costs for distributing water outside a water district.

The purpose of this Act is to restore the law relative to distribution of water back to what it was prior to the 1992 amendments to Idaho Code § 42-602 and to make clear that the Director shall not be subject to a writ of mandate when called upon to distribute water. Specifically, the Act clarifies that Chapter 6 of Title 42, Idaho Code is only applicable to distribution of water within a duly formed water district. Water users seeking to make a call for distribution outside a water district may elect to proceed directly against the owner of the water right claimed to be causing injury or may request the director to exercise authority under other chapters of title 42, Idaho Code. This Act, however, makes clear that the Director's authority to distribute water outside a water district is a discretionary function. The director shall have discretion to not shut or fastened any headgate or other facility for the diversion of water pursuant to a water right outside a water district if the director determines that the legal status of the water right or the legal or hydrologic relationship of the water right to one or more other water rights must first be adjudicated by a court.

This Act is also intended to nullify the effect of the recent Supreme Court decision, which held that review of a Director's decision under Idaho Code § 42-237a is not subject to appeal under the Administrative Procedures Act. The Act clarifies that such orders or decisions are subject to review under the APA.

FISCAL NOTE

This bill will result in a significant savings to the State of Idaho by not allowing private parties seeking distribution of water outside a water district to shift their legal burdens and costs to the Department of Water Resources.

ADDENDUM
B

Supreme Court Docket No. 38191-2010
(consolidated with nos. 38192-2010 & 38193-2010)

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY,

Petitioners-Appellants,
and

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,
Petitioners-Respondents on Appeal,
and

IDAHO DAIRYMEN'S ASSOCIATION, INC.,
District Court Cross-Petitioner,
v.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents-Respondents on Appeal,
and

IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Respondent-Cross Appellant,
and

THE CITY OF POCATELLO,
Intervenor-Respondent-Cross Appellant.

IDWR RESPONDENTS-RESPONDENTS' ON APPEAL BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Gooding, Case No. 2008-551,
Honorable John M. Melanson, District Judge, Presiding

trimline. *Id.* at 536. *See Clear Springs* at ___, 252 P.3d at 93-95, 97-98. Lastly, the district court affirmed the Director's ability to quantify material injury based on a projected volume of water that could be less than the SWC's total water rights: "[T]he total combined decreed quantity of the natural flow and storage water rights can exceed the amount of water necessary to satisfy in-season demands plus reasonable carry-over. Simply put . . . a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right." Clerk's R. Vol. 3 at 536 (emphasis added). Even though the CM Rules "do not expressly provide for the use of a 'baseline' or other methodology . . . the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable . . . . This Court affirms the reasoning of the Hearing Officer on this issue." *Id.*

However, because of the Director's improper decision to issue a separate, final order detailing his approach for quantifying material injury, the district court remanded the proceedings to the Director for inclusion of his methodology. *Id.* at 543.[12]

7. The District Court's Orders on Rehearing

Petitions for rehearing were filed by IGWA and Pocatello. Two issues upon which rehearing was sought was the district court's decision that full headgate delivery for TFCC was 3/4 of a miner's inch and the district court's instruction that the Director "issue [his] final order with regard to the methodology adjustments based exclusively upon the evidence and facts contained in the record and without requiring any further hearings on the matter." Clerk's R. Vol. 4 at 574. In response, the SWC "agree[d] that the Director is required to issue a new order

[12] In footnote 8 to the Order on Judicial Review, the district court references a June 30, 2009 "*Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover.* The *Order* is not part of the record in this matter." Clerk's R. Vol. 3 at 542, fn. 8. The June 30 interlocutory order issued by Director Tuthill was subsequently rescinded by Director Spackman. Clerk's R. Vol. 4 at 588.

The substantial evidence in the record plainly shows the effect of treating the SWC's water rights as quantity entitlements without regard for beneficial use: Canal capacity, irrigated area, the SWC's maximum recorded diversion, and the reasonable use of the State's water resources would have to be ignored. Rote, priority administration to decreed diversion rates is not the law in Idaho: "Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use." *American Falls* at 880, 154 P.3d at 451. The use of a baseline for purposes of determining material injury to an amount of water that is actually needed for beneficial use is supported by law, substantial evidence in the record, and should be affirmed on appeal.

3. The Director's Decision To Employ A Baseline Is Entitled To Deference

In recommending the use of a baseline, the hearing officer stated as follows: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to the need, the end result should be the same." R. Vol. 37 at 7091. According to the district court, even though the CM Rules "do not expressly provide for the use of a 'baseline' or other methodology . . . the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable . . . . This Court affirms the reasoning of the Hearing Officer on this issue." Clerk's R. Vol. 3 at 536. On appeal, the SWC simply reargues this point. The hearing officer's recommendation, the Director's acceptance of that recommendation, and the district court's affirmation of the use of a baseline are entitled to deference and should be affirmed.

"[T]he courts are not alone in their responsibility to interpret and apply the law. As the need for responsive government has increased, numerous executive agencies have been created to help administer the law. To carry out their responsibility, administrative agencies are

(emphasis added). The district court's decision is in accord with *American Falls* and should be affirmed.

In *American Falls*, blind, priority administration of senior natural flow and storage water rights in conjunctive administration was struck down. There, the Court first disposed of the surface water users'[26] argument that priority alone governs in conjunctive administration: "The district court rejected American Falls' position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis." *American Falls* at 870, 154 P.3d at 441 (emphasis added). "[N]o appeal was taken" from this issue. *Id.*

Next, the Court turned to the surface water users' argument that "the Director is required to deliver the full quantity of decreed senior water rights according to their priority . . . ." *Id.* at 876, 154 P.3d at 447 (emphasis in original) (internal quotation removed). That argument, too, was rejected: "If this Court were to rule that the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id.* at 877, 154 P.3d at 448 (emphasis added).

Finally, the Court reviewed the surface water users' argument that they were entitled to full reservoirs: "At oral argument, one of the irrigation attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights." *Id.* at 880, 154 P.3d at 451 (emphasis added). According to the Court, "This is simply not the law of Idaho." *Id.* "Neither the Idaho Constitution, nor statutes, permit irrigation

[26] Other than Milner and NSCC, all other members of the SWC were party to the litigation. *American Falls* at 862, 154 P.3d at 433.

a delivery call proceeding that the quantity decreed exceeds the amount being put to beneficial use by the senior must be supported by clear and convincing evidence.'" *SWC Opening Brief* at 30.

The only way a conflict can exist with the district court's holding is if the SWC's position on appeal is that the Director: (1) must administer to its decreed diversion rates; and (2) the clear and convincing evidentiary standard is an impenetrable shield to a delivery call. Again, strict priority administration to decreed diversion rates is not the law in Idaho.[24] *American Falls* 870, 154 P.3d at 441. Moreover, the clear and convincing standard is not insurmountable, as findings must be "highly probable or reasonably certain." *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008). Therefore, the SWC's position has no basis in law.

5. This Court's Decision In *American Falls* Precludes The SWC's Argument Regarding Administration Of Its "Decreed Diversion Rates"

The SWC's argument on appeal that the Director must administer junior ground water users in order to satisfy its "decreed diversion rates," *SWC Opening Brief* at 20 & 22, was rejected by the district court: "Simply put . . . a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right."[25] Clerk's R. Vol. 3 at 536

[24] The district considered and reconciled this issue in its Order on Judicial Review: "On first impression it would appear that the use of such a baseline constitutes a re-adjudication of a decreed or licensed water right. As stated by the Hearing Officer, '[t]he logic of the SWC in objecting to the Director's use of a minimum full supply is difficult to avoid.' R. Vol. 37 at 7090. However, on closer examination the use of a baseline is a necessary result of the Director implementing the conditions imposed by the CMR with respect to regulating junior rights . . . ." Clerk's R. Vol. 3 at 535-536.

[25] The hearing officer expressed a similar opinion in his Recommended Order: "The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of actual need for the water and the consequences to the State, its communities and citizens. Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management of the water right." R. Vol. 37 at 7086 (emphasis added).

districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use." *Id.* (emphasis added). *See also Clear Springs* at ___, 252 P.3d at 90 ("An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water . . . .").

Based on *American Falls*, the SWC is prohibited from arguing that priority and decreed diversion rates alone govern the Director's determination of material injury in conjunctive administration. "Somewhere between the absolute right to use a decreed water right 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." *American Falls* at 880, 154 P.3d at 451.

6. The District Court's Ordered Remand Was Proper

Lastly, the SWC argues that this proceeding should be remanded because the district court "erred by failing to properly require the Director to issue a single final order in this matter." *SWC Opening Brief* at 32. The SWC misinterprets the record and its argument should be rejected on appeal.

In this case, the district court held that Director Tuthill erred by not incorporating his material injury analysis in the Final Order that was subject to the court's review. Clerk's R. Vol. 3 at 542. Because of the error, and consistent with Idaho Code § 67-5279(2), the district court "remanded" the proceeding to the Director "for further proceedings consistent with this decision." *Id.* at 543. Pursuant to statute, this was the only relief that could be given by the district court. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, ___, 255 P.3d 1152, 1162 (2011).

Prior to staying the proceedings to allow the Director time to issue his material injury

ADDENDUM C

IDAHO DEPARTMENT OF
WATER RESOURCES

322 E Front Street, Suite 648, Boise ID 83702 • PO Box 83720, Boise ID 83720-0098
Phone: 208-287-4800 • Fax: 208-287-6700 • Email: idwrinfo@idwr.idaho.gov • Website: idwr.idaho.gov

Governor Brad Little

Director Gary Spackman

August 25, 2021

LUCAS YOCKEY
WATERMASTER, WATER DISTRICT NO. 34
211 E CUSTER RD STE B
MACKAY, ID 83251

VIA EMAIL TO: watermaster34@atcnet.net; blridgm@atcnet.net

RE: Futile Delivery Call – Antelope Creek

Dear Mr. Yockey,

On August 23, 2021, the Idaho Department of Water Resources (Department) received your email (attached) regarding a futile call determination on Antelope Creek. Based on the information you have provided, the Department believes your futile call determination on Antelope Creek is justified. This letter is to notify you that the Department supports the futile call determination based on the information noted below.

Background

- Brent Dalling (Dalling) reportedly has use of water right 34-10220 (water right owned by Alvin Crawford) via a lease agreement. Water right 34-10220 authorizes irrigation of 156 acres with 3.4 cfs from Antelope Creek and has a priority date of May 1, 1880.

- On August 9, 2021, you curtailed delivery of eight upstream junior water rights in response to a call for delivery of 34-10220 made by Dalling. The eight junior water rights represent about 12 cfs of water that, according to your observation, were being beneficially used in full. Dalling's call for water came after downstream senior users (1879 rights) on the Hanrahan ditch dismissed their calls due to the lack of sufficient water for beneficial use.

- On August 16, 2020, you measured the water reaching the point of diversion for 34-10220 to be approximately 0.35 cfs. You additionally explained that this measured amount of water still needs to travel about ¾ of a mile in an open ditch to reach the pivot pump (field headgate), resulting in additional losses before the water can be used by Dalling.

- After discussing with Dalling, you concluded the amount of water reaching the pump was insufficient to effectively operate the pivot or flood irrigate without incurring significant waste or shrink. In other words, curtailing 12 cfs and several hundred acres

of beneficial use by upstream users to deliver less than 0.35 cfs to Dalling's field headgate is both futile and wasteful.

The Department agrees your good faith attempt to deliver water to Dalling under water right 34-10220 has resulted in an appropriate determination of a futile call. You may continue to deliver to the upstream users in priority for the remainder of the 2021 irrigation season, unless it is subsequently determined that delivery of any downstream senior water right(s) is no longer futile.

Please feel free to contact me with any related questions or concerns you have.
Regards,

Rob Whitney
Manager, Water Distribution Section

cc: James Cefalo - IDWR Eastern Region

Whitney, Rob

Subject: FW: Antelope Futile Call

From: General Manager [mailto:blridgm@atcnet.net]
Sent: Monday, August 23, 2021 11:13 AM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Subject: RE: Antelope Futile Call

A couple more comments to consider as well.

On Thursday 8-12-2021 it was found that one of the Reese Diversion had only been partially curtailed. It was completely curtailed the same day. The main antelope has been very low mostly all year and going into august it had actually dried up and disconnected from itself approximately a mile below the cherry creek road. Cherry Creek itself has also been very low and hardly running so my assumption would be that the water that is reaching the Crawford diversion and everyone downstream of that point would be from an alternate source such as a spring.

From: General Manager <blridgm@atcnet.net>
Sent: Monday, August 23, 2021 10:54 AM
To: 'Luke, Tim' <Tim.Luke@idwr.idaho.gov>
Subject: RE: Antelope Futile Call

In response to your questions:

1. After the water is measured by the water district it goes into a private ditch for .73 miles until it reaches the pump for the pivot. The Lessee that it running the farm indicated that the pivot could run for approximately 2-3 times a day if restarted but only until the sump was pumped dry. That would be a maximum of 3 hours out of a 24 hour period. He also indicated that with what water was there he was going to flood irrigate with.
2. The water rights are listed under Alvin but I have been spoken to Glenn Crawford who seemed willing to help his neighbors out and make beneficial use but he ultimately left the decision up to his lessee Brent Daling. After speaking with Brent this morning he is intent on calling for the Crawford right.
3. After the 1879 rights in the Hanrahan stopped calling for their water earlier this year because they couldn't put it to beneficial use, Crawford placed a dirt dam and plastic across the entire creek since he was the last user calling for water so there was no water going past that point.

From: General Manager [mailto:blridgm@atcnet.net]
Sent: Monday, August 23, 2021 8:43 AM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Subject: Antelope Futile Call

Tim,
I am seeking your comments/support for a futile call to a senior water right located on antelope creek. On August 9, 2021 all junior water rights (listed below) were curtailed in order to try to deliver Alvin Crawford's 5-1-1880 (3.4cfs). On August 13, 2021 there was .68 cfs going over his weir and on August 16, 2021, after a week of the junior rights being curtailed, the water going over his weir at his point of diversion off antelope was unmeasurable with my charts in the

water measurement manual. It read a .14 on the staff gauge which after going to an app came out to be .35 cfs. It was my determination that it was futile to shut off 12.2 cfs which was being beneficially used in order to deliver .35 cfs.

Please let me know your thoughts or how you would like me to proceed.

Thank you

Lucas Yockey
Water Master
WD34

Curtailed Junior Rights

Tommy Waddoups Trust
- 34-784, .54 cfs

Marty Bennett
- 34-719A, .47 cfs

Mascaro Land & Livestock
- 34-932, 3.1 cfs

Josh Reese
- 34-591, 1.6 cfs

Antelope Valley Ranch
- 34-514A, 3.15 cfs

Lincoln Driscoll
- 34-426A, 2.32 cfs
- 34-426B, .28 cfs

Marty Bennet
- 34-719A, .47 cfs