

water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 (“Model”) show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. Pursuant to Idaho Code § 42-237a.g., “water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect ... the present or future use of any prior surface or ground water right.” Based on the information from the Model, the Director of the Idaho Department of Water Resources (“Department”) believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 1A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

Id. Based on that background, the Director initiated an administrative proceeding under Idaho Code § 42-237a.g. *Id.* The purpose was to decide whether the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. *Id.* The *Notice* set an administrative hearing for June 7-11, 2021. *Id.* at 2.

The Director mailed a copy of the *Notice* to ground and surface water right holders in Water District 37 (Big and Little Wood River basin, including Silver Creek) and Water District 37B (Camas Creek basin). *Id.* at 45. The *Notice* directed those persons wishing to participate in the proceeding to submit notice by May 19, 2021. *Id.* at 1.

Prior to the hearing, the Petitioners initiated this judicial proceeding by filing a *Petition for Judicial Review* (“*Petition*”). Among other things, the *Petition* sought entry of a temporary restraining order precluding the Director from commencing the administrative proceeding. The Court denied the request, and the administrative proceeding occurred as scheduled.

The Director issued his *Final Order* on June 28, 2021. R., 1882. He concluded that “consumptive ground water pumping in the Bellevue Triangle for purposes other than domestic and stock watering uses . . . should be curtailed as soon as possible in order to protect senior surface water rights diverting from Silver Creek and the Little Wood River.” *Id.* at 1908. The *Final Order* curtailed over 300 ground water rights for the 2021 irrigation season commencing

July 1, 2021. *Id.* at 1919. The curtailed rights cumulatively provided irrigation water to approximately 23,000 acres in Blaine County.

On June 30, 2021, the Petitioners filed a *First Amended Petition for Judicial Review* (“*Amended Petition*”). On the same date, they filed a *Second Application for Temporary Restraining Order* along with a *Second Motion for Preliminary Injunction*. The *Motions* sought an order precluding the Director from carrying out curtailment under his *Final Order*. On July 2, 2021, the Court denied the *Motions*. In doing so, it found the Petitioners had not met the standard for injunctive relief, noting the case involves complex legal issues of first impression that are not free from doubt. Affected ground water rights were therefore curtailed consistent with the *Final Order* on July 1, 2021. Curtailment continued until July 8, 2021, when the Director approved a negotiated mitigation plan submitted by the parties. *R.*, 2009.¹

The *Amended Petition* asserts the Director’s *Final Order* is contrary to law and requests the Court set it aside and remand for further proceedings. The Court entered an *Order* permitting the Intervenors to participate in this proceeding. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Amended Petition* was held before the Court on January 6, 2022.

II. STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4).

¹ The Director’s *Final Order Approving Mitigation Plan and Staying Curtailment* dated July 8, 2021, is not before the Court in this proceeding.

Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III. ANALYSIS

This case involves the conjunctive administration of interconnected ground and surface water rights in a time of shortage. Since 1994, conjunctive administration has occurred in this state pursuant to Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules").² However, the CM Rules were not utilized in this case. Instead, the Director acted under Idaho Code § 42-237a.g. to curtail junior ground water rights in favor of senior surface water rights. That code section, which is part of Idaho's Ground Water Act, has not previously been used for such purposes. Whether the Director may act under Idaho Code § 42-237a.g. to conjunctively administer interconnected ground and surface water rights in times of shortage, and if so how, are issues not previously addressed by Idaho courts.

A. The Director's authority to initiate administrative proceedings to conjunctively administer interconnected ground and surface water rights in times of shortage under Idaho Code § 42-237a.g. is affirmed.

A threshold issue is whether the Director has the authority to sua sponte initiate administrative proceedings for purposes of the conjunctive administration of interconnected ground and surface water rights in times of shortage. To address that issue, the Court turns to Idaho's Ground Water Act.³ The Ground Water Act was enacted by the legislature in 1951. It directs it shall be the duty of the Director "to control the appropriation and use of the ground water of this state as in this act provided . . ." I.C. § 42-231. One tool the Director may utilize in

² The CM Rules were adopted and became effective in 1994.

³ Idaho Code §§ 42-226 to 42-239.

furtherance of this duty is set forth in Idaho Code § 42-237a.g.⁴ That section gives the Director the power to initiate administrative proceedings to administer ground water rights under certain circumstances:

In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

. . .

g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power *he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available.* To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

I.C. § 42-237a.g. (emphasis added).

The language of Idaho Code § 42-237a.g. is plain. It empowers the Director to initiate administrative proceedings to prohibit or limit the withdrawal of water from a well when “water to fill any water right in said well is not there available.” I.C. § 42-237a.g. Water may be deemed unavailable to fill a ground water right in two scenarios. First, when ground water withdrawal would cause material injury to a senior water right, the water may be deemed unavailable. Second, when ground water withdrawal would exceed the natural recharge of the ground water source, the water may be deemed unavailable. These two scenarios have been recognized by the Idaho Supreme Court:

[Idaho Code § 42.237a.g.] merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface or ground water right or (b) result in withdrawals from the aquifer exceeding recharge.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011).

⁴ In 1953, the legislature amended the Ground Water Act to add Idaho Code § 42-237a.g.

Of the two scenarios where water may be deemed unavailable to fill a ground water right, it is the first that contemplates the conjunctive administration of interconnected ground and surface water rights.⁵ By its terms, that scenario applies where the withdrawal of ground water will materially injure a “prior surface *or* ground water right.” I.C. § 42-237a.g. (emphasis added). Under that circumstance, the Director may initiate an administrative proceeding under Idaho Code § 42-237a.g. to curtail the withdrawal of water under a junior ground water right in favor of a materially injured senior surface water right. *Id.* While the use of Idaho Code § 42-237a.g. for conjunctive administration is unprecedented in this State’s history, it is still a tool that the legislature has provided the Director to carry out his duties under the Ground Water Act. *Id.* The Director’s determination that he has the authority to initiate an administrative proceeding under Idaho Code § 42-237a.g. to conjunctively administer interconnected ground and surface water rights in times of shortage is affirmed.

A closer look at the Ground Water Act reveals it originally established a scheme for conjunctive administrative which included, but expanded beyond, that provided in Idaho Code § 42-237a.g. Recent legislative changes to the Act have limited that administrative scheme. But for purposes of this case, it is useful to examine the broader scheme as it previously existed. Until recently, the Ground Water Act contemplated a two-pronged scheme for conjunctive administration. The first prong, which is discussed above, is set forth in Idaho Code § 42-237a.g. Under that prong, the Director has the authority to initiate a proceeding for conjunctive administration purposes in times of shortage. Note that the Director may initiate such a proceeding when no adverse claim is made by one water user against another.⁶ *Id.* The second prong was set forth in Idaho Code §§ 42-237b-d. Under that prong, a water user had the authority to request conjunctive administration under the Ground Water Act by filing an adverse claim against another water user with the Director:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority, or whenever any person owning or having the right to use a ground water right believes that the use of such right is being adversely affected by another's use of any other water right

⁵ The second scenario authorizes the Director to initiate an administrative proceeding to address aquifer mining.

⁶ This authority is consistent with the Director’s duty under Idaho Code § 42-602, which requires that the Director “distribute water in water districts in accordance with the prior appropriation doctrine.” I.C. § 42-602. The statute does not limit the Director’s duty to circumstances involving adverse claims between water users within the district.

which is of later priority, such person, as claimant, may make a written statement under oath of such claim to the director of the department of water resources.

. . .

Upon receipt of such statement, if the director of the department of water resources deems the statement sufficient and meets the above requirements, the director of the department of water resources shall issue a notice setting the matter for hearing before a local ground water board, constituted and formed as in this act provided. The person or persons against whom such claim is directed and who are asserted to be interfering with the claimant's rights shall in such proceedings be known as respondents

I.C. § 42-237b (repealed 2021).⁷ Thus, the Ground Water Act contemplated a two-pronged scheme for conjunctive administration in times of shortage that encompassed scenarios with and without the filing of adverse claims.⁸

The legislature altered that scheme in 2021 when it repealed Idaho Code §§ 42-237b-d. In its repeal, the legislature recognized these sections of the Ground Water Act to be obsolete given the promulgation of the CM Rules:

Consistent with the Governor's Red Tape Reduction Act, this bill seeks to eliminate inactive provisions of the law. The legislation eliminates outdated and obsolete section of Idaho Code related to water right delivery calls. The procedures outlined in these sections are obsolete since the adoption of the Rules for Conjunctive Management of Surface and Ground Water Resources.

Statement of Purpose, RS 28076 H.B. No. 43 (2021). What was once a two-pronged administrative scheme under the Act is now a single-pronged scheme. That said, water users have not lost the ability to request conjunctive administration by filing an adverse claim with the Department. Such a request must simply occur under the CM Rules as opposed to the Ground Water Act. In this respect, the CM Rules have superseded the second prong of the Ground Water Act's scheme for conjunctive administration. The Court now turns to the issue of whether they have also superseded the first.

⁷ Under this scenario it was the local water board that would conduct the hearing and issue any resulting curtailment order, not the Director. I.C. § 42-237c (repealed 2021).

⁸ Idaho Code § 42-603 authorizes the Director to adopt rules and regulations necessary to carry out his duty to distribute water as set forth in Idaho Code § 42-602. The CM Rules were promulgated pursuant to this authority. As discussed elsewhere in this opinion, the CM Rules address scenarios involving the filing of adverse claims.

B. The promulgation of the CM Rules did not supersede the Director's authority to initiate administrative proceedings for purposes of conjunctive management under the Ground Water Act.

As explained above, the Director has the authority to initiate an administrative proceeding for purposes of conjunctive administration in times of shortage under the Ground Water Act. The next issue is whether the CM Rules limit or supersede that authority. For the reasons set forth herein, the Court holds they do not.

The CM Rules were promulgated by the Department in 1994. Rule 1 defines the scope of the CM Rules:

001. TITLE AND SCOPE (RULE 1)

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources." *The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.* It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.

37.03.11.001 (emphasis added). The language of Rule 1 is plain. Under its terms, the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls made by the holder of a senior surface or ground water right against the holder of a junior ground water right in an area having a common ground water supply.⁹ IDAPA 37.03.11.001. Thus, the CM Rules are implicated when one water user makes an adverse claim against another (i.e., makes a delivery call). No such delivery call has been made in this case.¹⁰

Nevertheless, the Petitioners assert the CM Rules apply in this case as a result of CM Rule 20.01. That Rule provides as follows:

Distribution of Water Among the Holders of Senior and Junior-Priority Rights. 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

⁹ A delivery call is "[a] request from the holder of a water right for administration of water rights under the prior appropriation doctrine." IDAPA 37.03.11.010.04.

¹⁰ It is disputed whether the Director was responding to a delivery call in this case. Two prior delivery calls were made and subsequently dismissed on procedural grounds. Although the Director initiated the underlying administrative proceeding for purposes of providing relief to potentially injured seniors, he was not responding to a delivery call at the time.

rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

IDAPA 37.03.11.020.01. The Court's reading of CM Rule 20.01 is informed by CM Rule 1. CM Rule 1 limits the scope of the CM Rules to setting forth the procedures for responding to a delivery call. Thus, the scope and application of the CM Rules is limited to scenarios where an adverse claim is made by one water user against another. The Court must read CM Rule 20.01 within that limitation. The Court therefore finds CM Rule 20.01 applies to all situations where junior ground water rights cause material injury to senior rights when a delivery call is made. Reading CM Rule 20.01 in this manner allows it to be read harmoniously with CM Rule 1, and avoids needlessly rendering the two Rules in conflict with one another.

The Court's reading of Rule 20.01 is reinforced by two additional factors. First, the Court's reading of Rule 20.01 is reinforced by CM Rule 3, which provides:

003. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 3).

Nothing in these rules limits the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.

CM Rule 3 makes clear the CM Rules do not limit the Director's authority under the Ground Water Act. Second, the Court's reading is reinforced by the legislative repeal of Idaho Code §§ 42-237b-d and its non-repeal of Idaho Code § 42-237a.g. The legislature repealed Idaho Code §§ 42-237b-d of the Ground Water Act because it had been superseded by the CM Rules. However, the legislature did not repeal Idaho Code § 42-237a.g. on those same grounds. Had the legislature believed Idaho Code § 42-237a.g. was superseded by the CM Rules, it would have repealed that code section as well. The fact it did not refutes the Petitioners' position, and reinforces the Court's reading of Rule 20.01 as set forth herein.

Therefore, the Court holds the promulgation of the CM Rules did not supersede the Director's authority to initiate administrative proceedings for purposes of conjunctive management under the Ground Water Act. It follows that in times of shortage, conjunctive administration can occur in one of two ways. Where no adverse claim is filed, the Director may initiate an administrative proceeding under the Ground Water Act. Where an adverse claim is filed, conjunctive administration implicates the CM Rules.

C. The *Final Order* does not comply with Idaho's prior appropriation doctrine.

The prior appropriation doctrine governs the use of Idaho's water.¹¹ Idaho Const., Art XV, § 3; I.C. § 42-106. Based on fundamental principles of beneficial use and first in time is first in right, the prior appropriation doctrine provides the parameters through which conjunctive administration must occur. *Id.* Whether the Director conjunctively administers water rights under the Ground Water Act or under the CM Rules, that administration must comply with the principles of the prior appropriation doctrine as they are set forth in this state's Constitution, statutes, and case law.

In comparing the Director's authority under the Ground Water Act and under the CM Rules, one distinction is obvious. The CM Rules set forth extensive rules, definitions, procedures, and criteria governing how conjunctive administration is to occur thereunder. For example, they set forth the procedures and criteria for determining an area of common ground water supply (CM Rule 31), for determining material injury and reasonableness of diversions (CM Rule 42), and for evaluating proposed mitigation plans (CM Rule 43).¹² The Ground Water Act provides no comparable rules, definitions, procedures, or criteria. This lack of guidance results in uncertainty as to how conjunctive administration is to occur under the Act. However, since both methods of conjunctive administration must comply with the prior appropriation doctrine, the processes and the results under each should be substantially similar.

The Director is not required to apply the CM Rules when conjunctively administering water rights under the Ground Water Act. That is because the Act provides him separate authority from that found in the CM Rules. However, in evaluating whether the Director's application of that authority complies with the prior appropriation doctrine, the Court is informed by the rules, definitions, procedures, and criteria set forth in the CM Rules. Those processes are useful to reference because they have been found to be facially constitutional. *American Falls Reservoir Dist. No. 2*, 143 Idaho 862, 872-880 154 P.3d 433, 443-451 (2007). Moreover, their purpose and the constitutionality of their application to the facts of various cases have been

¹¹ The Idaho Supreme Court has recognized the prior appropriation doctrine governs the use of ground and surface water. See *e.g.*, *Clear Springs Foods, Inc.*, 150 Idaho at 801-804, 252 P.3d at 82-85.

¹² Although these tenets are incorporated into the CM Rules, they are nevertheless grounded in common law and are integral to the prior appropriation doctrine. The Idaho Supreme Court has acknowledged "the tension between the first in time and beneficial use aspects of the prior appropriation doctrine." *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation District*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013).

evaluated by this Court and the Idaho Supreme Court. This judicial evaluation has created a line of precedent clarifying how conjunctive administration is to occur under the prior appropriation doctrine.

i. The prior appropriation doctrine requires the establishment of an area of common ground water supply.

The Petitioners assert the Director acted contrary to law by failing to establish an area of common ground water supply for purposes of conjunctive administration. An area having a common ground water supply is defined under the CM Rules in pertinent part as “[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source.” IDAPA 37.03.11.010.01.

In Ada County Case No. CV-WA-2015-14500, the Court addressed the importance of establishing an area of common ground water supply for purposes of conjunctive administration. The case involved a call for the conjunctive administration of water rights under the CM Rules. The call was made by senior surface water users against junior ground water users in Water District 37. Of significance, an area of common ground water supply had not previously been established in the area of the call. The Court held that the establishment of an area of common ground water supply is a necessary pre-condition to conjunctive administration of interconnected ground and surface water rights under the plain language of the CM Rules. *Memorandum Decision and Order*, Ada County Case No. CV-WA-2015-14500, pp.9-12 (April 22, 2016). The Court noted:

Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court’s estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive [administration] of surface and ground water.

Id. at 8-9. The Court found that senior water users could not seek conjunctive management in Water District 37 without the establishment of an area of common ground water supply.¹³ *Id.* at pp.9-12.

¹³ To do so, they were required to file their call under CM Rule 30, as opposed to CM Rule 40. The reason is that CM Rule 30, in conjunction with CM Rule 31, provides the procedures and criteria for establishing an area of

If a surface water user cannot achieve conjunctive administration of water rights without the establishment of an area of common ground water supply under the CM Rules, may the Director do that very thing under the Ground Water Act? The Court can discern no reason why conjunctive administration under the Act should occur pursuant to some other undefined metric. The necessity of establishing an area of common ground water supply is two-fold. First, it establishes the borders for due process. Its boundary establishes the world of ground water right holders who are potentially subject to curtailment. It is those water users who must be given proper notice and an opportunity to be heard. Second, with respect to priority administration, its boundary establishes the proper order of curtailment of junior rights. In times of shortage, junior water rights are administered in inverse priority to satisfy materially injured senior rights under the prior appropriation doctrine. Establishing an area of common ground water supply assures that those junior rights that are causing the material injury are those that are curtailed. For example, absent futile call, a junior ground water right with a priority of 1950 should not be curtailed while a junior ground water right with a priority of 1960 is allowed to continue to pump from the same source. Determining the area of common ground water supply is necessary to bring in *all* ground water rights which affect the flow of the subject surface water source. That is required to assure that proper priority administration is accomplished consistent with the prior appropriation doctrine.

The senior surface water rights involved in this case divert from Silver Creek and the Little Wood River. R., 1882. It is undisputed that an area of common ground water supply has not been established for Silver Creek and/or the Little Wood River. It is further undisputed that the Director did not establish one as part of this proceeding. Rather, the Director set a “potential area of curtailment,” to determine those junior ground water rights subject to curtailment. R., 1882. The procedures and criteria utilized to define the boundaries of the “potential area of curtailment” are not clear from the record.¹⁴ It is unknown how the “potential area of curtailment” was derived, or whether it is consistent with an area of common ground water supply for Silver Creek and/or the Little Wood River. Therefore, the record fails to establish that

common ground water supply. CM Rule 40, on the other hand, presupposes an area of common ground water supply has already been established.

¹⁴ Counsel for the Respondents was unable to explain how the boundaries of the “potential area of curtailment” were arrived at when asked at the judicial review hearing.

the “potential area of curtailment” encompassed *all* ground water rights which affect the flow of the subject surface water source, as required by the prior appropriation doctrine. Consequently, the Court holds that the establishment of an area of common ground water supply is a necessary pre-condition to conjunctive administration or interconnected ground and surface water rights under the prior appropriation doctrine. Since no such area was established in this case, the *Final Order* must be set aside and remanded.

ii. The prior appropriation doctrine requires conjunctively administering to material injury.

The Petitioners argue the Director erred by failing to conjunctively administer to material injury. This issue has been addressed by the Idaho Supreme Court. Idaho Code § 42-237a.g. empowers the Director to initiate administrative proceedings to prohibit or limit the withdrawal of water from a well when “water to fill any water right in said well is not there available.” I.C. § 42-237a.g. Water may be deemed unavailable to fill a ground water right in two scenarios. The Idaho Supreme Court has explained those two scenarios as follows:

[Idaho Code § 42.237a.g.] merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) *cause material injury to any prior surface or ground water right* or (b) result in withdrawals from the aquifer exceeding recharge.

Clear Springs Foods, Inc., 150 Idaho at 804, 252 P.3d at 85 (emphasis added). Under the first scenario, the Director’s ability to curtail is contingent upon a finding that the ground water withdrawal would cause “material injury” to a senior water right. *Id.*

That the Idaho Supreme Court used the term “material injury” in its interpretation of Idaho Code § 42-237a.g. is significant. “Material injury” is a term of art. It is not used or defined in Idaho Code § 42-237a.g. Rather, it is defined by the CM Rules as “[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.” IDAPA 37.03.11.010.14. Additionally, it is CM Rule 42 that provides the criteria the Director may consider in determining material injury. IDAPA 37.03.11.042. It follows that whether the Director conjunctively administers interconnected ground and surface water rights under the Ground Water Act or the CM Rules, the Idaho Supreme Court has directed he must administer to material injury. It

further follows that his evaluation of proposed mitigation plans correspond to the concept of material injury.¹⁵

In this case, the *Final Order* contains no finding of material injury to senior surface water rights that would receive water from curtailment. Nor does the *Final Order* contain an analysis of the factors listed in CM Rule 42 that may be considered in determining material injury. Rather, it appears the Director based his curtailment on depletions to the source (i.e., Silver Creek and the Little Wood River) caused by ground water use. Since the *Final Order* did not make any finding of material injury to senior surface water rights, the *Final Order* is contrary to law and must be set aside and remanded.

D. Due Process.

The Petitioners raise issues of due process concerns with respect to the hearing process utilized by the Director in this case. Many of those due process concerns dovetail with the issues addressed in Section III.C. of this opinion. The Court's analysis of the issues addressed in Section III.C. will address many of the due process concerns raised by the Petitioners related to the hearing process. With respect to any remaining due process issues, the Court holds it need not reach those at this time, as the Director's *Final Order* is already set aside and remanded for the reasons set forth herein.

E. Substantial rights.

Water rights are substantial rights as they are real property rights under Idaho law. I.C. § 55-101. The *Final Order* curtailed the Petitioners' water rights commencing July 1, 2021. The *Final Order* is inconsistent with Idaho's prior appropriation doctrine for the reasons set forth herein. Therefore, the *Final Order* was issued to the prejudice of the substantial rights of the Petitioners. It follows that the *Final Order* must be set aside and remanded.

F. Attorney fees.

The Petitioners, as well as Intervenor Sun Valley Company, Big Wood Canal Company, and Big Wood & Little Wood Water Users Association, seek awards of attorney fees under

¹⁵ The Idaho Supreme Court has previously recognized that the Director must evaluate whether "the holder of a water right is suffering material injury and using water efficiently and without waste . . ." *Clear Springs Foods, Inc.*, 150 Idaho at 809-810, 252 P.3d at 90-91.

Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds “that the nonprevailing party acted without a reasonable basis in fact or law.” The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a “legitimate question for this Court to address.” *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, none of the parties have prevailed in full. In addition, the issues presented to this Court are issues of first impression concerning whether the Director may act under Idaho Code § 42-237a.g. to conjunctively administer interconnected ground and surface water rights in times of shortage, and if so how. The Court holds that all the parties involved presented legitimate questions for this Court to address on those issues of first impression. Therefore, an award of attorney fees under Idaho Code § 12-117 is not warranted.

Additionally, Intervenors Big Wood Canal Company and Big Wood & Little Wood Water Users Association seek an award of attorney fees under Idaho Code § 12-121. The Idaho Supreme Court has held that “[a]ttorney’s fees are not available under Idaho Code section 12-121 on petitions for judicial review” *In Re Idaho Workers Compensation Bd.*, 167 Idaho 13, 24, 467 P.3d 377, 388 (2020). As such, the request for fees under Idaho Code § 12-121 is denied.

**IV.
ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the *Final Order* is hereby affirmed in part and set aside and remanded in part.

Dated February 10, 2022



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Dated: 2/10/2022 10:27 AM

Clerk of the Court
By 
Deputy Clerk