

have ended for the season. Tr. p. 542. BWCC rents this water to users seeking a supplemental supply, or allows it to become part of the natural flow supply available for diversion under water rights diverting downstream. *Id.*

If BWCC's Little Wood River water rights are curtailed in June, as predicted, the curtailment would prevent BWCC from renting its water to water users in need of a supplemental water supply, or would reduce the supply available for downstream water rights that may be senior to ground water rights diverting in the Bellevue Triangle. Tr. p. 556. Pendleton testified that, based on his observations, the flows of the Little Wood River at Station 10 near Richfield increase substantially within 48 hours of when ground water pumps in the Bellevue Triangle are shut off. Tr. p. 537.

John Arkoosh ("John") is a farmer and stockman who operates several farm properties owned by himself and his father, William Arkoosh ("William"), in a loose partnership with his father. Tr. p. 571. John testified regarding both his and his father's farms, water rights, and water uses.

William owns two farms, one in Gooding County and one in Lincoln County, for which he holds water rights to divert from the Little Wood River. The Gooding farm has two such water rights, 37-176 (W. Arkoosh Exs. 4 and 5) and 37-1131 (W. Arkoosh Exs. 6 and 7), which authorize diversions of 2 cfs and 2.4 cfs from the Little Wood River under priority dates of April 1, 1890, and August 1, 1906. Both water rights have the Exchange Condition, and William also has two supplemental water supplies for the Gooding farm: 100 inches of American Falls Reservoir District No. 2 storage water, and approximately 4.4 cfs of ground water under a 1977 priority date.⁷ Tr. pp. 581-582, 586-587. The Lincoln farm is irrigated by water rights 37-327 (W. Arkoosh Exs. 6 and 7) and 37-329 (W. Arkoosh Exs 8 and 9), which authorize diversions of 2.2 cfs and 2 cfs from the Little Wood River under priority dates of May 15, 1884, and May 15, 1886.⁸ These two water rights have the Exchange Condition, and William also has a supplemental supply of 30 inches of AFRD2 storage water for the Lincoln farm. Tr. p. 589. William raises alfalfa and silage corn on both the Gooding and Lincoln properties, and for part of the year these lands also support William's livestock. Tr. p. 590.

All of the Little Wood River water rights for William's Gooding and Lincoln farms have been curtailed this irrigation season, and these farms are now being irrigated with William's supplemental water alone. Tr. p. 592. While William's water rights for the Little Wood River have been curtailed in previous years, the curtailments have become increasingly earlier and more frequent in recent years. Tr. pp. 593-594. William's supplemental storage and ground water supplies are sufficient to fully irrigate the Gooding farm during the 2021 irrigation season, although curtailment has increased William's electrical costs as a result of the need to pump

⁷ The record does not appear to include the water right number for William's ground water right.

⁸ The Lincoln farm is supplied by a Big Wood River water right, 37-59M, but this water right is relevant to this proceeding only for purposes of describing the total water supply for the Lincoln farm.

ground water. Tr. pp. 587-588. The supplemental supply for the Lincoln farm is not sufficient to fully irrigate the Lincoln farm in 2021, however. Tr. pp. 592-593.

John submitted an estimate of the expected 2021 water supply shortfall for the Lincoln farm in 2021, and the effects the shortfall would have on crop production and revenue. W. Arkoosh Ex. 1. John projected a total injury for the Lincoln farm of approximately \$55,000 as a result of water shortage in 2021, and pumping costs of approximately \$2,000 for the Gooding farm. *Id.* John's water supply shortage estimates and loss projections for William's farms may be high because they are based on existing conditions, which are subject to change, and on assumptions and computations that may not be entirely accurate or correct. Even so, the record supports a finding that a shortage of water in 2021 has already impacted William's farming activities, and will probably cause significant economic injury by the end of the 2021 irrigation season.

John also testified as to two farms he owns in Lincoln County, which he referred to as the Varin farm and the Ohlinger farm, both of which are supplied by water rights to divert from the Little Wood River.⁹ John is raising alfalfa on the Varin farm, and has leased the Ohlinger farm to a farmer who is raising organic potatoes. Tr. pp. 599-600, 605. The Varin farm is supplied by water rights 37-326 (J. Arkoosh Exs. 2 and 3), 37-328 (J. Arkoosh Exs. 4 and 5), and 37-1127 (J. Arkoosh Exs. 10 and 11), which authorize diversions of 0.4 cfs, 0.6 cfs, and 1.6 cfs from the Little Wood River, under priority dates of November 1, 1882, April 1, 1885, and April 1, 1905. The Ohlinger farm is supplied by water rights 37-460 (J. Arkoosh Exs. 6 and 7) and 37-461 (J. Arkoosh Exs. 8 and 9), which authorize diversions of 4 cfs and 1.4 cfs from the Little Wood River under priority dates of June 3, 1884, and July 17, 1884.

All of the decreed water rights for the Varin and Ohlinger farms have been curtailed this irrigation season, with the exception of a portion of the 1882 water right for the Varin property. Tr. p. 606. This water right apparently has never been curtailed before, but will probably be fully curtailed within a month. Tr. pp. 601-602. The Ohlinger farm is also being supplied by 46.8 inches of American Falls storage water ("Carey Act Water"), but otherwise there are no supplemental water supplies for the Varin farm or the Ohlinger farm. At present, the water supplies for the Varin farm and the Ohlinger farm are not sufficient to properly grow and finalize their crops. John is attempting to secure several different supplies of additional water for the Varin and Ohlinger farms, but to date nothing has been finalized.

John submitted an estimate of the expected 2021 water supply shortfall for the Varin and Ohlinger farms in 2021, and the effects the shortfall would have on crop production and revenue. J. Arkoosh Ex. 1. John projected a total injury of approximately \$40,000 for the Varin farm, and \$611,000 for the Ohlinger farm, as a result of water shortage in 2021. *Id.*; Tr. pp 610-611. John's water supply shortage estimates and loss projections may be high because they are based on existing conditions, which are subject to change, and on assumptions and computations that may not be entirely accurate or correct. Even so, the record supports a finding that a shortage of

⁹ The Varin and Ohlinger farms are also supplied by two water rights for the Big Wood River, 37-10343 and 37-21485, but these water rights are only relevant to this proceeding for purposes of describing the farms' total water supply.

water in 2021 has already impacted John's farming activities, and will probably cause significant economic injury by the end of the 2021 irrigation season.

John testified that, based on his personal observations and experience, he believes that groundwater pumping in the Bellevue Triangle has decreased the supply of water in the Little Wood River that would otherwise be available for diversion under water rights held by himself and his father. John also testified that he believed their Little Wood River water rights would remain in priority longer and there would be less damage to their crops, if there were additional flows in the Little Wood River. Tr. pp.612-13. John testified that he believes that ground water pumping in the Bellevue Triangle is injuring his and William's water rights. Tr. p.632.

Alton Huyser is a farmer who testified as a principal of the Big Wood Farms LLC, which owns and operates Big Wood Farms. Huyser raises winter and spring wheat and alfalfa, and irrigates his crops with water rights 37-10561A (Big Wood Farms Exs. 6 and 7) and 37-10561B (Big Wood Farms Exs. 8 and 9), which authorize diversions of 4 cfs and 2.2 cfs from the Little Wood River under the common priority date of April 5, 1884.¹⁰ In normal water supply years, Huyser's Little Wood River water rights are curtailed in mid-August, and in combination with Huyser's Big Wood River water right provide a sufficient water supply for his crops. Tr. pp. 652-653. This year, however, Huyser's decreed water rights were curtailed on June 2, and at this point he has no water to irrigate his crops for the rest of the 2021 irrigation season. *Id.* Huyser has been attempting to secure supplemental water, but nothing has been finalized. Tr. p. 654.

Huyser submitted an estimate of the expected 2021 water supply shortfall for Big Wood Farms, and the effects the shortfall would have on crop production and revenue. Big Wood Farms Ex. 1. Huyser projected a total injury of approximately \$38,800 for 2021. *Id.* Huyser's water supply shortage estimates and loss projections may be high because they are based on existing conditions, which are subject to change, and on assumptions and computations that may not be entirely accurate or correct. Even so, the record supports a finding that a shortage of water in 2021 has already impacted Huyser's farming activities, and will probably cause significant economic injury by the end of the 2021 irrigation season.

Huyser testified that he believes ground water pumping in the Bellevue Triangle is part of the reason that the flows of the Little Wood River are insufficient to fill his water rights, and that ground water pumping is injuring his water rights. Tr. p. 657. Huyser also believes that if ground water rights in the Bellevue Triangle junior in priority to his Little Wood River water rights are curtailed, his Little Wood River water rights would be reinstated for a sufficient period of time to finalize his wheat crop. *Id.*

Don Taber is a dairy farmer who owns and operates three contiguous farms near Shoshone: the Taber or Home farm, the 7 Mile farm, and the Ritter farm. Tr. p. 673. Taber's farms focus primarily on raising feed for his dairy herd, but also have some acres in malt barley, sugar beets, and wheat. Taber Ex.1; 7 Mile Ex. 1; Ritter Ex. 1. The three farms are supplied with water from a number of water rights, including several that authorize diversions from the Little Wood River

¹⁰ The water rights are held by the Alton & Huyser Trust. Huyser also relies on Big Wood River water right 37-59K, but this water right is relevant to this proceeding only for purposes of describing the total water supply for Big Wood Farms.

under priorities ranging from April 1, 1883, to April 1, 1887. Taber's 1887 Little Wood River water rights have been curtailed, and while his 1884 water rights normally last most of the irrigation season, this year he expects the 1884 water rights will be curtailed in mid-June. Until recently, Taber's 1883 water rights remained in priority all season, but in recent years they have increasingly been curtailed for short periods. Tr. pp. 682-684. Taber is unsure of whether his 1883 water rights will be curtailed this year, and even if they remain in priority, he will not have a sufficient water supply to fully irrigate his farm lands. Tr. pp. 673-714.

Taber submitted estimates of the expected 2021 water supply shortfalls for the Taber farm, the 7 Mile farm, and the Ritter farm, and the effects the shortfall would have on crop production and revenue. Taber Ex. 1; 7 Mile Ex. 1; Ritter Ex. 1. Taber projected total injuries in 2021 of approximately \$82,000 for the Taber farm, \$126,000 for the 7 Mile farm, and \$177,600 for the Ritter farm. *Id.* Taber's water supply shortage estimates and loss projections may be high because they are based on existing conditions, which are subject to change, and on assumptions and computations that may not be entirely accurate or correct. Even so, the record supports a finding that a shortage of water in 2021 has already impacted Taber's farming activities, and will probably cause significant economic injury by the end of the 2021 irrigation season.

Taber testified that he believes that ground water pumping in the Bellevue Triangle is a significant cause of the reduced flows available for diversion under his Little Wood River water rights. Taber testified that based on his observations, flows in the Little Wood River increase within a few days after ground water pumping in the Bellevue Triangle is reduced. Taber also testified that, in his opinion, curtailment of ground water rights in the Bellevue Triangle junior in priority to his water rights would benefit his farms even if the water did not become available until August. Taber testified that he seeks to have water rights in the Bellevue Triangle curtailed based on the priority system. Tr. pp. 691-92, 697-98.

Charles Newell owns a 160-acre farm on which he is raising oats and grain to feed his cattle. Tr. p. 737-738. Newell irrigates his lands with several water rights, including water right 37-432, which authorizes diversion of 2.6 cfs from the Little Wood River under a priority date of April 15, 1885. Newell Exs. 4 and 5. Newell testified that his 1885 water right was expected to be curtailed on June 10 or 11. Tr. p. 736. Newell's other water rights had already been curtailed, and while he was trying to secure supplemental water supplies, prices are "very high and scary," and he had not been able to finalize any arrangements for additional water. Tr. pp. 732-48.

Newell submitted an estimate of the expected 2021 water supply shortfall for his farm, and the effects the shortfall would have on crop production and revenue. Newell Ex. 1. Newell projected a total injury of approximately \$55,000 for 2021. *Id.* Newell's water supply shortage estimate and loss projection may be high because they are based on existing conditions, which are subject to change, and on assumptions and computations that may not be entirely accurate or correct. Even so, the record supports a finding that a shortage of water in 2021 has already impacted Newell's farming activities, and will probably cause significant economic injury by the end of the 2021 irrigation season.

Lawrence Schoen owns 306 acres adjacent to the Silver Creek Preserve. Tr. p. 390. He irrigates a total of 14.4 acres with water rights 37-351B (priority June 1, 1886) and 37-352B (priority June 15, 1887). Tr. p. 391. He testified that he raises horse hay and pasture on the land. *Id.* As a result of a transfer from a surface water source to a ground water source, Schoen diverts his water through a well on his property. *See* Water Right 37-351B and 37-352B.

Schoen's well is shut off when the June 1, 1886, and June 15, 1887, surface water rights are curtailed on Silver Creek. *Id.* Schoen expressed frustration that a well "across the road" with "a water right 94 years junior" to his water rights gets to pump water when his rights are curtailed. *Id.* He testified that "the ground water and the surface water are one and the same water source here, and they should be managed on the continuum according to the priority doctrine." *Id.* at 398-99.

Most or all of these surface water right holders also testified as to the measures they have taken, and investments they have made, to increase the efficiencies of their irrigation systems and conserve water, such as converting to pivot irrigation systems, and piping their water from the point of diversion to the place of use. The surface water users also testified to the steps they have taken in 2021, and in earlier drought years, to conserve and extend their water supplies, such as securing supplemental water, planting less water intensive crops, and minimizing losses by selecting which fields and crops to continue watering and which to dry out.

Lakey also testified that, based on his experience and interactions with water users on Silver Creek and the Little Wood River, they have adequate water supplies when there is enough water to fill water rights with priorities equal to April 1, 1884, until September 1st. Tr. pp. 780-84, 819-20, 882-84; BV Ex. 1. Lakey also estimated that in an average year, 40,000 acre-feet is an adequate water supply for Silver Creek and Little Wood River water users, and that at least 35,000 are-feet of this supply must come from sources other than Magic Reservoir. Tr. p. 783-84; BV Ex. 1. When these conditions are met, the discharge at Station 10 during the period from April 1 to September 30 ranges from 25,000 to 33,000 acre-feet. Tr. p. 781; BV Ex. 1.

ANALYSIS AND CONCLUSIONS OF LAW

This case presents a question of distributing water in a year of drought and shortage. The ultimate issue is whether ground water rights diverting in the Bellevue Triangle should be curtailed this year in favor of senior water rights diverting from Silver Creek and the Little Wood River. The Bellevue Triangle is within Water District 37 and the Big Wood Ground Water Management Area ("BWGMA"). Sections 42-602 and 42-237a.g. of the Idaho Code guide the Director's analysis in this case.

I. Ground Water Pumping in the Bellevue Triangle Adversely Affects Senior Surface Water Uses in Silver Creek and the Little Wood River and Should be Curtailed.

Section 42-602 states that the Director "shall distribute water in water districts in accordance with the prior appropriation doctrine." Idaho Code § 42-602. The Idaho Supreme Court has held that this statute "gives the Director a 'clear legal duty' to distribute water," but "the details of the performance of the duty are left to the director's discretion." *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) (citations omitted).

Section 42-237a.g. authorizes the Director "to supervise and control the exercise and administration of all right to the use of ground waters," and states that in the exercise of this "discretionary power," 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." Idaho Code § 42-237a.g. The statute further states, in pertinent part, that "[w]ater 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[.]” *Id.* This statute gives the Director “broad powers” to prohibit or limit ground water withdrawals that adversely affect the use of senior surface water rights. *Stevenson v. Steele*, 93 Idaho 4, 11-12, 453 P.2d 819, 826-27 (1969).

The central legal inquiry in this case is whether withdrawals of ground water from wells in the Bellevue Triangle “would affect, contrary to the declared policy of [the Ground Water Act],” the present use of senior water rights diverting from Silver Creek and the Little Wood River, or their future use during the remainder of the 2021 irrigation season. Idaho Code § 42-237a.g. The “declared policy” of the Ground Water Act, *id.*, is set forth in Idaho Code § 42-226. This statute expressly affirms Idaho’s “traditional policy” of “requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation[.]” Idaho Code § 42-226. The statute further states that “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” *Id.* This last provision was added to Idaho Code § 42-226 through an amendment passed in 1953. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 801, 252 P.3d 71, 82 (2011).¹¹

The Idaho Supreme Court considered the meaning and intent of the 1953 amendment in the *Clear Springs* decision. 150 Idaho at 800-04, 252 P.3d at 81-85. The Court held that while the phrase “full economic development of underground water resources” had “modified the doctrine of first in time is first in right,” the modification did not mean that an appropriator “who is producing the greater economic benefit or would suffer greater economic loss” has the better right to the use of the water. *Id.* at 801-02, 252 P.3d at 82-83. Rather, the 1953 amendment was intended “to change the holding in *Noh v. Stoner* . . . that a prior appropriator of ground water was protected in his historic pumping level.” *Id.* at 802, 252 P.3d at 83. The Court explained that the phrase “full economic development of underground water resources” refers “to promoting full development of ground water by not permitting a ground water appropriator with an unreasonably shallow well to block further use of the aquifer,” *id.* at 803, 252 P.3d at 84, and held that “[b]y its terms, section 42-226 only applies to appropriators of ground water.” *Id.* at 804, 252 P.3d at 85.

The senior water rights in this case, however, are not ground water rights, but rather are surface water rights to divert from Silver Creek and the Little Wood River. Section 42-226’s “modification” of the doctrine that first in time is first in right, *Id.* at 801-02, 252 P.3d at 82-83, does not apply to surface water rights. *Id.* at 804, 252 P.3d at 85. Thus, the provision that “a reasonable exercise of this right shall not block full economic development of underground water resources” does not apply in this case, contrary to the ground water users’ arguments.

In this case, rather, the “declared policy” of the Ground Water Act, Idaho Code § 42-237a.g., is limited to Section 42-226’s affirmation of the requirement that Idaho’s water resources

¹¹ Idaho Code § 42-226 was originally enacted in 1951. 1951 Idaho Sess. Laws 423-24. The 1953 legislation that amended Idaho Code § 42-226 also added Idaho Code § 42-237a.g. to the Ground Water Act. 1953 Idaho Sess. Laws 278, 285.

are “to be devoted to beneficial use in reasonable amounts through appropriation,” and its recognition of the doctrine that “first in time is first in right.” Idaho Code § 42-226.

In this case, the Director must determine: a) whether ground water and surface water diversions in the Bellevue Triangle and from Silver Creek and the Little Wood River are “contrary” to the “traditional policy” of “beneficial use in reasonable amounts through appropriation”; or b) whether withdrawals of ground water in the Bellevue Triangle are contrary to the “doctrine of ‘first in time is first in right.’” Idaho Code §§ 42-226, 42-237a.g. These questions are addressed in sequence below.

a. Water Uses in the Bellevue Triangle and from Silver Creek and the Little Wood River are not Contrary to the Traditional Policy of “Beneficial Use in Reasonable Amounts Through Appropriation.”

The requirement that water be put to beneficial use “in reasonable amounts through appropriation,” Idaho Code § 42-226, has two components. The beneficial use must be authorized by a valid “appropriation,” and it must be in a “reasonable amount.”

The uses of the ground water and surface water involved in this proceeding have been authorized “through appropriation.” Idaho water rights are defined by elements, including the “particular purpose” or purposes for which the water may be used. *In re SRBA*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014). The record establishes that the ground water users in the Bellevue Triangle and surface water users on Silver Creek and the Little Wood River are diverting pursuant to decreed water rights. There have been no assertions that the ground water or the surface water is being used for purposes other than the beneficial uses authorized in the water rights, and there is no evidence in the record that would support such a conclusion.

Water rights decrees, however, do not answer the question of whether diversions are “in reasonable amounts” for purposes of an administrative proceeding under Idaho Code § 42-237a.g. “Reasonableness” is not an element of a water right, and an administrative determination of whether the quantity diverted is a “reasonable amount” depends upon the facts of the case. *AFRD2*, 143 Idaho at 877, 154 P.3d at 448. The record establishes that both ground water and surface water users have continuously striven to improve the efficiencies of their diversion, conveyance, and irrigation systems, and continue to do so. Water users in both groups have invested considerable amounts of time and money in connection with these efforts, and continue to do so. The record also establishes that, when a shortage of water is predicted or materializes, water users in both groups make planning and management decisions accordingly, in order to conserve and extend their water supplies, and prevent or minimize crop and revenue losses as much as possible.

The record, therefore, does not support a conclusion that ground water uses in the Bellevue Triangle, or surface water uses on Silver Creek and the Little Wood River, are contrary to Idaho’s “traditional policy” of requiring the state’s water resources “to be devoted to beneficial use in reasonable amounts through appropriation.” Idaho Code § 42-226. The Director concludes ground water and surface water diversions in the Bellevue Triangle and from Silver Creek and the Little Wood River are putting water to beneficial use in reasonable amounts through valid appropriations. Idaho Code § 42-226.