the Bellevue Triangle will produce enough water to satisfy only two water rights senior to April 1, 1884, and partially satisfy a third. *Id.* at 18. This premise does not support a conclusion that curtailing fewer ground water rights will still protect surface water rights senior to April 1, 1884, however. Rather it confirms that curtailment of all junior ground water rights in the Bellevue Triangle is the minimum necessary to protect these three water rights, as well as any other surface water rights senior to April 1, 1884. Even that amount of curtailment is not sufficient fully satisfy the September 1883 priority. *Id.* at 18 (watermaster testimony).

The record does not support South Valley's and Galena's assertion that the Exchange Condition ensures a full supply of water to the holders of senior surface rights having the Exchange Condition. To the contrary, the record confirms that the Exchange Condition does not prevent priority-based curtailment, and that it also does not guarantee a fully supply of supplemental water after the water right is curtailed. *See, e.g.,* Tr. pp. 288-97.

While the record does appear to support South Valleys and Galena's assertion that some of the surface water users' fields and crops have dried up to the point that it may be "too late" to save them, *SVGWD-GGWD Brief* at 20, that is not true for all of their fields and crops. The testimony of the watermaster and the surface water users establishes that curtailment of ground water pumping in the Bellevue Triangle will help minimize surface water users' crop and revenue losses, by preventing curtailment of some surface water rights and allowing some surface water rights that have been curtailed to come back on sooner than would otherwise have been the case.

The Director also disagrees with South Valley's and Galena's argument that curtailment would be futile because most of the curtailed water would remain in the aquifer during the 2021 irrigation season. The futile call doctrine does not require all or even most of the curtailed water to reach senior water users' points of diversion. All that is required is a "sufficient quantity for [the senior water user] to apply it to beneficial use." *Sylte*, 165 Idaho at 245, 443 P.3d at 259. While the record shows that the majority of the curtailed water would remain in the Wood River Valley aquifer during the 2021 irrigation season, the record also supports a conclusion that curtailment of ground water pumping in the Bellevue Triangle would result in useable quantities of water reaching the points of diversion for some senior surface water rights. South Valley and Galena also concede that curtailment of ground water pumping in the Bellevue Triangle would produce sufficient water to fully or partially satisfy at least three senior surface water rights. *SVGWD-GGWD Brief* at 18-20.

South Valley and Galena also point to the economic benefits resulting from ground water pumping in the Bellevue Triangle, and to the economic losses and that will result from curtailing ground water pumping in the Bellevue Triangle. The Director recognizes the substantial benefits that ground water pumping in the Bellevue Triangle provide. The Director also recognizes that curtailment of ground water pumping in the Bellevue Triangle will cause significant economic impacts. The record also establishes, however, that surface water uses on Silver Creek and the Little Wood River have substantial economic benefits. The record further establishes that many of the surface water rights on Silver Creek and the Little Wood River have been, and will be, curtailed due to a water shortage that is due, in part, to ground water pumping in the Bellevue Triangle.

Moreover, "full economic development of underground water resources," does not mean that "the ground water appropriator who is producing the greater economic benefit or would

suffer the greater economic loss is entitled to the use of the ground water when there is insufficient water for both the senior and junior appropriators." *Clear Springs*, 150 Idaho at 802, 252 P.3d at 83. As the Idaho Supreme Court has recognized, the prior appropriation doctrine as established by Idaho law can be "harsh," especially in "times of drought." *AFRD2*, 143 Idaho at 869, 154 P.3d at 440. "First in time is first in right" among those beneficially using the water, Id. Const. XV § 3; Idaho Code § 42-106, and "it is obvious that in times of water shortage someone is not going to receive water." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

II. This Proceeding Did Not Exceed Director's Statutory Authority or Violate Due Process Requirements.

Several parties make various overlapping procedural arguments that the Director exceeded or misinterpreted his statutory authority in initiating this administrative proceeding, that this proceeding should have been governed by the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.011.000--.051 ("CM Rules"), and that this proceeding violated their rights to due process. *See Cities/SVC's Post-Hearing Brief*; *Coalition of Cities Corrected Cities List and Notice of Joinder in Cities/SVC's Post-hearing Brief*; *City of Pocatello's Post-Hearing Brief and Joinder in Cities'/SVC's Post-Hearing Brief*; *IGWA's Post-Hearing Brief*; *South Valley Groundwater District and Galena Groundwater District's Post Hearing Memorandum*; and *Notice of Intent to Rely Upon Post-hearing Briefs of Galena Ground Water Users Association, South Valley Ground Water Users Association & IGWA* (Dean R. Rogers, III, and Dean R. Rogers, Inc.).[16] The Director disagrees with these arguments for reasons discussed below.

a. This Proceeding Is Not a Response to a Delivery Call and is Not Governed by the CM Rules.

South Valley, Galena, IGWA and Pocatello argue the Director was legally required to apply and follow the procedures, standards, and requirements of the CM Rules in this administrative proceeding. IGWA argues that under CM Rule 20, the CM Rules apply to "all situations" involving administration between or among ground water rights and surface water rights. *IGWA Post-Hearing Brief* at 1. Pocatello argues that "in all respects this was a delivery call case." *Pocatello's Post-Hearing Brief* at 4. South Valley and Galena assert that the CM Rules apply because the testimony of the senior surface water users amounted to conjunctive management "delivery calls." *SVGWD-GGWD Brief* at 44. These arguments lack merit.

CM Rule 1 plainly states that the CM Rules "prescribe procedures <u>for responding to a delivery call</u> made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right . . . ." IDAPA 37.03.11.001 (underlining added). The District Court for Twin Falls County has affirmed that the CM Rules are limited to cases respond to a "delivery call" as that term is defined and treated in the CM Rules. *Memorandum*

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[16] The Director assumes that the references in Rogers' filing to "Galena Ground Water Users Association" and "South Valley Ground Water Users Association" were intended to identify Galena Ground Water District and South Valley Ground Water District.

Decision and Order, Basin 33 Water Users, et al., v. IDWR, Ada County Case No. CV01-20-8069, at 8-9 (Nov. 6, 2020) ("the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls . . . . No such delivery call has been made in this case.").

The record shows that no delivery call was filed in this case, as some of the ground water users concede. *See Cities/SVC's Brief* at 11 ("this is not a water delivery call (let alone a delivery call under the CM Rules)") (parenthetical in original). The record shows, rather, that this proceeding was initiated by the Director, *sua sponte*, pursuant to Idaho Code § 42-237a.g. *Notice* at 1. This statute authorizes the Director "[t]o "supervise and control the exercise and administration of all rights to the use of ground water." Idaho Code § 42-237a.g. This code section states that "in the exercise of this discretionary power," the Director "may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well" during any period the Director determines "that water to fill any water right in said well is not there available." *Id.* "Water in a well shall not be deemed available to fill a water right therein," in turn, "if withdrawal of the amount called for by such right" would affect, contrary to the policy of the Ground Water Act, "the present or future use of any prior surface or ground water right . . . ." *Id.* (underlining added).

Nothing in Idaho Code § 42-237a.g. makes initiation of such an administrative proceeding contingent upon the filing of a delivery call or request for administration of ground water rights. Nothing in Idaho Code § 42-237a.g. or the CM Rules requires the Director to apply the CM Rules in conducting an administrative proceeding under Idaho Code § 42-237a.g. *See Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, supra, at 8-12 (rejecting the argument that "the CM Rules preclude the Director from exercising his authority under the [Ground Water] Act"). Further, the statute expressly committed the determination of whether to initiate this administrative proceeding to the Director's discretion. *See* Idaho Code § 42-237a.g. ("discretionary power").[17] As the Idaho Supreme Court recognized, in a 1969 case involving curtailment of junior ground water pumping in favor of senior surface water users, Idaho Code § 42-237a.g. grants "broad powers" to the Director in cases such as this one. *Stevenson*, 93 Idaho at 11-12, 453 P.2d at 826-27.

These authorities, and the timeline in this case, undermine South Valley's and Galena's argument that the surface water users' filed "delivery calls" simply by stating that they sought to have all water rights in Basin 37, including ground water rights, administered according to the prior appropriation doctrine. Prior to the hearing, the Director had informed the parties the surface water users would be required to provide some evidence of water shortage or injury traceable to junior ground water pumping. This was the purpose for which the surface water users provided testimony and exhibits, and the Director had "broad power" to impose this requirement upon the surface water users. *Stevenson*, 93 Idaho at 11-12, 453 P.2d at 826-27.

[17] The Director's exercise of this discretionary authority is subject to judicial review under applicable legal standards. *See, e.g., Rangen, Inc. v. IDWR*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016) (discussing the standards for reviewing "[d]iscretionary determinations of an agency").

Fulfilling this requirement, and in so doing clarifying their positions in this proceeding (some surface water users did not take a position on whether the Director should take any action) did not amount to filing "delivery calls."[18]

Further, and contrary to Pocatello's argument, the fact that this administrative proceeding used the same presumptions, burdens, and evidentiary standards as those that apply under the CM Rules did not convert this proceeding into a delivery call case. The CM Rules did not create these presumptions, burdens, and evidentiary standards, but rather simply acknowledged and incorporated the existing presumptions, burdens, and evidentiary standards long required by Idaho's prior appropriation doctrine. CM Rule 20.02; *AFRD2*, 143 Idaho at 873-74, 154 P.3d at 444-45. These standards are not unique to the CM Rules, and were well-established components of Idaho's prior appropriation doctrine long before the CM Rules were promulgated. *Id.*; *see also A & B Irr. Dist.*, 153 Idaho at 516-20, 284 P.3d at 241-45 (explaining development and application of the "clear and convincing evidence" in Idaho water law).

b. This Proceeding Must Adhere to the Well-Established Presumptions, Burdens, and Evidentiary Standards of Idaho's Prior Appropriation Doctrine.

The Cities and Sun Valley argue that because this case is a proceeding under Idaho Code § 42-237a.g. rather than the CM Rules, the presumptions, burdens of proof, and evidentiary standards of the CM Rules "do not clearly apply," and that "any determination by the Director to curtail ground water rights must be supported by 'clear and convincing evidence' or some other heightened proof[.]" *Cities /SVC Brief* at 13. These arguments are contrary to Idaho law.

As discussed above, the CM Rules did not create new or different presumptions, burdens, and evidentiary standards. They simply acknowledge and incorporate well-established presumptions, burdens, and evidentiary standards that were well-established components of Idaho's prior appropriation doctrine long before the CM Rules were promulgated. CM Rule 290.02; *AFRD2*, 143 Idaho at 873-74, 154 P.3d at 444-45; *A & B Irr. Dist.*, 153 Idaho at 516-20, 284 P.3d at 241-45. There is no merit in the arguments that the well-established presumptions, burdens, and evidentiary standards of Idaho's prior appropriation doctrine "do not clearly apply," and that junior ground water rights may not be curtailed in the absence of "clear and convincing evidence" that curtailment will benefit senior surface water users. These arguments nullify the presumption that senior water right holders are entitled to their decreed water rights, and impermissibly shift the risk of water shortage to senior water users.

c. "Full Economic Development of Underground Water Resources" is not at Issue in This Proceeding.

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[18] South Valley and Galena also re-assert arguments they made in their prehearing motion to dismiss. The Director disagrees with these arguments for the reasons explained in the *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement* (May 22, 2021), which is incorporated herein by this reference

South Valley, Galena, the Cities, and Sun Valley argue that curtailment, or curtailment without allowing time for mitigation to be secured, would violate Idaho Code § 42-226's "a reasonable exercise" of a senior priority "shall not block full economic development of underground water resources." Idaho Code § 42-226. *SVGWD-GGWD Brief* at 24, 41, 48; *Cities/SVC Brief* at 7-8, 14. The Director disagrees because this "modification" to the doctrine that "first in time is first in right," *Clear Springs*, 150 Idaho at 801-02, 252 P.3d at 82-83, has no application in this case.

In the *Clear Springs* case, junior ground water users also relied on Idaho Code § 42-226's "reference to 'full development of underground water resources" to limit or avoid a curtailment in favor of senior surface water appropriators. *Id.* The Idaho Supreme Court rejected this argument. The Court explained that "the reference to 'full 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. The Court thus held that "[b]y its terms, section 42-226 only applies to appropriators of ground water," and the senior water right holders were "not appropriators of ground water." *Id.* The Court therefore affirmed the district court's holding that the curtailment orders did not violate Idaho Code § 42-226. *Id.*[19]

This case, like *Clear Springs*, involves the question of whether junior ground water rights should be curtailed in favor of senior surface water rights. The Idaho Supreme Court's decision in *Clear Springs* confirms that Idaho Code § 42-226's "reference to 'full development of underground water resources" does not apply in questions of priority administration between senior surface water rights and junior ground water rights. *Clear Springs*, 150 Idaho at 801-04, 252 P.3d at 82-85. While this case is a proceeding under Idaho Code § 42-237a.g. rather than the CM Rules, the reasoning and holding of *Clear Springs* apply even more directly in this case, because the question is whether junior ground water pumping will affect, contrary to the "declared policy" of Idaho Code § 42-226, the present or future use of senior surface water rights. Idaho Code § 42-237a.g. Under *Clear Springs*, the "declared policy" of Idaho Code § 42-226 does not modify or limit "the doctrine of 'first in time is first in right'" with respect to senior surface water rights, and they are not subject to the admonishment that "a reasonable exercise" of senior priority "shall not block full economic development of underground water resources." *Clear Springs*, 150 Idaho at 801-04, 252 P.3d at 82-85.

d. Section 42-237a.g. Does Not Require the Director to Establish a Reasonable Pumping Level or the Reasonably Anticipated Rate of Future Natural Recharge Before Curtailing Ground Water Rights.

Pocatello, the Cities, and Sun Valley argue that the Director exceeded his authority under Idaho Code § 42-237a.g. by initiating an administrative proceeding without first determining whether the Wood River Valley aquifer is being "mined." This argument refers to Section 42-237a.g.'s prohibition against allowing ground water withdrawals to exceed "the reasonably

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[19] The Idaho Supreme Court also affirmed the district court's holding that the curtailment order did not violate Idaho Code § 42-237a. *Id.*

anticipated average rate of future natural recharge," which prohibits "mining the aquifer." *Clear Springs*, 150 Idaho at 804, 252 P.3d at 85; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973). The Cities and Sun Valley also argue that it is "inappropriate" to curtail ground water pumping before establishing a "reasonable ground water pumping level." Both of these argument are contrary to the statutory language.

Under the plain language of Idaho Code § 42-237a.g., establishing "the reasonably anticipated average rate of future natural recharge" is an option, not a requirement. The statute authorizes the Director to prohibit or limit ground water withdrawals in two different sets of circumstances: (1) when such withdrawals "would affect, contrary to the declared policy of [the Ground Water Act], the present or future use of any prior surface or ground water right"; *or* (2) when such withdrawals would exceed "the reasonably anticipated average rate of future natural recharge." Idaho Code § 42-237a.g. This focus of this administrative proceeding is the first set of circumstances. Nothing in Idaho Code § 42-237a.g. requires the Director to also consider the second set of circumstances and make a determination of whether the Wood River Valley aquifer is being "mined."

There is also no requirement in Idaho Code § 42-237a.g. that the Director must determine a "reasonable ground water pumping level" before curtailing junior ground water rights. The applicable language of the statute is discretionary rather than mandatory: the Director "*may* establish a ground water pumping level or levels . . . ." Idaho Code § 42-237a.g. (italics and underlining added); *see also A & B Irr. Dist.*, 153 Idaho at 511, 284 P.3d at 236 ("he is not obligated to establish a reasonable ground water pumping level"). While the Cities and Sun Valley nominally concede this point, they then pivot to argue that "the lack of any evidence discussing" a reasonable ground water pumping level means the Director committed fatal legal error by failing to consider "other provisions" of the Ground Water Act. *Cities/SVC Post-Hearing Brief* at 9-10. The Cities and Sun Valley do not provide any authority for this conclusion or try to reconcile it the above-cited holding in the *A&B* case, and do not identify the "other provisions" or explain why they allegedly were essential to the administrative proceeding. There is no merit in the argument that the Director was required to establish a "reasonable ground water pumping level" before curtailing junior ground water rights. [20]

e. The Determination of Whether Water is "Available" in a Well is Determined by the Effects of Withdrawals.

The Cities and Sun Valley also argue that the Director exceeded his authority under Idaho Code § 42-237a.g. because there was "no evidence about the amount of water in wells." *Cities/SVC Post-Hearing Brief* at 9. They argue that without such evidence, it is impossible to determine whether water in a well is "available" for use by the ground water right holder. *Id.*

[20] The Cities and Sun Valley also purport to "renew" a number of prehearing motions that were denied. *Cities/SVC Post-Hearing Brief* at 17-19. The Director denies the implied request for reconsideration of the denial of those motions.

This argument is contrary to the plain language of Idaho Code § 42-237a.g., which includes a provision specifically defining the two sets of circumstances (discussed above) in which water in a well "shall not be deemed available." Idaho Code § 42-237a.g. Under the first set of circumstances, the determination of whether water in a well is "available" for use by the ground water right holder depends on whether withdrawals "would affect" the present or future use of a senior surface or ground water right in a way contrary to the declared policy of the Ground Water Act. *Id.* In short, it is the effect of withdrawals on the use of other water rights that determines whether well water is "available" for use by a junior ground water right holder, *id.*, not "the amount of water in wells." *Cities/SVC Brief* at 9.

f. Junior Water Users Must Provide Mitigation to Avoid Curtailment.

The Cities and Sun Valley argue that curtailment cannot be ordered until junior ground water users have had the opportunity to secure mitigation. *Cities/SVC Brief* at 13-15.[21] This argument is based in large part on the reference in Idaho Code § 42-226 to "full economic development of underground water resources" and therefore is incorrect for the reason previously discussed: Idaho Code § 42-226's admonishment that "a reasonable exercise" of senior priority "shall not block full economic development of underground water resources" has no application to senior surface water rights. *Clear Springs*, 150 Idaho at 801-04, 252 P.3d at 82-85.

The argument that curtailment cannot be ordered until the junior ground water users secure mitigation is also contrary to the holdings of the District Court for in the second Rangen decision. *Memorandum Decision and Order* (5th Jud. Dist. Case No. CV 2014-4970) (June 3, 2015) ("*Second Rangen Dec.*"). In *Second Rangen Dec.*, the Director delayed curtailment to allow junior ground water users "sufficient time ... to prepare for curtailment." *Second Rangen Dec.*, at 4. The District Court rejected the Director's approach because it resulted in Rangen's senior rights being "prejudiced and subjected to unmitigated material injury while junior users were permitted to continue out-of-priority diversions." *Id.* at 7-8. The District Court held that "under the Director's rationale, the senior user's water use and operations should be disrupted so as to not unduly disrupt the juniors," which was contrary to Idaho's prior appropriation doctrine. *Id.* at 8. The argument that curtailment cannot be ordered in this case until junior ground water users secure mitigation is contrary to Idaho's prior appropriation doctrine for the same reasons.

The Director recognizes that it may take time to secure mitigation; it may also be that mitigation is simply not available, or not available at what the ground water users consider to be reasonable cost. Under Idaho's prior appropriation doctrine, however, this risk falls on the junior ground water right holders. The argument of the Cities and Sun Valley turns priority on its head by "unreasonably shift[ing] the risk of shortage to the senior surface water right holder." *First Rangen Dec.* at 13-14.

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[21] IGWA asserts Department staff member Tim Luke "reportedly" testified "that the right to provide mitigation under the CM Rules is not available in this proceeding." *IGWA's Brief* at 2. Luke did not testify that "the right to provide mitigation . . . is not available." His testimony was that he was not aware of what mitigation options were available in this case. Tr. p.378.