

g. This Proceedings Satisfied the Requirements of Due Process.

The Cities, Sun Valley, and IGWA argue that the schedule the Director established for this proceeding violated the requirements of due process because it was too compressed and denied them the opportunity to adequately prepare for the hearing. *Cities/SVC Brief* at 15-17; *IGWA Brief* at 5. The Cities and Sun Valley focus in particular on the fact that the Department did not provide information in response to a request by Sun Valley on the third day of the hearing. *Cities/SVC Brief* at 16-17. IGWA focuses on the time allegedly required to understand and scrutinize seniors' claims of injury, the reasonableness of seniors' diversions and uses of water, and "other complexities of conjunctive management." *IGWA Brief* at 5. South Valley and Galena note their concern with "this shortened hearing schedule and how it impacted their ability to have a meaningful opportunity to be heard," but "reserve all rights" on these matters rather than arguing that the hearing schedule violated any legal requirements or standards. *SVGWD-GGWD Brief* at 9 n.4.²²

"Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm'rs of Payette Cty.*, 159 Idaho 182, 190, 358 P.3d 67, 75 (2015) (citation omitted). Procedural due process requirements are met when notice and an opportunity to be heard are provided, and "the opportunity to be heard must occur at a meaningful time and in a meaningful manner." *Id.* "The procedure required is merely that to ensure that a person is not arbitrarily deprived of his or her rights." *Telford v. Nye*, 154 Idaho 606, 611, 301 P.3d 264, 269 (2013).

In this proceeding, the Cities, Sun Valley, and IGWA were never at risk of being "arbitrarily deprived" of any of their rights. It is undisputed that these entities hold no ground water rights diverting with the "Potential Area of Curtailment" originally described and depicted in the *Notice*, or within the smaller "Potential Area of Curtailment" subsequently described in Sukow's staff memorandum. Further, none of these entities' ground water rights will be curtailed pursuant to this order. The Cities, Sun Valley, and IGWA have not been injured or prejudiced by any of the due process violations they allege.

Further, this administrative proceeding provided both notice and a meaningful opportunity to be heard. The *Notice* was issued on May 4, 2021, and stated that the Director was initiating an administrative proceeding under Idaho Code § 42-237a.g. "to determine whether water is available to fill the ground water rights" within the Bellevue Triangle, which was depicted on a map attached to the *Notice*. The *Notice* stated that "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." The *Notice* invited interested parties to file notices of participation and scheduled a prehearing conference to discuss, among other things, the hearing procedure, remote participation at the hearing, discovery, witnesses, and burdens.

²² South Valley and Galena argued in their prehearing motion to dismiss that the hearing schedule violated their rights to due process. The Director addressed these arguments 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.

The *Notice* scheduled the hearing for June 7-11, 2021.²³ Pursuant to the *Notice* and the prehearing conference, the parties conducted discovery, deposed witnesses, and filed a number of prehearing motions. At the hearing, which lasted six days, multiple witnesses testified, including expert witnesses, and many exhibits were submitted into the record. The parties were also afforded the opportunity to file post-hearing briefs.

None of this is disputed by the Cities, Sun Valley, or IGWA. Their arguments, rather, are that a much more extended prehearing schedule was required to fully identify and develop the issues and the evidence, and to otherwise prepare for the hearing. *Cities/SVC Brief* at 17; *IGWA Brief* at 5. These arguments are largely based on analogizing this case to the cases involving conjunctive management delivery calls on the Eastern Snake Plain Aquifer (“ESPA”). IGWA asserts that those cases “did not present a special need for very prompt action” because ground water pumping did not “cause a sudden loss of water discharge from the springs” and “curtailment would not quickly restore the spring flows.” *IGWA Brief* at 4. The Cities’ expert witness testified that, as in the ESPA cases, he would have needed “many months” to prepare for this proceeding. Tr. p. 1442.

The assertions that this case is analogous to a delivery call in the ESPA are contrary to the record. This proceeding involves an aquifer that is far smaller than the ESPA in geographical extent and volume. The record shows that changes in ground water pumping from the Bellevue Triangle are quite rapidly reflected changes in the flows of Silver Creek and the Little Wood River, and that the amount of change is substantial. Moreover, there is a need for prompt action to protect senior surface water rights on Silver Creek and the Little Wood River. Many of these rights have been curtailed due water shortages and more likely will be soon; yet out-of-priority ground water pumping in the Bellevue Triangle continues. Under these circumstances, requiring “many months” of prehearing preparation would be far in excess of what is “warranted by the particular situation.” *Neighbors*, 159 Idaho at 190, 358 P.3d at 75. It also would effectively preclude in-season protection of senior surface water rights while allowing junior ground water right to continue pumping. See *Second Rangen Dec.* at 8 (rejecting the rationale that “the senior user’s water use and operations should be disrupted so as to not unduly disrupt the juniors”). In the circumstances of this case, the extended prehearing schedule that the Cities, Sun Valley, and IGWA seek “unreasonably shifts the risk of shortage to the senior surface water right holder.” *First Rangen Dec.* at 13-14. *Id.*

h. IDFG’s Ground Water Rights are Non-Consumptive and Should Not Be Curtailed.

IDFG holds three ground water rights in the Bellevue Triangle for fish propagation purposes, which are used at IDFG’s Hayspur Fish Hatchery. IDFG argues that these water rights should not be curtailed because they have are non-consumptive and have no adverse effects on senior surface water rights on Silver Creek and the Little Wood River. *IDFG Brief* at 3-12.

²³ On the third day of the hearing, the Director extended to hearing to June 12 in order to allow for all witnesses to be examined and exhibits submitted, and also left open the option of extending the hearing into the following week, although that turned out to be unnecessary.

IDFG's ground water rights have a condition that expressly limits them to "non-consumptive" use of water. Tr. pp. 1009-14. At the hearing, IDFG's witness described in some detail how water is used and measured at the hatchery, relying upon and explaining several illustrative and quantitative exhibits. Tr. pp. 1015-44. IDFG argues that the exhibits and testimony demonstrate the IDFG's use of water at the hatchery is non-consumptive and should not be curtailed. *IDFG Brief* at 3-12.

The Director concludes that IDFG has provided evidence showing that it is highly probable or reasonably certain that IDFG's use of ground water at the Hayspur Fish Hatchery is non-consumptive. IDFG has therefore provided clear and convincing evidence that its use of ground water in the Bellevue Triangle will not affect, contrary to the declared policy of the Ground Water Act, the use of senior surface water rights on Silver Creek and the Little Wood River during the 2021 irrigation season. *A&B Irr. Dist.*, 153 Idaho at 516, 284 P.3d at 24; Idaho Code § 42-237a.g. IDFG's ground water rights for the Hayspur Fish Hatchery, therefore, will be excluded from the curtailment order.

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that on July 1, 2021, starting at 12:01 a.m., ground water rights listed in Exhibit A to this order shall be curtailed. The holders of the water rights shall refrain from diversion and use of ground water pursuant to those water rights. The curtailment shall run through the 2021 irrigation season unless notified by the Department that this order of curtailment has been modified or rescinded as to their water rights. This order applies to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excludes ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water right used for *de minimis* stockwatering where such stock watering is within the limits of the definitions set for in Idaho Code § 42-1401A(11).

IT IS FURTHER ORDERED that the watermaster for Water District 37, on July 1, 2021, and thereafter through the irrigation season of 2021, is directed to curtail the ground water rights listed in Exhibit A to this order unless notified by the Department that this order of curtailment has been modified or rescinded.

DATED this 28th day of June, 2021.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 28th day of June, 2021, the above and foregoing FINAL ORDER was served by the method indicated below, and address to the following:

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