

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**ORDER DENYING MOTIONS TO
DISMISS, FOR CONTINUANCE OR
POSTPONEMENT, AND FOR
CLARIFICATION OR MORE
DEFINITE STATEMENT**

BACKGROUND

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). The Director commenced the administrative proceeding in response to predicted drought in Basin 37 for the 2021 irrigation season and in response to ground water modeling showing that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for certain holders of senior surface water rights. *Notice* at 1. The purpose of the hearing is for the Director to decide whether “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.” *Id.* at 1; *see also id.*, Attachment A (depicting the “Potential Area of Curtailment”). The Director, acting as presiding officer, set a prehearing conference for May 24, 2021, and set the hearing for June 7-11, 2021. *Id.* at 1-2.

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion to Dismiss/Supporting Points & Authorities/Motion to Shorten Time for Response/Request for Oral Argument* (“SVGWD MTD”) and *South Valley Ground Water District’s Motion for Continuance of Hearing* (“SVGWD MFC”). On the next day, Sun Valley Company (“Sun Valley”) filed a *Motion to Dismiss* (“SVC MTD”) and the City of Bellevue (“Bellevue”) filed a *Motion for More Definite Statement, Motion for Clarification, and Motion to Postpone Hearing* (“Bellevue Motion”). On May 19, 2021, attorney James P. Speck filed a *Joinder in and Support of Motions* on behalf of numerous clients¹ that joined in and

¹ Specifically: Griffin Ranch Homeowners Ass’n, Griffin Ranch PUD Subdivision Homeowners Ass’n, Inc., Robert P. Dreyer, River Rock Ranch LP, Margo Peck, Edward M. Blair Jr Personal Residence Trust, Marion R. and Robert M. Rosenthal, CW & RH Gardner Family Limited Partnership and Robert & Kathryn Gardner Family Trust, Rego 2008 Revocable Trust, Team Flowers Bench LLC, Parks Family 2006 Trust, Thomas W. Weisel, Tom Weisel

supported the motions filed by South Valley, Sun Valley, and Bellevue. On the same day, Galena Ground Water District filed *Galena Ground Water District's Joinder in and Support of South Valley Ground Water District's Motions*. On May 20, 2021 three joinder filings were made. Dean R. Rogers, III and Dean R. Rogers, Inc., filed a *Joinder in and Support of Motions* that joined and supported South Valley and Bellevue's motions; Sun Valley Water and Sewer District joined in the same motions in its *Joinder in, and Support of, Previously Filed Motions*; and the City of Pocatello filed *City of Pocatello's Joinder in and Support of Motions* joining in the motions filed by South Valley, Sun Valley and Bellevue. On May 21, 2021, the City of Hailey filed *City of Hailey's Joinder in and Support of Motions* joining in the motions filed by South Valley, Sun Valley and Bellevue. In addition, on May 21, 2021, the Big Wood and Little Wood Water Users Association filed *Joint Response to Motions*. For the reasons discussed below, the Director denies the above-referenced motions filed by South Valley, Sun Valley, and Bellevue.²

ANALYSIS

The above-referenced motions filed by South Valley, Sun Valley, and Bellevue seek several different forms of relief, sometimes in the alternative, and raise a number of different arguments. Some of the arguments presented in support of the relief requested overlap. The various arguments are addressed in the discussion below.

I. MOTIONS TO DISMISS

The motions to dismiss filed by South Valley and Sun Valley argue that Idaho Code § 42-237a.g. does not create authority for the Director to initiate this proceeding, and the Director has used an improper procedure to address the question of whether ground water rights diverting in the Bellevue Triangle should be curtailed during 2021 in favor of senior water rights diverting from Silver Creek and its tributaries. *SVGWD MTD* at 1-2, 9-20; *SVC MTD* at 2-12. South Valley and Sun Valley argue that the Ground Water Act³ does not authorize this proceeding, and that, in the absence of the filing of a delivery call under the *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"),⁴ the Director lacks authority to regulate or curtail diversions by holders of junior-priority ground water rights to protect diversions by holders of senior-priority surface water rights. *Id.* South Valley and Sun Valley further argue that the Notice and the administrative proceeding it initiated violate due process requirements.

Partners, Justin Power Separate Property Revocable Trust, Ridgeview Smith Properties LLC, Linda D. Woodcock, Redcliff Homeowners Ass'n, and The Jones Trust.

² South Valley and Sun Valley moved the Director to shorten time regarding their motions to dismiss, and also requested oral argument, pursuant to Rules 260, 270, and 565 of the Department's Rules of Procedure. *SVGWD MTD* at 28; *SVC MTD* at 14-15. Bellevue requested an expedited decision on its motion. *Bellevue Motion* at 7. The motions to shorten time are mooted by the issuance of this order, and the requests for oral argument on the motions are denied. IDAPA 37.01.01.260, .270 and .565.

³ Idaho Code §§ 42-226—42-239.

⁴ IDAPA 37.03.11.000—050.

SVGWD MTD at 2, 9-10, 20-27; *SVC MTD* at 1-6, 12-14. The Director disagrees, for reasons discussed below.

a. IDAHO CODE § 42-237a.g. AUTHORIZED THE INITIATION OF THIS ADMINISTRATIVE PROCEEDING.

The Director has the authority to initiate this administrative proceeding under the plain language of Idaho Code § 42-237a.g. Section 42-237a.g. 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. requires the filing of a delivery call or request for administration of ground water rights prior to the Director initiating an administrative proceeding. Idaho Code § 42-237a.g. expressly authorized the Director to initiate this proceeding even in the absence of a delivery call or a request for administration. Further, Idaho Code § 42-237a.g. expressly commits the determination of whether to initiate this proceeding to the Director’s discretion.⁵

Sun Valley argues, however, that Idaho Code § 42-237a.g. “requires a ‘call’ for administration of water rights,” because the statute refers to “the amount called for” by a ground water right that is potentially subject to curtailment in favor of a “prior surface or ground water right.” *SVC MTD* at 2 (quoting Idaho Code § 42-237a.g.). This argument incorrectly equates “the amount called for” by a junior ground water right with a “delivery call” filed by a senior surface water right holder against the junior ground water right. The “amount called for” by a ground water right is simply the licensed or decreed quantity of the ground water right. Idaho Code §§ 42-219(1), 42-1411(2)(c), 42-1412(6). This meaning is clear in the cited passage of Idaho Code § 42-237a.g., which in speaking of “the amount called for by such right” is referring to a ground water right for which water “shall not be deemed available” because continued withdrawals would affect “prior” surface or ground water rights. Idaho Code § 42-237a.g. (underlining added). A “delivery call,” in contrast, is a request made by the holder of a senior priority water right for administration of junior priority water rights. IDAPA 37.03.11.010.04. Sun Valley’s argument that Idaho Code § 42-237a.g. requires the filing of a “delivery call” is contrary to the natural reading of the statutory language and “counter to Idaho water law.” *North Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 523, 376 P.3d 722, 727 (2016).

⁵ 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”).

Sun Valley further argues that a different section of the Ground Water Act—Idaho Code § 42-237b⁶—requires the filing of a delivery call. Sun Valley argues Section 42-237b “requires an ‘adverse claim’ – or put another way a ‘call’ – to initiate the proceeding.” *SVC MTD* at 7, 9. This argument is incorrect because this proceeding was not initiated under Idaho Code § 42-237b, but rather under Idaho Code § 42-237a.g. Section 42-237a.g. expressly authorizes the Director to initiate this administrative proceeding even in the absence of a delivery call or “adverse claim.” Nothing in Idaho Code § 42-237b or in Idaho Code § 42-237a.g mandates that an “adverse claim” be filed prior to initiation of an administrative proceeding pursuant to Idaho Code § 42-237a.g.

Idaho Code §§ 42-237a.g. and 42-237b deal with distinctly different questions. Idaho Code § 42-237a defines the “Powers of the Director of the Department of Water Resources,” while Idaho Code § 42-237b deals with “Administrative Determination of Adverse Claims” between individual water users. The Ground Water Act grants the Director broad “discretionary power” to “supervise and control the exercise and administration of all rights to the use of ground water” Idaho Code § 42-237a.g. The Ground Water Act also includes a separate provision authorizing individual water right holders to pursue claims of injury against other water right holders. *See* Idaho Code § 42-237b (“Whenever any person owning or claiming the right to the use of any surface or ground water rights believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority”). There is no basis in the language or structure of the Ground Water Act for interpreting Idaho Code § 42-237b’s authorization for individual water users to pursue “adverse claims” against other water users as a limitation on the Director’s broad discretionary authority under Idaho Code § 42-237a.g. to supervise and control the exercise of ground water rights that may be affecting senior surface water rights.

This conclusion is also supported in the recent repeal of some sections of the Ground Water Act. The Legislature repealed Idaho Code § 42-237b, but it did not repeal or amend Idaho Code § 42-237a.g. *SVGWD MTD* at 11-12, 15; *SVC MTD* at 7-10. Consequently, while the Ground Water Act will no longer authorize the administrative determination of “adverse claims” by “local ground water boards” after July 1, 2021, the Ground Water Act will still expressly authorize the Director to “initiate administrative proceedings to prohibit or limit” the withdrawal of water under junior ground water rights that “would affect” the present or future exercise of “any prior surface or ground water right.” Idaho Code § 42-237a.g. Had these separate authorities been deemed inextricably linked or interconnected, as argued by South Valley and Sun Valley, then both would have been repealed. This is not what happened.

South Valley and Sun Valley also argue that, before initiating an administrative proceeding pursuant to Idaho Code § 42-237a.g, the Ground Water Act requires the Director to determine “an area of common ground water supply,” a “reasonable pumping level,” or a “reasonably anticipated rate of future natural recharge.” *SVGWD MTD* at 2, 9, 12-14, 18-20, 23-

⁶ The 2021 Idaho Legislature repealed Idaho Code § 42-237b, effective July 1, 2021.

24; *SVC MTD* at 3, 5, 11.⁷ Under the plain language of Idaho Code § 42-237a.g., however, the Director is allowed, not required, to make these determinations when exercising “discretionary power” to initiate and conduct administrative proceedings regarding supervision and control of ground water withdrawals. See Idaho Code § 42-237a.g. (“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 . . .”). The Director is also specifically authorized to allow ground water withdrawals “at a rate exceeding the reasonably anticipated rate of future natural recharge . . .” *Id.* The language of Idaho Code § 42-237a.g. expressly states that these determinations are not preconditions to the Director’s exercise of the “discretionary power” to initiate administrative proceedings under Idaho Code § 42-237a.g., but rather are permissible exercises of the Director’s authority to “supervise and control the exercise and administration” of ground water rights. *Id.*

South Valley argues, however, that in the *Clear Springs* decision,⁸ the Idaho Supreme Court conclusively determined that Idaho Code § 42-237a.g. allows the Director to prohibit ground water pumping “in only two scenarios: 1) where pumping is found to cause material injury; or 2) to prevent aquifer mining.” *SVGWD MTD* at 13-14. The *Clear Springs* decision does not support this conclusion. The *Clear Springs* Court did not comprehensively interpret Idaho Code § 42-237a.g. To the contrary, the Court only referenced Idaho Code § 42-237a.g. to consider the ground water users’ argument that under this provision “they are protected from delivery call as long as they are maintaining reasonable pumping levels.” 150 Idaho at 803, 252 P.3d at 84. The distinctly different question of whether the Director must establish a “reasonable pumping level” or “reasonably anticipated rate of future natural recharge” prior to initiating an administrative proceeding under Idaho Code § 42-237a.g. was not raised or decided in the *Clear Springs* case.

b. THE CM RULES DO NOT APPLY TO OR GOVERN THIS PROCEEDING.

South Valley and Sun Valley also argue that this administrative proceeding must be dismissed because the CM Rules provide the sole and exclusive procedural pathway for addressing the question of whether ground water rights diverting in the Bellevue Triangle should be curtailed during the 2021 irrigation season in favor of senior surface water rights diverting from Silver Creek and its tributaries. *SVGWD MTD* at 10-16; *SVC MTD* at 10-12. The Director disagrees, for reasons discussed below.

The CM Rules provide procedures for responding to delivery calls. As CM Rule 1 states: “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 . . .” IDAPA 37.03.11.001. In contrast, this administrative proceeding is not a response to a delivery call. Rather, as South Valley and Sun Valley admit, this administrative proceeding was initiated in the absence of a delivery call. See, e.g., *SVGWD MTD* at 8 (“the Association

⁷ South Valley and Sun Valley also make a related argument that CM Rule 30 required the Director to determine “an area of common ground water supply” before initiating this administrative proceeding. This argument is addressed below.

⁸ *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011).

members did not file a delivery call that satisfied the requirements of CM Rule 30”);⁹ *SVC MTD* at 1-2 (“in the absence of a call for delivery of water”). The plain language of the CM Rules contradicts assertions that the CM Rules govern this administrative proceeding. *See also Memorandum 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 plain language of the CM Rules also contradicts assertions that the CM Rules provide the sole and exclusive procedure for dealing with questions of administration between surface water rights and ground water rights. This case is an example. As previously discussed, Idaho Code § 42-237a.g. explicitly recognizes the Director’s broad “discretionary power” to initiate administrative proceedings to address the question of whether to prohibit or limit diversions under junior ground water rights that are affecting senior surface water rights, even in the absence of a delivery call or “adverse claim.” *See also 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”).

South Valley and Sun Valley argue, however, that the District Court for the Fifth Judicial District, Twin Falls County, has already conclusively determined that the CM Rules apply to and govern the issues raised in this administrative proceeding. In support of this argument, South Valley and Sun Valley repeatedly cite to and quote from the Court’s *Memorandum Decision and Order* issued on April 22, 2016, in the judicial review proceeding under Ada County Case No. CV-WA-2015-14500 (“*Mem. Decision & Order*”). *SVGWD MTD* at 6, 12, 16-19, 23; *SVC MTD* at 4-6, 10-11. That case, however, involved “a demand for the priority administration of water” that “the Director treated “as delivery calls under the CM Rules” *Mem. Decision & Order* at 3. The findings, analysis, and holdings therefore focused on the question of whether the “delivery calls” were governed by CM Rule 40 or CM Rule 30. *Id.* at 5-15. The question of whether the Director is authorized to initiate an administrative proceeding under Idaho Code § 42-237a.g. was never raised or decided. Nor did the Court hold that the CM Rules are the sole or exclusive procedural pathway for addressing the question of whether ground water rights authorizing diversion in the Bellevue Triangle may be subject to curtailment in favor of senior water rights diverting from Silver Creek and its tributaries. Moreover, four years later the same Court held that the CM Rules apply only when senior water right holders have filed delivery calls. *Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, supra, at 8-12.

For the same reasons, South Valley and Sun Valley have misplaced their reliance on decisions of the Idaho Supreme Court regarding the validity or interpretation of the CM Rules, such as *AFRD2 v. IDWR*, 143 Idaho 862 (2007), *A&B Irr. Dist. v. IDWR*, 153 Idaho 500 (2012), and *A&B Irr. Dist. v. Spackman*, 155 Idaho 640 (2013). *SVGWD MTD* at 10, 14-15; *SVC MTD* at 2-3, 7. None of these cases raised or decided the question of whether the Director is

⁹ *SVGWD* asserts that the *Notice* was issued “in direct response to claims of material injury made by senior water users in the Advisory Committee meetings held in mid-April.” *SVGWD MTD* at 19. Even assuming this assertion is correct (which it is not), verbal assertions made at the Advisory Committee meetings are not “delivery calls” within the meaning and requirements of CM Rule 30.