

authorized to initiate an administrative proceeding under Idaho Code § 42-237a.g., and none of these decisions held that the CM Rules are the sole or exclusive procedure for addressing the question of whether ground water rights can or should be curtailed to prevent injury to senior surface water rights. These types of questions never arose in these cases because conjunctive management delivery calls had been filed, the issues hinged upon whether the Department had properly responded to the delivery calls, and it was undisputed that the CM Rules governed the questions presented for resolution. That does not also mean, however, that the CM Rules are the sole or exclusive procedure for addressing questions of priority administration between interconnected ground water rights and surface water rights, especially when there is express statutory authority to the contrary—in this case, Idaho Code § 42-237a.g. See *Mead v. Arnell*, 117 Idaho 660, 666, 791 P.2d 410, 416 (1990) (“rules do not supplant statutory law nor do they preempt judicial statutory interpretation”) (citation omitted); *Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, supra, at 8-12 (rejecting arguments that the CM Rules bar application of the Ground Water Act).

c. THIS ADMINISTRATIVE PROCEEDING SATISFIES DUE PROCESS REQUIREMENTS.

South Valley and Sun Valley argue that this proceeding must be dismissed because it violates their due process rights. *SVGWD MTD* at 20-27; *SVC MTD* at 4-7, 12-14. South Valley and Sun Valley assert that the *Notice* deprives them of a full and fair opportunity to be heard and protect their water rights, because the schedule established in the *Notice* does not grant sufficient time for South Valley and Sun Valley to conduct discovery, arrange for expert analyses, and otherwise prepare for the hearing. *Id.* These assertions rest primarily on contentions that this case involves a delivery call under the CM Rules, and on attempts to analogize this case to conjunctive management cases involving the Eastern Snake Plain Aquifer (“ESPA”). See, e.g. *SVGWD MTD* at 20 (“the schedule for this case is unprecedented and is contrary to any other conjunctive administration case that the agency has ever considered”); *SVC MTD* at 14 (“In each of those cases, meaningful discovery was allowed to take place over the course of months and years, not mere days”).

South Valley’s and Sun Valley’s due process arguments rely in large part on their contention that this case is, or should be treated as, a response to a delivery call filed under the CM Rules, and therefore the *Mem. Decision & Order* establishes due process requirements for this case. *SVGWD MTD* at 22-23; *SVC MTD* at 4-5. As previously discussed, however, this case is not a response to a delivery call under the CM Rules, and the *Mem. Decision & Order* only applies to delivery calls under the CM Rules. The *Mem. Decision & Order* did not establish due process standards for administrative proceedings pursuant to Idaho Code § 42-237a.g. See *Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, supra, at 8-12 (distinguishing the CM Rules and the Ground Water Act). For these reasons, there is no merit in South Valley’s argument that an “area of common ground water supply” had to be determined prior to initiating this administrative proceeding in order to satisfy due process. *SVGWD MTD* at 20, 24. For the same reasons, there is no merit in contentions of South Valley and Sun Valley that the Director improperly relieved senior water rights holders of the burden of identifying and serving junior water rights holders with notice of a conjunctive management delivery call. *SVGWD MTD* at 22-24; *SVC MTD* at 4-5.

Moreover, it is incorrect to analogize this case to the cases that addressed conjunctive management delivery calls involving the ESPA. *SVGWD MTD* at 25; *SVC MTD* at 14. This case only addresses in-season administration of ground water rights diverting in the Bellevue Triangle during the 2021 irrigation season, and time is of the essence. A drought is predicted for 2021, and information and data currently available to the Director suggests that ground water pumping in the Bellevue Triangle during the 2021 irrigation season will have an immediate, measurable impact on surface flows in Silver Creek and its tributaries, and may injure senior surface water rights diverting from those sources.

The ESPA cases were very different. They involved many more ground water diversions and a far larger area than this case. The vast majority of the ESPA diversions were much farther away from the Snake River than ground water diversions in the Bellevue Triangle are from Silver Creek and its tributaries. The impacts of the ESPA diversions on surface flows of the Snake River are far more diffuse, delayed, and attenuated than the impacts of ground water diversions in the Bellevue Triangle are on the surface flows of Silver Creek and its tributaries. Resolving the ESPA cases often required long-term, multiple-season curtailments and/or mitigation plans.¹⁰ This case, in contrast, involves a smaller number of ground water rights pumping from a more limited area that is immediately adjacent to Silver Creek and its tributaries. These ground water diversions appear to have direct, largely un-attenuated impacts on the surface flows in Silver Creek and its tributaries. Further, this case only addresses potential shortages during the 2021 irrigation season, which likely will be a time of drought.

The Director has an affirmative duty to distribute water in accordance with the prior appropriation doctrine. *In Re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Protecting the water rights of senior appropriators diverting from Silver Creek and its tributaries during the upcoming irrigation season may require prompt administration of ground water rights in the Bellevue Triangle. While South Valley and Sun Valley are correct in arguing that junior ground water rights are real property rights, *SVGWD MTD* at 21; *SVC MTD* at 4, senior surface water rights diverting from Silver Creek and its tributaries are also real property rights, and in times of shortage have priority over the water rights of junior ground water appropriators. Idaho Const. Art. XV § 3; Idaho Code §§ 42-106, 42-226, 42-237a.g., 42-602, 42-607.

Further, “[d]ue process is not a rigid concept to be mechanically applied to every adversary confrontation; rather, due process is ‘flexible and calls for such procedural protections as the particular situation demands.’” *Bowler v. Bd. of Trustees of Sch. Dist. No. 392, Shoshone Cty., Mullan*, 101 Idaho 537, 542, 617 P.2d 841, 846 (1980) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). South Valley and Sun Valley ignore this settled principle by arguing that this case must follow the procedural requirements of the CM Rules and the ESPA cases, and by focusing only on the water rights of junior appropriators. This case does not involve an ESPA conjunctive management delivery call, however, and the information presently available to the Director indicates that ground water diversions in the Bellevue Triangle may have a direct and

¹⁰ See, e.g., *AFRD2 v. IDWR*, 143 Idaho 862 (2007); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225 (2012); *In the Matter of Distribution to Various Water Rights held by and for the Benefit of A&B Irr. Dist.*, 155 Idaho 640, 315 P.3d 828 (2012); *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016); *Rangen, Inc. v. IDWR*, 160 Idaho 251, 371 P.3d 305 (2016); *North Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 376 P.3d 722 (2016).

immediate effect on the flows of Silver Creek and its tributaries during the 2021 irrigation season. *Notice* at 1. Timely and effective priority administration of water rights is integral to due process, and often necessary if the Director is to “equally guard all the various interests involved.” Idaho Code § 42-101. Providing a full and fair opportunity for all potentially interested parties to be heard on a question of administration during the current irrigation season, while also protecting the water rights of all potentially interested parties, precludes the type of protracted, time-consuming proceedings contemplated by South Valley and Sun Valley. South Valley and Sun Valley seek procedural protection far in excess of what “the particular situation demands.” *Bowler*, 101 Idaho at 542, 617 P.2d at 846.

The schedule established by the Notice, in contrast, allows for timely, in-season administration of water rights in accordance with the prior appropriation doctrine. Further, the schedule guarantees that, before any order for curtailment is issued, there will be pre-hearing conference and a hearing on the merits. At the hearing, the parties will have an opportunity to submit exhibits, call and examine their own witnesses, cross-examine other parties’ witnesses, and cross-examine IDWR staff members who prepared the staff memoranda. This schedule provides notice to the parties and grants a “full and fair” opportunity to be heard before any curtailment order is issued. *Coeur d’Alene Tribe v. Johnson*, 162 Idaho 754, 762, 405 P.3d 13, 21 (2017).

Sun Valley also argues that the Notice violates due process because the subsequently-issued *Request for Staff Memorandum* (May 11, 2021) (“Request”) allegedly enlarged the boundary of the “Potential Area of Curtailment” identified in the Notice. *SVC MTD* at 5-6. This assertion is incorrect. The Notice is the legally operative document that establishes the potential area of curtailment for purposes of this administrative proceeding. The Request did not purport to modify the Notice, and the “Potential Area of Curtailment” depicted in the map attached to the Notice has not been changed or enlarged by the Request. The Request simply calls for staff to prepare a memorandum that contains “[f]acts and technical information” that may be pertinent to the issues to be addressed in this proceeding. *Request* at 1. The staff memorandum was posted on the IDWR website on May 17, 2021, and is available to all potentially interested parties.¹¹ The staff members that prepared the memorandum will testify at the hearing and be subject to cross-examination. *Request* at 1. The Director’s request that staff prepare the memorandum did not violate any due process requirement or prejudice any party.

II. MOTION FOR CLARIFICATION OR MORE DEFINITE STATEMENT

The *Bellevue Motion* includes a request for a clarification of the Notice, or a more definite statement regarding certain aspects of the Notice. *Bellevue Motion* at 1-3. Specifically, Bellevue asks for clarification or a more definite statement as to the boundaries or extent of the physical area within which ground water diversions are potentially subject to curtailment, whether

¹¹ The staff memorandum is posted on the IDWR website in multiple parts. *Jennifer Sukow Response to Request for Staff Memo* (May 17, 2021), *Phil Blankenau Response to Request for Staff Memo* (May 17, 2021), *Sean Vincent Response to Request for Staff Memo* (May 17, 2021), and *Tim Luke Response to Request for Staff Memo* (May 17, 2021). The “Supporting Files of Jennifer Sukow” were also posted on the same day. <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.

curtailment of ground water diversions in this area would extend beyond the 2021 irrigation season, and the “relevance” of certain information identified in the Request. *Id.* at 2-3. Bellevue argues that clarification or a more definite statement regarding these matters is necessary because the Request “asks for several items that are much broader than what is set forth in the Notice,” and “it is impossible to know at this point whether the Director will need to broaden or modify the Notice.” *Id.* Bellevue does not assert, however, that the Notice by itself is vague, ambiguous, or confusing. Rather, Bellevue argues that the Request can or will enlarge the Potential Area of Curtailment identified in the Notice, and that the Request creates the potential for curtailment to extend beyond the 2021 irrigation season. For the reasons discussed below, the Director disagrees and denies the *Bellevue Motion’s* request for clarification or a more definite statement.

The Notice is the legally operative document that establishes the potential area of curtailment for purposes of this administrative proceeding, and also the timeframe during which curtailment could potentially occur. Under the Notice, the “Potential Area of Curtailment” is limited to the area depicted in the map attached to the Notice, and the timeframe for potential curtailment of ground water rights within this area is limited to the 2021 irrigation season. *Notice* at 1 & Attachment A. The Request does not purport to modify the Notice, enlarge the “Potential Area of Curtailment” depicted in the map attached to the Notice, or enlarge the period of potential curtailment beyond the 2021 irrigation season. The Request is only an instruction to IDWR staff to prepare a memorandum setting forth facts and technical information that may be pertinent to the issues to be addressed at the administrative proceeding hearing. *Request* at 1. The fact that the Request calls for the memorandum to include information regarding surface water and ground water uses outside the Bellevue Triangle and during years other than 2021 does not enlarge the area potentially subject to curtailment as a result of any order issued in this administrative proceeding, nor does it enlarge the period of potential curtailment beyond the 2021 irrigation season.

Further, and contrary to the apparent understanding of the *Bellevue Motion*, the Request does not assume or establish the ultimate “relevance” of the information requested to the outcome of this administrative proceeding. *Bellevue Motion* at 3. Rather, the Request calls for facts and technical information that is potentially relevant to the issues to be addressed in this proceeding. *Request* at 1. The Request does not assume that all the requested facts and technical information ultimately are, or will be, relevant to the determination of whether ground water users within the Bellevue Triangle must be curtailed during the 2021 irrigation season in order to protect senior surface water rights diverting from Silver Creek and its tributaries. Rather, it is intended to ensure the record includes the facts and technical information that water users and IDWR staff have identified as potentially relevant. This approach promotes efficiency and fairness in the administrative proceeding.

III. MOTIONS FOR POSTPONEMENT OR CONTINUANCE.

Bellevue requests postponement of the hearing scheduled for June 7-11, 2021, *Bellevue Motion* at 3-6, and South Valley requests that the hearing be continued. *SVGWD MFC* at 1-4.¹²

¹² South Valley’s motion for continuance was filed “in the alternative” to South Valley’s motion to dismiss. *SVGWD MFC* at 1.

The primary argument asserted in support of these motions is that the hearing schedule established by the Notice does not allow sufficient time to address the issues presented in this proceeding, and to prepare a defense to potential curtailment of their water rights. *See Bellevue Motion* at 4 (“This rushed schedule certainly seems to give lip service to a full and fair opportunity for parties to defend their water rights and use”); *SVGWD MFC* at 3 (“grossly inadequate to prepare for the complex issues involved”). Both Bellevue and South Valley also argue that their attorneys have prior obligations (including an out-of-country trip) which will interfere with their attorneys’ ability to fully prepare for the hearing. *Bellevue Motion* at 6; *SVGWD MFC* at 4.

The arguments of Bellevue and South Valley that the hearing schedule fails to allow sufficient time to prepare for the hearing are essentially the same due process arguments made in the motions to dismiss, and lack merit for the same reasons. In brief, this case does not involve a conjunctive management delivery call on the ESPA, and the curtailment question presented is simply whether ground water uses in the Bellevue Triangle during the 2021 irrigation season will have adverse effects on the exercise of senior surface water rights diverting from Silver Creek and its tributaries. In other words, this case is not governed by the procedural requirements of the CM Rules, and is not analogous to the ESPA cases. Moreover, adopting the protracted and time-consuming schedule contemplated by Bellevue and South Valley would effectively preclude any possibility of protecting senior surface water rights diverting from Silver Creek and its tributaries from junior ground water uses in the Bellevue Triangle during the upcoming irrigation season. This would be contrary to the prior appropriation as established by Idaho law. Idaho Const. Art. XV § 3; Idaho Code §§ 42-106, 42-226, 42-237a.g. These legal considerations, and the circumstances of this case, also preclude the Director from granting an essentially indefinite postponement or continuance on grounds that some parties’ attorney have prior obligations or travel plans. The Director therefore denies the motions for postponement or continuance of the hearing scheduled for June 7-11, 2021.

DATED this 22nd day of May, 2021.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2021, the above and foregoing was served on the following by the method(s) indicated below:

<p>James R. Laski Heather E. O’Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Matthew A. Johnson Brian T. O’Bannon White, Peterson, Gigray & Nichols, P.A. 5700 East Franklin Road, Suite 200 Nampa, Idaho 83687-7901 mjohnson@whitepeterson.com bobannon@whitepeterson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Laird B. Stone Stephan, Kvanvig, Stone, & Trainor P.O. Box 83 Twin Falls, Idaho 83303-0083 sks&t@idaho-law.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Jerry R. Rigby Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 irigbv@rex-law.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Joseph F. James James Law Office, PLLC 125 5th Ave. West Gooding, ID 83330 joe@jamesmvlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>Robert L. Harris Holden, Kidwell, Hahn & Crapo, P.L.L.C. P.O. Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405 rharris@holdenlegal.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>